# "Public Use" Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development

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## I. INTRODUCTION

While the government's exercise of its eminent domain power has been long recognized and pre-dates the American colonies, it has always been controversial.

Part of the controversy lies in the diversity of purposes for which the government utilizes this power, which includes building railroads, electricity facilities, highways, parks, and shooting ranges. The diversity of objectives to which the power of the eminent domain has been applied has resulted in legislatures and the United States Supreme Court employing different and often inconsistent justifications for their actions and has left many wondering whether a meaningful check on the government with respect to the exercise of eminent domain power exists.

It is in this spirit that the recent Supreme Court's decision in *Kelo v. New London*,[1] which upheld the government's exercise of power of eminent domain to address the issues of slum clearance, elimination of urban blight, and economic development problems, has done little to alleviate the fears of unchecked power and manipulation of local, state, and federal authorities for private benefit. Furthermore, while much has been made of the issue of the usurpation of the right to private property for supposed economic benefit, little has been put forth regarding the supposedly ancillary issues of the consequences to those who were most affected—the plaintiffs. Simply stated, many of the plaintiffs lived in New London because the housing was affordable and the use of eminent domain did nothing to address the issue of availability and affordability of housing for those who were forced out. For many of those who had resided there, their homes had been purchased at a time when prices were considerably lower than they were during the litigation, and the prospect of finding housing of comparable quality and convenience for their level of compensation was not taken into consideration. For investors and developers who had moved to New London more recently, the relatively

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[1] 125 S. Ct. 2655 (2005).

depressed values made the housing affordable. In both cases, the loss of affordable housing for those who lived and worked in the city forced them to bear a burden that was not adequately considered in the process of eminent domain. Furthermore, the plaintiffs stood to lose and did lose much beyond the naked economic calculations of physical displacement, and their homes had a meaning and value that went beyond monetary compensation. In essence, the plaintiffs were not only ejected from their homes but from the greater community as well. Given the arbitrariness of the process and its tendency to favor those with the economic wherewithal and capital to propose and execute projects far beyond the economic means of most people, are there any protections for the common citizen? Is there anything to stop the nationalization of private property in the United States?

The "public use" requirement—one of the constitutional checks on the government power to exercise eminent domain—has not been consistently applied to provide the balance needed to check unbridled manipulation of public authority for private gain that the framers intended it to provide. Instead, the vagueness of the terms associated with and used to define "public use" have given cover to public and private parties acting in collusion to further interests that are not in the public's best interests. The courts must evaluate the condemnation process at every stage to ensure that the public use requirement provides a meaningful safeguard against the government's arbitrary exercise of eminent domain power.

Part I of this article traces the historic roots of eminent domain, explains the modern constitutional requirements, and most importantly, brings out that the public use requirement has been unsystematically applied. Part II summarizes the problems that courts face in analyzing cases addressing such issues as slum clearance, elimination of urban blight, and economic development. It then summarizes *Kelo*, the U.S. Supreme Court's most recent 5-4 decision that addresses the public use requirement, focusing on the debate between the majority and dissent about the definition of the public use, the government's role to promote economic development, and the roles of "unintended" third-party beneficiaries in the process. Part III then analyzes how the definitions of public use, the government's role in economic development, and the roles of third-party beneficiaries have changed over time and across economic sectors. Specifically, in analyzing railroad, utilities, travel, and environmental cases, the answers to these three issues vary with respect to the four kinds of cases presented. Part IV highlights the inconsistencies in its interpretation of public use between the Court's decisions on such issues as slum clearance, elimination of urban blight, and economic development when considering its own precedents in railroad, utilities, travel, and environmental cases. The definition of public use and the concomitant approaches employed with respect to slum clearance, elimination of urban

blight, and economic development cases are not consistent when compared to railroad, utilities, travel, and environmental cases, and the Court's deference to the legislature in *Kelo* is surprising and aberrant. Part V urges the Court to adopt an alternative public use test, where the judiciary has a clearly defined role to check legislative decisions with respect to determination of: (1) what constitutes blight; (2) what constitutes public use; and (3) what property can be taken to remedy a determined blight. In other words, the Court would evaluate the legislative process at every meaningful step of condemnation proceedings. The conclusion addresses what the city of New London should have done to comply with the proposed test.

## I. EMINENT DOMAIN CONSTITUTIONAL REQUIREMENTS

The sovereign's or nation's right to exercise the power of eminent domain[2] and the right of the landowner to compensation in takings predate "either the federal or state constitutions and are as old as political society."[3] The early Roman Empire relied on the power of eminent domain to build roads.[4] The practice of eminent domain existed in England long before the founding of American colonies.[5] Similar to current U.S. eminent domain law, English law required "interposition of the legislature."[6] Yet the legislature could not "absolutely strip . . . the subject of his property, in arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained."[7]

The modern eminent domain principle in the United States resides in the Fifth Amendment of the United States Constitution: "[N]o person shall be . . . deprived of life, liberty, or property, without due process, of law; *nor shall private property be taken for public use, without just*

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[2] Katherine M. McFarland, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 144 (2004).

[3] 6A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 2900 (perm. ed., rev. vol. 2005).

[4] Legal scholar and writer, Grotius, originated the term "eminent domain" in the seventeenth century. *See* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 7 (1980); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 553–54 (1972); Elizabeth A. Taylor, *The Dudley Street Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1062 (1995) (pointing out that little direct evidence exists on early Roman Empire use of eminent domain).

[5] *See* McFarland, *supra* note 2, at 145; FLETCHER, *supra* note 3, § 2900; Taylor, *supra* note 4, at 1062.

