

2016

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Recommended Citation

Pritchett, Wendell E., "A Solution in Search of a Problem: Kelo Reform over Ten Years Commentary Essays" (2016). *Connecticut Law Review*. 335.
https://opencommons.uconn.edu/law_review/335

CONNECTICUT LAW REVIEW

VOLUME 48

JULY 2016

NUMBER 5

Essay

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Kelo is NOT Dred Scott. Kelo is not only NOT Dred Scott, it was, as this Essay will argue, the right decision given the facts of the cases and the current state of legal jurisprudence. As an academic who has detailed the historic exploitation of eminent domain to uproot persons of color in this country, I find it interesting, and somewhat troubling, that the case has received so much criticism, much more criticism, I would argue, than other Supreme Court decisions that deserve condemnation. Certainly, eminent domain, like any other government power, must be regulated carefully. But upending the principles of judicial restraint and federalism is not necessary in this case. This Essay argues that eminent domain is a necessary tool for governments to promote the public interest, and that the problem of potential “abuse” can be managed by less dramatic—and more effective—methods than categorical bans on the use of condemnation.



A Solution in Search of a Problem: *Kelo* Reform Over Ten Years

WENDELL E. PRITCHETT*

Kelo is NOT *Dred Scott*. What perfect evidence of the hyperbolic tenor of our current political culture that a United States Supreme Court Justice could compare the decision that reaffirmed *the right to enslave human beings* and led to the Civil War, the most violent conflagration on United States territory in history, to a decision stating that there is no constitutional restriction (though there could be state restrictions) on the ability of a local government, in limited circumstances, to PAY a property owner to acquire their land.¹ The comparison screams “mountain vs. mole hill.” *Kelo* is not only NOT *Dred Scott*, it was the right decision given the facts of the cases and the current state of legal jurisprudence, and I write that as a person who has detailed the historic abuses of eminent domain in this country.² Certainly, eminent domain, like any other government power, must be regulated carefully. But upending the principles of judicial restraint and federalism is not necessary in this case. I will argue in this response to Horton and Levesque that eminent domain is a necessary tool for governments to promote the public interest, and that the problem of potential “abuse” can be managed by less dramatic—and more effective—methods than categorical bans on the use of condemnation.

The authors ably analyze the historical precedent and explain the reasons why the majority in the *Kelo* decision was correct.³ The decision is well in line with existing jurisprudence. It is a logical effort at judicial restraint. It promotes federalism in providing for more restrictive approaches at the state level. It is an honorable effort to avoid judicial activism. In addition, rejecting this approach and finding in favor of the *Kelo* plaintiffs would have created a jurisprudential mess and required state

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¹ See Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1407 n.5 (2016) (referencing Justice Antonin Scalia’s remarks about “the *Kelo* decision being on par with *Dred Scott*”).

² See, e.g., Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 37–41 (2003) (recalling the increased use of eminent domain in large cities throughout much of the mid-twentieth century).

³ See Horton & Levesque, *supra* note 1, at 1414–27 (analyzing the Court’s decision in *Kelo* in light of relevant historical precedents).

and federal courts to supervise local redevelopment efforts in a way that conservatives would find (I believe) very distasteful.⁴ So the authors are right to defend the positions they argued in court. The conclusion they reached is supported by case law, does not inhibit states in providing additional restrictions, and is the philosophically conservative approach; so then, what are the reasons for the *Kelo* backlash?

The crusade against eminent domain for economic development has always been a solution in search of a problem. Where is the evidence that eminent domain for economic development is running rampant? Despite the flood of articles on the case, I have seen no empirical studies showing either that eminent domain “abuse” was on the rise before *Kelo*, or that it has increased since it was decided.⁵ What is the scope of eminent domain in this country? Under what circumstances do local governments use eminent domain? What is the response of property owners and other members of the community to government eminent domain proposals? These are basic questions to which we have few answers. Yes, such work is time consuming, but it is not that complicated. Academics have built a robust literature on many topics examining regulatory interactions between the governments and their citizens.⁶ Why, then, have no enterprising young scholars taken on this research? Until such research is conducted, there is little we can say concretely about the scope of the supposed problem of eminent domain abuse.

