INRODUCTION

In *Kelo v. City of New London*, the Supreme Court offered its interpretation of the Takings Clause. We the People disagreed. In an unprecedented legal backlash, Americans from across the political spectrum united to oppose what they overwhelmingly viewed as a grievous constitutional error. But this reaction wasn’t merely political. Through the auspices of *popular constitutionalism*, the American people worked to abrogate the Supreme Court’s understanding of the Takings Clause and replace it with their own.

This Essay explores how popular constitutionalism emerged after *Kelo* in three parts. Part I offers a brief sketch of the Supreme Court’s decision in *Kelo* and how it weakened the protection of property rights. Part II charts how voters and legislators in forty-five states enacted reform legislation to curb eminent domain abuse, and claw back *Kelo*. As Professor Ilya Somin detailed in *The Grasping Hand*, many of these reforms were ineffective. However, the intensity and fervor with which the states tackled this issue—in particular those enacted through popular referenda rather than the legislature—is a testament to the populace’s rejection of the Supreme Court’s constitutional interpretation. *Kelo* offers an exemplar of how the people, and not the Supreme Court, remain the final arbiters of the meaning of our Constitution.

Part III highlights how popular constitutionalism also impacts state court judges interpreting state constitutions. In one of the more curious developments following *Kelo*, state courts consistently disregarded *Kelo* as a guide for interpreting their state constitutions—a departure from how these same courts had followed the federal Supreme Court’s lead on the Takings

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1 545 U.S. 469 (2005).

Clause for decades. Many of these judges, acting as conduits of the people, expressly rejected *Kelo*.

Through both legislative and judicial channels, Americans manifested a wide-ranging constitutional repudiation of the Supreme Court’s decision. On *Kelo?’s* inglorious decennial, thanks to popular constitutionalism, eminent domain ain’t what it used to be.

I. *Kelo v. City of New London*

In *Kelo*, the Supreme Court considered the constitutionality of the condemnation of several properties in New London, Connecticut, pursuant to a redevelopment plan. The goal of the plan was to transfer the condemned land to private developers, who promised to promote economic growth in the depressed area. There was no showing that the properties were “blighted or otherwise in poor condition.” In a 5-4 decision, Justice Stevens upheld the use of eminent domain, finding that promoting economic development was a valid “public purpose” under the Fifth Amendment. More importantly, Justice Stevens signaled that courts should adhere to a “policy of deference to legislative judgments in this field.” The Courts should not “second-guess the City’s considered judgments about the efficacy of [the] development plan.” In turn, it would be the people that second-guessed the Court’s considered judgment about the meaning of the Takings Clause.

In *The Grasping Hand*, Ilya Somin chronicles how *Kelo* garnered more public attention than “all but a handful of other Supreme Court rulings,” most of which was “hostile.” Forty-five states enacted eminent domain reform laws after the Court decided *Kelo*, which is probably a “more extensive legislative reaction than any other single court decision in American history.” The American people overwhelmingly rejected the Supreme Court’s ruling in *Kelo*. This was “a consensus that cut across gender, racial, ethnic, and partisan lines.” The House of Representatives, in an extremely lopsided 365-33 vote, enacted a resolution denouncing the case. Presidents Bush and Clinton and numerous politicians in between assailed the deci-

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4 *Kelo*, 545 U.S. at 475.
5 *Id.* at 480.
6 *Id.* at 488.
7 SOMIN, supra note 2, at 135.
8 *Id.* at 135-36.
9 *Id.* at 137.
sion. But more important than the near consensus was the message the American people conveyed.

Even though the Supreme Court established a low constitutional baseline, the people remained free to reject that theory short of the Article V amendment process. The *Kelo* majority emphasized that the states remained free to place “further restrictions on its exercise of the takings power.” Justice Stevens, who authored *Kelo*, wrote in an article that “the public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing such policy concerns.” Judge Richard Posner similarly commented that the reaction to *Kelo* serves as “evidence of [the decision’s] pragmatic soundness,” and added that opponents of eminent domain have “plenty of political muscle, which they are free to use.”

But the analyses from Stevens and Posner only explain the reaction on a single dimension. The states didn’t just place “further restrictions” on the takings power. They overwhelmingly rejected the philosophical basis on which the Supreme Court relegated property rights to a second-class status. The people—especially when acting through the referenda process—channeled the higher power of “fundamental” rights. These weren’t just statutes or regulations, but articulations of constitutional values. In other words, *popular constitutionalism*.

