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LEGAL MEMORANDUM

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Revisiting *Kelo*

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Abstract

The Supreme Court's ruling in Kelo v. City of New London *sparked considerable public outrage. The prospect that any homeowner could lose his or her house and property to a corporation whose operation a city thought could better serve its needs generated uncertainty and fear. But that day has passed. The tenth anniversary of* Kelo *is marked more by public sufferance of the Supreme Court's ruling than by continued public outrage. The Supreme Court has not returned to the subject, and its decision therefore stands as the Court's last word on the meaning of the Public Use Clause. The problem for the public and property rights advocates is that* Kelo *has been forgotten. If* Kelo *should return to prominence because some state or city prefers B to A as a property owner, the Constitution will likely offer property owners no protection against whatever public benefits a majority of a state or local government can imagine.*

Government uses its eminent domain power for a host of reasons. Classic examples are the need to construct a bridge, a port, a national park, or a government office building. More contemporary instances include the elimination of a public nuisance like an unprotected hazardous waste dumping site or a row of dilapidated crack houses overrun by vermin. The public generally understands that the government will exercise its eminent domain power to take private property in only three circumstances: when government personnel will use it, when the public will use it, or when private parties will use or develop it for the public's benefit in a quasi-governmental capacity.

This paper, in its entirety, can be found at **http://report.heritage.org/lm155**

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Key Points

- A decade ago, the U.S. Supreme Court gave its approval to an unprecedented and remarkable use of the eminent domain power, ruling in *Kelo v. City of New London* that as long as a property owner is paid the fair market value of what is taken, the Constitution permits a city to transfer that property from one private party to another because the city prefers what the second party will do with that land.
- Since the end of the New Deal, the Court has virtually abandoned any pretense of even requiring the government to manufacture some credible public justification for a taking.
- Despite the fact that the Public Use Clause is an express textual component of the Fifth Amendment—a provision that, after all, refers to "life, liberty, *and property*"—the Court has eschewed any serious review of the government's eminent domain power to ensure that it predominantly serves a "public purpose," let alone constitutes a "public use."

A decade ago, however, the Supreme Court of the United States gave its approval to an unprecedented and remarkable use of the eminent domain power. In *Kelo v. City of New London*,[1] the Court ruled that as long as a property owner is paid the fair market value of what is taken, the Constitution permits a city to transfer that property from one private party to another—literally from *A* to *B*, in that case, from a homeowner to a real estate developer—because the city prefers what *B* will do with that land.

New London decided that certain particular tracts of private property would be more profitable to the community if the property belonged to different owners and was put to a different use. Unlike what is supposed to happen in an urban renewal program, the city took perfectly kempt and functioning homes away from long-term city residents and gave the homes and the ground land to a private real estate developer in the hope of enticing a large corporation to locate a facility in the area.

The homeowners challenged the takings in court. They lost in the state courts, but the Supreme Court agreed to hear their plea. Unfortunately for the landowners, however, the Court ruled by a five-to-four vote that as long as just compensation is paid, the government may transfer property from one private party to another not to remedy a social ill, but as long as the government can mount the claim that the latter party will use the land in a manner that improves the local economy.

The *Kelo* decision did not sit well with the public,[2] and the disquiet it caused reached across political lines. "The stark realization that one person could be booted off his property so that another could take his place brought forth a huge sigh of disbelief from all parts of the political spectrum."[3] Modern-day liberals (also known as progressives) treated the decision as yet another capitulation to a well-heeled business interest at the expense of politically powerless individuals, parties who would not even have had the means to defend their homes were it not for the assistance of a public-interest organization, the Institute for Justice.[4] Conservatives (also known as classical liberals) saw the case as a violation of the principle that a person's home is his or her castle,[5] a tenet reflecting the belief that one's home is a place of refuge, security, and comfort and should be protected by the law.[6]

Seeing that their homes could now be taken by the government for use by a private developer in virtually any case, the public voiced an immediate and vocal opposition to the *Kelo* ruling. The public believed that the *Kelo* case did not involve a taking in

1. 545 U.S. 469 (2005).

2. *See, e.g.*, Ronald S. Cope, Kelo v. City of New London—*How Safe Is Your Castle?*, 94 Ill. B.J. 186 (2006) ("Few recent cases have generated more debate and news coverage than *Kelo*[.]"); Ilya Somin, *The Judicial Reaction to Kelo*, 4 Alb. Gov't L. Rev. 1, 2 (2011) (hereafter Somin, *Judicial Reaction*) ("*Kelo* triggered an unprecedented political backlash. Surveys showed that some eighty percent of the public opposed the decision, which was also denounced by politicians and activists from across the political spectrum. Forty-three states and the federal government enacted legislation intended to curb economic development takings; this is probably the broadest legislative reaction ever generated by any Supreme Court ruling."); *id.* at 3–4 ("[The] state courts have not reacted to *Kelo* by adopting similarly permissive approaches to public use issues. To the contrary, three state supreme courts have explicitly repudiated *Kelo* as a guide to their state constitutions. Other recent state supreme court decisions have imposed constraints on takings that go beyond *Kelo* even if they have not completely rejected the *Kelo* approach.... Overall, the trend of post-*Kelo* state public use decisions seems to be in the direction of greater restriction.") (footnotes omitted); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2101–02 (2009) (hereafter Somin, *Political Response*) ("The Supreme Court's decision in *Kelo v. City of New London* generated a massive backlash from across the political spectrum. *Kelo*'s holding that the Public Use Clause of the Fifth Amendment allows the taking of private property for transfer to new private owners for the purpose of promoting 'economic development' was denounced by many on both the right and the left.").

3. Richard A. Epstein, Kelo: *An American Original*, 8 Green Bag 2d 355, 356 (2005); *see also, e.g.*, H.R. Rep. No. 113-357, 113th Cong. 2 (2014) (report accompanying H.R. 1944, the Private Property Rights Protection Act of 2013) ("[P]ublic opinion polling showed that Americans from across racial, ethnic, partisan, and gender lines condemned the [*Kelo*] decision.") (footnote omitted).

4. *See* Epstein, *supra* note 3, at 357; *see also* Richard A. Epstein, *Taking Stock of* Takings*: An Author's Retrospective*, 15 Wm. & Mary Bill Rts. J. 407, 410 (2006) ("Liberals rightly saw in *Kelo* an urban bulldozer that allows insiders to take advantage of their political clout.").

5. *See* Epstein, *supra* note 4, at 410 ("[C]onservatives saw in *Kelo* a gratuitous weakening of the institution of private property.").

6. *See, e.g.*, U.S. Const. amend. IV ("The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") (emphasis added); United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972) ("[The] physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

circumstances remotely similar to the types of uses that historically justified the government's exercise of the eminent domain power and put in jeopardy one of the rights that traditionally has defined the American dream: the right to own a home.

Some states responded by amending their constitutions and their statutory codes; others had state court rulings that rejected the rationale of *Kelo*.[7] Congress has not responded to *Kelo*, however, and the Supreme Court has not revisited the issue in the past decade. *Kelo* therefore remains the Supreme Court's most recent discussion of the meaning of the Public Use Clause.