Yes, there is a study associated with the Institute for Justice and produced in 2003, which helped start the national movement against eminent domain. It found that “private condemnation” (properties to be taken by eminent domain and transferred to private parties) notices had been filed for over 3,722 properties in the five years leading up to the

⁴ *Id.* at 1418–19.

⁵ The lack of such evidence is especially noteworthy considering that literature on *Kelo* is voluminous. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1415 (2006) (arguing that *Kelo* was rightly decided); Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82, 84 (July 7, 2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo> [<https://perma.cc/5M4J-RSGD>] (assessing *Kelo*’s state-level effects); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 129, 131 (2009) (arguing that *Kelo* represented an unwarranted expansion of the “public use” requirement of the Takings Clause); Ilya Somin, *What if Kelo v. City of New London Had Gone the Other Way?*, 45 IND. L. REV. 21, 21 (2011) (considering a world in which *Kelo* had been decided the other way and the effects it would have had on existing property rights).

⁶ For example, many scholars have examined how healthcare regulation has shaped the interaction of the public with our healthcare system. *See, e.g.*, Deven McGraw, *Paving the Regulatory Road to the “Learning Health Care System”*, 64 STAN. L. REV. ONLINE 75, 75 (Feb. 8, 2012), <http://www.stanfordlawreview.org/online/privacy-paradox/learning-health-care-system> [<https://perma.cc/XH E2-RDUC>] (suggesting that healthcare regulations serve as a disincentive to improving the healthcare system); William D. White, *Market Forces, Competitive Strategies, and Health Care Regulation*, 2004 U. ILL. L. REV. 137, 138–41 (examining the interaction between market forces and regulation in shaping the organization of the healthcare sector over a thirty-year span).

study.⁷ Another 6,560-plus were “threatened.”⁸ While these seem like large numbers, consider that (according to the National Association of Realtors) as of 2013 the country had approximately 115 million residential units and 5.6 million commercial units.⁹ In addition, putting aside the self-interested nature of that study (they were the lawyers for the plaintiff), this study does not attempt to examine the question of change over time. The authors certainly find, and highlight, examples where local governments have used condemnation for projects where the chances of success were speculative at best. The report also documents that eminent domain is used in jurisdictions across the country. But two examples from each state over a period of ten years do not constitute a crisis. Nor have the ten years since the decision brought the decline of property in this country. Motel 6’s continue to open, free from the fear that they will become a Ritz-Carlton.¹⁰

In the immediate post-*Kelo* years there was a flurry of legislative activity. Many states passed laws “restricting” the use of eminent domain within their territory. However, Ilya Somin, who has studied this issue more intensely than any other academic, tells us that the majority of these laws are weak and will have little impact.¹¹ Many of them ban the use of eminent domain solely for purposes of economic development, but they maintain vague definitions of blight that would encompass almost any property, allowing its condemnation.¹² As a result, Somin concludes that these laws do not actually protect property owners from condemnation.¹³ Why, given the backlash, aren’t these laws stronger? Somin argues the nature of our political system is such that the public cannot understand, and therefore cannot demand reform of, complicated issues.¹⁴

But maybe the laws were symbolic because the issue was one of symbolism, an effort of legislators to respond to an “Astroturf”¹⁵ campaign

⁷ DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003), http://ij.org/wp-content/uploads/2015/03/ED_report.pdf [<https://perma.cc/9WMK-DQNN>].

⁸ *Id.*

⁹ *Field Guide to Quick Real Estate Statistics*, NAT’L ASS’N OF REALTORS, <http://www.realtor.org/field-guides/field-guide-to-quick-real-estate-statistics> [<https://perma.cc/LMJ4-GK8Q>] (last updated Mar. 21, 2016).

¹⁰ According to its website, as of the time of this Essay there are approximately 1,200 Motel 6 locations. *About, MOTEL 6*, <https://www.motel6.com/en/about.html> [<https://perma.cc/XG5Y-MPTY>] (last visited Mar. 21, 2016).

