"Public Use" or Public Abuse? A New Test for Public Use in Light of *Kelo*

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ABSTRACT

The Takings Clause of the Fifth Amendment has long been controversial. It allows the government to take private property for the purpose of "public use." But what does public use mean? The definition is one of judicial interpretation. It has evolved from the original meaning intended by the drafters of the Constitution. Now, the meaning is extremely broad. This Note argues that both the original and contemporary meaning of public use are problematic. It explores the issues with both definitions and suggests a new test, solidified in legislation instead of judicial interpretation.

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INTRODUCTION

The debate over the scope and limits of eminent domain is as old as the Magna Carta. In drafting the United States Constitution, Thomas Jefferson and James Madison debated whether the government should have *any* authority to seize private property: Jefferson said no, whereas Madison said yes but with restrictions.[1] Ultimately, Madison's more moderate view prevailed, and he incorporated the restrictions in what is known as the "Takings Clause" in the Fifth Amendment.[2] This portion of the Fifth Amendment provides that "private property shall not be taken for public use, without just compensation."[3] However, as an Illinois appellate court once noted, "[w]hat constitutes a 'public purpose' . . . has plagued the American judiciary ever since it arrogated to itself the prerogative of interpreting constitutions."[4]

The debate surrounding the drafting of the Takings Clause is evidence that the Founding Fathers did not recognize the government's power to seize property but instead sought to limit it.[5] The problem is that quite the opposite has happened. Federal courts have considerably broadened the definition of "public use,"[6] which was originally intended to limit sovereign takings.[7] Now, virtually any benefit bestowed by a taking may constitute a "public purpose."[8] This Note focuses on the meaning of public use in federal case law—the parameters of which have become controversial in the wake of the 2005 U.S. Supreme Court decision in *Kelo v. City of New London*.

1. Bruce L. Benson, *The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?*, 12 INDEP. REV. 423, 429–30 (2008).

2. *Id.* at 430.

3. U.S. CONST. amend. V.

4. Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc., 510 N.E.2d 982, 984 (Ill. App. Ct. 1987).

5. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 524 (2009).

6. *See generally* Kelo v. City of New London, 545 U.S. 469, 472 (2005).

7. *See* Bell, *supra* note 5.

8. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 35 (2015).

In general, two schools of thought exist with regard to the scope of public use. The narrow interpretation, taken by many constitutional originalists, views property rights as fundamental rights afforded constitutional protection.[9] Under the narrow view, property rights are considered so fundamental that they should only be taken away if the government uses the property or if the property is available to the public.[10] This narrow interpretation requires condemned property to either be used by the government or made available as a public utility.[11] On the other hand, living constitutionalists endorse a broader view of public use. These scholars believe that the public use requirement for a taking is satisfied by projects that generally benefit the public, even if the public cannot actively access or use the space.[12] This Note contends that both interpretations are flawed.

If the original intent of the drafters of the Constitution was to protect citizens from government takings that are not absolutely necessary, then both the narrow and broad interpretations of public use are unsuccessful in doing so. The narrow interpretation is underinclusive and fails to provide for certain public uses that should justify a taking. The broad interpretation has strayed too far from the intended purpose of the Fifth Amendment by allowing condemnations for economic development and blight reduction that confer benefits on private parties.[13] This Note proposes a new, hybrid test that recognizes the worthwhile aspects of each interpretation but remains flexible.

The proposal is a federal law that continues to focus on protecting private property in accordance with both the drafters' intent and the narrow interpretation but adds new elements informed by common themes in contemporary state case law. Further, to avoid the issues resulting from a broad interpretation, the proposed test also includes some limitations taken from state statutes, constitutions, and common law. The proposed test pulls

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9. Ilya Somin, *Debating the Original Meaning of "Public Use,"* VOLOKH CONSPIRACY (Feb. 27, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/debating-the-original-meaning-of-public-use/ [https://perma.cc/4VMP-YRF7] (explaining the differing views of constitutional originalists and living constitutionalists).

10. Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 850 (2006).

11. Somin, *supra* note 9.

12. Parlow, *supra* note 10, at 851.

13. "Blight" is defined by each jurisdiction, but in essence, it refers to an area that is deteriorating, consequentially making it useless and in the process of becoming a slum. Jonathan M. Purver, Annotation, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096 § 3 (1972) (discussing a "blighted area" as expansively construed); *see also* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101–02 (2009).

language from state laws because states provide original and creative limitations on takings. State legislatures are free to impose strict limitations on takings and state courts are free to adopt stringent tests for establishing a public use. Finally, because the meaning of public use will necessarily evolve over time, the test is meant to serve as a baseline that state legislatures and federal courts may continue to build upon as new issues arise.

Part I of this Note explains the historical background of the Takings Clause. This part also summarizes how takings are administered at the state level and how current law permits delegation to municipalities. Further, Part I discusses the development of federal law and the departure from the original purpose of the Takings Clause that culminated in the controversial U.S. Supreme Court case *Kelo*. Part II considers the *Kelo* case itself as well as the different rationales offered by the Court's majority and dissenting opinions. Part III explores the legislative and judicial developments post-*Kelo* with particular emphasis on how the broad and narrow interpretations of public use mesh with the modern trend of using eminent domain to promote affordable housing developments. Part IV surveys how state courts have interpreted public use in the wake of *Kelo*, identifying common themes and innovative approaches. Finally, in light of post-*Kelo* jurisprudence, Part V proposes a new federal test for understanding public use that, as previously mentioned, attempts to remedy deficiencies in both broad and narrow interpretations.

