AUTHORSHIP BY OMISSION: HOW EDITORIAL CHOICES IN CASEBOOKS SHAPE THE APPREHENSION AND MEANING OF LAW

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ABSTRACT

The unique internal workings of the legal mind are a point of pride for the profession. But do those internal machinations reflect, and possibly reinforce, biases that ought to be examined, if not challenged? Expanding on recent work on the subject, this article makes the case that the casebook, the primary means of legal instruction, offers insights into the biases of the legal mind. Using some concepts adapted from other disciplines, the article analyzes coverage of the same case in seven textbooks to demonstrate how even the smallest changes can dramatically change the reader's understanding of what the law is.

Implications for practice include the following:

1. The bias inherent in the law,
2. The value of identifying subjective meaning in "objective" places,
3. Challenging built-in presumptions of how the law works,
4. The importance of organization in creating meaning, and
5. Self-improvement by identifying and challenging one's own biases.

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I. INTRODUCTION

Law school casebooks have a (not entirely unearned) bad reputation. Langdell's casebook method of teaching, now the dominant form of formal legal education in the United States, has been controversial since its inception.[1] It has been criticized for its narrow view of the law in order to replicate scientific methodology,[2] the fact that it is too theoretical,[3] and inefficient use of student time and attention.[4] The casebooks themselves have been criticized as collections of cases with no connecting trend of legal doctrines.[5] Casebooks have always been expensive, and that price has increased dramatically in the past twenty years.[6]

1. Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 160 (1965).

2. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 227 (1949).

3. A. V. Dicey, *The Teaching of English Law at Harvard*, 13 HARV. L. REV. 422, 429 (1900).

4. Austin, *supra* note 1, at 164-65.

5. Austin, *supra* note 1, at 165. I can also confirm anecdotally that I have seen a large enough number of struggling students read the entire casebook ahead of class, to the detriment of their understanding of the material, that I now explicitly discourage it when introducing new students to law school.

6. Steven Chung, *Do Law School Casebooks Have a Future?*, ABOVE THE LAW (Sept. 6, 2023, 12:16 PM), https://abovethelaw.com/2023/09/do-law-school-casebooks-have-a-future/#:~:text=Today%2C%20law%20school%20casebooks%20cost,per%20year%20on%20books%20alone [https://perma.cc/SXR9-8LH7].

For all their faults, casebooks are a singular medium that reflect, reshape, and reinforce the legal community that creates and learns from them.[7] "Because casebooks still maintain the center of gravity in legal education, they serve as the vehicle through which each succeeding generation of lawyers is socialized into patterns of thinking about law and legal practice."[8] One might assume, given Langdell's scientific aspirations, that these casebooks reflect a somewhat sterile and "unbiased" view of the law. This presumed objectivity could not be further from the truth. "Casebooks provide their authors with an opportunity to construct a thoroughly realized, if often inadequately articulated, instantiation of their own particular jurisprudential and normative belief systems."[9] This reflection of author bias is no bug, but rather a feature of this unique art form. In her review of Randy E. Barnett's Contracts casebook,[10] Kellye Testy calls attention to an ideological commitment to consent as the basis of contract law that permeates the casebook.[11] Rather than use this to criticize the casebook, she instead calls attention to it as a way to help students identify the assumptions that the law takes as a given, giving students an opportunity to identify and combat the biases of the community they are entering.[12]

This longstanding potential within casebooks to identify the unique perspective and biases of the law and legal community finds fresh cause given the United States' increasingly divided political landscape. With increasing frequency, law professors find themselves in a situation where right-leaning students accuse them of stifling viewpoint diversity while left-leaning students criticize them for doing too little to protect marginalized groups.[13] This framing positions professors as a third, neutral party hoping to find some middle ground between two poles, but it denies the unique perspective that a member of the legal community brings to the table—a perspective that can be identified and reinforced through analysis of the casebooks introducing the student to that unique perspective.

In this article, I make the case that a form of literary analysis can offer insight into casebooks that can help reveal the biases within the legal community, either as individual authors or as a community at large. I begin by

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7. For a layperson-friendly example of this, see VERONICA ALVAREZ & THERESA SOTTO, L.A. CNTY. MUSEUM OF ART, ART OF MANY CULTURES: A RESOURCE GUIDE FOR VISITING LACMA 1 (Sarah Jesse ed., 2014) https://www.lacma.org/sites/default/files/module-uploads/ArtofManyCulturesResourceGuide.pdf [https://perma.cc/8R6K-37XU] ("Artists are a product of the culture and society in which they grew; and as such, they are influenced by the customs and norms of their society. Often, their artwork reflects upon and upholds the objects, ideas, and customs that that society values.").

8. Janet Ainsworth, *Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews*, 20 SEATTLE U. L. REV. 271, 275 (1997).

9. *Id.* at 274.

10. RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1st ed. 1995).

11. Kellye Testy, *Intention in Tension*, 20 SEATTLE U. L. REV. 319 (1997).

12. *Id.* at 322-23.

13. *See, e.g.*, Meera E. Deo, *The Paradox of Faculty-Student Interactions*, 69 J. LEGAL EDUC. 36 (2019).

addressing Kathleen Fletcher's recent work on the subject, which offers a compelling argument for bias within casebooks and a strong dataset to begin this textual analysis.[14] While Fletcher's work is essential to this article, my analysis differs considerably from hers for reasons I identify in this section. The most important difference, interpreting the message conveyed rather than identifying that a message was conveyed, leads me to my next section, which spells out some concepts borrowed from artistic disciplines that aid the interpretive process. I then use these tools to analyze the casebooks that Fletcher identified in her earlier article and spell out some initial conclusions derived from this small, but instructive, sample. By doing this, I demonstrate how literary analysis of casebooks is a vital tool both for recognizing and combatting bias and for embracing the unique art form of our legal culture.

II. BUILDING FROM FLETCHER'S ARTICLE

Kathleen Fletcher's article, *Casebooks, Bias, and Information Literacy—Do Law Librarians Have a Duty?*[15] makes a compelling case for the existence of bias in the casebooks used to teach law by demonstrating the difference in editorial decisions among several different textbooks.[16] In order to make that point, she looks at how a number of casebooks addressing the same topics (four Constitutional Law casebooks, three Property casebooks, and three Civil Procedure casebooks) cited different portions of a particular case's facts as the "key facts" of that case.[17]

While Fletcher's article makes an exciting case for the existence of bias in legal casebooks, she leaves several rich veins of inquiry untapped. This section explains these promising additional topics, which the article explores later.

A. Cross-Doctrinal Analysis

One thing that stands out about Fletcher's article is her decision on which case to cover. Her sample case for Constitutional Law was *Kelo v. City of New London*.[18] In *Kelo*, a city attempted to purchase multiple residents' homes through eminent domain as part of an urban development project.[19] Several homeowners refused, noting the private (as opposed to public) use of the condemned land.[20] The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."[21] In a 5-4 decision, the

14. Kathleen D. Fletcher, *Casebooks, Bias, and Information Literacy—Do Law Librarians Have a Duty?*, 40 LEGAL REFERENCE SERVS. Q. 184 (2021).
15. *Id.*
16. *Id.* at 189-99.
17. *Id.*
18. Fletcher, *supra* note 14, at 189.
19. 545 U.S. 469, 475 (2005)
20. *Id.*
21. U.S. CONST. amend. V, cl. 4.

United States Supreme Court ruled that the public purpose for which the land was being used was sufficient to meet the Constitution's requirements for eminent domain.[22] The case was controversial even before its resolution, with major organizations like the American Association of Retired Persons (AARP) and the National Association for the Advancement of Colored People (NAACP) filing an amicus curiae brief supporting the plaintiffs.[23] The Court's decision prompted massive backlash.[24] Following *Kelo*, forty-five states amended their laws to limit or prevent the use of eminent domain for purposes of economic development.[25] The decision remains unpopular almost twenty years after its resolution, with a recent survey of self-identified libertarian and conservative legal scholars listing it as the seventeenth worst Supreme Court decision in the history of the United States.[26]

Without looking at the content of the case, it is clear why Fletcher chose *Kelo* as her sample case. The four textbooks she cites[27] all have their own clear differences from one another in the facts cited. The three that do cite[28] *Kelo* cite entirely different parts of the opinion from one another. One of the four[29] does not cite the case at all.

The decision to use *Kelo* is noteworthy because *Kelo* is arguably as much a Property Law case as it is a Constitutional Law case. While only three of the four Constitutional Law casebooks that Fletcher examines cite *Kelo*,[30] all three of the Property casebooks do.[31] While there is inevitably overlap between the two topics, Property and Constitutional Law are entirely different areas of the law. An editor might limit their explanation of the cases' key facts to those that

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22. *Kelo*, 545 U.S. at 478-79.

23. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057.

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

25. Ilya Somin, *Will Connecticut Finally Enact Meaningful Eminent Domain Reform?*, VOLOKH CONSPIRACY (Apr. 23, 2019, 11:34 PM), https://reason.com/volokh/2019/04/23/will-connecticut-finally-enact-meaningful-eminent-domain-reform/ [https://perma.cc/V6P9-5PBS].

26. Matthew J. Frank & Mark David Hall, *Supreme Failures from the Court*, L. & LIBERTY (Jan. 26, 2023), https://lawliberty.org/supreme-failures-from-the-court/ [https://perma.cc/XYJ9-ECW8].

27. Fletcher, *supra* note 14, at 189. The four Constitutional Law casebooks she uses are: ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (4th ed. 2013); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (4th ed. 2012) [hereinafter MASSEY CONSTITUTIONAL]; RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (9th ed. 2010); JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (Concise 13th ed. 2009) [hereinafter VARAT CONCISE].

28. CHEMERINSKY, *supra* note 27; MASSEY CONSTITUTIONAL, *supra* note 27, at 782; ROTUNDA, *supra* note 27.

29. VARAT CONCISE, *supra* note 27.

30. *Supra* note 28.

31. Fletcher, *supra* note 14, at 192. The three Property casebooks she uses are: JESSE DUKEMINIER ET AL., PROPERTY (8th ed. 2013); CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES (1st ed. 2012) [hereinafter MASSEY PROPERTY]; JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (5th ed. 2010).

were most relevant to the Court's analysis of the doctrinal area covered by the casebook. For example, in *National Federation of Independent Business v. Sebelius*,[32] the Supreme Court ruled that the Individual Mandate of the Patient Protection and Affordable Care Act[33] was unconstitutional under the Commerce Clause,[34] but was constitutional under the Taxing and Spending Clause.[35] While *Sebelius* might warrant citation in either a Constitutional Law casebook or a Tax Law casebook, one might expect the Constitutional Law casebook to contain more significant coverage of the Court's Commerce Clause analysis than one would expect from the Tax Law casebook.[36] Even if the search proves fruitless, it is at least worth investigating whether there is a difference in the ways that a case is edited across multiple disciplines.

While both Property and Constitutional Law have the general goal of teaching students the law of a subject, they have entirely different goals in terms of content for students and methodologies for accomplishing those goals. The Multistate Bar Examination (MBE) Content Scope Outlines may offer a helpful framework that provides some (imperfect) empirical support for this intuition, since both classes teach material that is tested heavily on the widely adopted MBE.[37] The different ways that the Multistate Bar Exam organizes its topics for Constitutional Law and Property offer some insight into the different goals each class has for teaching its students.

The MBE subject outline breaks Constitutional Law into four distinct topics.[38] Three of those include judicial review, separation of powers, and the relationship between nation and states in a federal system.[39] The fourth topic (which constitutes 50 percent of Constitutional Law questions on the MBE) addresses individual rights. Here is the content outline for individual rights:

IV. Individual rights
- A. State action
- B. Due process
  - 1. Substantive due process
    - a. Fundamental rights
    - b. Other rights and interests
  - 2. Procedural due process
- C. Equal protection

32. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

33. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10106(b)-(d), 124 Stat. 119, 909-10 (2010) (codified as amended at 26 U.S.C. § 5000A).

34. *Sebelius*, 567 U.S. at 588 (finding the individual mandate unconstitutional under U.S. CONST. art. I, § 8, cl. 3.).

35. *Id.* (finding the individual mandate constitutional under U.S. CONST. art. I, § 8, cl. 1.)

36. I acknowledge this is a hypothetical example rather than one demonstrated by analysis of Constitutional Law and Tax Law casebooks, and that this characterization of possible editorial decisions may be incorrect.

37. NAT'L CONF. BAR EXAM'RS, MBE SUBJECT MATTER OUTLINE (2020).

38. *Id.* at 1-2.

39. *Id.*

1. Fundamental rights
2. Classifications subject to heightened scrutiny
3. Rational basis review

D. Takings

E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws

F. First Amendment freedoms

1. Freedom of religion and separation of church and state
    a. Free exercise
    b. Establishment
2. Freedom of expression
    a. Content-based regulation of protected expression
    b. Content-neutral regulation of protected expression
    c. Regulation of unprotected expression
    d. Regulation of commercial speech
    e. Regulation of, or impositions upon, public school students, public employment, licenses, or benefits based upon exercise of expressive or associational rights
    f. Regulation of expressive conduct
    g. Prior restraint, vagueness, and overbreadth
3. Freedom of the press
4. Freedom of association [40]

Takings, which would include cases like *Kelo*, is a viable topic for testing. However, that topic is given nowhere near as much nuance or explanation as due process, equal protection, or First Amendment freedoms. This likely reflects the more extensive jurisprudence of the non-takings topics, but as evidenced below, there are multiple different aspects of takings claims that can dramatically affect the cases considered and the legal concepts demonstrated. Regardless of the reason, takings feels comparable to state action or the general "Other Protections" clause—relevant, but as seen below, some of the first things to get cut in Constitutional Law coverage. Takings feels like it is included as an afterthought.