¹¹ ILYA SOMIN, *THE GRASPING HAND: KELO V. THE CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 136–37, 141 (2015).

¹² *Id.* at 84–86.

¹³ *Id.*

¹⁴ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2163 (2009).

¹⁵ Gerry Mackie, *Astroturfing Infotopia*, 56 THEORIA 30, 32 (2009) (“Astroturfing is the use of paid agents to create falsely the impression of popular sentiment (the grass-roots are fake, thus the term astroturf, which is artificial grass.)”).

that used the plight of a particularly sympathetic plaintiff, Suzette Kelo, to foment anger about a little known and poorly understood government tool, eminent domain. Perhaps state legislators, no doubt lobbied by “real estate interests” and “power-hungry local officials,” decided that eminent domain is a necessary tool of governance and that to significantly restrict local powers would have potentially significant negative side-effects.

How often is eminent domain used by local governments to take a well-maintained property and give it to a developer in the pursuit of economic growth? In essence how big a problem are we talking about here? We don’t know. And therefore we don’t know what the problem is that we’re trying to solve. In most areas, we conduct research before making policy recommendations. But in this case emotion has overwhelmed empirical study.

To date the most nuanced assessment of eminent domain in this country, Debbie Becher’s *Private Property and Public Power: Eminent Domain in Philadelphia*, presents a very different view of the eminent domain process than reformers would like us to see.¹⁶ Through a comprehensive review of the use of eminent domain in Philadelphia from 1992 to 2007, Becher helps us understand how eminent domain decisions are made, contested, and implemented in one large city.¹⁷ Becher certainly finds problems with many aspects of the process, but she does not discover a government set on uprooting people from their homes, and she does not find a groundswell of protest against government condemnation efforts, even when they involve transferring condemned property to other private owners.¹⁸

Over the period Becher studied, Philadelphia began the process of taking 6,880 properties (a number similar to that which, in a much shorter period, the Institute for Justice chronicled for the whole country in their report) and completed the process for 4,320.¹⁹ Like many others after their industrial eras, the city witnessed a large population loss in the second half of the twentieth century, and possessed thousands of vacant houses and parcels of land.²⁰ Beginning with the administration of Mayor Edward G. Rendell, and expanding with the term of Mayor John Street, who initiated the Neighborhood Transformation Initiative, the city engaged a major condemnation effort, an effort that was largely responsible for Pennsylvania’s high position among eminent domain “abusers” in the 2003

¹⁶ DEBBIE BECHER, *PRIVATE PROPERTY AND PUBLIC POWER: EMINENT DOMAIN IN PHILADELPHIA* 11 (2014) (explaining that private citizens often view eminent domain positively).

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 58; BERLINER, *supra* note 7, at 179–80.

²⁰ For background on Philadelphia’s industrial decline, see GUIAN A. MCKEE, *THE PROBLEM OF JOBS: LIBERALISM, RACE, AND DEINDUSTRIALIZATION IN PHILADELPHIA* 12–13 (2008).

Institute for Justice Report.²¹

In the period Becher studied, condemnation efforts totaled almost one percent of the total number of properties in the city (540,000).²² Yet, this effort did not create a groundswell of opposition. Of the 4,320 properties in which eminent domain was completed, Becher found that only 240 property owners (or six percent) contested the taking.²³ In the overwhelming majority of takings, the property owners accepted the process, and the community did not complain. The major reason for this tepid response was that most of the properties taken were vacant.²⁴ Sixty-four percent of the properties taken (2,760 of 4,320) were empty lots.²⁵ Only eight percent (340) of the properties were occupied.²⁶ Philadelphia officials, cognizant of the history of eminent domain in neighborhoods of color as well as the disruptive effects of dislocation, targeted their efforts on properties that were unoccupied and were having a negative impact on the residents in these communities.²⁷

In addition, contrary to the presentation of eminent domain as a means to enrich the elite and take property away from ordinary citizens, the taken properties were typically used for affordable housing or small-scale business. Forty-seven percent of the projects that received condemned properties were affordable housing projects, fifty-eight percent of the commercial projects involved expansions of businesses that abutted the properties taken.²⁸ A significant number of projects supported the expansion of local churches, social service agencies, and health care agencies.²⁹ These community-based entities were not looking to profit on the backs of the poor, they were seeking to expand their services to the community. In fact, ninety-eight percent of the development occurred in

²¹ BECHER, *supra* note 16, at 58; BERLINER, *supra* note 7, at 179–80.