II. THE PEOPLE RESPOND

In response to *Kelo*, the people in many states responded through citizen referenda. These initiatives were not mere attempts to change the law, but channeled a higher aspirational power, that tapped into fundamental property rights. Further, unlike many popular constitutionalist movements that attempt to influence an upcoming judicial decision, this movement boiled over following *Kelo*.

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11 SOMIN, supra note 2, at 137, 163.
16 SOMIN, supra note 2, at 135.
A. Aspirational Citizen Referenda

When the Supreme Court interprets a statute in an unpopular way,17 the people are free to change that interpretation through the democratic process.18 When the Supreme Court finds that a law is unconstitutional,19 unless a more narrowly tailored variant can be drafted, the only formal recourse is the nearly impossible Article V amendment process.20 However, a declaration of constitutionality by the Court creates a very different dynamic. Usually a decision invalidating a state practice, such as the Court’s conclusion in Furman v. Georgia21 that the death penalty was unconstitutional, removes a state’s power. However, a decision like Kelo “did not deprive the states of any power they previously enjoyed.”22 In response to Furman, “some thirty-five states and the federal government enacted new death penalty statutes intended to conform to Furman’s requirements between 1972 and 1976.”23 These steps were “largely an effort to restore the preexisting status quo.”24

In contrast, “the reaction to Kelo sought to change” that status quo in a manner that appeals to broader notions of popular constitutionalism.25 As Larry Kramer has observed, “Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means.”26 The reaction to Kelo serves as an exemplar of this paradigm.

As a testament to the popular mobilization against Kelo, citizens in over a dozen states utilized their state-referenda process to change the law.27

18 See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending employment discrimination statute on which Ledbetter was decided).
20 The Flag Desecration Amendment was introduced in the House of Representatives after Johnson and Eichman. Alexander White, Note, Keep ‘Em Separated: Article I, Article V, and Congress’s Limited and Defined Role in the Process of Amending the Constitution, 113 COLUM. L. REV. 1051, 1071-74 (2013). It has passed the House of Representatives several times by an overwhelming majority, but never received the requisite two-thirds super-majority in the Senate. Id.
21 408 U.S. 238, 239-40 (1972) (per curiam).
22 SOMIN, supra note 2, at 135.
23 Id. (citing Gregg v. Georgia, 428 U.S. 153, 179-80 & n.23 (1976)).
24 Id.
25 Id.
These initiatives sought to provide stronger protections for property rights, and voters enacted them by overwhelming “margins ranging from 55 percent to 86 percent.” But more striking than the margins of success was the level of impact. As Somin explains, “In sharp contrast to legislatively enacted post-Kelo reforms, those adopted by popular referendum are generally much stronger.” Indeed, four of the six most effective laws were passed in states where citizens did not need prior approval of the state legislature to place a measure on the ballot. In contrast, where the people were not able to select the language of their own referenda—that is the initiatives “required preapproval by state legislatures”—the proposals were far less protective of property rights. These effective referenda, drafted by the people (with the aid of motivated public interest groups) did not merely seek to add additional restrictions on the takings power, but represented a deeper, philosophical repudiation of the principles on which Kelo was decided.

A careful study of the language of the referenda illustrates this forcefulness. One of the effective referenda elevated the discourse from one of merely reacting to Kelo, to recognizing the “fundamental,” and more deeply, the “inalienable” nature of property rights. In 2006, Arizonans enacted Proposition 207 by a whopping margin of 64.8% to 35.2%. Citizens “decalare[d] that all property rights are fundamental rights and that all people have inalienable rights to acquire, possess, control and protect property.” The Federal Private Property Rights Protection Act, which passed the House of Representatives in 2005 but never reached the Senate, presents Kelo as a decision that poses a “threat to the property rights of all private property owners,” which are “central to liberty.”

Only two eminent domain referenda were defeated. One of them from California offers a case study of the dichotomy between a blasé proposal, and one that reaches beyond the quotidian. In 2008, the Golden State voted in favor of the largely ineffectual Proposition 99. The declared pur-
pose of the Proposition was to amend the California Constitution to respond to *Kelo*, in which the “Court held that it was permissible for a city to use eminent domain to take the home of a Connecticut woman for the purpose of economic development.”\textsuperscript{38} Alas, special interest groups added Proposition 99 to the ballot as a counterweight to the more protective Proposition 98.\textsuperscript{39} The latter employed far more robust language in describing the rights to be protected. It spoke of the “inalienable right to own, possess, and protect private property.”\textsuperscript{40} These are rights that the “courts have not protected.”\textsuperscript{41}

This aspirational language seeks to channel the higher power of “fundamental” and “inalienable” rights.\textsuperscript{42} Professor Jack Balkin has observed that “[m]ost successful political and social movements in America’s history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles.”\textsuperscript{43} Though these referenda only amend the state constitution, they are better recognized as a vision of what constitutional law ought to represent—in this case, expansive protection for property rights.