I. HISTORICAL EVOLUTION OF THE TAKINGS CLAUSE

a. The Framers' Intent

Madison first drafted the Takings Clause to read: "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without just compensation."[14] While evidence of a debate among the drafters surrounding the scope of government's power to seize property exists,[15] there does not appear to be any evidence of a debate surrounding the restrictions enumerated in the clause as it was adopted.[16] Nevertheless, scholars have inferred Madison's intent based on historical context. In a time when relinquishing property to the Crown was common in England, the original language of the clause suggests Madison's focus

14. JAMES MADISON, *Amendments to the Constitution, [8 June] 1789*, *in* 12 PAPERS OF JAMES MADISON 196, 207 (Charles F. Hobson & Robert A. Rutland eds., 1979).

15. Benson, *supra* note 1.

16. *See id.* at 430.

was on protecting citizens from the government.[17] If that is the case, then the Takings Clause was drafted to reflect "a congruence of concerns relating to the perceived need to protect particular forms of real property from state seizure."[18] Further, the original language compared to the adopted language reveals Madison's focus on the direct physical seizure of property—an issue debated today in light of controversial regulatory takings.[19]

Even before Madison presented the Bill of Rights to Congress, his understanding of property rights was heavily influenced both by the work of the English scholars who preceded him and the other drafters of the Constitution. For example, King John of England first introduced the due process requirement to the Takings Clause in the *Magna Carta Libertatum*.[20] It states that "[n]o freeman shall be seized or imprisoned, or stripped of his rights or possessions[.]"[21]

Madison also would have likely been aware of Sir William Blackstone's four-volume series titled the *Commentaries on the Laws of England* and published in the mid-eighteenth century. In this series, Blackstone recognized the individual right to property. He stated:

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any individual in the universe.[22]

Finally, in John Locke's *Two Treatises on Government*, he defined political power as the right to make laws for the protection and regulation

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17. Madison's emphasis on direct takings was spelled out in his National Gazette piece. James Madison, *Property*, NAT'L GAZETTE, March 29, 1792, at 174–75. He stated:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions . . . .

James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 175.

18. William Michael Treanor, *The Original Understanding of the Takings Clause*, GEO. ENVT'L L. & POL'Y INST. PAPERS & REPS. 2, 6 (1998) (discussing how the original language demonstrates a focus on physical seizures).

19. *Id.* at 2. Regulatory takings occur when the government prevents a landowner via regulation from making a particular use of property that would otherwise be permissible. Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992)).

20. Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015).

21. KING JOHN OF ENGLAND, MAGNA CARTA 1215 (British Libr. Trans., 2014) (clause 39).

22. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

of property.[23] Locke argued that in the absence of laws humans have a duty to protect one another, but people generally accept laws because they are ultimately for the benefit of the public.[24] Taken together, these works provide a basis for understanding property rights in relation to the government and public interest. In essence, Madison likely wished to recognize an individual's right to property as fundamental, meaning that a property owners should not be required to relinquish their rights to property.[25] At the same time, he likely understood the government's inherent power to take or regulate property in the interest of the public good.[26] Thus, based on this understanding of property rights at the time the Takings Clause was drafted, Madison probably intended for public use to have a very limited scope; hence why Constitutional Originalists' interpretation of public use is narrow.

b. The Administration of Eminent Domain

Eminent domain is defined as "[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."[27] What would otherwise be an almost unrestrained power of federal and state government to take private property is limited by constitutional clauses such as the Fifth Amendment.[28] Although the drafters debated making this power explicit in the Constitution, the government's taking power remains inherent.[29] This power can be inferred from other clauses in the Constitution, such as Article I, Section 8, which gives states the authority to take property to build "forts, magazines, arsenals [and] dockyards" with the consent of the legislature of the state in which the property is located.[30]

Before the Supreme Court incorporated the Takings Clause into the Fourteenth Amendment's due process provision, federal courts did not restrain states from exercising eminent domain powers to take private

23. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 195 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

24. *Id.* at 197.

25. *See generally* James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174–75 (describing the application of the term "property" and the government's relation to property).

26. *See* Benson, *supra* note 1, at 428–29.

27. Mayor of Balt. v. Valsamaki, 916 A.2d 324, 335 (Md. 2007) (quoting BLACK'S LAW DICTIONARY 562 (8th ed. 2004)).

28. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE SERIES, REAL ESTATE: PROPERTY LAW § 9.1 (2d ed. 2020).

29. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 560 (1972).