Tenth anniversaries are fitting occasions for the re-examination of Supreme Court cases. A decade is ample time to witness how a ruling has played out in the lower federal and state courts; what, if anything, the Congress and state or local legislatures have done in response to the decision; whether the Supreme Court has revisited the issue and reaffirmed it, revised it, or tossed it into the ashbin; and how the public has responded to the ruling. In other words, have the states, cities, and public accepted the ruling and moved on to other issues, or do any of them still harbor a lingering distaste for what five people on Maryland Avenue have allowed the government to do to property owners?[8]

This *Legal Memorandum* is one step in the re-examination process.[9]

The Common Law

The common law strongly guarded property rights.[10] Blackstone found that under English law and custom, "every man might use what trade he pleased."[11] John Locke wrote that men created civil society to protect "property" along with life and liberty.[12] Adam Smith believed that the right to pursue a lawful occupation was an essential element of the right to "property."[13] "The seventeenth-century English constitutional maxim making liberty dependent on security in private rights to property may be the most familiar legal doctrine identified by historians of that period."[14] By the following century, in the "pantheon of British liberty there was no right more changeless and tireless than the right to property."[15]

7. *See, e.g.*, Ilya Somin, The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain 8 (2015) (noting "the dramatic political reaction to *Kelo*, which generated a wider backlash and more state legislation than almost any other decision in modern Supreme Court history. The massive political and legislative reaction to *Kelo* was an important boost for the cause of property rights. The issue attracted more public attention than ever before, and a number of states passed strong reform legislation, particularly those that enacted it by referendum"); *id.* at 9 ("Since *Kelo*, several state supreme courts have considered whether or not that decision's interpretation of the Public Use Clause of the federal Constitution should guide their own interpretations of similar clauses of their respective state constitutions. Overwhelmingly, the answer has been 'no.'"); Daren Bakst, *Prohibiting Use of Eminent Domain*, Inside ALEC (July–Aug. 2011); Steven J. Eagle et al., *Coping with* Kelo*: A Potpourri of Legislative and Judicial Responses*, 42 Real Prop. Prob. & Tr. J. 799 (2008) (describing the states' responses to *Kelo*); *Judicial Reaction to* Kelo, *supra* note 2; Somin, *Political Response*, *supra* note 2. For an example of how one state responded to *Kelo*, see Somin, *supra*; Daren Bakst, *Eminent Domain in North Carolina: The Case for Real Reform*, The John Locke Soc. (May 2007). Not all of the responses to *Kelo*, however, are likely to be effective. *See* Somin, *supra*, at 8.

8. For critical analyses of the *Kelo* decision, see, for example, Paul D. Carrington, *Using Public Funds for Corporate Welfare: A Nineteenth Century View of* Kelo, 9 Green Bag 2d 121 (2006); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol'y 491 (2006); Epstein, *supra* note 3. For a pre-*Kelo* discussion of the Public Use Clause issues arising in connection with takings, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 161–81 (1985).

9. This Heritage Legal Memorandum should be read together with the Heritage paper discussing the possible responses that Congress could and should take today to ameliorate the adverse effects of that decision. *See* Daren Bakst, *A Decade After Kelo: Time for Congress to Protect American Property Owners*, Heritage Foundation Backgrounder No. 3026 (June 22, 2015), *available at* http://report.heritage.org/bg3026.

10. *See generally* Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 209–17 (2003).

11. William Blackstone, Commentaries *34.

12. *See* John Locke, The Second Treatise of Government § 87, at 43 (3d J.W. Gough ed. 1966) (1689).

13. *See* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations bk. 1, ch. 10, pt. 2 (1776) ("The patrimony of a…man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of [his] most sacred property.").

14. John Philip Reed, Constitutional History of the American Revolution: Authority of Rights 31–32 (1986); *see id.* at 33 ("The first and principal cause of making kings…was to maintain property and contracts, traffic and commerce among men.") (quoting John Davies, Attorney General of Ireland) (footnote omitted).

15. *Id.* at 27.

The Colonists brought the common law with them to the New World,[16] including its steadfast protection for property.[17] The Framers of the Constitution also made known the value that they placed on property.[18] "John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding generation."[19] As James Madison put it, "[g]overnment is instituted no less for the protection of the property, than of the persons of individuals."[20] Other members of the Founders' generation also extolled the benefits of private property and supported strong legal protection for its ownership.[21]

The Public Use Clause

The Constitution protects private property in several ways.[22] One of the explicit protections afforded property by the Constitution can be found in the Fifth Amendment. Read as a whole, the Fifth Amendment speaks directly to the government in two ways. First, it places certain actions completely out of bounds. No one may twice be put in jeopardy of losing life or limb for the same offense, and no one may be compelled to be a witness against himself in any criminal case. Those clauses contain some terms that need to be spelled out—When are

16. *See, e.g.*, Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J. L. & Pub. Pol'y 337, 414 & n.361 (2015).

17. *See, e.g.*, St. George Tucker, View of the Constitution of the United States 41 (Reprint 1999) (1803) ("The rights of property must be sacred, and must be protected; otherwise there could be no exertion of either ingenuity or industry, and consequently nothing but extreme poverty, misery, and brutal ignorance.").

18. *See, e.g.*, H.R. Rep. No. 113-357, *supra* note 3, at 3–4 (collecting authorities); James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 10–27 (3d ed. 2008) (hereafter Ely, The Guardian of Every Other Right); *id.* at 25 ("[T]he cry 'Liberty and Property' became the motto of the revolutionary movement."); I Records of the Federal Convention of 1787, at 147 (Max Farrand ed., 1966) (James Madison) ("The primary objects of civil society are the security of property and public safety."); *id.* at 302 (Alexander Hamilton) ("[The] one great obj[ect] of Gov[ernment] is personal protection and the security of Property."); Paul Freund, The Supreme Court in the United States 35 (1961) (quoting John Adams that "property must be secured or liberty cannot exist"); Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 38 (2012); *see also* Economic Liberties and the Judiciary 3 (James A. Dorn & Henry G. Manne eds., 1987) (quoting James Madison's 1792 essay on property published by the National Gazette); Bernard H. Siegan, Economic Liberties and the Constitution 1–80 (2d ed. 2005); James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 San Diego L. Rev. 673 (2008); Sandefur, *supra* note 10, at 218–26 (all discussing the importance of property and economic liberty to English and early American law, politics, sociology, and life).

19. James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 Harv. J. L. & Pub. Pol'y 27, 29–30 (2012); *see also, e.g.*, Epstein, *supra* note 8, at 29 ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.").

20. The Federalist No. 54, at 339 (Clinton Rossiter ed. 1961). *See also, e.g.*, Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) ("That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property be held sacred.") (Story, J.); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50–51 (1815) (identifying "the right of the citizens to the free enjoyment of their property legally acquired" as "a great and fundamental principle of a republican government"); Vanhorne's Lessee v. Torrance, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) ("[I]t is evident…that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man…. The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.").

21. "[L]eading figures in the founding of this nation believed that property rights held a cherished place in any hierarchy of social and legal values. John Locke, who had a pervasive influence on the founding generation, believed that every person had an inalienable right to life, liberty, and property and that civil societies come into existence in order to protect those rights. The colonists chafed at the restrictions placed on trade by the English mercantile system, as well as the monopolies—then known as patents—that the Crown granted to favored parties, and gravitated toward a free market economy based on private contracting by the mid-17th century. Montesquieu believed that the natural effect of commerce is to lead to peace. [¶] In the 1776 classic work *The Wealth of Nations*, Adam Smith criticized monopolies and extolled the virtues of free trade and a free-market economy. The Virginia Declaration of Rights, enacted in 1776, the same year that Adam Smith's *The Wealth of Nations* was published, incorporated that principle into Virginian law, stating that all men have certain inherent rights namely, the enjoyment of life and liberty, with means of acquiring and possessing property, and pursuing and obtaining happiness and safety. Founders such as James Madison, Alexander Hamilton, James Wilson, and John Marshall were familiar with Smith's theories, and they believed that the protection of private property was necessary for economic growth." Paul J. Larkin, Jr., *Economic Liberty and the Constitution: An Introduction*, in Economic Liberty and the Constitution: An Introduction, The Heritage Foundation Special Report 3–4 (Paul J. Larkin, Jr. ed., 2014) (hereafter Heritage Economic Liberty Report) (footnotes and internal punctuation omitted); *see also* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, *in* Heritage Economic Liberty Report, at 19–22.

22. *See* Larkin, *supra* note 21, at 4 (discussing explicit and implicit protections for private property).

two crimes "the same offense"? What does it mean to be a "witness" against himself or herself?—but the text is clear that what the Framers had in mind was a complete prohibition on particular government actions.

Otherwise, the amendment allows the government to pursue others only if it satisfies certain conditions. No one may be charged with a serious crime *unless* a grand jury has first made that decision.[23] No one may be deprived of life, liberty, or property *unless* the government has afforded him or her due process of law. And no private property may be taken for public use *unless* the owner has received just compensation.[24] Here, too, the clauses contain specific terms that need fleshing out—What compensation is "just"?—but the text only attaches a condition to the government's exercise of sovereign power; it does not impose a flat ban.

