

WITH WHITE GLOVES: EMINENT DOMAIN IN THE GAMING INDUSTRY

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I. INTRODUCTION

The Framers drafted the Constitution with the clear belief that feudalism was “incompatible with a republican form of government.”¹ In fact, John Adams once described Americans as in “direct opposition” to feudalism.² George Mason began the Virginia Declaration of Rights by describing the right to acquire and possess private property as an inherent natural right which cannot be infringed.³ Alexander Hamilton described the “security of Property” as “one of the greatest objects of Government.”⁴ James Madison once wrote that a just government “*impartially* secures to every man, whatever is his *own*.”⁵ Sir William Blackstone, one of the most influential legal commentators in world history, described “the law of the land” as “postpon[ing] even *public necessity* to the *sacred* and *inviolable* rights of private property.”⁶ These principles inspired James Madison to maintain “the inviolability of property” in the Constitution.⁷ Consequently, the Takings Clause enshrined in the Bill of Rights intended to limit the government’s power to acquire private land, expressly stating, “nor shall private property be taken for *public use*, without just compensation.”⁸

Given the Framers’ intent and the country’s emphasis on individual rights, property rights would seemingly be recognized as a fundamental right and awarded the highest level of judicial protection. Surprisingly, they are not a

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¹ Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 394 (2006).

² John Adams, *A Dissertation on the Canon and Feudal Law*, BOS. GAZETTE (Aug. 12, 1765).

³ VA. CONST. art. I, § 1.

⁴ *Kelo v. City of New London*, 545 U.S. 469, 496 (O’Connor, J., dissenting) (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 302 (M. Farrand ed. 1911)).

⁵ *Id.* at 505. (quoting James Madison, *Property*, NAT. GAZETTE (Mar. 27, 1792)).

⁶ *Id.* (Thomas, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 134–135 (1765)) (emphasis added).

⁷ Madison, *supra* note 5.

⁸ U.S. CONST. amend. V (emphasis added).

fundamental right, and exercises of eminent domain are awarded only the lowest level of judicial scrutiny, rational basis review. While the Constitution purports to shield property rights, judicial decisions have destroyed protections for property with regards to eminent domain. Over the years, the definition of *public use* expanded to the point where “any property may be forcibly taken for any purpose deemed by redevelopers to be more lucrative than the existing one.”⁹ The Supreme Court replaced *public use* with *public purpose*, which has been further redefined as *public benefit* and “has now become a primary vehicle for transferring property rights and ownership from one private owner to another.”¹⁰

For economic redevelopment, private interests often use eminent domain as a “tool of first resort.”¹¹ For example, the casino gaming industry is uniquely susceptible to “private to private” takings, as many state statutes expressly find that economic development of the industry is for public use, purpose, or benefit.¹² This Note begins with a brief history of the exercise of eminent domain for Las Vegas, Nevada casino resort properties, then discusses the expansion of the power with the Supreme Court’s *Kelo* decision, the citizenry’s backlash, and the states’ responses, or lack thereof, to this decision. Next, the Note discusses the issues eminent domain raises for the unique gaming industry. Finally, this Note presents solutions to the issue presented by *Kelo* and its progeny. Although private takings serve as an enticing and increasingly broad tool of first resort for casino projects with promises of economic development, they impose a significant social cost, are antithetical to the principles of this Nation, and often create economic waste rather than spurring development.

II. EMINENT DOMAN AND LAS VEGAS CASINOS

Carol Pappas fled to America from Nazi occupation in Greece during World War II.¹³ Carol’s husband ran the White Spot restaurant in downtown Las Vegas.¹⁴ The City of Las Vegas targeted the Pappas property for construction of the Fremont Street Experience parking garage and exercised eminent domain to seize their property.¹⁵ Carol Pappas fought this taking in the Nevada court system

⁹ Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 365 (2006). *See also Kelo*, 545 U.S. at 472.

¹⁰ Edward J. Lopez et. al., *Pass a Law, Any Law, Fast: State Legislative Responses to the Kelo Backlash*, 5 REV. L. & ECON. 102 (2009) (citation omitted).

¹¹ *Id.*

¹² NEV. REV. STAT. § 463.0129 (2019); MASS. GEN. LAWS ch. 23K, § 1 (2011); 4 PA. CONS. STAT. § 1102 (2017); N.J. STAT. § 5:12–1 (2011); 230 ILL. COMP. STAT. 10/2 (2019).

¹³ Alan Choate, *Carol Pappas, Foe of Eminent Domain, Dies*, LAS VEGAS REV. J. (Oct. 27, 2009), <https://www.reviewjournal.com/news/carol-pappas-foe-of-eminent-domain-dies>.

¹⁴ *Id.*

¹⁵ *Id.*

for more than ten years.¹⁶

The Nevada Legislature “clearly defined” takings of private property for economic redevelopment as a public purpose.¹⁷ The United States Supreme Court described such a determination to be “well-nigh conclusive.”¹⁸ The Las Vegas City Council created the Las Vegas Redevelopment Agency (“LVRA”) through Chapter 79 of the Nevada Revised Statutes (“NRS”), which specifically identified the elimination of blight as a “public purpose.”¹⁹ Conditions constituting blight include: “increased crime rates and requests for police assistance, business flight from the downtown area, decline in tourism, lack of parking, visitor and residents’ perceptions of lack of safety in the area, and increases in vacant and aging buildings.”²⁰

In 1994, the City asked the LVRA to evaluate downtown and “determine whether redevelopment was necessary to combat physical, social, or economic blight.”²¹ The LVRA concluded a serious physical, social, and economic blight burdened all of the targeted downtown areas, including the Pappas property.²² They further concluded that a large-scale redevelopment project with the combined efforts of the City and private sector would be necessary to eliminate the blight and that simply “working with individuals on a piecemeal basis would not stem the decline.”²³ This project allowed the LVRA to exercise eminent domain to take private property for “projects designed to eliminate . . . blight.”²⁴ Thus, the City, casinos in the downtown area, and the LVRA conceptualized an anchor project called the Fremont Street Experience to revitalize the downtown and eliminate blight.²⁵ This project included a five-story parking garage which encompassed an entire city block, including the Pappas property.²⁶

Mr. and Mrs. Pappas refused the LVRA’s initial offers for the property and after negotiations for a lease failed, the LVRA acquired the Pappas property unopposed via eminent domain in January 1994.²⁷ Thereafter, the Pappases filed a counterclaim alleging six causes of action, including a procedural due process violation for the acquisition of their property and a substantive due process violation for inadequate compensation.²⁸ The district court denied the Pappases’

¹⁶ *See id.*; *see also* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 8 (Nev. 2003).

¹⁷ *Pappas*, 76 P.3d at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 6

²¹ *Id.*

²² *Id.* at 6.

²³ *Id.*

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ *Id.* at 7–8.

²⁷ *Id.* at 8.

²⁸ *Id.*

motion for a rehearing regarding the taking and, consequently, the LVRA immediately proceeded to demolish their property and began construction of the parking garage.²⁹ Ultimately, the district court found the LVRA's actions constituted an improper use of eminent domain because, among other reasons, there were less restrictive alternatives, the LVRA acted in bad faith, and the taking did not constitute public use.³⁰ However, the Pappas property was already destroyed.

On appeal, the Nevada Supreme Court analyzed the definition of *public use*, a question that has "plagued the American judiciary ever since it arrogated to itself the [prerogative] of interpreting constitutions."³¹ The Pappases argued that the Nevada Supreme Court should adopt a narrow interpretation of *public use*, which would require an actual public project for use by the public at large.³² On the other hand, the LVRA argued for the broader interpretation, which "includes any 'use [that] concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'"³³ Nevada's high court recognized that the United States Supreme Court adopted the broad interpretation and rejected any literal public use requirement.³⁴ The court also recognized that Nevada and other similar jurisdictions traditionally applied the broader definition.³⁵

Nonetheless, the Pappases argued that even under the broader definition, the taking did not constitute a public use because the LVRA transferred the property from one private entity to another.³⁶ The court noted the United States Supreme Court "soundly rejected" the idea that a private taking automatically falls outside a constitutional exercise of eminent domain.³⁷ In *Hawaii Housing Authority v. Midkiff*, the Supreme Court upheld the Hawaiian Legislature's exercise of eminent domain, as it was intended to break up a powerful and deeply rooted land oligopoly.³⁸ Although Hawaii transferred the property from one private party to another, under the rational basis test, the Court determined the taking constituted a proper public use and exercise of the state's police power, deferring to the state legislature "unless the use be palpably without reasonable

²⁹ *Id.*

³⁰ *Id.* at 9.

