

WEIGHING AND REWEIGHING EMINENT DOMAIN'S POLITICAL PHILOSOPHIES POST-KELO

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I. INTRODUCTION

Referring to the emergence of the civil rights movement, Justice Felix Frankfurter wrote that “[y]esterday the active area . . . was concerned with ‘property.’ Today it is ‘civil liberties.’ Tomorrow it may again be ‘property.’”¹ Frankfurter’s tomorrow has arrived—that is, if media attention is an accurate gauge of what area is “active.” Two of the most anticipated and widely covered decisions from the Supreme Court’s October Term 2004 involved issues of property law. One of the headline-grabbing cases addressed the legality of music and movie downloads from the Internet under copyright law.² The other property issue in the limelight, both before and after the Court’s decision, involved the one property issue that has rocketed into courtrooms and newspapers around the nation—eminent domain.³ Eminent domain refers to the authority of the sovereign to seize an individual’s private property without the

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1. FELIX FRANKFURTER, OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 19 (Philip Elman ed., 1956).

2. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

3. For example, the Institute for Justice, a libertarian public law firm, is or has been involved in a number of eminent domain cases around the country. Among the cases are *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003); *Smith v. Ayotte*, 356 F. Supp. 2d 9 (D.N.H. 2005); *Gamble v. City of Norwood*, No. C-040019 (Ohio Ct. App. Sept. 3, 2004); *State v. One 1994 Ford Thunderbird*, 793 A.2d 792 (N.J. Super. Ct. App. Div. 2002). Also, courts have decided a number of cases involving the use of eminent domain over the course of the past decade. *See, e.g.*, *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

consent of that individual.⁴ In other words, eminent domain weighs the delicate balance between governmental power and the rights of the individual citizen in favor of governmental power. More fundamentally, eminent domain affects the relationship between individual citizens because the government's exercise of eminent domain involves individuals who surrender property for the benefit of other legal persons. In short, eminent domain prioritizes the relationships of individuals in society, both human and corporate, by reallocating real property rights.

However, the social restructuring that accompanies eminent domain comes at a cost for the government. It is not a naked assertion of power at the complete expense of the individual.⁵ Tucked away at the foot of a set of clauses that reads like a minicode of criminal procedure, the last phrase of the Fifth Amendment to the United States Constitution declares: "nor shall private property be taken for public use, without just compensation."⁶

4. *Kohl v. United States*, 91 U.S. 367, 373-74 (1875). The Supreme Court held that:

The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

Id.

5. The power of eminent domain is not explicitly enumerated in the Constitution. Instead, it is implicitly recognized as a power of the sovereign. See *United States v. Carmack*, 329 U.S. 230, 241 (1946) (referring to the Takings Clause as a "tacit recognition of a preexisting power"); *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 240 (1897) (reciting that "[i]n every government there is inherent authority to appropriate the property of the citizen for the necessities of the state, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse"); *Kohl*, 91 U.S. at 371 (observing that "[t]he powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States").

6. U.S. CONST. amend. V. In its entirety, the Fifth Amendment states:

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 offence 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.

Denominated as the Takings Clause, those few words serve as one of the most important protections afforded private property owners because the words, at least in theory, restrain the power of the government to take an individual's property by eminent domain.⁷ The government is barred from seizing an individual's property unless it both makes a public use of the property and pays for the property. The text of the Takings Clause imposes both of these limitations: the public use clause—"nor shall private property be taken for public use"—and the just compensation clause—"without just compensation."⁸

When compared to the amount of ink spilled on the public use requirement,⁹ neither courts nor scholars spend much effort outlining the contours of the Fifth Amendment's just compensation requirement.¹⁰ This difference results from the courts' marked inability to define public use with anything approaching the consistency that would allow for predictable results.¹¹ The Michigan Supreme Court, for example, adopted a broad view of public use in *Poletown Neighborhood Council v. City of Detroit*¹² and allowed a local government to take land by eminent domain for purposes of economic revitalization.¹³ Twenty-three years later, however, the Michigan Supreme Court reexamined its definition of public use in

7. Of course, the object of the power of eminent domain must be considered "property" as well.

8. U.S. CONST. amend. V.

9. See, e.g., James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?: Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov.-Dec. 2003, at 30; William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (2004); Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59 (1996); Patricia E. Salkin & Lora A. Lucero, *Community Redevelopment, Public Use, and Eminent Domain*, 37 URB. LAW. 201 (2005).

10. This is not to say, however, that no scholarship on the topic of just compensation exists. Indeed, that is not the case. See, e.g., James W. Ely, Jr., *"That due satisfaction may be made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765 (1973). Nevertheless, a cursory comparison of the volume of literature associated with each topic suggests that much more has been written on the public use clause.

11. For more on the evolution of the definition of public use, see *infra* notes 101-212 and accompanying text.

12. 304 N.W.2d 455 (Mich. 1981).

13. *Id.* at 459.

County of Wayne v. Hathcock.¹⁴ Constricting the broad definition of public use adopted in *Poletown*, the *Hathcock* court described *Poletown* as “a radical departure from fundamental constitutional principles and over a century of this Court’s eminent domain jurisprudence.”¹⁵ The oscillating definition of public use is a magnet for eminent domain debate.

The legal confusion engulfing the definition of public use and legal setbacks for advocates of private property rights in courts around the nation have led to an ever-increasing public outcry against many, if not most, exercises of eminent domain. Opponents of eminent domain describe it as an “abuse [that] has become a national plague.”¹⁶ Eminent domain is referred to as the “anti-individualist power” or “legal plunder” and governments that acquire property through eminent domain are derided as “land thieves.”¹⁷ Furthermore, a group of property rights advocates compiled an “Eminent Domain Abuse Survival Guide” to assist landowners facing the prospect of losing their properties by eminent domain.¹⁸ On the other hand, city planners sanitarily refer to eminent domain as “an economic development tool” and argue that “eminent domain power equals progress” because of the increased tax revenue that is commonly cited as the reason for its exercise.¹⁹

14. 684 N.W.2d 765, 772 (Mich. 2004).

15. *Id.* at 787.

16. Jeff Jacoby, Op-Ed, *The Battle of Fort Trumbull*, BOSTON GLOBE, July 26, 2001, at A11; accord Jack Ventimiglia, *Using Eminent Domain for Economic Gain under Fire; Could Affect Plans for Triangle*, GLADSTONE SUN-NEWS (Missouri), Aug. 19, 2004, available at http://www.zwire.com/site/news.cfm?newsid=12714236&BRD=1452&PAG=461&dept_id=155071&rfi=8.

17. Sheldon Richman, Op-Ed, *Will Bush Side with the Property Thieves?*, BALT. CHRON., Jan. 21, 2005, available at <http://baltimorechronicle.com/012105SheldonRichman.html>.

18. The name of the group is the Castle Coalition. According to its Web site:

Activists nationwide have used the Eminent Domain Abuse Survival Guide to successfully fight illegitimate land-grabs. Expanding on the most effective practical strategies to protect your property outside of the courtroom, the Survival Guide is designed to be a comprehensive roadmap for any grassroots battle against eminent domain for private development.

Castle Coalition: Eminent Domain Abuse Survival Guide, http://www.castlecoalition.org/survival_guide/index.html (last visited Mar. 1, 2006). The guide describes the process of eminent domain and recommends that landowners band together to oppose the action by participating in public meetings, holding rallies against eminent domain, organizing a media campaign against any proposed condemnation, and lobbying politicians in an effort to prevent the taking. *Id.*

19. Christopher D. Kirkpatrick, *Eminent Domain Foes Argue Land Seizure Being Abused to Help Private Companies*, TOLEDO (OH) BLADE, Nov. 28, 2004, at

Unquestionably, the jurisprudential fog that hangs over the scope of eminent domain's public use requirement does little to allay the increasingly caustic rhetoric accompanying a government's exercise of eminent domain.

Recently, the Supreme Court ended a twenty-year hiatus from eminent domain jurisprudence with its decision in *Kelo v. City of New London*.²⁰ The issue presented in *Kelo* was whether a city could invoke its power of eminent domain to take property from one private party and transfer it to another private party for the "sole purpose" of economic redevelopment.²¹ In other words, *Kelo* explored whether "economic development" was sufficiently "public" to satisfy the public use requirement of the Takings Clause. Despite the appearance of taking property from A to give it to B, which would undeniably violate the Takings Clause, the Court upheld New London's exercise of eminent domain by a vote of five to four.²² Whatever one thinks of the outcome in *Kelo*—and many disapprove, if the large volume of critical commentary that erupted on the Internet after the decision is a reliable indicator²³—the case is an important addition to eminent domain jurisprudence.

However, all of the attention given to the public use requirement masks the other issue in eminent domain cases: whether the compensation given to the dispossessed landowner is, in fact, "just." Notably, several Justices inquired about the Fifth Amendment's just compensation requirement during the oral arguments in *Kelo*. Justice Kennedy asked if any scholarship existed that addressed the appropriate measure of compensation in cases where property is taken from one private party for the economic benefit of another private party.²⁴ The attorney responded neither definitively nor directly to Justice Kennedy's question: "I

A1.

20. 125 S. Ct. 2655 (2005).

21. Brief of Petitioners at i, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

22. *Kelo*, 125 S. Ct. at 2658.

23. A collection of newspaper articles on the topic of eminent domain both pre- and post-*Kelo* is available at www.emdo.blogspot.com, a Web site entitled Eminent Domain Watch that includes links to other Web sites with eminent domain materials. Eminent Domain Watch, <http://www.emdo.blogspot.com> (last visited Mar. 1, 2006); see also The Polls Are In: Americans Overwhelmingly Use of Eminent Domain for Private Gain, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Mar. 1, 2006) (containing a collection of public opinion polls on the outcome in *Kelo*). For a discussion of the legal maneuvering post-*Kelo*, see Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Malia Rulon, *Chabot: Protect Property*, CINCINNATI ENQUIRER, July 1, 2005, at C1 (discussing a bill in Congress "intended to blunt" the *Kelo* decision).

24. Transcript of Oral Argument at 23, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

believe there has been some scholarship about it, but we think it's vital that there be a public use requirement."²⁵ Later, Justice Breyer asked whether there was some mechanism to ensure that the dispossessed landowner would be put in the same position as if he was not compelled to sell his house or whether the owner was "inevitably worse off."²⁶ Justice Souter followed Justice Breyer's question by commenting: "[W]hat bothered Justice Breyer I guess bothers a lot of us. And that is, is there a problem of making the homeowner or the property owner whole? But I suppose the answer to that is that goes to the measure of compensation which is not the issue here."²⁷

The Justices' questions regarding the appropriate amount of compensation during *Kelo's* oral arguments, a public use clause case, highlight the underlying philosophical tension within the law of eminent domain between governmental power and the rights of an individual citizen. This Article responds to the philosophical concerns raised by the Justices. Part II of this Article briefly describes the political philosophies that form the foundation of the Takings Clause—republicanism and liberalism—and outlines their histories in eminent domain jurisprudence. Part III traces the interpretive evolutions of both the public use and just compensation clauses from nineteenth-century cases to the Court's decision in *Kelo*. Part IV concludes that the current interpretations of public use and just compensation stray from the balance of ideologies embodied in the Takings Clause. The end result of the divergent evolutions is that the eminent domain balance tips toward republicanism. After describing several proposals to readjust the eminent domain balance, Part V argues for the incorporation of subjective harm into the just compensation calculus to inject a measure of liberalism into the modern approach to just compensation. The Article concludes that a broader assessment of the individual losses associated with eminent domain, even though they are subjective, resuscitates the word "just" in "just compensation" and brings the eminent domain balance closer to a point of equipoise.

25. *Id.*

26. *Id.* at 48.

27. *Id.* at 49.

II. POLITICAL PHILOSOPHY AND THE TAKINGS CLAUSE

Although they might disagree about the degree of influence,²⁸ historians generally acknowledge that one philosophy played a central role in shaping the early history of this nation and its laws, including property law—republicanism. The founders' investigation of history instructed them that past republics had died from "luxury," a sense of satisfaction, and an earnest desire for greater personal gain, which ignited envy in citizens and subsequent conflict.²⁹ To escape the seduction of individualism that ruined prior republics, the founders embraced a brand of republicanism that instructed that "the common good would be the only objective of government."³⁰ The welfare of the public, according to Thomas Paine, was "wholly characteristic [sic] of the purport, matter or object for which government ought to be instituted, and on which it is to be employed, Res-Publica, the public affairs, or the public good; or, literally translated, the public thing."³¹ At its core, republicanism was characterized, in part, by the "sacrifice of individual interests to the greater good of the whole."³² Instead of individual achievement, qualities such as "frugality," "scorn of ease," and "industry" were heralded in the republican mind.³³ Early American law reflects this all for one and one for all mentality. Price and wage controls, constitutional provisions prohibiting monopolies, along with other economic regulations all highlight the emphasis on the body politic as a whole rather than the individual.³⁴

28. Stephen A. Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903, 917-18 (1989) (reviewing G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35 (1988)). The topic of republicanism and its influence on the founding generation is quite complex and beyond the scope of this Article. Professor Siegel's book review provides further detail regarding the meaning of republicanism to the founding fathers and the dispute among historians regarding the appropriate definition of republicanism. *See id.* at 916-22.

29. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 52 (University of North Carolina Press 1998) (1969).

30. *Id.* at 52 ("The history of antiquity thus became a kind of laboratory in which autopsies of the dead republics would lead to a science of social sickness and health matching the science of the natural world.").

31. THOMAS PAINE, RIGHTS OF MAN: PART THE SECOND, ch. III (Philip S. Foner ed., 1945) (1792), available at <http://www.thomaspaine.org/Archives/ROMpart2.html>.

32. WOOD, *supra* note 29, at 53.

33. *Id.* at 52.

34. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 33 (2d ed. 1998); WOOD, *supra* note 29, at 63-64.

According to one historian, “[i]deally, republicanism obliterated the individual.”³⁵

The emphasis on personal sacrifice for the public good would seem to leave little space for individual accomplishment. However, the elevation of the public good above that of the individual illuminates a second, and possibly more nuanced, aspect of republicanism—an unflinching faith in the notion that a sovereign should wield power for the good of the people.³⁶ Republican principles encouraged individual citizens to participate in the decision making processes of the community.³⁷ So if individual interests were subservient to the public good, then legislatures could be expected to act in accordance with the public good because they were simply an aggregate of individuals joined by the common cause of promoting the public welfare.³⁸ Republican deference to legislative prerogative embraced the notion that “what was good for the whole community was ultimately good for all the parts” of the community; individual prosperity was directly proportional to community welfare.³⁹ To make that correlation, republicanism presupposed that the “public” possessed a uniform set of interests that could be advanced by legislative action.⁴⁰ Regardless of the merits of that assumption, the public interest deciphered as a result of legislative debate more closely approximated the public good than other forms of decision making, particularly that undertaken by aristocrats or royals.⁴¹ The legislative process curbed the threat that the legislature would pass legislation pursuant to an individual legislator’s private interests. Passing legislation required a consensus of legislators, and they were supposed to act pursuant to the public good, which made it most difficult to pass corrupt bills.

Although they recognize republicanism’s influence, historians also point out that it was not the only influence on this nation’s early political and legal thought. Republicanism’s emphasis on individual sacrifice and legislative deference posed a threat to individual rights; therefore, liberalism emerged as a philosophical competitor to challenge republican orthodoxy. Contrary to

35. WOOD, *supra* note 29, at 61.

36. Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 350 (1999).

37. See Siegel, *supra* note 28, at 916 (“Men . . . most realized their humanity when they participated in public, communal life.”).

38. See WOOD, *supra* note 29, at 58.

39. *Id.*

40. *Id.* at 57-58.

41. See William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701 (1985).

republicanism and its public-minded private citizen, liberalism viewed a citizen as self-interested and divorced from the public good except for those members of the public whose interests aligned with her own.⁴² In fact, “[p]ublic life, in the liberal view, involves just another forum in which individuals pursue their private interests.”⁴³ And unlike republicanism’s faith in legislative deliberation, liberals argued that individual rights were not subject to political determination; they were “prepolitical” and could not be violated according to the whims of the political process.⁴⁴ For liberals, government existed to protect rights accruing to an individual by virtue of citizenship, not to promote the public welfare.⁴⁵

The influences of these competing theories, republicanism and liberalism, pervade the theoretical and jurisprudential history of eminent domain. The earliest references to the concept of “eminent domain” per se can be found in the works of a collection of seventeenth- and eighteenth-century legal writers. Hugo de Groot (Grotius) first paired the phrase “eminent domain” with the power of government to take property from a citizen against that citizen’s will in his 1625 masterpiece, *On the Law of War and Peace*.⁴⁶ Grotius wrote that

through the agency of the king even a right gained by subjects can be taken from them in two ways, either as a penalty, or by the force of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is public advantage; then, that compensation from the public funds be made.⁴⁷

Almost fifty years later, Samuel Von Pufendorf maintained that a citizen’s private property could be “seized” by the state pursuant to its eminent domain authority but asserted that the seized property

42. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process* 95 COLUM. L. REV. 782, 821 (1995) (“Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest.”).