The portion of that amendment discussed in *Kelo* provides as follows: "nor shall private property be taken for public use, without just compensation." The portion referring to a taking "for public use" has come to be known as the Public Use Clause, even though it is really just a phrase. The clause could be read in different ways.[25] One reading treats the term "public use" as a limitation on the type of takings that the government may pursue. That is, it assumes that the government can exercise its eminent domain power only in those instances where the property taken from its original owner will be used by or for the public. Examples would include bridges, seaports, public parks, military bases, government offices, and so forth.

A second interpretation of "public use" would limit not the government's ability to take property, but the requirement to pay compensation. That is, the government must provide a property owner with just compensation *only* when the taking is for a public use; takings for a private use would not require any payment.[26] That interpretation, however, while textually plausible, leads to anomalous results.[27] A property owner suffers the same harm regardless of the recipient. Whether the government takes his land for a public wharf or hands the deed over to a private party for a private wharf, the owner has lost his property. Compensating only some takings, moreover, would readily skew the takings process toward whatever category is free. The government could always evade paying compensation simply by taking title to property for a private party, leasing the property back from that third party for some period, and eventually purchasing it. It is doubtful that the Framers, who saw private property as a feature to be protected, intended to allow the government to manipulate the eminent domain power in that way to avoid paying a landowner for his loss.

Another aspect of the Fifth Amendment also supports that conclusion. A condition necessary for a taking to be lawful is that the property owner must receive "just compensation" for his loss. That term has always been construed in an objective manner to mean the fair market price for the property. As a practical matter, that formula means a property owner cannot recover for the loss of any unique or special subjective value that he places on the land.[28] It may be that the land the government needs for a military base has been in his family since the state entered the union or that he was born in the house that the state wants to turn into a federal office building. All that and more may be

23. The Grand Jury Clause also contains an exception for the military, but the exception does not bear upon the point made in the text.

24. The Fifth Amendment provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

25. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 71–72 (1986).

26. *See* Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993).

27. *See* Cole v. LaGrange, 113 U.S. 1, 7–88 (1885) (interpreting same text in Missouri constitution) ("The express provisions of the constitution of Missouri tend to the same conclusion. It begins with a declaration of rights, the sixteenth article of which declares that 'no private property ought to be taken or applied to public use without just compensation.' This clearly presupposes that private property cannot be taken for private use.... Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever.") (citations omitted).

28. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949).

true, but the government does not need to compensate him for the loss of those attributes he holds so dear because that loss is "part of the burden of common citizenship."[29]

The standard for measuring just compensation sheds light on the proper interpretation of the Public Use Clause.[30] The formula for determining what compensation is due is not oblivious to the unique value that a property owner may place on his homestead. The just compensation requirement does not require the government to pay a landowner for that loss because the "use" to be made of the property will benefit the property owner either because the government as the public's representative will use it (think military base) or because he, like every other member of the public, can use it (think highway). The "public use" requirement therefore justifies the reduced compensation that a property owner will receive. Weaken or eliminate the "public use" requirement and you render unjust the compensation that an owner receives.[31]

From the Gilded Age to the New Deal

The Supreme Court had interpreted various clauses in the Constitution before the 19th century was even one-quarter done.[32] The Public Use Clause, however, was not among them. The Supreme Court did not decide that the federal government could exercise the eminent domain power until 1875.[33] The Court also did not rule that the Takings, Public Use, and Just Compensation Clauses applied to the states until very late in the 19th century.[34] The

29. "For purposes of the compensation due under the Fifth Amendment, of course, only that 'value' need be considered which is attached to 'property,' but that only approaches by one step the problem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship.... Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.... The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent. But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the 'market price' becomes so important a standard of reference." *Kimball Laundry Co.*, 338 U.S. at 5–6 (1949) (citations and footnotes omitted).

30. *See* Cohen, *supra* note 8, at 537 ("[T]he constitutionally required just compensation that courts routinely award property owners when the government condemns their property is generally viewed as undercompensatory. The Supreme Court has decided that just compensation equals fair market value, that is, what a willing buyer would pay in cash to a willing seller at the time of the taking. The shortcomings of this formula for determining just compensation are obvious. The owners of a condemned property are, by definition, not willing sellers. They may be unwilling to sell because the fair market value offered does not match the value of the property *to them*, either because they value the property more highly for sentimental reasons or because they are denied compensation for increments of value that willing sellers would probably insist upon, or at least bargain hard for, before entering into a transaction.") (footnotes and internal punctuation omitted; emphasis in original).

31. For the argument that "public use" should be limited to use by the public and benefits for the public that can be characterized as "public goods," see Epstein, *supra* note 8, at 166–69.

32. *See*, *e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (the Commerce Clause); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (the Contract Clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (the Necessary and Proper Clause); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (the Bankruptcy Clause); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (the Appellate Jurisdiction Clause); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (the Original Jurisdiction Clause).

33. *See* Kohl v. United States, 91 U.S. 367 (1875). Before then, the states exercised their eminent domain authority on behalf of the federal government. *See* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 600 & nn.2–3 (1949).

34. *See* Chicago, B. & Q. R. Co., 166 U.S. 226 (1897). Previously, the Supreme Court had ruled that the Fifth Amendment, like the other provisions of the Bill of Rights, applied only against the federal government. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

result is that most of the Supreme Court decisions interpreting the Public Use Clause are 20th century decisions.[35]

The late development of Public Use Clause precedent is unfortunate for two reasons. One is that there is no Supreme Court decision construing the clause by justices who were contemporaries of the Founders. We therefore may not know all of the reasons why the Framers of the Constitution and Bill of Rights included that clause in the Fifth Amendment. We certainly do not have the opinions of justices who knew the Framers far better than we do.

The other problem is that the Court did not develop a body of case law interpreting the Public Use Clause when the nation was principally a rural society and its economy was largely based on agriculture, a sector in which land is critical.[36] Instead, the Court first began to construe the Public Use Clause when the cities were filling out and the economy was based on industry, especially heavy industry like the steel being manufactured for railroads.[37]

Those differences may be quite significant because the value given to realty and personalty may have flip-flopped as the 19th century progressed. If so, that development could explain why the late 19th and early 20th century federal and state decisions read the Public Use Clause quite narrowly,[38] interpreting it to include takings done for a "public

35. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); United States *ex rel*. TVA v. Welch, 327 U.S. 546 (1946); Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937); Cincinnati v. Vester, 281 U.S. 439 (1930); Rindge v. County of Los Angeles, 262 U.S. 700 (1923); Block v. Hirsh, 256 U.S. 135 (1921); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Block v. Hirsh, 256 U.S. 135 (1921); Mt. Vernon-Woodberry Cotton Duck Co v. Alabama, 240 U.S. 30 (1916); O'Neill v. Leamer, 239 U.S. 244 (1915); Strickley v. Highboy Boy Gold Mining Co., 200 U.S. 527 (1906); Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896); Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885); *cf*. Cole v. LaGrange, 113 U.S. 1 (1885) (interpreting same text in a state constitution). Many state courts, however, read the public use requirement narrowly early in the 19th century. *See* Cohen, *supra* note 8, at 505–06 (footnotes omitted): "[T]he early civil law theorists Grotius, Vattel, Pufendorf, and Bynkershoek all argued for limitations on the power of eminent domain, insisting, respectively, that the power should be used only for 'public advantage,' 'public welfare,' 'necessity of the state,' or 'public utility.' Stoebuck further noted that these theorists, often quoted in American judicial opinions, 'apparently influenced' the American development of the 'public use' requirement. Alternatively, Philip Nichols, Jr. concluded that 'American courts seem to have evolved [the public use requirement] by reference to the "higher law," with some assistance from an implication by negative inference from the phrase in the Fifth Amendment to the Federal Constitution, and in many state constitutions, "nor shall private property be taken for public use without just compensation."' In any case, even absent explicit legislative or constitutional provisions, many early decisions held that governments lacked the power to permit the nonconsensual taking of private property for private use. Some such holdings were based on natural law theories, while other courts reached the same result by concluding that state constitutional language implied that property could only be taken for a public use."

36. *See* Douglass C. North, The Economic Growth of the United States, 1790–1860 (1966).

37. *See* Walter Licht, Industrializing America: The Nineteenth Century (1995); Glenn Porter, The Rise of Big Business, 1860–1920 (2006).

