2025

The “Ownership” of Real Property: The Consequences of Kelo v. City of New London

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INTRODUCTION

For many, the ownership of real property constitutes the pinnacle of the American Dream.[1] For the American homeowner, the purchase of a first home is often the largest investment one makes.[2] Homeownership is one of the cornerstones of financial stability, an indicator of one's attachment to the community, an aspect of upward mobility, and a secure place for families to grow and flourish.[3] While society often uses the phrase "homeowner" or "property owner" to describe those who possess real property in fee simple absolute, can one ever truly "own" their home?

Of course, it is well established that failing to pay one's mortgage or property taxes can lead to foreclosure or a sheriff's sale.[4] But for those property owners who do everything correctly, who timely pay their mortgage or property taxes and live in peace, it often comes as a surprise when their land is arbitrarily "condemned" for the "public benefit." Indeed, enshrined in the Fifth Amendment to the United States Constitution is the phrase "nor shall private property be taken for public use, without just compensation."[5] The phrase "without just compensation" is what gives federal, state, and local governments the power to take private land for public use, so long as they provide "just compensation". Yet government possesses the power of eminent domain, which enables the government to interfere with the rights of private property ownership.

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[1] Investopedia, *What Is The American Dream? Examples and How to Measure It*, https://www.investopedia.com/terms/a/american-dream.asp

[2] Kiplinger Personal Finance, *Buying A House Could Be The Best Investment You Ever Make.* https://www.kiplinger.com/real-estate/buying-a-house-could-be-best-investment-you-make

[3] *Id*.

[4] Non-payment of property taxes can lead to a public auction of the parcel in order to pay outstanding debt. Sometimes referred to as a sheriff's sale. N.J. Stat. 54:5-31.

[5] US CONST. AMEND. V

This work examines eminent domain through the lens of the "public use" requirement and the Supreme Court cases that interpret and decide the reach of governmental power under the Fifth Amendment. The most expansive and controversial Supreme Court case concerning eminent domain in recent years is *Kelo v. City of New London.*[6] At the time of this work, the United States Supreme Court has yet to call into question or overturn the ruling set for in *Kelo*. To date, this landmark Supreme Court case forever changed the landscape and the jurisprudential principles behind eminent domain.

Using *Kelo* as a backdrop, this work will examine how modern jurisprudential theory can sometimes lead to harmful consequences. Specifically, Part I of this work will examine the history of eminent domain before *Kelo*. Then, Part II of this work will examine the jurisprudential and legal principles behind the rule set forth by the majority in *Kelo* and the challenges raised by the dissent. Part III will then examine where eminent domain jurisprudence stands twenty years after the landmark decision. As the outcome of *Kelo* demonstrates, sometimes a progressive and sudden departure from formalistic legal precedent in judicial decision making can have far-reaching and harmful consequences.

I. EMINENT DOMAIN BEFORE *KELO*

Eminent domain is a legal doctrine with a long and rich history, which far predates the conception of the United States of America. Early sources of eminent domain jurisprudence date back to the Middle Ages.[7] One historical rationale of eminent domain was to provide a legal justification for colonialization, in which a sovereign would declare a parcel of land to be within

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[6] *Kelo v. City of New London*. 545 U.S. 469 (2005)
[7] Reynolds, Susan. *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good*. The University of North Carolina Press, 2010. Project MUSE muse.jhu.edu/book/19231.

its control and use eminent domain as the legal basis for controlling the use of the land.[8] Another rationale of eminent domain, which emerged in the Middle Ages, is conceptually similar to eminent domain as it is known today.[9] That rationale was that a sovereign, having control within its geographical boarders, should possess a mechanism to divest competing uses of their land in order to further their objectives.[10] It is important to note that the use of what came to be known as eminent domain by monarchies and other early authoritarian governments was often used for questionable purposes self-serving to those in the government (and not the public).[11] Perhaps not surprising, the original owner or inhabitants were often divested of the land without any sort of compensation or means of redress.[12] The history of eminent domain would begin a new chapter with the creation of the sovereign and independent United States of America, in which further evolutions and limitations would shape the way eminent domain is used today.

A. Eminent Domain's Place in the United States Constitution

The Fifth Amendment to the United States Constitution, among other things, restricts the federal government from taking private land for public use without just compensation.[13] Until the ratification of the Fourteenth Amendment, which extended many of the protections of the Fifth Amendment to the state level of government, state governments were not held to the same standards for eminent domain.[14] The plain text of the Fourteenth Amendment makes no mention of just compensation, but states "nor shall any State deprive any person of life, liberty, or

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[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] U.S. CONST. AMEND. V.
[14] While the Fourteenth Amendment extends the protections of the Fifth Amendment to the State level of government, many other Constitutional Amendments have been "incorporated" through the Fourteenth Amendment's due process clause.

property, without due process of law".[15] Looking to the text of the United States Constitution and its amendments, in 1878, the United States Supreme Court found that the concept of eminent domain is an inherent function of sovereignty that requires no constitutional authority.[16] A "taking" has been perceived by courts to mean a condemnation of one's parcel of land, in whole or in part, without the owner's assent[17]. However, the phrases "for public use" and "without just compensation" contained in the Fifth Amendment, have led to much legal debate on what exactly a public purpose is and what compensation is just.[18] In essence, these phrases serve as a substantial hinderance to the United's States sovereign power of eminent domain and a limitation on when the government can seize private land for public use and benefit.