Real Property[41] does not cover *Kelo*, but in a way that makes its exclusion feel peculiar. Topic II of the Property content scope outline, "Rights in real property," has a section, "D. Zoning (fundamentals other than regulatory taking),"[42] that feels like such a natural fit for the topic that it must specifically

40. *Id.* at 2.
41. *Id.* at 6-7.
42. *Id.* at 6.

state that it is not included. The entire Real Property outline reads as more of a transactional document than the Constitutional Law outline. Its five major topic areas each receive approximately equal coverage and include questions of types of ownership, real estate contracts, mortgages, and titles.[43] Even its section dedicated to property rights emphasizes how things like a restrictive covenant are made rather than what the purpose of a restrictive covenant is.[44] The emphasis is on the realities of its doctrine and practice rather than more theoretical topics like those covered in Constitutional Law.

Even if the difference between doctrines fails to produce any easily identifiable or obviously relevant distinction between the two, the different organization of the information can have pronounced effects on the apprehension and interpretation of law. If nothing else, it is worth investigating whether editors make different editorial decisions when editing a case for a Property casebook instead of a Constitutional Law casebook. Although the case that Fletcher used[45] demonstrated her point by showing visible differences in the "key" facts reported by the various casebooks, using a different case leaves the notion that different doctrines reflect the case differently from one another unexplored.

B. Defining "Bias"

Fletcher's point in evaluating these casebooks for bias is heavily informed by the pedagogical responsibilities of law librarians. Principle III of the American Association of Law Librarians' *Principles and Standards for Legal Research Competencies* states, "A successful legal researcher critically evaluates information."[46] The version of these standards published in 2013 listed evaluating information and material under the criteria of "authority, credibility, currency, and authenticity" as a competency under this principle.[47] The current version of these competencies, updated in April of 2020, added two additional criteria, "relevance and bias."[48]

There is nothing wrong with the word bias. It seems to be the most concise and accurate term for the phenomenon that she is describing. It also provides a valuable reason to examine how casebooks are written for both professional reasons and to shed light on important modern political questions. For example,

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43. *Id.* at 6-7.

44. *Id.* at 6.

45. Shelley v. Kraemer, 334 U.S. 1 (1948) (finding that the judicial enforcement of racially restrictive covenants qualifies as discriminatory state action prohibited by the Fourteenth Amendment).

46. AM. ASS'N OF L. LIBR., PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCIES 3 (2013), https://www.aallnet.org/wp-content/uploads/2017/12/AALL2013 PrinciplesStandardsLegalResearchCompetencyPrint.pdf [https://perma.cc/SB6L-P5UX].

47. *Id.* at 8.

48. AM. ASS'N OF L. LIBR., PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCIES 4 (2020).

the Association added relevance and bias in 2020, a month after the World Health Organization began referring to the COVID-19 pandemic as a pandemic.[49] The COVID-19 pandemic stood apart from other health scares due to the early, constant, and persistent misinformation regarding the virus.[50] This misinformation was often presented on social media (and occasionally by public officials)[51] alongside correct or more reliable information, making it more efficient to evaluate claims by content rather than source.[52] The reference to "relevance and bias" as a part of information literacy includes content analysis where the prior definition did not.

The issue here is that Fletcher leaves the term "bias" undefined in a way that opens the door for miscommunication. Merriam-Webster defines bias as "an inclination of temperament or outlook."[53] This definition has no inherently political dimension to it. However, there is a real danger that when one uses the word "bias," they implicitly mean "political bias."[54] Fletcher, who couches her conversation of bias in contemporary politics, does this herself. For example, her first paragraph directly addresses former President Donald Trump and presents a political dichotomy by noting that "[t]he popular literature is unsure if the media is biased toward liberalism or conservatism, and scholarly authors seem unable to reach definite conclusions in the matter."[55] While she may refer to multiple types of bias in the article, the distinction between political and other forms of bias should be made explicit.

I will add a word noting the type of bias present where appropriate. For example, two of the Constitutional Law casebooks arguably demonstrate political bias in their editorial decisions. However, there are other forms of bias that may be less charged than political bias. These types of bias may be read as

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49. Tedros A. Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/5EN9-P3LR].

50. *See* Taylor Nelson et al., *The Danger of Misinformation in the Covid-19 Crisis*, 117 MO. MED. 6, 510 (2020); Tiffany Hsu, *As Covid-19 Continues to Spread, So Does Misinformation About It*, N.Y. TIMES (Dec. 28, 2022), https://www.nytimes.com/2022/12/28/technology/covid-misinformation-online.html [https://perma.cc/5R8Y-HVMN].

51. For example, Congresswoman Marjorie Taylor Greene was banned from Twitter for spreading COVID-19 misinformation. *See* Davey Alba, *Twitter Permanently Suspends Marjorie Taylor Greene's Account*, N.Y. TIMES (Jan. 2, 2022), https://www.nytimes.com/2022/01/02/technology/marjorie-taylor-greene-twitter.html [https://perma.cc/F5F4-V4LJ].

52. Hsu, *supra* note 50 ("'Pre-Covid, people who believed in medical misinformation were generally just talking to each other, contained within their own little bubble, and you had to go and do a bit of work to find that bubble[.] . . . But now, you don't have to do any work to find that information—it is presented in your feed with any other types of information.'").

53. *Bias*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/bias [https://perma.cc/3LHS-KUT6] (last visited Oct. 7, 2023).

54. I received numerous comments while writing this paper challenging the use of the loaded term. An earlier draft of this article emphasized political realities that, while indirectly relevant, ultimately diluted the article's focus and message.

55. Fletcher, *supra* note 14, at 1.

the editor's point of view. For a less charged example of bias, recency bias is a cognitive bias to place more weight on recent experiences than older ones when estimating future events.[56] Its antonym, primacy bias, emphasizes the first pieces of information that people received over those that they encountered later.[57] One might argue that American legal thought (and perhaps the law more generally) demonstrates either of these biases.[58] While either claim may have political implications, neither is inherently political bias.[59] These political implications might be worth investigating further, but they are not essential at this early stage in the interpretive process.

C. Acknowledging the Message's Existence Without Acknowledging Its Content

My most significant departure from Fletcher's approach is to focus on the content of the bias conveyed by editorial choices rather than the mere existence of that bias. While Fletcher makes a compelling case that textbook authors have various biases that significantly affect the content and message their textbook conveys, she does not examine what that message is. As she explains,

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56. Robert B. B. Durand et al., *Behavioral Biases in the NFL Gambling Market: Overreaction to News and the Recency Bias*, 31 J. BEHAV. & EXPERIMENTAL FIN. 100522 (2021) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861231 [https://perma.cc/H7QR-NKQG].

57. Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCH. Q. 285, 286 (1983).

58. For examples of articles accusing the legal world of recency bias, see Chance Meyer, *Law Schools Need Improvement Science, Now More Than Ever*, 51 SYLLABUS 9, 10 (2022) (criticizing the customary approach to a new law school challenge by stating, among other things, that "recency bias is common."); Eric Segall, *Recency Bias and the Supreme Court as a Broken Institution*, DORF ON LAW (Apr. 11, 2022), https://www.dorfonlaw.org/2022/04/recency-bias-and-supreme-court-as.html [https://perma.cc/225B-VMN4] ("Recency bias has played a large role in the thinking of Court watchers that we are in more difficult times than ever when it comes to the Justices' decisions."). For an example accusing the legal world of primacy bias, see Matthew I. Fraidin, *Heuristics, Cognitive Biases, and Accountability: Decision-Making in Dependency Court*, 90 CLEV. ST. L. REV. 913, 944 (2013) ("Judges in family court likely are susceptible to a cognitive bias described as the 'primacy effect.'").

59. For an example of recency bias having some effect on politics, see Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 545 (2010) ("Political scientists have found that voters pay closer attention as the election draws near and posit a 'recency bias' (the 'what have you done for me lately' phenomenon), where voters weigh more heavily their representatives' recent actions, in response to which politicians seeking re-election attempt to accomplish more for their constituents toward the end of their terms."). For an example of primacy bias having some effect on politics, see Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773 (2012) (arguing that, although partisan judicial elections are flawed because prior knowledge of party affiliation can overwhelm consideration of judicial ability, such elections are superior to straight-ticket voting because the voter is given opportunity to challenge prior biases).

> It is not necessary for law librarians to determine and teach students whether the biases of casebook authors skew "liberal" or "conservative." The point is that the standards for information literacy call for students themselves to be able "to evaluate . . . point of view or bias."[60]

It is not a librarian's job to provide a list of "conservative" and "liberal" textbooks, but failing to engage with the message conveyed by a text at all will leave students unable to identify subtle biases among reliable sources in any meaningful way. Most of the factors listed within the standards point to comparatively discreet information—"reliability, validity, accuracy, authority, relevance"—that can be easily and quickly identified.[61] These five factors can be understood as information literacy, which is a concept closely associated with librarianship. The ability to evaluate a point of view or bias, while a component of information literacy, requires deeper and more subjective analysis that taps into a distinct, but closely related, concept—media literacy.

1. Defining Information Literacy and Media Literacy.—Information literacy is an aspect of librarianship that has become a major part of modern discourse, and this is reflected in its inclusion within the American Bar Association's Standards and Rules of Procedure as a required topic of legal instruction.[62] While a precise definition of information literacy is elusive, the following is a useful working definition:

> Information literacy is the set of integrated abilities encompassing the reflective discovery of information, the understanding of how information is produced and valued, and the use of information in creating new knowledge and participating ethically in communities of learning.[63]

The American Association of Law Libraries' *Principles and Standards for Legal Research Competencies* includes an information literacy-like obligation for evaluating legal informational material under criteria of "authority, credibility, currency, authenticity, relevance, and bias."[64]

Media literacy is a more nebulous concept than information literacy that has evolved in both definition and public interest over recent years. One commonly cited definition comes from the 1992 Aspen Media Literacy Leadership Institute, which defined media literacy as "the ability to access, analyze,

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60. Fletcher, *supra* note 14, at 201.

61. AM. ASS'N OF L. LIBR., *supra* note 48, at 4.

62. AM. BAR. ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023 43 (2022).

63. ASS'N OF COLL. & RSCH. LIBRS., FRAMEWORK FOR INFORMATION LITERACY FOR HIGHER EDUCATION 3 (2015).

64. AM. ASS'N OF L. LIBR., *supra* note 48, at 4.

evaluate, and create media in a variety of forms."[65] "It is a broadened definition of literacy that includes media beyond text and promotes curiosity about the media we consume and create."[66] The Center for Media Literacy, an educational organization "[d]edicated to promoting and supporting media literacy education as a framework for accessing, analyzing, evaluating, creating and participating with media content,"[67] has expanded its definition:

> [Media literacy] provides a framework to access, analyze, evaluate, create and participate with messages in a variety of forms – from print to video to the Internet. Media literacy builds an understanding of the role of media in society as well as essential skills of inquiry and self-expression necessary for citizens of a democracy.[68]

Media Literacy Now, another educational organization dedicated to increasing media literacy education in public schools, offers its own definition of the concept:

> Media literacy is the ability to:
> - Decode media messages (including the systems in which they exist);
> - Assess the influence of those messages on thoughts, feelings, and behaviors; and
> - Create media thoughtfully and conscientiously.[69]

In short, media literacy involves the skills necessary to take information and derive conclusions and meaning from it, rather than the ability to know discrete pieces of information. It is worth knowing that a textbook conveys a message, but it is the equivalent of knowing that a conversation occurred with no knowledge of what the participants talked about. My inquiry is an attempt to figure out what the conversation entailed and demonstrate how others might pursue a similar analysis.

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65. *Media Literacy: A Definition and More*, CTR. FOR MEDIA LITERACY, https://www.medialit.org/media-literacy-definition-and-more [https://perma.cc/2D4E-ZPVH] (last visited Feb. 6, 2023).

66. Mary Kate Lonergan, *What Is Media Literacy and How Can Simple Shifts Center It*, PBS TCHR. LOUNGE (Oct. 28, 2022), https://www.pbs.org/education/blog/what-is-media-literacy-and-how-can-simple-shifts-center-it [https://perma.cc/F38E-RQK7].

67. *About CML*, CTR. FOR MEDIA LITERACY, https://www.medialit.org/about-cml [https://perma.cc/TZM5-5E4P] (last visited Oct. 6, 2023).

68. *Media Literacy: A Definition and More*, *supra* note 65.

69. *What is Media Literacy?*, MEDIA LITERACY NOW, https://medialiteracynow.org/what-is-media-literacy/ [https://perma.cc/5TRF-B5BB] (last visited Feb. 6, 2023).

III. TREATING CASEBOOKS AS ART

The shift from information literacy to media literacy has an underlying current in changing how those assessing legal materials consider those cases. "Information" suggests objectivity. Many definitions of information emphasize things like "facts" or "data."[70] There is such a thing as good information—information that is correct—and bad information—information that is wrong. Legal documents like casebooks aspire to this objectivity to present the law as it was decided and leave it to the reader to respond to those facts.

While media[71] can be related to information (since people use media to communicate information broadly), it can also communicate less clearly defined concepts, such as emotions, perceptions, or general concepts. This makes the analysis of media an inherently more subjective exercise. If "good" media and "bad" media exist at all (a subject of considerable and long-standing debate),[72] the analysis will emphasize the content of the message conveyed and the effectiveness in conveying that message.[73] These sorts of questions are typically the purview of art critics rather than attorneys.

In essence, I encourage the reader to engage with legal casebooks (and perhaps legal documents and the law more generally) as art. While this approach may be novel, it is not unprecedented. Pierre Schlag articulated a "description of those recurrent forms that shape the creation, apprehension, and identity of the law," which he identified as "aesthetics."[74] Schlag's definition of aesthetics explicitly rejected the ethical and moral issues with "the disturbing possibility that law paints its order of pain and death on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas." [75]

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70. For example, one definition of the word given by Merriam-Webster is simply "Facts, Data." *Information*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/information [https://perma.cc/NE72-A24M] (last visited Oct. 8, 2023). Another from the Oxford English Dictionary defines information as "Knowledge communicated concerning some particular fact, subject, or event." *Information*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/information_n?tab=meaning_and_use#416073 [https://perma.cc/8MA8-3VRC] (last visited Oct. 8, 2023).