43. Siegel, *supra* note 28, at 916-17.

44. Treanor, *supra* note 42, at 821; see Siegel, *supra* note 28, at 917 (“Liberalism denies the possibility of a society having a public interest apart from the sum of its members’ individual interests.”).

45. See Siegel, *supra* note 28, at 917; Treanor, Note, *supra* note 41, at 705 (“Non-republicans . . . sought to create a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference.”).

46. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] 219 (Francis W. Kelsey trans., Oxford 1925) (1625).

47. *Id.* at 385.

had to be “applied to public purposes” and that the citizen required remuneration from the “public treasury.”⁴⁸ In 1737, Cornelius van Bynkershoek noted that the “authority by which the sovereign stands out above his subjects jurists call the right of eminent or pre-eminent domain, following Grotius who first defined it in *On the Law of War and Peace*.”⁴⁹ According to Bynkershoek, the sovereign had the power to take property from private citizens upon “adequate grounds” or when “public necessity or utility absolutely requires.”⁵⁰ However, a legitimate exercise of the eminent domain power required the sovereign to make “payment of the price from the common treasury.”⁵¹ Bynkershoek’s description of eminent domain shows that the phrase “eminent domain,” as well as its principles, had become cemented in the minds of legal scholars 112 years after it appeared on paper.

Though worded differently, each of the early definitions of eminent domain shares a common view of the relationship between governmental power and the individual right to private property. Grotius observed that property of individuals was subject to sovereign power to augment “public advantage,”⁵² and Pufendorf noted that an individual’s property can be taken for “public use.”⁵³ Bynkershoek’s recognition that property could be confiscated by the sovereign if “adequate grounds”⁵⁴ existed seems broad enough to

48. 2 SAMUEL VON PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM* [ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW] ch. 15 (On the Power of Sovereign Authority over Property Within the State) 166-67 (Michael Silverthorne trans. & James Tully ed., Cambridge Univ. Press 1991) (1673), available at http://www.constitution.org/puf/puf-dut_215.txt.

49. 2 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI* [QUESTIONS OF PUBLIC LAW] ch. 15 (On Eminent Domain and the Payment for Property Appropriated Under the Right of Eminent Domain) 218 (Tenney Frank trans., Oxford 1930) (1737), available at <http://www.lonang.com/exlibris/bynkershoek/bynk-215.htm>; see also 1 EMMERICH DE VATTEL, *LE DROIT DES GENS, OU PRINCIPLES DE LA LOI NATURELLE: APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* [THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS] § 244 (New York, S. Campbell 1796) (1757) (“The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth in the state, is called the eminent domain.”). Though these scholars might be considered obscure by today’s standards, references to them can be found in two of the classic cases on property law: *Johnson v. M’Intosh*, 21 U.S. 543, 563 (1823) and *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805).

50. 2 BYNKERSHOEK, *supra* note 49, at 219.

51. *Id.*

52. 2 GROTIUS, *supra* note 46, at 385.

53. 2 PUFENDORF, *supra* note 48, at 166.

54. 2 BYNKERSHOEK, *supra* note 49, at 219.

capture both of the previous definitions. For the founding fathers of eminent domain literature, eminent domain elevated the public's interest above that of an individual's right to private property; individuals were required to sacrifice their rights to property for the benefit of the community. Thus, the earliest definitions of eminent domain embrace the first prong of republicanism: self-denial for the good of the whole.

The description of eminent domain offered by its founding fathers, at least on paper, also acknowledged the second prong of classical republicanism—the faith reposed in the sovereign to make decisions in the best interests of the people.⁵⁵ Grotius wrote that “recourse is had to the right of eminent domain, not indiscriminately, but only in so far as this is to the common advantage in a civil government, which, even when regal, is not despotic.”⁵⁶ Bynkershoek opined that

[i]f you have in mind a ruler who permits himself to act according to his whims the discussion is to no purpose, but I have reference to one who is concerned for the public welfare, and could give reason if need be for his decisions and commands. The just ruler limits his own authority, and does not fear to hear the judgement [sic] of others regarding its limitations.⁵⁷

Pufendorf displayed a similar sentiment in the seventh book of his work, *Of the Law of Nature and of Nations*.⁵⁸ Pufendorf maintained that the sovereign “ought to esteem nothing as contributing to their own private or personal Good, which is not, at the same time, profitable to the Common-wealth.”⁵⁹ In sum, the tenor of the comments from Grotius, Bynkershoek, and Pufendorf suggests that each believed that the sovereign should act in the best interest of its citizens.

Though imbued with republicanism, each of the early descriptions of eminent domain simultaneously recognized that the power to seize property from the individual citizen was not unfettered. Instead of taking private property from the individual

55. *Id.*

56. 3 HUGO GROTIUS, *DE JURE BELLI AC PACIS* [ON THE LAW OF WAR AND PEACE] 797 (Francis W. Kelsey trans., Oxford 1925) (1625).

57. 2 BYNKERSHOEK, *supra* note 49, at 218.

58. 7 SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM* [OF THE LAW OF NATURE AND OF NATIONS] ch. 3 (Of the Generation of Civil Sovereignty or Majesty) 160 (Basil Kennett ed., Oxford 1703) (1673), available at http://oll.libertyfund.org/Texts/LFBooks/Pufendorf0210/LawOfNations/0163_Pt07_BookVII.pdf.

59. *Id.* ch. 9, 227.

without consequence, Grotius cautioned that a legitimate exercise of eminent domain required “that compensation from the public funds be made” to the dispossessed property owner.⁶⁰ Similarly, Pufendorf counseled that the citizen must obtain remuneration for the loss of property from the “public treasury.”⁶¹ And Bynkershoek wrote that if the sovereign “appropriates upon adequate grounds, he will do so . . . upon proper payment from the common treasury.”⁶² This recognition of individual rights in the face of governmental power represents a liberal component of eminent domain. The sovereign’s usurpation of the right of private property from the individual came at a price, and the public was obligated to make good on the loss inflicted in its name.

The competing ideologies that form the heart of eminent domain affected the American colonies’ view of the relationship between governmental authority and the private citizen. Two colonies considered provisions that turned out to be quite similar to the Fifth Amendment protections that would later be enshrined in the Bill of Rights. The 1641 Massachusetts Body of Liberties, which became a part of its colonial charter, contained a provision that provided compensation for government acquisition of private property: “[n]o man’s Cattel [sic] or goods of what kinde [sic] soever shall be pressed or taken for any publique [sic] use or service And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently [sic] recompenced.”⁶³

More closely resembling the modern breadth of eminent domain, the 1669 Fundamental Constitution of Carolina, which was never enacted in full, contained a provision that allowed the government to take an owner’s real property for the purpose of constructing buildings, provided that “[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint.”⁶⁴

In reality, the idea that government had to indemnify a property owner for lands confiscated by the government was not

60. 2 GROTIUS, *supra* note 46, at 385.

61. 2 PUFENDORF, *supra* note 48, at 167.

62. 2 BYNKERSHOEK, *supra* note 49, at 219.

63. THE BODY OF LIBERTIES OF 1641 § 8, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 1660-1672 (William H. Whitmore ed., Boston, Rockwell & Churchill 1889), *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch14s2.html>.

64. THE FUNDAMENTAL CONST. OF CAROLINA art. 44 (John Locke, 1669), *reprinted in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA 1669-1761, at 142 (John D. Cushing, ed., 1977), *available at* http://www.tea.state.tx.us/ssc/primary_resources/pdf/Constitution_of_South_Carolina_1669.pdf.

unanimously embraced by the colonies. In some cases, the government compensated the dispossessed landowner, while in other cases the landowner had to bear the burden of the loss sans remuneration.⁶⁵ But while the concepts associated with eminent domain did not command unanimous support among colonial governments, they had an undeniable impact on James Madison, who authored the Fifth Amendment and its Takings Clause. Madison was keenly concerned with protecting private property rights,⁶⁶ leading him to include the Takings Clause in the original draft of the Bill of Rights: “[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation.”⁶⁷ Of course, Madison’s original phrase was slightly altered in its final form—the word “relinquish” was changed to the word “take” in the final draft.⁶⁸ Apparently, this change, and arguably the Takings Clause as a whole, was not deemed particularly significant—the Takings Clause was adopted with little to no debate in Congress.⁶⁹

Madison’s Takings Clause, both as originally written and as

65. See Treanor, *supra* note 42, at 786 n.14 (noting that the charter provisions that governed Massachusetts and Carolina were rather progressive, in that none of the other colonial charters required a colonial government to pay for the property it took from private landowners); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 63-64 (1977) (stating that the principle of just compensation was not “widely established” at the time of the Revolution); Treanor, Note, *supra* note 41, at 695 (suggesting that colonial legislatures “regularly” confiscated private property without paying the owner any compensation). *But see* James W. Ely, Jr., “*That Due Satisfaction May be Made: The Fifth Amendment and the Origins of the Compensation Principle*,” 36 AM. J. LEGAL HIST. 1, 4 (1992) (commenting on Horwitz and Treanor’s conclusion that the colonies did not adhere to a policy of compensation for eminent domain, Ely states that, “[w]ith limited exceptions, the usual practice was to compensate landowners”).

66. See JACK N. RACKOVE, *ORIGINAL MEANINGS* 330-31 (1996) (stating further that, “were it not for Madison, a bill of rights might never have been added to the Constitution”).

67. 12 *THE PAPERS OF JAMES MADISON* 201 (Charles F. Hobson et al. eds., Univ. of Va. Press 1979) (1789-1790).

68. See Treanor, Note, *supra* note 41, at 711 n.95 (“The accounts of the congressional debate over the Bill of Rights provide no evidence as to why the change in language was made.”).

69. *Id.* at 708-09 (suggesting that most members of Congress simply doubted that the federal government would exercise its power of eminent domain and that, therefore, consumption of convention time with trivial concerns made little sense); see also Treanor, *supra* note 42, at 835 (“Those concerned with the protection of property presumably found convincing the argument that Madison advanced in Federalist Ten and believed that the structure of the national government that the Constitution established adequately protected property interests.”).

enacted by Congress and the state legislatures, intertwines the two fundamental philosophies originally identified by Grotius over 160 years earlier.⁷⁰ The public use clause reflects republicanism: an individual property owner is required to sacrifice her property interest for the good of the public at the request of the government if the property taken is to be put to a “public use.” A condemnation for the good of the whole outweighs the individual right to private property. However, the property owner does not bear the entire burden of eminent domain because the sovereign must provide the dispossessed owner with a “just compensation” in exchange for the property. Thus, the “just compensation” requirement evokes the concern for individual rights and government protection of those rights associated with liberalism.

An 1816 opinion by Chancellor James Kent of the Court of Chancery of New York displays the competing influences of republicanism and liberalism on early eminent domain jurisprudence.⁷¹ In *Gardner v. Village of Newburgh*,⁷² officials from

70. See Treanor, *supra* note 42, at 819 (arguing that the Takings Clause embraces both republican ideals because the government is barred from decreasing the value of property and liberal ideals in that some rights are so fundamental as to be beyond deprivation due to political inequalities).

71. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816). Although this Article addresses the doctrine as it stands in the United States, evidence exists to show that eminent domain has existed throughout much of the history of civilization. See, e.g., Nathan Matthews, *The Valuation of Property in the Roman Law*, 34 HARV. L. REV. 229, 252-53 (1921) (describing an episode where a Roman tribune by the name of Lucius Icilius strong-armed the Roman Senate into passing a law that took title to land from private citizens and gave it to the public upon the payment of compensation and also noting that buildings in Constantinople were acquired for schools after paying a “*compentens pretium*” to the owners of the buildings); see also 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ch. 1, § 1.2, at 68 (3d ed. 1964) (asserting that the first known exercise of eminent domain occurred when King Ahab of Israel seized the land of his neighbor, Naboth, to improve his own lot). *But see* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 553 (1972) (“It is not even clear Rome exercised a power of compulsory taking, though some scattered bits of evidence suggest she did.” Regarding King Ahab’s exercise of eminent domain specifically, Stoebuck observes that “[t]he internal facts . . . indicate the king had no such legal power, for he had to have Naboth stoned to death before he could make the vineyard his.”). In terms of the exercise of eminent domain by King Ahab, Stoebuck’s interpretation seems more accurate because the government, of course, does not murder the landowners whose land is pegged for acquisition by eminent domain. According to the Biblical book of 1 *Kings*, Naboth and his sons were executed after being framed for capital offenses by local officials at the behest of Ahab’s wife, Jezebel. 1 *Kings* 21: 1-5. Ahab and Jezebel, however, paid a heavy price for their treachery, which was forecast to them by Elijah. Ahab was killed by an arrow during battle and died in Naboth’s field where dogs licked his blood, while Jezebel was thrown from a window, died

the village of Newburgh persuaded the state legislature to pass an act that allowed Gardner's waterway to be diverted in order to provide the village with "pure and wholesome water."⁷³ Although the statute required compensation to landowners for injuries resulting from "the laying of conduits," the statute failed to mandate compensation for damages associated with the diversion of water.⁷⁴ Nevertheless, the village offered a "trifling and very inadequate compensation."⁷⁵ Gardner, however, refused to accept the offer and sought an injunction to stop the diversion.⁷⁶ Whether the diversion required compensation proved to be a difficult question for Chancellor Kent because of the absence of positive law regarding eminent domain in New York at the time.⁷⁷

Without constitutional or statutory guidance, Chancellor Kent turned to natural law to determine if the legislature possessed the authority to divert the water without compensation. Reflecting the republican ideology, Kent acknowledged that the state had the authority to force an individual property owner to sacrifice her property for the good of the public.⁷⁸ But, Kent argued, the exercise of this power required that the property be put to a public use.⁷⁹ And embracing the liberal tradition, Kent maintained that a legitimate exercise of eminent domain mandated a "fair compensation" from the legislature to the dispossessed landowner.⁸⁰ As authority for these propositions, Kent pointed out that

from the fall, and was eaten by dogs. 2 *Kings* 9: 11-40; 2 *Chronicles* 18.

72. 2 *Johns*. Ch. 162.

73. *Id.* at 164. For an additional well-known early eminent domain case that contains republican and liberal elements, see *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795). Within a decade of the passage of the Fifth Amendment, the court observed that "[e]very person ought to contribute his proportion for public purposes and public exigencies." *Id.* at 310. Consistent with the liberal underpinnings of eminent domain, however, the court recognized that "no one can be called upon to surrender or sacrifice his whole property, real or personal, for the good of the community, without receiving a recompence [sic] in value." *Id.*

74. *Gardner*, 2 *Johns*. Ch. at 163-164 (stating that Gardner alleged that he needed the water supply for his cattle).

75. *Id.* at 162.

76. *Id.*

77. *Id.* at 167. Though there was little positive law in New York, Chancellor Kent pointed out that Pennsylvania, Delaware, and Ohio had provisions in their state constitutions that addressed the compensation requirement. *Id.* In addition, Kent noted that the some European nations, such as France, also have provisions regarding eminent domain and compensation. *Id.*

78. *Id.* at 166.

79. *Id.*

80. *Id.* at 162.

Grotius, Pufendorf, and Bynkershoek, when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses when public necessity or utility require it; but they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified.⁸¹

Because the statutory diversion of water took private property from Gardner without adequate compensation, Kent granted the injunction.⁸² Thus, Kent unearthed the founding fathers of eminent domain literature to support his description of eminent domain power, which shows the impact of Grotius, Pufendorf, and Bynkershoek on the theory of eminent domain in this country.

Modern eminent domain jurisprudence is still influenced by the republican and liberal ideals discussed by Grotius almost four centuries ago.⁸³ In *County of Wayne v. Hathcock*, the Michigan Supreme Court opined that the sovereign had the authority to take property for “the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents.”⁸⁴ However, the state’s constitution requires the sovereign to pay a “just compensation” to the dispossessed property owner before seizing the property.⁸⁵ At the federal level, the Supreme Court in *Monongahela Navigation Co. v. United States*⁸⁶ observed that eminent domain allowed “the public to take [from the private citizen] whatever may be necessary for its uses.”⁸⁷ Nevertheless, the Court declared that the Fifth Amendment “prevents the public from loading upon one individual more than his just share of the burdens of government” when “he surrenders to the public something more and different from that which is exacted from other members of the public.”⁸⁸ The Supreme Court best captured

81. *Id.* at 166-67 (citations omitted). Kent later cited to Blackstone: [t]he sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the Legislature. And how does the Legislature interpose and compel? “Not,” says Blackstone, “by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained.

Id. at 167 (citation omitted).

82. *Id.* at 168.