B. Early Eminent Domain Caselaw

While eminent domain has always been a sovereign power of the United States, the vastness of America's geographic bounds and the rapid and early expansion of the same meant that there was more than enough land for everyone. However, the rapid technological expansions of the late 19th century led to some of the first controversies regarding the use of eminent domain power.[19] Specifically, most early eminent domain caselaw involved government takings of private land for the purposes of transporting persons or property.[20] In *Boom Co. v. Patterson*[21], the United States Supreme Court issued one of the first explanations of what a public taking was and what compensation is considered just.[22] In that case, a Missouri law mandated that for

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[15] U.S. CONST. AMEND. XVI, Sect. 1
[16] "The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty". *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)
[17] *Kelo v. City of New London*, 545 U.S. 469 (2005).
[18] Today, the market rate of the land is often considered to be "just compensation".
[19] William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738
[20] *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)
[21] *Id*.
[22] *Id.*

private land to be taken for public use, a private actor tasked with fulfilling that public use[23] must petition the state court in the county where the land was located for appraisal and condemnation of the land.[24] Thereafter, the landowner could "appeal" the condemnation and appraisal, in which a case would be certified an a proceeding was held before a jury to determine whether the condemnation was valid and what compensation the landowner was owed.[25] The company seeking to construct a "boom[26]" on the landowner's private land appealed to the United States Supreme Court, which held that Missouri's procedural requirements for an eminent domain taking were a constitutionally permissible action.[27]

Even before the Fourteenth Amendment, it was clear that state governments, as individual sovereigns, can make their own procedural requirements for eminent domain. In fact, many of the eminent domain cases explored in this work originate from state government actors attempting to exercise their power of eminent domain. But as exercises of eminent domain became more common, so did issues regarding which objectives eminent domain could seek to achieve and what compensation the original owner was owed. One of the earliest and perhaps most substantial limits on eminent domain was the rule propagated in the case *Missouri Pacific Railway Co. v. Nebraska*[28], in which the Court established that the taking of private land for the sole benefit of another private individual was not a valid exercise of eminent domain under the Fourteenth Amendment.[29] In *Missouri Pacific Railway Co.,* a group of private farmers brought action against a railway company, seeking to compel the company to surrender a portion of the

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[23] In these instances, private actors are contracted by the government.
[24] *Id.*
[25] *Id.*
[26] A "boom" is a device used in logging to transport lumber along riverways. *Id.*
[27] *Id*.
[28] *Mo. P. R. Co. v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896)
[29] *Id*.

land adjacent to the track for the construction of a grain elevator.[30] While Nebraska law and the Nebraska supreme court found that this law tangentially of served a public purpose, the United States Supreme Court held that there was not a public purpose in this case that allowed the private farmers to benefit at the expense of a private rail company and that this taking was not a taking for public use.[31]

C. What is a Public Use?

Throughout the history of American eminent domain jurisprudence, the types of land uses that constitute a "public use" have changed gradually to meet the needs of an expanding nation. When one thinks of what constitutes public use, military installations, roads, railways, hospitals, and public utilities are often what initially come to mind. But absent instances where a parcel of land is condemned, developed, and subsequently operated solely by a governmental agency, most takings benefit private actors as well. Indeed, "public" utilities like electricity, natural gas, and water are almost always operated by private companies.[32] Knowing that certain functions are necessary for society, the United States Supreme Court has long held that eminent domain takings that serve a public use, can simultaneously benefit private actors as well.[33] Thus at the time *Kelo* was decided, "public uses" were largely separated into three main types: public uses operated mostly by public agencies, public uses that are developed or operated by private companies, and takings for a public purpose that may eventually lead to a private use.[34] After the

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[30] *Id*.
[31] *Id*.
[32] Often called common carries, these private companies are contracted by the government to provide a service to the public.
[33] *See Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp*., 503 U.S. 407 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co*., 240 U.S. 30 (1916)
[34] *Kelo v. City of New London*. 545 U.S. 469 (2005).

ruling in *Kelo*, it would seem the United States Supreme Court created a fourth category: the "economic redevelopment" category.

i. The "Purely Public Use" Category.

One of the original historical motives for the concept of eminent domain was that it is sometimes necessary for a sovereign to seize private land within its borders to achieve a compelling public interest. Taking land for the construction of a military installation, hospital, roadway, railway, airport, public park, and other publicly controlled entities have always been a historical purpose of eminent domain.[35] One early example is the United States Supreme Court case *Old Dominion Land Co. v. United States*[36], in which the United States Military used eminent domain to acquire a parcel of land for a military installation when the owner refused to sell.[37] In *Old Dominion*, the United States Military was renting a parcel of land, on which they erected multi-million-dollar structures.[38] When the landlord wished not to renew the lease, the United States offered to buy the land, but the landowner refused.[39] In holding that the United States Military could seize the land through eminent domain, the United States Supreme Court noted that the construction and operation of military installations was historically an action that could be achieved by eminent domain.[40]

At its core, eminent domain takings that occur to serve a compelling public interest and benefit only public actors seem to pertain to the ideas of legal realism. Legal realism is the theory that law, and particularly judicial adjudication is more than just a formal analysis of sources, but

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[35] *Id*.
[36] *Old Dominion Land Co. v. United States,* 269 U.S. 55 (1925).
[37] *Id.*
[38] *Id*.
[39] *Id*.
[40] The landlord was compensated by an amount prescribed by a jury on remand. *Id*.

rather a consideration of the facts and social interests that surround a case or controversy.[41] While several state legislatures and certain acts of Congress have attempted to codify aspects of eminent domain, most of the United State Supreme Court's inquiry into which eminent domain takings are constitutional involve an analysis of how useful the land would be to one party or another. In cases like *Old Dominion*, where a multi-million-dollar strategic military installation is threatened by a private landowner, a legal realist would examine the facts to evaluate who would make better use of the land.[42] Especially like the landowner in *Old Dominion*, who refused to sell the parcel to the United States Military for no stated reason, a legal realist would likely find an eminent domain taking to be in the interest of public policy.[43] Especially in the early days of eminent domain jurisprudence, legal realist philosophy seemed to permeate many decisions in an era where legal realism had yet to gain much traction.

ii. The "Common Carriers" Category.