38. The Supreme Court decided one relevant case within the last quintile of the 19th century, a case dealing with the so-called mill laws. *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885). With water power being the only type then available, some states enacted laws authorizing mills to construct dams for power generation. The result sometimes was to flood upstream property. The Court sidestepped the Public Use Clause challenge by treating the matter as an adjustment of property rights, not a taking. *See id*. at 21–26. In any event, mills were required to service all members of the community, so they are better seen as public utilities than as private companies. *See* Somin, *supra* note 7, at 39–40.

purpose" as well as a "public use," regardless of who the recipient was.[39]

There was, however, a related body of Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment. The most famous—or infamous, depending on your perspective—decision in that series is *Lochner v. New York*.[40]

Lochner involved the New York Bakeshop Act of 1895, a law that was allegedly motivated by the Progressive Era interest in advancing the secular welfare of mankind through government intervention.[41] Among other things, the act limited to 60 per week and 10 per day the number of hours that a baker could work. New York defended the statute on the ground that it would redress squalid conditions found in New York City's highly decentralized baking industry.[42]

Arrested for violating the statute by allowing an employee to work during one week more than the maximum number of hours permitted by the law, Lochner was convicted at trial. He argued on appeal that the statute unconstitutionally interfered with his right to enter into contracts as he and his employees saw fit. The New York courts rejected Lochner's argument, but he prevailed in the Supreme Court.[43]

Writing for a five-to-four majority, Justice Rufus Peckham began by noting both that "the right to purchase or to sell labor" is a form of "liberty" protected by the Fourteenth Amendment's Due Process Clause and that, accordingly, the government cannot arbitrarily deprive someone of that right.[44] Justice Peckham then examined the health and safety rationale offered for the statute, undertaking a *de novo* review of the relationship between an hourly workday limitation and the alleged benefits of that cap.[45] Finding none, he concluded that the purpose of the law was to limit competition for the benefit of unions rather than to protect individual bakers. That was an impermissible application of the police power, Justice Peckham reasoned, and, because it

39. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) ("[W]hile many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time. Not only was the 'use by the public' test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'.... Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed 'the inadequacy of use by the general public as a universal test.'.... We have repeatedly and consistently rejected that narrow test ever since.") (citations and footnotes omitted); *see also*, *e.g.*, Mt. Vernon–Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established."). *See also* Cohen, *supra* note 8, at 506–08 (footnotes omitted): "As the Nineteenth Century progressed, however, the use of eminent domain expanded dramatically. In an effort to foster investment and speed economic development, legislatures in every state granted the power of eminent domain to private corporations building or operating railroads, turnpikes, bridges, and canals. Courts generally upheld these takings on the theory that the companies were what would today be called common carriers, obligated to provide service to any member of the public, or on the theory that the ultimate uses of the taken property would produce a public benefit.... [¶] In the 1840s and 1850s, however, a different view began to emerge: In some jurisdictions, actual use by members of the public became an essential element of 'public use.' The impetus for this development was increasing concern among courts that the explosive growth in the use of eminent domain, made possible by wide judicial adoption of the broad view of public use, threatened the institution of private property, and that legislatures had been co-opted into favoring powerful private interests over the public good. Other judges feared that excessive support for private enterprise might bring additional government regulation. There is some scholarly disagreement over how widespread this use-by-the-public view ever became.... [¶] Nonetheless, adherence to a use-by-the-public standard, even where it existed, was often more rhetorical than actual, although some legislative acts were struck down under the rule. Stoebuck described the use-by-the-public rule as 'mostly fabeled [sic].'"

40. 198 U.S. 45 (1905).

41. Bakery unions and large industrial bakers supported the act because it benefitted them. Union bakers worked in two shifts with each one ordinarily less than 10 hours, while the primarily immigrant, non-union bakers worked in a single shift often of 12 to 22 hours per day. *See* Richard A. Epstein, *A New Birth of Freedom*, 11 Claremont Rev. of Books 38 (Fall 2011) (reviewing David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011)); Sandefur, supra note 10; Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv. L. Rev. 1363, 1373 n.78 (1990).

42. *See*, *e.g.*, Bernstein, *supra* note 41.

43. For discussions of *Lochner*, see Bernstein, *supra* note 41; David E. Bernstein, *Reassessing* Lochner v. New York, *in* Heritage Economic Liberty Report, *supra* note 21, at 13–16; James W. Ely, Jr., Book Review, *Economic Due Process Revisited*, 44 Vand. L. Rev. 213, 215–16 (1991) (reviewing Paul Kens, Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York* (1990)).

44. *Lochner*, 198 U.S. at 53.

45. *Id.* at 59-60.

arbitrarily deprived Lochner of the liberty to enter into a contract that he and his workers found reasonable, the New York Bakeshop Act was unconstitutional.[46] Lochner and some cases like it remained good law until well into the New Deal.[47]

Over the next four decades, the Supreme Court decided a handful of cases raising issues under the Public Use Clause without developing a theory explaining why the Framers used that clause in the Fifth Amendment or what justifications were necessary to satisfy its requirements.[48] Some consistent themes, however, developed over time. One theme was that the term "public use" meant "public use *or public benefit*," while another was that there was an almost limitless number of public benefits that would satisfy the clause.[49] There was also one additional common denominator to those cases: The property holder always lost, because the government could always articulate some public reason for its taking.[50]

At the same time that the Court was deciding those cases, the Court came under fire for broadly interpreting the companion Due Process Clause as a protection against other types of innovative social and economic legislation. *Lochner*, in particular, came under heavy assault because it was seen as the standard-bearer for a so-called constitutional right to contract.[51] Critics argued that the Supreme Court had illegitimately frustrated legislation designed to help the nation fight its way out of the Great Depression. Rather than allow the federal and state governments to experiment with solutions to that problem, critics claimed, the Supreme Court had come perilously close to constitutionalizing Darwin's theory of "survival of the fittest" as an inflexible economic policy.[52] Critics of *Lochner* further maintained that the right to own property or to engage in commerce does not include a right to immunity from regulations adopted for the benefit of the public and that legislatures are in a better position

46. "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.... It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *Sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.* at 64.

47. *See, e.g.*, Morehead v. Tipaldo, 298 U.S. 587 (1936) (declaring unconstitutional a state minimum wage law); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (declaring unconstitutional a federal law creating a railroad retirement system); Coppage v. Kansas, 263 U.S. 1 (1915) (declaring unconstitutional a state law that forbade employers to require employees to agree not to join labor organizations); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (declaring unconstitutional a federal statute providing for minimum wages for women and children in the District of Columbia); and Adair v. United States, 208 U.S. 161 (1908) (declaring unconstitutional a federal statute that forbade employers to discharge employees because they were members of labor organizations); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. Chi. L. Rev. 373, 373 (2003).

48. *See supra* note 35.

49. *See* Cohen, *supra* note 8, at 493–94 ("The conceptions of public use can be generally divided into two categories: the 'narrow' view and the 'broad' view. Under the narrow view, the term 'public use' means 'use by the public.' Under this approach, property is taken for 'public use' only if the public has the right to use the property, or the property is owned by the government, after it is taken. Under the broad view, property is taken for 'public use' if the taking results in some public advantage or benefit. Under this view, anything that enhances public welfare constitutes a 'public use.' The broad view is almost universally accepted; indeed, throughout most of American history, it has been the dominant view.") (footnotes omitted).

50. The property owner won a single 19th century case on the ground that the taking was for a non-public use. *See* Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403 (1896). *Missouri Pacific R. Co.* held that a Nebraska order requiring a railroad to permit a private party to build a grain elevator on the railroad's land was an unconstitutional non-public taking. The Supreme Court later reinterpreted *Missouri Pacific R. Co.*, however, as not involving eminent domain. *See Midkiff*, 467 U.S. at 241. That reading of *Missouri Pacific R. Co.* allowed the Court to keep its record intact. *See id.* ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

51. *See, e.g.*, Larkin, *supra* note 21, at 2–3.