83. Grotius’ widely recognized works were written between 1604 and his death in 1645. 13 *ENCYCLOPEDIA AMERICANA* 508 (1991).

84. 684 N.W.2d 765, 776 (Mich. 2004).

85. *Id.* at 777 (citing MI. CONST. of 1963 art. X, § 2).

86. 148 U.S. 312 (1893).

87. *Id.* at 325.

88. *Id.*

the essence of the two ideologies embodied by the Takings Clause in *Armstrong v. United States*.⁸⁹ The Court instructed that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁹⁰

But merely identifying the two competing political philosophies animating the Takings Clause in both theory and precedent does little to illuminate the nature of the relationship between them. The existence of republican and liberal wings of the Takings Clause suggests that the two must be roughly in a state of equipoise for the limitations to further the best interests of the public while simultaneously protecting the rights of the individual property owner. Overemphasizing the republicanism in the Takings Clause allows a government to gobble up property for public uses pursuant to its eminent domain power, which transgresses the time-honored respect for private property. On the other hand, overemphasizing the liberalism in the clause risks putting the brakes on government projects that benefit the public, such as public schools, roads, or firehouses.⁹¹ To show the balance even more clearly, inverting the interpretations of the limitations simply transfers the risks between the clauses. Underemphasizing the republicanism in the Takings Clause threatens to place obstacles in the way of projects that increase the welfare of the public while diminishing the liberalism shows a lack of due regard for the right of private property. Thus, the interpretations of the public use and just compensation clauses of the Fifth Amendment must exhibit some degree of, in a word, balance.

The balanced interpretation required of the Takings Clause is evident in writings that influenced early American thought regarding the importance of private property and its relationship to the purpose of government. In his *Essay Concerning Civil Government*, John Locke argued that the “preservation of property” was the “end of Government, and that for which Men enter into Society.”⁹² Similarly, Alexander Hamilton recognized that “[o]ne

89. 364 U.S. 40 (1960).

90. *Id.* at 49.

91. This is not to suggest that such projects will be altogether abandoned because, after all, the sovereign has the right of eminent domain. Nevertheless, prolonging the initiation of such projects only delays the public’s reception of the benefits associated with the projects.

92. JOHN LOCKE, *An Essay Concerning Civil Government*, in TWO TREATISES OF GOVERNMENT 378 (Peter Laslett ed., Cambridge University Press 1960) (1689).

great object of Government is personal protection and the security of Property.”⁹³ But early Americans simultaneously thought that the purpose of government was to promote the welfare of the people. As evidence of that belief, Vermont and Pennsylvania’s first constitutions contained identical provisions declaring that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community.”⁹⁴ As a result, a tenuous balance existed between the role of government as promoter of public welfare and protector of private property. While republicanism tied economic growth and development to individual growth and virtue,⁹⁵ liberalism stood as a bulwark against the predations of government. To maximize either aspiration, a balance had to be and still must be maintained between these two roles of government. Without that balance, an anomalous situation arises wherein a government formed for the protection of property takes property from individuals thereby eliminating the very reason for its formation.⁹⁶

III. THE EVOLUTION OF PUBLIC USE AND JUST COMPENSATION INTERPRETATIONS

Balancing the republican and liberal elements of eminent domain has long been the task, or maybe chore, of the nation’s

93. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1937). Likewise, James Madison wrote that:

[i]f there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, available at http://www.constitution.org/jm/17920329_property.htm.

94. PA. CONST. of 1776 ch. I, cl. V; VT. CONST. of 1793, ch. I, art. 7; see also, e.g., CONN. CONST. art. I, § 2 (1818) (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.”). The 1818 date of Connecticut’s state constitution is ironic, given that Connecticut is called “The Constitution State,” although its first formal constitution does not date from the Revolutionary period.

95. Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987).

96. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 585 (1972) (“It would, of course, be absurd to form a government having ‘the’ end of preserving property, and then to use that government to take away property.”).

courts. Prior to the incorporation of the Bill of Rights, state courts interpreted state law limitations on the sovereign power of eminent domain. Chapter I, Article 2 of Vermont's 1793 Constitution, for example, states "[t]hat private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."⁹⁷ Thus, Vermont courts had to interpret when Vermonters' private property was "subservient to public uses" or what was "an equivalent in money."⁹⁸ Following the incorporation of the Fifth Amendment via the Due Process Clause of the Fourteenth Amendment, courts had to answer the questions of what Congress meant by "public use" and just how much compensation amounted to "just compensation."⁹⁹ The answers to these questions shed light on the balance of political philosophies struck by courts in their interpretations of eminent domain's limitations under either the federal Takings Clause or its state counterparts. Regardless of the source of the law, courts generally did not have to interpret both limitations in the same case because complainants often challenged the definition of public use or the amount of compensation but not both.¹⁰⁰ As a result, the evolution of the restraints on eminent domain unfolded in separate cases throughout the history of eminent domain jurisprudence. Tracking the evolutions of the two clauses, then, provides a platform to compare the balance between republicanism and liberalism contemplated by the foundational writings on eminent domain to the modern balance reflected in eminent domain jurisprudence post-*Kelo*.

A. *Public Use*

Whether referring to state or federal law, a coherent definition

97. VT. CONST. of 1793, ch. I, art. 2.

98. See, e.g., *Richardson v. Vt. Cent. R.R.*, 25 Vt. 465, 475 (1853) ("[T]he Legislature might, in their exercise of the right of eminent domain, take private property for the use of the public; and that they were not required in a case like that, by the terms of our constitution, to make compensation.").

99. See, e.g., *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 228 (1897); *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 416 (1896).

100. This does not mean that public use and compensation questions never arose within the context of one case because some plaintiffs did, in fact, make both public use and compensation arguments. In *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9 (N.Y. 1837), the plaintiff argued that the legislature lacked the authority to delegate its eminent domain power to the railroad and also that compensation had to be paid prior to the seizure. Even so, the latter issue did not involve the amount of compensation per se but rather the relationship between the time of payment and the time of the actual taking. *Id.* at 13-14, 17.

of public use has proven to be elusive—what amounts to a “public use” has varied over time. Interestingly, the debate regarding the public use limitation can be traced back to the scholars credited with identifying the power of eminent domain on paper. Grotius suggested that the eminent domain power can be used only for “public advantage,” but Bynkershoek argued that the sovereign may take property pursuant to eminent domain for “public utility.”¹⁰¹ Adding his own linguistic turn, de Vattel wrote that the sovereign could exercise eminent domain upon “adequate grounds” or “in case of necessity, and for the public safety.”¹⁰² Although it is possible that the alternative phrases constitute more of a change in form over substance, de Vattel’s last phrase, at the very least, seems to allude to a narrower conception of eminent domain power, a more vigorous public use limitation.

The ambiguity existing in the foundational writings proved irrelevant during the early history of eminent domain in this country because the public use limitation failed to restrain the sovereign’s power to take land. For example, states enacted Mill Acts during the nineteenth century that allowed a riparian owner to construct a dam to power a mill on the riparian owner’s property even though the dam caused neighbors’ lands to flood.¹⁰³ The Mill Acts, in effect, granted one landowner the power to take the land of a neighbor in exchange for monetary compensation, which is more or less identical with the eminent domain power.¹⁰⁴ Though the riparian owner gained the sole benefit as a result of the dam, courts upheld these statutes as public uses against challenges that the only benefit accrued to private, not public, parties. In *Scudder v. Trenton Delaware Falls Co.*,¹⁰⁵ for example, a landowner argued that a private company’s acquisition of a “raceway” to conduct water to its mills over his land failed to benefit the public in any way; therefore, the act violated the public use limitation under New Jersey state law.¹⁰⁶ After noting the benefits associated with similar projects in the state, the court found that “great benefit will result to the community from the contemplated improvement.”¹⁰⁷ The court neglected to describe this “great benefit” to the public. Apparently, the contribution of water power to the general well-being and

101. See 2 BYNKERSHOEK, *supra* note 49 at 219; 2 GROTIUS, *supra* note 46, at 385.

102. See 1 VATTEL, *supra* note 49, § 244.

103. See, e.g., Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 206 (1978).

104. *Id.* at 206-07.

105. 1 N.J. Eq. 694 (N.J. Ch. 1832).

106. *Id.* at 726-30.

107. *Id.* at 729.

advancement of the public trumped the rights of the private landowner.

Mills were not the only improvements that satisfied, albeit questionably, the public use limitation on eminent domain during the nineteenth century. State statutes authorized the construction of roads, even those for purely private use, pursuant to the power of eminent domain. In *Brewer v. Bowman*,¹⁰⁸ for example, the Supreme Court of Georgia examined the constitutionality of an 1834 Georgia statute that authorized the court to grant private rights of way to individuals for the purpose of ingress or egress from farms or residences.¹⁰⁹ Investigating the “public use” aspect of the statute under state law in dicta, the court reasoned that the public obtained a benefit even though a private individual was the primary beneficiary.¹¹⁰ The court noted that without the ability to gain access to their lands, property owners would not have the ability to vote, participate in legal proceedings as members of juries or as witnesses, or get goods to and from the market.¹¹¹ Though the public as a whole would never use the private road, the court reasoned that the road

would not necessarily, in the view in which we have been considering the question, be *exclusively* for the benefit of the party applying for it, but that the *public interest* would also be promoted, by enabling every citizen to perform all the duties which are required of him by law, for the benefit of the whole community.¹¹²

Interpretive contortions to find a public aspect in cases like those involving dams or roads that benefited private persons reflect a fairly broad interpretation of what was meant by “public use” under many state laws.¹¹³ A broad interpretation of public use, in turn, reflects a strong view of one prong of the republican foundation of eminent domain—personal sacrifice for the good of the public. During the early to mid-nineteenth century, courts routinely held that private property owners had to sacrifice their individual rights in the interest of public welfare. The public interest that

108. 9 Ga. 37 (1850).

109. *Id.* at 37-39.

110. *Id.* at 40.

111. *Id.*

112. *Id.* The court actually struck down the statute because it did not contain a provision to compensate the property owner for the loss of land. *Id.* at 42. For a list and more complete exposition on cases involving private rights of way, see Berger, *supra* note 103, at 207-08.

113. See Berger, *supra* note 103, at 205 (referring to the “broad view” of public use).

outweighed individual property rights was the interest in economic growth.¹¹⁴ Internal improvements were necessary to spur industrial growth, and eminent domain proved to be the most “potent legal weapon” to advance the cause—a legal subsidy for economic growth.¹¹⁵ Canvassing the history of the public use doctrine, the Idaho Supreme Court elucidated the link between economic growth and a government’s taking of property for public use in *Potlatch Lumber Co. v. Peterson*.¹¹⁶ The court observed that:

[t]he provisions in regard to the power of eminent domain and the taking of private property for a public use . . . emanate[] directly from the people instead of from the Legislature and [are] therefore, legal and valid, emanating from the highest power. In meeting the marvelous industrial development of many of the United States in the last 100 years, it has been found impossible in many instances to follow or apply the letter of the common law in regard to the power of eminent domain. To follow it in the application of that power in many instances would greatly hamper, retard, and, in many instances, defeat the development of the great natural advantages, resources, and industrial opportunities of many of the states of the Union. And the framers of our Constitution thoroughly understood those facts and understood that a complete development of the material resources of our young state could not be made unless the power of eminent domain was made broader than it was in many of the Constitutions of

114. Republicanism’s adherence to personal sacrifice for economic growth was not necessarily adverse to individual prosperity. *See supra* notes 36-41 and accompanying text.

115. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63 (1977); *see also* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 *YALE L.J.* 599, 601 (1949). Early in the history of eminent domain jurisprudence, the majority of interpretative work was undertaken by state courts because state governments often condemned land and then transferred it to the federal government. *See, e.g., id.* at 599 n.3. For cases where the state government condemned land on behalf of the federal government, *see Glimer v. Lime Point*, 18 Cal. 229, 247-50 (1861); *Reddall v. Bryan*, 14 Md. 444, 477-78 (1859) (involving the condemnation of land in order to build aqueduct for the City of Washington); *Burt v. Merchants’ Insurance Co.*, 106 Mass. 356, 361-62 (1871) (concerning land sought to build a post office). For a case in which a court denied the power of a state to condemn land on behalf of the federal government, *see Trombley v. Humphrey*, 23 Mich. 471, 481 (1871) (involving land to be used for building lighthouses). The first case to construe the power of the federal government to condemn land on its own behalf occurred in 1875. *See* Comment, *supra*, at 599 n.3 (citing *Kohl v. United States*, 91 U.S. 367 (1875)).

116. 88 P. 426 (Idaho 1906).

the several states of the Union.¹¹⁷

The court concluded that it was the “character of the use, whether strictly public or otherwise” that determined whether or not a particular exercise of eminent domain was constitutional or not.¹¹⁸

The seemingly boundless republican interpretation of “public use” represented in state court opinions during the early nineteenth century met opposition from legal commentators and judges later in that century.¹¹⁹ In his influential treatise on constitutional law, Thomas M. Cooley argued that “public use implies a possession, occupation, and enjoyment of the land by the public, or public agencies.”¹²⁰ Echoing Cooley’s argument in *Bloodgood v. Mohawk & Hudson Railroad*,¹²¹ Senator Tracy decried the substitution of “public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement” for “public use,” which had a natural connotation of “public possession and occupation.”¹²² Similarly, Justice Woodbury

117. *Id.* at 430-31. The court further stated that:

[i]n Idaho, owing to the contour of the country, its mountain fastnesses, and the great difficulty of preparing and constructing means and modes of communication and transportation, and also owing to the arid condition of the state, the necessity for irrigation in the development of the state’s agricultural resources and in the development of its boundless mineral wealth, it was considered a necessity to the complete development of the material resources of the state to enlarge and broaden the power of eminent domain in the state In many of the state Constitutions the right to exercise the power of eminent domain is made to depend upon the question whether the use contemplated is or is not a public use in the most narrow and restricted meaning of the phrase “public use.”

Id. at 431.

118. *Id.* at 431.

119. Phillip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940) (identifying the time of this transition as the 1840s or 1850s).

120. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (Boston, Little Brown & Co. 1868).

121. 18 Wend. 9 (N.Y. 1837).

122. *Id.* at 60. The case was an action for trespass against a railroad that had damaged plaintiff’s property by destroying fences and digging into the soil. *Id.* at 9. The railroad argued that it was not liable for the damage because an act of incorporation gave it the right to enter the plaintiff’s lands, which caused the subsequent damage. *Id.* The issue revolved around whether the legislature’s delegation of its eminent domain power in the act of incorporation was constitutional. *Id.* at 10. The court held that the act was constitutional, but that the railroad had to pay damages to the plaintiff prior to the appropriation. *Id.* at 78. As a result, Senator Tracy’s discussion of the meaning of public use is dicta.

picked up the chorus in his dissent to the majority decision in *West River Bridge Co. v. Dix*.¹²³ Looking at public use precedent, Justice Woodbury argued that “[i]t may be, and truly is, that individuals and the public are often extensively benefited by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights.”¹²⁴ Instead, Justice Woodbury maintained that uses “must in their essence, and character, and liabilities be public within the meaning of the term ‘public use.’”¹²⁵

From the critics’ point of view, the expansive nature of what counted as a “public use” posed a substantial threat to the right of private property. In his *Bloodgood* opinion, Senator Tracy rhetorically asked what limit could be placed upon the legislature to protect private property if the broad interpretation was the correct constitutional interpretation.¹²⁶ The implication was that no such limit could be imagined. And although it recognized that “public use” may mean “public usefulness, utility or advantage, or what is productive of general benefit,” the Supreme Court of West Virginia lamented the consequences of such a definition in *Salt Co. v. Brown*.¹²⁷ The court observed that:

[w]hile this is in one sense true, it is yet perfectly obvious that, if the principle there announced is acted upon, without a most careful and guarded reference to the nature, necessity and extent of the use for which private property is sought to be taken, the great constitutional safeguard which has been thrown around it will be utterly subverted.¹²⁸

123. 47 U.S. 507 (1848).

124. *Id.* at 547.

125. *Id.* For a list of cases addressing the narrower interpretation of public use, see JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 164 n.6 (Chicago, Callaghan & Co. 1888), and Nichols, *supra* note 119, at 617 n.14, listing cases in which the court defined public use to be “use by the public.”

126. *Bloodgood*, 18 Wend. at 60. Senator Tracy asks whether there is “any limitation which can be set to the exertion of legislative will in the appropriation of private property.” *Id.* Later, he remarked that

[i]t seems to me that such a construction of legislative powers is inconsistent with secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision. Indeed it concedes to legislative discretion a wider range than I think could be maintained for it on the principles of natural law, if we had no written constitution.

Id. at 62.

127. 7 W. Va. 191, 196 (1874).

128. *Id.*

Simply put, the broad interpretation risked not only encroaching upon, but swallowing the right to private property in its entirety.