71. Here meaning "[t]he main means of mass communication, *esp.* newspapers, radio, and television, and (from the later 20th century) content accessed via the internet, regarded collectively." *Media*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/media_n2?tab=meaning_and_use#37520622 [https://perma.cc/XSW4-BAUL] (last visited Oct. 8, 2023).

72. *See, e.g.*, A.H. Hannay, *Is Art Subjective?*, 48 PROC. ARISTOTELIAN SOC'Y 29, 29 (1947–48) ("Popular discussions about art almost invariably centre on the question of the relativity of taste, and there is usually a tendency to admit that there is no objective rightness or wrongness in art.").

73. It is worth pointing out that information can be considered better or worse based on how clearly it is communicated. Even then, incorrect information clearly communicated would still be bad information while correct information communicated poorly could conceivably become good information if properly presented or interpreted.

74. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049, 1051 (2002).

75. *Id.* at 1050.

However, he acknowledged the clear connection between the study of aesthetics and the study of art.[76] As evidenced below, this concern with an overly abstract and amoral approach to the law is not entirely unwarranted. Ronald Dworkin offered a more explicitly artistic example when he compared a judge deciding a case informed by past precedent to an author writing a chapter as part of a chain novel in which several authors take turns writing chapters informed by each previously written chapter in the hope of creating a single cohesive document.[77] As the tools of law move online and presentation beyond traditional hierarchically arranged text becomes more common, a more aesthetic understanding of the law is essential to its research, instruction, and application.[78]

While one might reject the notion that law, as it presents itself in the real world and art, are the same,[79] that line blurs when faced with a creative work describing the law. Dworkin's example fits that act of writing a casebook perfectly, so long as the reader replaces the judge with the casebook editor who is more interested in accurately reflecting reality than shaping a better one. The way that casebooks are written, which are typically "opaque"[80] and deliver information in "small drips"[81] so that students are forced to learn doctrine by analyzing a text, actively encourage students to engage in interpretation to understand what the proposed reality even is. As Matthew Butterick argued in *Typography for Lawyers*, "The substance-presentation distinction has always been a false dichotomy, because the two overlap."[82] If a choice as simple as the type of font used can change the message conveyed by a casebook, a choice as complex as how to edit and present a case and whether to include a case at all can certainly change a casebook's message.

While it is far beyond the scope of this article to explore all aspects of art criticism, here are a few artistic concepts that will clarify the casebook analysis moving forward.

A. The Audience

The first concept is one that will likely be familiar to most readers—that what information a work conveys, and how it organizes and conveys that

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76. *Id.* at 1049-50.

77. RONALD DWORKIN, LAW'S EMPIRE 228-38 (Hart 1986).

78. Sam Williams, *The Aesthetics of Legal Research*, 41 LEGAL REFERENCES SERV. Q. 1, 3 (2022).

79. For one example, see J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663 (2010).

80. KENT C. OLSON, LEGAL INFORMATION: HOW TO FIND IT, HOW TO USE IT 58 (1999).

81. *Id.*

82. MATTHEW BUTTERICK, *Why Does Typography Matter?*, in TYPOGRAPHY FOR LAWYERS (2d ed. 2015); *see also* Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ASS'N LEGAL WRITING DIRS. 87 (2010) (arguing that the narrative of an argument in a case can be strengthened or weakened by use of fonts that align with the narrative conveyed).

information, will differ wildly based on the writer's intended audience. Numerous legal writing books emphasize this point.[83] Part of law is the art of persuasion,[84] and it is essential to know whom one is trying to persuade to effectively persuade them. Most readers likely already understand this point, at least as applied to writing intended to persuade (such as a brief or an academic article).[85] They also likely understand how content is written to inform also changes based on the perceived knowledge and abilities of those it is meant to inform.

However, this observation carries several implications that may be less intuitive to most readers. The first is that a reader does not passively receive information, but instead apprehends that information by engaging with the text. When a reader engages with a text, it is a conversation between the writer, who communicates with the reader through the text, and the reader, who interprets the text. That act of interpretation is not a passive one. A reader injects their own experiences and biases into their understanding of a text. One must understand both participants in that conversation to understand the message conveyed.

If media literacy requires both an interpreter and a text to interpret, what interpreter should be given priority when assessing a work's meaning? One approach would be to consider multiple possible perspectives and characterize how they might respond to a text. For example, in her feminist analysis of a Contracts casebook, Mary Joe Frug "describe[d] a variety of possible casebook readers in order to create a shared sense of readers and their attitudes towards gender."[86] Frug then included explanations of how these different readers—including such characters as "The Feminist," "The Reader with a Chip on the Shoulder," and "The Innocent Gentleman"—would respond to the material covered by the text.[87]

While Frug's rightly celebrated work is an exhaustive and insightful example of what a detailed analysis of a single casebook can reveal, her approach is different from that of this article.[88] For my purposes, it is neither necessary nor desirable to create a caricature of students or colleagues to derive

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83. *See, e.g.*, WAYNE SCHIESS, WRITING FOR THE LEGAL AUDIENCE (2d ed. 2014); CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS (3d ed. 2020) (chapter 19, entitled "The Transition from Objective to Persuasive Writing," specifically calls attention to the importance of a new audience); KAMELA BRIDGES & WAYNE SCHIESS, WRITING FOR LITIGATION (2011) (which addresses the distinct audiences for numerous types of legal documents, including complaints, demand letters, jury instructions, and motions).

84. *See, e.g.*, JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES (2d. ed. 2022).

85. COUGHLIN, ET AL., *supra* note 83. That chapter 19 is entitled "The Transition from Objective to Persuasive Writing" indicates that the first eighteen chapters deal largely for objective writing.

86. Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. UNIV. L. REV. 1065, 1066 (1985).

87. *E.g.*, *id.* at 1070-74; *id*. at 1081.

88. For example, she focuses a casebook's structural details and content inclusions more than the case-by-case editorial decisions considered here. She also approaches the text from a different viewpoint than I do (although not necessarily one that I disagree with).

meaning from the editorial decisions made in these casebooks. However, it should not merely be implied that the readings below are heavily informed by my own experiences and biases.[89] Living within the legal profession for ten years can change my biases from those of a first-year law student who is more likely to read a casebook. It is also entirely possible that another reader would draw very different conclusions from these texts. One of those conclusions may be that they convey no message, that the search for meaning within these decisions is "reading too much into it." This conclusion is an act of interpretation itself, one that makes a tremendous amount of effort to remove messages that the text conveys. Not having a take on the text is a take itself, one that presumes neutrality and objectivity while emphatically reinforcing numerous deeply ingrained messages and biases.[90]

The importance of the individual reader in deriving meaning from a text also means that a work's meaning may change based on the audience that it is intended for and the audience that reads it. I examine casebooks instead of their accompanying teacher's manuals because those are different texts written for a different audience. I am most interested in the messages that casebooks convey to their students. While teacher manuals might affect that meaning by informing how the material is discussed in class or assigned, it offers another level of interpretation—the instructor reading it—that dramatically complicates the narrative. With that said, a reader more interested in a "deep dive" into their casebook would likely benefit from applying the same analysis to the teacher's manual.

B. Death of the Author

The importance of the reader in the process of discovering meaning implies another observation from the art world—that the author does not have the final word on what their work means. In his 1967 essay *The Death of the Author*, French literary critic Roland Barthes argued that the author's intentions and biography were less important in discerning a text's meaning than each reader's interpretation of the text.[91] First, there is a serious question about who an author even is. Barthes challenged the notion of a human author (specifically the primacy of that author's vision and desires in interpretation), a distinctly modern creation that owed its existence to the social movements and individualism of empiricism, rationalism, and reformation.[92] He instead characterized a text as a

89. For one factor differentiating this analysis from Frug's, I am male instead of female, making me more like the characters described by Frug than the author performing the analysis.

90. For an example of a scholar arguing a similar point, see Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) ("These decisions about what or how we teach are not neutral, objective, or apolitical. They are decidedly political, and they have consequences for the shape of the profession and law.").

91. Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., Fontana 1977).

92. *Id*. at 142-43.

nebulous collection of influences simply transcribed by a scriptor.[93] Even allowing for a discernible human creator whose intent could be divined, most (if not all) projects involve some level of collaboration that makes the identification of a single creator impossible. For a modern example, while there is a tendency to credit a film's creation to its director,[94] film is a creative medium that is the product of input from dozens, if not hundreds, of people.[95] At a smaller (and perhaps more relatable) scale, if a book has an editor and an author, to read the editor out of the text denies a key creative force behind it.[96] Second, even if an author or set of authors can be clearly identified, it is impossible to detect what exactly that author intended.[97] While it risks overstating the case to say that the author is dead (especially in light of some author-centric analysis below), the value of the author's intent and interpretation of their own work should be given limited weight in textual analysis.

The Death of the Author is a deeply influential work that I have only superficially characterized here.[98] Even this superficial characterization offers some insights into the casebook analysis below. First, in order to kill the author, the reader must notice an author who has either deliberately or accidentally obfuscated their role in creating the text. While casebooks are credited to their editors, within the text of the book itself individual opinions cite the judge who is credited with writing the opinion.[99] A reader must understand that they are reading and interpreting a text that has already been read, translated, and

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93. *Id.* at 145.

94. For instance, the "auteur" theory (which was adapted from French film criticism and literally translates to "author" theory) is a tool of film criticism that identifies how unique filmmakers leave a unique stamp on their work, despite filmmaking's collaborative nature. *See* Peter Wollen, *The Listmaker*, SIGHT & SOUND, Nov. 1998, at 30 (book review).

95. One need only look to the credits of a motion picture to see how many people were involved with a single production. According to one blog post, an average of 500 people are involved in the creation of a film. *See* Pete Briley, *How Long Does It Take to Make a Movies? The Ultimate Guide*, MUSIC GATEWAY (June 7, 2023), https://www.musicgateway.com/blog/filmmaking/how-long-does-it-take-to-make-a-movie# [https://perma.cc/9ED4-JQVS].

96. *The Death of the Author* is a translation of the French title *La mort de l'auteur*, which is a play on LE MORTE D'ARTHUR, the Anglo-Norman French translation of "The Death of Arthur." *See* SIR THOMAS MALORY, LE MORTE D'ARTHUR (A.W. Pollard 1903). LE MORTE D'ARTHUR is a collection of the numerous tales told about King Arthur, Camelot, and other figures of Arthurian legend. The collection was compiled, edited, and curated by Sir Thomas Malory. Due to the diffuse sources that contributed to the work, biographical analysis of the text is impossible and pointless. As one helpful colleague noted, the editor's touch might be *very* light, but as evidenced below, even a light touch can meaningfully affect the interpretation of a text.

97. For an introduction of this concept that predates but is somewhat complimentary to Barthes, *see* William K. Wimsatt & Monroe Beardsley, *The Intentional Fallacy*, 54(3) SEWANEE REV. 468 (1946) ("[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art.").

98. For a detailed explanation of the term's history and place in philosophical discourse, see Elton Fukumoto, *The Author Effect after the Death of the Author: Copyright in a Postmodern Age*, 72 WASH. L. REV. 903 (1997).

99. For examples, see the aforementioned casebooks, *supra* notes 27, 31.

interpreted by an editor in order to produce their own informed interpretation of the text.

A second takeaway from *The Death of the Author* for these casebooks is that the reader is not bound by the intent of editor. There is significant evidence that even the most intelligent people are oblivious to their own biases.[100] Those biases might not be apparent until one encounters someone who does not have those biases or has their own conflicting ones. While the author's intent might help the reader to interpret the work, it is one tool of many that can inform analysis. This means that while the author's intent may not be an essential aspect of interpretation, the identity of the author may be relevant in discerning (or providing additional evidence of) an interpretation of the text. The author's intent is relevant, but it is far from dispositive.

Disentangling an author's intent from the message conveyed by the book also allows the reader to analyze a message without engaging in armchair psychology. While an attentive reader might make inferences about the character of the casebook editor by the message that they convey, those inferences could easily be incorrect. The emphasis on the author's message, rather than the author themselves, keeps the analysis on the reader's relationship to the work. It is one thing to say that an author makes editorial decisions informed by their biographical details that change the message that they convey. It is another for a reader to recognize biases in another work that allow them to identify and examine their own biases, and perhaps change those biases and their impact on the world. The second of these options seems like the far more helpful one.

For a contemporary example of why breaking meaning free of the author's intent can be beneficial and even necessary, consider generative "artificial intelligence" such as Chat GPT. These programs work by creating a wide variety of typically creative work—including images and text—by learning the patterns and structure of input training data and then using that data to generate new materials that exhibit similar characteristics.[101] The application of the term "artificial intelligence" to these technologies is arguably something of a misnomer. Skeptics argue that they mimic text without any core understanding

100. HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 16 (updated ed. 2020) ("[O]ne of the many remarkable contradictions we see in [bias] research is that intelligent people with high self-esteem may be the most likely to develop blind spots about their biases."). The book also cites Philip G. Dodgson & Joanne V. Wood, *Self-Esteem and the Cognitive Accessibility of Strengths and Weaknesses After Failure*, 75(1) J. OF PERS. & SOC. PSYCH. 178 (1998), for the principle that people with high self-esteem may be less likely to internalize negative thoughts or ideas about themselves.