**B. Restoration of Constitutional Values**

The movement in opposition to *Kelo* also sought to restore the values of an earlier constitutional era the Supreme Court uprooted. Consider the message of two pundits on polar opposite sides of the political spectrum. Prominent liberal anti-corporate activist Ralph Nader, said that “the U.S. Supreme Court’s decision in *Kelo* v. City of New London mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.”\textsuperscript{44} Popular conservative talk radio host Rush Limbaugh made a similar constitutional argument more forcefully, by evoking the history and framers of our Constitution:

\begin{itemize}
\item See \textsc{Somin, supra} note 2, at 316 n.161 (citing Samantha Young, Voters Reject Prop. 98, Endorse Prop. 99, \textsc{Long Beach Press-Telegram}, June 4, 2008 (observing that the California League of Cities supported Proposition 99 in order to defeat Proposition 98)). Prop 98’s defeat was also attributed to a separate provision banning rent control. \textit{Id.} at 165.
\item \textit{Id.} § 1(b).
\item \textsc{J}\textsc{ack M. Balkin, Living Originalism} 11 (2011).
\end{itemize}
“Government can kick the little guy out of his and her homes and sell those home [sic] to a big developer who’s going to pay a higher tax base to the government. Well, that’s not what the Takings Clause was about. It’s not what it is about. It’s just been bastardized, and it gets bastardized because you have justices on the court who will sit there and impose their personal policy preferences rather than try to get the original intent of the Constitution.”

Whether or not Nader and Limbaugh were offering an accurate assessment of our constitutional tradition is immaterial. But what matters is this appeal to the founding generation’s understanding of the Constitution, and a time-gone-by where your home was your castle.

This movement satisfies the two constraints that Professor Reva Siegel has identified for social movements to “act as effective change agents within the American constitution order[: ]” the (1) “‘consent condition’” and the (2) “‘public value condition.’” She explains, “The consent condition requires those who disagree about questions of constitutional meaning to advance their views through persuasion, by appeal to the Constitution.” For example, Nader and Limbaugh both articulated their message by rejecting the Supreme Court’s pronouncement, and appealing to their individualized, and contrary, vision of the Constitution. The second constraint, “the public value condition[,] requires advocates to justify new constitutional understandings by appeal to older constitutional understandings that the community recognizes and shares.” Here too, the opponents of Kelo appealed not to the Constitution as interpreted by the Supreme Court, but their own Constitution that offers robust protection of property rights. It was a blatant rejection of the Supreme Court’s authority as the final arbiter of property rights.

Jack Balkin has similarly explained that “the key tropes of constitutional interpretation by social movements and political parties are restoration, on the one hand, and redemption, on the other.” The backlash to Kelo aimed to redeem the values of the traditional respect for property rights, while restoring the Constitution’s limitation of takings for “public use” rather than “public purpose.” The supporters of this movement were able to “translate partial and partisan judgments about constitutional meaning into the language of a common tradition.” In this case, the supporters of the

46 For reasons pointed out by Justice Thomas in dissent, the majority’s decision in Kelo is inconsistent with the Fifth Amendment’s text and history.
48 Id.
49 Id. at 1356.
50 Balkin, supra note 43, at 11.
52 Siegel, supra note 47, at 1356-57.
referenda directly appealed to what they view as a long-standing protection of fundamental rights—even if the truth is that the Supreme Court had long abandoned that view five decades earlier in *Berman v. Parker*, if not earlier.

**C. The Movement After, Not Before, the Case**

*Kelo*’s popular constitutionalist movement was unique, in that it emerged *after*, rather than *before* a Supreme Court decision. This stands in contrast with the movements that arose in anticipation of constitutional battles over the Second Amendment and the Affordable Care Act’s (“ACA”) individual mandate.

The Supreme Court’s 2008 decision in *District of Columbia v. Heller*, which recognized an individual right to keep and bear arms, was preceded by “[d]ecades of mobilization inside and outside the academy [that] forged modes of interpreting the Second Amendment.” This mobilization was particularly effective, as it “imbued the amendment with compelling contemporary social meaning by connecting the right to bear arms to some of the most divisive questions of late twentieth-century constitutional politics.” In the span of several decades, this movement was able to alter the thinking about the right to bear arms, based on a deep probing into the original understanding of the Second Amendment.

