Eminent Domain After *Kelo*

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Ilya Somin*: I would like to thank the University of Chicago Federalist Society for organizing this event, and Dean Levmore and Dean Schill[1] for taking part. It's not often that a mere associate professor gets to be on a panel with not one but two University of Chicago Law School deans!

I'm going to start off by explaining what *Kelo v. City of New London* was about: namely economic development takings, and then describe why economic development takings generally cause more harm than good. I will go on to analyze some of the doctrinal and legal problems with the *Kelo* decision itself. Finally, I'll briefly talk about the massive political reaction that followed *Kelo*—in some ways a bigger backlash than has been generated by any Supreme Court decision in many decades if not even in the entire history of the Court.

What are economic development takings? Quite simply, they are situations where the government condemns property belonging to one private individual and transfers it to some other private entity solely on the justification that the new owner might produce more economic development than the old one. There is no claim that any kind of public facility will be built or that the area being condemned is blighted or otherwise harmful. Rather, the argument is that more development will be produced for the community. In several ways, these sorts of takings are more problematic and more dangerous than other condemnations.

The biggest danger has to do with something that Dean Levmore has written about in his scholarship,[2] the ability of politically influential interest groups to exploit this process at the expense, of the politically weak. There are several reasons why this kind of exploitation is especially likely with economic development takings.

First, there is the sheer breadth of interest groups that can take advantage of this rationale for condemnation. Almost any profit-making business can claim that if you condemn some land and transfer it to them, they might produce more development than existed previously. This really opens the floodgates for interest group "capture" of the condemnation process.

A second problem is that in none of the states which permit these sorts of condemnations are the new private owners legally required to produce the development that supposedly justified the taking in the first place. This of course gives people incentive to promise far more development than they will actually deliver. You give them the land they want, and years later it turns out that there's almost no development or much less than was initially claimed. Indeed, in many instances, what actually happens is that you destroy more development by wiping out the existing use of the property than you produce by transferring it to new owners. That is exactly what occurred in the *Kelo* case itself. Some $80 million in public funds were spent on that project. To date, nothing has actually been built on the site, and at least at the moment, there is no prospect that anything will be built in the near future.

Similar events have happened elsewhere. Prior to *Kelo*, the most famous economic development condemnation in American history was the *Poletown* case in Detroit in 1981.[3] This was actually a much more egregious case than *Kelo.* Some 4,000 people were forced out of their homes in Detroit, in order to transfer the land to General Motors to build a new factory. At the time, it was promised by GM that there would be more than 6,000 jobs generated. In reality, there were never more than half that many. When you total up all the costs of the Poletown takings (as I did one of my articles),[4] you find that even if you ignore the humanitarian harm inflicted on those displaced, the condemnations were a failure. It is very likely that much more development was destroyed than created in that condemnation.

In both of these cases and many others, politically influential groups were able to get land from the poor or politically weak. In *Poletown*, you had mostly working-class people going up against General Motors, which is a pretty powerful interest in the state of Michigan. In *Kelo*, we now know that the taking was instigated in large part as a result of lobbying by the Pfizer Corporation, which hoped to benefit from the condemnation because they were building a headquarters in New London. So there is a fairly consistent pattern.

In principle, the political process might be able to deal with this problem. If voters see that abusive takings are going on, they can punish the responsible officials at the ballot box during the next election. However, there are reasons why this rarely if ever happens. One is what scholars call the "rational ignorance" of voters. Most voters have very little incentive to learn about politics. Even if you do become knowledgeable, there is little or no payoff to having that information. The chance that any one will vote change the outcome of an election is infinitesimally small.

A great deal of survey evidence, including some that I have compiled in my forthcoming book on political ignorance,[5] shows that most voters have very little knowledge of politics and public policy. In particular, they have difficulty assessing very complex issues. Economic development takings tend to be quite complex because it's hard for nonexperts to tell whether one of these condemnations really will generate more development. In most cases, voters simply don't have the knowledge to figure it out.

A second and related problem is that, even if voters are knowledgeable, often it's only years after the condemnation occurs that you can actually tell what has happened and whether any development has been generated. By that time, public

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attention has generally moved on to other issues. Many of the people who approved the initial condemnation may not even be in office any more.