101. *See, e.g.*, Adam Pasick, *Artificial Intelligence Glossary: Neural Networks and Other Terms Explained*, N.Y. TIMES (Mar. 27, 2023), https://www.nytimes.com/article/ai-artificial-intelligence-glossary.html [https://perma.cc/C9TE-UT3L]; Andrej Karpathy et al., *Generative Models*, OPEN AI (June 16, 2016), https://openai.com/research/generative-models [https://perma.cc/5JPC-HVK5].

of what it is doing or talking about.[102] Evangelists contend that any intelligence that it possesses is entirely alien to human consciousness and cannot be easily understood.[103] The issue of "artificial intelligence" as a creative actor has already raised questions over things like copyright, which traditionally demands a human author of creative work.[104] Whatever one makes of this debate, the concept of bias in these generative artificial intelligence models is a widely recognized separate issue with the technology.[105] Bias exists and can have real consequences regardless of who the author is or if a text even has an author. To understand what those biases are and why they matter, readers must be able to interpret the text critically.

A third point is that interpretation is not always a conscious act. If the writer has an unconscious bias, the reader almost certainly does as well—it may just be a different bias. One might hope that a reader becomes more aware of their biases by recognizing them in another work. However, this process may take time, if it happens at all. That does not mean that an instinctive reaction to a work has no value for either its editor or an instructor. In the words of game designer Mark Rosewater, "Your audience is good at recognizing problems and bad at solving them."[106] Many teachers' first response to a persistent disconnect with their students amounts to the popular quote from *The Simpsons*: "Am I so out of touch? No, it's the children who are wrong."[107] There is an understandable tendency to focus on what baggage students are bringing into the conversation, which presumes a sort of neutrality and "correctness" to the professor's role in that conversation. When a person visits a doctor, the first thing the doctor does is ask how the patient is feeling. The patient is the expert on that specific topic (i.e., how they feel). The doctor's value comes from having the tools and knowledge necessary to interpret that feeling and find a solution.[108] When

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102. *See*, *e.g.*, Max G. Levy, *Chatbots Don't Know What Stuff Isn't*, QUANTA MAG. (May 12, 2023), https://www.quantamagazine.org/ai-like-chatgpt-are-no-good-at-not-20230512/ [https://perma.cc/56AY-TZ54].

103. For example, A.I. engineers have taken to comparing generative A.I. to "Shoggoths," horrors of undefinable alien intelligence created by author H.P. Lovecraft. *See* Kevin Roose, *Why an Octopus-like Creature Has Come to Symbolize the State of A.I.*, N.Y. TIMES (May 30, 2023), https://www.nytimes.com/2023/05/30/technology/shoggoth-meme-ai.html [https://perma.cc/AT23-54C8].

104. *See*, *e.g.*, Michael D. Murray, *Generative and AI Authored Artworks and Copyright Law*, 45 HASTINGS COMM. & ENT. L.J. 27 (2023).

105. *See*, *e.g.*, Drew Roselli et al., *Managing Bias in AI*, *in* WWW '19: COMPANION PROCEEDINGS OF THE 2019 WORLD WIDE WEB CONFERENCE 539-44 (Ass'n for Computing Mach. ed., 2019).

106. GDC, *'Magic: the Gathering': 20 Years, 20 Lessons Learned*, YOUTUBE (May 2, 2016), https://www.youtube.com/watch?v=QHHg99hwQGY&t=3472s [https://perma.cc/Z4NQ-A7G7] (beginning at 56:50). Rosewater also wrote and published a version of this presentation on the *Magic: The Gathering* website. *See* Mark Rosewater, *Twenty Years, Twenty Lessons-Part 3*, MAGIC: THE GATHERING (Jun. 13, 2016), https://magic.wizards.com/en/news/making-magic/twenty-years-twenty-lessons-part-3-2016-06-13 [https://perma.cc/8AFB-JF6J].

107. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast May 5, 1994).

108. GDC, *supra* note 106.

multiple readers consistently have the same reaction to a text, there is likely something about the text facilitating that reaction that the reader intuits but cannot fully articulate. When this situation occurs, it may be more helpful for the author (or, in this case, the teacher) to think of themselves as doctors helping a patient identify a problem rather than a teacher correcting a wayward pupil.

C. The Kuleshov Effect

A third artistic concept that might help clarify the casebook analysis is one borrowed from film criticism: the Kuleshov Effect. The effect is named for Lev Kuleshov, a film editor and theorist who perceived the ability of film to convey meaning through multiple images as the key to film's identity as a distinct art form.[109] Kuleshov's contention was that viewers drew more meaning from the interaction of two different images than they drew from either image in isolation.[110] To demonstrate this principle, Kuleshov edited a film in which footage of an actor alternated with footage of other material. The footage of the actor was the same each time, but when paired with footage of food, audiences read the actor's blank expression as hunger, while they read the actor's blank expression as sadness when paired with footage of a girl in a coffin.[111]

While this effect is an imperfect explanation of one aspect of evaluating these casebooks, it evokes an important organizational principle that informs these readings. When analyzing several different cases that have been organized into a single document with a cohesive narrative, the way that the topics are organized will inform how those individual cases are understood, even if the content remains the same. The Thirteenth Amendment of the United States Constitution, which ended slavery in the United States,[112] is cause for celebration and a national holiday.[113] The Thirteenth Amendment, which mostly prohibited slavery but allowed slavery or involuntary servitude ". . . as a punishment for crime whereof the party shall have been duly convicted," has been widely criticized as enabling and even encouraging criminal conviction.[114] No matter how accurately a source portrays the Amendment, that source will

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109. *Kuleshov Effect: Everything You Need to Know*, NASHVILLE FILM INST., https://www.nfi.edu/kuleshov-effect/ [https://perma.cc/9DL4-E8VF] (last visited Oct. 14, 2023).

110. GERALD MAST & BRUCE F. KAWIN, THE MOVIES: A SHORT HISTORY 176 (Allyn & Bacon 1996).

111. *Id.*

112. U.S. CONST. amend. XIII

113. Juneteenth National Independence Day Act, Pub. L. No. 117-17, 135 Stat. 287 (2021). For an example of the history behind the holiday, see Derrick Bryson Taylor, *Juneteenth: The History of a Holiday*, N.Y. TIMES (June 19, 2023), https://www.nytimes.com/article/juneteenth-day-celebration.html [https://perma.cc/TQ5F-BZKJ].

114. Ava DuVernay's award-winning documentary 13TH is a popular example. 13TH (Netflix 2016). For academic work dealing with this topic, see for example MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509 (2014).

read differently in the context of Constitutional Law, which would emphasize the primary purpose of the law, than it would in Criminal Law, which would emphasize its modern implications for punishment and enforcement.

The notion that *Kelo* makes more sense as a Property case than a Constitutional Law case is arguably an example of this—that *Kelo* will mean something different if it is introduced in the context of government power and individual liberties than it will in the context of ownership. As demonstrated below, placing *Kelo* in different sections of the book that address different aspects of constitutional law can significantly change the meaning that the reader draws from the case. The key takeaway is that the structure of the book and the case's location within the book can convey a message at least as clearly as the edits made within the case itself.

IV. ANALYZING THE INDIVIDUAL TEXTBOOKS

Now that the reader knows what I am doing and some of the rudimentary tools that I am using to do it, it is time to interpret the casebooks and determine what (if any) message can be divined from the editorial decisions that the casebook editors made.

Before analyzing the casebooks, readers should note that while I am using approximately the same data set (collection of sections of textbooks) as Fletcher, I am using a slightly different collection of material than she does. As noted above, I consider the case's location within the textbook while she does not. I also consider an additional Constitutional Law textbook that clarifies the editorial decisions identified by Fletcher. Finally, I use an entirely different case than she does for the Property textbooks.

Those small changes help illustrate the important point that the examples below are not intended as any sort of definitive "bias analysis" for these or any other casebooks. The list is far too small to be exhaustive. The emphasis is also on a portion of a single case within textbooks containing hundreds. I deliberately minimize attempts to acknowledge how someone else might interpret the work. They are intended as seven examples of how a reader might derive meaning from an author's editorial decisions. Even if the sample size is too small to derive any universal understanding, it offers several insights into patterns of author bias worth noting and keeping in mind moving forward.

The following sections expand on Fletcher's observation by exploring her data set. I begin by discussing how the four Constitutional Law casebooks in question[115] present (or decline to present) *Kelo*—the case mentioned above in which the Court found that it was constitutionally permissible to take private property using eminent domain for the public purpose of economic development through private use. I then look at how the three Property textbooks that Fletcher

115. CHEMERINSKY, *supra* note 27; MASSEY CONSTITUTIONAL, *supra* note 27; ROTUNDA, *supra* note 27; VARAT CONCISE, *supra* note 27.

identified[116] treat *Kelo*. For each textbook, I describe how *Kelo* fits within the book's organization and describe the edits that the author makes in order to present *Kelo* in the way that best fits their understanding of their topic.[117] These observations are not intended as a definitive analysis of what these casebooks are and how they work, but rather as a demonstration of how one might interpret the story that each textbook tells about its topic and how that might shape student understanding of the topic overall.

A. Kelo *in Constitutional Law Casebooks*

In her article, Fletcher looks at the contents of four different Constitutional Law casebooks. These books are *Constitutional Law*, 4th edition, by Erwin Chemerinsky; *American Constitutional Law: Powers and Liberties*, 4th edition, by Calvin Massey; *Modern Constitutional Law: Cases and Notes*, 9th edition, by Ronald D. Rotunda; and *Constitutional Law: Cases and Materials*, concise 13th edition, by Jonathan D. Varat, William Cohen, and Vikram D. Amar.[118] The case that she picked to examine, which I reuse here, is *Kelo v. City of New London*.[119] I also include a fifth casebook, *Constitutional Law: Cases and Materials*, 13th edition, by Jonathan D. Varat, William Cohen, and Vikram D. Amar,[120] which is the complete edition of the concise edition Fletcher considers. This full edition *does* include *Kelo*, but in a way that helps to understand why the editors chose to omit the case in the concise edition.

1. Chemerinsky: Liberal Political Bias.—Erwin Chemerinsky addresses *Kelo* in his chapter discussing economic liberties.[121] That chapter also covers the Contracts Clause and, critically, a historical review of Economic Substantive Due Process that goes through the *Lochner*-era decisions and the post-1937 decisions that have largely rejected that earlier doctrine.[122] The *Lochner* era was a period in the early twentieth century during which the United States Supreme Court regularly struck down laws that infringed on economic liberty or private contract rights.[123] *Lochner* in particular has been widely criticized as "the

116. *See* Fletcher, *supra* note 14, at 190-91; DUKEMINIER ET AL., *supra* note 31; MASSEY PROPERTY, *supra* note 31; SINGER, *supra* note 31.

117. While I have attempted to describe the contents of each book clearly and concisely, I include a version of *Kelo* highlighting the text cited in each casebook in the Appendix.

118. Fletcher, *supra* note 14, at 189.

119. 545 U.S. 469 (2005).

120. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (13th ed. 2009) [hereinafter VARAT FULL].

121. CHEMERINSKY, *supra* note 27, at 698.

122. *Id.* at xviii-xix.

123. Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th Century*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 31 (Harvey Martin Jacobs ed., 2003). The era is named for *Lochner v. New York*, 198 U.S. 45 (1905), an infamous decision overruling a New York law setting maximum working hours for bakers as violative of the workers' freedom to contract under the Constitution's Fourteenth Amendment.

symbol, indeed the quintessence, of judicial usurpation of power."[124] Section D of Chemerinsky's chapter on economic liberties has four sub-sections: an introduction; a section asking what a "taking" is; a section asking if it is for "public use"; and a section discussing "just compensation."[125] Chemerinsky includes *Kelo* in sub-section 3, as the second of two cases discussing what a "public use" is.[126] The other, earlier case is *Hawaii Housing Authority v. Midkiff*, in which the Court ruled that using eminent domain to break up highly concentrated Hawaiian land ownership was a public service.[127]

Chemerinsky's edits emphasize the procedure and intention of the proposed development plan. It includes the first paragraph in its entirety, the first paragraph of Section I, and the majority of the second paragraph of Section I.[128] These quotations from Section I emphasize the dire economic state of the area and how the plan was designed to resolve that issue in its entirety. The facts that Chemerinsky omits went into detail about how the land being taken would be used as a part of that plan.[129] Chemerinsky's brief quotation of Section II describes the plaintiffs in short, sympathetic terms as proud homeowners who are being forced out exclusively because of their proximity to the project.[130]

The story that Chemerinsky tells through his editorial decisions is a cohesive one, but one that forces the reader to make several assumptions without realizing it. The chapter begins by describing how generalized economic rights as a limiting factor on government action is effectively a dead doctrine.[131] Rather than address these economic rights as a part of substantive due process, which he discusses in another chapter, he connects these discarded rights to other economic protections that are explicitly ensured by the Constitution. In doing so, he weakens those explicitly protected rights by association with a dead (and unpopular) doctrine.

Chemerinsky then describes what economic rights the Constitution does protect, spelling out the three components that a regulatory taking requires: (1) there is a taking, (2) it is for a public use, and (3) there is just compensation.[132] This analysis more closely resembles the Property outline, emphasizing the elements of a regulatory taking rather than saying broadly what the point of a regulatory taking is.[133] The facts of *Kelo* provided emphasize utilitarian

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124. ROBERT H. BORK, THE TEMPTING OF AMERICA 44 (1990). For examples, see BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 744 (6th ed. 2009) *(describing the case as "one of the most condemned cases in United States history.").*

125. CHEMERINSKY, *supra* note 27, at xix-xx.

126. *Id.* at xix.

127. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984).

128. CHEMERINSKY, *supra* note 27, at 698.

129. *See generally* Kelo v. City of New London, 545 U.S. 469, 473-75 (2005); *see also* the Chemerinsky-highlighted version of *Kelo* in the appendix.

130. CHEMERINSKY, *supra* note 27, at 699.

131. *Id.* at 623.

132. *Id.* at 658-710.