²² BECHER, *supra* note 16, at 58. The total number of properties in the city at the time was 540,000. *Id.*

²³ *See id.* (“[V]ery few of these property takings met any official resistance. Owners of only 240 of the 4,320 (6 percent) taken properties lodged any kind of official contestation, through litigation or reversion.”).

²⁴ *See id.* at 67–68 (“The vast majority of properties taken . . . were vacant. . . . To some extent, the low frequency of resistance to takings overall was due to the fact that most properties taken were in devastated neighborhoods, were vacant of occupants, and often had no buildings at all.”).

²⁵ *Id.* at 67.

²⁶ *See id.* (“A full 92 percent, or 3,990, of the over 4,320 properties taken for private reuse were vacant.”).

²⁷ *See id.* at 65, 67 (“Overall, Philadelphia restricted eminent domain to its most problematic neighborhoods. . . . The vast majority of properties taken between 1992 and 2007 were vacant. . . . Government was twice as likely to encounter formal opposition for taking an occupied property as for taking a vacant one.”).

²⁸ *See id.* at 69–70 (“Affordable housing projects accounted for 47 percent of the total projects Most of the commercial projects and institutional projects—58 percent and 71 percent, respectively—were expansions into vacant lots that abutted current operations.”).

²⁹ *See id.* at 70 (“Institutional projects, which made up 11 percent of the projects, generally served preexisting churches, social services, community centers, and healthcare organizations.”).

the city's most distressed areas.³⁰ Examining all this evidence, Becher concludes that:

Despite the warnings of judges, journalists, and activists, my research shows that in at least one large city, the taking of functioning businesses and homes for higher-intensity development is actually quite rare, and officials generally avoid cases that would so readily strike most Americans as an abuse of government power.³¹

A significant portion of our urban infrastructure is more than a century old.³² Houses and neighborhoods that were once desirable have deteriorated. This causes major problems for the people living in neighboring properties, for communities as a whole, and for local governments—problems that necessitate government action. Local leaders are not power-hungry despots eager to dislocate little old ladies. Rather, they are struggling administrators attempting to respond to public demands for improvement in their communities, even when that same public refuses to pay for such improvements. As Horton and Levesque tell us:

City councilors who vote for an unpopular condemnation are likely to be voted out of office, especially since in the usual situation the taxpayers have to pay for the property condemned. The decision in New London was made after long and public discussions. It was not a cozy backroom deal with a developer out to make a financial killing.³³

Such was the case in Philadelphia, where eminent domain continues.³⁴

The authors are generous. Despite their clear victory, they are willing to explore how reforms might create more tailored and efficient eminent domain decision-making procedures.³⁵ Their suggestions are good regarding how the public should distinguish between good and bad uses of condemnation, and they would productively be added to state laws guiding state judges. There is no need to go back to the U.S. Supreme Court; *Kelo* is sound law. Though I do not have empirical evidence to support this

³⁰ See *id.* at 65 (“[98] percent of all taken properties were located in neighborhoods with very serious problems . . .”).

³¹ *Id.* at 75.

³² See AMER. SOC’Y CIV. ENGINEERS, 2013 REPORT CARD FOR AMERICA’S INFRASTRUCTURE 65–67 (2016), <http://www.infrastructurereportcard.org/a/#p/home> [https://perma.cc/K8FN-7GX9] (demonstrating the degeneration of American urban infrastructure).

³³ Horton & Levesque, *supra* note 1, at 1425.