30. U.S. CONST. art. I, § 8.

property.[31] Now, the recognized limitations on a state's condemnation power come from state constitutions that often reflect the Fifth Amendment or state legislation.[32] Additionally, federal courts are free to review state takings.[33]

States have the power to condemn, but they may delegate that power through statutes to governmental and certain quasi-governmental creatures, such as counties, cities, special districts, and public-utility corporations.[34] Thus, it is possible for eminent domain to occur where the state or municipality itself may not be a party to the action. However, "[a] governmental body subordinate to the state . . . may not exercise, create, extend or expand a power of eminent domain in the absence of statutory authority."[35] "Statutes delegating the right of eminent domain are strictly construed by the courts."[36]

c. Development of Fifth Amendment Interpretation

The United States Supreme Court first recognized the federal government's power to take private property in 1875 when it allowed the Secretary of the Treasury to take private property for the construction of a post office.[37] Because the Constitution does not explicitly grant condemnation powers to the federal government, all condemnations prior to this case were conducted through the states' power to condemn enumerated in Article I, Section 8.[38] Although the government has an inherent power to take property, Article I, Section 8 of the Constitution explicitly grants state legislatures the power to decide what constitutes a public use by defining them in statutes. However, because the Supreme Court—in *Kohl v. United States*—recognized the federal government's inherent power to condemn, the federal government no longer needs to use the state's Article I power for takings. Thus, *Kohl* effectively eliminated limitations on the federal government's condemnations.[39]

Next, the Court's decision in *Berman v. Parker* blurred the distinction between "public interest," "public welfare," and "public

31. Norwood v. Horney, 853 N.E.2d 1115, 1132 (Ohio 2006).

32. *See, e.g.*, WASH. CONST. art. I, § 16.

33. *Norwood*, 853 N.E.2d at 1132.

34. STOEBUCK, *supra* note 28, at § 9.3.

35. Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 646 (Okla. 2006).

36. City of Smithville v. St. Luke's Northland Hosp. Corp., 972 S.W.2d 416, 420 (Mo. Ct. App. 1998).

37. *See generally* Kohl v. United States, 91 U.S. 367 (1875).

38. Benson, *supra* note 1, at 429.

39. *Id.*

purpose" when defining public use.[40] In 1954, department store owners challenged the constitutionality of the Redevelopment Act.[41] In the Act, the state legislature gave the Redevelopment Land Agency the ability to seize property to redevelop blighted areas.[42] Ultimately, the Court rejected the plaintiffs' claims, affirming the lower court's decision that it was within the legislative branch's discretion to decide that reducing aesthetics and health issues caused by blighted areas was a public use.[43] By using the terms public use and public purpose interchangeably, Justice William O. Douglas, in the majority opinion, established that the public use requirement of the Fifth Amendment was satisfied if the use of property would further some public purpose or generally promote welfare—a far less stringent standard than requiring that the public have access to and use the property.[44] Additionally, he noted that the "role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[45] Thus, through Justice Douglas's opinion, the Court also gave broad judicial deference to the legislature.[46]

In 1984, the Court further expanded its understanding of public use in *Hawaii Housing Authority v. Midkiff* by concluding that the government itself does not have to use the property to legitimize the taking because the public use test is one of purpose, not mechanics.[47] As elucidated by this case, "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[48] Essentially, the Court reasoned that the fact that the property is conveyed to a private owner does not mean that the taking has no public use.[49] Thus, after the Court decided *Midkiff*, the government was no longer required to use the property it condemned, but instead, the government could take private property if it would generally serve a public purpose.

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40. *See generally* Berman v. Parker, 348 U.S. 26 (1954) (comparing "public welfare" and "public purpose").

41. *Id.* at 28.

42. *Id.* at 29.

43. *Id.* at 35–36.

44. Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in* Kelo v. City of New London, 41 GONZ. L. REV. 81, 88 (2005).

45. *Berman*, 348 U.S. at 32.

46. *See id.*

47. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

48. *Id.* at 243.

49. *Id.* at 243–44.

II. THE BEGINNING OF THE END: *KELO V. NEW LONDON*

In 2005, the United States Supreme Court decided *Kelo*.[50] This holding represents an extreme departure from the original purpose of the Takings Clause. In this case, the Court applied such an expansive understanding of public use that it effectively neutered the essential requirement in the Takings Clause: That a taking must be for public use.

In 2000, the city of New London, Connecticut, approved an economic development plan projected to create over 1,000 jobs in order to "increase tax and other revenues, and to revitalize an economically distressed city."[51] Subsequently, the city's development agent successfully negotiated with most property owners and bought all but ten residences and five other properties needed to implement its plan.[52] Consequently, the agent tried to invoke eminent domain to acquire the remaining properties, none of which were alleged to be "blighted or otherwise in poor condition."[53] In response, the property owners brought an action claiming these takings violated the public use restriction, and they urged the Court to adopt a bright-line rule precluding economic development from potential public uses.[54] The key question was voiced by Justice Scalia during oral argument when he stated, "It is quite different to say you can give [a property] to a private individual simply because that private individual is going to hire more people and pay more taxes. That [understanding] . . . just washes out entirely the distinction between private use and public use."[55]

In a 5–4 decision, the United States Supreme Court upheld the takings for the purpose of economic development and refused to second-guess the city's considered judgment as to the development plan.[56] The Court relied heavily on *Berman* and *Midkiff* in its reasoning. It emphasized the need to maintain the Court's "policy of deference to legislative judgment in this field," and it did not require the city to provide evidence of the public purpose.[57] It also rejected any suggestion that it should

50. Kelo v. City of New London, 545 U.S. 469 (2005).

51. *Id.* at 472.