I readily grant that some of these problems can occur even with ordinary, more traditional takings to build a road or bridge or other public facility. But they are at least somewhat less severe. With traditional takings, you at least have some sort of public facility that is built. Ordinary citizens can see it and get some sense of how valuable the road or bridge in question is to the community. For example, they might be able to tell whether a new road or bridge has reduced traffic congestion. It's not that these problems don't exist with other takings. But they tend to be more severe with economic development condemnations.

Although I am a critic of economic development takings, I admit that there is a nontrivial economic rationale for them, the so-called "holdout" problem. Let's say you have an assembly project that you need to do where, in order to build a new factory, you need to buy up land from a large number of existing owners. There is the danger that this valuable project will be held up by one or a few people saying: "I'm happy to sell my land to you but you have to pay me this vast sum of money, say, ninety percent of the expected profit from the project; otherwise, I won't sell." This is the classic holdout problem that advocates of economic development takings cite to justify the practice.

The argument has some merit, but it is greatly overblown. Markets have some very good mechanisms for dealing with holdouts that don't require the use of eminent domain. I'll just focus on one here: secret purchases. You can only become a holdout if you know that a big assembly project is going on. What developers often do is simply make people offers without actually telling them that this is part of a big assembly project. Therefore, potential sellers don't know that they have an opportunity to be holdouts. In that way, holdout problems are reduced. That's how Disney acquired the land to build Disney World, for example.[6]

Secret assembly has many advantages over eminent domain. A crucial one is that with eminent domain, there is no guarantee that the political process will restrict its use to those situations where holdout problems are actually likely. Indeed, in *Kelo*, there was no real holdout problem, as Richard Epstein of the University of Chicago explained in great detail in his amicus brief in the case.[7] Yet, politically powerful interests nonetheless pushed for the use of condemnation. When you have economic development takings, there is no reason to believe the political process will confine their use to those situations where it is justified by the possibility of holdout problems. By contrast, secret assembly cannot be "captured" by interest groups in the same way.

I would like to turn next to the *Kelo* case itself.[8] I'll start by noting a couple of positive aspects of the decision. Although it did uphold the use of condemnation for economic development, it actually constrained takings slightly more than the Court's previous public use decisions. Before *Kelo*, the Supreme Court had twice interpreted the Public Use Clause of the Fifth Amendment as essentially saying that a public use is whatever the government says it is.[9] In *Kelo*, they stepped back from that very slightly. There is still very broad deference to government. But the Court said that maybe there won't be quite as much if the taking is not part of a development plan.[10] Moreover, the ruling was a close 5-4 decision. That itself might give some people pause because it shows that this is a controversial issue in the Court. The previous two big cases in this area had both been unanimous.

That said, there are several serious problems with the majority opinion which still interpreted public use as including virtually any kind of "public purpose" where the government could claim that there's some potential benefit to the public.[11] One flaw is that they almost completely ignored the 18th- and 19th-century history of public use. Although there were divergent views during that period, nonetheless the dominant position was that public use is not simply some potential benefit to the public. Rather, in most states it was interpreted to mean either actual ownership by the government of the condemned property or a situation where it was privately owned but there was a legal right of the general public to physically use it (as with a public utility). This is almost entirely ignored in the majority opinion.

Second, there is a fundamental logical problem in the majority's approach. They admit that the Public Use Clauses creates an individual right that is supposed to constrain the government. But they interpret that right in a way that allows the government to define its scope. The government gets to decide what is or is not a public use, subject only to extremely minor limitations. This defeats the whole point of having a constitutional individual right in the first place, which is to constrain abuses by the government. It makes little sense to have a constitutional right whose scope is defined by the very organization that the right is supposed to constrain. Indeed, this is the only part of the Bill of Rights that the Court has interpreted in this way. It is like appointing a committee of wolves to guard your chicken coop. When you do that, the wolves will tend to gobble up the chickens. The same thing happens here.