The second category of eminent domain takings, condemnations which serve a public use but tangentially benefit private actors, flowed from the ideas of purely public takings in a formalist approach. While land may be dedicated to public use, private companies are often contracted by government agencies or are better positioned to serve such a public use. Thus, this category of eminent domain takings is often referred to as the "common carrier" taking, in which a private entity assumes control of the land in service to the public. Railways are one example of a common carrier, in which public transportation is owned and operated by a private entity. In *National R.R. Passenger Corp. v. Bos. & Me. Corp.*[44], a private railroad company was able to use

[41]Legal Information Institute, *Legal Realism*, Wex Definitions Team https://www.law.cornell.edu/wex/legal_realism
[42] *Old Dominion Land Co. v. United States,* 269 U.S. 55 (1925).
[43] *Id*.
[44] *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp*., 503 U.S. 407, 112 S. Ct. 1394 (1992)

the power of eminent domain to take possession of another private railroad company's tracks.[45] In deciding that this condemnation was not a violation of the Fifth or Fourth Amendment, the United States Supreme Court noted that although the party seeking the condemnation was a private entity, they nonetheless were seeking to serve a public interest by using the railway to benefit public passengers.[46]

Another example of a "common carrier" taking can be an exercise of eminent domain for the purpose of building a public utility. In *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*[47], an electric company was able to directly benefit from the government's use of eminent domain to acquire land, water, and water rights to build a hydroelectric dam.[48] In *Mt. Vernon*, the United States Supreme Court held that it was a natural extension of the term "public use" to include a utility which could make everyone's lives easier.[49] Thus, when the government contracts with or allows a private company to perform a public function that the government would otherwise perform, a use of eminent domain power to achieve that public purpose is valid under the United States Constitution.

In adopting the "common carriers" category of eminent domain takings, the United States Supreme Court used a formalist approach to their reasoning. Legal formalism is the belief that judicial decisions should be based primarily on a logical analysis of legal sources, such as

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[45] *Id.*
[46] *Id*.
[47] *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916)
[48] *Id*.
[49] As Justice Holmes artfully put it: "In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is." *Id* at 32.

statutes and caselaw.[50] In the written opinions of both *National R.R.* and *Mt. Vernon*, the majority reaches its conclusion through a highly methodical analysis of legal sources. Both cases begin with the text of the United States Constitution and its amendments, proceeding to craft a logical sequence of caselaw in support of their legal conclusions. Viewing the purely public use and the common carriers' categories side by side, one can see that both seek to accomplish the same or similar objectives: a public service. The only difference between the two categories are the means in which the objective is carried out, in which either agents of the government or private entities contracted by the government use the acquired land to conduct a public service. Given the similarities in policy objectives and legal foundations between the purely public use category of eminent domain and the "common carriers" category, one can see how a formalist approach would naturally lead to the extension of the "public use" requirement to private actors engaged in the business of providing the public with an essential service.

iii. The "Public Purpose" Category.

The third and most recent[51] category of eminent domain takings is the "public purpose" taking, in which private land is taken for some sort of public purpose even though the condemned land may later be used for private purposes. In a highly realist approach, the United States Supreme Court crafted this category in response to pressing issues in land use public policy. In *Haw. Hous. Auth. v. Midkiff*[52], a housing market crisis in the State of Hawaii led to a major development in eminent domain jurisprudence.[53] In 1984, the housing market in Hawaii was almost completely dominated by just few wealthy private actors, making individual

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[50] *See Generally* Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897); Brian Leiter, American Legal Realism, in The Blackwell Guide to the Philosophy of Law and Legal Theory (2005)
[51] Notwithstanding the developments which occurred in *Kelo*.
[52] *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984)
[53] *Id.*

homeownership untenable for most Hawaiian citizens.[54] The Hawaiian government then passed legislation that allowed the state to use the power of eminent domain to seize land owned by the corporations and sell it to perspective homeowners at an affordable price[55]. In defending the constitutionality of this legislation, the United States Supreme Court held that even though the taking would eventually benefit private citizens, such takings were to achieve the pervasive public policy goal of allowing the public to obtain ownership of residential real estate.[56] In finding that an eminent domain taking from a private entity could be a means for another private entity to acquire ownership of the former's land, the United States Supreme Court reasoned that because the private parties that would eventually take possession of the land were not yet identified[57], the taking did not violate the rule set forth in *Missouri Public Railroad*[58].

While certain distinctions can be made between the legal theories behind the decisions in *Hawaii Housing Authority* and *Missouri Public Railroad*, a reading of *Hawaii Housing Authority* appears to call into question the hardline restriction set forth in *Missouri Public Railroad.*[59] A close reading of *Hawaii Housing Authority* reveals that the United States Supreme Court considered an extensive amount of public policy evidence in reaching their decision, which evinces a legal realist approach to the holding the Court reached.[60] For example, the Court

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[54] *Id.*

[55] The price in which the residential tenants purchased the land was the same price in which the Hawaii Housing Authority acquired the land from the prior owner. The price in which the Hawaii Housing Authority acquired the land was either determined at a condemnation hearing or negotiated between the Hawaii Housing Authority and former owner. Residential tenants could obtain a loan from the Hawaii Housing Authority for up to 90% of the purchase price in order to the buy the land in which they used to rent, the tenants also had the right of first refusal for up to ten years from the condemnation. *Id*.

