Takings Clause issues have been back in the news lately as the Supreme Court tackles a new dispute this term out of California. But what is the Takings Clause? How does it operate? And what are its limits? Analyzing a landmark Supreme Court case, *Kelo v. City of New London*, that addressed some of these issues, lends itself to this analysis. The 2005 decision was as important as it was controversial and remains so today, both in its holding and effect.

Revisiting *Kelo*: Exploring "Public Use" from Common Law to Today

Framing the Argument: Definitions and History

Eminent domain is the process by which a government may seize private property with just compensation but without the owner's consent.[1] This process demonstrates competing interests that the United States has wrestled with since its founding: a conflict between government regulation and property rights. Throughout American history, governments have undertaken infrastructure projects, building transportation systems, public buildings, aqueducts, and much more.[2] For example, throughout the Great Depression, the implementation of New Deal policies required the construction of irrigation networks, naval stations, and national parks, leading to significant land acquisition on behalf of the federal government of over 20 million acres of land.[3] Recently, the government's use of eminent domain to transfer land from one private owner to another for economic development has sparked controversy on both sides of the issue. Proponents of this use of eminent domain claim that economic development can provide jobs and an investment influx to struggling communities.[4]

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[1] "Eminent Domain," National Association of Realtors, https://www.nar.realtor/eminent-domain.

[2] DOJ, "History of the Federal Use of Eminent Domain," Department of Justice, April 13, 2015, https://www.justice.gov/enrd/history-federal-use-eminent-domain#:~:text=Eminent%20domain%20has%20been%20utilized.

[3] DOJ, "History of the Federal Use of Eminent Domain."

[4] *Kelo v. City of New London*, 545 U.S. 469 (2005).

At the same time, opponents argue that this use of eminent domain is too ripe for corruption.[5] Opponents fear that the beneficiaries of this type of property transfer are likely to be individuals and corporations with immense power in the political process at the expense of other Americans. This reverse Robin Hood fear of land redistribution to the rich and connected at the expense of the poor has resulted in many states passing laws and several members of Congress introducing bills to limit the use of eminent domain as a matter of statute, including restricting the use of eminent domain for economic development except in cases of blight.[6]

Thinking through the Constitutional Concerns

The Constitution is not silent on this question. The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[7] There are two parts to this constitutional guarantee. The latter end of this clause dictates that individuals must receive "just compensation" when the government takes their private property. However, if one reads the line carefully, it is clear that, as a threshold matter, the seizure of private property must be for "public use."[8] Therefore, to determine the legality of using eminent domain to transfer land from one private owner to another for economic development, one must decide if the term "public use" encompasses such transfers. Answering this question requires an inquiry about the original public meaning of these words at the time of enacting the Fifth Amendment. The original public meaning should bind, given that this meaning has democratic legitimacy derived from the ratification process. In favor of this use of eminent domain, governments have argued that

[5]Ilya Somin, "The 10th Anniversary of Kelo v. City of New London," *Washington Post*, June 23, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/23/the-10th-anniversary-of-kelo-v-city-of-new-london/.

[6]Ilya Somin, "The Political and Judicial Reaction to Kelo," *Washington Post,* June 4, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/.

[7]545 U.S. 469 (2005).

[8]545 U.S. 469 (2005).

“public use” does not require use by the general public and that federal courts should give the government broad latitude to determine what public needs justify the use of the eminent domain power. On the other hand, property owners have argued for a more cabined interpretation of “public use” that would allow eminent domain only in cases where the government plans to own the property or allow the general public to use it.[9] In addition, property owners have used the importance of property rights to the founding generation to bolster their arguments, arguing that the phrase “public use” must be read narrowly to give meaningful effect to the restriction on government seizure of private property.[10]

<u>Logic and History: An Analysis of Opposing Arguments</u>

Opponents of the use of eminent domain to transfer land from one private owner to another have the better of the constitutional argument since the Constitution limits eminent domain to cases of “public use,” not “public necessity” or “the common good.” Proponents’ argument that federal courts should award government broad deference to determine for themselves how they define “public use” also falls flat since it renders this phrase as surplusage in the Constitution. The other side’s argument boils down to reading the Public Use Clause not as a limit on government eminent domain use but instead as a grant of authority to use its eminent domain power for both private and public uses. That reading may make sense as a modern economy emerges that is fueled by government investment in the private sphere, but it would render the words “public use” meaningless in the clause. The Framers of our Constitution knew how to use broader terms when they desired. Article I, Section 8, Clause I provides one example. There, the Framers used the term “general welfare” in stating, “The Congress shall have power

[9]545 U.S. 469 (2005).

[10]545 U.S. 469 (2005).

to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." Without analyzing the contours of the term "general welfare" in this distinct context, it is clear that this term is broader than the term "public use." An eminent domain land transfer cannot be legal solely if a state government determines that it is for the economic benefit of the public. If that were to be the case, the Framers would have used a term closer to "general welfare" in this context.

The common law background that informed the Bill of Rights reinforces this interpretation.[11] During the common law, the law of nuisance allowed for the elimination of land use that had detrimental effects on the public good.[12] However, the founding generation understood the law of nuisance and the eminent domain power as distinct, with the power of nuisance being understood as within a state's regulatory power, without requiring "just compensation."[13] It is illogical to adopt an interpretation that treats these two areas of law as the same. The public policy fears that this approach does not allow for governments to foster economic development has proved the exact opposite. After political blowback from the Supreme Court's 2005 decision in *Kelo v. City of New London*, which permitted these types of government-mandated property transfers, Anaheim, California, successfully achieved the same ends without using eminent domain. Establishing a land-value premium and allowing almost all conceivable property use permitted property owners to sell to a broader range of buyers, resulting in billions of private investments in offices, restaurants, retail spaces, and high-rises.[14]

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[11]William Blackstone, 1 Commentaries on the Laws of England 134–135, 1765.

[12]Blackstone, 134-135.

[13]Blackstone, 134-135.

[14]Steven Greenhut, "The Anti-Kelo," *Wall Street Journal,* April 6, 2006, https://www.wsj.com/articles/SB114429329028218556.

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