A third problem is that the Court claimed that there was a hundred years of precedent backing up their position.[12] There is no question there was some precedent supporting them. But the 100 year claim is simply wrong. If you look at those cases from the late 19th and early 20th century which they claim support their position, in reality none of them actually has anything to do with the Public Use Clause of the Fifth Amendment. They are all cases where takings were challenged under the Due Process Clause of the 14th Amendment. Just read the text of those cases. None of them even so much as mentions the Takings Clause.[13]

Why were property owners bringing these cases under the Due Process Clause rather than under public use? The answer is that during that period the Supreme Court did not interpret the Bill of Rights as being incorporated against the states. So the only way you could challenge a state taking in federal court was by using the Due Process Clause of the 14th Amendment. In one of the very few cases where the Supreme Court did apply the Public Use Clause in this period (because it was a federal government taking)—the 1896 *Gettysburg* case—the Court specifically stated there that if it was a taking transferring property to a private individual, then heightened scrutiny would apply.[14]

Finally, the *Kelo* majority ignored the problems with the political process that I discussed in the first part of my presentation. It might be permissible to allow the government broad discretion if there was not a danger of capture of the process by interest groups. But, in fact, that danger is very great. The Court suggests the planning process might constrain it.[15] But that is unlikely to work. Virtually all takings of this kind, including the one in *Kelo*, are part of a plan of some sort. It is not hard to come up with a plan to rationalizes pretty much any condemnation that benefits a private business. This is especially true if, as the Court concluded in *Kelo*, courts are forbidden to "second-guess" the quality of the plan.[16] A local government can easily come up with a plan that justifies transferring property to General Motors or Pfizer or any other private interest. And under *Kelo*, courts would probably have to approve the taking.

I could say much more about *Kelo* itself. But I want to use my last few minutes to talk about the massive political backlash that *Kelo* generated. After *Kelo* was decided, it was condemned—pun intended—by a wide range of people across the political spectrum, including Rush Limbaugh, Ralph Nader, Bill Clinton, the NAACP, and numerous political activists and talk show hosts on the left and right.[17] In addition, polls showed that over eighty percent of the public opposed the decision.[18]

Because of this widespread political opposition, many people expected that the problem of economic development takings would be dealt with by the political process. And indeed, forty-three states and the federal government enacted legislation purporting to curb these types of condemnations. This is more legislation than has been enacted in response to any Supreme Court decision in all of American history.

But the majority of these new laws actually don't constrain economic development takings in any meaningful way. In many cases, economic development condemnations are banned but "blight" condemnations are permitted. And "blight" is defined so broadly that virtually any area could be declared blighted and then condemned. For example, the Supreme Court of Nevada, ruled that that downtown Las Vegas is blighted, and therefore upheld a condemnation there that transferred property to politically influential casino interests.[19] Nevada has since changed its blight law; but numerous other states still have blight statutes with the same or similar wording. There are other comparably extreme examples that I could cite if time permitted.

Why did this happen? Why was stronger legislation not passed? There are several factors involved. But a big one is the very kind of political ignorance that made it hard for voters to monitor economic development condemnations in the first place. Voters who don't pay close attention to what's going on quite understandably could not tell the difference between laws that effectively constrained takings and those were primarily for show. Indeed, it is no accident that ineffective reform laws were particularly common among those states that actually used this sort of condemnation power extensively beforehand.[20]

Survey questions that I designed for the Saint Index poll showed that only thirteen percent of the public could both correctly answer a question about whether their state had passed a reform law and also knew whether it was likely to be effective or not.[21] And for various technical reasons, even that figure probably over estimates the true level of knowledge.[22]

I have covered the shortcomings of economic development takings and the *Kelo* decision, and also briefly analyzed the political reaction to *Kelo*. Last but not least, I've set up some targets for Dean Levmore to shoot at, and I look forward to his response.

Thank you very much.

Saul Levmore*: Much of the backlash against *Kelo* has less to do with takings law and more to do with opposition to Big Government, and especially to aggressive local governments. I don't like Big Government either. But there is something of a "baby with the bathwater" problem here. We can agree that ill-advised government activity is ruinous. Governments take the wrong properties; they buy the wrong properties; they probably cannot spell "blight" correctly. They undertake the wrong wars; they pass taxes they should not; they build bridges in the wrong locations; they overpay for toilet seats. In short, we must be careful to differentiate between bad government and too much government. I do not hear anyone saying that the government should not be allowed to build aircraft carriers or pay for land needed to expand a military base. When we observe unwise military spending, we do not jump to the conclusion that it is constitutionally impermissible spending or that it is the Supreme Court that ought to control this misguided government activity.