³⁴ See Pritchett, *supra* note 2, at 51 (“The city of Philadelphia . . . is currently considering a major ‘Neighborhood Transformation Initiative,’ which aims to clear large areas of the city’s most dilapidated housing in the hope that the cleared land will attract private development.”).

³⁵ See Horton & Levesque, *supra* note 1, at 1425–27 (proposing clarifications to Justice Kennedy’s *Kelo* test).

statement, I think, given the intensity of emotion on the issues, that it is likely that local government officials are much more reticent to use this approach today than they were ten years ago. Until we have a clear understanding that eminent domain abuse is a problem, the current state of the law is the best approach.

I am not arguing that eminent domain is never used in an illegal manner, or that regulation is not important, particularly to protect persons of color. During the period in American history where the largest amount of condemnation occurred, the targets were mostly African-Americans and other people of color (along with some poor whites) whose presence in cities, elites felt, threatened their economic future.³⁶ We do have some empirical data on the urban renewal era, and it concludes that almost two million inhabitants were uprooted by urban renewal from 1949 to 1973 (including condemnations for the public housing and highway programs).³⁷ There is no record of how many persons of color were uprooted nationally, but it was certainly several hundred thousand. It is known that more than one hundred thousand persons of color were uprooted in New York City alone.³⁸ Even though many of the properties taken through urban renewal programs were well-maintained,³⁹ the blight designation was the primary vehicle by which the law allowed exceptions to the general expectation (not the law, but certainly the general rule) that government would not use eminent domain to take one owner's property and give it to another. Although the urban renewal program is no more, property designated as blighted remains vulnerable. Additionally, these properties continue to be owned or occupied disproportionately by persons of color.⁴⁰ But the

³⁶ See Pritchett, *supra* note 2, at 38 (“Robert Weaver (later to become the first HUD Secretary) argued that urban renewal presented a ‘threat or an opportunity’ to African-Americans. He worried that the program would be used to entrench racial segregation and prevent blacks from moving into new areas.” (footnote omitted)).

³⁷ See *Urban Renewal*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Urban_renewal.aspx [<https://perma.cc/T6BL-B5JS>] (last visited Mar. 18, 2016) (“More than two thousand construction projects on one thousand square miles of urban land were undertaken between 1949 and 1973, when the urban renewal program official ended. Roughly six hundred thousand housing units were demolished, compelling some two million inhabitants to move. . . . In New York City, more than one hundred thousand African Americans were uprooted, destroying the social and economic fabric of many neighborhoods.”).

³⁸ *Id.*

³⁹ See, e.g., Pritchett, *supra* note 2, at 34 (“New York Life created a controversy when it demanded that several well-maintained blocks be cleared because they would afford the project better views of the lake. Even redevelopment advocates acknowledged that the plan ignored ‘actual slum areas completely’ and planned ‘the demolition of a well-kept Negro area where the bulk of property is resident owned, its taxes paid, and its maintenance above par.’”).

⁴⁰ See, e.g., DEP’T OF THE PUB. ADVOCATE, EVICTED FROM THE AMERICAN DREAM: THE REDEVELOPMENT OF MOUNT HOLLY GARDENS 4 (2008), http://www.njeminentdomain.com/uploads/file/PubAdvocate_gardens_report.pdf [<https://perma.cc/6X24-3KN6>] (“Various sources of data dating from the year 2000 or later reveal the recent demographics of Mount Holly Gardens. During this period, the residents fell almost entirely within the low-to-moderate-income range—forty-seven percent

question is: what are the best mechanisms to protect those who might be unfairly targeted?