³¹ *Id.* at 10 (quoting *Lake Louise Imp. Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.*, 510 N.E.2d 982, 984 (1987)).

³² *See id.*

³³ *See id.* at 10 (quoting *S. California Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982)).

³⁴ *Id.* (citing *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 159–62 (1896)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*; *see Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984).

foundation.”³⁹

In the Pappases’ case, the Nevada Legislature declared that blight constituted a “serious and growing menace” to public health, safety, public welfare, and property values, in addition to increasing crime.⁴⁰ In a highly deferential opinion, Nevada’s high court concluded that if a redevelopment plan rationally related to blight eradication, then the plan will constitute a public purpose and implementation of the plan will constitute proper exercise of eminent domain.⁴¹ The Nevada Supreme Court found substantial evidence to support the rationality of LVRA’s determination that the area suffered from physical, social, and economic blight, including deterioration of infrastructure, high crime and unemployment, and loss of tourism.⁴² Additionally, it did not matter that the Pappas property was not itself blighted. The court cited the Supreme Court’s *Berman* holding that “[p]roperty may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending.”⁴³ The reason for this is that redevelopment projects are often conducted on a large scale, affecting wide swathes of land, rather than on a “piecemeal basis.”⁴⁴

Justice Leavitt, writing for the dissent, found that a private taking is, by definition, not public use, and consequently is unconstitutional and void.⁴⁵ Departing from the reasoning in *Berman*, Justice Leavitt argued that the Pappas property did not suffer from any blight, did not constitute a slum, and presented no injurious conditions.⁴⁶ Thus, LVRA’s stated goal of eradicating blight was not only illegitimate, but it was not even applicable.⁴⁷ Furthermore, the redevelopment statute in question required all noncontiguous targeted areas be blighted or necessary for eminent domain to be exercised; the LVRA proved only that the property was desirable, but not that it was necessary or suffered from blight.⁴⁸ The Supreme Court of the United States subsequently declined to hear the case.⁴⁹ Carol Pappas described the seizure poignantly, “[t]hey have stolen our property with the point of a bayonet in Greece. Here, they steal it with white gloves.”⁵⁰

³⁹ *Pappas*, 76 P.3d at 10–11 (quoting *Midkiff*, 467 U.S. at 241).

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² *Id.* at 7.

⁴³ *Id.* at 14 (quoting *Berman v. Parker*, 348 U.S. 26, 35 (1954)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 17 (Leavitt, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, *cert. denied*, 541 U.S. 912 (2004).

⁵⁰ Choate, *supra* note 13.

Paul Moldon's story is similar.⁵¹ The City of Las Vegas made an offer for Moldon's rental property in 1995 for the construction of the Stratosphere, a hotel and casino located just north of the Las Vegas Strip.⁵² Moldon turned down the offer because he felt it was too low, and the City responded by simply seizing his property through eminent domain.⁵³ Moldon then lost a challenge to the eminent domain action.⁵⁴ The City of Las Vegas compensated Moldon \$725,000 in exchange for his property, although a jury later valued the land at \$1.5 million.⁵⁵ Not only did the City undervalue Mr. Moldon's land, but it placed the \$725,000 into a Clark County trust account, where it siphoned \$200,000 in accrued interest into its own general fund.⁵⁶ Moldon's attorney described this as a "raiding [of] a person's bank account" and stated "[w]e fought the taking of the real estate for [ten] years, and now we've had to fight the taking of the interest for three years."⁵⁷

Ultimately, the Nevada Supreme Court held that Moldon possessed a property interest in the deposit and that the siphoning of the interest in Moldon's trust account constituted an unconstitutional taking because it "unduly burden[ed] the Moldons to singlehandedly benefit the public as a whole."⁵⁸ A healthy man at the beginning of this lengthy battle, Moldon grew frail and suffered from multiple sclerosis by its conclusion.⁵⁹

III. A PINK LITTLE HOUSE AND *KELO*

To better understand eminent domain in the context of the gaming industry, it is important to examine a landmark Supreme Court eminent domain case. In 2000, the City of New London, Connecticut, created an extensive economic redevelopment plan in the Fort Trumbull area for the purpose of creating jobs, generating tax revenue, revitalizing the economically distressed downtown New London, and making the waterfront more attractive for recreational activities.⁶⁰ New London purchased property from voluntary sellers

⁵¹ See Scott Wyland, *County Must Repay Trust Account Interest*, LAS VEGAS REV. J. (July 25, 2008), <https://www.reviewjournal.com/news/county-must-repay-trust-account-interest>.

⁵² *Id.*; Erin Neff, *City Asks Court to Overturn Ruling Against Eminent Domain*, LAS VEGAS SUN (Sept. 14, 2000), <https://lasvegassun.com/news/2000/sep/14/city-asks-court-to-overturn-ruling-against-eminent/>.

⁵³ Neff, *supra* note 52.

⁵⁴ *City of Las Vegas Downtown Redevelopment Agency v. Crockett*, 34 P.3d 553, 563 n.48 (Nev. 2001).

⁵⁵ *Moldon v. Cnty. of Clark*, 188 P.3d 76, 78 (Nev. 2008).

⁵⁶ *Id.* at 79 n.2.; Wyland, *supra* note 51.

⁵⁷ Wyland, *supra* note 51.

⁵⁸ *Moldon*, 188 P.3d at 81–82.

⁵⁹ Neff, *supra* note 52.

⁶⁰ *Kelo v. City of New London*, 545 U.S. 469, 474–75 (2005).

while it exercised its eminent domain power to seize property from the “unwilling owners.”⁶¹ At the time, New London suffered from unemployment at double the rate of Connecticut and its population shrunk to its lowest number in nearly a century.⁶² New London founded the New London Development Corporation (“NDLC”), a private nonprofit, to effectuate the City’s economic redevelopment plan.⁶³ The State issued \$15.35 million in bonds to support the NDLC and the creation of the Fort Trumbull State Park.⁶⁴ Soon after, Pfizer, a biopharmaceutical company, announced the construction of a \$300-million research facility.⁶⁵

The NLDC and the owners of fifteen properties were unable to reach an agreement regarding their property, and the NDLC began the condemnation process which led to the lawsuit.⁶⁶ Susette Kelo, a homeowner in the waterfront district, lived in her “little pink house” for three years before the lawsuit commenced.⁶⁷ She invested in home improvements to capitalize on her view of the Thames river.⁶⁸ Kelo’s neighbor, Wilhelmina Dery, on the other hand, lived in her home for her entire life, an impressive eighty-two years before the lawsuit commenced.⁶⁹ The NLDC intended for some of the subject land to be used for research and development office space bordering the proposed Pfizer facility, and for other land to be used as either parking or retail space.⁷⁰ There were no allegations of blight or poor condition; the properties were condemned “only because they happened to be located in the development area.”⁷¹ The petitioners brought an action alleging that the taking violated the *public use* requirement of the Fifth Amendment.⁷²

The Connecticut Supreme Court ruled that all of the desired exercises of eminent domain were constitutional.⁷³ The majority cited the Connecticut General Statutes, which stated that “a legislative determination that the taking of land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”⁷⁴ Furthermore, United States Supreme Court precedent purportedly supports the majority’s conclusion.⁷⁵ The

⁶¹ *Id.* at 472.

⁶² *Id.* at 473.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 475.

⁶⁷ *Id.*; *Kelo Eminent Domain*, INST. JUST., <https://ij.org/case/kelo> (last visited Apr. 9, 2022).

⁶⁸ *Kelo*, 545 U.S. at 475.

⁶⁹ *Id.*

⁷⁰ *Id.* at 475–76.

⁷¹ *Id.* at 475.

⁷² *Id.*

⁷³ *Id.* at 476.