The challenge to the ACA was “blazed in record time” as the case—*National Federation of Independent Business v. Sebelius*—hurled towards the Supreme Court. The movement behind this challenge was like the *Heller* movement on steroids. In less than two years, a constitutional argument that the individual mandate was invalid went from “off-the-wall” to “on-the-wall.” This argument was embraced and ushered in by one of

57 *Id.*
the strongest constitutional social movements in a generation: the Tea Party. 61

As previously mentioned, *Kelo* is different because the popular constitutionalist movement came after the Supreme Court decision. While one might assail the *Sebelius* and *Heller* movements as strategic, and designed to make a Supreme Court challenge more feasible, the *Kelo* movement was largely organic, and not geared towards a specific court case.

In another corollary, the movement challenging the individual mandate has largely faded from existence in the three years since *Sebelius* was decided. While opposition to the ACA remains strong, the fervid opposition to a federal mandate to buy insurance seems no longer to be of popular concern. In contrast, even years after *Kelo*, widespread opposition to the decision had sustaining force. Two national polls conducted in the Fall of 2005—months after *Kelo* was decided—revealed that “81 percent and 95 percent of respondents were opposed to” the decision. 62 These numbers “cut across racial, ethnic, partisan, and gender lines.” 63 Opposing the decision were “77 percent of men, 84 percent of women, 82 percent of whites, 72 percent of African Americans, and 80 percent of Hispanics,” as well as “79 percent of Democrats, 85 percent of Republicans, and 83 percent of Independents.” 64 Few contentious issues could garner such wide-ranging support, with Democrats and Republicans agreeing in equal numbers.

Perhaps more strikingly, these results were not ephemeral. A similar study performed in 2009—on the decision’s fourth anniversary—showed “over 80 percent opposition to economic development takings; once again, the overwhelming opposition cuts across racial, gender, ideological, and partisan lines.” 65 The mobilization against the ACA furthered a pending case; an unpopular case triggered the challenge to eminent domain.

Yet, it is not enough to simply advance a constitutional ideal. As Siegel has observed, “Utopians and cranks can make all the claims on a constitutional tradition they want; but they are by definition marginal.” 66 There must be a strong enough backing to give the movement legitimacy. Balkin and Siegel explain that “movements acting alone are rarely able to destabilize the meaning of constitutional principles.” 67 What must happen for the constitutional idea to shift from “off-the-wall” to “on-the-wall,” is for the constitutional ideal to gain acceptance among powerful social movements. 68 Through strategic public interest lawsuits and awareness

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63 Id.
64 Id.
65 Id.
66 Siegel, *supra* note 47, at 1362.
68 Balkin, *supra* note 60.
campaigns, groups like the Institute for Justice, Pacific Legal Foundation, the Goldwater Institute, and other groups helped to shine a light on the *Kelo* decision, and how it disrupts deeply-held views about property rights. The peoples’ sustained movements have kept the spotlight on eminent domain, even a decade after *Kelo*, and have continued to chip away at that decision’s constitutional foundation.

### III. The Courts Respond

Traditionally, popular constitutionalism views the people, and not the courts, as the primary conduit to affect how we interpret our fundamental laws. The reaction to *Kelo* highlights a different facet of popular constitutionalism: state judges, who have discretion to interpret their own laws independent of the Supreme Court. Almost every state constitution has a provision similar to the Federal Constitution’s Takings Clause, with various degrees of protection—some stronger, but none weaker. For the most part, before *Kelo*, the state supreme courts followed the lead of the federal Supreme Court on interpreting their takings clauses. After the Supreme Court’s 1954 decision in *Berman*, which offered an expansive conception of the takings power, virtually every single state supreme court fell in line and adopted that reasoning, although they were by no means required to do so. This trend, however, began to reverse in the 1980s and 1990s, as courts started to offer stronger protections for property rights. This wave crested after *Kelo*, as state courts repudiated the Supreme Court’s decision, and found that their state constitutions were incompatible with the federal baseline. Contributing to this shift were the popular movements that rejected *Kelo*’s conception of property rights.