Take the case of Mount Holly, New Jersey. There the city has undertaken a decade long effort to clear a long-established majority black community.⁴¹ In 2002, the Township of Mount Holly, a small community in the New Jersey suburbs outside of Philadelphia, designated the Mount Holly Gardens neighborhood as blighted and set in motion a plan that would uproot more than 1,000 people.⁴² Built in the mid-1950s for military personnel serving at Fort Dix and McGuire Air Force Base, the 379 two-story attached units were some of the only affordable housing in the township.⁴³ While Mount Holly is overwhelmingly white, Mount Holly Gardens was, in 2000, forty-four percent African-American and twenty-two percent Hispanic.⁴⁴ Furthermore, the majority of the residents were poor, with incomes below \$20,000 annually.⁴⁵ By the 1970s, the units, which were originally owned by the Federal Housing Agency, had been sold to owner-occupants and absentee landlords, many of whom failed to maintain the properties.⁴⁶ During the 1980s, parts of the neighborhood became locations for drug dealing and other crime.⁴⁷ In response to these problems, the township declared that 327 units should be acquired and that the neighborhood should be redeveloped for new housing.⁴⁸ In 2002, Mount Holly Gardens was designated as blighted.⁴⁹ The township subsequently issued a redevelopment plan; however, the plan was vague as to how much and what types of housing should be acquired.⁵⁰

Although the redevelopment designation authorized the township to condemn the properties within the redevelopment area, the township chose to negotiate voluntarily with the property owners.⁵¹ By 2008, the township

of the households earned less than \$20,000 per year; forty-three percent earned between \$20,000 and \$40,000; nine percent earned more than \$40,000; and 0.7% earned more than \$60,000. . . . Of the 1,605 individuals who lived in the Gardens at the time of the 2000 census, forty-four percent were African American, [and] twenty-two percent were Hispanic" (footnotes omitted)).

⁴¹ See *id.* at 16–17 ("By September 2006, when the Township filed its Workable Relocation Assistance Plan, its intentions were clear: 'In order to permit the redevelopment of the area in accordance with the goals of the redevelopment plan, the Township intends to acquire all the units in the Mount Holly Gardens, which will necessitate the relocation of its residents.'").

⁴² See *id.* at 16 ("The threat of displacement has loomed over Gardens residents since October 2002, when the Township designated the area as 'blighted.'").

⁴³ *Id.* at 4–5.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 5.

⁴⁷ *Id.*

⁴⁸ *Id.* at 24.

⁴⁹ *Id.* at 4, 6.

⁵⁰ *Id.*

⁵¹ *Id.* at 9, 17–18.

had acquired 232 of the units.⁵² Homeowners were offered what the township determined to be market rates for their properties, and many were offered relocation assistance in the form of no-interest loans ranging from \$15,000 to \$20,000 to purchase a new home.⁵³ The prices that the township offered as market rates ranged between \$27,000 and \$49,000, depending on the size of the acquired unit.⁵⁴ Some, but not all, of the tenants of the acquired buildings were offered relocation assistance of up to \$7,500.⁵⁵

High among the many challenges residents faced was the fact that there were very few units for sale or rent in Mount Holly at comparable prices to the sale or rental prices of the units acquired.⁵⁶ Identical units outside of the redevelopment area were sold for \$82,000 to \$99,900.⁵⁷ The average listing price for a house in Mount Holly at the time was \$279,985.⁵⁸ The redevelopment plan was constantly changing, but by 2008 it envisioned the development of 520 units for homeownership or rental.⁵⁹ Of these, fifty-six would be classified as affordable, and only eleven of those would be offered to residents of the neighborhood whose units were demolished.⁶⁰

Different problems faced those who chose not to sell. The township quickly began demolishing the homes that it acquired, many of which were attached to still-occupied homes.⁶¹ By 2008, the township had demolished seventy-five homes.⁶² The township tore up sidewalks and driveways, closed neighborhood facilities, and turned off electricity to many of the streetlights.⁶³ The remaining residents lived in what had quickly turned from a busy community into a ghost town.⁶⁴ The township's actions, not surprisingly, spurred additional residents to sell and vacate the community.⁶⁵

In 2003, many of the residents hired South Jersey Legal Services,

⁵² *Id.* at 18.

⁵³ *See id.* at 9 (explaining the relocation assistance provided to the residents of Mount Holly Gardens).

⁵⁴ *Id.*

⁵⁵ *Id.* at 13.

⁵⁶ *Id.* at 9–11.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 11.

⁵⁹ *Id.* at 24.

⁶⁰ *Id.*

⁶¹ *Id.* at 18–19.