52. *See, e.g.*, Learned Hand, *Due Process of Law and the Eight Hour Day*, 21 Harv. L. Rev. 495 (1908); Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454 (1909). *See generally* David E. Bernstein, Lochner's *Legacy's Legacy*, 82 Tex. L. Rev. 1, 4 n.14 (2003) (collecting contemporary authorities).

than courts to decide what best serves the nation's or a state's interests.[53]

Those arguments eventually persuaded the Supreme Court.[54] Beginning in 1938, the Court abandoned its *de novo* review of the rationality of economic legislation and substituted in its place a very deferential standard of review.[55]

Over time, the result has been the development of a two-tiered standard of judicial scrutiny.[56] Since those decisions, the Supreme Court has generally taken a "hands off" approach to judicial review of federal and state economic legislation.[57] The Court has treated social and economic legislation as presumptively constitutional and has stated that it will hold such legislation invalid only if it cannot be said to advance any conceivable legitimate state interest, whether or not the legislature actually had that purpose in mind when it enacted the relevant law.[58]

53. *See, e.g.*, Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 Harv. J. L. & Pub. Pol'y 13 (2012). Along the way, the Supreme Court held unconstitutional a goodly number of federal and state laws, but the Court certainly did not use the Due Process Clause to run the table. In fact, contrary to the accepted wisdom of the era, the Court upheld the majority of the economic and social welfare legislation during the pre- and early New Deal period. *See, e.g.*, Note, *supra* note 41, at 1366.

54. For a discussion of that development, see Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government (2013).

55. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (upholding a state law setting minimum and maximum milk prices); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining a state minimum wage law and overturning a decade-old ruling in *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), which had held unconstitutional a different state minimum wage law); United States v. Carolene Products Co., 304 U.S. 144 (1938) (upholding a federal statute prohibiting the shipment of "filled milk" (*viz.*, skimmed milk) in interstate commerce).

56. The Supreme Court's 1938 decision in *Carolene Products* announced three principles that have led to the current federal constitutional analysis of legislation. First, statutes would generally be entitled to a presumption of constitutionality. 304 U.S. at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." (footnote omitted)). Second, that presumption may not apply to legislation that trespasses on a specific constitutional guarantee. *Id.* at 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). Third, the Court left open the issue whether laws that hamper the ability of politically powerless, "discrete and insular minorities," also may be entitled to heightened judicial protection. *Id.* ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.... Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious...or national...or racial minorities...[and] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.") (citations omitted).

57. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963) ("We refuse to sit as a superlegislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.") (citation and internal punctuation omitted).

58. One of the best summaries of the current law of "rational basis review" can be seen in FCC v. Beach Communications, Inc., 508 U.S. 307, 313–15 (1993) (citations and internal punctuation omitted): "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.... Where there are plausible reasons for Congress' action, our inquiry is at an end.... This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. [¶] On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity...and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it[.] Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record...has no significance in rational-basis analysis.... In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.... Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." Some argue that "rational basis" review amounts to no review at all. *See, e.g.*, Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013); Richard A. Epstein, *Public Use in a Post-*Kelo *World*, 17 Sup. Ct. Econ. Rev. 151, 153 (2009) ("Let the rational basis test form any part of the analysis, and the legislative act will routinely pass muster except in rare cases of overt personal misconduct.").

At the same time, the courts must strictly scrutinize the rationale offered to justify laws that trespass on express constitutional rights or injure a "discrete and insular minority."[59] Those two tiers of scrutiny remain the law today.[60]

Those two lines of decisions—cases interpreting the Public Use Clause and cases interpreting the Due Process Clause—intersected in three decisions decided since the middle of the 20th century. Those cases—*Berman v. Parker*,[61] *Hawaii Housing Authority v. Midkiff*,[62] and *Kelo v. City of New London*[63]—have defined the term "public use" as it stands today. In so doing, they have effectively denuded the Public Use Clause of any effective protection of property rights that the clause should have offered. As a practical matter, the *Berman*, *Midkiff*, and *Kelo* decisions have erased the "public use" limitation from the text of the Fifth Amendment.

The Modern Trilogy of Public Use Cases

Berman v. Parker. The first case in the trilogy is *Berman v. Parker*.[64] At stake in *Berman* was the District of Columbia Redevelopment Act of 1945,[65] a federal statute designed to provide a comprehensive remedy for blighted areas in the nation's capital. The act created the District of Columbia Land Redevelopment Agency for the purpose of acquiring from the owners property situated in blighted areas for the purposes of transferring it to government agencies for use as streets, schools, or recreational facilities and leasing or selling it to private parties in accordance with a comprehensive land use plan.

Berman and the other plaintiffs owned property with a department store. They challenged the constitutionality of the act on the ground that it would simply transfer property from them to another private party, in violation of the Public Use Clause.[66] The Supreme Court unanimously rejected that argument.

The Court concluded that the case involved an analysis of the proper application of the "police power"—that is, the authority possessed by every government to protect the public safety, order, health, morality, and peace and quiet,[67] as well as to advance whatever other "physical," "spiritual," "aesthetic," and "monetary" goals the legislature should deem important.[68] Elimination of slum conditions in the nation's capital, the Court decided, was a permissible goal for Congress to achieve,[69] which left only the question whether Congress had acted appropriately in the means it chose to pursue community redevelopment.[70] The Court did not stop to inquire whether urban development tools—such as zoning, tax breaks, eminent domain seizures, and the like—truly improve local economies overall, rather than merely shift or divert development to particular

59. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).
60. *See id.*; *supra* note 56.
61. 348 U.S. 26 (1954).
62. 467 U.S. 229 (1984). In the interest of full disclosure, the author of this paper was one of the lawyers who represented the ground-land owners in the *Midkiff* case.
63. 545 U.S. 469 (2005).
64. 348 U.S. 26 (1954).
65. Ch. 736, 60 Stat. 790 (1946).
66. "To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community." *Berman*, 348 U.S. at 31. The common law prohibited the government from using eminent domain for the purpose of upgrading someone's property. *See, e.g.*, EPSTEIN, *supra* note 8 at 178 & n.38.
67. "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." *Berman*, 348 U.S. at 32–33.
68. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33.
69. *Id.*
70. *Id.*

areas or industries, or ask whether the displaced residents were the type of politically powerless individuals for whom the Court had promised enhanced protection by the courts. Skipping over those issues, the Court decided that it was for Congress, not the courts, to decide what means are best to achieve the permissible end of ridding a community of blight:[71]

"Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[72]

As if to emphasize that it did not see the Public Use Clause as playing any important role in eminent domain, the Court ended its opinion by saying that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[73] That ominous sendoff foretold the outcome of the next two cases in the trilogy.[74]

Hawaii Housing Authority v. Midkiff. Following *Berman* was *Hawaii Housing Authority v. Midkiff*.[75] The facts in *Midkiff,* however, did not remotely resemble those in *Berman*. While *Berman* involved large areas of ramshackle housing dotting a decaying urban area, the land in *Midkiff* was usable, kempt, inhabited, and desirable—very desirable, in fact. The Hawaii legislature, however, believed that the strong demand for the property in *Midkiff* was a harm to the community, not a benefit. The alleged problem, according to the state legislature, was that a relatively small number of parties owned the bulk of residential property in the state,[76] so much in fact as to oligopolize the housing market.[77] To remedy the problem, the legislature enacted the Land Reform Act of 1967.[78] The act enabled residents who owned a house, but not the underlying real estate, on a single-family residential lot to petition the Hawaii Housing Authority to condemn the property and sell it to the residents.

71. "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.... Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.... The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose." *Id*. at 33–34 (citations omitted); *see also id*. at 33–36.

72. *Id*. at 35–36.

73. *Id*. at 36.

74. Sandwiched between *Berman* and *Midkiff* was the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). That court upheld the condemnation of a large swath of land for sale to General Motors in the hope of stimulating employment. The projection was that the property transfer would generate an estimated 6,150 jobs. The reality fell far short of that projection. *See* Cohen, *supra* note 8, at 545 ("Seven years after displacing 4,000 residents, destroying 1,400 homes and between 140 and 600 businesses, the plant employed only about 2,500 people. In fact, Ilya Somin speculates that Detroit may have sustained a net job loss as a result of the General Motors project.") (footnotes omitted; citing Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1007). The Michigan Supreme Court changed direction nearly 25 years after *Poletown*, overruling that decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2005). For the argument that so-called economic development takings should be altogether prohibited, see Cohen, *supra* note 8, at 544–68.