⁷⁴ *Id.*; CONN. GEN. STAT. § 8-186 (2021).

⁷⁵ *Kelo*, 545 U.S. at 476.

Connecticut Supreme Court held that the takings were “reasonably necessary” to achieve New London’s intended public use and the takings were for “reasonably foreseeable needs.”⁷⁶ The takings were “sufficiently definite” and given “reasonable attention” in the economic redevelopment plan.⁷⁷

Once again, a state’s high court applied the rational basis test to review the deprivation of one’s property rights. In fact, Justice Zarella dissented to this aspect of the majority’s ruling, arguing for heightened scrutiny and a requirement for the City to “adduce ‘*clear and convincing evidence*’ that the economic benefits of the plan would in fact come to pass.”⁷⁸ Justice Zerella recognized property rights may rise to the level of a fundamental right and exercises of eminent domain compelled higher scrutiny due to the “tremendous” social cost of takings, which includes families being forcibly removed from homes they have lived in for generations.⁷⁹

The United States Supreme Court granted certiorari to finally decide the issue of whether a taking of property for economic development satisfies the Fifth Amendment’s requirement of *public use*.⁸⁰ The Court prefaced its holding with two commonly accepted truths.⁸¹ First, the government cannot “take the property of *A* for the sole purpose of transferring it to another private party *B*, even if *A* is paid just compensation.”⁸² Second, a state may transfer property from one private party to another only if the property’s ultimate use is for the general public, such as takings for common carriers, for example an airline or railroad.⁸³

The Court expressly stated that a taking would be unconstitutional if it were for “the purpose of conferring a private benefit on a particular private party.”⁸⁴ The Constitution further forbids a taking if the actual purpose is to bestow a private benefit, regardless of any public use pretext.⁸⁵ The Court found that the facts in *Kelo* were distinguishable from the commonly accepted truths because they were “executed pursuant to a carefully considered development plan,” there was no evidence of an “illegitimate purpose” on the part of the City, and the City did not intend to “benefit a particular class of identifiable individuals.”⁸⁶ However, the Court noted that the City did not plan to open the seized land to the public at large and the beneficiaries were not common carriers.⁸⁷

⁷⁶ *Id.*

⁷⁷ *Id.* at 476–77.

⁷⁸ *Id.* at 477 (citation omitted) (emphasis added).

⁷⁹ *Kelo v. City of New London*, 843 A.2d 500, 589 (Conn. 2004).

⁸⁰ *Kelo*, 545 U.S. at 477.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 478.

⁸⁶ *Id.* (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

⁸⁷ *Id.*

First, the Court justified its holding by claiming it had long abandoned any literal public use requirement.⁸⁸ In *Berman*, the Court upheld a redevelopment taking that targeted a blighted area in Washington, D.C., where most of the housing was “beyond repair.”⁸⁹ An owner of a targeted local store, which did not suffer from blight, filed an action and argued that the creation of a more attractive community did not constitute a valid public use.⁹⁰ The Supreme Court, in a unanimous opinion authored by Justice Douglas, rejected this argument, deferring to the local authorities’ finding that a redevelopment plan must be planned as a whole and that nothing in the Fifth Amendment “stands in the way” of the use of eminent domain to eliminate blight.⁹¹ The Court further defined *public welfare* broadly as including “spiritual as well as physical, aesthetic as well as monetary” values.⁹² Such a subjective and esoteric standard could encompass any property that a local unelected agency determines could look more pleasing or be put into “better” use.

Similarly, the *Kelo* Court cited *Midkiff*, a case which the Ninth Circuit earlier described as a “naked attempt on the part of the state of Hawaii to take the property of *A* and transfer it to *B* solely for *B*’s private use and benefit.”⁹³ The Supreme Court reversed the Ninth Circuit, holding Hawaii’s intent to eliminate the “social and economic evils of a land oligopoly” by breaking it up through eminent domain satisfied *public use*.⁹⁴ It did not matter that the government took the property of *A* (the land oligopoly) and gave it to *B* (new owners); the fact that the taking intended to break up the land oligopoly sufficed to constitute *public use*.⁹⁵

The Court reaffirmed *Midkiff* and *Berman*, claiming the cases emphasized “great respect” to federalism and awarded appropriate deference to local governments making decisions for their constituent’s needs.⁹⁶ The Court deferred to New London’s determination that even though the subject land did not suffer from blight, the land was still “sufficiently distressed” to justify eminent domain intended to revitalize the local economy.⁹⁷

The Court also rejected the landowners’ argument that economic development can never constitute public use.⁹⁸ The Court recognized economic development as a “traditional and long-accepted function of the government” and that there is “no principled way of distinguishing economic development from

⁸⁸ *Id.* at 479 (quoting *Midkiff*, 467 U.S. at 244).

⁸⁹ *Id.* at 480 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

⁹⁰ *Id.* at 481; *Berman*, 328 U.S. at 98.

⁹¹ *Kelo*, 545 U.S. at 481; *Berman*, 348 U.S. at 98.

⁹² *Kelo*, 545 U.S. at 481; *Berman*, 348 U.S. at 98.

⁹³ *Kelo*, 545 U.S. at 481–82 (emphasis added) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 235 (1984)).

⁹⁴ *Id.* at 482 (quoting *Midkiff*, 467 U.S. at 241–42).

⁹⁵ *See Midkiff*, 467 U.S. at 244.

⁹⁶ *Kelo*, 545 U.S. at 482.

⁹⁷ *Id.* at 483.

⁹⁸ *Id.* at 484.

the other public purposes that [they] have recognized,” such as redeveloping a blighted area in *Berman* or breaking up an “artificial deterrent” to Hawaii’s residential land market in *Midkiff*.⁹⁹ The Court completely dropped any public harm requirement because Ms. Kelo’s property, unlike the properties in *Berman* and *Midkiff*, harmed no one, but could merely be made more productive.

Next, the New London landowners argued the use of eminent domain impermissibly blurred the distinction between public and private takings.¹⁰⁰ The Court also rejected this argument and found that accomplishment of a public purpose will sometimes inevitably benefit private individuals.¹⁰¹ In *Midkiff*, the seizure of the oligarchs’ land conferred a benefit on Hawaiian citizens who were previously unable to purchase scarce land.¹⁰² In *Berman*, the Court specifically rejected the argument that a taking which conferred a benefit onto a private party violated the Fifth Amendment and recognized that public purpose may be better realized through private enterprise than public ownership.¹⁰³

Finally, the Court rejected the idea that public use should be restricted to forbid “transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more in taxes.”¹⁰⁴ This seemingly contradicts the Court’s own aforementioned accepted truth, as it was quite clearly a taking of the property of Ms. Kelo for the sole purpose of transferring it to another private party, but the Court distinguished this *ad hoc* and found that a redevelopment plan acts as some sort of superseding break in the chain between the two private parties.¹⁰⁵ The Court also rejected a heightened level of scrutiny requiring *reasonable certainty* that the purported benefits will actually occur, because it would depart from its precedent and would frustrate economic development plans by tying them up in the courts.¹⁰⁶ Perhaps in anticipation of the backlash following *Kelo*, the Court stated “empirical debates over the wisdom of takings” do not belong in the courts and instead are a matter of public debate appropriate for the legislature and states to decide.¹⁰⁷

In his concurring opinion, Justice Kennedy suggested that takings with only an incidental or pretextual justification of public use should be struck down under rational basis review.¹⁰⁸ Justice Thomas also attacked application of the rational basis test, noting that it typically involves *nontraditional* property interests and that eminent domain is a much more blatant infringement of

⁹⁹ *Id.*; *Midkiff*, 467 U.S. at 242; *Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹⁰⁰ *Kelo*, 545 U.S. at 485.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 485–86.

¹⁰⁴ *Id.* at 486–87.

¹⁰⁵ *See id.* at 487.

¹⁰⁶ *Id.* at 487–89.

¹⁰⁷ *See id.* at 489.