⁶² *Id.* at 6.

⁶³ Dan Wang, *New Jersey Town Rips Up Working-Class Neighborhood for Private Developers*, HUFFINGTON POST (Aug. 1, 2012, 2:06 PM) http://www.huffingtonpost.com/2012/08/01/new-jersey-development-mount-holly-gardens_n_1723746.html [<https://perma.cc/T2TL-RJD7>].

⁶⁴ *See id.* (characterizing the exodus from Mount Holly Gardens and discussing the township's demolition activities).

⁶⁵ *See id.* (describing the collateral effects of the township's decision to demolish portions of Mount Holly Gardens).

which brought a lawsuit alleging that the Mount Holly Gardens redevelopment plan violated the Fair Housing Act by having a discriminatory impact on persons of color in the community.⁶⁶ A federal district court judge dismissed the case, concluding that the plaintiffs had not shown that the township was guilty of intentional racial discrimination.⁶⁷ However, the Third Circuit Court of Appeals reversed the trial court, ruling that the plaintiffs had provided enough statistical evidence to show that the redevelopment plan had a discriminatory impact on persons of color.⁶⁸

The township appealed to the U.S. Supreme Court, but in 2013, the parties settled, and the township agreed to provide replacement housing to some dislocated residents and increased relocation payments to other residents.⁶⁹ Both parties had an incentive to settle. By that time, the township had incurred \$18 million in costs for the redevelopment plan, even though nothing had been built, and the town was facing a significant budget deficit.⁷⁰ The plaintiffs settled the case in fear that the U.S. Supreme Court would reverse the Third Circuit ruling.⁷¹

As the Mount Holly case shows, eminent domain can still be used to uproot communities of color. However, as the resolution of this case shows, the law provides avenues to defend communities against local governments seeking to use the power of condemnation to eliminate them. While much damage was done to Mount Holly Gardens during the ten years of this dispute, the settlement provides a mechanism for at least partial rebuilding of this community and the incorporation of the residents who were there when the process began. In addition, the victory of the

⁶⁶ Jesse Kearney, *Pressure to Settle: The Mount Holly Settlement, Disparate Impact and the Fair Housing Act of 1968*, RACIAL JUSTICE PROJECT (Mar. 26, 2014), <http://www.racialjusticeproject.com/pressure-to-settle/> [<https://perma.cc/Q74K-UL94>]; see also Wang, *supra* note 63 (stating that Mount Holly Gardens had the highest concentration of minorities in the township and that the township's actions related to housing had a disparate impact on minorities).

⁶⁷ *Mount Holly Citizens v. Twp. Mount Holly*, No. 08-2584 (NLH)(JS), 2011 WL 9405, at *1 (D.N.J. Jan. 3, 2011).

⁶⁸ See *Mount Holly Gardens Citizens v. Twp. Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011) (stating that data from the 2000 census indicates that demolition of the Mount Holly Gardens would have a far greater impact on minority households in comparison to white households); Kearney, *supra* note 66.

⁶⁹ Adam Liptak, *Fair Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html [<https://perma.cc/F8K2-GVXD>].

⁷⁰ Adam Serwer, *Bulldozing Homes and Civil Rights in Mount Holly, NJ*, GRIO (Nov. 5, 2013, 2:30 PM) <http://thegrio.com/2013/11/05/bulldozing-homes-and-civil-rights-in-mount-holly-nj/> [<https://perma.cc/A6YB-23KC>].

⁷¹ See Adam Serwer, *Mount Holly Settlement Spares Fair Housing Act—For Now*, MSNBC (Nov. 14, 2013, 11:30 AM), <http://www.msnbc.com/msnbc/mount-holly-settlement-spar-es-fair-housing-act-for-now> [<https://perma.cc/GL2Y-YNU3>] (stating that the settlement agreement “deprive[d] the conservative dominated Supreme Court of the opportunity to weaken the Fair Housing Act”).

residents in this case is notice to other governments considering similar actions that involve the use of eminent domain.