75. 467 U.S. 229 (1984).

76. "Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners.... The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles." *Id*. at 232 (citation omitted).

77. "The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id*.

78. *See* Haw. Rev. Stat. ch. 516 (1984).

The trustees of the estate created by the will of the last surviving lineal descendant of Hawaii's first monarch owned residential property subject to the Land Reform Act, and they challenged the statute under the Public Use Clause. Again acting unanimously, the Supreme Court rejected the land owners' public use claim.

Writing for the Court, Justice Sandra Day O'Connor said that *Berman* provided the starting point for any analysis of the Public Use Clause.[79] *Berman*, she wrote, essentially equated the scope of the Public Use Clause with the reach of a state's police power.[80] Quoting from *Berman*, the Court stated that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police power."[81] While the courts have a role to play in deciding whether a taking satisfies the Public Use Clause, that role is extraordinarily limited. A court may not substitute its judgment for a legislature's, the Court wrote, "'unless the use be palpably without reasonable foundation.'"[82] As long as a taking has "a conceivable public purpose," the state may use eminent domain to achieve its end,[83] even if the state fails to accomplish its hoped-for result.[84] Moreover, the state may transfer land from one private party to another to reach its goals without at any time taking title to the property.[85] The "government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[86]

To be sure, the Court stated in dicta that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[87] But—and anyone who had read that far in the *Midkiff* opinion would have known that there was a "but" coming—the Court held that "no purely private taking is involved in these cases."[88] A taking done to redistribute valuable land now took its place alongside a taking done to redistribute worthless land as a permissible "public purpose."

Kelo v. City of New London. The last case in the trilogy is *Kelo v. City of New London*.[89] Like *Berman* and *Midkiff*, *Kelo* rejected a Public Use Clause challenge to the exercise of eminent domain, but *Kelo* stands out among the trilogy for two reasons. One is

79. *Midkiff*, 467 U.S. at 239.

80. *Id*. at 239–40.

81. *Id*.

82. *Id*. at 241 (quoting United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 680 (1896)).

83. *Id*.

84. *Id*. at 242–43 ("Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if…the…[state] Legislature rationally could have believed that the [Act] would promote its objective.'… When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.") (citations and footnote omitted).

85. *Id*. at 243–44 ("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. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion…directly enjoy or participate in any improvement in order [for it] to constitute a public use.'…. '[W]hat in its immediate aspect [is] only a private transaction may…be raised by its class or character to a public affair.'… As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land.") (citations omitted).

86. *Id*. at 244.

87. *Id*. at 245.

88. *Id*. The Supreme Court decided *Ruckelshaus v. Monsanto Co*., 467 U.S. 986 (1984), less than a month after *Midkiff*. *Monsanto* also rejected a Public Use Clause claim. At issue there was a federal statute that allowed a federal agency to consider data and trade secrets submitted by one pesticide manufacturing company when reviewing a pesticide permit application filed by a second firm as long as the later-in-time applicant justly compensated the earlier-in-time applicant for use of the relevant information. The Court held that the law did not violate the Public Use Clause because Congress had acted with the legitimate purpose of reducing the research costs to new applicants that might otherwise serve as a barrier to entry. *Id*. at 1015.

89. 545 U.S. 469 (2005).

that *Kelo* is the only decision in which the Court was not unanimous. The Court upheld the city's condemnation, but this time by only a five-to-four majority. The other reason is that Justice O'Connor, who wrote the unanimous opinion in *Midkiff,* authored a dissent in *Kelo*.

Late in the 1990s, the city of New London, Connecticut, was suffering through considerable economic troubles. The Navy had recently closed a local base in the Fort Trumbull area; the local unemployment rate was twice that of the entire state; and the city's population was at its lowest point in more than 70 years. The pharmaceutical company Pfizer, Inc., announced that it might build a multimillion-dollar research facility near the Fort Trumbull area. To stimulate the economy, the New London Development Corporation (NLDC) developed a plan to renovate the area by constructing a "mixed-use complex" with "homes, a hotel, a marina, restaurants, shops, office space, and other amenities."[90] After reviewing the plan, the city council authorized the NLDC to acquire the necessary property by purchase or through eminent domain. Ten homes and a few other properties were scheduled to be condemned.[91]

The NLDC wanted to use property owned by several local residents—Suzette Kelo and her neighbors—for the new development, but they refused to sell. Instead, they sued the NLDC, claiming that the taking would violate the Public Use Clause. The plaintiffs lost in the Connecticut state courts and, later, in the Supreme Court as well.[92]

Justice John Paul Stevens began his opinion for the Court by stating that "[t]wo polar propositions are perfectly clear."[93] The government may not transfer property from *A* to *B* "for the sole purpose" of redistributing ownership even if *A* is justly compensated for his loss, but the government may transfer property from one private party to another if "the purpose of the taking" is to enable a "future 'use [of the property] by the public.'"[94] Relying on the findings made by the state courts, the Supreme Court concluded that the New London development plan "was not adopted 'to benefit a particular class of identifiable individuals'" and therefore did not run afoul of the first proposition.[95]

Turning next to the second proposition, the Court explained that the meaning of the term "public use" had evolved over the 19th and 20th centuries as legislatures saw the need to expand the reach of state legislation in order to address new and more deeply rooted social and economic problems.[96] The Supreme Court's jurisprudence had afforded the state legislatures considerable deference to address such ills, the majority noted, by enlarging the "public use" concept to reach takings that sought to remedy systemic problems rather than merely acquire property for use by the government or private individuals. The Court had interpreted the "public use" term in the Fifth Amendment in order to enable the states to address modern needs. The result, the Court noted, was that as long as just compensation is provided, the Constitution now permits states to exercise their eminent domain authority to achieve takings done for a "public purpose" or to meet a "public need," as well as takings that historically had been accomplished for the simple purpose of obtaining property so that it could actually be used by the public.[97] The takings in *Kelo* satisfied that requirement, the Court held, because they were part of a comprehensive area redevelopment project that the city hoped would pump up the local economy: "The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue."[98]

The Court also declined to create a bright-line rule prohibiting general economic development takings on the ground that "neither precedent nor logic"

90. *See* Cohen, *supra* note 8, at 492.
91. *See* Somin, *Judicial Reaction*, *supra* note 2, at 5.
92. *Id.* at 473–77.
93. *Id.* at 477.
94. *Id.*
95. *Id.* at 478 (quoting *Midkiff*, 467 U.S. at 245).
96. *Id.* at 478–82.
97. *Id.* at 478–83.
98. *Id.* at 483.

justified that exception.[99] The Court's precedents permitted the state to use its eminent domain power for that purpose, the Court concluded, and there was no "principled way of distinguishing economic development from the other public purposes" that the Court had already upheld.[100]

Justice Anthony Kennedy joined the majority opinion, but he also wrote a separate concurring opinion.[101] In his view, the majority correctly applied the same "rational basis" review generally appropriate to analyzing social or economic legislation under the Equal Protection Clause, a standard of review that would justify holding unconstitutional only those takings where it can "clearly" be shown that the purpose "is to favor a particular private party, with only incidental or pretextual public benefits[.]"[102] That was not true in *Kelo*, Justice Kennedy found, because the city adopted the redevelopment plan not to benefit a particular developer, corporation, or individual, but to deliver an "'economic advantage to a city sorely in need of it[.]'"[103]

Justice Kennedy did leave open the possibility that some takings might not qualify as legitimate: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[104] *Kelo* was not such a case, however, because (1) the taking arose "in the context of a comprehensive development plan meant to address a serious citywide depression"; (2) "the projected economic benefits of the project cannot be characterized as *de minimis*"; (3) the "identities of most of the private beneficiaries were unknown" when the city formulated its plans; and (4) New London "complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes."[105]

Justice O'Connor, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, dissented.[106] Like the majority, she started from the principle that the government may not transfer property from *A* to *B* simply to rearrange ownership, but she disagreed with the majority whether the purpose of the taking in *Kelo* was anything else. That taking was not accomplished to establish a military base or a public transit system, uses for or by the public that historically would have qualified under the Public Use Clause.[107]

Nor was mere possession of the property harmful to the public due to "blight resulting from extreme poverty" as in *Berman* or an "oligopoly resulting from extreme wealth" as in *Midkiff*.[108] The takings in those cases were justified, she believed, because both sought to eliminate a harmful use of property. By contrast, the takings in *Kelo* were defended only on the ground that they would "generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure."[109] Those justifications, she wrote, had no "realistic limitation"[110] because only a "stupid staff[er]" could fail to devise some rationale explaining why a taking had some public benefit.[111] Justice O'Connor acknowledged that there was "errant language in *Berman* and *Midkiff*" equating the "public

99. *Id.* at 484.