Compared to the interpretation applied to Mill Acts or private roads, the understanding of “public use” embodied in the writings of Cooley and Tracy is far narrower. For them, an incidental, amorphous benefit accruing to the public after taking land and transferring it to a private party was insufficient to satisfy the “public use” limitation on eminent domain. According to the narrow interpretation, “public use” meant that the government controlled the use of the property or simply that the public had a right to utilize the property in a physical sense.¹²⁹ The bottom line was that the taking of private property had to have some direct effect on the public weal to meet the more stringent requirements of the narrow interpretation. Though seemingly straightforward, even the narrow interpretation proved to be infected with ambiguity, such as what percentage of the public must be able to “use” the property to satisfy the requirement.¹³⁰

In reality, neither the narrow nor the broad interpretation captured a sufficient number of adherents to cover the field.¹³¹ Instead, the two competing views managed a sort of peaceful coexistence, but the result in any given case was, to say the least, unpredictable. Where one court found that a proposed use, such as a railroad, satisfied the public use definition, another court reached the opposite conclusion.¹³² Of course, the jurisprudential uncertainty

129. LEWIS, *supra* note 125, § 164.

130. Comment, *supra* note 115, at 603-04 n.26.

131. See Berger, *supra* note 103, at 209 (“While the narrow view of public use held considerable sway, especially in the latter half of the nineteenth century, it never completely took over the field.”).

132. Compare, e.g., *Aldridge v. Tuscumbia, Courtland, & Decatur R.R.* 2 Stew. & P. 199, 203 (Ala. 1832) (upholding the exercise of eminent domain for railroad purposes), with *Pittsburg, Wheeling & Ky. R.R. v. Benwood Iron-Works*, 8 S.E. 453, 467 (W.Va. 1888) (reversing a lower court decision to allow a railroad company to condemn land pursuant to a state statute). The Alabama Supreme Court in the former case stated that:

[i]t is true that the term “use” is employed in the latter clause of the thirteenth section of our declaration of rights. “Nor shall any person’s property be taken, or applied to public use, unless just compensation be made therefor.” But it would be curtailing the sovereign power of the government, very much, indeed, to say that, under this clause, in the declaration of rights, private property could not be appropriated to the public, without a continued occupancy of the thing appropriated. Whatever is beneficially employed for the community is of public use, and a distinction cannot be tolerated.

Aldridge, 2 Stew. & P. at 203. Conversely, the West Virginia Supreme Court ruled in the latter case that:

[t]he mere declaration in a petition that the property is to be appropriated to public use does not make it so; and evidence that the

associated with the definition of public use caused a good deal of consternation among legal commentators and courts alike. In his 1888 treatise on eminent domain, John Lewis remarked that “when . . . we come to seek for the principles upon which the question of public use is to be determined, or to define the words, ‘public use,’ in the light of judicial decisions, we find ourselves utterly at sea.”¹³³ Similarly, the Nevada Supreme Court announced that “[n]o question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words ‘public use.’”¹³⁴ The court then sarcastically noted that “[t]he authorities are so diverse and conflicting that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases.”¹³⁵

public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was a private gain, and it was apparent that the general public had no interest in it. We would do nothing to hinder the development of the State nor to cripple railroad companies in assisting such development, but at the same time we must protect the property rights of the citizens. All that to which the corporations are entitled under a proper construction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use.

Benwood Iron-Works, 8 S.E. at 467.

133. LEWIS, *supra* note 125, § 159.

134. *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 400-01 (1876).

135. *Id.* at 401. The full text of the court’s comment, which reflects the judicial dissatisfaction with the state of the law, is as follows:

[w]hat is the meaning of the words ‘public use’ as contained in the provision of our state constitution? It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property is to be seized. In other words, that in favor of private rights the construction should be strict; that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest, or advantage to the community is a taking for a public use. No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words ‘public use’ as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right.

Id. at 400-01; see also *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158

Nineteenth-century post-incorporation Supreme Court jurisprudence offered little help to courts seeking resolution of the public use quagmire. In *Fallbrook Irrigation District v. Bradley*,¹³⁶ for example, the Court examined whether an irrigation project satisfied the Fifth Amendment's public use requirement.¹³⁷ Reviewing the state of public use doctrine, the Court recognized that "[t]he question, what constitutes a public use, has been before the courts of many of the States, and their decisions have not been harmonious, the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others."¹³⁸ Despite acknowledging the inconsistency in the various definitions of public use, the Court's muddled phrasing of its decision to uphold the irrigation plan against a public use challenge lacked the clarity required to give direction to lower courts. The Court announced that "we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use."¹³⁹ What the Court failed to mention, however, was whether a "public purpose" was the equivalent of a "public use" for Fifth Amendment purposes. Though imperceptible at the time, the change in phrasing had a profound effect on the evolution of public use doctrine during the twentieth century.

The confusion enveloping the constitutional interpretation of public use during the nineteenth century proved equally vexing for twentieth-century courts. *Berman v. Parker*¹⁴⁰ concerned the District of Columbia Redevelopment Act ("DCRA"), which was enacted by Congress to eliminate urban blight and substandard housing in a District neighborhood by use of eminent domain.¹⁴¹ Section 4 of the DCRA delegated the power of eminent domain to a governmental agency for "the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight."¹⁴² To promote redevelopment, the condemned lands were to be transferred to parties who agreed to initiate projects that conformed to the overall plan.¹⁴³ Although public agencies could receive land under the DCRA, section 7(g) of the statute stated that private parties were

(1896) (making a similar observation).

136. 164 U.S. 112 (1896).

137. *Id.* at 158.

138. *Id.*

139. *Id.* at 164.

140. 348 U.S. 26 (1954).

141. *Id.* at 28-29.

142. *Id.* at 29 (noting that this section of the statute also created the District of Columbia Redevelopment Land Agency).

143. *Id.* at 30.

the preferred recipients of the properties acquired pursuant to eminent domain.¹⁴⁴ Because his land was to be transferred to a private developer following a proposed condemnation under the DCRA, a commercial landowner challenged it as a violation of the public use limitation of the Fifth Amendment.¹⁴⁵

Addressing the public use challenge to the DCRA, the Court identified a justification that satisfied the public use requirement and appeared to endorse a broad interpretation of public use—a sort of generalized “public welfare.”¹⁴⁶ The Court stated that “[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.”¹⁴⁷ In this case, the DCRA was held to promote the “public welfare” by resuscitating the vitality of a neighborhood through the elimination of blight and inadequate housing on an area-wide basis.¹⁴⁸ According to the Court, the public benefited from the plan because:

[m]iserable 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.¹⁴⁹

144. *Id.*

145. *Id.* at 31 (stating that a department store resided on the property).

146. *Id.* at 33.

147. *Id.* (citation omitted).

148. *Id.* at 34-35. The court stated that:

[t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

Id.

149. *Id.* at 32-33.

Thus, the Court held that the DCRA did not violate the public use clause of the Fifth Amendment.¹⁵⁰ The Court's dramatic description of the living conditions in the area made it difficult to be too critical of the "public" aspect of the decision. After all, critics might be slow to argue against a plan designed to eliminate living quarters that reduced residents "to the status of cattle."

After a period of thirty years, the Supreme Court returned to the public use doctrine in *Hawaii Housing Authority v. Midkiff*.¹⁵¹ The unusual facts in *Midkiff* involved Hawaii's determination that its "feudal land tenure system" had distorted the market for residential property, thereby "injuring the public tranquility and welfare."¹⁵² Therefore, the legislature enacted the Land Reform Act ("LRA"), which allowed the government to acquire land by eminent domain and then transfer it to qualified private parties.¹⁵³ Ten years after the enactment of the LRA, a private landowner whose property was subject to an action for eminent domain filed a lawsuit claiming that the LRA contravened the public use requirement of the Fifth Amendment.¹⁵⁴ Similar to the argument in *Berman*, the complainant alleged that the statute allowed the legislature to take property for a private use because the property wound up in the hands of private parties for their sole benefit.¹⁵⁵

The Court's decision reaffirmed the broad understanding of

150. *Id.* at 35-36.

151. 467 U.S. 229 (1984).

152. *Id.* at 232. The Court described the feudal system in Hawaii as one: in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land [This resulted in a market where] 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.

153. *Id.* at 233-34. Private parties that qualified under the LRA included: tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act.

Id. at 233 (citation omitted).

154. *Id.* at 234-35.

155. *Id.* at 235.

“public use” propounded in *Berman*, which may have been predictable given the similarity of the issues in the two cases. The Court stated that the simple fact that the beneficiaries of the eminent domain action were private rather than public did not mean that the exercise of sovereign power was unconstitutional.¹⁵⁶ To the contrary, the Court stated that it “long ago rejected any literal requirement that condemned property be put into use for the general public.”¹⁵⁷ In fact, it held that the beneficiaries of an eminent domain action need not constitute “any considerable portion” of the community.¹⁵⁸ Despite the private nature of the eminent domain action, the transaction as a whole may rise to a “public affair” because of its “class or character.”¹⁵⁹ In this case, the negative consequences associated with the “unique” land oligopoly and the scheme designed to ameliorate those consequences endowed the LRA with a satisfactory public use for Fifth Amendment purposes.¹⁶⁰

Following the Court’s *Midkiff* decision, the next high-profile public use battle was fought in the courts of the State of Michigan. In *Poletown Neighborhood Council v. City of Detroit*,¹⁶¹ the Detroit Economic Development Corporation sought to acquire a large amount of real property within an area of Detroit known as Poletown and transfer it to General Motors so that it could build an assembly plant on the site.¹⁶² In the midst of an economic downturn, the City argued that such action was necessary “to alleviate and prevent conditions of unemployment and fiscal distress.”¹⁶³ The dispossessed homeowners of Poletown countered that the condemnation was a taking for a private use in violation of the public use clause in the state constitution.¹⁶⁴ According to the

156. *Id.* at 243-44.

157. *Id.* at 244.

158. *Id.* (citing *Rindge Co. v. L.A. County*, 262 U.S. 700, 707 (1923)).

159. *Id.* at 244 (citing *Block v. Hirsch*, 256 U.S. 135, 155 (1921)). The quoted language goes back even farther than the Court’s citation. In *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), the Court examined whether the condemnation of land for an irrigation system constituted a public use for Fifth Amendment purposes. The Court stated that “[i]t is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use.” *Fallbrook*, 164 U.S. at 161-62.

160. *Midkiff*, 467 U.S. at 244.

161. 304 N.W.2d 455 (Mich. 1981)

162. *Id.* at 457. The State of Michigan delegated the power of eminent domain to the locality pursuant to the terms of the Economic Development Corporations Act. *Id.* (citing MICH. COMP. LAWS §§ 125.1601-125.1636 (1974)).

163. *Id.* at 458.

164. *Id.*

Poletown complainants, the public benefit derived from the condemnation was “incidental” to the actual motive for the taking.¹⁶⁵ The legal fight, then, was about the scope of Michigan’s definition of public use in its state constitution.

Ruling against the private-property owners, the Michigan Supreme Court, ironically, transposed the complainants’ assertions and used them to support its conclusion. The court maintained that “[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”¹⁶⁶ On the other hand, the court characterized the public benefit of the City’s plan to be “clear and significant.”¹⁶⁷ As a result, the court ruled that the “public” benefit of the City’s plan—“the economic boost”—satisfied the “public use” requirement of the state constitution.¹⁶⁸

After two decades of controversy, which even included a documentary of the *Poletown* saga, the Michigan Supreme Court revisited its *Poletown* decision in 2004 in *County of Wayne v. Hathcock*.¹⁶⁹ In *Hathcock*, Wayne County sought to exercise its power of eminent domain to acquire nineteen parcels of real property for the purpose of building a “business and technology park.”¹⁷⁰ Taking the appropriate cue from the *Poletown* decision, the County claimed that the plan would resuscitate the “struggling economy” in that part of the state.¹⁷¹ The dispossessed landowners, however, argued that the County’s plan violated the public use clause in the state constitution.¹⁷² Notably, the defendants did not assert that the government’s plan failed to yield any benefit to the public.¹⁷³ Instead, the property owners urged that the benefits to private parties were far greater than those accruing to the public in the aggregate.¹⁷⁴ In short, the arguments in *Hathcock* were similar to those addressed in *Poletown*.¹⁷⁵

165. *Id.*

166. *Id.* at 459.

167. *Id.*

168. *Id.* at 459-60.

169. 684 N.W.2d 765 (Mich. 2004).

170. *Id.* at 769. The plan required the acquisition of approximately 1,300 acres. *Id.*

171. *Id.* at 769-70.

172. *Id.* at 770.

173. *Id.* at 778.

174. *Id.*

175. One difference between the cases is that the eminent domain proceedings in *Poletown* were undertaken to eliminate blight whereas no such blight elimination occurred in *Hathcock*. The *Hathcock* condemnations were undertaken to eliminate noise problems associated with an airport. *Id.* at 770.

Even though it appeared to fit squarely within the ambit of *Poletown*, the Michigan Supreme Court ruled that building a “technology park” for the primary benefit of a private party did not satisfy the “public use” requirement of Michigan’s constitution.¹⁷⁶ The court reviewed its pre-*Poletown* eminent domain jurisprudence and found that the County’s plan lacked any of the characteristics of a public use identified in cases decided before *Poletown*.¹⁷⁷ The County’s plan did not create “instrumentalities of commerce” like roads, require the recipient of the property to remain accountable to the public post-condemnation, or eliminate an issue of public concern like blight.¹⁷⁸ For the *Hathcock* court, the County’s plan amounted to nothing more than a taking of land from one private party to give another private party the primary benefit.¹⁷⁹ Distancing itself from *Poletown*, the court stated that *Poletown* was “most notable for its radical and unabashed departure from the entirety of this Court’s pre-1963 eminent domain jurisprudence.”¹⁸⁰ The court emphatically declared that “the *Poletown* analysis provides no legitimate support for the condemnations proposed [here] . . . and . . . is overruled.”¹⁸¹ After *Hathcock*, a robust uncertainty crept into the exercise of eminent domain because a number of courts had referred to *Poletown* to support their expansive interpretations of the public use clause in eminent domain controversies.¹⁸²

The *Hathcock* decision encouraged those who claimed that eminent domain was being abused by local governments around the country—and they had numbers to support their claims of abuse.

Regardless of this factual distinction and its merits, the legal arguments in the two cases were quite similar. In fact, the *Hathcock* majority relied heavily on Justice Ryan’s dissenting opinion in *Poletown* in reaching its decision to overrule the precedent set by *Poletown*. *Id.* at 781-86.

176. *Id.* at 786-87.

177. *Id.* at 782-83 (citing *Lakehead Pipe Line Co. v. Dehn*, 64 N.W.2d 903 (Mich. 1954) and *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951)).

178. *Id.* at 781-83.

179. *Id.* at 784.

180. *Id.* at 785.

181. *Id.* at 787.

182. *See, e.g.*, *Kelo v. City of New London*, 843 A.2d 500, 528 (Conn. 2004); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 12 (Nev. 2003); *Common Cause v. State*, 455 A.2d 1, 24 (Me. 1983) (including the earliest citation to *Poletown* outside Michigan); *City of Duluth v. State*, 390 N.W.2d 757, 763 n.2 (Minn. 1986); *Maready v. City of Winston-Salem*, 342 N.C. 708, 725, 725 n.1, 467 S.E.2d 615, 626, 626 n.1 (1996) (noting that “[t]o date, courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives”); *City of Jamestown v. Leever Supermarkets, Inc.*, 552 N.W.2d 365, 372 (N.D. 1996).

One group, for example, documented approximately ten thousand exercises of eminent domain from 1998 to 2002 allegedly in violation of the public use clause because they primarily benefited private parties and only indirectly advanced public interests.¹⁸³ To them, *Hathcock* represented the possibility of a major shift in policy toward greater protection of private property of citizens around the country that had been abandoned in decisions like *Berman* and *Midkiff*. In their view, courts had stamped their imprimaturs on too many justifications for eminent domain that went well beyond any legitimate definition of public use. Of course, *Hathcock* was a state court decision binding only the State of Michigan. However, private property activists did not have to wait long before the fight over the current state of the public use doctrine reached the doors of the United States Supreme Court.

The most recent addition to the public use morass arrived in June 2005 with the case of *Kelo v. City of New London*.¹⁸⁴ Like many other cities in New England, the City of New London was in the throes of an economic downturn during the mid-1990s. One of its primary employers, the Naval Undersea Warfare Center, closed in 1996, which contributed to a rise in the City's unemployment rate to a level nearly double that of the state by 1998.¹⁸⁵ Further indicating the economic hardship within the City, the City's population had diminished to its lowest number in approximately eight decades.¹⁸⁶ In light of the economic problems facing the City, a Connecticut state agency identified New London as a "distressed municipality."¹⁸⁷ As a result, the New London Development Corporation decided to use its power of eminent domain to acquire property for development purposes.¹⁸⁸

Once acquired, New London called for the property to be transferred to Pfizer, Inc., in the hope that it would be "a catalyst to the area's rejuvenation."¹⁸⁹ The property designated for

183. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003) (counting a total of "10,282+ filed or threatened condemnations for private parties," including "3,722+ properties with condemnations filed for the benefit of private parties" and "6,560+ properties threatened with condemnations for private parties").