[56] *Id*.

[57] Or never had to be identified. *Id*.

[58] That a taking purely for the benefit of one private party over another was Unconstitutional. *Mo. P. R. Co. v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896)

[59] It is important to note that there was nearly a century between the decision set forth in *Missouri Public Railroad* and *Hawaii Housing Authority*.

[60] Justice O'Connor, writing for the majority, credited the "extensive hearings [of] the Hawaii Legislature [which] discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners.

credited the finding that over half of all land in the Hawaiian Islands was owned by just 72 private actors.[61] The Court also took judicial notice of the fact that aside from these private owners, a majority of the Hawaiian population were renters of the land in which they lived and worked.[62] Finally, the Court gave substantial deference to the fact that the highly concentrated control of nearly half of the state's lands in just 72 private actors greatly inflated the price of the land, made land ownership nearly impossible for anyone who was less than upper class, and eroded the public tranquility and welfare.[63] Indeed, these public policy findings led the majority to distinguish *Missouri Public Railroad*, which created a whole new category of constitutional eminent domain takings. This realist approach paved the way for the ruling in *Kelo*, in which the majority made frequent reference to the Court's prior decision in *Hawaii Housing Authority*.

II. *KELO* AND ITS JURISPRUDENTIAL PREMISES

When examining the underlying jurisprudential theories of a case, it is important to recognize that few judges or their decisions fall neatly into one single theory. Exposing the underlying jurisprudential theories of a judicial decision depends not only on the facts of the case, but the legal and non-legal authorities on the subject matter. *Kelo v. The City of New London* was a highly contested and controversial case, which gained national attention and received input from several amici.[64] A review of the jurisprudential theories of the majority and the dissent must not be divorced from the facts and procedural history of the landmark case. Evaluating the facts, procedural history, and the reasoning of the majority and the dissent in *Kelo*, one can see how the underlying jurisprudential theories of legal realism, as adopted by the majority, and legal formalism, as adopted by the dissent, manifested in this landmark case.

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[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Kelo v. City of New London*, 545 U.S. 469 (2005)

A. The Factual and Procedural Circumstances of Kelo.

A landmark Supreme Court case in the context of both property law and constitutional law, the ruling set forth in *Kelo* was as controversial as the facts behind the case are fascinating.[65] The City of New London is a costal municipality in the State of Connecticut, which was, at the time leading up to the decision in *Kelo*, undergoing a period of poor economic performance.[66] In the factual findings of the United States Supreme Court:

> Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.[67]

As part of a revitalization effort, the New London City Council sought to redevelop a parcel of waterfront property.[68] The proposed redevelopment would include retail businesses,[69] new residential units, and a proposed Pfizer Pharmaceuticals research facility.[70] The City of New London commissioned a not-for-profit private company, the New London Development Corporation,[71] to head the redevelopment project.[72] The corporation selected its site for their revitalization program, which was focused on 90 acres of the Fort Trumbull area.[73] The development plan encompassed seven parcels.[74] Parcel 1 was designated for a waterfront conference hotel at the center of a "small urban village" that would have included restaurants and

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[65] For an engaging depiction of the story behind *Kelo*, the reader is encouraged to watch the film *Little Pink House*.
[66] *Kelo v. City of New London*, 545 U.S. 469 (2005)
[67] *Id.*
[68] *Id.*
[69] Experts estimated that the redevelopment plan would create over one thousand new jobs. *Id.*
[70] The massive research center that Pfizer proposed to build was initially valued at $300 million. *Id.*
[71] Later the respondent in *Kelo*. *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

shopping.[75] A pedestrian "riverwalk" would have originated there and continued down the coast, connecting the waterfront areas of the development.[76] Parcel 2 would have been the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park.[77] Parcel 3, which was located immediately north of the Pfizer facility, would contain at least 90,000 square feet of research and development office space.[78] Parcel 4A is a 2.4-acre site that would have been used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina.[79] Parcel 4B would have included a renovated marina, as well as the final stretch of the riverwalk.[80] Parcels 5, 6, and 7 would have provided land for office and retail space, parking, and water-dependent commercial uses.[81]

However, the site selected by the New London Development Corporation was comprised of 115 privately owned parcels of residential land and a thirty-two-acre section of government land that was once occupied by the United States Navy.[82] Petitioner Susette Kelo had lived in the Fort Trumball area since 1997, but to her misfortune, her home was situated atop a parcel of land that the New London Development Corporation sought to revitalize.[83] Joined by eight other petitioners,[84] Susette Kelo fought to keep her home in a battle that led all the way to the United States Supreme Court. Susette Kelo's home was a modest house located near the shore, which

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[75] This parcel also would have had marinas for both recreational and commercial uses. *Id.*
[76] *Id*.
[77] *Id*. This parcel would have also included a space reserved for a new U. S. Coast Guard Museum.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] Eighteen of the thirty-two acres are now occupied by Trumball State Park. *Id*.
[83] *Id*.
[84] Petitioner Wilhelmina Dery was born in her Fort Trumball home in 1918 and lived there her entire life, her husband (also a petitioner) lived in the home with her for sixty years. Ten out of the fifteen homes which were eventually condemned through eminent domain were occupied by their owners or a family member of the owners. The other five were investment properties. *Id*

she prized for the property's peaceful ocean view.[85] She took diligent care of her home and during her ownership, she made significant improvements to the property.[86] Susette Kelo paid her dues and did everything she could to live a peaceful life by the shore. But like most homeowners, Susette Kelo was blissfully unaware of the legal forces that could divest her of her home.