133. NAT'L CONF. BAR EXAM'RS, *supra* note 37, at 6.

considerations and treat the city's actions as several small components that function together as part of a cohesive whole.[134] The United States has a proud tradition of accomplishing policy objectives through private action, and this seems of a piece with other economy-stimulating efforts that are clearly constitutional.[135] With no free-standing property interests and a clearly stated public objective, this rationale appears logical, if not inevitable. It even relies on an instance where eminent domain was used to transfer privately held property to an economically disadvantaged racial minority, giving a more benign example of the same underlying doctrine in action.[136] While this specific instance might produce an unwanted outcome, it makes sense as a part of the cohesive whole with a unique ability to serve the public good.

I begin with Chemerinsky's book because it appears to offer an in-depth, favorable impression of *Kelo*. This is entirely consistent with Chemerinsky's public persona as a left-of-center legal scholar.[137] While there are less political biases considered below, it makes sense to begin with a clear political divide between casebook authors. Chemerinsky's book also makes relatively limited edits to the contents of the case, seemingly only leaving out facts about the specific uses of the land taken. The book is the least heavily edited of the Constitutional Law textbooks, but that limited editing makes its significant editorial decisions more subtle and harder to notice.

2. Massey: Conservative Political Bias.—Massey's book is broken into three broad parts: "The Role of the Courts in Constitutional Interpretation," "Enforcing the Constitutional Allocation of Government Power," and "Limits on the Use of Governmental Power."[138] One noteworthy feature differentiating Massey's book from others is that its primary emphasis is on the judiciary and its role in constitutional interpretation. While the book inevitably discusses the other branches of government (and all Constitutional Law casebooks do give the courts a key role), the key actor in all instances is the judiciary.

Massey addresses *Kelo* in the chapter titled "Economic Rights: The Takings and Contracts Clauses."[139] The chapter goes into some detail on the Takings Clause, considering the public-use Requirement, regulatory takings (or when a regulation becomes a taking), and conditional regulatory takings.[140] *Kelo* is

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134. *Kelo*, 545 U.S. at 473-75.

135. For a recent example, see The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), which was designed to counter the economy-depressing effects of the COVID-19 pandemic by providing funds to private individuals and corporations.

136. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

137. For examples of his other work supporting center-left legal causes, see ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010); ERWIN CHEMERINSKY WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022); ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021).

138. MASSEY CONSTITUTIONAL, *supra* note 27, at ix-xvii.

139. *Id.* at 606.

140. *Id.* at xix.

considered as part of the public-use requirement, again following *Hawaii Housing Authority v. Midkiff*.[141]

Massey's edited version of the case includes part of the majority opinion's introduction and a parenthetical summarization of the facts presented by the Court.[142] The edits to the introduction simplify the parties by referring to the city's development agent as "[The city]" and removing any reference to the other residents who voluntarily sold their land to the city.[143] The factual parenthetical mentions the city's economic history, but its emphasis is on the private uses to which the land in question will likely be used.[144] It quotes several individual features of the city's overall plan, including office space, new residences, parking lots, and retail space.[145]

Massey's story is one in which the Court has eroded constitutional protections into nothingness out of undue deference to state interests. He says as much in the opening paragraph of the chapter: "By judicial construction . . . these barriers to government invasion of economic interests have been much reduced."[146] His organization of the book is also instructive here. In his chapter exploring due process, Massey discusses "Economic Rights as the Substance of Due Process."[147] Massey differentiates the protection of economic due process (which he characterizes as wider-ranging) from those economic protections clearly described by the Constitution itself.[148] The section introducing the topic is titled "The Rise and Fall of Economic Rights as the Substance of Due Process," while the next section is titled "The Modern Revival: 'Privacy' Rights."[149] In essence, economic rights that were the core of due process during the *Lochner* era bear a close relationship to individual, non-economic rights of the modern era, while economic rights explicitly protected elsewhere in the Constitution are their own thing and have largely been interpreted by courts into meaninglessness. Even if the doctrinal takeaway is the same for both Massey and Chemerinsky (i.e., that there is limited meaningful protection against regulatory takings for private use rather than public use), there is a huge difference between one of many fallen economic rights and the Court's dereliction of duty on this specific protection.

The edited case fits within that narrative by allowing several dubious uses of the land by private actors with only marginal consideration of the government's goals or the processes the city took to ensure legitimacy. The discussion of the city's dire economic straits is very limited. While the edited opinion recognizes a government plan, it emphasizes individual uses of the

141. *Id.*
142. *Id.* at 606-07.
143. *Id.*
144. *Id.* at 607.
145. *Id.*
146. *Id.* at 601.
147. *Id.* at xviii.
148. *Id.* at 602.
149. *Id.* at 501, 514.

taken land rather than its role as a part of that plan or the processes taken to ensure its legitimacy.[150] The edited opinion's examples are also facially private, arguably ridiculous without context, and vaguely reflect upper-class interests rather than those of the working class.[151] The casebook concludes its discussion of the case by noting subsequent legislative and judicial rejection of the decision, presenting a story of the case in which the Court's abdication of its constitutional duty was so complete that other parties needed to take action to avoid disaster.[152]

Massey and Chemerinsky are worth addressing early since they clearly demonstrate the bias Fletcher observes. She asks the reader to "note that, if all the facts selected were significant, Chemerinsky and Massey chose almost a completely opposite set."[153] These opposing factual considerations lead to conflicting interpretations of the case. Where Chemerinsky's editorial decisions portray a more favorable impression of *Kelo*, Massey's decisions portray a more negative one. I characterize this as a conservative political position, as it was the liberals on the Court and swing Justice Anthony Kennedy who voted for the majority decision while the four conservatives on the Court voted against it. However, this is an un-nuanced characterization, primarily assuming that the left favors government action over property interests while the right favors property interests over government action.

It is also worth noting that by editing the case more aggressively than Chemerinsky did, Massey also makes his edits more visible than Chemerinsky's.[154] While this might be off-putting to those who perceive the law as more objective or neutral, the more explicit editorial decisions can also help readers appreciate law professors as third parties to a conversation rather than moderating forces.

3. Rotunda: Topic Bias.—Rotunda's book is organized in a similar manner to the other casebooks, with its most significant departure from other casebooks being a chapter on the state action doctrine.[155] He addresses *Kelo* in his chapter focusing on due process.[156] This places the case closer to where it was in Chemerinsky's book, among topics such as substantive due process, the incorporation of the Bill of Rights, the new procedural due process, and the Second Amendment.[157]

The casebook only includes one fully edited case in its consideration of taking by possession, *United States v. Causby*,[158] but includes descriptions of

150. *Id.* at 607.

151. For example, Massey emphasizes that many of the uses are for leisure activities. *Id.*

152. *Id.* at 612.

153. Fletcher, *supra* note 14, at 189.

154. See the appendix for a highlighted comparison using the original Supreme Court decision.

155. ROTUNDA, *supra* note 27, at xvii.

156. *Id.*, at xvi.

157. *Id.*

158. United States v. Causby, 328 U.S. 256 (1946).

Kelo and several other cases in its notes following that case.[159] *Causby* is a classic case relating to one of the questions posed by the other textbooks: did a taking occur when the government regularly flew aircraft at low altitudes over their land?[160] The notes summarize several cases in which unique facts did or did not constitute a taking.[161] Rotunda discusses *Kelo* in his final note, Note 7, specifying that it is a public-use question.[162]

Rotunda's explanation of the facts begins with its conclusion that "the city of New London's proposed taking of non-blighted homes in order to promote development that the City believed would increase the City's tax base qualifies as a 'public use' within the meaning of the Takings Clause."[163] The facts include the order of events—Pfizer's facility, the City's delegation of power to the New London Development Corporation (NLDC), the NLDC's purchases, and the petitioner's rejection.[164] Rotunda also gives one of his only full quotations to the majority opinion's acknowledgment that the properties were only being condemned because of their proximity to the project.[165] However, there are several quotations to parts of the opinion that consider the "[c]arefully considered" development plan as a part of "a whole greater than the sum of its parts."[166]

Rotunda's story is one that has room for *Kelo*, but only to the extent that it supplements his book's consistent interest in state action.[167] Rotunda considers these sorts of economic rights as an extension of the economic due process doctrine that died at the beginning of the century. He also treats the newer due process cases as something of a revival of the doctrine in a new form rather than as a new doctrine. The key is that neither of these editorial decisions connects to *Kelo*. Instead, *Kelo* is a note at the end of an extended analysis of whether government action constituted a taking.[168] This conceptually lines up well with his unique chapter on state action.[169] While takings and state actions are different doctrines, the core analysis is similar—does this government action fit within the definition of a vague constitutional term? This also helps to explain Rotunda using his few paragraphs on *Kelo* to describe the city's delegation of its power to a non-profit corporation.[170] A regulatory taking by a non-state actor might be

159. ROTUNDA, *supra* note 27, at 556-66.
160. *Causby*, 328 U.S. at 256.
161. ROTUNDA, *supra* note 27, at 559-66.
162. *Id.* at 565-66.
163. *Id.* at 565.
164. *Id.*
165. *Id.*
166. *Id.*
167. In the words of Mr. Peanutbutter, "Is my problem with women any movie directed by Christopher Nolan? Because, yes, women are involved, but it's never really about the women. It's about me." *See* Alejandro Margariños, *Bojack Horseman - Christopher Nolan Joke Scene*, YOUTUBE (Apr. 29, 2020), https://youtu.be/gfdRUjhz00U [https://perma.cc/65N8-SFHX].
168. ROTUNDA, *supra* note 27, at 565.
169. *Id.*
170. *Id.* at xvii.

an interesting wrinkle in the state action doctrine. Even if it is not, it is a small clarification that may stand out to an author who is particularly interested in the state action doctrine.

The bias here is less political than in other casebooks, but it may reflect a more omnipresent bias—law professors are likely to emphasize material that they write or have written scholarship about. This might be considered "topic bias," where a strong interest in a particular topic informs the analysis of other, unrelated topics. While the chapter discussing state action might serve a valid purpose within the work, it is the clearest departure from the content of other casebooks. It also emphasizes an area that Rotunda has written about at length.[171] A preoccupation with niche topics that alters (and possibly ignores) other, less niche topics (or topics of less abstract real-world consequence) is one way that a casebook editor can convey a message to a reader, whether intentional or not. That message, that the arcane machinations of the law are more important than the people that it governs, is far from value-neutral. Even if the description of that case is entirely accurate, a student might learn far more than the doctrinal holding of the case itself.

4. Varat et al.: Intellectual Novelty Bias.—The book by Varat et al. offers a unique opportunity because the casebook in question has two different versions to look through—the concise edition considered by Fletcher and the full edition.[172] While Fletcher correctly notes that the concise edition does not consider *Kelo* at all,[173] the full edition does in an interesting fashion.[174] This is the first casebook cited with more than one listed author. It is, therefore, entirely possible that this unique inclusion is a product of compromise among multiple voices. This is part of the reason that considering a casebook and its message detached from the biographical details of the authors or editors can help to clarify the message expressed by the material.

Varat et al. include *Kelo* in their chapter titled "The Due Process, Contract, and Just Compensation Clauses and the Review of the Reasonableness of Legislation."[175] This decision places just compensation in the immediate vicinity of *Lochner*-era court decisions under the label of "economic regulatory legislation," echoing Chemerinsky's topic organization.[176] While other due process topics are included in the chapter, they appear in different sections and are implicitly conceptually distinct.[177]

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171. *See, e.g.*, Ronald D. Rotunda, Runyon v. McCrary *and the Mosaic of State Action*, 67 WASH. U. L. Q. 47 (1989); Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935 (1975); Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court*, 55 ARK. L. REV. 795 (2003).

172. VARAT CONCISE, *supra* note 27; VARAT FULL, *supra* note 120.

173. Fletcher, *supra* note 14, at 189.

174. VARAT FULL, *supra* note 120, at 591-96.

175. *Id.* at xvii-xix.

176. *Id.* at 591-96.

177. *Id.*

Before describing the edits that the authors made to the case, it is important to note where *Kelo* fits within the book's edits. Subsection C begins on page 589 and begins with a paragraph describing topics covered in future subsections.[178] It then goes into an additional topic, which is the meaning of "public use."[179] The book notes that judicial scrutiny of the requirement has been quite limited, describing two cases where the requirement was read broadly.[180] It then goes into a more detailed discussion of *Brown v. Legal Foundation of Washington*, calling particular attention to a footnote in Justice Scalia's dissent.[181] Finally, on page 591, the authors begin a pages-long description, with significant excerpts, of *Kelo*.[182] This section then ends before going into a subsection on restrictions of property use, with no further commentary.[183]

The *Kelo* half-inclusion begins with a paragraph-long description of the case's facts.[184] The paragraph includes the reason for the State Action, including its economic depression and decreasing population.[185] It describes the city's delegation of planning to the NLDC, the role of the property as part of a greater plan, and the city's eventual delegation of eminent domain power to the organization.[186] It also identifies many of the uses of the property, with a collection of transparently private uses (including shops and restaurants, an urban neighborhood, and office space).[187] It also specifically details how most homeowners willingly sold, how fifteen residents declined to sell, and how four of the homes would be used for office space while eleven would be for park and marina support.[188]

The story of *Kelo* here is one of a noteworthy case that simply is not all that interesting. By looking at the table of contents, one would not even know that *Kelo* or the topic of whether a use was or was not public was in the book at all.[189] It is included within a chapter dominated by the rise and fall of economic due process, and with both the section on the Contract Clause and the section on the Just Compensation Clause[190] asking, "What Does It Add to Due Process,"[191] the answer is an emphatic "not much." The concise edition supports this

178. The topics are "what kind of government regulation affecting the use of property constitutes a 'taking' of it," "what constitutes 'property,'" and the "government's obligation in the event of a taking." *Id.* at 589.

179. *Id.* at 589-96.

180. *Id*. at 589 (those two cases are Berman v. Parker, 348 U.S. 26 (1954), and Haw. Hous. Auth., 467 U.S. at 229).