#### A. The State Courts After *Berman*

In *Berman*, the Supreme Court upheld the District of Columbia’s “urban renewal” policy that condemned an entire neighborhood, even though

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69 See e.g., Timothy Sandefur, *Goldwater Institute Joins PLF in Urging Arizona Supreme Court to Protect Property Rights*, PAC. LEGAL BLOG (Apr. 19, 2013), http://blog.pacificlegal.org/goldwater-institute-joins-plf-in-urging-arizona-supreme-court-to-protect-property-rights/ (“Proposition 207, passed in the wake of the infamous Kelo decision, says that if the government seizes your land outright, or imposes a regulation that deprives your property of its value, you can file a lawsuit to get the just compensation that the Constitution guarantees you.”).

the government did not deem all parts to be blighted.\textsuperscript{71} Justice Douglas’s unanimous decision in \textit{Berman} stands for the broad proposition that the judiciary should defer to the legislature on “the public needs to be served by social legislation.”\textsuperscript{72} Therefore, the judiciary’s role in judging a “public purpose” is significantly narrow.\textsuperscript{73} Note how the Court framed the inquiry in terms of the capacious “public purpose,” rather than the Fifth Amendment’s more narrow “public use” language.\textsuperscript{74} This decision, along with the Court’s decision in \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{75} laid the groundwork for \textit{Kelo} decades later. However, unlike the backlash against \textit{Kelo}, the Court’s unanimous decision in \textit{Berman} occasioned little pushback. Indeed, virtually all state courts fell in line, and adopted the Court’s broad interpretation of the Takings Clause, even though they were free to offer stronger protections under their state constitutions.\textsuperscript{76}

The overwhelming majority of state courts, relying on \textit{Berman}, upheld similar urban redevelopment regimes.\textsuperscript{77} For example, the New Jersey Su-

\textsuperscript{71} Blackman, \textit{Equal Protection from Eminent Domain, supra} note 3, at 703 (“‘Urban renewal’ was often known as ‘negro removal’ because city planners frequently cleared out predominantly minority neighborhoods.”).

\textsuperscript{72} \textit{Berman v. Parker}, 348 U.S. 26, 32 (1954).

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} U.S. CONST. amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”); \textit{Berman}, 348 U.S. at 32.

\textsuperscript{75} 467 U.S. 229 (1984).


\textsuperscript{77} Wilmington Hous. Auth. v. 408 & 410 King Street, 254 A.2d 856, 858-59 (Del. Super. 1969); Grisanti v. City of Cleveland, 181 N.E.2d 299, 308 (Ohio Ct. App. 1962) (“In this context, we again point to the decision of the Supreme Court of the United States in the case of \textit{Berman v. Parker}.’’); Isaacs v. Okla. City, 437 P.2d 229, 234 (Okla. 1966) (“Similar standards were approved in the \textit{Berman} v. Parker case. We find that this is not a valid objection.” (citation omitted)); Redev. Auth. v. Woodring, 430 A.2d 1243, 1246-47 (Pa. Commw. Ct. 1981) (“Although \textit{Berman v. Parker} dealt with the realization of police power goals through the exercise of eminent domain, that fact does not shrink the breadth of the Supreme Court’s description of the police power itself.”), aff’d, 445 A.2d 724 (Pa. 1982); Miller v. City of Tacoma, 378 P.2d 464, 471 (Wash. 1963) (“Thus, any question of public use or due process under the federal constitution, with regard to this type of legislation, is settled.”); see also Blankenship v. City of Decatur, 115 So. 2d 459, 463 (Ala. 1959) (citing \textit{Berman} to uphold constitutionality of Redevelopment Projects Act); City of Phx. v. Fehner, 363 P.2d 607, 609-10 (Ariz. 1961); Cmty. Redev. Agency v. Goldman (\textit{In re Bunker Hill Urban Renewal Project 1B}), 389 P.2d 538, 556 (Cal. 1964) (citing \textit{Berman} to uphold condemnation of private property for purpose of selling to developers); Bailey v. Hous. Auth., 107 S.E.2d 812, 814 (Ga. 1959); City of Chi. v. Barnes, 195 N.E.2d 629, 631 (Ill. 1964); Alanel Corp. v. Indianapolis Redevelop. Comm’n, 154 N.E.2d 515, 522 (Ind. 1958); State ex rel. Fatzer v. Urban Renewal Agency, 296 P.2d 656, 660 (Kan. 1956); Dinwiddie v. Urban Renewal & Cmty. Dev. Agency, 393 S.W.2d 872, 874 (Ky. 1965) (“This Court is now obliged to follow the ruling in the \textit{Miller} and \textit{Berman} cases.”); Master Royalties Corp. v. City of Balt., 200 A.2d 652, 659 (Md. 1964); Paulk v. Hous. Auth., 195 So. 2d 488, 490 (Miss. 1967); Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986, 992 (N.M. 1970); Redev. Comm’n v. Sec. Nat’l Bank of Greensboro, 114 S.E.2d 688, 697 (N.C. 1960).
preme Court breezily extended the Berman standard to that of its own state constitution.78 A decision from the Colorado Supreme Court in 1961—seven years after Berman—noted that “[t]he high courts of 26 states have upheld such statutes,” while “a decision of unconstitutionality has been reached in only two states, Florida and South Carolina.”79 The first, Adams v. Housing Authority,80 invalidated an urban renewal law in 1952—two years before Berman—under the Florida Constitution.81 In 1956, the Supreme Court of South Carolina found that the government could not use eminent domain to transform low class residential areas to commercial areas, as it would violate the South Carolina Constitution.82 The court cited and, ostensibly but not expressly, disagreed with Berman.83