100. *Id.* at 484–85.

101. *Id.* at 490–93 (Kennedy, J., concurring).

102. *Id.* at 491.

103. *Id.* (quoting the trial court's findings).

104. *Id.* at 493.

105. *Id.*

106. *Id.* at 494–505 (O'Connor, J., dissenting).

107. *Id.* at 497–98 (O'Connor, J., dissenting).

108. *Id.* at 500 (O'Connor, J., dissenting).

109. *Id.* at 501 (O'Connor, J., dissenting).

110. "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at 503 (O'Connor, J., dissenting) (citations omitted).

111. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting).

use" requirement with the police power,[112] but she wrote off those passages as dicta. "The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing," Justice O'Connor wrote.[113] "In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."[114] The result, she concluded, is to make it impossible to distinguish private from public takings.[115]

Justice Thomas also dissented. Unlike Justice O'Conner, however, he believed that the Court's mistakes ran even deeper than Justice O'Connor had explained. In his view, the Public Use Clause not only should be given a meaning, but also should be interpreted to require that the public (or the government as the public's representative) have use of the property.[116]

The common law and early state decisions addressing takings supported the conclusion that the police power could be used to address nuisances without a public use or compensation precondition, but the eminent domain power was subject to both restrictions.[117] The Court's error, he said, was directly attributable to prior decisions, such as *Berman*, that mistakenly equated the scope of the state's police power with the meaning of "public use." In fact, he wrote, a state's proper reliance on its police power is not subject to the same restrictions that apply when the government uses its eminent domain power.[118] The majority's interpretation of "public use" denied that term any independent constitutional meaning and made principled application of that term impossible.[119] Accordingly, Justice Thomas would have junked the Court's precedents and started over from scratch. "I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property."[120]

The Current Status of the Public Use Clause

Like specific elements of a contract, particular constitutional provisions should be read together with their cognate elements and in light of the structure and purpose of the entire document. Here, doing so reveals that the Constitution sought to protect property rights in several ways. The Framers, for example, put "property" on a par with "life" and "liberty" in the Fifth Amendment because they believed that all three interests must be protected against arbitrary deprivation. The Founders gave Congress the authority to regulate interstate and foreign commerce[121] but not local activities like farming or blacksmithing; governance of those activities was

112. *Id.* at 501 (O'Connor, J., dissenting).

113. *Id.* at 502 (O'Connor, J., dissenting).

114. *Id.*

115. "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*.'" *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting) (citation omitted) (emphasis in original).

116. "The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun 'use' as '[t]he act of employing any thing to any purpose.' The term 'use,' moreover, 'is from the Latin *utor,* which means "to use, make use of, avail one's self of, employ, apply, enjoy, etc."... When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is 'employing' the property, regardless of the incidental benefits that might accrue to the public from the private use. The term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property." *Id.* at 508–09 (Thomas, J., dissenting) (citations omitted).

117. *Id.* at 509–14 (Thomas, J., dissenting).

118. *Id.* at 519–20 (Thomas, J., dissenting); *see* Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).

119. "The 'public purpose' test applied by *Berman* and *Midkiff* also cannot be applied in [a] principled manner. 'When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience...we are afloat without any certain principle to guide us.'" Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 6, 60–61 (1837) (opinion of Tracy, Sen.)." *Kelo*, 545 U.S. at 520 (Thomas, J., dissenting).

120. *Id.* at 521 (Thomas, J., dissenting).

121. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").

left to the states.[122] The expansion of the Commerce Clause that Congress today would invoke to regulate those practices lay 150 years in the future. That may explain why the Framers did not bar Congress from interfering in the operation of commercial contracts in the same way that they kept the states at bay.[123]

The Constitution also did not corral the states' authority to regulate property because the Framers saw no real threat to property from that direction. Eighteenth century state constitutions protected property rights;[124] the states could establish the qualifications to hold state office;[125] and they could define the qualifications to vote in state (or federal[126]) elections, which often included property ownership.[127] Aside from what is now the District of Columbia,[128] the Constitution did not put land aside in the states for use by the federal government, perhaps because the Framers assumed that the federal government would purchase whatever land it needed.[129] Nonetheless, the Framers made sure that the new federal government could not take property from its owners unless they were paid and the property was put to a "public use," however strict or loose a reading that term might receive.

All that changed later on. In the New Deal era, the Supreme Court decided to treat social and economic welfare legislation as a class by itself, a category of law in which the legislature would have tremendous freedom to experiment with different approaches to achieve whatever ends the political branches thought worthwhile. No longer would the Supreme Court second-guess the judgments of elected officials as to what goals were legitimate ones for society to pursue: greater protection against the economic vicissitudes of life, greater safeguards against unsafe working conditions, and the like. Legislatures also would be free to select from among the several means that might enable society to achieve those goals: minimum wage laws, occupational safety laws, collective bargaining laws, and so forth.

Despite the fact that the Constitution expressly referred to "life, liberty, and property" as entitled to equal dignity under the Constitution, the Supreme Court retreated from its early 20th century position that property rights should not be left to the protection of the electoral process. Constitutional restraints on the ability of the legislature to reallocate property rights in order to avoid the harms of

122. *See* United States v. E.C. Knight & Co., 156 U.S. 1 (1895) (manufacturing is not part of interstate commerce), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

123. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall…pass any…Law impairing the Obligation of Contracts[.]").

124. *See* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J. L. & Pub. Pol'y 5, 6–7 (2012) (quoting property rights protections in late 18th century constitutions in Massachusetts, New Hampshire, Pennsylvania, and Vermont).

125. The Constitution defines the criteria to hold federal, not state, office. *See*, *e.g.*, Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J. L. & Pub. Pol'y 241, 259 (2014); *compare* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (ruling that the Constitution establishes the exclusive requirements to hold office as a Representative, a Senator, or a President).

126. *See* U.S. Const. art. I, § 2, cl. 1 (electors in each state for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id*. amend. XVII (adopting the same criterion for senatorial elections); Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2257-59 (2013); *cf*. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors).

127. *See* Harper v. Virginia St. Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.... Most of the early Colonies had [property qualifications for voting]; many of the States have had them during much of their histories[.]") (footnotes omitted); 2 Records of the Federal Convention 203 (Farrand ed. 1911) (James Madison) ("Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty."). The Framers' assumption that that the states would continue to safeguard property rights also may have been one reason why they assigned the selection of United States Senators to the states, not the electorate, as they did for the House of Representatives. *See* U.S. Const. art. I ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."), *superseded by* U.S. Const. amend. XVII (providing for the direct election of Senators).

128. *See* U.S. Const. art. I, § 8, cl. 17 (the Seat of Government Clause) ("The Congress shall have Power…[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States[.]").

129. *See id*. ("The Congress shall have Power…to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]").

a laissez faire approach to macroeconomic policy largely disappeared. The principle that the political process could be trusted to rectify any mistakes that elected officials make in economic policy decisions now reigned. Gone was the principle that the political process always puts the possession of property rights at risk because, when a majority of people find themselves without property, they will want to use their political clout to force the legislature to reassign others' property rights to themselves.

There was another influence operating here too. Since the 1930s, the fear that courts would make erroneous or illegitimate, class-based economic policy judgments if they could second-guess legislatures has haunted American constitutional law like Banquo's ghost. The result has been that the courts almost consistently—supported by the academy almost unanimously—have declined to hold unconstitutional federal or state laws that diminish property rights.[130]

The fallout from the explosion of substantive due process has almost killed the Public Use Clause as well.

- The Supreme Court struck the first blow in *Berman*, ruling that the Public Use Clause and the police power were coterminous; whatever legislation a state could justify under its police power was, by definition, legislation that served a "public use."