181. VARAT FULL, *supra* note 120, at 590; Brown v. Legal Found. Wash., 538 U.S. 216 (2003).

182. VARAT FULL, *supra* note 120, at 591-96.

183. *Id.* at 596.

184. *Id*. at 591.

185. *Id.*

186. *Id.* at 591.

187. *Id.*

188. *Id.*

189. *Id.* at xviii.

190. U.S. CONST. amend. V, cl. 4

191. VARAT FULL, *supra* note 120.

interpretation since it simply removes the sections of chapter nine relating to the Contract Clause and the Just Compensation Clause.[192]

The reader does get an interesting wrinkle in the casebook's factual inclusions, though. Its sprinkling of both public and private individual uses of the condemned property treats the city's plan as a complicated and cohesive one.[193] The specific mention of the division of the fifteen uses—eleven with a much stronger (if less explicit)[194] case for the use being public than the other four—continues this treatment.[195] While strict application of "public use" language would likely prohibit the plan, the practical analysis considered in all other cases makes a stronger case for allowing the use of eminent domain. There was a plan responsive to a city's goals with significant community buy-in, and the majority of those who rejected it had a much weaker case than the other four. The case warrants inclusion because its facts are noteworthy, but its legal elements simply are not.

Like the previously mentioned bias towards scholarship, this bias towards intellectual novelty over emotionally resonant cases or real-world impact may be an omnipresent bias worth acknowledging further. It is hard to criticize this instinct too heavily because making editorial decisions to make the law more accessible and interesting is precisely why casebooks exist. However, by making the law overly abstract, authors and professors run the risk of alienating their students. The law governs how people interact with one another. While the specific mechanisms through which government acts are interesting and worth theoretical exploration, the cases that professors use to instruct students can have profound effects on the lives of the people involved with those cases. Part of the reason *Kelo* resonated as much as it did was just *how* sympathetic the plaintiffs were, with plaintiff Susette Kelo's story inspiring a book in 2009[196] and a feature film in 2017.[197] Law instructors' instincts may be to emphasize the abstract law and figure out how it might apply to unique facts. This is not (necessarily) a bad instinct.[198] It is a vital skill for students to learn. But when

192. VARAT CONCISE, *supra* note 27, at viii. It is worth noting, however, that this did not foretell a change to come—the full 16th edition, published in 2021, contains *Kelo* in much the same way as the full 13th edition. *See* VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 534-39 (16th ed. 2021).

193. VARAT FULL, *supra* note 120, at 591.

194. The eleven petitioners were granted relief by the trial court while the four office space petitioners were not, due to the indefinite nature of the proposed use beyond generalized support for the marina and park. *See* Kelo v. City of New London, No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002).

195. VARAT FULL, *supra* note 120, at 591.

196. JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009).

197. LITTLE PINK HOUSE (Dada Films 2017).

198. This point strays dangerously close to the longstanding debate between formalism, or "[t]he theory that law is a set of rules and principles independent of other political and social institutions," *Legal Formalism*, BLACK'S LAW DICTIONARY (11th ed. 2019), and realism, or "the theory that law is based not on formal rules or principles but instead on judicial decisions deriving

making something real more abstract, it is important to be wary of making things too abstract. When a conversation on law is limited to students who have never practiced and faculty who have not practiced in years, if they have at all, the risk of becoming overly abstract becomes exponentially higher. That is even more true for topics like Constitutional Law than it is for more "grounded" disciplines like Property.

B. Property Textbooks

Fletcher considered three property textbooks in her article: *Property*, 8th edition, by Jesse Dukeminier et al.; *Property Law: Principles, Problems, and Cases*, by Calvin Massey; and *Property Law: Rules, Policies, and Practices*, 5th edition, by Joseph William Singer.[199] Her sample case that she studied for those textbooks was *Shelley v. Kraemer*, a United States Supreme Court decision that found that the Michigan state government denied members of a racial minority equal protection by enforcing restrictive covenants based on race against them.[200]

While this case offers some interesting insight that supports her broader point, I consider a different case for two reasons. First, as she notes, the different fact selections are "not as dramatically different as the facts selected in *Kelo* . . ."[201] Second, *Kelo* is as much a Property case as it is a Constitutional Law case, giving a unique opportunity to see if coverage of the case differed across disciplines. Given those two considerations, I use her collection of textbooks to consider differences in how the three textbooks cover *Kelo*. This section follows a pattern similar to the one considered above. All three casebooks cover *Kelo*, although all three are instructive in their unique use of the case. While the differences between casebooks are not as pronounced as they were in the Constitutional Law casebooks, there are still meaningful differences among the three that could dramatically affect understanding of the law. There are also meaningful differences between the three Property books and the four Constitutional Law textbooks that warrant some examination.

1. Dukeminier et al.: Status Quo Bias.—Jesse Dukeminier et al.'s casebook, *Property: Eighth Edition*, covers *Kelo* in its final chapter, "Eminent Domain and

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from social interests and public policy as conceived by individual judges, *Legal Realism*, BLACK'S LAW DICTIONARY (11th ed. 2019). I do not seek to resolve the debate here but note that to the extent the law school's mission is to teach students law that they will be tested on for the bar exam, any amount of realism that enhances student understanding of the law will be subservient to knowledge of the law itself.

199. Fletcher, *supra* note 14, at 192; *supra* note 31.

200. Shelley v. Kraemer, 334 U.S. 1 (1948).

201. Fletcher, *supra* note 14, at 192.

the Problem of Regulatory Takings."[202] *Kelo* is the only case fully reported in the section on public use.[203]

There are no visible edits in Dukeminier et al.'s treatment of the case beyond the ones one might expect for a casebook, such as cutting footnotes and counsel.[204] While other parts of the case are edited down (including a reduction of Justice Kennedy's concurring opinion to a parenthetical explanation),[205] the facts are included in their entirety and as described by the majority opinion.[206] The annotations following the case spell out that the doctrine is "in shambles," with subsequent notes pointing out that public use could mean either end or means when determining a public use, the inconsistent level of scrutiny applied in such cases, and the political aftermath of the case.[207]

There are a few different ways to read this mostly unedited facts section. The first is a desire to be as even-handed as possible—simply let the reader decide what matters most by including the facts in their entirety. The notes following the case could also be read this way: They include several different perspectives on the case, as well as subsequent developments that might be read favorably or unfavorably.

However, this seems unlikely given the role of facts in a case. The full adoption of the majority's description of the facts likely at least signals agreement that those are the facts that mattered to the Court. By emphasizing those facts emphasized by the majority, one could interpret this complete repetition of the facts as reported by the majority as support for the majority's opinion.

The story that this casebook tells is probably most in line with one suggested in the notes following the case—that the doctrine was largely unworkable and is best handed over to politically accountable actors.[208] While the commentary in these notes has points both in favor of and against *Kelo*, including the eventual fate of the land in question and how the expansive reading of the doctrine might conflict with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[209] the notes speak to a confusing doctrine with inconsistent application and an outcome that sufficiently shocked the conscience to warrant political action (which the Court had even suggested in its opinion). This section's heading refers to a status quo bias, which is a bias toward maintaining an existing situation rather than taking action that might change that

202. DUKEMINIER ET AL., *supra* note 31, at xxiv.

203. *Id.* Justice Thomas's dissenting opinion also appears in a footnote in the section discussing physical occupation and regulatory takings. *Id.* at 1161.

204. DUKEMINIER ET AL., supra note 31, at 1111-23. See also the highlighted version in the Appendix.

205. *Id.* at 1117-18.

206. *Id.* at 1111-12.

207. *Id.* at 1123, 1124-31.

208. The book attributes this opinion to Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 32, 98 (2005).

209. 42 U.S.C. §§ 2000cc-2000cc-5.

condition.[210] While this might be a fair characterization of the message conveyed here (as it reports the existing situation with no real alternative and offering no clear alternative path),[211] it is still somewhat different than reinforcing a message by accurately repeating it.

One key difference to note here is that Dukeminier et al. do not edit their cases nearly as extensively as any of the Constitutional Law textbook authors did.[212] This may have something to do with how the two disciplines treat cases. One reason could be that Constitutional Law case topics are argued with wider implications for society while Property presents the law as it is and leaves the reader/attorney to figure out what to do with it. The Property textbook structure, while clear, has less of a narrative. Property and its transfer get spelled out, and then there is a list of government actions that might affect or limit that ownership. This less narrative organization of the topic may inspire biases of its own. For example, by conceptualizing property as a creation of the government that is best characterized as a bundle of rights, the validity of property as a concept and government intrusion into it both feel more immediately defensible than government intrusion into other rights. In any case, the lighter touch when it comes to editing is worth further exploration but can also leave more room for reader inference.

2. Singer: Simplicity Bias.—Singer includes *Kelo* in his final chapter, which discusses regulatory takings law.[213] This covers a variety of topics, some conceptual (such as "Property as a Mediator Between Citizens and State")[214] but most direct and small (*Kelo* is in a section dedicated to public use, which also addresses state law).[215]

Singer's edits to the facts in the majority opinion are minimal, but he makes a few different decisions than Dukeminier et al. First, he includes multiple footnotes from the case most other editors leave out.[216] The first of these simply states the text of the Fifth Amendment and mentions its incorporation through the Fourteenth Amendment.[217] However, the second footnote discusses negotiation over more specific development plans happening at the time of litigation.[218] This offers a rare example of a footnote included within the reported facts of a case, which raises the further question of which footnotes Singer chose not to include. For example, Footnote 2 in the Court's opinion discusses research that multiple state agencies did on the development plan.[219]

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210. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7 (1988).

211. DUKEMINIER ET AL., *supra* note 31, at 1123-27.

212. Compare highlighted versions of *Kelo* in the Appendix.

213. SINGER, *supra* note 31, at xxxiii.

214. *Id.*

215. *Id.* at xxxiii-iv.

216. *Id.* at 1074, 1076-77, 1079-82.

217. SINGER, *supra* note 31 at 1114.

218. *Id.* at 1076 n.2.

219. Kelo v. City of New London, 545 U.S. 469, 473 n.2 (2005).

Footnote 3 notes that the City and the NLDC will be treated interchangeably for the remainder of the case unless necessary.[220]

Second, he cuts one paragraph from the two sections containing the facts of the case. The missing section states:

> Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, and, second, whether the takings were for "reasonably foreseeable needs." The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process.[221]

The facts are otherwise unedited.

The story this casebook tells is similar to Dukeminier et al., but that story gains a key wrinkle in the book's decision to exclude references to the indefinite use of the land and its effect on the overall holding. It is possible that these decisions keep the emphasis on the private versus public question instead of the generalized holding. This reading is consistent with the decision to exclude Footnote 3 and simply not call attention to other possible wrinkles. However, this clarity has the consequence of confusing other aspects of the case. For example, the difference between the landowners whose homes were destined to become office space and the landowners whose homes were likely to be used to support the park and marina likely did not matter to the Court. However, without the reference to the indefinite use of the property, the decision reads as the Court finding use for office space a more compelling public use than taking land to support public lands. This presents the government's claim of public use as even stronger than the initial opinion's by making the weaker claim overall seem like the one with greater constitutional support. It is a small point, but an example of how clarifying or simplifying the issue can warp a reader's understanding of that issue before they even know the outcome.

3. Massey: Consistent Bias, Different Perspectives.—Calvin Massey offers an exciting point of comparison because he wrote textbooks for both topics that covered *Kelo* in detail.[222] Massey's book is the exception among the property textbooks in that it extensively edits *Kelo*. This is seemingly true throughout Massey's book—using Fletcher's examples from *Shelley*, Massey includes fewer facts than either Dukeminier et al. or Singer there as well, although his edits more closely align with Dukeminier's as Singer again replicates the case in its entirety.[223]

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220. *Id.* at 475 n.3.
221. *Id.* at 476-77; *see* SINGER, *supra* note 31, at 1114.
222. MASSEY CONSTITUTIONAL, *supra* note 27; MASSEY PROPERTY, *supra* note 31.
223. Fletcher, *supra* note 14, at 191, 193.

Massey includes *Kelo* in his final chapter, "Eminent Domain and the Problem of Regulatory Takings."[224] It differs from the other property casebooks by dedicating its final chapter to various forms of takings, whereas the other books included takings as one of several related topics in their closing chapters.[225]

There are some small but noticeable changes in Massey's edits between the two casebooks. Here, Massey does not remove the introduction's references to the other willing sellers.[226] The parenthetical summarization of the facts is largely identical, with most of the differences coming in how the first few sentences are arranged.[227] Here is the opening of the paragraph in Massey's Constitutional Law casebook:

> New London, Connecticut, an economically depressed city of some 24,000 residents, concluded that the Fort Trumbull area, a 90-acre peninsula jutting into the Thames River consisting of some 115 privately owned properties and a 32-acre state park, was ideally suited for redevelopment. The occasion for this decision was pharmaceutical manufacturer Pfizer's decision to build a large research facility adjacent to the Fort Trumbull area.[228]

And here is the first sentence in Massey's Property Law casebook:

> After Pfizer, a major pharmaceutical manufacturer, decided to build a large research facility adjacent to New London, Connecticut's Fort Trumbull area, a 90-acre peninsula jutting into the Thames River consisting of some 115 privately owned properties and a 32-acre state park, the city concluded that the Fort Trumbull area was ideally suited for redevelopment to improve the depressed economic conditions of the city.[229]

While the facts are the same, the main reason for the regulatory taking (Pfizer's research facility) comes before the relevant property. The city's conditions shift from "economically depressed"[230] to "depressed economic conditions."[231] Massey's book also lists those conditions as one of the last facts in Property rather than one of the first as in Constitutional Law. The Property book makes it clearer that Fort Trumbull is a part of New London rather than an

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224. MASSEY PROPERTY, *supra* note 31, at xvii.
225. *Id.*
226. *Id*. at 782.
227. See the highlighted versions in the Appendix for visual comparison.
228. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
229. MASSEY PROPERTY, *supra* note 31, at 782.
230. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
231. MASSEY PROPERTY, *supra* note 31, at 782.

independent adjacent area.[232] Finally, the last parenthetical explanation of the facts is different: The Constitutional Law textbook says only, "The Connecticut Supreme Court upheld the plan, and the Supreme Court affirmed,"[233] whereas the Property book's parenthetical contains a sentence before that: "Residents and property owners contended that condemnation to implement this plan was not for a public use."[234]

While many of these changes arguably make the case clearer, they do tell a slightly different story from the one told in the Constitutional Law casebook. The private use of the property is even more strongly emphasized than it is in the Constitutional Law casebook, while the government's plan is given even less consideration here than it was in the Constitutional Law casebook by making the alleged public use even more secondary than it was in the initial facts. The Constitutional Law casebook also places greater importance on individuals and their rights rather than government action. This helps to demonstrate the different states of mind that different doctrines can have on how a case is understood. In Constitutional Law, the emphasis on government action means the reading of the case is likely more informed by opinions on government action generally. The government wants to do a thing—can it do it? In Property, which emphasizes the rights that property owners can exercise against other citizens and governments, the property owner is the central figure. The property owner wants to enjoy the use of their property—can they stop the actor trying to take it from them? Even if the answer is the same either way—yes, the government can take this action, or no, the property owner cannot stop them from taking it—the framing of the issue shapes what that doctrinal reality means to the reader.