¹⁰⁸ *Id.* at 491 (Kennedy, J., concurring).

traditional property rights.¹⁰⁹ The Court previously characterized traditional property rights as reflecting the “overriding respect for the sanctity of the home that has been embedded in our traditions since the origin of the Republic.”¹¹⁰ Additionally, Thomas argued, the effects of the unprincipled public purpose test would disproportionately impact marginalized and poor communities because they are less likely to put their land to the most efficient and productive use, and are less politically powerful.¹¹¹ This is the exact “discrete and insular” minority that ordinarily warrants a higher standard of judicial scrutiny when implicated.¹¹² Large urban renewal projects in the mid-twentieth century disproportionately destroyed minority communities, who made up sixty-three percent of individual families displaced.¹¹³

In a scathing dissent, Justice O’Connor wrote that the Court abandoned a “long-held, basic limitation on government power” and that all private property is now vulnerable to being transferred to another private party, so long that there is economic utility in doing so.¹¹⁴ She cited one of the nation’s earliest property cases, *Chandler v. Bull*, in which Justice Chase held that a taking of property *A* to give it to private party *B* amounts to “political heresy, altogether inadmissible in our free republican government.”¹¹⁵ Justice O’Connor argued the majority’s ruling did just that because the NLDC was an unelected, private nonprofit with private appointees, whose stated purpose was unjustifiably vague, and their taking to make the land more productive was not justifiable, effectively writing the words “for public use” out of the Takings Clause.¹¹⁶

The facts in *Kelo*, O’Connor argued, could be distinguished from *Midkiff*, a case for which she authored the unanimous opinion, and *Berman*, where the takings were necessary to rectify conditions “injurious to the public health, safety, morals, and welfare.”¹¹⁷ Justice O’Connor argued that the *Kelo* taking departed from precedent as it was for purely economic purposes and the majority improperly extended public use to any taking where there is a conceivable “secondary benefit” to the public, such as increased tax revenues or job creation.¹¹⁸ O’Connor argued the majority’s ruling turned the Public Use Clause into a redundancy which would not stop the government “from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”¹¹⁹ O’Connor felt the majority abdicated their responsibility “to

¹⁰⁹ *Id.* at 518 (Thomas, J., dissenting).

¹¹⁰ *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

¹¹¹ *Id.* at 520–21.

¹¹² *Id.* at 521–22 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 (1938)).

¹¹³ *Id.* at 522 (citation omitted).

¹¹⁴ *See id.* at 494 (O’Connor, J., dissenting).

¹¹⁵ *Id.* (quoting *Calder v. Bull*, 3 U.S. 386, 388–89 (1798)).

¹¹⁶ *Id.* at 494–96.

¹¹⁷ *Id.* at 498–502.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 503.

enforce properly the Federal Constitution (and a provision meant to curtail state action, no less)” and that the ruling would benefit “citizens with disproportionate influence and power in the political process, including large corporations and firms” while harming the vulnerable.¹²⁰

IV. A POPULAR REVOLT AND AN ELITIST REACTION

The cruel irony of *Kelo* is what resulted of Ms. Kelo’s property. Only four years after the decision, the redevelopment plan fell apart and the “identifiable beneficiary,” Pfizer, announced that it was closing the \$350-million research center and laying off 1,400 workers without even notifying the City of New London ahead of time.¹²¹ The lot upon which Ms. Kelo’s house once stood remained vacant until 2014, when it did not become a parking lot or retail space, but instead became a home to feral cats and otherwise remained unused, along with the other properties seized.¹²²

Justice Palmer, a member of the Connecticut Supreme Court majority, personally apologized to Ms. Kelo and told her that he regretted his decision.¹²³ Justice Stevens, author of the *Kelo* majority opinion, admitted he based his ruling on an “embarrassing to acknowledge” misunderstanding of precedent and that it earned the status of the “most unpopular opinion” he ever wrote.¹²⁴ Kelo’s attorney Dana Berliner claimed that evidence showed, at the time of the decision, that the redevelopment plan would never come into fruition, but the courts

¹²⁰ *Id.* at 504–05.

¹²¹ See *After the Homes are Gone: On the Aftermath of a Supreme Court Ruling*, SF GATE (Feb. 9, 2012, 3:17 PM), <https://www.sfgate.com/opinion/editorials/article/After-the-homes-are-gone-3209347.php>; Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), <https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>.

¹²² Ilya Somin, *The Story Behind Kelo v. City of New London – How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, WASH. POST (May 29, 2015, 8:25 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/>; Ilya Somin, *Give Susette Kelo Her Land Back*, REASON: THE VOLOKH CONSPIRACY (May 25, 2018, 3:15 PM), <https://reason.com/2018/05/25/give-susetta-kelo-back-her-land/> [hereinafter Somin: Give Susette Kelo Her Land Back].

¹²³ Somin: Give Susette Kelo Her Land Back, *supra* note 122.

¹²⁴ Ilya Somin, *Justice Stevens Admits Error in the Kelo Case—but Also Doubles Down on the Bottom Line*, REASON: THE VOLOKH CONSPIRACY (June 8, 2019, 2:55 PM), <https://reason.com/volokh/2019/06/08/justice-stevens-admits-error-in-the-kelo-case-but-also-doubles-down-on-the-bottom-line/>; Jess Bravin, *Justice Stevens on His ‘Most Unpopular Opinion,’* WALL ST. J. (Nov. 11, 2011, 2:55 PM), <https://www.wsj.com/articles/SB10001424052970204358004577032071046475782>.

ignored this evidence.¹²⁵ Similarly, the *Midkiff* ruling resulted in Japanese investors purchasing the newly available land as vacation homes, which resulted in a “dramatic increase, not a decrease, in home prices,” contrary to the public purpose justification of breaking up the land oligopoly.¹²⁶

Ordinary Americans particularly reviled the *Kelo* decision. Following the *Kelo* decision, polls indicated that eighty percent of Americans across all political, ideological, and racial lines were opposed to the ruling, as one commentator put it, “[t]his is one of the rare issues where Ralph Nader, Rush Limbaugh, and the NAACP were all on the same side.”¹²⁷ Another poll showed that eighty-nine percent of people opposed the use of eminent domain for economic development, leading the pollster to say that he had never seen such a lopsided result in his career.¹²⁸ This consensus is a product of private property rights being perceived as a fundamental ideal in American life and culture.

The *Kelo* holding de facto constitutionalized trickle-down economics, where the economic development is hypothesized to “trickle down in the form of increased tax revenues and wages” and confer a “public benefit” for purposes of the Fifth Amendment.¹²⁹ Michael Kinsey described the decision as the Court declaring “that yuppification is a valid public purpose.”¹³⁰ A *Kelo* analysis requires the Court to surrender its power in deciding whether an economic development plan constitutes a public purpose, while giving unfettered discretion to municipal agencies benefitting from private for-profit developers, so long as any decision they make is “conceivably rational.”¹³¹ The Court relegated this profound constitutional question to state legislatures and local, unelected, and unaccountable condemning bodies.¹³² The local agencies with this newfound authority often do not grasp the law, serve for-profit private interests, and have no incentive to pursue the public interest, leaving the Court little to do besides approve and legitimize the agency’s decision.¹³³

On the other hand, members of the ruling class championed the *Kelo* decision. The editorial boards of both the New York Times and Washington Post endorsed the decision on the exact same day.¹³⁴ Nancy Pelosi described the ruling

¹²⁵ SF GATE, *supra* note 121.

¹²⁶ Kanner, *supra* note 9, at 354–55.

¹²⁷ Ilya Somin, *The Grasping Hand: “Kelo v. City of New London” and the Limits of Eminent Domain*, CATO INST. (June 23, 2015), <https://www.cato.org/publications/commentary/grasping-hand-ke-lo-v-city-new-london-limits-eminent-domain>.

¹²⁸ Kanner, *supra* note 9, at 345.

¹²⁹ *Id.* at 336.

¹³⁰ *Id.*

¹³¹ *Id.* at 336–37.

¹³² *Id.* at 337.

¹³³ *Id.* at 337–38.