184. 125 S. Ct. 2655 (2005).

185. *Id.* at 2658.

186. *Id.* (stating that the population at the time of the eminent domain action had fallen to 24,000).

187. *Id.*

188. *Id.* at 2660.

189. *Id.* at 2659. Pfizer had plans for a \$300 million research facility on the property. The development was also slated to include a hotel with restaurants and shopping, marinas, a pedestrian "riverwalk," eighty new residences, a new

condemnation was located in a portion of New London called Fort Trumbull and consisted of 115 privately owned parcels of land, which included ten owner-occupied parcels of land.¹⁹⁰ The record contained no evidence that the homes on the ten owner-occupied properties were dilapidated or created blight.¹⁹¹ Instead, the homes to be condemned just happened to be in the area selected for transfer to Pfizer.¹⁹² Because their properties were to be given to a private party post-condemnation, Susette Kelo and several other Fort Trumbull homeowners challenged the exercise of eminent domain in an attempt to retain their homes.¹⁹³ Thus, the issue before the Court was “whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”¹⁹⁴

First, the Court reviewed its history of public use jurisprudence and noted that nineteenth-century courts utilized a narrow interpretation of public use, one that required that the public have the opportunity to set foot on the acquired property.¹⁹⁵ However, the Court concluded that the narrow interpretation had fallen out of favor over the course of time because of the difficulty of its application and the changing needs of society.¹⁹⁶ Instead of a narrow interpretation, the Court’s historical review revealed that it had begun to apply a “more natural interpretation of public use as ‘public purpose’” by the end of the nineteenth century.¹⁹⁷ Moreover, the Court stated that it had “repeatedly and consistently rejected that narrow test ever since.”¹⁹⁸ Applying the broader definition of public use utilized in cases like *Berman* and *Midkiff* to the facts in *Kelo*, the Court found that the City had a “carefully formulated” plan designed to stimulate economic development in New London.¹⁹⁹

U.S. Coast Guard Museum, and other office and retail venues. *Id.*

190. *Id.* at 2659-60. Thirty-two acres of the land to be acquired had been the site of the Naval Undersea Warfare Center. *Id.* at 2659.

191. *Id.* at 2660.

192. *Id.* at 2659-60.

193. *Id.* at 2660.

194. *Id.* at 2660-61. The complainants won an injunction at trial, except with respect to one parcel designated for office use. On appeal, the Supreme Court of Connecticut removed the injunctions granted at trial. Thereafter, the U.S. Supreme Court granted certiorari. *Id.*

195. *Id.* at 2662.

196. *Id.* (commenting that the narrow interpretation required answers to questions such as “what proportion of the public need have access to the property?” and “at what price?”).

197. *Id.* (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896)).

198. *Id.* at 2663.

199. *Id.* at 2665.

The development plan not only sought to create jobs and increase the tax base of the community, but also provided for residential and recreational uses of the condemned lands.²⁰⁰ As a result, the Court held that New London's "plan unquestionably serv[ed] a public purpose;" therefore, the City's plan satisfied the public use standard of the Fifth Amendment's Takings Clause.²⁰¹

In a strongly worded dissent, Justice O'Connor charged that the majority decision deleted "the words 'for public use' from the Takings Clause of the Fifth Amendment."²⁰² Instead of being faithful to Court precedent, Justice O'Connor alleged that the majority had veered from the reasoning in *Berman* and *Midkiff* by upholding an exercise of eminent domain with only remote public benefits.²⁰³ While both *Berman* and *Midkiff* involved taking land from private parties and subsequent redistribution, the public benefit derived from those takings "directly" resulted from the acquisition of the land regardless of the subsequent transfer to a private party.²⁰⁴ The public purpose was accomplished "when the harmful use was eliminated" by the taking to remove blight in *Berman* or to break the land oligopoly in *Midkiff*.²⁰⁵ As a result, the subsequent transfers of the condemned properties in those cases were irrelevant.²⁰⁶

New London's plan was different, according to Justice O'Connor, because the petitioners' homes were not the cause of the harm to be eliminated; no harm was directly remedied as an immediate consequence of the taking.²⁰⁷ Therefore, the facts in *Kelo* fell outside of *Berman* and *Midkiff*, and the Court's decision "significantly expand[ed] the meaning of public use."²⁰⁸ The majority decision embraced the idea that the government could take private property from one private party and transfer it to another private party so long as the latter's use was an "upgrade" with some "secondary" public benefit.²⁰⁹ Such reasoning put the property of all private parties at a risk of loss for the benefit of other parties who plan to make a more economically productive use of the land.²¹⁰ In

200. *Id.* at 2659.

201. *Id.* at 2665.

202. *Id.* at 2671 (O'Connor, J., dissenting).

203. *Id.* at 2675.

204. *Id.* at 2674-75.

205. *Id.* at 2674.

206. *Id.* at 2674-75.

207. *Id.* at 2675 (pointing out that New London did not allege that the homes caused any "social harm").

208. *Id.*

209. *Id.* at 2675-77.

210. *Id.* at 2677 (writing that "[t]he specter of condemnation hangs over all

conclusion, Justice O'Connor chastised the majority for its failure to protect the owners of private property from governmental invasion.²¹¹ For her and her fellow dissenters, Justice O'Connor believed that the decision not only constituted a "perverse result" that could not have been intended by the founders, but also represented "an abdication of our [judicial] responsibility."²¹²

B. Deference to Legislative Decision Making and the Public Use Clause

In addition to the republican tug of war between state and individual power underlying public use cases, the other core element of republicanism—deference to legislative conclusions—presented its own set of challenges for courts in eminent domain cases. Courts, of course, could not encroach upon the elected government's legislative prerogative without violating the separation of powers doctrine. But, on the other hand, courts could not give free reign to the legislature to exercise its eminent domain power while protecting citizens against governmental abuse. As a result, one court might give voice to both sides within the same case. In *Varner v. Martin*,²¹³ for example, the Supreme Court of Appeals of West Virginia observed that "[t]he Legislature by its general act declares in the first place what is a 'public use' for which private property may be condemned."²¹⁴ Later, the court declared that "the existence or nonexistence of a public use in any given class of cases in which

property").

211. *Id.*

212. *Id.* Notably, Justice Thomas penned a separate dissent from the majority decision. Similar to Justice O'Connor's assertion, Justice Thomas claimed that the Court's decision "erased the Public Use Clause from our Constitution." *Id.* at 2678 (Thomas, J., dissenting). Instead of adhering to the doctrine of public use as set forth in the Court's past cases, Justice Thomas would again anchor the interpretation of public use in the understanding that prevailed at the time of the founding. *Id.* at 2678. According to Justice Thomas, the original understanding of the clause was 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." *Id.* at 2679. Founding-era dictionaries and early state practices confirm this original understanding of the public use limitation. *Id.* (citing 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)). Present Court public use jurisprudence, as exemplified in *Berman* and *Midkiff*, has strayed from this original understanding. As a result, according to Justice Thomas, the majority decision "is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 2678.

213. 21 W. Va. 534 (1883).

214. *Id.* at 550.

the Legislature has authorized private property to be condemned must be determined by the courts.”²¹⁵ Thus, the court’s language suggested that it both deferred to the legislative determination of public use and made the final public use determination, which reflected the difficult position for courts addressing this issue.

Despite the difficulty, a number of cases from the nineteenth century demonstrate that the judicial comments regarding the role of the courts in the public use determination had bite. In *Bankhead v. Brown*,²¹⁶ an Iowa case from 1868, the Supreme Court of Iowa struck down a legislative act that allowed a private party to petition a governmental board for an order to take land to build a road.²¹⁷ The court ruled that the statute allowed the government to take land for private uses, which ran afoul of constitutional protections.²¹⁸ The road in the case was to be used to provide access to a coal bank,²¹⁹ which suggests that the court could have found a public use in light of the importance of coal. But the court held otherwise.²²⁰ Similarly, the Supreme Court of Nebraska overturned a legislative act that allowed companies to take land for the construction of “a drain from the Missouri River” on private lands.²²¹ The court reasoned that the decision regarding which land to take could be made according only to private interests without reference to public benefit; therefore, the court struck down the statute.²²² However, the court could have found that constructing drains and ditches allowed landowners to reclaim wetlands and put them to a use in the service of the public, such as growing crops or raising livestock. But, again, the court declined to construe the statute broadly enough to encompass those uses.²²³

215. *Id.* at 550-51 (“This [public use] determination of the Legislature in the first instance can not be conclusive on the courts.”).

216. 25 Iowa 540 (1868).

217. *Id.* at 549-50.

218. *Id.* at 547. Stating that the title of the statute was “An Act to provide for the establishment of private roads in Iowa,” the court seized upon the phrase “private roads” to support its conclusion that the condemnation was for private uses. *Id.*

219. *Id.* at 542.

220. *Id.* at 549-50.

221. *Jenal v. Green Island Draining Co.*, 10 N.W. 547, 547 (Neb. 1881).

222. *Id.* at 548. One of the court’s concerns was that the organizational structure of the companies allowed decisions to be made pursuant to the private interests of the decision-making company. *Id.*

223. *Id.* For an extensive list where courts addressed the issue of whether an eminent domain action amounted to a private use, see LEWIS, *supra* note 125, § 157 n.1. Other cases include, for example, *Sadler v. Langham*, 34 Ala. 311, 326-31 (1859). In *Sadler*, the Alabama Supreme Court stated that:

The strong judicial oversight of public use decisions continued into the late nineteenth and early twentieth centuries. Six years after its fence-sitting decision in *Varner v. Martin*,²²⁴ the West Virginia Supreme Court took a firm stand and announced that “[t]he right to take, which depends upon whether it is to be taken for public or private use, is a judicial question.”²²⁵ Moreover, the strong judicial review of public use questions was perceived to be the dominant view in most jurisdictions facing the same question. In his 1888 treatise on eminent domain, John Lewis concluded that “[a]ll the courts . . . concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary.”²²⁶ The United States Supreme Court took a similar approach to the role of the judiciary in the public use determination during the early part of the twentieth century. In *Hairston v. Danville & Western Railway Co.*,²²⁷ the Court recognized a split of opinion on the question of what constituted a public use for Fifth Amendment purposes.²²⁸ Nevertheless, the Court remarked that “[t]he one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question.”²²⁹ According to the Court, the different conclusions in the state supreme courts resulted from the variety of circumstances associated with the cases, such as soil conditions and the needs of the public.²³⁰ Even more pointedly, the Court

[w]e do not say that the legislature may not declare other uses to be public, or provide the means of testing before some competent tribunal, and upon appropriate proceedings, the question whether there may not be other uses, of such general interest to communities, as, upon such finding, to justify a judgment or sentence of the court that the use is public, and justifies the condemnation of private property to a reasonable extent, in the securing of such use.

Id. at 330.

224. 21 W. Va. 534 (1883).

225. *Pittsburg, Wheeling & Ky. R.R. v. Benwood Iron-Works*, 8 S.E. 453, 458 (W.Va. 1888).

226. LEWIS *supra* note 125, § 158. Note 1 of § 158 contains an extensive list of cases used to support the point that public use was a judicial question. *Id.* n.1. The first case listed is *Sadler v. Langham*, but it is questionable whether that case unambiguously shows that public use was an outright judicial question. The case, as mentioned above, contains language that suggests that a fair degree of deference is due to the legislature in its public use determinations. *Sadler*, 34 Ala. at 316.

227. 208 U.S. 598 (1908).

228. *Id.* at 606.

229. *Id.*

230. *Id.* (“The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people.”).

announced that it would not defer to the legislative judgment of the state, but rather to the final conclusion of the courts of the state.²³¹ So instead of subverting the judicial role in deciding what satisfied the public use limitation, the variety of results confirmed that the ultimate decision was, in fact, one for the courts to determine.

Later in the twentieth century, however, the language of the Court's eminent domain decisions showed signs that the judicial safeguard against taking property for private uses was eroding. In *Old Dominion Land Co. v. United States*,²³² the Court said that a legislative "decision is entitled to deference until it is shown to involve an impossibility."²³³ Obviously, showing that the public-minded goals of a statute are impossible to achieve erected a high hurdle for those challenging eminent domain on public use grounds. To support its conclusion, the Court deferentially cited to the title of the act in question, "Sites for Military Purposes," which satisfied the public use limitation because the phrase "military purposes" evidenced a public use.²³⁴ And by the mid-twentieth century, the language employed in *Berman* suggested that the deference accorded to legislative decision-making had expanded even further. In *Berman*, the Court equated the power of eminent domain with the police power, a power that lacks a "complete definition."²³⁵ In a frequently cited portion of the decision, the Court described the breadth of the police power and thus the deference accorded legislative public use determinations:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.²³⁶

The Court concluded that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for

231. *Id.* at 607.

232. 269 U.S. 55 (1925).

233. *Id.* at 66.

234. *Id.*

235. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

236. *Id.* (citations omitted).

the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”²³⁷

The principles enunciated in *Berman* were confirmed thirty years later in *Midkiff*. After reiterating that the public use requirement was “coterminous” with the police power, the Court commented that its past decisions “made clear that it [would] not substitute its judgment for a legislature’s judgment . . . ‘unless the use be palpably without [a] reasonable foundation.’”²³⁸ Although the Court’s statement seems to derogate from the idea that the plan must involve an “impossibility,” as described in *Old Dominion*, the Court cited to *Old Dominion* and noted that it had been approved in *Berman*.²³⁹ The difference may have been nothing more than a refinement or recasting of the *Old Dominion* “impossibility test.” The Court explained that “where the exercise of 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.”²⁴⁰ Whatever linguistic differences existed between *Midkiff* and past decisions, the Court’s bottom line remained the same: its role in determining the public use question was “narrow.”²⁴¹

The deference shown to legislative conclusions regarding what is and is not a public use played a key, yet subtle, role in the outcome of *Kelo*. Writing for the majority, Justice Stevens noted that the Court’s decisions in cases such as *Berman* and *Midkiff* embraced a broad definition of the phrase “public use” arising from the “longstanding policy of deference to legislative judgments in this field.”²⁴² Because the needs of the public involved questions beyond judicial determination, the Court afforded “legislatures broad latitude in determining what public needs justify the use of the takings power.”²⁴³ Though the petitioners argued in favor of a test that would exclude economic development from permissible public uses, the Court found that economic development was an “accepted

237. *Id.* at 35-36.

238. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984) (quoting *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)). The Court’s wording was borrowed from Justice Peckham’s decision in *Gettysburg Electric Railway*, 160 U.S. at 680 (“When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.”).

239. *Midkiff*, 467 U.S. at 240 (referencing *Berman*, 348 U.S. at 32 and *Old Dominion*, 269 U.S. at 66).

240. *Id.* at 241.

241. *Id.* at 240.

242. *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005).

243. *Id.* at 2664.

function of government” and refused to interfere with that determination.²⁴⁴ The Court simply declined “to second guess the [wisdom of the] City’s considered judgments about the efficacy of its development plan.”²⁴⁵ Here, the Court found that the City had “carefully formulated an economic development plan that it believes will provide appreciable benefits to the community.”²⁴⁶ Though it recognized the hardship suffered by homeowners like Ms. Kelo, the Court suggested that the appropriate restraint on eminent domain actions of this type should originate in the legislature and not in the judiciary.²⁴⁷

C. *Just Compensation*

Compared to the turbulent history of its republican counterpart, the interpretative path cut by the just compensation clause is far more straightforward.²⁴⁸ Courts have long considered the purpose of the compensation required by the Takings Clause to be to remedy the wrong or injury suffered by an owner of private property subject to eminent domain. In 1805, the Supreme Court of North Carolina

244. *Id.* at 2665. In *Kelo*, the petitioners asked the Court to adopt a bright line test that would exclude economic development per se. *Id.* In the alternative, the petitioners requested that the Court utilize a test that required the proposed plan to yield the public benefits with a “reasonable certainty.” *Id.* at 2667. The Court dismissed that assertion based upon its narrow oversight role, which did not include an investigation into the “wisdom” of the legislative determination. *Id.*

245. *Id.* at 2668 (“We also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.”).

246. *Id.* at 2665 (referencing the expected benefits of “new jobs and increased tax revenue”).

247. *Id.* Justice Kennedy wrote a separate concurrence to point out that subjecting public use questions to rational basis scrutiny did not mean that takings for purely private persons would be upheld as a result of *Kelo*. *Id.* at 2669 (Kennedy, J., concurring). For Justice Kennedy, the petitioners’ per se test of invalidity was unnecessary because of the adequacy of the present degree of scrutiny and would sacrifice a number of permissible projects with unquestionable public benefits. *Id.* at 2670.