Furthermore, over the past few years other legal and regulatory structures have evolved to provide further protection for communities facing the discriminatory use of eminent domain. In February 2013, the Department of Housing and Urban Development (HUD) issued a ruling titled “The Implementation of the Fair Housing Act’s Discriminatory Effects Standard.”⁷² The rule, meant to clarify the application of the Fair Housing Act (FHA) to cases in which the plaintiffs alleged the actions of a defendant had a “discriminatory effect,” lays out a three-part process by which HUD evaluates such claims.⁷³ In essence, the rule is a burden-shifting process, requiring plaintiffs to provide prima facie evidence of discriminatory effect, which can be rebutted by proof by the defendant that its actions are necessary to achieve “substantial legitimate, nondiscriminatory interests.”⁷⁴ The plaintiff may still establish liability by showing that the interest could be promoted by practices with less of a discriminatory effect.⁷⁵ Applying this framework to the Mount Holly Gardens case, it is likely that the residents could have proven both discriminatory effect and that the township could have eliminated the blighted conditions with other approaches that would have allowed the residents to remain. This rule, which relied on and amplified the interpretations of federal appeals courts across the country, provides significant support in situations such as Mount Holly Gardens.⁷⁶

Furthermore, in January 2015, in a decision that surprised many, the U.S. Supreme Court ruled that a finding of disparate impact was sufficient to prove a violation of the FHA. In the case, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*,⁷⁷ the Court interpreted the phrase “or otherwise make unavailable” in the FHA to mean that if a defendant’s actions had the result of adversely affecting a protected group, such activities violated the FHA if they were “artificial, arbitrary, and unnecessary barriers.”⁷⁸ The decision, based partly on HUD’s prior rule making on the issue, provides additional protection for residents vulnerable to racially motivated local development efforts.

Finally, in June 2015, HUD issued a final rule clarifying the

⁷² Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.* (stating that HUD, through its interpretation of the Fair Housing Act and the federal circuit courts’ interpretation of the Act, has established that liability under the Act “may arise from a facially neutral practice that has a discriminatory effect”).

⁷⁷ 135 S. Ct. 2507 (2015).

⁷⁸ *Id.* at 2518, 2524 (citations omitted).

department's enforcement of the FHA's "Affirmatively Furthering Fair Housing" requirement.⁷⁹ HUD revised the rule to "equip communities that receive HUD funding with data and tools to help them meet long-standing fair housing obligations in their use of HUD funds."⁸⁰ Historically all communities receiving HUD support were required to show that their activities furthered fair housing goals, but for many years this rule was vague and not enforced. Under the new rules, HUD will work with recipients to gather information and create a streamlined process to "help communities analyze challenges to fair housing choice and establish their own goals and priorities to address the fair housing barriers in their community."⁸¹ The rule was vehemently criticized by Republicans in Congress.⁸² However, HUD officials view it as a means to focus local attention on the many local development activities that promote segregation or impede racial integration.⁸³ Each of these legal tools provides additional protection to the people most likely to be subject to eminent domain "abuse." They are the appropriate mechanisms to rein in the inappropriate use of condemnation.

The attorneys who represented the City of New London in *Kelo* have had a difficult decade. The *Kelo* decision provided an excellent opportunity to rally public anger against government—not a hard thing to do in these contentious times. But the claim that governments cannot be trusted with the power to condemn property lacks empirical proof. Until it does, efforts to "reform" eminent domain in the United States will struggle to gain traction, and supporters of a limited and targeted use of eminent domain like Horton and Levesque will continue to prevail.

⁷⁹ Press Release, U.S. Dep't Hous. & Urban Dev., HUD Announces Final Rule on Affirmatively Furthering Fair Housing (July 8, 2015), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-084 [<https://perma.cc/B7B9-VHAE>].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Stanley Kurtz, *Attention America's Suburbs: You Have Just Been Annexed*, NAT'L REV. (July 20, 2015), <http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz> [<https://perma.cc/HB46-2T8Q>].

⁸³ Press Release, U.S. Dep't Hous. & Urban Dev., *supra* note 79.