52. *Id.* at 475.

53. *Id.*; *see* discussio*n infra* Section III.b and note 13 (defining blight).

54. *Kelo*, 545 U.S. at 481.

55. Transcript of Oral Argument at 53–54, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

56. *Kelo*, 545 U.S. at 488–89. For an analysis of the Court's erroneous reliance on the *Lochner*-era due process cases, see Ilya Somin, *Justice Stevens Admits Error in the* Kelo *Case–But Also Doubles Down on the Bottom Line*, VOLOKH CONSPIRACY (June 8, 2019), https://reason.com/2019/06/08/justice-stevens-admits-error-in-the-kelo-case-but-also-doubles-down-on-the-bottom-line/ [https://perma.cc/C3U9-59XL].

57. *Kelo*, 545 U.S. at 480.

formulate a more rigorous test but acknowledged that a state was still free to place further restrictions on exercising the state's takings power.[58]

In Justice Kennedy's concurrence, he emphasized the importance of judicial review for determining a public use.[59] Although Justice Kennedy agreed with the majority in rejecting a presumption of invalidity for economic development, he acknowledged that a "more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings."[60]

Justice O'Connor, joined by Justice Scalia and Justice Thomas, dissented, explaining that, prior to this case, the Court had generally identified three categories of takings in compliance with the public use requirement: (1) sovereign transfers of private property to public ownership, such as roads, hospitals, or military bases; (2) sovereign transfers to private parties who make the property available for the public's use, such as railroads, public utilities, or stadiums; and (3) takings that serve a public purpose.[61] Further, Justice O'Connor concluded that economic development did not meet the public purpose requirement in any of these categories.[62] She distinguished this case from both *Berman* and *Midkiff*, in which legislative bodies had found that the elimination of the existing property use was necessary to remedy a harm.[63] Thus, in those cases, it did not matter that the property was turned over to private use because the public purpose was realized when the harmful use was eliminated.[64] She criticized the majority in *Kelo* for expanding the meaning of public use and permitting a taking for "ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public."[65] Justice O'Connor explained that expansion of the definition of public use would render the Public Use Clause meaningless to the Takings Clause.[66]

58. *Id.* at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

59. *Id.* at 490–92 (Kennedy, J., concurring).

60. *Id.* at 493.

61. *Id.* at 497-98 (O'Connor, J., dissenting). "Public ownership" meaning a property owned by the public. "Use-by-the-public" meaning that the public is permitted to use the property.

62. *Id.* at 497.

63. *Id.* at 500.

64. *Id.*

65. *Id.* at 501.

66. *Id.* at 494.

Finally, in Justice Thomas's dissent, he espoused a narrow interpretation of public use, stating that "it is 'imperative that the Court maintain absolute fidelity to' the [Public Use] Clause's express limit on the power of the government over the individual."[67] Thomas argued for adherence to the plain language of the Public Use Clause by discussing the history and original meaning of public use.[68] He further declined to justify "insurmountable deference to legislative conclusions that a use serves a 'public use'" because it is unlikely that the Framers intended to completely defer to legislatures, and additionally, the Court does not do so in other circumstances of constitutional interpretation.[69] In the end, New London acquired Susette Kelo's property but never developed it.[70] Today, her home sits blighted.[71]

III. POST-*KELO* ISSUES UNDER THE BROAD AND NARROW INTERPRETATION

a. Backlash to the Broad Interpretation

Since *Kelo*, economic development has been considered a valid public use within the meaning of the Takings Clause, so long as its actual effect is not to bestow a private benefit to a single private property owner.[72] Thus, condemnations for economic purposes may be legitimatized by a development plan of some kind.[73] After *Kelo* was decided, lawmakers immediately recognized the potentially dangerous implications from its holding. These dangers sparked an enormous political backlash at both the state and federal level. The response to *Kelo* created more new state legislation than any other Supreme Court decision in history—even surpassing *Furman v. Georgia*.[74] After *Furman*, thirty-five states passed

67. *Id.* at 507 (Thomas, J., dissenting) (quoting Shepard v. United States, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in judgment)).

68. *Id.* at 517.

69. *Id.*

70. The Cato Institute, *The* Kelo *Decision Ten Years Later*, YOUTUBE (June 23, 2015), https://www.youtube.com/watch?v=5zswtTQaFuE [https://perma.cc/L2AD-R3AQ].

71. *Id.*

72. Somin, *supra* note 9.

73. Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 630 (2006).

74. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (holding that the death penalty is a cruel and unusual punishment and violates the Eighth and Fourteenth Amendments). For a comprehensive analysis of the effective and ineffective legislative reforms post-*Kelo*, see Somin, *supra* note 13, at 2102.

new death penalty statutes.[75] In the first three years after *Kelo* was decided, forty-three states passed laws or amended their constitutions to explicitly ban economic development as a public use.[76] The U.S. House of Representatives also immediately passed a resolution denouncing *Kelo* and placed a limitation on eminent domain power.[77] In total, forty-five states enacted reforms in the ten years after *Kelo*, and polls showed that 80% of the public disapproved of the ruling.[78]

For example, Texas's amended Constitution now states that "'public use' does not include the taking of property. . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."[79] Additionally, Chapter 2 of the Pennsylvania Code specifically enumerates limitations and exceptions of eminent domain, stating that "[e]xcept as set forth in subsection (b), the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited."[80] Subsection (b) provides an extensive list of exceptions.[81] Unfortunately, not all post-*Kelo* reforms successfully addressed the problem created by the Court's holding and the broad interpretation of public use.

b. Blight Condemnations Under the Broad Interpretation

For instance, in an attempt to avoid private-to-private takings, many states enacted legislation prohibiting takings for private economic

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75. Evan J. Mandery, *It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty–Here's How It Failed*, THE MARSHALL PROJECT (Mar. 30, 2016), https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed [https://perma.cc/6WS5-GNEY].

76. *See* Somin, *supra* note 13, at 2102.

77. *See generally* H.R. Res. 340, 109th Cong. (2005) (enacted).

78. Ilya Somin, *The Political and Judicial Reaction to* Kelo, VOLOKH CONSPIRACY (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/ [https://perma.cc/Y5HK-2YGA].

79. TEX. CONST. art. I, § 17(b).

80. 26 PA. CONS. STAT. § 204(a) (2006).

81. *Id.* at (b) (including, for example, "(2) The property is taken by, to the extent the party has the power of eminent domain, transferred or leased to any of the following: (i) A public utility or railroad as defined in 66 Pa.C.S. § 102 (relating to definitions). (ii) A common carrier. (iii) A private enterprise that occupies an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area. (3) There is, on or associated with the property taken, a threat to public health or safety. This paragraph includes the following: (i) Removal of a public nuisance. (ii) Removal of a structure which is: (A) beyond repair; or (B) unfit for human habitation or use. . . . (4) The property taken is abandoned. (5) The property taken meets the requirements of section 205 (relating to blight). (6) The property taken is acquired by a condemnor pursuant to section 12.1 of the act of May 24, 1945 (P.L.991, No.385), known as the Urban Redevelopment Law. (7) The property taken is acquired for the development of low-income and mixed-income housing projects pursuant to the act of May 28, 1937 (P.L.955, No.265), known as the Housing Authorities Law, or to be developed using financial incentives available for the development of low-income and mixed-income housing projects").

development. Private-to-private takings occur when a private property is taken under the guise of eminent domain but is transferred to a private party for a private purpose.[82] Although private-to-private takings were prohibited, state legislatures simultaneously allowed takings for "almost any area where economic development could potentially be increased," thereby creating a special exception that allowed for blight condemnations.[83]

For example, Illinois's municipal code permits acquisition of a slum or blighted area for the "elimination and for the prevention of the development or spread of slums and blight and may involve slum clearance and redevelopment in a Slum and Blighted Area Redevelopment Project."[84] In *Kelo*, eliminating blight was one of the justifications for the economic development plan.[85] Under this line of reasoning, allowing condemnations to reduce blight provides an avenue for permissibly taking private property for private economic use. Therefore, some statutes, touted as reforms to combat the broad interpretation of public use, are ineffective because they still allow takings for private development.

c. Affordable Housing

In addition to reforms still allowing private-to-private takings, the broad definition of public use is problematic in other ways, such as its marginalization of issues like affordable housing. Cities that invoke the acute need for affordable housing in order to justify private-to-private takings have received pushback from those on both sides of the debate.[86] Those who hold a narrow view recognize that government entities can easily acquire property to construct affordable housing units, but this interpretation prohibits government entities from transferring the properties to private developers, who arguably could construct and operate these properties more efficiently and effectively.[87] On the other hand, affordable housing certainly constitutes a public use under the broad interpretation but so does other economic development.[88] With the broader

82. *See* United States v. 14.02 Acres of Land More or Less in Fresno Cnty., 547 F.3d 943, 952 (9th Cir. 2008).

83. Somin, *supra* note 13, at 2121.

84. 315 ILL. COMP. STAT. 5/3(j) (2006) (defining a blighted area as "any area of not less in the aggregate than 2 acres located within the territorial limits of a municipality where buildings or improvements, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or layout or any combination of these factors, are detrimental to the public safety, health, morals or welfare").

85. Kelo v. City of New London, 545 U.S. 469, 483 (2005).

86. Parlow, *supra* note 10, at 851–52.

87. *Id.* at 852.

88. *Id.* at 852–53.

definition of public use, cities will likely use their condemnation power to build projects that generate more property or tax revenue than affordable housing.[89] Thus, cities in need of affordable housing may use eminent domain to acquire land, but the narrow interpretation would make operation inefficient and the broad definition arguably incentivizes the use of eminent domain for other more fiscally attractive projects.

Eminent domain is regularly used as a method to improve communities and remedy problems arising in growing metropolitan areas. For example, in increasingly expensive cities, such as New York, Seattle, and San Francisco, the need for affordable housing is growing as homeless populations increase.[90] In 2017, the Mayor of New York City, Bill de Blasio, proposed a solution to the homelessness crisis by using eminent domain to acquire twenty-five to thirty privately owned buildings to create affordable housing.[91] Even though de Blasio reasoned that "[a]ddressing the homelessness is a fundamental public good," eminent domain was ultimately not necessary for the project because negotiations with the landowners were successful.[92]

Seattle took a slightly different tack. In March 2019, the Seattle City Council passed mandatory affordable housing requirements accompanying the upzoning[93] of twenty-seven neighborhoods.[94] The city will likely need to use eminent domain to create government-implemented affordable housing units in these newly upzoned neighborhoods. Affordable housing is an important issue in growing cities, and eminent domain remains a potential avenue for assisting in land acquisitions.