248. This is not to say that the just compensation clause has not encountered a few interpretive hurdles over time. For example, many constitutions failed to address when compensation had to be paid in relation to the time of condemnation, and a split of authority developed. As a result, one line of cases held that compensation had to be paid to the owner prior to ouster. For a list of cases so holding, see LEWIS, *supra* note 125, § 456 n.44. Conversely, a separate line of cases ruled that ouster could occur prior to the payment of compensation provided that the government offered some form of security to the dispossessed landowner that guaranteed payment. For a list of cases so holding, see *Id.* § 456 n.45. Such questions are tangential to the central issue of what was the appropriate interpretation of “just compensation” for Fifth Amendment purposes.

wrote that the purpose of the just compensation requirement was to provide the dispossessed property owner with “an equivalent for the injury thereby sustained.”²⁴⁹ Similarly, in 1846, the Supreme Court of Ohio asserted that “[t]he word compensation imports, that a wrong or injury has been inflicted, and which must be redressed in money.”²⁵⁰ More broadly, courts nominally referred to the remedy for the “wrong” or “injury” caused by eminent domain as “damages.”²⁵¹ In 1841, the Supreme Court of Indiana asked “[w]hat,

249. *Den ex dem. Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805).

250. *Symonds v. Cincinnati*, 14 Ohio 147, 175 (1846); *see also, e.g., Hooker v. New-Haven & Northampton Co.*, 14 Conn. 146, 159 (1841) (commenting on compensation after a legislative exercise of eminent domain for canal purposes, the Supreme Court of Connecticut maintained that the “injury” that demanded recompense resulted from the act of condemnation).

251. In cases where less than an entire tract of land was taken, the dollar amount determined by the freeholders was only a foundation for the compensatory sum because courts routinely subtracted the value of the project’s benefits from the value of the damages to arrive at a final compensatory sum. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 182 (2d ed. 1985). In theory, the doctrine attempted to gauge the balance of monetary justice between the dispossessed property owner and the public at large. The Supreme Court of Pennsylvania explained that

[t]he owner of the land is entitled to a just compensation it is true, and no person wishes to deprive him of it; but if the improvement made is a benefit rather than an injury, of what has he a just ground to complain? It would be inequitable as regards the public, and would moreover impede the prosperity of the commonwealth, that an individual whose property has been enhanced in value probably fourfold, should nevertheless still require payment out of the public coffers of the full value of the land. The injustice of this would be most manifest in Pennsylvania, where the vendee, as an equivalent for roads and highways, receives six per cent on the amount of his purchase.

M’Masters v. Commonwealth, 3 Watts 292, 296 (Pa. 1834). In reality, however, the doctrine proved to be “a very large involuntary private subsidy” for the public welfare. *See* FRIEDMAN, *supra*, at 182 (quoting HARRY N. SCHEIBER, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329, 364 (Donald Fleming & Bernard Bailyn eds. 1971)).

In some cases, the command to offset benefits values was included in the language of the charter that granted the power of eminent domain to a private party. For example, the Virginia charter that created the James River and Kanawaha Company required freeholders to determine an amount for damages and “combin[e] therewith a just regard to the advantages, which [the owner of the land will] derive from the construction of the canal, for the use of which the land was condemned.” *James River & Kanawaha Co. v. Turner*, 36 Va. (9 Leigh) 313, 322 (1838). In 1836, Indiana passed the Internal Improvement Act that allowed the Madison and Lafayette Railroad to take private land along with other materials, such as sand and gravel, for the public purpose of constructing a railroad. *McIntire v. State*, 5 Blackf. 384, 384-85 (Ind. 1840). In exchange for the land and materials, however, the statute required the railroad to make a damages payment to the property owner that accounted for the

then, constitutes a 'just compensation' for private real property appropriated to public use, considered both as to the amount to be paid, and the manner of payment?"²⁵² The court concluded that the proper remedy was "to pay [the dispossessed landowner] the fairly adjudged damage he sustains on the account of the lands appropriated."²⁵³ In 1839, the Court of Appeals of Kentucky observed that neither the government of a city, or of the State, "could take or encroach on private property, without the owner's consent, or payment to him of adequate damages."²⁵⁴

In many cases, courts characterized the compensatory sum as "damages" because the statutes that delegated eminent domain power to other parties, such as railroads, denominated the payments to be made in exchange for property as "damages."²⁵⁵ According to an 1833 Georgia statute, the Monroe Railroad Company possessed the authority to take land from private owners upon making a payment that took "into consideration the loss or damage which may occur to the owner or owners, in consequence of the land being taken."²⁵⁶ North Carolina's act to incorporate the Raleigh & Gaston Railroad Company directed the court to "appoint five disinterested and impartial freeholders, to assess the damages to the owner from the condemnation of the land" for railroad purposes.²⁵⁷ Similarly, Virginia's act to incorporate the James River and Kanawaha Company instructed that "five freeholders shall be appointed by the county court of the county in which such lands may lie, to ascertain the damages, which will be sustained by the proprietors, from the condemnation of the lands wanted for the use of the company."²⁵⁸

"benefits resulting to the [owner] from the construction of the work occasioning the injury." *Id.* at 385.

252. *State v. Beackmo*, 8 Blackf. 246, 250 (Ind. 1846).

253. *Id.*

254. *Lexington & Ohio R.R. v. Applegate*, 38 Ky. (8 Dana) 289, 301 (1839).

255. For more on the legality of delegating eminent domain power to a private party, see LEWIS, *supra* note 125, §§ 237-43. Referring to the compensation required by the Takings Clause following eminent domain as "damages" gives rise to the question of whether the damages owed spring from the law of torts or contracts. If the damages are analogous to tort damages, then the government would be akin to a tortfeasor. On the other hand, the damages might spring from the compact between government and citizen, which would make just compensation payments analogous to contract damages. The question of whether the "damages" mentioned throughout the history of eminent domain jurisprudence arise from tort or contract is the subject of an upcoming project.

256. *Mims v. Macon & W. R.R.*, 3 Ga. 333, 335 (1847).

257. *Raleigh & Gaston R.R. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 452 (1837).

258. *James River & Kanawaha Co. v. Turner*, 36 Va. (9 Leigh) 313, 314 (1838).

Whether referring to common law or a charter, the amount that dispossessed owners have received in exchange for property has invariably equaled the value of the land taken for a public use throughout the history of eminent domain jurisprudence.²⁵⁹ Some courts employed phrases other than “market value of the land” to describe eminent domain damages, such as “actual value” or “cash market value” of the land, but the phrases generally utilized the objective measure of the market as a gauge for value.²⁶⁰ Regardless of the modifier, courts equated the value of the land and the amount of compensation. During the mid-nineteenth century, the Court of Appeals of Kentucky succinctly stated that “[a] just compensation for property applied to public use, clearly implies, as we think, the value of the property in money.”²⁶¹ With greater reach, the Supreme Court of California remarked that “the rule is of universal acceptance that the measure of this damage is the market value.”²⁶²

The Supreme Court of California’s comment, though expansive, was probably not too far off the mark—the market value standard for eminent domain compensation echoes throughout the history of Supreme Court eminent domain jurisprudence as well. In *Boom Co. v. Patterson*,²⁶³ which was decided in the late nineteenth century, the Court confronted a challenge to eminent domain based upon the amount of just compensation due post-condemnation.²⁶⁴ The Court counseled that there was “little difficulty” in divining the rule for compensation because “[t]he inquiry in such cases must be what is the property worth in the market.”²⁶⁵ During the mid-twentieth century, the Court opined that “[f]air market value has normally been accepted as a just standard” for compensating private parties who lose land as a result of eminent domain.²⁶⁶ And although the issue of the adequacy of compensation provided by the fair market value has not been presented directly to the Court in recent times, little doubt exists as to the continued adherence to the fair market

259. LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 17 n.8 (James C. Bonbright ed., 2d ed. 1953) (denominating market value as “the proper measure of compensation, at least in the usual run of cases” and providing a number of citations in support of the assertion); W. Harold Bigham, “Fair Market Value,” “Just Compensation,” and the Constitution: A Critical View, 24 VAND. L. REV. 63, 63 (1971).

260. ORGEL, *supra* note 259, §§ 17-19.

261. *Jacob v. City of Louisville*, 39 Ky. (9 Dana) 114 (1839).

262. *Sacramento S. R.R. v. Heilbron*, 156 Cal. 408, 409 (1909).

263. 98 U.S. 403 (1878).

264. *Id.* at 404.

265. *Id.* at 408.

266. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

value standard.²⁶⁷ In fact, the hibernation of just compensation jurisprudence, in one sense, confirms the stranglehold that fair market value has on the question of what constitutes just compensation for the loss of land by eminent domain. No real question exists; the association of fair market value with just compensation under the Fifth Amendment has become an unquestioned “article of faith.”²⁶⁸

From a definitional standpoint, state and federal cases commonly interpret fair market value as “what a willing buyer would pay in cash to a willing seller.”²⁶⁹ According to the Court, “[i]n determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.”²⁷⁰ Moreover, the fair market value standard not only comprehends a willing transaction, but also takes account of the “highest and best use” of the property in its valuation.²⁷¹ In some states, no interpretation is necessary because

267. See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (“The Court therefore has employed the concept of fair market value to determine the condemnee’s loss.”); *United States v. Fuller*, 409 U.S. 488, 500 (1973) (Powell, J., dissenting) (referencing “the fundamental notion of just compensation, that a person from whom the Government takes land is entitled to the market value, including location value, of the land”).

268. Bigham, *supra* note 259, at 63.

269. *United States v. Miller*, 317 U.S. 369, 374 (1943); *Little Rock Junction Ry. v. Woodruff*, 5 S.W. 792, 794 (Ark. 1887). In *Woodruff*, the court elaborated:

[s]ince, then, the market value is the criterion of damages, we are led to inquire, what is the market value? The word market conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour’s notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And, when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property.

Id.; see also ORGEL, *supra* note 259, § 20 (discussing the various definitions of fair market value).

270. *Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878).

271. *United States v. Fuller*, 409 U.S. 488, 490 (1973) (using the “highest and best use” language); see also, e.g., *Ala. State Docks Dep’t v. Atkins*, 439 So. 2d 128, 132 (Ala. 1983); *Ark. State Highway Comm’n v. First Pyramid Life Ins.*

an identical definition of fair market value has been codified by state statute. California Code section 1263.320(a) defines fair market value as:

the highest price on the date of valuation that would be agreed to by a seller, being willing seller, under no obligation to sell, and a willing buyer, under no similar obligation or necessity to buy, each dealing with each other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.²⁷²

Thus, some states have statutes on the books that require courts to make a similar evaluation to those required of “freeholders” in the earliest corporate charters. The interpretation and method of determining just compensation has not changed with time, they have only been codified.

IV. WEIGHING THE TAKINGS CLAUSE BALANCE PRE- AND POST-*KELO*

As the previous Part outlined, the public use and just compensation clauses have evolved along very different paths. Although the public use clause provided little to no restraint in early America because of its broad interpretation, some courts had adopted a much narrower interpretation of public use by the end of the nineteenth century. But prior to *Kelo*'s arrival, the narrow interpretation vanished and the definition of public use had again inflated to include incidental public benefits that appear rather remote from unquestionably public-minded undertakings such as schools or public roads. Similarly, the deference afforded legislative determinations of public use has increased over time.²⁷³ The relationship between courts and the public use determination has gone from one where courts declared that public use was a “judicial question” to *Berman* and *Midkiff*'s holding that a court's role was a “narrow” one. Conversely, the interpretation of the just compensation clause has been virtually the same throughout the history of eminent domain jurisprudence. A property owner who

Co., 602 S.W.2d 609, 613 (Ark. 1980); *Gentile v. Ives*, 270 A.2d 680, 684 (Conn. 1970); *State v. Pioneer Mill Co.*, 637 P.2d 1131, 1138 (Haw. 1981); *La Briola v. State*, 328 N.E.2d 781, 783-88 (N.Y. 1975).

272. CAL. CIV. PROC. CODE § 1263.320(a) (Deering 2005); *see also, e.g.*, MD. CODE ANN., REAL PROP. § 12-105(b) (LexisNexis 2003) (defining fair market value as “the price as of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay”).

273. One exception, for example, is the Michigan Supreme Court's decision in *Hathcock*, the decision that overruled its famous *Poletown* decision. *See supra* notes 161-83 and accompanying text.

lost land as a consequence of eminent domain received fair market value for the land during the eighteenth century and the same holds true for the twenty-first-century property owner. So, while the scope of the public use definition changed over time, the interpretation of what constitutes “just compensation” petrified.

The diverging evolutions of the two clauses have had a profound effect on the modern balance between the republicanism and liberalism contemplated by the Takings Clause: republicanism heavily outweighs liberalism. The expansive interpretation of the public use clause represents a strong view of both prongs of republicanism. Individual property owners sacrifice their private rights for the good of society as determined by the legislature without much, if any, judicial interference. On the other hand, the stasis of just compensation interpretation reflects an unchanging view of what society owes the individual owner in exchange for the loss of property. Nothing has been taken from the liberal side of the balance, but nothing has been added either. The failure of the liberalism represented by the just compensation clause to adjust to the republicanism in the public use clause reduces the effectiveness of the just compensation limitation on governmental acquisition of property.

Kelo seemingly adds weight to the republican side of the scale because of its support for a broad interpretation of public use. The decision appears to provide a green light to just about any justification for eminent domain, or at least it is hard to imagine what does not count as a “public use” absent an exceptional oversight by the condemning authority. However, the only real difference between *Kelo* and its noteworthy predecessors, *Berman* and *Midkiff*, is that *Kelo* presented an economic development justification for eminent domain unadorned by more socially appealing purposes such as blight elimination or breaking a land oligopoly. Justice Kennedy recognized the thin veil that covered the private parties who benefited from the eminent domain actions in *Berman* and *Midkiff* during *Kelo*’s oral arguments. Responding to the contention that *Berman* and *Midkiff* barred exercises of eminent domain for private uses, Justice Kennedy remarked that “everybody knows that private developers were the beneficiaries in *Berman*.”²⁷⁴ “Public use” was the equivalent of “public purpose” even though accomplished through private intermediaries;²⁷⁵ therefore, *Kelo*’s

274. Transcript of Oral Argument at 12, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

275. The equivalence of the phrases is traceable to the decision in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896). See *supra* notes 136-38 and accompanying text.

conclusion regarding the legitimacy of individual sacrifice for the good of the whole had little impact on the eminent domain balance.

Nevertheless, the dissenters maintained that *Kelo* was, in fact, different from *Berman* and *Midkiff* because the acquisition of private land produced a public benefit without transfer to another party because the taking itself eliminated the problem.²⁷⁶ However, the justifications for the exercises of eminent domain in both *Berman* and *Midkiff* must have hypothesized that the properties taken from individual citizens would be transferred to another party to remedy the problems that were the objects of the legislation in those cases. Without subsequent transfer in *Berman*, the government would have remained the owner of dilapidated properties, and, unless it planned to renovate the properties, then they had to be transferred. In fact, the express language of the DCRA made private parties the preferred recipients of the condemned properties.²⁷⁷ The same holds true, and maybe even more so, in *Midkiff*. The plan for redistribution of fee simple titles in *Midkiff* must have comprehended subsequent transfer to a private party because, without such a transfer, the government's acquisition of the land simply made the government a member of the land oligopoly. In both cases, then, individual owners had to sacrifice their private property rights in the name of the public good and the property had to be transferred to another private party so the latter could put the property to the "public use." The republican ethos of individual sacrifice for the good of the body politic even if the public benefit is realized after transfer to a private party forms one part of the rationale in *Berman* and *Midkiff* just as it does in *Kelo*.

Although its resolution of the tug of war between state and individual power does not alter the republican side of the eminent domain balance, *Kelo* adds weight to the republican side of the balance when viewed through the lens of the other central tenet of republicanism—legislative deference. Both *Berman* and *Midkiff* preserved a "narrow" role for courts in the determination of what is and is not a public use by explicit language in the decisions.²⁷⁸ The majority decision in *Kelo*, on the other hand, makes no reference at all to the Court's "narrow" role in the public use decision. Instead, the majority discusses the Court's "great respect" for legislative decisions and its "longstanding policy of deference to legislative

276. *Kelo v. City of New London*, 125 S. Ct. 2655, 2674 (2005) (O'Connor, J., dissenting).

277. *Berman v. Parker*, 348 U.S. 26, 30 (1954).

278. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman*, 348 U.S. at 32.

judgments in this field,” without citation to *Berman* or *Midkiff* for either proposition.²⁷⁹ Although the omission could be a change of form over substance, the absence of language preserving the Court’s “narrow” role is striking. Citation might suggest that the narrow role was preserved by implication, but no citation was offered. Supreme Court cases have gone from stating that the public use determination is a judicial question, to preserving a narrow role in *Berman* and *Midkiff*, to simply reciting that the Court defers to legislative conclusions in *Kelo*. As a result, *Kelo* can be understood to be a slight expansion of the deference accorded legislative determinations of public use—a sort of addition by subtraction to the republican side of the eminent domain balance. And when added to the eminent domain balance along with the broad view of public use and the staid definition of just compensation, *Kelo* tilts the eminent domain balance even further toward the republican side of the scale.

Despite the ascension of republicanism epitomized in *Kelo*, the power of eminent domain did not always cut such a wide swath through the right of private property when the proposed public use contemplated taking a person’s home. In fact, some of the charters that delegated the eminent domain authority to private companies, like railroads, specifically excluded the home from those lands subject to confiscation. For example, an 1836 Virginia statute provided that the Tuckahoe and James River Railroad Company possessed “the power and authority to enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure.”²⁸⁰ However, the statute commanded the railroad to lay out its track “so that no dwelling house, or space within sixty feet of one, belonging to any person, be invaded without his consent.”²⁸¹ Explicitly recognizing the circumscribed power of the railroad, the Court of Appeals of Virginia commented that the statute required the railroad “to avoid encroaching upon dwelling houses and to pay for the property taken.”²⁸²

Similarly, North Carolina passed a charter in 1835 that created the Raleigh and Gaston Railroad Company and delegated the power of eminent domain to it for railroad purposes.²⁸³ Section 12 of the

279. See *Kelo*, 125 S. Ct. at 2663.

280. *Tuckahoe Canal Co. v. Tuckahoe & James River R.R.*, 38 Va. 42, 47 (1840) (citing 1836 Va. Acts 104).

281. 1836 Va. Acts 104.

282. *Tuckahoe Canal Co.*, 38 Va. at 79.

283. *Raleigh & Gaston R.R. v. Davis*, 19 N.C. 451, 451-52 (1837) (stating that the statute was passed “for the purpose of effecting a communication by a railroad from some point, in or near the City of Raleigh, to the termination of

charter stated that the railroad had “full power to enter upon all lands through which they may wish to construct the road, to lay out the same,’ not invading dwelling-houses.”²⁸⁴ Again, the North Carolina company had broad authority to take land to construct its railroad, but that authority excluded the power to take a home. These examples from Virginia and North Carolina are not unique; other legislatures also withheld authority to take a private dwelling when delegating the power of eminent domain to private companies for public purposes.²⁸⁵

Though seemingly clear, the construction of the dwelling exemptions in nineteenth-century corporate charters could become a source of litigation. One example of such litigation is New Jersey’s *In the Matter of a Public Highway, Laid Out in the Counties of Bergen and Hudson*.²⁸⁶ In that case, the New Jersey Legislature granted a charter to the New Barbadoes Toll Bridge Company to construct a five-mile long road that originated on the east side of the

the Greenville and Roanoke railroad, at or near Gaston, on the Roanoke river” (quoting 1835 N.C. Sess. Laws 299)).

284. *Id.* at 452 (quoting 1835 N.C. Sess. Laws 299).

285. *See, e.g.,* Aldridge v. Tuscumbia, Courtland, & Decatur R.R., 2 Stew. & P. 199, 201 (Ala. 1832) (noting that section 5 of the charter that incorporated the railroad recited that “no right shall exist in said company to pull down or remove any dwelling-house without the consent of the owner thereof”); Erie & N.-E. R.R. v. Casey, 26 Pa. 287, 320 (1856) (referring to a clause in the charter that “forbids them [the railroad] to take down a dwelling-house or run through a graveyard”); Yost’s Report, 17 Pa. 524, 526 (1851) (noting that one section of a statute incorporating a turnpike company gave the power to take land to the company and stated that the power “shall be construed to extend and apply to every frame and wooden building erected after said time, except dwelling-houses actually occupied as such”). Similarly, in *Richmond and York River R.R. v. Wicker*, 54 Va. (13 Gratt.) 375 (1856), the court stated that:

[i]n this case the question is presented, Whether the general assembly intended by the statute . . . to forbid the construction of works of internal improvement within the space of sixty feet about any dwelling-house whatever, by whomsoever that space may be owned, or only to protect the owners in the enjoyment of their dwelling-houses, and of a space of sixty feet of their own land lying about such dwelling-houses? In my opinion, the terms of the statute, standing alone, import that a dwelling-house and a space of sixty feet about it are exempt from invasion by internal improvement companies, as being reserved to the owner thereof. Without such invasion the owner enjoys his dwelling-house and circumjacent land to the extent of his boundary, however large. If, however, public necessity requires that a portion of his property be taken from him, it may be done, but not so as to invade his dwelling-house or a space of sixty feet about it.

Id. at 376-77 (citation omitted).

286. 22 N.J.L. 293 (1849).

Passaic River and terminated in Secaucus.²⁸⁷ To construct the road, the company sought to confiscate several parcels of land belonging to one particular owner that had been improved with bridges, roads, and a toll house.²⁸⁸ The owner objected to the confiscation of this property as a violation of the charter provision because it allowed the company to take land for the purpose of building a road, but not to take bridges and roads.²⁸⁹ The court turned to the language of the charter and discovered that section 36 of the charter announced that “nothing in the act contained shall be construed to extend to . . . pulling down or removing any dwelling house, market house, or other public building heretofore erected, and which may encroach on any highway.”²⁹⁰ More pointedly, the court continued that:

If a public highway has in any instance, in this state, been laid through or over a dwelling, such instances are certainly rare. No instance has fallen under my observation, nor, upon inquiry, have I heard of one; on the contrary, the disposition to avoid interfering with structures or improvements of any kind, and so to carry out the act as to do the least injury to private property, has been such as to create, in many instances, serious public inconvenience in the laying out of roads.²⁹¹

Reaching an identical conclusion, a concurring judge observed: “I know of no improvement upon land which, according to practice or according to law, will constitute a bar in New Jersey to its appropriation to a public highway, except a dwelling house, or market house, or other public building.”²⁹²

Interestingly, dwellings remain exempt from the exercise of eminent domain under certain circumstances pursuant to the provisions of some modern statutory codes. Section 6005 of Maine’s code states that “[n]o railroad corporation may take, without consent

287. *Id.* at 300.

288. *Id.* at 301.

289. *Id.* at 302.

290. *Id.* at 303.

291. *Id.* at 303-04.

292. *Id.* at 308 (Nevius, J., concurring). Judge Nevius also observed that: [i]n the case of *State v. Stites and others*, 1 Green 176, the court said, ‘there was good reason for the protection of a man’s castle (his dwelling house), but there was no statute, nor any solid argument, which would render more sacred, or less liable to intrusion, a bark house or tan yard, than a field, an orchard, or a garden.’

Id. (Nevius, J., concurring). Judge Nevius agreed with the majority opinion except as it pertained to the matter of the location of the road but conceded, as the comments suggest, that a home could not be taken. *Id.* at 306 (Nevius, J., concurring). For another example of a case where the statutory construction of the dwelling exemption was the issue, see *Yost’s Report*, 17 Pa. 524, 526 (1851).

of the owners, meetinghouses, dwelling houses, or public or private burying grounds.”²⁹³ Section 3187 of Louisiana’s code provides a little less protection for the dwelling, in that:

The right of expropriation shall in no case extend to graveyards, nor the dwelling house, yard, garden, and other appurtenances thereof, unless the jury shall find, by their verdict, that the line of the proposed railroad or canal can not be diverted from that proposed by the company without great public loss or inconvenience.²⁹⁴

Similarly, the Code of West Virginia announces that “[n]o railroad company, or other company of internal improvement, . . . shall invade the dwelling house of any person, or any space within sixty feet thereof, without the consent of the owner” unless necessary to avoid certain construction problems.²⁹⁵ These statutes may or may not set a meaningful limit on the power of eminent domain given the demise of the railroad or the lack of necessity for canals. Nonetheless, they remain on the books and provide a statutory obstacle, even if symbolic, to the exercise of eminent domain when a citizen’s home is at stake.

Decisions like *Kelo* and its ancestors on the state and federal level, on the other hand, stand in stark contrast to the protection represented in dwelling exemptions both past and present. Though not at issue, the facts of *Kelo* raise questions regarding the amount of compensation that is “just” in cases where a citizen loses a home by eminent domain because the eminent domain balance is so heavily tilted in favor of republicanism post-*Kelo*. Even the *Kelo*

293. ME. REV. STAT. ANN. tit. 23, § 6005 (1964). The section is entitled “Limitation of right to enter or take land.” *Id.*

294. LA. REV. STAT. ANN. § 9:3187 (1997).

295. W. VA. CODE § 54-1-4 (1981). The caveat is that taking the dwelling is only banned: “unless necessary so to do in passing through a narrow gorge, defile or narrow pass, or to avoid undesirable curves, angles, and grades, in the construction of its line, or to eliminate such curves, angles, and grades in any line heretofore constructed.” *Id.* Similarly, Alabama’s code states that:

[u]nless otherwise provided by law, no street railroad company or any other corporation, except railroad companies, pipeline companies and public works companies shall, without the consent of the owner, construct any railway, tramway, canal, tunnel, underground passage, telegraph, or telephone line, aqueduct, pipeline or any other line or works through any yard or cartilage of a dwelling house, garden, stable lot or barn.

ALA. CODE § 10-5-5 (1999); *see also, e.g.*, IND. CODE ANN. § 8-4-10-2 (1998) (“Such proposed lateral railroad shall not exceed one hundred (100) feet in width, except where excavations, embankments, or other necessity require it; nor shall the same pass through any burial ground, place of public worship, or any public building or dwelling-house without the consent of the owner.”).

majority recognized the hardship suffered by a property owner in such cases. The Court wrote that, “[i]n affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.”²⁹⁶ Without adjusting the republican and liberal sides of the eminent domain balance, the question of what is “just compensation” will continue to focus on the tangible nature of the property without taking account of what the court notes is the “hardship that condemnations may entail.”

V. REWEIGHING THE TAKINGS CLAUSE BALANCE

Even before the decidedly republican decision in *Kelo*, legal commentators argued that adjusting the eminent domain balance through the public use clause was futile. A piece from the 1949 *Yale Law Journal* offered “an advance requiem” for eminent domain: “so far as the federal courts are concerned, neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications.”²⁹⁷ Later, Professor Richard Epstein characterized *Berman* as a “mortal blow” to the public use limitation in his influential book, *Takings: Private Property and the Power of Eminent Domain*.²⁹⁸ Another prominent commentator, Professor Thomas W. Merrill, concluded that “most observers today think the public use limitation is a dead letter.”²⁹⁹ Nevertheless, much of the legal commentary concerning eminent domain has sought to realign the balance of republicanism and liberalism in the Takings Clause by employing arguments aimed at reducing the republicanism of the clause.³⁰⁰ But *Kelo*’s unabashed genuflection toward legislative

296. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

297. See Comment, *supra* note 115, at 613-14.

298. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161 (1985).

299. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986).

300. See, e.g., William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 949-50, 954 (2004) (arguing that reducing federal monies that support state exercises of eminent domain would place the financial burden on local governments, which would spur greater selectivity in the allocation of resources for public use); Garnett, *supra* note 9, at 936 (suggesting that the means-end inquiry associated with regulatory takings cases should be imported into the law of eminent domain as a gauge of constitutionality under the public use clause); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 224-28 (2004); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 305-14 (2000).

determinations of public use apparently dooms any proposal aimed at cabining eminent domain's republican foundation. Fifty-six years after the "advance requiem," *Kelo* represents *the* requiem for the impediment created by the public use clause.

Myopic emphasis on legal mechanisms to constrain the republicanism of the public use clause, however, blurs the link between the public use and just compensation clauses as it relates to the exercise of eminent domain. Removing weight from one side of a balance is only one way to correct an imbalance. If the Takings Clause balance is to move toward equipoise, one way to do so without disruption to public use doctrine is to alter the interpretation of the just compensation clause. Moreover, an adjusted eminent domain scale may slow governmental acquisition of homes for private redevelopment and ameliorate, to the extent such is possible, the undeniable hardship that accompanies the confiscation of the home. By shifting the balance-seeking focus, the question changes from what can be used to reduce the republicanism in the public use clause to what can be added to the liberalism represented by the just compensation clause.

One recent scholarly proposal to reinvigorate the liberalism in the Takings Clause is to implement "gain-based compensation" in lieu of the current fair market value standard as the measure of just compensation.³⁰¹ Under a gain-based compensation standard, the amount of money paid to a dispossessed property owner is equal to the proportional contribution, in terms of dollars, that the lost property contributed to the assembly value of the land.³⁰² Once determined, the percentage contribution is applied to the post-condemnation value of the proposed project to determine the final compensatory sum.³⁰³ For example, suppose the government takes five properties by eminent domain worth \$100,000, \$100,000, \$250,000, \$150,000, and \$100,000 for a total assembly value of the land of \$700,000. Each of the five parcels of land contributed to the assembly value in proportion to their individual percentages of the total assembly value. So, the three \$100,000 parcels of land contributed 14.3% to the assembly value, the \$150,000 parcel contributed 21.4%, and the most valuable parcel of land accounted for 35.7% of the final assembly value. If the public use project is estimated to be worth \$1,000,000, then the owners of each of the five parcels would receive a percentage of that dollar amount based upon the percentage contribution to the final assembly value under a

301. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 870 (2004).

302. *Id.* at 870-73.

303. *Id.*

gain-based compensation system. So, the owners of the three parcels of land worth \$100,000 would receive \$143,000, the owner of the \$150,000 parcel would receive \$214,000, and the owner of the \$250,000 parcel of land would receive \$357,000 as just compensation for the condemned land.³⁰⁴

Other proposals shunt the determination of an appropriate amount of just compensation following eminent domain to the legislature. One offering suggests that the legislature establish a statutory schedule for post-eminent domain compensation that accounts for a variety of fungible and nonfungible factors, such as duration of residence prior to condemnation.³⁰⁵ Presumably, the longer one lives in one's home, the greater the compensation. Taking a slightly different legislative approach, the Indiana House of Representatives recently considered a bill to increase the compensatory sums given to landowners who lose private property to commercial developers.³⁰⁶ To determine the compensatory dollar amount, the government would make a comparison between 150% of the assessed value of the property and the average of three independent appraisals of the property.³⁰⁷ The dispossessed owner would receive the greater of the two dollar amounts as just compensation for the loss of property.³⁰⁸

Although the previous proposals add weight to the liberal side of the eminent domain balance by putting more money into the pockets of an owner who loses property by eminent domain, none of the proposals is entirely consonant with the liberalism embodied in the clause. The individual and the protection of her rights stand at the center of liberal orthodoxy, and a liberal interpretation of just

304. Professors Krier and Serkin use a simpler example where each of the initial values of land is \$100,000 and the final public use value is \$1,000,000. *Id.* at 872. With those figures, each of the post-condemnation compensatory amounts turns out to be \$200,000. *Id.* While the example is straightforward, it assumes that the parcels of land are identical in value, which masks the differences in compensatory sums. As a result, a slightly more complex example is provided in the above text to elucidate these differences. As a check, the gain-based compensatory amounts sum to \$1,000,000, which is the dollar value assigned to the public use post-condemnation.

305. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 735-37 (1973). The article does not specifically address losses inflicted because of eminent domain, but the scheme and justification readily applies to eminent domain. *Id.*

306. Matthew Tully, *House OKs Higher Price for Eminent Domain*, INDIANAPOLIS STAR, Feb. 23, 2005, at B4 (stating that the bill would make governments pay a premium to obtain property for commercial development).

307. *Id.*

308. *Id.* Cities in Indiana campaigned against it, but the measure passed the Indiana House by a vote of sixty-seven to twenty-nine.

compensation requires an individualized assessment of harm. Proposals like gain-based compensation or legislative mandates treat all property owners subject to eminent domain in an identical fashion. Gain-based compensation is based upon the market value of the land and its relationship to the assembly value of the public use project without any reference to the unique losses suffered by the individual property owner. Compensation based on legislative schedules or quotas are afflicted with the same shortcoming—no individualized account is made of the attachment an owner has to her home. Gain-based compensation and legislative benchmarks for payments are nothing more than assembly-line compensation divorced from the individual assessment required of the liberalism embraced by the just compensation clause.

More importantly, assembly-line compensation may not be effective in its effort to rebalance the eminent domain scales. Whichever form of assembly-line compensatory scheme is chosen, the condemner will know from the outset how much it will have to pay to advance the project. For example, project planners will undoubtedly have knowledge regarding the value of a given project as well as the market value of the properties to be acquired. As a result, planners can calculate how much gain-based compensation will be owed to the dispossessed property owners. The same is true for legislative directives that mandate a specified compensatory sum—it is easy to calculate the compensation if a statute says that it is to be 150% of the market value of the property. So while these proposals offer greater financial benefits to the individual owners, they neither account for unique individual harm nor apply sufficient pressure to the brakes of eminent domain. Certainty of cost, even if greater when compared to fair market value, may or may not move the eminent domain balance nearer to a state of equipoise when the government condemns an individual's home.