In almost every eminent domain case, the entity seeking to invoke the power of eminent domain to take title of another's property first attempts to purchase the land.[87] In *Kelo*, the New London Development Corporation made offers to purchase each of the privately owned parcels in the redevelopment zone[88]. While many of the homeowners took the buyout option, several holdouts, including Susette Kelo, held fast.[89] Determined to acquire the land needed for the revitalization project, the New London Development Corporation made progressively higher offers to buy the remaining parcels of land.[90] When it became clear that Susette Kelo and some of her neighbors would not be enticed to abandon their homes at any price, the New London Development Corporation petitioned the City of New London to condemn the properties through the use of eminent domain.[91]

Susette Kelo and her remaining neighbors sued the New London Development Corporation in the Connecticut Superior Court, alleging that the use of eminent domain against their homes constituted a violation of the takings clause of the Fifth Amendment to the United

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[85] *Id*.
[86] *Id*.
[87] In most of the cases cited above, the party seeking to invoke the power of eminent domain first offered to purchase the land in question. *See Mo. P. R. Co. v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916); *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp*., 503 U.S. 407, 112 S. Ct. 1394 (1992); *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).
[88] *Kelo v. City of New London*, 545 U.S. 469 (2005).
[89] *Id*.
[90] *Id*.
[91] *Id*.

States Constitution.[92] Specifically, the petitioners argued that allowing the New London Development Corporation, a private company, to use eminent domain to acquire their properties for the private benefit of that company was a violation of the "public use" requirement.[93] The Connecticut Superior Court held that the properties located in parcel three could be condemned but held that the properties located in parcel 4a could not be condemned.[94] Both petitioners and respondents appealed to the Connecticut Supreme Court, which held in favor of respondents[95]. The United States Supreme Court granted certiorari to determine whether economic redevelopment constituted a public use.[96] In a 5-4 decision, the United States Supreme Court held that the New London Development Corporation's use of eminent domain was for a constitutionally permissible public use.[97]

A. The Supreme Court's Reasoning

In beginning its analysis, the United States Supreme Court reiterated the position that a purely private taking from one private party for the benefit of another is unconstitutional.[98] In a strikingly realist tone, the majority stated outright that the type of taking that was to occur in *Kelo* did not fit squarely into one of the existing categories of a "public use."[99] Indeed, the taking in *Kelo* was not a purely public use, it was not for the use by a common carrier, nor was the

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[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.

taking justified as a "public benefit" as was the taking in *Haw. Housing Auth*[100]. Justice Stevens, writing for the majority, stated "viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."[101] Citing to the rule set forth in *Hawaii Housing Authority*, the majority reasoned that "economic development" was a natural extension of the "public purpose" category of eminent domain takings.[102] The majority rejected petitioner's argument that allowing an eminent domain taking for economic redevelopment would essentially open the door for a private takings of virtually any type, stating that "the hypothetical cases posited by petitioners can be confronted if and when they arise."[103] Asserting a strong position that state and local governments should have be given discretion in determining when to use eminent domain to enact an economic development plan, the majority reasoned that federal courts should only intervene in cases of purely private takings that are not identified as being part of a plan of economic development or an identified public use.[104] With their holding in *Kelo*, the United States Supreme Court vastly expanded the rights of state and local governments to use eminent domain as a means to achieve economic development. But as the dissent and other critics of the decision would argue, this decision came at the expense of private landowners, who can now be divested of their property if another can make better use of it.[105]

III. THE JURISPRUDENTIAL FORCES BEHIND *KELO*: THE MAJORITY AND THE DISSENT

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[100] As the dissent in *Kelo* recognized, the taking in *Haw. Housing Auth.* was for the benefit of the local residential tenants, not for a private redevelopment organization like that of the taking in *Kelo*. *Id.*
[101] *Id*. at 482
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] Some of first words of the dissent in *Kelo* read: "Under the banner of economic development, all private property is now vulnerable to being taken. *Id*.

Apart from the few United States Supreme Court cases which are decided with unanimous decisions, the differences between the majority, concurrence, and dissent in a particular case can highlight the controversy of the issues at hand. Concurring opinions, which reach the same or slightly different result of the majority but for different reasons, are one display of the impact which a judge's jurisprudential beliefs have on a case.[106] But while the majority and dissent in each case, by their nature, reach different conclusions based on the facts at hand, the most apparent difference between the two opinions is often the jurisprudential approach the justices take in reaching their conclusion. The controversial 5-4 decision in *Kelo* highlights the fact that depending on how a judge views what the law is and how judicial decisions should be made plays an immense role in the deciding of cases. In the majority and dissent in *Kelo*, the difference of jurisprudential approaches in each opinion highlights the ideologies of legal formalism and legal realism.