The vast majority of courts did not just follow Berman, but embraced its disregard of the text of the Takings Clause. Many courts specifically relied on Berman’s characterization of the Fifth Amendment requiring only a “public purpose,” rather than the text’s “public use” clause.84 Further, other courts agreed with the Supreme Court that the judicial role in guarding against takings for private development is virtually nonexistent. For example, the Iowa Supreme Court stressed, “It is not for the courts to oversee the choice of a boundary line nor to sit in review on the size of a partic-

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78 Levin v. Twp. Comm., 274 A.2d 1, 21 (N.J. 1971) (“Neither the Federal nor the State Constitution presents a barrier to such a municipal course of action . . . . The Supreme Court opinion in Berman undoubtedly represents the most liberal judicial recognition in the country of the scope of the legislative grant of power to a redevelopment agency to deal with land areas which may be declared blighted.”).


80 60 So. 2d 663 (Fla. 1952) (en banc).

81 Id. at 670-71. This decision was partially overturned two decades later by Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451, 457 (Fla. 1975) (per curiam).


83 Id. (“Berman v. Parker is the subject of a critical article in the June 1955 issue of the American Bar Association Journal.”).

84 Arco Pipeline Co. v. 3.60 Acres, 539 P.2d 64, 68 (Alaska 1975) (citing Berman for the proposition that after a declaration of a taking has been filed, property owner can only “challenge the validity of the taking as not being for an authorized public purpose or as having been made capriciously or in bad faith” (emphasis added)); Bowker v. City of Worcester, 136 N.E.2d 208, 213 (Mass. 1956) (“The improvement of the appearance and attractiveness of a project area has been recognized as a valid public purpose in Berman v. Parker.” (emphasis added)); Hous. & Redev. Auth. v. Greenman, 96 N.W.2d 673, 679 (Minn. 1959) (“It is within the province of the legislature to declare a public use or purpose, subject of course to a review by the courts, and such determination by the legislative body will not be overruled by the court except in instances where that determination is manifestly arbitrary or unreasonable.” (emphasis added)); Romeo v. Cranston Rede. Agency, 254 A.2d 426, 432 (R.I. 1969) (“Perhaps the single greatest contribution to the expanded view of a public use came in 1954 with the holding of the United States Supreme Court in the case of Berman v. Parker.”); Meierhenry v. City of Huron, 354 N.W.2d 171, 176 (S.D. 1984) (“As a general principle, the acquisition of land in blighted areas and the sale or leasing of this land for private redevelopment is deemed a legitimate public purpose.” (emphasis added)).
ular project area.” The Idaho Supreme Court relied on *Berman* for the broad proposition that eminent domain can be used even to eliminate “ugliness,” unconnected with blight, for “[u]nless defendants herein have shown that the purpose of the urban renewal plan fails to meet the objectives set forth in” the statute “and is instead designed to predominately benefit private interests, their argument must fail.” Perhaps the most notorious post-*Berman* decision was *Poletown Neighborhood Council v. City of Detroit*, where the Michigan Supreme Court upheld the condemnation of private property to build a General Motors plant. Citing *Berman*, the court concluded that “when a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’” Such opinions represented the general consensus in the decades after *Berman*.

B. The State Courts Before Kelo

While the state courts of the 1960s and 1970s overwhelming followed *Berman*, this trend began to reverse by the late 1980s. This was likely the result of “a rising property rights movement [that] had begun to challenge legal orthodoxy on Takings Clause issues, including public use.” In the decade before *Kelo*, four state supreme courts found that their state constitutions prohibited takings for economic development where the government transferred property to private parties.

The Montana Supreme Court rejected a condemnation where the state attempted to transfer property to a private business, unless the transfer was related to a public project. The decision, based on both the federal and state constitutions, cited neither *Berman v. Parker* nor *Hawaii Housing Agency v. Iacometti*, *Levin v. Twp. Comm.*

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85 Dilley v. City of Des Moines, 247 N.W.2d 187, 192 (Iowa 1976); see also Urban Renewal Agency v. Iacometti, 379 P.2d 466, 470 (Nev. 1963) (“Once it has been determined that the designation of a particular project area is valid, the court should not consider the taking or leaving of sound buildings within its periphery.”); Levin v. Twp. Comm., 274 A.2d 1, 19 (N.J. 1971) (“We see no basis for interfering with the municipal view that their holdings should be included in the blighted area.”).


