

Commentary

All Sound, No Fury? The Impacts of State-Based *Kelo* Laws

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INTRODUCTION

The 2005 U.S. Supreme Court decision in *Kelo v. City of New London, Connecticut* (545 U.S. 469 (2005)) was one of the Court's most controversial decisions in the first decade of this century and without a doubt the most controversial in the areas of takings, land use, and property rights. That this is true can be verified by the breadth of media coverage about the case and the extent of state legislative action following the Court's decision (see Sagalyn 2008 and Nadler et al. 2008 for discussions of media coverage; Jacobs and Bassett 2010a and 2010b and Castle Coalition 2007 for data on state legislative action). As of 2010, 43 states have passed so-called state-based *Kelo* laws.

But in law, as in politics, the issue is not, necessarily, what is done, but what it means. That is, law—like politics—can be as much about the symbolism of action as about action itself (Edelman (1964) 1985 is the classic text on symbolism in politics). So an important question is, what actual impact are these state laws having or likely to have?

From 2007 to 2009, with support from the Lincoln Institute of Land Policy, we set out to get an early answer to this query (this commentary draws from Jacobs and Bassett 2010b). Our results are, on the one hand, surprising, especially given the media coverage and heated public rhetoric about the case and its implications for landowners, for local governments, and for core American principles. On the other hand,

our results fit with earlier research about a prior generation of state-based private property laws (Jacobs 1998, 1999b).

In this commentary, we provide a brief explanation of the *Kelo* case and the Court's decision (assuming that many readers are already familiar with it). We then explain the research we undertook and what we learned from it. Here we concentrate on the analyses and reflections offered on the state-based laws from a set of legal scholars strongly opposed to the Court's decision and strongly in favor of the actions taken by the 43 states. Finally, we offer

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some conclusions about what we believe the controversy over the *Kelo* case is likely to mean for the future of land use planning in American cities, especially given that the circumstances for such planning have changed so dramatically since the time that gave rise to the case.

THE SITUATION AND THE DECISION

New London, Connecticut, is an old industrial port city on the East Coast of the United States. It reached its economic peak in the 1920s, when its economic base was shipbuilding. Since that time, the city has experienced substan-

tial economic and population decline.

As the population and property tax base shrunk, the city's ability to provide basic public services deteriorated. In the 1990s, New London developed a plan for economic revitalization. The plan focused on an area consisting of 115 separate properties. The plan required consolidation of these properties into a single parcel. The city further proposed to then split the parcel and transfer ownership of one of the newly created parcels to a multinational pharmaceutical company for a research and production facility.

The city approached landowners about their interest in voluntary sale of their land. One hundred landowners agreed to sell; 15 refused. The city then proposed use of eminent domain procedures on the outstanding 15 properties (an action where they agreed to pay fair market value for the property). In so doing, the city did not assert that these properties were "blighted" (the legal and planning standard under which such eminent domain actions have existed since the 1954 Court decision in *Berman v. Parker*, 348 U.S. 26 (1954)). Rather, under the explicit authority of state enabling legislation and based on a thorough comprehensive plan, both of which the Court acknowledged, the city asserted only that the outstanding parcels were required to accomplish a greater public good—increased jobs for the community, increased public revenues (taxes), and increased economic competitiveness.

We concluded that the post-*Kelo* legislation had created much noise, but that this fulmination seems to have created little in the way of long-lasting impacts.

Fighting to save her “little pink house,” Susette Kelo became the spokesperson for the opposition to New London’s proposed action. Kelo and her colitigants argued that the type of eminent domain proposed by the city was a misreading of the original intent of the takings clause of the Fifth Amendment of the Constitution (“nor shall private property be taken for public use, without just compensation.”). According to Kelo’s lawyers, the original Constitutional clause was intended to allow for governmental actions that create public facilities (such as roads, parks, airports, and hospitals) but not for government to take private land from one private owner to give to another private owner. They asserted that if the Court found in favor of New London (and against Kelo, which the Court did, though only by a 5–4 vote) there would be no effective limit to any proposed physical taking of privately owned land by government; government could always assert that a proposed new use of land was in the greater public interest.