A. Formalism and Realism, Generally

In American jurisprudence, two competing philosophies permeate many legal decisions and the views of judges and justices who rule on such cases. Legal formalism, the jurisprudential theory that law is derived from a logical analysis of rules, dominated early American legal tradition and remains a compelling philosophy for many legal scholars and professionals.[107] Justice Scalia and Justice Thomas, who were part of the dissent in *Kelo*[108], were known legal formalists, whose decisions often follow a systematic analysis of purely legal sources. A competing and emerging jurisprudential theory is legal realism, the idea that law and legal

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[106] In *Kelo*, there was one concurring opinion authored by Justice Kennedy. Kennedy wrote a concurring opinion to supplement the inquiry of the majority, clarifying that an application of rational basis review to determining whether an eminent domain is "for the public benefit" does not include takings in which the public benefit is *de minimis* when compared to the benefit of the public good. *Id*.

[107] See Thomas C. Grey, Modern American Legal Thought, 106 YALE L. J. 493, 493-497 (1996); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

[108] Justice O'Conner was part of the dissent was its author. *Kelo v. City of New London*, 545 U.S. 469 (2005).

decision making serves social interests and promotes informed public policy decisions.[109] While legal realists engage in an analysis of legal sources in making their decisions, they also consider non-legal factors.[110] For a legal realist, the findings of legislative bodies, regulatory agencies, professionals in their respective fields, and research findings are all sources that should be considered when performing legal decision making.[111] The controversial 5-4 decision in *Kelo* highlights the contrast between legal formalism and legal realism, in which the majority and dissent engage in analyses that reach opposite results.[112]

i. Legal Formalism

Legal formulism is best defined as viewing the law and judicial decision making as a set of rules.[113] But because all rules are subject to and often change over time, formalists are no stranger to the fact that judges play a significant role in the advancement of legal theories in each decision they make.[114] At the same time, formalists appreciate, respect, and often demand an adherence to the authorities which bind judges in the decisions in which they make.[115] In order to reconcile the everchanging nature of the human construct of law with their need to adhere to the set of rules which already exist, legal formalists favor limited advancements and/or deviations from the "black letter law" and judicial precedent.[116] In more open terms, legal formalism views advancements in the law and legal theory as a slow, careful, and methodical force for societal change, in which new advancements do not stray too far from and respect the rules which came

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[109] See Brian Leiter, American Legal Realism, in The Blackwell Guide to the Philosophy of Law and Legal Theory (2005); Thomas C. Grey, Modern American Legal Thought, 106 YALE L. J. 493, 497-502 (1996).
[110] *Id*.
[111] *See Id*.
[112] *Kelo v. City of New London*, 545 U.S. 469
[113] See Thomas C. Grey, Modern American Legal Thought, 106 YALE L. J. 493, 493-497 (1996); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).
[114] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).
[115] *Id*.
[116] *Id*.

before them. Many view formalism as a comfortable and predicable legal theory in that adherence to a pre-existing set of rules offers insight as to how a judge will reach their decision, but others view formalism as a hinderance to large developments in legal theories that unnecessarily slows societal change.

ii. Legal Realism

Legal realism is the jurisprudential theory that law and legal decision making should not be divorced from the social, political, and factual circumstances of the not only the case itself, but from that of society as a whole.[117] As Justice Oliver Wendell Holmes, considered a founder of legal realism[118], stated, "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts".[119] Thus, legal realists are less concerned with adherence to purely legal authorities, but rather how all forces, legal or non-legal, will influence judicial decision making. For legal realists, consideration of societal forces outside of the facts of a specific case and/or binding legal authorities is essential for determining how judicial decisions are made.[120] As Justice Holmes artfully put it, "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic".[121] While adherence to logical interpretations of purely controlling legal sources is obviously important, legal realists recognize that considering the wider social forces at play behind judicial decision making can lead to more predictable and more nuanced decision making.

B. Formalism and Realism in the Kelo *Opinions.*

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[117] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)
[118] Referred to as legal realism's intellectual forebearer. Brian Leiter, *American Legal Realism* (2002) at 3.
[119] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457; 457.
[120] Brian Leiter, *American Legal Realism* (2002)
[121] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457; 465

The majority in *Kelo*, in its reasoning for ruling for the City of New London, indicated that its decision must not be divorced from the facts and public policy implications that would follow.[122] In the very first pages of the majority opinion, the majority cites to the findings made by the City of New London and the projected improvements that the New London Development Corporation would have made.[123] In rejecting the petitioner's arguments, the majority found that creating over 1000 new jobs, bringing a major corporate entity to the area, and developing residential and recreational property was a benefit to the public that should be allowed so long as the impacted landowners were compensated for their loss.[124] While the majority laid a foundation and explanation of the legal precedent that supported its decision, the consideration of public policy interests evince a realist approach to the legal issues at hand in *Kelo*[125]. In essence, the majority reasoned economic development is beneficial to the public, and that stubborn landowners should not be able to permanently cripple economic progress.

The dissent, however, took a far more formalist approach, performing a detailed analysis of the history of eminent domain jurisprudence and whether a ruling for the respondents in *Kelo* would have been an impermissible departure from legal precedent.[126] As the dissent stated:

> under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be

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[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] See Brian Leiter, American Legal Realism, in The Blackwell Guide to the Philosophy of Law and Legal Theory (2005); Thomas C. Grey, Modern American Legal Thought, 106 YALE L. J. 493, 497-502 (1996).
[126] *Id*.

> upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public.[127]

This seemingly disapproving tone at the beginning of the dissents opinion indicates that the dissent did not only disagree with the outcome of the case, but the dissent's disapproval of the public policy justifications which the majority used in creating an entirely new category of eminent domain takings. The dissent also stated, in connection with interpreting the takings clause, "when interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, that no word was unnecessarily used, or needlessly added."[128] In asserting such emphasis on the United States Constitution and early caselaw which interpreted it, the dissent engages in a formalistic approach to their opinion by narrowing their inquiry to legal authority. A legal formalist views law and legal decision making as a set of rules, in which precedent and adherence to reasonable predictions should take priority over external factors of a particular case.[129] The dissent cited to far more cases than the majority did, laying a completed historical analysis of eminent domain jurisprudence while providing a brief explanation of the rule set forth in each case.[130] When the dissent's analysis reached *Hawaii Housing Authority,*[131] they distinguished the ruling in that case from the majority's holding in *Kelo*.[132] As Justice O'Connor reasoned:

> Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely

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[127] Kelo v. City of New London, 545 U.S. 469, 494 (2005)
[128] It is interesting to note that the dissent quotes directly from the case *Wright v. United States*, 302 U.S. 583 (1938). *Id* at 496.
[129] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).
[130] The dissent's opinion is also longer and takes up more pages than the majority's opinion. *Kelo v. City of New London*, 454 U.S. 469.
[131] The case which the majority reasoned laid the foundation for their decision. *Id*.
[132] *Id*.

private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[133]

The dissent distinguished *Hawaii Housing Authority*[134] by stating that the overall public use propagated by the exercise of eminent domain in that case was to protect the residential landowner, not harm them as what occurred in *Kelo*. Applying this formalist approach, the dissent was extremely skeptical of the majority's reasoning, viewing the ruling in *Kelo* as an unconstitutional departure from the prior decisions of the United State Supreme Court.

IV. The Legal Landscape of Eminent Domain After Kelo

After the landmark ruling in *Kelo*, the United States Supreme Court has since adhered to the legal principles and theories set forth in the *Kelo* case. At the time of this work, the United States Supreme Court has yet to issue a majority opinion questioning the decision reached in *Kelo*. But since the *Kelo* decision, a few United States Supreme Court cases have not only referenced *Kelo*, but even affirmed the ruling established in the same. In *Eychaner v. City of Chicago*[135], the United States Supreme Court denied certiorari to hear a case that called into question the ruling in *Kelo*. The majority provided no reasoning to support their decision and simply denied certiorari.[136] Justice Thomas and Justice Gorsuch wrote a dissenting opinion, arguing that certiorari should be granted to correct the mistake the United States Supreme Court made in *Kelo* or, alternatively, to

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[133] *Kelo v. City of New London*, 545 U.S. 469 at 500 (2005), quoting *Midkiff*, 467 U.S., at 245.
[134] Which the Court referred to as *Midkiff*. *Id*.
[135] *Eychaner v. City of Chi*., 141 S. Ct. 2422 (2021)
[136] *Id*.

clarify the types of economic development which constitutes a public use.[137] The declination of the United States Supreme Court to hear this case displayed either a respect to the precedent set forth in *Kelo*, or possibly hesitance to revisit the controversial issue.

At the time of this work[138], the United States Supreme Court has yet to call into question or reverse the ruling set forth in *Kelo*. In an effort to limit the expansive reach of the holding in *Kelo*, several states have codified eminent domain restrictions that limit expansiveness of the newly formed "economic development" category of public taking.[139] To protect private property rights, many states have enacted legislation that substantially limits the power of the "economic development" category of eminent domain takings, or have eliminated the category entirely in the eyes of the state legislature.[140] The only states which have not passed legislation which prohibits the use of eminent domain solely for economic development are Arkansas, California, Hawaii, Maryland, New York, Rhode Island, Utah, and Washington.[141]

The Castle Coalition and the Institute for Justice have also tracked the status of eminent domain at the state level since Kelo.[142] The Institute for Justice grades each state on how protective their laws are in general against eminent domain abuse, the ranking is

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[137] *Id*.
[138] This work was completed in 2024.
[139] Lexis Nexis*, Eminent Domain State Law Survey* https://plus.lexis.com/document/documentlink/?pdmfid=1530671&crid=2a0a5d51-84c3-4ff9-91d4-9c39efc6b267&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5TDP-XG61-JW09-M4C7-00000-00&pdcontentcomponentid=500749&pddoctitle=Eminent+Domain+State+Law+Survey&pdproductcontenttypeid=urn%3Apct%3A16&pdiskwicview=false&ecomp=2gntk&prid=1940fb12-ce1c-4290-ace1-54ae281601ff
[140] *Id*.
[141] *Id*.
[142] CASTLE COALITION: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, https://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf; Institute for Justice, *Grades for State Eminent Domain Laws, https://ij.org/issues/private-property/eminent-domain/*

reached after review of each state's statutes and controlling caselaw.[143] Massachusetts, New York, and Arkansas received an "F".[144] Alaska, California, Hawaii, New Jersey, Maine, Vermont, Connecticut, Rhode Island, Maryland, Kentucky, Tennessee, Indiana, Colorado, Nebraska, Montana, and Idaho received a rating in the "D" range.[145] Washington, Wisconsin, Missouri, West Virginia, and North Carolina received a rating in the "C" range.[146] Oregon, Nevada, Utah, Arizona, Wyoming, Minnesota, Iowa, Kansas, Oklahoma, Texas, Louisiana, Alabama, Mississippi, Georgia, South Carolina, Indiana, Ohio, Pennsylvania, Delaware, and New Hampshire received a rating in the "B" range.[147] North Dakota, South Dakota, New Mexico, Florida, Virginia, and Michigan received a rating in the "A" range.[148]