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89. *Id.* at 853.

90. *See* Emily Badger, *Happy New Year! May Your City Never Become San Francisco, New York or Seattle*, N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/upshot/happy-new-year-may-your-city-never-become-san-francisco-new-york-or-seattle.html [https://perma.cc/7N4Y-4UMJ].

91. Bill de Blasio, Mayor of N.Y.C., Mayor de Blasio Announces Move to Convert Cluster Buildings into Permanent Affordable Housing for Homeless Families (Dec. 12, 2017), https://www1.nyc.gov/office-of-the-mayor/news/758-17/transcript-mayor-de-blasio-move-convert-cluster-buildings-permanent-affordable [https://perma.cc/4S86-YXHY].

92. *Id.*

93. Upzoning occurs when areas are rezoned to allow for higher use, such as changing a residential zone to a commercial one or a commercial zone to an industrial one. *See* 3 DWIGHT H. MERRIAM & SARA C. BRONIN, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 38:12 (4th ed. 2020) (upzoning amendments).

94. Daniel Beekman, *Seattle Upzones 27 Neighborhood Hubs, Passes Affordable-Housing Requirements*, SEATTLE TIMES (Mar. 18, 2019), https://www.seattletimes.com/seattle-news/politics/seattle-upzones-27-neighborhood-hubs-passes-affordable-housing-requirements/ [https://perma.cc/PZ8R-8BH6].

IV. STATE CASE LAW

The broad definition of public use defined in *Kelo* serves as a baseline for state legislatures and courts to limit sovereign takings. Since 2005, states have added limitations to proving a public use through constitutions, statutes, and case law. Although almost every state enacted a statute in response to *Kelo*, questions for state courts arising from eminent domain challenges inevitably still exist. Common themes have emerged among states that were tasked with determining a public use definition and meaning post-*Kelo*. Part V is a survey of contemporary eminent domain issues, which highlight some unique state statutes and generally demonstrate a common focus: protection of property owners.

To start, it is important to understand how eminent domain case law works. State legislatures define specific public uses in statutes and place limitations on the "creatures of government" in constitutions. However, the presumption of a public use enumerated in a state law is rebuttable if parties can prove that a taking is clearly and palpably of a private character. On the other hand, an acceptable public use, even in the hands of a private actor, may still exist if the use is of a public character. Therefore, subsequent conveyances to private parties are not per se impermissible. Further, courts may find that the character of a taking is still for a public use when the public merely has a right to access it or even if an incidental private benefit exists.

a. A Survey of Common Themes and Examples of Contemporary Issues

In the first few years following *Kelo*, Ohio, Oklahoma, Maryland, and the District of Columbia were the first supreme courts tasked with addressing eminent domain issues. These state courts distinguished between taking particular properties for general "economic development"—which, like the plan in *Kelo*, could provide a public benefit through tax revenues, jobs, or blight reduction—and larger plans in the furtherance of genuine urban renewal.[95] For the most part, state courts appear to have found ways to protect property owners by distinguishing from *Kelo*.

95. *See generally, e.g.*, Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006); Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639 (Okla. 2006); Mayor of Balt. v. Valsamaki, 916 A.2d 324 (Md. 2007).

Norwood v. Horney was the first state supreme court case decided after *Kelo*.[96] The Ohio Supreme Court held that the economic benefit from a redevelopment did not satisfy the public use requirement in the state constitution.[97] In this case, a struggling city entered into a contract to redevelop a neighborhood.[98] The private company planned to build 200 apartments or condominiums, over 500,000 square feet of office and retail space, and two public parking facilities.[99] The court acknowledged that, although "there is merit in the notion that deference must be paid to a government's determination that there is sufficient evidence to support a taking[,]" defining a public use is still a judicial question.[100] The court agreed with Justice O'Connor's dissent, which explained that a state is not permitted to take an individual's property solely for economic gain.[101] Thus, although economic factors may be considered in determining whether private property may be appropriated, an economic benefit to the community, standing alone, did not satisfy the public use requirement.[102]

In another case, the Supreme Court of Oklahoma denied Muskogee County's attempt to take property for the installation of three pipelines.[103] Two of the three proposed pipelines would only serve a privately owned electric generation plant.[104] The third pipeline was intended to serve new residents and enhance water service to current residents.[105] In this case, the county (a municipality) was attempting to invoke eminent domain, so the court's analysis was limited to a strict statutory construction of the Oklahoma law.[106] A county's power to condemn property comes from a statute conferring the state's power to condemn. As noted above, these statutes are strictly construed.

96. David L. Callies & Christina N. Wakayama, *Public Use/Public Purpose After* Kelo v. City of New London 20 (Mar. 8–9, 2007) (presented at the Rocky Mountain Land Use Institute in Denver, Colorado), https://www.law.du.edu/images/uploads/rmlui/conferencematerials/2007/Friday/Was ChickenLittleRightIstheskyfalling/RMLUIKeloUpdatePaperMarch2007.pdf [https://perma.cc/S2BF-96V4].