The legal reasoning and final decision in *Kelo* was, from a law and planning perspective, unsurprising. On a base of strong legal and historical analysis, the majority of the Court showed why the action by New London was acceptable. In so doing, the Court affirmed 50 years of similar actions by local and state governments throughout the United States, actions which, while often clothed in a justification of “blight,” regularly had no more (or less) justification to them than that provided by New London.

But in its decision, the Court itself provided the basis for much of the public policy controversy that followed. According to the Court, their decision was only about whether New London’s action was acceptable under the U.S. Constitution (not in violation of the terms for takings in the Fifth Amendment), but, the Court noted, “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power” (545 U.S. 469 (2005) at 489). That is, while New London’s and similar local and state governmen-

tal actions were legal under the U.S. Constitution, the U.S. Supreme Court invited state legislatures to decide whether such actions should be legal under state constitutions.

The reaction to the Court’s decision was swift, strong, and negative. Within a week, a proposal was floated that then-U.S. Supreme Court Justice David Souter’s home in Weare, New Hampshire, should be condemned so that it might be replaced by the “Lost Liberty Hotel.” Using the threat of unconstrained governmental action against ordinary home owners, a national campaign emerged to thwart the impact of *Kelo*. Following the invitation of the Court, state laws that appear to do just this have been adopted in 43 states. The explicit intent of most of these laws is to 1) prohibit governmental eminent domain actions for the sole purpose of economic development and 2) prevent privately owned land from being taken for allocation to another private owner.

In order to investigate the impact of these state-based *Kelo* laws, we adopted a multileveled strategy. We inventoried and catalogued laws that had been adopted, undertook exploratory interviews with key stakeholders in the post-*Kelo* debate (ranging from the American Planning Association to the National Conference of State Legislatures to the Castle Coalition [the organization actively promoting the state-based laws]), implemented a web-based survey about the laws’ impacts with groups such as planners, municipal attorneys, and developers, and tracked the emerging literature, mostly from opponents of the *Kelo* decision (that is, those who supported the new state-based laws), about their perceptions of the impacts of these laws (Jacobs and Bassett 2010a).

Our survey findings present a mixed picture of *Kelo* impacts upon planning practice. Looking across different areas of planning practice, only one planning endeavor—central city revitalization—was identified as being negatively impacted by state-level *Kelo* laws. Moreover, while the majority of respondents continued to characterize the property rights movement in their state as “strong” or “very strong,” very

few respondents indicated that their governmental units had changed public planning processes in any meaningful way as a result of the *Kelo* backlash. And although respondents did report a negative impact of *Kelo* on the willingness of their local government units to publicly contemplate or discuss the potential use of eminent domain, only a minority of respondents perceived the issue as a high priority issue for community members or their elected leadership. (For more detail, see Jacobs and Bassett, 2010a.) We concluded that the post-*Kelo* legislation had created much noise, but that this fulmination seems to have created little in the way of long-lasting impacts.

In this article we supplement the data presented in Jacobs and Bassett (2010a) by further exploring the impact of the laws through the writing and analyses of opponents of the *Kelo* decision, most of whom actively support the state laws.

‘MERELY HORTATORY FLUFF’ – A HOLLOW VICTORY?

Almost immediately after legislatures began passing state-based laws, supporters and proponents of these laws began to wonder whether and to what extent these laws represented a substantive victory (Sandefur 2006). Recently, this initial reflection on the extent of “victory” represented by the state-based laws has become a flood of concern and consternation. Writings by supporters and advocates of state-based laws illustrate their own anxieties and doubts over what has resulted from state-based reforms—particularly why what has not happened has not happened.

Positively, what strikes Somin (2009) as particularly impressive about the state-based *Kelo* legislation is what it represents in constitutional law history:

The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history. The closest competitor is *Furman v. Georgia*, which struck down all then-existing state death penalty laws. . . . a strong case can be made that *Kelo* has drawn a more extensive [state] legislative reaction than any other single court decision in American history (Somin 2009: 2102).

Why would what is characterized by supporters and advocates as a spontaneous and bottom-up backlash to the *Kelo* decision be so hollow in content?