To date, several state legislatures and judiciaries have either expanded on or restricted the ruling in *Kelo*, creating legal differences in each state's eminent domain policies.[149] Nevada, Arizona, Texas, North Dakota, Michigan, Louisiana, Mississippi, Florida, Georgia, South Carolina, Virginia, and New Hampshire have all amended their state constitutions to prohibit the use of eminent domain for economic development in response to the decision in *Kelo*.[150] The state supreme courts of North Dakota, Iowa,

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[143] Institute for Justice, *Grades for State Eminent Domain Laws, https://ij.org/issues/private-property/eminent-domain/*
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] At the time of this work, 652 decisions have cited to *Kelo v. City of New London*, with 299 federal court cases and 324 state court cases respectively. Lexis Nexis, *Eminent Domain State Law Survey*, https://plus.lexis.com/shepards/shepardspreviewpod/?pdmfid=1530671&crid=e779c567-b710-4a0c-aef0-f0e14939a29b&pdshepid=urn%3AcontentItem%3A7XW4-F591-2NSF-C0WD-00000-00&pdshepcat=citingref&pddoctabclick=true&prid=24a95d14-a7fc-491e-9d4e-1726d7fc6c75&ecomp=2gntk#/citingref
[150] Institute for Justice, *Grades for State Eminent Domain Laws, https://ij.org/issues/private-property/eminent-domain/*

Oklahoma, and Ohio have explicitly rejected the holding in *Kelo.*[151] The state supreme courts of Utah, Missouri, Maryland, Pennsylvania, New Jersey, and Rhode Island have limited the reach of eminent domain takings in the name of economic development.[152] Thus, nearly two decades after the landmark cases, courts and legislatures have altered the reach of eminent domain in ways which created regional differences in eminent domain jurisprudence. It would not be surprising if one of these differences sparks the next dispute regarding the constitutionality of certain eminent domain takings, allowing the United States Supreme Court to revisit the issue once more.

CONCLUSION

Since our nation's founding, eminent domain has evolved in many ways through the reasoning and analysis of judges and those who advise them. What began as an inherent power of a sovereign nation to control the use of land within its borders became a means for private actors to take title of land to redevelop it for the potential economic benefit of the public. After the ruling in *Kelo*, Susette Kelo and her neighbors' homes were condemned and demolished, petitioners were paid just compensation for the value of their properties market value.[153] Forty-seven states passed laws limiting the scope of eminent domain, in a display of bipartisan backlash to the controversial decision.[154] The

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[151] *Id*.
[152] *Id*.
[153]Institute for Justice, *Kelo Eminent Domain*, https://ij.org/case/kelo/#:~:text=Backlash%20to%20Kelo&text=New%20London%20also%20triggered%20an,eminent%20domain%20for%20private%20gain. Susette Kelo's iconic pink house was moved to another location in Connecticut.
[154] Lexis Nexus, *Eminent Domain State Law Survey*, https://plus.lexis.com/document/documentlink/?pdmfid=1530671&crid=2a0a5d51-84c3-4ff9-91d4-9c39efc6b267&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5TDP-XG61-JW09-M4C7-00000-00&pdcontentcomponentid=500749&pddoctitle=Eminent+Domain+State+Law+Survey&pdproductcontenttypeid=urn%3Apct%3A16&pdiskwicview=false&ecomp=2gntk&prid=1940fb12-ce1c-4290-ace1-54ae281601ff

backlash from the decision and the destruction of petitioner's homes was fatal to the redevelopment project, Pfizer Pharmaceuticals abandoned their facility after their tax breaks ended and the parcel that once housed petitioners laid barren until 2022.[155] The cost of litigating *Kelo* and what little work occurred on the redevelopment project cost the city $80 million.[156] While the legal realist approach implemented by the majority was reached after a careful analysis of legal and non-legal sources, many would argue that the more methodical legal formalist approach deployed by the dissent would have stopped the tragedy that befell petitioners and the City of New London from happening.[157] When buying a home, one often makes the biggest investment of one's life. But depending on when and where someone wants to purchase a home, a consideration of how likely it is that their home can be taken in the name of "economic development" may be the only way for some to protect the right to peaceful ownership. After *Kelo*, as the dissent framed it in the beginning of their opinion, can one really "own" property?

No one jurisprudential theory is truly perfect. Many of America's celebrated and remembered judges are those who not only decide cases reasonably and fairly, but those who embrace the positives of many jurisprudential theories to make the best decisions under the circumstances. Many would agree that sometimes new and far-reaching developments in judicial decision making is necessary to not only resolve legal disputes, but to facilitate needed change in society. But when, as *Kelo* illustrates, judges make large leaps from precedent or "black letter law" in making their decisions, the unintended

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[155] The parcel of land disputed in *Kelo* is currently being developed into 100 high end apartments. Institute for Justice, *Kelo Eminent Domain*, https://ij.org/case/kelo/#:~:text=Backlash%20to%20Kelo&text=New%20London%20also%20triggered%20an,eminent%20domain%20for%20private%20gain.

[156] *Id*.

[157] Regardless of what approach one sides with, both approaches involve a high a degree of legal reasoning.

harm and consequences of such decisions linger for decades. Fortunately, in the case of *Kelo*, forty-seven state legislators decided to pass laws limiting the harm of the *Kelo* decision.[158] But in deciding other cases, courts should not abandon entirely the protections and benefits that a formalistic analysis can impart. While a zealous adherence to one single jurisprudential theory can limit the quality of judicial decisions, consideration of tried-and-true formalist beliefs can supplement and even enhance the positives of other jurisprudential theories.

[158] Institute for Justice, Grades for State Eminent Domain Laws, https://ij.org/issues/private-property/eminent-domain/