INTRODUCTION TO THE SYMPOSIUM ON KELO V. CITY OF NEW LONDON

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KeIo v. City of New London1 was one of the Supreme Court’s most controversial decisions of the last several decades. Although the Fifth Amendment only permits the taking of private property for “public use,” the Court ruled that the transfer of condemned land to private parties for “economic development” is permitted by the Constitution—even if the government cannot prove that the expected development will ever actually happen.2 Though the decision was in line with previous precedent going back to the 1950s,3 it drew strong dissents by Justices Clarence Thomas and Sandra Day O’Connor, and generated a massive public backlash. Surveys showed that over 80% of the public opposed the ruling, and 45 states enacted eminent domain reform laws in response.4 KeIo broke the seeming consensus among experts in favor of an extremely broad definition of “public use” that would allow government to condemn property for virtually any purpose. The controversy the ruling generated among both experts and the public continues to this day.

In this symposium, which grew out of a panel I chaired at the 2015 annual meeting of the Association of American Law Schools, three leading scholars add to our understanding of KeIo and its legacy.5 Professor Josh Blackman’s contribution situates the backlash generated by KeIo in the context of the growing academic literature on “popular constitutionalism”: the influence of social movements and public opinion on constitutional law. As he explains, the strong public response to the Court’s ruling has important affinities with previous popular constitutional movements, such as the civil rights movement, the gun rights movement, and others. It also has some important differences, including the fact that the anti-KeIo movement mostly arose only after the Supreme Court issued a controversial decision. Most earlier prominent episodes of popular constitutionalism preceded key Supreme Court decisions in the relevant fields.

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1 545 U.S. 469 (2005).
2 Id. at 485-88.
5 The AALS panel also included presentations by Professor Alexandra Klass of the University of Minnesota, and myself. Unfortunately, Professor Klass was unable to participate in this symposium.
The *Kelo* backlash is also unusual among popular constitutional movements because it gathered support from across the political spectrum. Popular constitutional movements are usually anchored on either the right or the left, with relatively little backing from the other side. Blackman’s essay sheds light on the significance of these and other aspects of the *Kelo* backlash.

Professor Carol Brown’s essay expands on some key issues raised in Justice Clarence Thomas’s dissent in *Kelo*. Among other things, Thomas emphasized the dangers of unchecked eminent domain power for the poor and politically weak. Professor Brown explains the basis for this concern, and also outlines its connection to the original meaning of the Takings Clause (another important focus of Justice Thomas’s dissent). The disproportionate impact of blight and economic development takings on the poor and racial minorities may help to explain the unusual political coalition that developed in opposition to *Kelo*, discussed in Professor Blackman’s essay. Brown acknowledges that many experts believe that eminent domain may sometimes be needed to overcome “holdout” problems, but argues that these experts overemphasize the issue and that any problems can be addressed without giving unbridled deference to the government or departing from the original meaning of “public use.”

Professor Julia Mahoney addresses the connections between *Kelo* and more recent takings cases generated by the 2008 financial crisis and the federal government’s response to it. At first glance, there seems little connection between the two situations. But Professor Mahoney notes some important parallels, including the influence of a crisis atmosphere and the dangers of possible interest group manipulation. As she emphasizes, it is important to develop a more effective judicial and political regime for regulating takings in times of crisis. Sadly, such crises are likely to recur, and when they do, they may again generate perverse incentives for both policymakers and interest groups.

As all three essays demonstrate, there is much to be learned from the *Kelo* case and its aftermath. Even a decade after the Supreme Court’s ruling, there is far from any kind of consensus on the many normative and empirical issues it raises. The three essays collected in this symposium represent outstanding contributions to the ongoing discussion over these important questions.

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6 *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).