¹³⁴ See Editorial, *The Limits of Property Rights*, N.Y. TIMES (June 24, 2005), <https://www.nytimes.com/2005/06/24/opinion/the-limits-of-property-rights.html>;

as, “almost as if God had spoken.”¹³⁵ Indianapolis Mayor Bart Peterson and Professor Erwin Chemerinsky described the ruling as merely affirming the status quo.¹³⁶ Professor Chemerinsky blamed the public backlash of *Kelo* on the public’s misunderstanding of the ruling and the way the media framed the decision.¹³⁷ Remember, Justice Stevens himself admitted his ruling was based on a misunderstanding of the law. The Brookings Institution described the ruling as promoting “holistic redevelopment.”¹³⁸ Professor Richard Lazarus cynically described the backlash as an “extraordinary PR job by the property rights movement.”¹³⁹

Kelo did not merely “affirm the status quo”; rather, it abandoned the once-limited circumstances in which eminent domain could be used to eliminate serious social and public harms, and only incidentally benefitted private parties.¹⁴⁰ Moreover, a century of jurisprudence preceded *Kelo*, with no case articulating the ultimate broad *Kelo* standard, and it is doubtful a “reaffirmation of the status quo” would lead to such a divisive split in the *Kelo* ruling.¹⁴¹ The Court’s ruling had the Orwellian effect of declaring *public is private* and *use is purpose*, and a taking from private party *A* to private party *B* is not actually a taking from private party *A* to private party *B*.¹⁴² All that is required under the *Kelo* standard, or lack thereof, is that the plan has some conceivable rational basis and is not arbitrary.¹⁴³ All businesses create plans and all economic development agencies create plans, thus it is simple to recite some economic plan that could satisfy the “standard.”¹⁴⁴ On the other hand, when deciding whether to award a business compensation for losses suffered due to eminent domain, courts apply a stricter standard which requires that the losses must be “reliably valued,” rather than simply reasonably valued, even if the business has been operating in the location for years.¹⁴⁵

V. *KELO* AND THE GAMING INDUSTRY

The *Kelo* ruling profoundly affected the gaming industry. Many states incorporate language expressly mentioning “general welfare,” “general public,”

see also Editorial, *Eminent Latitude*, WASH. POST (June 24, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062301698.html>.

¹³⁵ Kanner, *supra* note 9, at 345.

¹³⁶ *Id.* at 343.

¹³⁷ *Id.* at 343–44.

¹³⁸ *Id.* at 344.

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 346.

¹⁴¹ *Id.* at 347.

¹⁴² *Id.* at 381.

¹⁴³ *Id.* at 359.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

and “economic development,” among other problematic post-*Kelo* language, directly into gaming statutes. The entire basis for state legalization of gaming is often to incentivize economic development. New casino resorts and markets bring promises of tax revenue, jobs, and tourism, often to economically distressed areas.

Nevada declared that “[t]he gaming industry is *vitally important to the economy* of the State and the *general welfare* of the inhabitants.”¹⁴⁶ Additionally, Nevada mandates that “all gaming establishments . . . must remain open to the *general public*.”¹⁴⁷ The protection of the gaming industry in Nevada has been described as a compelling interest because it supports the state’s entire economy.¹⁴⁸ Massachusetts expressly declared its fundamental gaming policy objectives as creating employment opportunities by “promoting local small businesses and the tourism industry, including the *development* of new and existing small business and tourism entities,” and promoting the state’s “unique cultural and social resources.”¹⁴⁹ Similarly, Pennsylvania, New Jersey, and Illinois all made express declarations of economic development as a critical public policy behind their gaming enactments.¹⁵⁰ The New Jersey legislature even described the gaming industry as a “critically important and valuable asset in the continued viability and economic strength of New Jersey” and expressly stated the economic stability of gaming is “in the *public interest*.”¹⁵¹

Moreover, gaming can constitute a key component of a state’s tax revenue. Massachusetts received an additional \$600 million in tax revenue due to the legalization of gaming in 2011.¹⁵² Although this is a small portion of Massachusetts’s overall tax revenue, it is an important source of funding for education, local aid, and economic development, among a variety of other uses.¹⁵³ In 2018, Nevada’s gaming industry created an economic impact of \$67.6

¹⁴⁶ NEV. REV. STAT. § 463.0129(1)(a) (2021) (emphasis added).

¹⁴⁷ *Id.* § 463.0129(1)(e) (emphasis added).

¹⁴⁸ See *Hotel Emps. & Rest. Emps. Int’l Union v. Nev. Gaming Comm’n*, 984 F.2d 1507, 1517 (9th Cir. 1993).

¹⁴⁹ MASS. GEN. LAWS ch. 23K, § 1 (2011) (emphasis added).

¹⁵⁰ 4 PA. STAT. AND CONS. STAT. ANN. § 1102 (West 2017); N.J. REV. STAT. § 5:12-1 (2011); 230 ILL. COMP. STAT. 10/2 (2019).

¹⁵¹ N.J. REV. STAT. § 5:12-1 (emphasis added).

¹⁵² MGC Communications, *The Massachusetts Gaming Commission Releases July 2020 Gross Gaming Revenue for Plainridge Park Casino, MGM Springfield and Encore Boston Harbor*, MASS. GAMING COMM’N (Aug. 17, 2020), <https://massgaming.com/blog-post/the-massachusetts-gaming-commission-releases-july-2020-gross-gaming-revenue-for-plainridge-park-casino-mgm-springfield-and-encore-boston-harbor/>.

¹⁵³ *Revenue*, MASS. GAMING COMM’N, <https://massgaming.com/regulations/revenue/> (last visited Apr. 9, 2022).

billion.¹⁵⁴ The gaming and tourism industry employed more than a quarter of Nevadans and generated taxes representing 37.5% of Nevada's general fund revenue.¹⁵⁵

Clearly, there is troubling language in these statutes if one owns a piece of land that a gaming company has its eyes on in the post-*Kelo* world. The statutes themselves often make the express legislative determination of *public use* necessary in the *Kelo* context. In these cases, the condemning agency needs only to point at the language of the statute as justification for its taking. Furthermore, gaming-related taxes represent a key component for state and local economies and tax revenues, commingling the public and state's interests with private interests.

Following *Kelo*, the legislature in thirty-eight states passed laws to restrict the broad eminent domain power created by the Supreme Court, which could potentially minimize the consequences of the gaming statutes' language. These laws were ultimately enacted in thirty-seven of these states.¹⁵⁶ Additionally, four more states enacted laws via popular vote, bringing the total to forty-one states that responded to the "perceived injustice" of *Kelo*, signifying a "national backlash of support for property rights."¹⁵⁷ Some states banned the exercise of eminent domain for economic development altogether, while others, such as Florida and Georgia, narrowly defined *public use* or *blight*.¹⁵⁸ However, of the thirty-seven states that enacted laws through the legislative process, only twenty-three states passed meaningful reform, whereas fourteen states passed weak or symbolic laws.¹⁵⁹ These symbolic laws impose weak restrictions, retain broad deference to local legislatures, or create "loopholes, exemptions, and vague definitions of *public use* or *blight*."¹⁶⁰ State legislatures found themselves confronting powerful interests who supported the status quo, thus these fourteen states passed symbolic measures to quell an angry populace, while leaving the substantive eminent domain law intact.¹⁶¹

Many state legislatures responded to the *Kelo* backlash, but only in the sense that they passed a law, whether a state passed meaningful reform depended on the political and economic situations within each state.¹⁶² States with higher rates of inequality were more likely to enact either a largely symbolic law or no

¹⁵⁴ Howard Stutz, *Report: Gaming's Economic Impact in Nevada Totals \$67.6 Billion in 2018*, CDC GAMING (Mar. 5, 2019), <https://www.cdcgamingreports.com/report-gamings-economic-impact-in-nevada-totals-67-6-billion-in-2018/>.

¹⁵⁵ *Id.*

¹⁵⁶ Edward J. Lopez et al., *Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 REV. L. & ECON. 102 (2009).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 106.

¹⁵⁹ *Id.* at 109.

¹⁶⁰ *Id.* at 130.