Yet, despite this widespread and seemingly strong response by states, Somin and others are decidedly disappointed in what they see as the substantive content of these laws. For example, Somin (2009: 2170) himself notes that “[s]o far, the *Kelo* backlash has yielded far less effective reform than many expected. This result is striking in light of the overwhelming public opposition to the decision.”

Ely, a highly respected historian and legal scholar whose work is cited by those across the political spectrum (though his sentiments are allied with the state-based laws), begins an article by saying “[i]t is not always easy to ascertain, however, whether this outpouring of legislation . . . amounts to meaningful limitations on the use of eminent domain or merely hortatory fluff” (Ely 2009: 133). At a minimum he thinks that “[a]mong the . . . jurisdictions that passed such laws, the efficacy of these measures varies,” and therefore “. . . the conclusion at this point is decidedly mixed” (Ely 2009: 131). Somin agrees. According to Somin (2009: 2114), “[w]ith some important exceptions, the legislative response to *Kelo* has fallen short of expectations. . . . most of the newly enacted laws are likely to impose few, if any, meaningful restrictions on economic development takings.”

Why is this true? Why would what is characterized by supporters and advocates as a spontaneous and bottom-up backlash to the *Kelo* decision be so hollow in content? (Nadler et al. 2008 are one of several who reference the state-based legislation in this way; the term is also in the title of Sandefur 2006 and Somin 2009.) This is especially intriguing since The Institute for Justice—the litigator on behalf of Susette Kelo—developed and distributed model state legislation aimed at addressing the key issues in the case (Morris 2009).

Here there is both agreement and disagreement among the state law supporters. The agreement centers on the largely symbolic nature of the majority of the state-based laws that have been passed. López et al. (2009: 108, 130), for example, argues that “[l]egislators may be prone to symbolic politics due to the

intensity of the popular backlash . . .” thus “. . . many of the new eminent domain laws are more symbolic than meaningful.” He and his colleagues argue that “. . . the legislative response to *Kelo* was responsive to measures of the backlash but only in the binary decision whether to pass a new law—any new law—in order to do something in the face of a popular backlash” (López et al. 2009: 131). Morris (2009: 240) reaches the same conclusion. “[A]ll legislative responses to *Kelo* were not equal. Some states adopted symbolic legislation, making no significant change in the substantive constraints on the exercise of eminent domain powers by the state or local governments.” Why would they do this?

The rewards for politicians of passing anti-*Kelo* reform legislation were . . . immediate and straightforward. After passing an anti-*Kelo* reform politicians could report to their constituents that they had passed a piece of legislation with broad support protecting a core American value against grasping developers, tyrannical mayors, or other villains. If legislative success ever is a benefit to a politician’s reelection bid, surely this would be such a case (Morris 2009: 253).

If there is broad agreement about what is going on, there is less agreement, even disagreement, about why it is occurring. Largely using a set of social science analytical tools, scholars worked to tease out the “how come” component of what hasn’t happened. Sandefur (2006) examined a large number of the laws that had been passed in the immediate aftermath of the 2005 *Kelo* decision. He argued that ineffectiveness was best explained by interest-group lobbying. That is, those who stood to lose by the adoption of nonsymbolic state-based laws (as described by Morris, “environmentalists and government employees and officials in declining urban areas” (2009: 254)) shaped the legislative process so as to result in a symbolic rather than substantive outcome. Morris (2009) is not sure, and Somin (2009) is absolutely certain that Sandefur’s explanation is insufficient.

Morris (2009) assesses a larger set of laws. His primary goal is to understand the factors that explain the differences

among the states in the types of laws they adopted. Overall he argues for a “public choice model of legislative action, rather than an ideological one, with legislatures facing other constraints . . . being less likely to give up valuable eminent domain powers and legislatures where adoption of real reform was less costly (faster growth) or more beneficial” (Morris 2009: 238). In terms of why, though, his conclusion is that “[l]egislators could choose between symbolic and substantive reforms because, despite the widespread popular distaste for *Kelo* itself which made adopting some form of ‘reform’ a politically popular step, voters often did not distinguish symbolic from substantive reforms” (Morris 2009: 247–248). This was true because of “voters’ rational ignorance about the substance of eminent domain reforms” actually enacted; in other words, symbolic reforms could satisfy the immediate political demand for action (Morris 2009: 248).