88 Id. at 459.

89 *Poletown*, 304 N.W.2d at 459 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)); see also *Davis v. City of Lubbock*, 326 S.W.2d 699, 707 (Tex. 1959) (“The achievement of the redevelopment of slum and blight areas . . . constitutes a public use . . . regardless of the use which may be made of the property after the redevelopment has been achieved.”) (quoting People ex rel. Gutknecht v. City of Chi., 121 N.E.2d 791, 795 (Ill. 1954)).

90 SOMIN, supra note 2, at 59.

91 Id. at 58-59.

92 Id. at 60.

93 Id.

Authority v. Midkiff.\textsuperscript{95} By all accounts, it could only be an interpretation of the state constitution. In 2002, the Illinois Supreme Court explained that while under Berman, “[g]reat deference should be afforded the legislature and its granting of eminent domain authority . . . the exercise of that power is not entirely beyond judicial scrutiny.”\textsuperscript{96} Relying on a pre-Berman precedent, the opinion states, “Courts all agree that the determination of whether a given use is a public use is a judicial function.”\textsuperscript{97} With that scrutiny, the court concluded that “contribution to positive economic growth in the region” is not a public use to justify the use of eminent domain.\textsuperscript{98} Here, the state court is creating daylight between it and Berman, evincing a broader protection for property rights.

Recall that following Berman, the Supreme Court of South Carolina was the only state supreme court that rejected the federal Supreme Court’s pronouncement.\textsuperscript{99} Since then, the Palmetto State has taken “a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property.”\textsuperscript{100} Without any citations to Berman or Midkiff, the Supreme Court of South Carolina in 2003 held that even if “projected economic benefit to [a] County is very attractive, it cannot justify condemnation.”\textsuperscript{101} The final, and most significant, case in this quartet is County of Wayne v. Hatchock.\textsuperscript{102} The Michigan Supreme Court reversed the two-decade old decision of Poletown Neighborhood Council v. City of Detroit, and found that economic development takings are invalid under the Michigan Constitution.\textsuperscript{103} Indeed, the court specifically rejected the reliance on Berman as “disingenuous,” focusing on the Wolverine State’s own “eminent domain jurisprudence.”\textsuperscript{104} These cases arguably operated in a vacuum—it was unclear whether economic development was a “public purpose”—and had not yet been addressed by the Supreme Court. However, that would change in 2005, when the Supreme Court made clear the answer was yes.

\textsuperscript{95} Id.
\textsuperscript{97} Id. (quoting Tuohy v. City of Chi., 68 N.E.2d 761, 764 (Ill. 1946)).
\textsuperscript{98} Id. at 9, 11.
\textsuperscript{101} Ga. Dep’t of Transp., 586 S.E.2d at 856.
\textsuperscript{102} 684 N.W.2d 765, 770, 778 (Mich. 2004).
\textsuperscript{103} Id. at 787-88.
\textsuperscript{104} Id. at 785-86.
C. The State Courts After Kelo

For decades, virtually all state supreme courts followed the lead of the federal Supreme Court by following Berman v. Parker’s capacious readings of the takings power. Even most courts that did not adhere to Berman did not overtly express its disagreement with the case. There would be a very different story following Kelo in 2005.

First, consider the Ohio Supreme Court’s judgment in City of Norwood v. Horney. The 2006 decision came on the heels of a “sharply divided” decision in Kelo. The Buckeye State’s high court expressly repudiated the holding of Kelo, finding that the “fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement” of the Ohio Constitution. Specifically, the court found it was “not bound to follow the United States Supreme Court’s determinations of the scope of the Public Use Clause in the federal Constitution . . . and [it] decline[d] to hold that the Takings Clause in Ohio’s Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution’s Takings Clause . . . .”

The court stressed that the Ohio Constitution “confers an ‘inviolable’ right of property on the people.” Indeed, citing Justice Thomas’s Kelo dissent, the court stressed that meaningful scrutiny “preserves the courts’ traditional role as guardian of constitutional rights and limits.” That is, the court views itself as the guardian of the rights of the people—the very mobilization that rejected Kelo in broad constitutional terms. This holding stands in stark contrast with its decision half a century earlier, where the Ohio Supreme Court followed Berman.