- When the Court next addressed the issue in *Midkiff*, it could have limited *Berman* to urban renewal programs that sought to enable a community to "use" or "benefit from" the elimination of what politely goes by the name of "urban blight." The Court again, however, chose to enable the political process. Deeming large-scale property ownership a social harm—a harm not remotely like the type of nuisance for which the common law provided a remedy—the Court allowed Hawaii to force landowners to sell their ground land to the owners of the houses built atop it. The Court seemed oblivious to the irony that the only reason why private parties owned those homes was that the *Midkiff* plaintiffs had leased the land to them years beforehand, so that the taking truly was done merely for the purpose of transferring property from *A* to *B*.

- *Kelo* dropped the last clod[131] on the Public Use Clause when it upheld a city's decision that a parcel of land was worth more in *B*'s hands than *A*'s, even though, as a matter of logic and economics, *A* obviously valued the land more than *B* because *A* was unwilling to sell it at the price B was offering and the property harmed no third party (no *C*, no *D*, and so forth).

In each case, the Court justified its hands-off approach by claiming that the political branches were in a far better position than the courts to decide what action promoted the public safety, health, and welfare.[132] The judiciary therefore should leave that arena entirely to the play of politics, the Court decided—which was precisely the fear that the Framers had when the Public Use Clause became law. Accordingly, the policy implications of *Berman*, *Midkiff*, and *Kelo* for property rights are devastating.[133]

130. Some scholars have pushed back, arguing that the Court should protect property rights to a greater extent than the law does today. *See, e.g.*, Ely, The Guardian of Every Other Right, *supra* note 18; Epstein, *supra* note 8; Neily, *supra* note 58; Bernard H. Siegan, *supra* note 18; Roger V. Abbott, Note, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 Cath. U. L. Rev. 475 (2013).

131. *See* Marty Robbins, "*Streets of Laredo*" in *Marty Robbins—All Time Greatest Hits* (1972), https://www.youtube.com/watch?v=L14UKBjC5Is.

132. Protection of the public safety, health, and welfare is the traditional rationale for exercise of the police power. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); License Cases, 46 U.S. (5 How.) 504, 523–25 (1847).

133. *See* Cohen, *supra* note 8, at 496–97 ("The *Kelo* decision was correct as a matter of law, following naturally from *Berman* and *Midkiff* and consistent with American judicial and legislative approaches to the public use question that pre-date the U.S. Constitution. Yet the policy implications of the *Kelo* decision and the precedents underlying it are extremely troubling. As Justice O'Connor correctly noted in her dissent in *Kelo*, the majority's holding that the construction of economic development projects may constitute a public use means that 'all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.'") (footnote omitted). The only ray of hope in *Kelo* is this: The majority and Justice Kennedy in his concurring opinion both wrote that the Public Use Clause would prohibit a taking if the justification for it were a sham that was designed simply to transfer property from *A* to *B*. *See Kelo*, 545 U.S. at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."); *id*. at 493 (Kennedy, J., concurring) ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.").

To be sure, even before it laid *Lochner* to rest, the Supreme Court had never construed the Public Use Clause to limit the government's eminent domain power. The Court has often *said* that the government may not take property from *A* simply to give it to *B,* but it had never *found* a taking to fail that test. Before and after the New Deal, the Court has stretched the clause to encompass legislation that served "a public purpose" or was "a matter of public interest,"[134] a phrase that eventually replaced the "public use" that the Fifth Amendment's text requires. Since the end of the New Deal, however, the Court has virtually abandoned any pretense of even requiring the government to manufacture some credible public justification for a taking. The result is that a hearing in the Supreme Court today on a Public Use Claim would proceed as follows: The lawyer for the government would pretend that there is a public purpose for the taking, and the Court would pretend to believe him before ruling in his favor.[135]

One irony of that development can be seen in the great divide that the Supreme Court has created in constitutional law. Statutes that trespass on specific Bill of Rights guarantees like the First Amendment Free Speech Clause are subjected to strict judicial scrutiny, and most fail.[136] Statutes that impair fundamental rights to "liberty" also are subject to strict scrutiny, and again most fail.[137] Yet, despite the fact that the Public Use Clause is an express textual component of the Fifth Amendment—a provision that, after all, refers to "life, liberty, *and property*"—the Supreme Court has eschewed any serious review of the government's eminent domain power to ensure that it predominantly serves a "public purpose," let alone constitutes a "public use." The Court has relegated the Public Use Clause to the same constitutional suburbs occupied by cases such as *Lochner*.

The trilogy of decisions from *Berman* to *Midkiff* to *Kelo* has effectively left the Public Use Clause without any independent role to play in the Fifth Amendment. Of course, in each case, the Supreme Court has reiterated the maxim that the government may not simply transfer property from *A* to *B,* but those passages had as much effect on the outcome of those cases as the "Oyez" that the Court's Marshal proclaims at the beginning of every oral argument session. Justice O'Connor was right to note that no one but a "stupid staff[er]"[138] could fail to imagine *some* public benefit from *any* taking, because *any* transfer of property can always further *some* government purpose if a court is free to imagine whatever that purpose may be, regardless of whether a reasonable person would have drawn that conclusion, and is free to hypothesize that the legislature actually had that purpose in mind.[139] *Berman*, *Midkiff*, and *Kelo* have effectively transformed the relatively straightforward phrase "for public use" into almost anything that the legislature might put forward as a conceivable public use or benefit.

The Court's decision in *Kelo* would at least have had the virtue of candor if the majority had just said that the Public Use Clause no longer makes sense, so the Court will no longer require government to manufacture justifications that are to some degree "public." Such a ruling would have been illegitimate because courts have no warrant to disregard

134. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159–64 (1896).

135. For the argument that the Public Use Clause died a quiet death long before the current trilogy of decisions, see, for example, Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J 599, 614 (1949) ("The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion, although rarely with so much directness. Doubtless the doctrine will continue to be evoked nostalgically in dicta and may even be employed authoritatively in rare, atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue.").

136. *See, e.g.*, Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2279 (2011) (holding unconstitutional under the Free Speech Clause a state law imposing restrictions and labeling requirements on the sale or rental of "violent video games" to minors). Some laws do pass that test. *See, e.g.*, Williams-Yulee v. State Bar, 135 S. Ct. 1656 (2015) (upholding a state ban on the personal solicitation of campaign funds by a sitting judge). But they are in a very small minority.

137. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional a state law making it a crime for two persons of the same sex to engage in certain intimate conduct in the home).

138. *Kelo*, 545 U.S. at 502 (O'Conner, J., dissenting).

139. *See* Rubenfeld, *supra* note 26, at 1079 ("The Court has held, for instance, that a state may (with proper compensation) take *A*'s estate and give it to his tenants *B, C,* and *D* on the ground that redistributing concentrated holdings of property can plausibly be deemed to further the public welfare. Construed this way, the so-called 'public-use requirement' is simply duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses.") (footnotes omitted).

constitutional text that judges find obsolete, inconvenient, or difficult to interpret. But at least it would have been honest.

Conclusion

Ten years ago, the Supreme Court's ruling in *Kelo* sparked considerable public outrage. The prospect that any homeowner could lose his or her house and property to a corporation whose operation a city thought could better serve its needs generated uncertainty and fear. But that day has passed. The tenth anniversary of *Kelo* is marked more by public sufferance of the Supreme Court's ruling than by continued public outrage. The Supreme Court has not returned to the subject during that period. Congress has done nothing. State and local governments have taken some steps in response to *Kelo*. How effective they are remains to be seen. The *Kelo* decision itself, however, has not gone away. The Supreme Court has remained silent.

Kelo stands as the Supreme Court's last word on the meaning of the Public Use Clause, a meaning that, for all intents and purposes, is vacuous. Like the civil servant in a highway tollbooth, *Kelo* simply ensures that the government pays its way before moving on for whatever reason the government finds necessary to use eminent domain. The problem for the public and property rights advocates is that the *Kelo* decision not only has retreated into the background, but also has been forgotten. But like the bear who hibernates in a cave until it needs nourishment, *Kelo* could return to prominence whenever a state or city prefers *B* to *A* as a property owner. Unfortunately, when that happens, the Constitution may offer property owners no protection against whatever public benefits that a majority of a state or local government can imagine.

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