¹⁶¹ *Id.*

¹⁶² *Id.* at 131.

new law at all.¹⁶³ For example, New York and New Jersey, which have high racial and income inequality, did not pass any legislation in response to *Kelo* and are unlikely to do so in the future.¹⁶⁴ In 2009, the New York Court of Appeals heard a controversial economic development takings case and possessed the opportunity to implement meaningful changes. Although the state's high court determined the subject property did not suffer from severe blight, it found judicial interference of the private condemning body's determination was not appropriate if there is room for "reasonable difference of opinion."¹⁶⁵

On the other hand, states where public backlash was spurred due to frequent private-to-private takings, and states with a history of economic liberty were more likely to pass meaningful laws in response to *Kelo*.¹⁶⁶ The laws were nearly entirely the product of grassroots movements.¹⁶⁷ The strongest predictor of meaningful eminent domain reform was the value of new housing, with a booming construction market either creating a strong home builder influence or being an indicator of economic growth, incentivizing states to respond to *Kelo* meaningfully by not impeding continued growth.¹⁶⁸

The Illinois General Assembly passed Senate Bill 3086 (2006), an attempt to limit the state's eminent domain power.¹⁶⁹ However, the bill was criticized as creating so many exceptions that it effectively undermined any meaningful restriction on private-to-private takings.¹⁷⁰ The bill permitted exercise of eminent domain for blighted properties so long as a vague and illogical list of factors which "represented some of the worse examples in law" were met.¹⁷¹ Some of these factors included "deleterious layouts" or "excessive vacancies" as grounds for takings.¹⁷² Moreover, the bill still allowed for private takings so long as economic development served as a secondary purpose to a primary purpose of urban renewal.¹⁷³ Additionally, the law still allowed for the designation of entire areas as "blighted" due to the condition of a few properties in the area.¹⁷⁴ Senate Bill 3086 is an example of symbolic reform still managing to fail.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *In re Goldstein v. N.Y. State Urb. Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

¹⁶⁶ Lopez et al., *supra* note 156, at 111, 131.

¹⁶⁷ *See id.* at 119.

¹⁶⁸ *See id.* at 131.

¹⁶⁹ CASTLE COALITION, 50 STATE REPORT CARD TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 17 (2007).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

In 2013, Illinois passed a gaming bill which sought to amend the Illinois Eminent Domain Act by a 32-20 margin.¹⁷⁵ The bill stated, in pertinent part, “the City [of Chicago] may acquire, by eminent domain or by condemnation proceedings . . . *real or personal property* or interests in . . . property located in the City, and the City may convey to the [Chicago Casino Development] Authority property so acquired. *The acquisition of property under this Section is declared to be for a public use.*”¹⁷⁶

Clearly, this bill would vastly expand the takings power for the gaming industry in Illinois. This amendment would grant unbridled power to the Chicago Casino Development Authority for taking *real* and *personal* property for the use of gaming development. The bill even made a preemptive determination of public use within its own text.¹⁷⁷ There is not even a requirement for a finding of blight or a requirement for economic development to be a secondary purpose.¹⁷⁸ Although the Senate decisively passed the bill, for now it was effectively killed by adjournment.¹⁷⁹ However, this may not have stopped the exercise of eminent domain to make room for casinos in Illinois. In 2020, the Illinois Department of Transportation (“IDOT”) sought to seize twelve feet of private property for a “bike path” through an industrial area seldomly traveled and suspiciously near a proposed casino site.¹⁸⁰ IDOT refused to comment about whether the potential casino factored into its decision.¹⁸¹

On the other hand, Nevada passed one of the strongest and most meaningful eminent domain reforms in what is known as the “Property Owner’s Bill of Rights.”¹⁸² When *Kelo* was decided, the biennial Nevada State Legislature was not in session, so Nevada’s citizens proposed a ballot initiative which contained “both a prohibition on private-to-private transfers and controversial takings language.”¹⁸³ A court challenge removed the latter portion from the initiative because it violated the single-subject requirement under NRS section 295.009, a requirement intended to prevent confusion and promote

¹⁷⁵ S.B. 1739, 98th Gen. Assemb. (Ill. 2013); Senate Vote of S.B. 1739, 98th Gen. Assemb. (Ill. 2013), https://www.ilga.gov/legislation/votehistory/98/senate/09800SB1739_05012013_001000T.pdf.

¹⁷⁶ S.B. 1739, *supra* note 175 (emphasis added).

¹⁷⁷ *See id.*

¹⁷⁸ CASTLE COALITION, *supra* note 169, at 17.

¹⁷⁹ *Bill Status of SB1739*, ILL. GEN. ASSEMB., <https://ilga.gov/legislation/BillStatus.asp?DocTypeID=SB&DocNum=1739&GAID=12&SessionID=85&LegID=72645> (last visited Feb. 20, 2022).

¹⁸⁰ Tim McNicholas, *Lynwood Neighbors Put Off by State’s Plan to Take Land for Bike Path*, CBS CHI. (Jan. 20, 2020, 6:22 AM), <https://chicago.cbslocal.com/2020/01/20/lynwood-idot-bike-path-eminant-domain/>.

¹⁸¹ *Id.*

¹⁸² NEV. CONST. art. 1, § 22; CASTLE COALITION, *supra* note 169, at 32.

¹⁸³ CASTLE COALITION, *supra* note 169, at 32.

informed decisions.¹⁸⁴ Consequently, the initiative became framed as purely a *public use* issue, expressly forbidding direct and indirect private takings and placing the burden on the government to prove public use.¹⁸⁵

As a result of this amendment, there is a much greater burden on the government seeking to take land through eminent domain. The amendment also eliminated all private-to-private takings.¹⁸⁶ Moreover, the amendment guarantees appraisal at the highest and best use, with guaranteed compensation to put the property owner at least back at the same position had the property not been taken at all.¹⁸⁷ Alternatively, if the fair market value is applied, the property owner would be entitled to the highest price the property would be sold for on an open market.¹⁸⁸ Property owners can challenge the government's appraisals and elect for a sympathetic jury to determine whether the taking is actually for public use.¹⁸⁹ Additionally, if a property is taken, then after five years of nonuse it will revert to the original property owner.¹⁹⁰

Nevada's constitution requires a proposed constitutional amendment to be approved in either two successive elections or to pass in the state legislature and a general election. Nevada voters passed the initiative by a twenty-six percent margin in 2006 and a twenty-one percent margin in 2008, which led to the ratification of the initiative into the state constitution.¹⁹¹ Nevada voters soundly rejected a competing initiative, which contained significantly weaker language, by a thirty-five percent margin in 2010.¹⁹² Accordingly, enshrined in the Nevada Constitution's Declaration of Rights is an outright prohibition on private-to-private takings and an onerous burden for the government to establish public use. Pennsylvania, a state with a long history of eminent domain abuse, passed a similar measure known as the "Property Rights Protection Act" with "near-unanimous support in the General Assembly," which significantly narrowed the state's definition of "blight" and prohibited private-to-private

¹⁸⁴ Prot. of Prop. Rts., Inc. v. Heller, 141 P.3d 1235, 1240 (Nev. 2006).

¹⁸⁵ CASTLE COALITION, *supra* note 169, at 32.

¹⁸⁶ NEV. CONST. art. 1, § 22(1).

¹⁸⁷ *Id.* § 22(3–4).

¹⁸⁸ *Id.* § 22(5).

¹⁸⁹ *Id.* § 22(2).

¹⁹⁰ *Id.* § 22(6).

¹⁹¹ *Nevada Property Owners Bill of Rights, Question 2 (2006)*, BALLOTPEDIA [https://ballotpedia.org/Nevada_Property_Owners_Bill_of_Rights,_Question_2_\(2006\)](https://ballotpedia.org/Nevada_Property_Owners_Bill_of_Rights,_Question_2_(2006)) (last visited Feb. 20, 2021); *Nevada Property Owners Bill of Rights, Question 2 (2008)*, BALLOTPEDIA [https://ballotpedia.org/Nevada_Property_Owner%27s_Bill_of_Rights_Amendment,_Question_2_\(2008\)](https://ballotpedia.org/Nevada_Property_Owner%27s_Bill_of_Rights_Amendment,_Question_2_(2008)) (last visited Feb. 20, 2021).

¹⁹² CASTLE COALITION, *supra* note 169, at 32; *Nevada Eminent Domain Amendment, Question 4 (2010)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada_Eminent_Domain_Amendment,_Question_4_\(2010\)](https://ballotpedia.org/Nevada_Eminent_Domain_Amendment,_Question_4_(2010)) (last visited Feb. 20, 2021).

takings.¹⁹³ Despite their troubled past with eminent domain abuses, Pennsylvania and Nevada passed meaningful reform measures that should prevent future takings of private property for gaming properties.