In Somin’s (2009) analysis he specifically argues that Sandefur is incorrect in his conclusion. As an alternative Somin offers forth the idea (not dissimilar to Morris’s) that it is “political ignorance” that best explains what has and has not happened in the states.

Why . . . has there been so much ineffective legislation? . . . [while] it is difficult to provide a definitive answer . . . I would . . . suggest that the weakness of much post-*Kelo* legislation is in large part due to widespread public ignorance. Survey data . . . show that the overwhelming majority of citizens know little or nothing about post-*Kelo* reform laws in their states. . . . The political ignorance hypothesis accounts for the pattern of reform laws better than the leading alternative theory, which holds that the relative paucity of effective reform laws is the result of interest group lobbying” (Somin 2009: 2154–2155).

Somin’s data seem to reinforce this assertion: “I present survey data showing that the vast majority of Americans were indeed ignorant of the content of post-*Kelo* reform legislation in their states. In an August 2007 Saint Index survey, only 21% of respondents could correctly answer whether or not their state had

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passed eminent domain reform legislation since *Kelo*, and only 13% both knew whether their state had passed legislation and correctly indicated whether that legislation was likely to be effective” (Somin 2009: 2106). Therefore, he concludes, “[m]ost voters are “rationally ignorant” of public policy, having little incentive to acquire any substantial knowledge about the details of government actions” (Somin 2009: 2106).

But even Ely (2009), the crafter of the “hortatory fluff” phrase that titles this section, is left to wonder whether “the glass [is] half full or half empty.” He is convinced that there is little prospect of congressional action to address the fundamental issue at the heart of the *Kelo* dispute. And likewise, he is decidedly skeptical as to whether the U.S. Supreme Court will take up the matter again any time in the near future. Therefore, he believes that whatever the problems, the policy question about the acceptable extent of eminent domain will be one engaged by the states, on a state-by-state basis.

For Ely (2009), as for Nadler et al. (2008), the bright spot in the period since the Supreme Court’s *Kelo* decision is in public awareness and discussion. “The most significant impact of *Kelo* may well be heightened public awareness of the need to guard property rights . . . [a] welcome, if unintended, consequence of *Kelo* has been to restore the rights of property owners to public dialogue” (Ely 2009: 150). In a similar vein, Nadler et al. (2008: 306) note: “. . . the *Kelo* decision seems to have tapped into existing concerns about the sanctity of the home, government overreaching, and tensions between protecting public goods (like the environment) and protecting private rights. In some sense, *Kelo* was a “perfect storm” because all of these issues were directly implicated in the decision. . . .”

Will this new public awareness manifest itself in anything other than symbolic legislation, especially in light of the “rationally ignorant” behavior of most voters suggested by Somin? At the time of the writings noted here (all of which were prepared prior to the 2008 economic meltdown), the authors had a basis for hope. Morris (2009) and López

et al. (2009) both conclude that there was a strong correlation between states where there was strong economic activity and the existence of substantive (as opposed to symbolic) state legislation. Why? “[L]egislatures in growing states were more likely to adopt reforms than legislatures in stagnant and declining ones” because doing so might check the economic development process (Morris 2009: 244). Or, as López et al. (2009: 131) argue:

the strongest economic influence over legislative responses resides with the value of new housing . . . {as} . . . the observed market value of new housing is a strong indicator of the industry’s stake in restricting development takings. . . . Our results are consistent with the idea that home builder groups exert more influence in states with more ongoing home construction and that legislatures respond with meaningful restrictions and sooner. An alternative interpretation is that new home construction is an indicator of economic growth so that states with more current growth are more likely to update eminent domain laws so as not to suppress continued growth.

The link between economic growth and substantive legislation is an important and, we believe, insightful observation. To the extent it is true, its implications during a time of severe economic constriction may be the opposite of that hoped for by the laws’ supporters. That is, states that passed substantive legislation may experience significant “buyer’s remorse” as they confront their new inability to use the traditional power of eminent domain to promote direly needed economic redevelopment actions.