The real, or better, objection is that we are concerned about overachieving interest groups. That concern suggests an irony in *Kelo.* Imagine that *Kelo* had been decided by Justice Somin, that the *Poletown* case had gone the other way, and so forth, so that the government found itself unable to take property in all but the most obvious cases of public use. Would that not look a bit like military spending? Our government rarely makes a private corporation build a submarine. Rather, interest groups come and encourage the building of submarines. They try and accept $2 billion for a submarine that might well be built for half that amount. When the government needs toilet seats, we can count on someone offering to develop specifications then build the seat for $600.

In his written work, Professor Somin argues that government could accomplish its anti-blight aims with tax breaks and with the enforcement of building restrictions. But these tools involve the feeding of interest group frenzy at least as much as compensated takings. Why would we think that interest groups prefer takings to tax breaks? They seem to thrive in both domains.

I prefer to think that the problem with takings is that we are not very good—in courts or elsewhere—at figuring out the right level of compensation. When the government overpays, there is grave inefficiency. If it undercompensates, people scream on talk radio that they detest takings.

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If we take a broad view, it is likely that most people love to be "taken." Many of these transactions are invisible because they are completed in the shadow of takings law. Think, for example, of the enormous amount of property taken for the interstate highway system, and think of wartime requisitions. We know why most sellers, many nominally voluntary, have been satisfied; the government likely overpaid. For most government agents, it is easier to overpay and get the turnpike done on time, or the war won, than it is to go to court on behalf of the citizens. Put slightly unfairly, when we go to war, businesses that are likely to supply goods to the government do not drop in value. A combination of overpayment and occasional condemnation—but always the threat of condemnation—creates windfalls rather than victims.

And each time the government overpays, new interest groups arise and discover that they want more and not less of this government activity. The losers are, of course, dispersed. Imagine, for example, that the federal government decides to build a bridge in your state. Does anyone say "This is going to be terrible for my state; the government will spend money here and condemn the wrong properties at unfair prices"? It is this harm from overpayment that must be compared to the harm done by eminent domain. If you constrain the government's power to take, it will do more taxing and spending—which is to say more buying of $600 toilets from eager sellers. Every government strategy involves insiders and interest groups.

If we look with fresh eyes at our iPhone app or pocket Constitutions (distributed by an interest group)—and I am a bit surprised that the Constitution has not yet been mentioned—we are reminded that the Bill of Rights is absorbed with wartime problems and with high crimes and misdemeanors. And then it turns to the problem and promise of government. The government—though I recognize that it is not a monolithic entity—defines crimes and then the Fifth Amendment, as well as other Amendments, offers some protections, including the double jeopardy clause. Similarly, the government defines property in many ways and then the Fifth Amendment offers protective rules. Professor Somin thinks of the government as the wolves we must fear, but I have already suggested that what we must fear is ourselves, or at least the interest groups we form. In any event, the Fifth Amendment says "nor shall [any person] be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

There are a few plausible plain meanings of these words but I do not think any of them justifies the anti-*Kelo* posture encouraged by Professor Somin. The idea that the government should refrain from taking private property for private use is hardly obvious; it is something of a modern construct. The words appear to communicate the notion that if the government wants to take your life, if the government wants to draft you into military service—which is one means of liberty deprivation—or if the government needs your property for something, it can not simply grab and go. It is required to have some legal regime, some due process, some legislation, or something related to its courts. It is less than clear what "due process" itself means. At times, the government might take private property for public use. Imagine the most extreme public use; the government needs your factory for its war effort. In that case, it must pay you just compensation. The implication might be that if it were not for such a public purpose, then it would not be required to pay any compensation! Note that there is no rule about taking from one private interest for the benefit of another. Imagine, in this regard, that after the war in Granada it becomes clear that the government's war-making was motivated by the pleas of twenty Americans studying in medical school down there. Similarly, imagine that an invasion in the Middle East is fueled by the needs of several oil companies. That these ventures might involve public spending, or takings, for private use, is not addressed in these clauses. I doubt that anyone thinks the government is forbidden from fighting such wars.

Indeed, our government engages in private-to-private transfers, or takings, with some regularity. It taxes some citizens and funds others. There are constant private-to-private transfers, and we learn to encourage them or defend against them through the political process. In comparison to our tax-and-transfer form of government, a hue and cry over an occasional and *compensable* "taking" of private real property for a purpose supported by other private interests seems almost like a fetish. The real action is elsewhere, and it is even more of a taking for private purposes because the losers are regularly uncompensated; not undercompensated, but uncompensated.