The question then becomes what other options exist to resuscitate the liberalism represented by the just compensation clause. One answer is to compensate individual owners for what is lost over and above the loss of soil—subjective losses inflicted on a property owner as a result of eminent domain. Compensating a dispossessed homeowner with nothing more than the fair market value of the soil completely ignores the unique toll the condemnation extracts from the owner. A homeowner loses the connection to her home formed from life's experiences occurring within its confines. Moreover, the shortfall yielded by the fair market value standard is nothing short of an open secret. Judge Richard A. Posner has commented that "just compensation is not full compensation in the

economic sense” because it does not account for the loss of “subjective values.”³⁰⁹ Similarly, Richard Epstein noted that “[t]he central difficulty of the market value formula for explicit compensation . . . is that it denies any compensation for real but subjective values.”³¹⁰

Incorporating subjective harm into the just compensation equation, however, requires a broader understanding of the compensation mandated by the Takings Clause. The language of the Takings Clause—“nor shall private property be taken for public use, without just compensation”³¹¹—seemingly links compensation with the property taken for public use. As a result, those seeking to limit the scope of just compensation maintain that the compensation remedies damage to property, but not to people. This is exactly the construction that has been adopted by courts throughout the jurisprudential history of eminent domain. For example, an 1839 Kentucky case recited that “the constitutional guarantee of a just compensation to every person whose property shall be appropriated to public use without his consent, entitles the owner of property, so appropriated, to the money value thereof.”³¹² One lucid textual argument for limiting compensation to the extent of the value of the property taken was penned by Justice Brewer in *Monongahela Navigation Co. v. United States*.³¹³ Justice Brewer argued that:

The noun “compensation,” standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the

309. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (6th ed. 2003).

310. EPSTEIN, *supra* note 298, at 83. Other scholars recognize that just compensation falls short of compensating for all of the injuries inflicted on a property owner as a result of eminent domain. See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958-59 (referring to the failure to compensate for subjective losses as part of an “uncompensated increment” of damage associated with eminent domain); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967) (defining unique losses to property owners that result from forced sales of property as “demoralization costs”).

311. U.S. CONST. amend. V.

312. *Jacob v. City of Louisville*, 39 Ky. (9 Dana) 114 (1839); see also, e.g., *S.F., Alameda, & Stockton R.R. v. Caldwell*, 31 Cal. 367, 375 (Cal. 1866) (“The value of the land taken may amount to the full compensation to which the owner is entitled.”); *Chesapeake & Ohio Canal Co. v. Hoyer*, 43 Va. (2 Gratt.) 511, 520 (1846) (“The sheriff is to administer an oath to the jury to value the land and all damages the owner shall sustain by cutting the canal through such land, or the partial or temporary use or occupation of such land.”).

313. 148 U.S. 312 (1893).

equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective “just” had been omitted and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective “just.” There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. “No person shall be held to answer for a capital, or otherwise infamous crime,” etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the “just compensation” is to be a full equivalent for the property taken.³¹⁴

Justice Brewer’s narrow reading of the just compensation requirement underemphasizes the inclusion of the word “just” in the clause’s language. The use of the word “just,” rather than being the emphatic, but empty, modifier under Justice Brewer’s reading, connotes that the compensation should fairly remunerate the individual for the loss suffered at the hands of the government. The damage caused to the person as a result of eminent domain unquestionably includes not only the loss of soil, but also subjective harm. Under the fair market value standard and its circumvention of the human element inherent in property, subjective harm remains uncompensated. If Justice Brewer is correct, then the word “just” adds very little to the meaning of the Takings Clause. The compensation provided to the dispossessed owner is not just in the sense that it is fair or deserved but instead becomes superfluous in that it is just—in the sense that it is only—compensation.

In addition to erasing the word “just” from the Takings Clause, the principle that just compensation is limited to the value of the soil lost by an owner ignores the human element inherent in the clause and overlooks the historical foundations of eminent domain. The absence of the word “person” in the Takings Clause does not necessarily mean that the compensatory protection offered by the clause only remedies property damage. To the contrary, the phrase “private property” unmistakably implies that a person is involved in the transaction. Private property is a collection of rights acquired

314. *Id.* at 326; *see also, e.g.,* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (“For purposes of the compensation due under the Fifth Amendment, of course, only that ‘value’ need be considered which is attached to ‘property.’”).

by a person and enforced by the state;³¹⁵ eminent domain takes these rights. Notably, seventeenth- and eighteenth-century legal writers uniformly maintained that the compensation indemnified the dispossessed property owner for the loss of a right and not just the soil, which is commensurate with the definition of “property.” Grotius stated that “even a right gained by subjects can be taken from them in two ways, either as a penalty or by the force of eminent domain.”³¹⁶ Therefore, “compensation from the public funds [must] be made, if possible, to the one who has lost his right.”³¹⁷ For his part, Pufendorf recited that “[w]here citizens have had their property bestowed upon them by the rulers, it is for the latter to decide what rights the former have over the property.”³¹⁸ Pufendorf defined property as a “special right” derived from “an agreement at least tacit” among people concerning things in the world.³¹⁹ The exercise of eminent domain, according to Pufendorf, strips the citizen of this “special right.” Bynkershoek wrote that “the sovereign by right of eminent domain takes from his subjects an acquired right whether in things movable or immovable or in action.”³²⁰ In sum, the early scholars who identified the right of eminent domain did not delimit compensation to the tangible nature of the lost property.

The distinction between the loss of a right as opposed to the loss of soil widens the scope of just compensation because a broader spectrum of damages is available for the deprivation of a right. In *Carey v. Piphus*,³²¹ the Court held that the actions of state officials violated the constitutional rights of a candidate for elected office.³²² The Court found that a violation of procedural due process had occurred and envisioned a broad view of the damages available to remedy the transgression.³²³ The Court stated that, “over the centuries, the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly

315. See LEWIS, *supra* note 125, § 55 (“Property in anything is a bundle of rights.”).

316. 2 GROTIUS, *supra* note 46, at 385.

317. *Id.*

318. 2 PUFENDORF, *supra* note 48, at 152.

319. 1 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM [ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW] ch. 12 (On Duty as Regards the Acquisition of Ownership) 70 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1673), available at http://www.constitution.org/puf/puf-dut_112.htm.

320. 2 BYNKERSHOEK, *supra* note 49, at 218.

321. 435 U.S. 247 (1978).

322. *Id.* at 263-64.

323. *Id.* at 257-64.

for injuries caused by the violation of his legal rights.”³²⁴ More specifically, the Court wrote that:

we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.³²⁵

Thus, the Court adopted a generous view of the remedy available to redress the loss of an intangible right.

To this point, courts have not applied *Carey*'s broad conception of damages to their interpretations of the just compensation clause. Courts hold that damages for subjective harms arising from eminent domain cannot be awarded because they are, in a word, speculative. Justice Thurgood Marshall, for example, justified the omission of subjective harm from the just compensation calculation “[b]ecause of serious practical difficulties in assessing the worth an individual places on particular property at a given time.”³²⁶ The “practical difficulties” to which Justice Marshall referred are undoubtedly those associated with the valuation and proof of damages arising from the mental distress and subjective damage following the loss of property by eminent domain. Indeed, no formula exists by which to measure how much value an individual attaches to a home.

The irony is that a citizen deprived of a right with no tangible concomitant under *Carey*—procedural due process—has a broader spectrum of available damages than one who is deprived of tangible property, such as one's home in *Kelo*. If anything, one might expect that the “practical difficulties” associated with proving mental distress would be greater in cases where the harm results from the deprivation of paper rights with no physical counterpart. The loss of a dwelling by eminent domain, on the other hand, creates predictable, yet subjective, losses based on verifiable facts such as duration of ownership and the occurrence of significant life events—births, deaths, and the like—during occupancy. If a jury can assess subjective losses associated with the deprivation of the intangible, then a jury can do the same with the confiscation of a dwelling by eminent domain.

Furthermore, the process of determining the fair market value of a home for purposes of paying just compensation to the dispossessed owner is not without speculation, particularly in cases

324. *Id.* at 257.

325. *Id.* at 263-64.

326. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

like *Kelo*. As a general matter, identifying the fair market value of property involves a price comparison between the property to be acquired and similar properties that have been sold on the open market in the recent past. But that simple rule is not workable or fair in all cases. For example, one of the homes to be acquired by eminent domain in *Kelo* had been in one family, the Derys, for a total of 104 years.³²⁷ The market value of a residence that has not been in the market in over a century is, at best, speculative. The Supreme Court recognized that very fact in *United States v. Miller*:³²⁸ “[w]here the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of [fair market value] involves, at best, a guess by informed persons.”³²⁹ “[E]ven in the ordinary case,” according to the Court, “assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety.”³³⁰ Assumptions are nothing more than speculation. The current approach to just compensation accounts for speculation when it fixes the cost of an eminent domain project, but not when it threatens to inject uncertainty into the compensation calculus. Speculation counts against the dispossessed homeowner, not in favor of her.

The language from the nineteenth century cases is broad enough to include compensating for subjective harm, but such damages were not explicitly identified by courts in their just compensation decisions. Justice Harlan, for example, wrote in *Chicago Burlington & Quincy Railroad v. City of Chicago*³³¹ that:

The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances, is fair and full equivalent for the thing taken from him by the public.³³²

327. Brief of Petitioners at 1-2, *Kelo v. City of New London*, 125 S. Ct. 2655 (No. 04-108). Wilhelmina Dery’s family moved into the home in 1901 and Ms. Dery continued to reside there at the time of the condemnation action. Wilhelmina’s son resided next door to his mother’s home in a home that was a wedding present from his grandmother. *Id.*

328. 317 U.S. 369 (1943).

329. *Id.* at 374-75.

330. *Id.* at 374.

331. 166 U.S. 226 (1896).

332. *Id.* at 241-42; *see also, e.g.*, *Doughty v. Somerville & Easton R.R.*, 21 N.J.L. 442, 451 (1848) (holding that a landowner who lost land for railroad purposes was “entitled to the highest compensation or damage, not only for the land, but for the inconvenience of the road, its locomotives and appendages, and whether the road be constantly used, or not at all, is of no consequence, he gets

Reaching a similar conclusion regarding a railroad charter, the Supreme Court of North Carolina characterized the compensation mandated by the terms of the charter as “fair and liberal, embracing not only the direct, but all incidental and consequential damages.”³³³ An 1839 Maryland court recited that an 1825 act for internal improvement required “the most liberal compensation for the damages” suffered by a property owner as a result of eminent domain.³³⁴ More emphatically, the Supreme Court of Ohio found that a “just, full and adequate compensation must be made” to the property owner following the loss of property via eminent domain in *Symonds v. Cincinnati*.³³⁵ Moreover, the court opined that:

Other cases may occur where the full value of the property will not be a just compensation. His house may be taken down, and he and his family thrown out of employment, and, in addition to the value of his house, he would clearly be entitled to consequential damages, or he would not receive *full* compensation.³³⁶

The Supreme Court of Ohio’s view of what constituted just compensation seems addressed to dispossessed homeowners like those in *Kelo*, even though the opinion was penned over one hundred and fifty years earlier.

The lack of explicit recognition of subjective damages does not mean that the just compensation required by the Takings Clause excluded them from the equation. Quite to the contrary, the absence of language addressing subjective harm in these cases stems from one fact: the law did not recognize mental or emotional distress as a compensable injury without accompanying physical harm until the twentieth century. The basic rule at common law was that “mere injury to feelings or affections did not constitute an independent basis for the recovery of damages.”³³⁷ In fact, the Restatement (Second) of Torts noted that the principle of compensating for

the highest pay for the greatest inconvenience”).

333. *Raleigh & Gaston R.R. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 461 (1837).

334. *Tide Water Canal Co. v. Archer*, 9 G. & J. 479, 484 (Md. 1839); *see also, e.g., Thompson v. Grand Gulf R.R. & Banking Co.*, 4 Miss. (3 Howard) 240, 250 (1839) (describing post-condemnation compensation under constitutional provisions as being “full compensation”).

335. 14 Ohio 147, 174 (1846).

336. *Id.* at 174-75.

337. *Herrick v. Evening Express Publ’g Co.*, 113 A. 16, 17 (Me. 1921); *see also, e.g., Gadbury v. Bleitz*, 233 P. 299, 299-300 (Wash. 1925) (discussing the general rejection of compensation for mental harm).

emotional damage was still in its formative state as late as 1965.³³⁸ From a historical perspective, then, the failure to account for subjective mental harm for purposes of just compensation is not the result of careful consideration or experience. Rather, the absence of subjective harm from just compensation jurisprudence is the product of historical inertia.

The slow recognition of mental distress as a legal injury resulted from the same concerns that prevent subjective harm from factoring into just compensation: the speculative nature of the actual damage as well as the difficulty of translating such damage into a dollar amount. But unlike the situation during the early to mid-twentieth century, the law has matured to embrace compensation for mental distress. Indeed, damages are now available for intentional infliction of emotional distress, a tort foreign to the pages of nineteenth-century jurisprudence, and compensation for medical malpractice law provides compensation for “non-economic damages.”³³⁹ Neither of these areas of the law involves more speculation than that associated with compensating for the subjective harm caused by the loss of a home following eminent domain. The proof does not appear to be any more inaccessible than that for medical malpractice or emotional distress torts. Moreover, the court serves as the ultimate check on the jury’s valuation of the damages because it can order a reduction of the amount, just like it can in other cases. In short, the historical inertia that overlooked subjective harms has lost its momentum in other areas of the law; therefore, the friction excluding subjective harm from the interpretation of just compensation diminishes by inference.

VI. CONCLUSION

At its core, the decision to exclude subjective damages from the just compensation equation is simply a policy decision that favors

338. RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

339. See, e.g., *Garhart v. Columbia/Healthone L.L.C.*, 95 P.3d 571, 578 n.5 (Colo. 2004) (discussing a statutory cap on noneconomic damages in certain legal actions such as medical malpractice.) According to the relevant Colorado statute, “[n]oneconomic loss or injury’ means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, physical impairment or disfigurement, and impairment of the quality of life.” COLO. REV. STAT. § 13-64-302(II)(A) (2004); see also, e.g., *Sheltra v. Smith*, 392 A.2d 431, 431-33 (Vt. 1978) (discussing the recognition of intentional infliction of emotional distress in Vermont); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) (explaining more of the history regarding the recognition of mental distress as a legal harm).

corporate interests over the individual right of private property. Indeed, the emphasis on economics vis-à-vis the right of private property may have been the wedge that divided republicanism from liberalism in the Takings Clause, thus forcing them down divergent evolutionary paths. In any event, the eminent domain balance is now skewed toward republican interests, a fact which crystallizes in cases like *Kelo*. Courts justify the imbalance by characterizing the diminution of the right of private property as the cost of citizenship.³⁴⁰ However, such a policy elevates one legal person above another legal, albeit fictive, person. After all, businesses are legal persons under the law. Moreover, giving effect to the policy in cases like *Kelo* contravenes one of the basic contentions of the founding fathers of the eminent domain literature. Bynkershoek counseled that “since it incurs so much ill will to deprive men of an acquired right the ruler should ever remember: ‘Not only what is permissible, but also what is seemly.’”³⁴¹ Confiscating a home and then transferring it to another private party for the primary economic benefit of the latter is unseemly, particularly when cognizable injuries go uncompensated.

Because losses attributable to eminent domain, regardless of the compensatory scheme, do not have a perfect monetary equivalent, compensation is more like mitigation than restitution. Including a subjective element in the compensation calculus, much like other proposals, increases the monetary mitigation factor and might remove a modicum of the unseemliness associated with the ordeal.³⁴² But compensating for subjective harm does more than place dispossessed property owners in a better financial situation

340. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). The Supreme Court has stated that:

[t]he 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.

Id.

341. See 2 BYNKERSHOEK, *supra* note 49, at 219.

342. See Fennell, *supra* note 310, at 993-95 (2004) (questioning the effectiveness of increasing monetary payments as just compensation for losses inflicted by eminent domain).

post-condemnation. Accounting for speculative damages in the just compensation equation may lead to improved planning for projects slated to use eminent domain as an advancement tool, because the relative certainty of cost associated with the fair market value standard diminishes. In that sense, allowing for speculative damages accomplishes its primary goal—better balancing the Taking Clause scale between public use and just compensation. A more robust interpretation of just compensation increases the liberalism of the just compensation side of the Takings Clause scale, which, in turn, brings the liberal side of the scale closer to a position of equipoise with the republican public use side of the scale. The “just” in “just compensation” would no longer be an adjective having little relevance in the text of the Takings Clause; the compensation would no longer be *just* compensation but, rather, “just compensation.”