Second, also in 2006, the Oklahoma Supreme Court held that “economic development” was not a “public purpose” for the Oklahoma state constitution. Rather than rely on the Kelo majority, the opinion drew from Justice O’Connor’s dissent. Under the Oklahoma Constitution, “the pow-

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105 City of Norwood v. Horney, 853 N.E.2d 1115, 1136 (Ohio 2006).
106 Id. at 1122.
107 Id. at 1123.
108 Id. at 1136.
109 Id. at 1137.
110 Id. at 1137-38 (citing City of Cleveland v. Hurwitz, 19 Ohio Misc. 184, 192 (1969)).
111 Horney, 853 N.E.2d at 1138.
112 Grisanti v. City of Cleveland, 181 N.E.2d 299, 308 (Ohio Ct. App. 1962) (“In this context, we again point to the decision of the Supreme Court of the United States in the case of Berman v. Parker.”).
114 Lowery, 136 P.3d at 639-54.
er of eminent domain should be exercised with restraint and we therefore construe the term ‘public purpose’ narrowly specifically in this context.”

Like in Ohio, the Oklahoma Supreme Court had also followed Berman nearly half-a-century earlier, and had stressed that nothing in its decision “disturb[ed] that rule.” But the court expressly repudiated Kelo: “To the extent that our determination may be interpreted as inconsistent with the U.S. Supreme Court’s holding in Kelo v. City of New London, today’s pronouncement is reached on the basis of Oklahoma’s own special constitutional eminent domain provisions.” Similar to the courts before it, the decision by the Oklahoma Supreme Court took on a much higher resonance, speaking of its “constitutional obligation to protect and preserve the individual fundamental interest of private property ownership.” For it is the Oklahoma Constitution, as interpreted by its guardians on the state’s highest court, that “provide[s] private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution.

Third, in Benson v. State, the South Dakota Supreme Court joined the trend, and rejected Kelo. Like in Ohio and Oklahoma, the state constitution, as interpreted by the state’s highest court, “provides its landowners more protection against a taking of their property than the United States Constitution.” In contrast, two decades earlier, the South Dakota Supreme Court had closely followed Berman, explaining that condemnation of “blighted areas” was a “legitimate public purpose,” rather than the constitutionally required “public use.” But in Benson, the Mount Rushmore State’s high court rejected the Supreme Court’s interpretation of “public use,” and found that the state was “free to impose ‘public use’ requirements that are stricter than the federal baseline.”

As Somin noted, “It may well be, however, that the post-Kelo state court decisions were largely continuations of a preexisting trend towards stronger judicial scrutiny of public use issues.” These state court decisions aren’t merely repudiations of Kelo. In each case, the court views its role as the interpreter of its state constitution as part of a broader regime for the protection of the fundamental rights to property. The language used was

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115  Id. at 647.
116  Isaacs v. Okla. City, 437 P.2d 229, 234 (Okla. 1966) (“Similar standards were approved in the Berman v. Parker case. We find that this is not a valid objection.”) (citation omitted).
117  Lowery, 136 P.3d at 646 n.11.
118  Id. at 651.
119  Id. at 650-51.
120  Id. at 651.
121  710 N.W.2d 131 (S.D. 2006).
122  Id. at 146.
124  Benson, 710 N.W.2d at 146 (quoting Kelo v. City of New London, 545 U.S. 469, 489 (2005)).
125  SOMIN, supra note 2, at 191.
not one of mere disagreement, but of a diametrically opposite philosophical view. After Berman, virtually every single court adhered to, and followed the Supreme Court’s broad pronouncement of the eminent domain power. This trend reversed, to a degree, in the 1980s and 1990s as state courts began to question the reach of Berman. But Kelo was a popular constitutionalist tipping point, as state courts now became the guardians of the constitutional rights of the people, after the Supreme Court of the United States abdicated that all-important task.

The states did not amend their constitutions after Kelo. The text remained the same. What changed, was that the people rejected the Supreme Court’s conception of property rights, and the state courts, as the final arbiters of those state constitutions, reacted accordingly.126

CONCLUSION

Every year, the Supreme Court resolves controversial issues on a divided, 5-4 basis. In the wake of the decision, supporters cheer, while opponents jeer. But with time, the animated responses fade, and advocates move on to prepare for the next landmark case. Kelo, unlike all other decisions in recent memory, did not fit into the mold. Virtually everyone across the political spectrum rejected the opinion. Instead of the opposition fading, it remained at such high levels that forty-five states took action to repudiate the decision. It resonated so deeply, that the people organized referenda to change their state’s highest laws. Judges, cognizant of these changes, began to find their state constitutions provide more protections than the federal constitution. Ten years later, due in large part to this process of popular constitutionalism, Kelo is not the decision it once was.