By contrast, Massachusetts failed to enact any eminent domain reform at the state level and eminent domain abuses remain prevalent throughout the state.¹⁹⁴ Massachusetts gave the City of Everett permission to exercise their eminent domain power on private property for the construction of the \$2.4-billion Wynn Boston Harbor project.¹⁹⁵ Massachusetts permitted the City to seize up to nine parcels for the casino.¹⁹⁶ Even McDonald's could not successfully challenge this awesome power and was subjected to a potential taking.¹⁹⁷

Everett's planning director justified the proposed taking because "[t]he Wynn project will help accelerate future redevelopment throughout the neighborhood."¹⁹⁸ Wynn spokesman Michael Weaver stated eminent domain may be necessary "to create a new area of economic development, of which our project will be the centerpiece and a catalyst."¹⁹⁹ Paul McMorrow, the governor's housing and economic development director, stated the plan encouraged economic growth and development.²⁰⁰ However, one Everett resident believed, "[i]t would cast fear in me as a small business owner to consider buying or opening a property in Everett if I knew that it could be seized for what they consider to be a better opportunity."²⁰¹ Ultimately, the City of Everett decided to only use eminent domain as a last resort and never actually exercised the power.²⁰² Wynn spent \$19.5 million purchasing residential, commercial, and industrial properties well above market price voluntarily from homeowners and landlords, and sometimes involuntarily from tenants.²⁰³

Although Wynn never exercised eminent domain, the possibility clearly remains for future lucrative gaming resorts. In late 2021, the City of Everett once

¹⁹³ CASTLE COALITION, *supra* note 169, at 42.

¹⁹⁴ *Id.* at 25.

¹⁹⁵ Jon Chesto, *State Gives Everett the Power to Seize Parcels Near Casino Site*, BOS. GLOBE (Sept. 18, 2015, 9:16 PM), <https://www.bostonglobe.com/business/2015/09/18/state-gives-everett-officials-power-seize-parcels-near-casino-site/WEIGDI4p0DbHGII66KZyI/story.html>; Mark Micheli, *Why is Steve Wynn Spending Millions on These Everett Homes*, BOS. GLOBE (Mar. 30, 2017, 7:35 PM), <https://www.bostonglobe.com/metro/regionals/north/2017/03/30/wynn-casino-rises-nearby-neighborhood-faces-demolition/6neLAA03dOIEjYjENauYWM/story.html>.

¹⁹⁶ Chesto, *supra* note 195.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Micheli, *supra* note 195.

again approved the use of eminent domain for properties surrounding Wynn's Boston Harbor.²⁰⁴ Although the City stated it simply wished the approval would spur a private sale, the City is clearly comfortable with using the coercive threat of eminent domain to achieve what it wants.²⁰⁵

New Jersey is particularly in need of reform and has seen some of the most egregious abuses of eminent domain.²⁰⁶ The standard for economic development is "so broad that most every New Jersey property is subject to acquisition."²⁰⁷ Under New Jersey law, "'lack of proper utilization' that leads to 'stagnant or not fully productive' use of the land" constitutes "blighted" property.²⁰⁸ This broad definition could mean any piece of property that is not maximizing production potential is blighted, which would include virtually every single residential home and most businesses, as a nice Amazon warehouse would certainly be more productive than Mom and Pop's Diner. The standard of proper utilization is similarly ambiguous, as it seemingly requires property in New Jersey to optimize all possible utilization. A cynic may view this ambiguous language as a license for agencies to use their own interpretations to clear up this ambiguity and condemn any property they choose.

One particularly famous pre-*Kelo* story of eminent domain involved a casino development, a woman named Vera Coking, and a real estate developer named Donald Trump.²⁰⁹ The Casino Reinvestment Development Authority ("CRDA") threatened to take Ms. Coking's Atlantic City home to make room for a limousine parking lot for Donald Trump's Plaza Hotel and Casino.²¹⁰ Coking refused to sell her house and instead commenced a lengthy legal battle, with a New Jersey court ultimately ruling in her favor and ending the CRDA's attempt to take her house.²¹¹ Ironically, Ms. Coking's home outlived Trump's presence in Atlantic City, as Trump eventually sued to have his name removed

²⁰⁴ Jon Chesto, *Wynn Resorts Files Plans for 1,800 Seat Events Venue Across from Encore Casino in Everett*, BOS. GLOBE (Dec. 3, 2021, 4:04 PM), <https://www.bostonglobe.com/2021/12/03/business/wynn-resorts-files-plans-1800-seat-events-venue-across-encore-casino-everett/>.

²⁰⁵ *See id.*

²⁰⁶ *See* CASTLE COALITION, *supra* note 169, at 34.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Dana Berliner, *Eminent Domain Abusers Are Making a Comeback*, WSJ OPINION (May 16, 2014, 6:06 PM), <https://www.wsj.com/articles/SB10001424052702303701304579547603224974692>; Manuel Roig-Franzia, *The Time Donald Trump's Empire Took on a Stubborn Widow – and Lost*, WASH. POST (Sept. 9, 2015), https://www.washingtonpost.com/lifestyle/style/the-time-donald-trumps-empire-took-on-a-stubborn-widow--and-lost/2015/09/09/f9cb287e-5660-11e5-b8c9-944725fcd3b9_story.html.

²¹⁰ Berliner, *supra* note 209.

²¹¹ *Id.*

from the dilapidated and blighted casino.²¹² In 2021, the casino was demolished.²¹³ Vera Coking is a great example of the shortsightedness of many economic development plans. Developers are willing to take a homeowner's property for promises of revenue and jobs, but many times these plans never bear fruit.

New Jersey gives the CRDA the power to exercise eminent domain to complete economic projects in Atlantic City, which includes takings to encourage economic development.²¹⁴ The CRDA helped develop some public works but primarily seized property for "public-private partnership activities" to create jobs and increase property values.²¹⁵ In 2012, the CRDA restarted an economic development plan, with Revel Casino using gaming tax revenue from its proposed casino project to fund the stagnant project.²¹⁶ One of the targeted properties belonged to Charles Birnbaum and a home where he grew up, ran his piano business, and maintained a memorial for his parents.²¹⁷ After negotiations failed, the CRDA simply went to the court and requested authority to take the property.²¹⁸ After initially allowing the project to proceed, Revel Casino went bankrupt and the trial court found for Birnbaum.²¹⁹

On appeal, the New Jersey Superior Court affirmed the trial court's ruling that a taking required a more specific plan than merely stockpiling potentially useful land.²²⁰ Moreover, without elucidating a new standard, the New Jersey high court recognized the need for the legislature and judiciary to scrutinize economic development takings.²²¹ Revel, ironically known as the "Casino the State Saved," was a spectacular \$2.4-billion failure.²²² Deborah Howlett, the president of New Jersey Policy Perspective, prophetically—or perhaps not so prophetically—stated, "[t]here was a reason that the private sector

²¹² Roig-Franzia, *supra* note 209.

²¹³ Tracey Tully, *Watch the Trump Era in Atlantic City End With 3,000 Sticks of Dynamite*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/02/17/nyregion/atlantic-city-trump-plaza-implosion.html>.

²¹⁴ Casino Reinvestment Dev. Auth. v. Birnbaum, 203 A.3d 939, 942 (N.J. Super. Ct. App. Div. 2019); N.J. Stat. § 5:12-161 (p); N.J. Stat. § 5:12-160 (a); *see generally*, N.J. Stat. § 5:12-182.

²¹⁵ *Birnbaum*, 203 A.3d at 946.

²¹⁶ *Id.* at 944.

²¹⁷ *Id.*

²¹⁸ *Id.* at 944–45.

²¹⁹ *Id.* at 945–46.

²²⁰ *Id.* at 947–49 (holding that an articulated need for a taking "must be more specific than the 'mere stockpiling' of real estate that might, hypothetically, be useful for a redevelopment project in the future").

²²¹ *Id.* at 950.