An intriguing case of this, for instance, is presented in contemporary Detroit. Despite the fact that Michigan as a state, and Detroit as a metropolitan region, are clearly stagnant or declining economically, in 2006, voters approved by an 80% majority one of the most stringent limitations on the power of eminent domain in the post-*Kelo* era through a legislatively referred constitutional amendment, Proposition 4. From a legal perspective, Proposition 4 was unnecessary as it merely reinforced existing limitations on the use of emi-

nent domain instituted in 2004 when the Michigan Supreme Court overturned the *Poletown* decision (*Poletown Neighborhood Council v. City of Detroit* 304 N.W.2d 455 (1981)) in *Wayne County v. Hathcock* (684 NW 2d 765 (2004)). From a political perspective, however, the Proposition was an exemplar of symbolic legislation—allowing voters to express their overwhelming outrage by voting for a law that made virtually no difference in law or policy.

Michigan’s restrictions on eminent domain, however arrived upon, are real and their impacts are starting to be felt. Legal scholar John Mogk argues that the state’s eminent domain limitations prevent the city from being able to assemble land for larger redevelopment projects or even to move residents in order to consolidate neighborhoods—actions that may be necessary if the city’s current Detroit Works planning effort is to succeed. In order to move forward, the state’s constitution, he warns, may need further amendment—in this case one that would exempt distressed communities (however defined) from these restrictions (Buckwalter Burkooz 2010).

CONCLUSIONS AND IMPLICATIONS

The contemporary property rights movement burst onto the policy scene in the late 1980s and early to mid-1990s. Between 1991 and 1996, 26 of the lower 48 states adopted one or more of the laws promoted by the property rights movement (Emerson and Wise 1997, Jacobs 1998). But the actual impact of these laws and the movement was less clear. Assessments undertaken in the late 1990s suggested that state-based laws were having little impact on actual policy and planning practice (Jacobs 1998, 1999b; White 2000 takes a slightly different perspective). That this was true was both confounding to the movement and puzzling to them and their opponents. For the supporters of these laws, the issue became “what to do next?” They had been successful in passing laws, yet it didn’t appear that they were being successful in actually changing administrative practices.

The *Kelo* case provided a major opportunity to advance their policy

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agenda. The property rights movement approached the mounting, argument, and aftermath of the *Kelo* case such that they were set to win regardless of the case's outcome. If the case had been decided in favor of Susette Kelo and against New London, the property rights movement would have established a significant brake on governmental use of eminent domain for economic development purposes. However, their "loss" in the case was turned into a "victory" through their systematic effort to promote state-based laws that did not follow the U.S. Supreme Court, a ruling the Court itself framed as permissive, rather than forcing, in structure.

But among a set of supporters and advocates of these state laws there appears to be a broad consensus that there has been little substantive impact from them. Overall, the laws are characterized as more symbolic than substantive in nature and content.

The U.S. Supreme Court's 2005 decision in the *Kelo* case has generated a lot of sound, but not much fury. Immediately after the decision, commentaries and reports by property rights advocates—often emanating from think tanks—warned of impending danger for the American home owner and the fundamental threat to American democracy (see, for example, Sandefur 2006 and Castle Coalition 2007).

That there should be social conflict over the public's efforts to manage privately owned land is in and of itself not surprising (Jacobs 1999a, Jacobs and Paulsen 2009). That the physical taking of land would be the source of this conflict is even less surprising. But it is not clear that, beyond the spirited focus of a set of dedicated activists, the American public or their elected representatives really see the issues raised by the state-based laws as requiring substantial attention and especially not now.

In earlier research an element of this same phenomenon was noted – that state legislatures were passing legislation but this legislation was having little impact in administrative processes (Jacobs 1998, 1999b). Why would this be so? While the scholars discussed above offer one set of explanations (i.e., interest group

lobbying, political ignorance), another explanation may have to do with the very nature of American political structure. The earlier research noted that it is not uncommon for state legislators to come to their positions from service in local government. As such they are sensitive to both state interference in local affairs and the need for flexibility by local officials in their governance activities. It is possible that the preponderance of symbolic over substantive legislation reflects these same tensions.

So how should these laws be viewed? It appears that the state-based *Kelo* laws can be viewed in at least one of two ways: with regard to the changes they have engendered in eminent domain activity and in the way they have changed public discourse about eminent domain and governmental authority for physical takings.