C. Conclusions from All Seven Casebooks

To close out this analysis of all seven casebooks, this short section summarizes a few key takeaways. These reflect what are hopefully fairly straightforward and uncontentious readings of the text. There are certainly deeper layers that this analysis could allow given more time and space—time and space that these examples hopefully indicate is worth spending on this endeavor independently.

1. The Author's Identity (But Not Their Intent) Matters.—First, the identity of the author, and their work outside of the casebook, matters. This presents itself in straightforward ways through partisan bias or unique scholarly interests. An author who is liberal in other domains (like Chemerinsky) will likely present a case in the most charitable light toward liberal interests. A scholar who is unusually invested in a unique aspect of law will likely emphasize that aspect of a case when it appears. Rotunda's scholarship suggests that he is more

232. *Id.*
233. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
234. MASSEY PROPERTY, *supra* note 31, at 782-83.

interested in the state action doctrine than the Takings Clause, and his treatment of the Takings Clause reflects the parts of the clause that align with that interest in state action. Massey was interested enough in both constitutional law and property to write books on both, and his treatment of a case like *Kelo* that implicates both fields suggests greater interest in the case and greater precision in its treatment than editors whose primary interest lies in one field or the other. The identity of the author is also relevant when books have multiple authors. Trying to decipher the peculiar treatment of *Kelo* in Varat et al.'s book may be as simple a matter as realizing a work has more than one competing vision behind it, and its ultimate placement might reflect some level of editorial compromise. Whatever conclusions one derives from the above analysis, the notion of an invisible author is a difficult one to defend.

With that said, as evidenced by the *Death of the Author* conversation above, the intent of the author matters far less in the interpretation of their work than the work itself. While one might read a bias into one of the textbooks that might not otherwise be there, it is the text itself, supported by external evidence, that is the biased source, not the author's intention. Most, if not all, of these editorial decisions were likely entirely unintentional. The more minimalistic Property casebook edits stand out as particularly unlikely examples. The existence of conscious bias might make bias within a text more visible, but its absence cannot be read as a sign of its nonexistence.

2. The Organization of a Book Affects the Book's Message.—The notion that a case's placement within a casebook can change its meaning as much as the actual edits to the case finds ample support when analyzing the three Property textbooks. While the Kuleshov Effect is an imperfect metaphor for what is happening there, it offers a simple example of how important the notion of proximity is to interpretation. The four Constitutional Law textbooks that reflect *Kelo* in a positive or relatively tangential manner all connect it to due process, with a particularly visible connection to the economic rights nominally protected by the Court during the *Lochner* era. The textbook that most negatively portrays *Kelo* detaches it from the contentious due process discourse and instead treats it as an independent, explicitly protected right. More narrowly and perhaps more obviously, a book that includes a smaller excerpt from *Kelo* or only addresses it as a note to another case will present *Kelo* as a less significant case than one that dedicates a substantial number of pages to it or highlights the case itself.

There are many reasons that any of the editors might have made these editorial decisions. Takings does not fit within the broader concepts of constitutional law, so a decision to group it with another topic makes sense. If an editor does that, comparing it to economic due process makes sense, especially if the takeaway is that the Court does not seriously protect economic rights in either instance. On the other hand, treating a taking as a separate constitutional issue with a similar outcome is more precise, but also may conceal the broader point that the other three casebooks make. Takings is also a niche

topic, making it easier to cut in a course using the casebook than more similar, more topical and hotly debated substantive due process. No matter what the conscious reason for the decision, the author's intent might be relevant, but it is far from the most important factor. The point is not to examine the inner thoughts of these editors, but to acknowledge that the editorial decisions they made might change the lessons that readers take from them.

3. Constitutional Law and Property Law Editors Edit Cases Differently.—This point affirms the intuition that editors treat cases differently if they are editing a case for Property instead of Constitutional Law. In general, it seems that Property casebook editors are prone to leaving cases relatively unedited, while Constitutional Law editors make substantial changes to fit cases within the book. Even the least heavily edited Constitutional Law casebook, Chemerinsky's, still cut out a key paragraph that dramatically changed the meaning of the case. The most heavily edited of the Property casebooks, Massey's, most closely paralleled his edits to his Constitutional Law casebook. This limited editorial touch extends to those editorial decisions outside of the case itself. There was greater uniformity among the Property textbooks in how they treated *Kelo*—always in the book's last chapter, grouped with similar topics across the three books. While editorial choices are still apparent in each book's organization, there is more of an "industry standard" across Property books (at least in where they include *Kelo* relative to other material).

This standard itself almost certainly reflects biases inherent to the industry regarding the topic that have become so ingrained in thought on the doctrine that they seem natural and remain unexamined. Pushes to change law schools' approach to property as a doctrine, including shifting to a more practical focus,[235] changing the content covered,[236] and even teaching the course at all,[237] reflect a growing awareness of these biases and the importance of acknowledging them. However, this push is also against a nebulous and entrenched pattern of thought rather than an individual author simply informed by the biases inherent to their chosen topic. Translating these challenges into changes will require smaller scale, regular engagement. The broader structural

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235. HEATHER WAY ET AL., REAL PROPERTY FOR THE REAL WORLD: BUILDING SKILLS THROUGH CASE STUDY (1st ed. 2017).

236. For an example of dueling perspectives considering no longer teaching the rule against perpetuities, a famous (and famously difficult) part of traditional property courses, see Ilya Somin, *Should We Teach Law Students the Rule Against Perpetuities?*, THE VOLOKH CONSPIRACY (Aug. 11, 2007, 2:32 PM), https://volokh.com/2007/08/11/should-we-teach-law-students-the-rule-against-perpetuities/ [perma.cc/94nZ-5N5d]; and Dave Fagundes, *Why Teach the Rule Against Perpetuities?*, PRAWFSBLOG (Apr. 3, 2011, 9:54 AM), https://prawfsblawg.blogs.com/prawfsblawg/2011/04/why-teach-the-rule-against-perpetuities.html [https://perma.cc/8W5C-GHMC].

237. For example, the UC Berkeley School of Law no longer requires first-year students to take Property law. *First-Year Curriculum*, BERKELEY LAW, https://www.law.berkeley.edu/academics/jd/first-year-curriculum/ [perma.cc/X8F5-YPY7] (last visited Oct. 8, 2023). Even if it is only coincidental, it is also worth noting that this change happened during Erwin Chemerinsky's tenure as the law school's dean.

argument is part of the point in defining the death of the author, to acknowledge that an author's surroundings and culture can be an even more important factor in their text than the author's intent. But by focusing on an individual text, the problem can become more manageable.

4. There Is More to Learn from Casebooks.—As noted above, this collection of casebooks is far from exhaustive. It primarily demonstrates the point that one can, and probably should, look to the messages that textbooks convey. Any casebook, and certainly any change in the medium that makes a casebook read more as a curated collection of cases rather than a book, will also influence the message that a case conveys. There are other dimensions of casebook analysis that are entirely irrelevant to these seven casebooks. Other textbooks might have limitations either removed or placed upon them by their unique publication in ways that the article does not consider here. For example, the Property casebook a colleague assigns, *Property: A Contemporary Approach*, is written with the specific purpose of being accessible online.[238] This goal leads the authors to include several captions within both the print and text versions of the casebook that take users away from the case and toward other online resources, such as a photo of the *Kelo* house, a map of the planned development, and a copy of the economic impact report all within the narrow facts sections considered here.[239] This fractured engagement with the opinion itself may well have its own effect on reader apprehension and interpretation, especially given the known and developing differences between how readers process information on a computer rather than on a page.[240] In a world where part of the generational divide defining American culture and politics is an increasing number of "digital natives" more familiar with online resources than print resources, possibilities like these offer yet another way to explore the message legal academics convey through their editorial decisions.[241] As the audience of a text changes, as is the case with students increasingly unfamiliar with print entering the print-centric world of the law, the possible meanings of a text change as well.

5. Media Literacy Is a Skill That Can Only Be Learned Through Practice.—Finally, this section demonstrates that while it is necessary to emphasize aspects of information literacy that can be objectively determined, doing so without reference to subjective, individualized interpretation is insufficient to teach the skill. The reader—the audience—means at least as much to the meaning of the text as the author, and frankly may well mean more. While none of the casebooks inaccurately present *Kelo*, all of them make decisions that present something other than the case itself. Part of the reason that it can be difficult to introduce media literacy in an academic setting is its own subjective nature.

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238. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH (5th ed. 2021).

239. *Id.* at 860-61.

240. Lauren M. Singer & Patricia A. Alexander, *Reading on Paper and Digitally: What the Past Decades of Empirical Research Reveal*, 20 REV. EDUC. RSCH. 1 (2017).

241. Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 1, 3-6 (2001).

Creative work has no single meaning. But the potential for an individualized understanding of a text to expose truths about its topic is a reason to spend more time refining that skill, not less. And this individualized skill can only be taught by examples like those included above. By learning to identify these alterations and their impact within the work of others, readers become better able to identify these biases and unique viewpoints within themselves.

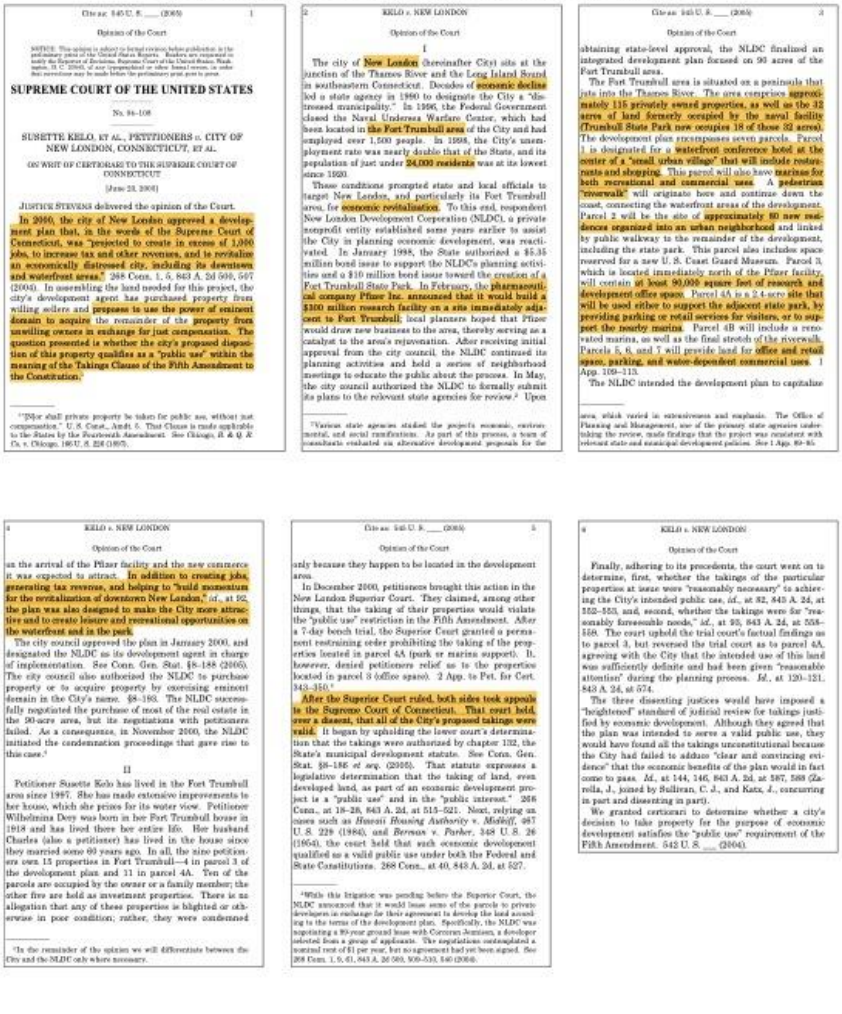
V. CONCLUSION

An author or editor injects their own bias into a work as soon as they make an editorial decision about that work. The existence of bias in a text or classroom is unavoidable, and not inherently negative. However, it is insufficient to acknowledge that bias exists and leave it unexplored. There is bias within the legal profession, and legal academia in particular, that can be detrimental to practice and education in an increasingly polarized and information-skeptical environment. Taking the time to explore and understand the reader's own biases will help keep the legal community connected to the public it nominally serves and educates.