I digress for a moment on the word "public" in the Fifth Amendment. It has an interesting history. When that Amendment was drafted, corporations were regarded as "public." Public meant being a public corporation; they had charters in the period of the framing and into the early 1800s. It is plausible that the Amendment communicated the following message: (1) There is an entity called Dartmouth College (for example); it has a public charter, it is a public corporation. (2) Imagine that the federal government were to establish a national university in the District of Columbia or in Philadelphia, or perhaps it were to purchase land and add to Dartmouth College's holdings and work a deal in which Dartmouth College itself became the national university. (3) If so, which is to say if the government takes land to enhance a public corporation, it must pay just compensation. This seems like a perfectly sensible rule. It is in a context in which the colonies often allowed their governments to take without compensation. In some colonies, as remains true in various parts of the world, if the government constructed a road through your unimproved land it, did not need to pay. The idea behind this doctrine of resumption is that the landowner was often receiving more benefit than loss.

Finally, let us remember that without an eminent domain power at all, government would often be hobbled. Imagine a government at war, and a seller who knows that its fighter jets cannot be taken. Similarly, suppose that a government builds a highway (even to benefit "private parties" in the interior) but every landowner can hold out for a high price. The obvious holdout power of these owners of assets has caused every stable government in the world to equip itself with eminent domain power, but to instruct itself to pay fair value in order not to discourage private investment, and perhaps to encourage reasonably efficient takings. This is not an American creation. The argument against eminent domain is really a suggestion that the government operate in secrecy so as to prevent these

holdouts. This is a dangerous claim in a democracy. The disadvantages of secrecy carry over to many cases where private activity is at issue. It is unlikely that we really want a state government to woo private industry and to say: "Come invest in our state. But instead of discussing this openly in our state capital, carry out your investment, including the purchase of land, secretly, and we will secretly give you zoning rights, access roads, and so forth." We don't want such secrecy, but transparency often needs eminent domain as a partner.

In the modern world, unlike the Framers' world, there's more need for eminent domain, rather than less, because Disney World is not going to buy land, no one's going to Groton and building a big research park, without knowing in advance about what the tax rates will be, what the possibility of highways to ship the product will be, or what the investment in education will be. So private parties go to state governments and they say, "I have three or four locations where I can invest and open a factory, or I can invest abroad; I want to know what my political package is because once I go to you and open my plant, you might change the rules because now you'll have holdout power over me."

I find it hard to understand why someone skeptical of government would want a rule that encouraged nontransparent zoning and other regulation. It seems clear that as soon as we bring interest groups into the discussion—and stop thinking of eminent domain as a stand-alone topic with no dynamic impact on other law—we must be more suspicious of forcing the government to go outside of transparent takings law to more secret deals. Eminent domain has some costs, because our assessment of property values is imperfect, but in return for a little more eminent domain we get much less in the way of tax breaks, secrecy, and government overspending on property purchases and side projects.

Somin: I'm going to take just a few minutes to briefly talk about three topics in reverse order of Dean Levmore. First secrecy, then the Constitution, and then, lastly, alternatives to eminent domain such as tax policy.

Regarding secrecy, yes, absolutely, I prefer secrecy when it's private owners doing a private development project. If that's what they're doing and there's no government money or government power involved, then I think that's perfectly fine. The market can sort out development projects that are more valuable than existing uses of the land from those that are not.

Dean Levmore suggests that developers might secretly go to the government and ask for various concessions. But this is actually less likely if you cannot resort eminent domain. In that scenario, you have to operate in secrecy to acquire the property you need for a development project. If the developers go to government beforehand, governments tend to do this thing called "leaking." It might leak out that Disney is buying up lots of properties for an assembly project; if that happens, Disney will be faced with holdout problems. That prospect will diminish Disney's incentive and ability to negotiate in secret with the government in advance for special tax breaks and other concessions. I think that's a good thing. As a general rule, government should try to treat all businesses equally. Firms should compete with each other for consumer dollars in the marketplace rather than competing for government favors in the political arena. I am grateful to Dean Levmore for pointing out this advantage of my position that I didn't think of myself. I fully intend to include it in my forthcoming book on *Kelo*.