²²² *See* Ronda Kaysen, *The Casino the State Saved*, N.Y. TIMES (Jan. 3, 2012), <https://www.nytimes.com/2012/01/04/realestate/commercial/revel-a-2-4-billion-casino-nears-completion-in-atlantic-city.html?pagewanted=all>.

wasn't stepping up. If they believed there was an opportunity to make money, they would have funded this."²²³

Tribal casinos also commonly exercise eminent domain. The Federated Indians of Graton Rancheria exercised eminent domain for a road-widening project for easier access to their \$800-million Graton Resort Hotel and Casino project.²²⁴ Outraged, a landowner said, "This is not about the money . . . you can't just take someone's property . . . How would the city feel if I did an eminent domain of their kitchens so that I can have dinner tonight?"²²⁵ Despite the divisive project, the City identified a "public interest" and moved forward with the exercise of eminent domain.²²⁶

VI. SOLUTIONS

The United States Supreme Court's abrogation of deciding a federal constitutional issue to the states has had mixed success. Most states passed some kind of reform, although nearly half of these measures were merely symbolic or weak. State constitutional amendments, particularly those created by grassroots citizen movements such as Nevada's, are the strongest line of protection against eminent domain abuse and misuse. Constitutional amendments are not as easily overturned as acts by the legislature or judicial precedent. Moreover, constitutional amendments, such as Nevada's, create a clear standard and heavy burden that the government must satisfy to justify a taking. This amendment takes away a lot of the guesswork and judicial discretion that leaves eminent domain such a vague and all-encompassing area of law. Additionally, it guarantees fair compensation for a taking, rather than the pennies on the dollar that property owners often receive.

State legislatures may also provide some relief, but their interests often conflict with their citizens' interests, as seen in Illinois' attempt to grant near plenary power to the gaming agency to exercise eminent domain. New Jersey's answer to the post-*Kelo* eminent domain power so far has been within the judiciary. The New Jersey Superior Court even recognized the need for greater judicial scrutiny for takings. However, the judiciary seems unwilling to grant

²²³ *Id.*

²²⁴ Jeremy Hay, *Rohnert Park Authorizes Use of Eminent Domain for Casino Road Widening*, PRESS DEMOCRAT (Feb. 13, 2013), <https://www.pressdemocrat.com/article/news/rohnert-park-authorizes-use-of-eminant-domain-for-casino-road-widening/>; see also Karina Ioffe, *City Will Use Eminent Domain to Take Over 5 Properties*, PATCH: ROHNERT PARK-COTATI, CA (Feb. 13, 2013, 2:03 PM), <https://patch.com/california/rohnertpark-cotati/city-votes-to-take-over-5-properties>; *City Claims Eminent Domain for Graton Rancheria Casino Road*, INDIANZ (Feb. 14, 2013), <https://www.indianz.com/IndianGaming/2013/02/14/city-claims-eminant-domain-for.asp>.

²²⁵ Hay, *supra* note 224.

²²⁶ *Id.*

more protection from takings. Nicholas Casiello Jr., one of the world's leading gaming attorneys, described the natural political process as the solution for eminent domain abuses.²²⁷ Mr. Casiello described eminent domain as being a volatile exercise of government power and causes substantial blowback when exercised, disincentivizing its use.²²⁸ The CRDA are political appointees, thus Atlantic City politicians and the CRDA are hesitant to exercise eminent domain because they do not want to lose votes and fear political repercussions.²²⁹

For a time, it appeared the Supreme Court would revisit *Kelo* and eminent domain in its October 2021 session. Fred Eychaner challenged Chicago's exercise of eminent domain on his non-blighted property.²³⁰ The Illinois high court held the city could use eminent domain to prevent speculative future blight and that "[r]ecognizing the difference between a valid public use and a sham can be challenging."²³¹

On July 2, 2021, the Supreme Court denied the petition for a writ of certiorari.²³² Justices Kavanaugh, Thomas, and Gorsuch indicated they wished to grant the writ.²³³ Justices Thomas and Gorsuch provided a written dissent, first arguing that *Kelo* was wrong when it was decided and continues to be wrong.²³⁴ Next, they argued that *Kelo* cited authority which not only undermined its own holding but also established the use of eminent domain to avert future blight as violating the Public Use Clause.²³⁵ The dissent recognized the Court's duty to prevent lower courts from "further dismantl[ing] constitutional safeguards" and the taking at issue was the quintessential large corporation using the coercive power of the state to seize property of a relatively weak private citizen, as Justice O'Connor warned in her *Kelo* dissent.²³⁶

Nonetheless, eminent domain is an issue the United States Supreme Court should revisit. Eminent domain disparately impacts the "discrete and insular" minorities that a famous footnote once swore to protect. Moreover, eminent domain abuses have been described as an "urban ethnic cleansing," where the politically disadvantaged and vulnerable are removed from their homes to make room for more lucrative opportunities with the backing of

²²⁷ Telephone interview with Nicholas Casiello Jr., Partner, Fox Rothschild LLP (Oct. 2, 2020) (on file with author).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *City of Chicago v. Eychaner*, 26 N.E.3d 501, 504 (Ill. App. 2015), *cert denied*, 141 S. Ct. 2422 (2021).

²³¹ *Id.* at 521.

²³² *Eychaner v. City of Chicago*, Illinois, 141 S. Ct. 2422 (2021).

²³³ *Id.*

²³⁴ *Id.* at 2223 (Thomas, J., dissenting from denial of certiorari).

²³⁵ *Id.*

²³⁶ *Id.* at 2423–24.

immensely politically and economically powerful interests.²³⁷ Private takings are antithetical to the nation's founding ideals. The United States was founded on a reverence for private property. In fact, this country just ended a nearly century-long ideological war around the appropriate respect for private property. Eminent domain is a tool for the government to take property for public infrastructure projects for the greater good of the country as a whole. The definition of public use has eroded to the point where it encompasses taking an individual's home to make room for a more lucrative economic project that primarily benefits private interests and only incidentally benefits the public through tax revenue or job creation.

Moreover, the free market is a more appropriate tool for acquiring land intended for resorts, as shown by the Boston Harbor project. Redevelopment agencies and local legislatures are often blinded with siren songs of jobs and tax revenue, thus they exercise the nuclear option of eminent domain and try to force doomed development plans. If a project is viable, the free market will step in and property owners will typically sell if the offered sum is high enough, which it usually will be if the planned project is economically viable. If the owner does not wish to sell, then that is their right. Instead, these local agencies use force to implement economic development projects and often wind up with total economic loss.

Recently, there has been a growing chorus that property rights should be elevated to the status of a fundamental right and a strict scrutiny analysis should be conducted when property is taken through eminent domain.²³⁸ In fact, the Supreme Court recognizes the sanctity of the home to justify heightened scrutiny for laws infringing on liberties such as sexual liberty or unreasonable searches.²³⁹ It is an oddity that the sanctity of a home is worthy of heightened scrutiny for some purposes, but the desecration of this sanctity through forcible removal and even its destruction only warrants rational basis review, the lowest level of scrutiny.

The Supreme Court's abrogation of its duty to protect constitutional rights and its unfettered deference to local legislatures and condemning bodies is wholly indefensible. The condemning bodies are unelected and unaccountable, which undercuts the argument for letting the political process handle it. Additionally, local legislatures suffer from short-sightedness and are often influenced by powerful interests at the expense of their citizens' interests. For a

²³⁷ Kanner, *supra* note 9, at 368; *see also* THE CIVIL RIGHTS IMPLICATION OF EMINENT DOMAIN ABUSE U.S. COMM'N ON CIVIL RIGHTS (Jan. 27, 2014), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf.

²³⁸ *E.g.*, Nicholas M. Gieseler & Steven Geoffrey Giesler, *Strict Scrutiny and Eminent Domain After Kelo*, J. LAND USE, Spring 2010, at 191; *see also, e.g.*, Gregory S. Alexander, *Property as a Fundamental Constitutional Right - The German Example*, 88 CORNELL L. REV. 733 (2003).

²³⁹ *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 601 (1980); *see also, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

country that prides itself on respect for private property rights and recognizes the unique sanctity of the home, takings should be subject to the highest level of judicial scrutiny.