Even if the utilitarian arguments for examining bias or my interpretations of editorial decisions here are unconvincing, exploring the bias found in our work has rewards of its own. When readers engage with a casebook as a literary work with meaning informed by its author's identity, or examine a book for bias, they engage with that book as a work of art. Art does not strictly belong to the artist, and it can be daunting to realize how vastly different what the author says is from what the author means. However, that same unknowability also means that there is always something new for authors to discover about themselves and the world. By acknowledging the smallness of their own worldview, the author gives themselves the space that they need to grow.

APPENDIX

Fig. 2: *Kelo*, facts and procedure, as appears in MASSEY CONSTITUTIONAL



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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 04–108

SUSETTE KELO, ET AL., PETITIONERS *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June 23, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 6, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

[1]"[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

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Opinion of the Court

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

[2]Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated an alternative development proposals for the

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obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of these 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U. S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. 1 App. 109–113.

The NLDC intended the development plan to capitalize

area, which varied in extensiveness and emphasis. The Office of Planning and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See 1 App. 89–95.

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on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8–188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8–193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[3]

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned

[3]In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

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only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343–350.[4]

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8–186 *et seq.* (2005). That statute expresses 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." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

[4]While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A. 2d 500, 509–510, 540 (2004).

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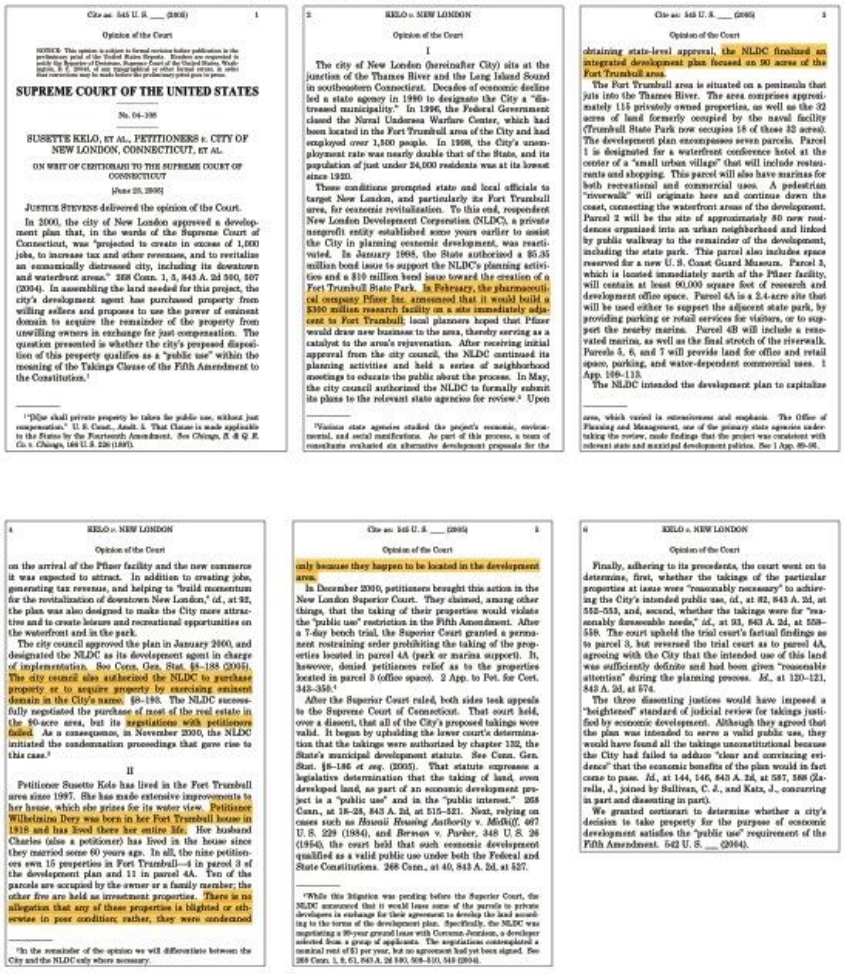
Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82, 843 A. 2d, at 552–553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93, 843 A. 2d, at 558–559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120–121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U. S. ____ (2004).

APPENDIX

Fig. 3: *Kelo*, facts and procedure, as appears in ROTUNDA



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2 KELO *v.* NEW LONDON

Opinion of the Court

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The NLDC intended the development plan to capitalize

area, which varied in extensiveness and emphasis. The Office of Planning and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See 1 App. 89–96.

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The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8–188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8–193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[3]

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned

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Opinion of the Court

only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent injunction order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 345–359.[4]

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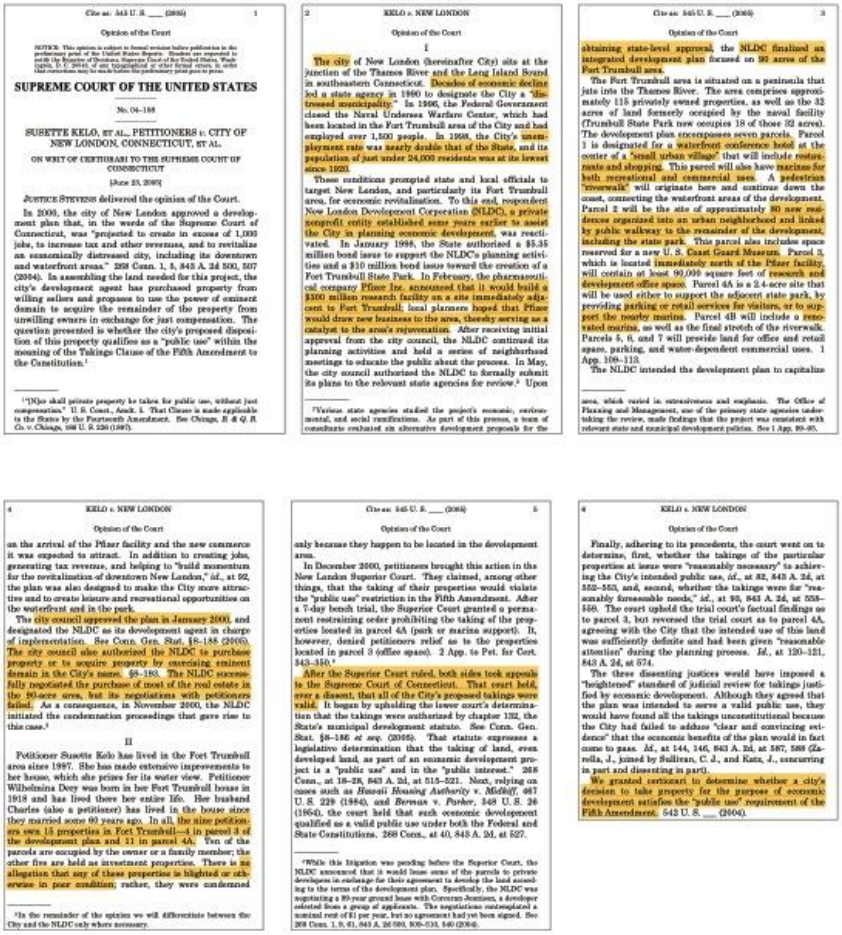
Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82, 843 A. 2d, at 552–553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93, 843 A. 2d, at 558–559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120–121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U. S. ___ (2004).

APPENDIX

Fig. 4: *Kelo*, facts and procedure, as appears in VARAT ET AL.



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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 04–108

SUSETTE KELO, ET AL., PETITIONERS *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June 23, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

[1] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

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I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

[2] Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the

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After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8–186 *et seq.* (2005). That statute expresses 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." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

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6 KELO *v.* NEW LONDON

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We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 543 U. S. ____ (2004).

APPENDIX

Fig. 5: *Kelo*, facts and procedure, as appears in DUKEMINIER ET AL.

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Opinion of the Court

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2 KELO *v.* NEW LONDON

Opinion of the Court

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APPENDIX

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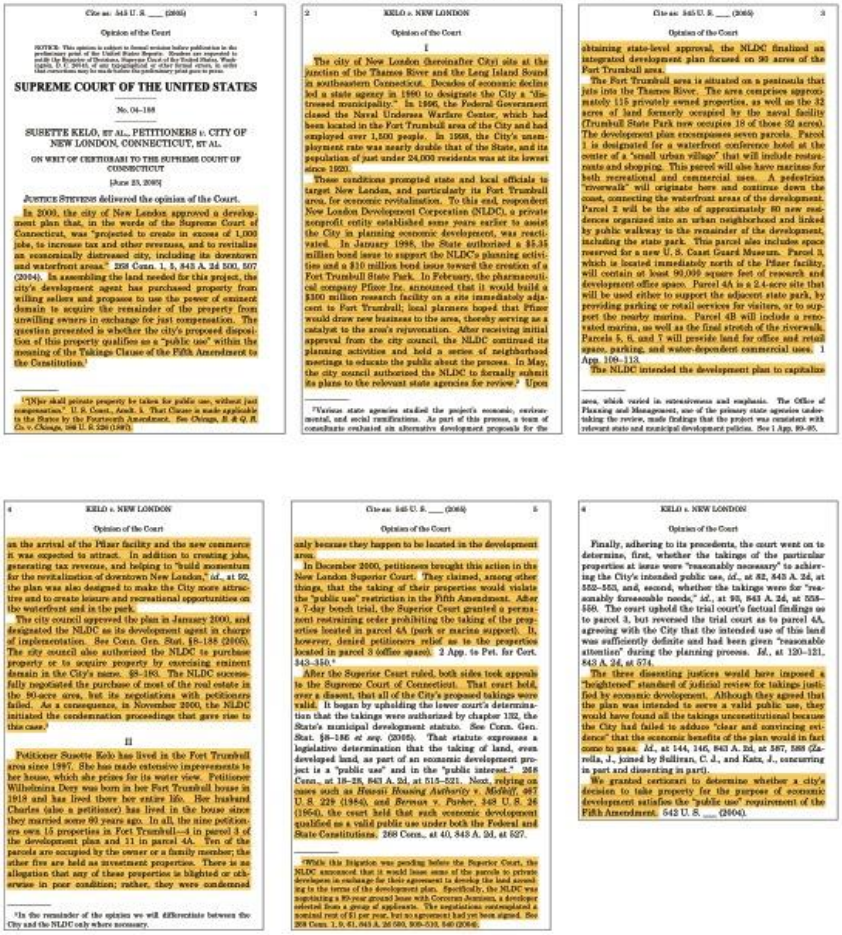

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The NLDC intended the development plan to capitalize

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The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8–188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8–193. The NLDC success-fully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[3]

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petition-ers own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or oth-erwise in poor condition; rather, they were condemned

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only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a perma-nent restraining order prohibiting the taking of the prop-erties located in parcel 4A (park or marina support). It, however, denied petitioners' relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343–350.[4]

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determina-tion that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8–186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development pro-ject is a "public use" and in the "public interest." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

[4] While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land accord-ing to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A. 2d 500, 505–510, 540 (2004).

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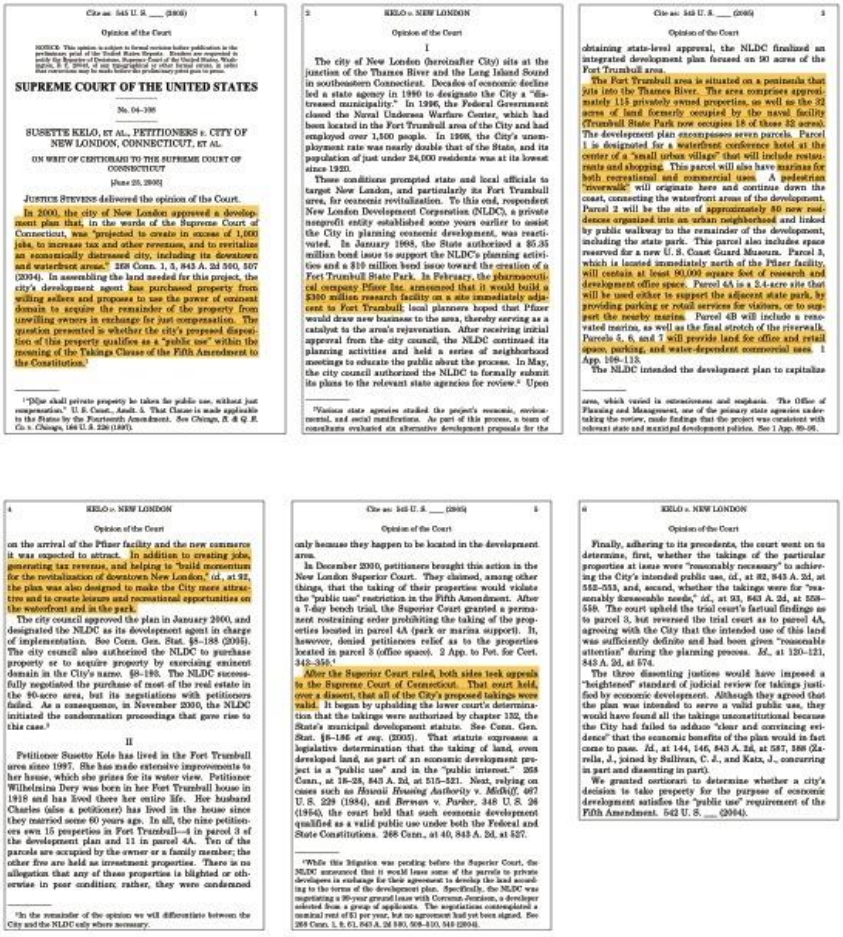
Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achiev-ing the City's intended public use, *id.*, at 82, 843 A. 2d, at 552–553, and, second, whether the takings were for "rea-sonably foreseeable needs," *id.*, at 93, 843 A. 2d, at 558–559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120–121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justi-fied by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evi-dence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U. S. ____ (2004).

APPENDIX

Fig. 7: *Kelo*, facts and procedure, as appears in MASSEY PROPERTY



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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–108

SUSETTE KELO, ET AL., PETITIONERS *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June 23, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

[1]"[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. *See Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

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I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

[2]Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the

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