Two points regarding the Constitution, which I think I did touch on a bit in my talk. First, as I discussed in my presentation, there is lots of evidence that the original meaning of "public use" was much more restrictive than the definition adopted in cases like *Kelo*. If you are a Federalist or an originalist of any kind, that should matter. Second, in regard to the text, there is a long and somewhat complicated history that boils down to this: the reason why the original Bill of Rights in 1791 says, "Nor shall private property be taken for public use without compensation," is that it was not imagined that the federal government at that time had the power to take property for private use at all. They thought that only "public use" takings needed to be constrained because private takings were not authorized by the Constitution to begin with.

But the relevant point for constraining state government takings is not 1791 but 1868, when the Bill of Rights was incorporated against the states. By that time, the most widely accepted definition of "public use," including public use clauses in state constitutions with the same wording as a Federal Constitution, was a relatively narrow one. Indeed, the leading treatise about these issues at the time, published in 1868 by Justice Thomas Cooley of the Michigan Supreme Court, defined it precisely that way.[23]

Finally, I think Dean Levmore is absolutely right on one point: If government doesn't engage in these types of takings, they can do other bad things instead. He's also right that government is dangerous. I believe that some of that other government activity should also be under tighter constraints than it currently is.

But I would also say that these takings are particularly dangerous and particularly abusive relative to other policy tools for several reasons. One is, they are more opaque and difficult for voters to monitor. Second, there is something that Dean Levmore actually pointed out in one of his own fine articles in 1990: eminent domain enables specific targeting of politically weak people.[24] When you use taxation, by contrast, most of the time you have to tax relatively affluent people because they're the ones who have the money. But they also have considerable political power. So when you tax them too much, you often get anti-tax revolts and backlashes. That imposes some constraints.

I agree, of course, there can be other types of government favoritism toward private interests. But this is a particularly pernicious kind, one that we don't need to tolerate in order to achieve its ostensible purpose of economic development. We should be able to eliminate this type of dangerous favoritism without waiting for the day when we can get rid of every other abuse of government power.

Levmore: Government activity is necessarily "opaque." War is opaque in the sense that it is difficult for voters to know when

a war is a good or a bad one. Think also of increases in tax rates, of choices about what to tax, about relying on one tax rather than another. The point is that we ought not introduce opacity as an argument just where it is convenient in debate.

Second, one's own preference for a bridge, or other government project, provides little information as to whether the government performed well when it built a bridge at a given cost. The decision is a complicated one. I do not see the difference between deciding to build a bridge and deciding to battle blight in a particular manner.

Finally, a reminder about secrecy and regulation. In the modern era we will rarely find a business assembling land for large project without a great deal of pre-clearance regarding various government rules and tax laws. Investors want to know about property taxes, about zoning, about job training for employees, and so forth. These rules must be in place or the investor will go to another jurisdiction. It is that process that needs to be transparent. If we want transparency in these decisions, then it is unrealistic to imagine that we can have many secret assemblies of large properties, as we might have experienced in the past. And without such secrecy good investments will be stymied by holdouts unless eminent domain is available.

Endnotes

1 University of Chicago Dean Michael Schill was the moderator of the debate.

2 Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285 (1990).

3 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

4 Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005 (symposium on *County of Wayne v. Hathcock*).

5 Ilya Somin, Democracy and Political Ignorance (forthcoming).

6 Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 206 (2007).

7 Kelo v. City of New London, 545 U.S. 469 (2005), amicus br. of Cato Institute 2004 WL 2802972, at 23-25 (authored by Richard Epstein).

8 Kelo v. City of New London, 545 U.S. 469 (2005).

9 *See* Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (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).

10 *Kelo*, 545 U.S. at 488.

11 *Id.* at 478-85.

12 *See id.* at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

13 *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 240-44 (2007).

14 *Id.* at 242-43 (discussing United States v. Gettysburg Elec. Ry. Co. 160 U.S. 668 (1896)).

15 *Kelo*, 545 U.S. at 487-88.

16 *Id.* at 488.

17 Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2109-09 (2009).

18 *Id.* at 2109-14.

19 *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 12-15 (Nev. 2003).

20 Somin, *The Limits of Backlash*, *supra* note 17, at 2117-19.

21 *Id.* at 2155-59.

22 *Id.* at 2156-57.

23 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union 530-38 (1868).

24 Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285 (1990).