Supporters of state-based *Kelo* laws and independent researchers both find little change in what local and state governments are actually doing, or anticipate doing, as a result of the laws. Why? There are several possible explanations. One is that *Kelo*-style takings seldom actually occur. The New London action was for economic development and was not based on a declaration of blight. Physical takings can be for a wide range of activities, and for at least 50 years (since *Berman v. Parker* 348 U.S. 26 (1954)), when eminent domain has to do with inner city redevelopment, it has most usually been accompanied by a declaration of blight. Almost none of the state-based laws prohibit physical takings when blight is declared. A second explanation is that even when government property acquisition is necessary, many of the transactions are (or at least appear to be) voluntary. Even in the New London situation, 100 of 115 landowners voluntarily sold their land without eminent domain action by the city. So it is possible that the state-based laws are a solution to a problem that does not really exist.

As argued by even the supporters of state-based legislation, the most significant impact of these laws seems to be in the area of public awareness. The wide-ranging media coverage of the *Kelo* decision, the asserted bottom-up backlash against the decision, and survey data about the common understanding of the

decision and its appropriateness all suggest significantly heightened attention to eminent domain and the appropriate role of governmental activity in physical takings. To the extent this situation remains, it provides the conditions for positive changes to planning practice. By sensitizing a broad range of interests to a core set of planning issues, it has made planning a more central focus of public discussion and debate. State-based laws are leading to requirements that when eminent domain is exercised it needs to be more explicitly tied to a planning process (as was the case in New London). This means that eminent domain will be more transparent, and planners (and the elected officials to whom they report) will become more accountable. This suggests how important it is for planners to think about how planning issues are presented (Bassett 2009).

When we began this research, public discussion about land use, taxation, and takings was set within a very different frame than it is today. Now, local, state, and national discussion is focused on the aftermath of the subprime mortgage collapse, the "Great Recession," and their systemic impacts on the domestic economy. Communities and states nationwide are forced to have unexpected and uncomfortable discussions about the provision of local and state services as the property tax and income tax base that supports those services softens and frequently declines (sometimes significantly and precipitously). The national media seems to have a constant stream of articles detailing this phenomenon. In years past, when local governments found themselves in a fiscal crisis, they could and would turn to their states for assistance. And, in turn, when states found themselves in a parallel fiscal crisis, they could and would turn to the federal government for assistance. Today it is increasingly clear that neither states nor the federal government are in a position to provide assistance as their own fiscal positions stagnate (if not decline).

It is in this context that it is necessary to understand the present and to project the likely future of eminent domain action by state and local governments and its use by planning authorities. We

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believe that it is likely that planning in general and eminent domain in particular will be reexamined as a planning tool, and we may perhaps even witness a resurgence in support. Communities severely affected by the credit, housing, and mortgage-finance crises will be forced to reexamine any and all tools at their disposal as ways to address abandoned housing and facilitate economic and social redevelopment. As communities do this, it is not at all clear what, if any, resistance they will experience from a citizenry wanting (and needing) real solutions to real and seemingly ever more complex problems.

Does this mean that the property rights activists will abandon their activism? No. Just as they have, for over two decades, sought to continuously advance their agenda and learn from their policy experiments, they will, again, learn from their successes and failures with state-based *Kelo* legislation. State-based *Kelo* laws represent the latest, not the final, wave of policy activism on property rights issues in the United States.

It is neither possible nor advisable for the planning community to ignore the sound generated by property rights advocates. Through their commitment to their perspective and cause, they have succeeded in changing the way the American public thinks about the core issue in physical and regulatory takings—the appropriate balance point of the government vis-a-vis that of the individual with regard to property rights (Bassett 2009, Jacobs 2010). But at the same time, it is not clear that the institutional changes they have brought forth—in this case, state-based *Kelo* laws—have changed public administrative practice or fundamentally matter to the public and its representatives. If this is the case, then the strategies that planners and those who advocate for the planning process may not need to be as defensive as initially seemed to have been necessary. In fact, it is even possible that planners may be able to mount arguments for planning solutions to contemporary problems, and the dearth of ideas for how to move forward may allow for the serious engagement of these arguments.

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