97. *Norwood*, 853 N.E.2d at 1123.

98. *Id.* at 1124.

99. *Id.*

100. *Id.* at 1136–37.

101. *Id.* at 1140.

102. *Id.* at 1140–41.

103. *See* Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 652–53 (Okla. 2006).

104. *Id.* at 642.

105. *Id.* at 643.

106. *Id.* at 646.

Additionally, Oklahoma precedent required the court to construe constitutional eminent domain provisions "strictly in favor of the owner and against the condemning party."[107] The court rejected the county's contention that the third pipeline would serve a public purpose by enhancing economic development through the "[increase of] taxes, jobs and public and private investment."[108] Instead, the court reasoned that municipalities did not have unrestrained discretion to condemn property for economic development outside the purposes enumerated in statutory schemes, which, in Oklahoma, is limited to blight removal.[109] Thus, economic development alone did not constitute a public purpose sufficient to justify the takings.[110] The transfer of private property to a private party, in the absence of blight, was not a permissible taking for a municipality.[111]

In 2007, the District of Columbia Court of Appeals held that unlike the plaintiffs in *Kelo*, the plaintiff in *Franco v. National Capital Revitalization Corp.* adequately pled a pretextual defense.[112] He argued that the sole objective of the acquisition at issue was to build a new shopping center.[113] Although the court did not decide the case on its merits (it remanded the case), it provided guidance on the meaning of "pretext"[114] and noted that the most determinative factor in *Kelo* was whether a plan "unquestionably served a public purpose."[115]

That same year, the Court of Appeals of Maryland denied a taking for the purpose of economic development—despite its permissibility under state law—because the City of Baltimore did not adequately prove that public interest required immediate possession of a specific property.[116] Although Maryland law recognized economic development as a public purpose when implemented as part of an urban renewal plan, a quick-take condemnation[117] required the city to provide justification proving that the

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107. *Id.* (citing Stinchcomb v. Oklahoma City, 198 P. 508, 508 (First Syllabus by the Court) (Okla. 1921)).

108. *Id.* at 648.

109. *Id.* at 650.

110. *Id.*

111. *Id.*

112. Franco v. Nat'l Cap. Revitalization Corp., 930 A.2d 160, 171–72 (D.C. 2007).

113. *See id.* at 171.

114. *Id.* at 172.

115. *Id.* at 173–75 ("We conclude that a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed.").

116. Mayor of Balt. v. Valsamaki, 916 A.2d 324, 355 (Md. 2007)

117. Ehren M. Fournier, *When Condemnation Precedes Compensation: Understanding the 'Quick Take,'* FAEGRE DRINKER (July 2, 2019), https://www.faegredrinker.com/en/insights/public

immediate taking was for a public purpose.[118] Thus, in the context of a quick-take condemnation, the Maryland Court of Appeals followed Ohio and Oklahoma, holding that condemnation of a property solely for genuine urban renewal purposes, without more, was not enough to constitute a public use.[119]

However, in a more recent Iowa Supreme Court decision, the court recognized that "trickle-down benefits of economic development are not enough to constitute a public use," but it still permitted takings for the construction of an oil pipeline.[120] The court reasoned the Dakota Access Pipeline provided the public the benefits of cheaper and safer transportation of oil and lower petroleum prices.[121] Further, the pipeline was a common carrier, which falls squarely within the second category of traditionally valid public uses cited by Justice O'Connor in the *Kelo* dissent.[122] Thus, although other state courts used the *Kelo* dissent to bolster their opinions and distinguish the cases before them to protect property owners, their line of reasoning is clearly not dependable. The Iowa Supreme Court directly cited the decisions from Ohio, Oklahoma, and Maryland.[123] Yet, the Iowa court approved takings for an oil pipe merely because an additional benefit beyond economic development existed.[124]

b. Limitations and Nuance

Because states are free to narrow restrictions on takings beyond those established by the United States Supreme Court and the Fifth Amendment, some state statutes are extremely protective. For example, in *Reading Area Water Authority v. Schuykill River Greenway Association*, the Supreme Court of Pennsylvania denied condemnation of a drainage easement because it reasoned the sewer line at issue primarily served a private subdivision, even though drainage systems generally constitute a public use.[125] In the statute conferring condemnation power, the Pennsylvania

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ations/2019/7/when-condemnation-precedes-compensation-understanding-the-quick-take [https://perma.cc/DYB7-JDAW] ("In a quick-take proceeding, possession and title pass to the condemning agency before the court determines the amount of just compensation the agency owes to the property owner.").

118. *Valsamaki*, 916 A.2d at 355.

119. *Id.* at 356.

120. Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829, 849 (Iowa 2019).

121. *Id.*

122. *Id.*

123. *Id.* at 845–51.

124. *Id.* at 851. For a comprehensive analysis on the issues with oil pipelines and eminent domain, see generally Natalie M. Jensen, Note, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29 FORDHAM ENV'T L. REV. 320 (2017).

125. Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, 100 A.3d 572, 583–84 (Pa. 2014).

legislature elected to prohibit all takings that would be used for any private enterprise.[126] This statute differed from other state statutes that permitted an incidental private benefit.

Further, in *Salt Lake City Corp. v. Evans Development Group, LLC.*, the Utah Supreme Court acknowledged the limitations on the use of property by a third party under the State's eminent domain statutes.[127] It held that the city of Salt Lake could not condemn property and exchange it with a public utility company.[128] Under the Utah eminent domain statutes, the condemnor must: (1) be the party in charge of the public use for which the property is sought; (2) commence and complete construction within a reasonable time; and (3) satisfy the public use requirement on the specific property subject to condemnation.[129] The requirements were not met in this case because "the City was the sole condemnor, but it was Rocky Mountain Power that was to be in charge of the public use of building and operating an electrical substation."[130]

Thus, these additional unique limitations imposed by some states help confine the United States Supreme Court's broad interpretation of public use in those respective states.

V. THE "NARROW-PLUS" TEST

It is uncontested that the drafters of the Takings Clause sought to protect private property from sovereign takings unless the new use of property would benefit the public. However, the narrow view of public use that is most consistent with the original intent of the drafters is underinclusive and precludes takings that constitute a valid public use. This fact explains the gradual expansion of the definition of public use in case law. On the other hand, the broad definition impermissibly justifies takings that are not completely necessary for the greater good, such as takings for private economic development. Even in the wake of *Kelo*, state courts do not necessarily protect private property owners to the extent likely intended by the drafters. Therefore, a statutory fix at the federal level with a test for defining public use somewhere between the recognized narrow and broad interpretations is imperative.

This Note's proposal is to create a flexible "narrow-plus" federal test for a finding of public use. This new test will remain rooted in the narrow interpretation by focusing on protection from government seizure of

126. *Id.* at 583.
127. Salt Lake City Corp. v. Evans Dev. Grp., LLC, 369 P.3d 1263 (Utah 2016).
128. *Id.* at 1269.
129. *Id.* at 1267–68.
130. *Id.* at 1269.

property unless the taking is assuredly for a public use. However, this Note proposes to add elements for determining public use based on state case law, which by implication includes elements of some state statutes and constitutions. The elements of the test will remain simple so that federal (and state) courts may apply it regardless of how Congress changes the enumerated public uses in statutes. Additionally, the test includes limitations taken from state law in order to prevent another broad interpretation of public use.

First, all courts should continue to give deference to the legislature when declaring something a public use. This guideline will also allow Congress and state legislatures to add stricter eminent domain guidelines as they see fit. If a challenge to a specific taking exists, the judiciary will review the character and purpose of the taking. Under this new test, the condemnor must provide evidence to satisfy the following three prongs: (1) the purpose of the taking is principally for a public use; (2) the condemnor will oversee the construction and operation of the public use; and (3) the public use will definitely occur on the specific property acquired. To reiterate, state legislatures are free to create stricter tests or enumerate specific public uses. Like some of the examples above, a state may add restrictions, such as precluding any incidental private benefits or economic development plans. This test merely provides a baseline and starting point because what constitutes a public use will undoubtedly evolve.[131]

The "narrow-plus" test would likely remedy the blight loophole in state statutes and the affordable housing issues arising under both the narrow and broad interpretations of public use. Blight removal would only be permissible if the parties could prove the first and third prongs of the test. If the property in question actually posed public health issues (like the properties in *Berman* and *Midkiff*), then it would be a permissible taking. However, private-to-private takings would not satisfy either requirement.

Application of the new test to the affordable housing issue provides an example of the need for an interpretation of public use between the confines of the narrow and broad definitions. Under the new test, cities would be permitted to transfer property to a private party to more efficiently construct and operate affordable housing. Assuming statutory authority from the state, cities could likely produce evidence that the takings constitute a public use because affordable housing contributes to the general welfare and therefore meets the first prong. This main issue under the broad interpretation would be resolved because takings for

131. Stout v. City of Durham, 468 S.E.2d 254, 257 (N.C. Ct. App. 1996) ("Whether a condemnor's intended use of property is for 'the public use or benefit' is a question of law for the courts; the concept is flexible and adaptable to changes in society and governmental duty.").

profitable development would likely not satisfy the first prong, and therefore affordable housing would not have to compete with more lucrative projects. The second prong of the new test would be satisfied even if private parties assumed responsibility for affordable housing projects (the main issue under the narrow interpretation) because the only requirement is that the condemnor "oversees" the construction and operation of the affordable housing units. Therefore, municipalities could potentially hire sub-contractors and take a hands-off approach to supervision. Finally, assuming the affordable housing units are constructed on the same plot of land as the condemnation, the third prong would be easily met.

CONCLUSION

The Takings Clause is ostensibly for the protection of private property. However, the narrow definition of public use has evolved as a necessity to address modern issues. The broad definition of public use announced in *Kelo* illustrates an extreme departure from the Founding Fathers' intention to limit sovereign takings. Given that eminent domain continues to be a vital tool for the government, gaps in the new broad definition of public use require a remedy. The proposed test can ultimately serve as a baseline federal test either at common law or enumerated in a statute to protect private property owners as was originally intended.