[6] Gardener v. Vill. of Newburgh, 1 N.Y. Ch. Ann. 332 (1816) (discussing similarities between English and U.S. takings law); McFarland, *supra* note 2, at 145–47 (arguing that the Founding Fathers were strongly committed to protection of private property and early eminent domain cases followed a strict due process analysis).

[7] *Gardener*, 1 N.Y. Ch. Ann. at 332 (emphasizing the importance of a "reasonable price") (quoting Blackstone).

*compensation*."[8]

Thus, when the federal or state government[9] exercises the power of eminent domain, it must observe two requirements—"public use" and "just compensation"—to comply with the Fifth Amendment.[10] For the purposes of the Fifth Amendment, the "definition of property is broad, encompassing the entire group of rights incidental to ownership."[11] States promulgated similar requirements in their state constitutions to limit the state governments' ability to exercise eminent domain.[12] Thus, because the Fifth Amendment applies to all states through the Fourteenth Amendment, "there is a possibility of a federal question in every taking by eminent domain under state authority, even if all requirements of the constitution of the state are held to have been complied with."[13]

Many scholars trace the origin of eminent domain in the United States to the opinion of Chancellor Kent in *Gardner v. Village of Newburgh*.[14] In *Gardener,* Chancellor Kent issued an injunction against the statutorily authorized taking of the plaintiff's right to use and enjoyment of a stream because he was not justly compensated.[15] Chancellor Kent stressed that "to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law."[16] Chancellor Kent also stressed the importance of the public use requirement, but without specifically addressing the point in the case before him.[17]

While the "just compensation" requirement is fairly clear, the courts

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[8] U.S. CONST. amend. V (text in italics is commonly referred to as the "Takings Clause") (emphasis added). "Due to scant and ambiguous historical record, the original intent of the Fifth Amendment Takings Clause cannot be known." Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far*," 49 AM. U. L. REV. 181, 181 (1999) (concluding that "very little historical material exists from which to ascertain the Framers' intent" because "neither colonial practice not Founding Era philosophy was entirely clear").

[9] The Fifth Amendment applies to the state government through the Fourteenth Amendment. *See* 26 AM. JUR. 2D, *EMINENT DOMAIN* § 21 (2004).

[10] *See* FLETCHER, *supra* note 3, at §§ 2901, 2913; Taylor, *supra* note 4, at 1063 (tracing both requirements to principles of natural law).

[11] Amen v. City of Dearborn, 718 F.2d 789, 794–95 (6th Cir. 1983).

[12] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 21 (2004).

> [O]nly a few state constitutions expressly prohibit the taking of property by the authority of the state that are not public. The characteristic provision found in the constitutions of the several states, and in that of the United States as well, is to the effect that property shall not be taken for the public use without just compensation.

*Id.*

[13] Johnston v. Ala. Pub. Serv. Comm'n, 252 So. 2d 75, 91 (Ala. 1971) (Lawson, J., dissenting).

[14] FLETCHER, *supra* note 3, § 2900.

[15] *Gardener*, 1 N.Y. Ch. Ann. at 332.

[16] *Id.*

[17] *Id.* (mentioning "an instance in which the Roman senate refused to allow the praetors to carry aqueduct through the farm of an individual, against his consent, when [the aqueduct was] intended merely for ornament").

have yet to agree on the precise meaning of the term "public use."[18] In fact, similar to *Gardener*, most decisions focus on "just compensation," but not the "public use" requirement. In general, however, the government cannot exercise eminent domain to transfer property from one private individual for the private use of another even when the government justly compensates the former.[19] That is, "a purely private taking cannot withstand a constitutional scrutiny."[20] However, many courts have held that a primary and paramount public purpose "will not be defeated by the fact that incidentally a private use of benefit will result which would not itself warrant the exercise" of eminent domain.[21] Thus, beyond the general rule there is little or no agreement as to what constitutes public use;[22] adding "primary" or "dominant" to an already ambiguous public use merely complicates the meaning of the term. Many have expressed that the term "is elastic and keeps pace with changing conditions."[23] Scholars have emphasized that efforts to precisely define public use have failed because

> [f]irst, there is the impossibility of reconciling decisions of the courts within or among states. [Second, the] . . . source of difficulty lies in the fact that courts were more influenced by established customs of the various states at the time their constitutions were adopted than by a literal interpretation of

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[18] *See* Taylor, *supra* note 4, at 1063–64; Alois Valerian Gross, 81 L. ED. 2d 931, § I(2), *When Is Taking of Property for "Public Use" so as To Be Permissible Under Federal Constitution if Just Compensation Is Provided – Supreme Court Cases* (2005); 26 AM. JUR. 2D, *EMINENT DOMAIN* § 47 (2004).

[19] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

> [T]he rule against taking for private uses is so firmly established that it cannot reasonably be subjected to analysis in the light of mere canons of construction, and it is now well-settled that the prohibition against the taking of property for public use without just compensation impliedly, but definitely, forbids a taking of property for private uses.

26 AM. JUR. 2D, *EMINENT DOMAIN* § 47 (2004).

[20] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 48 (2004).

[21] *Id.* § 55 (relying on *Midkiff*, 467 U.S. 229 (1984)).

> The controlling question is whether the paramount reason for the taking of the land to which objection is made is the public interest, to which private benefits are merely incidental, or whether the private interests are paramount and the public benefits are merely incidental.

26 AM. JUR. 2D, *EMINENT DOMAIN* § 56 (2004). Moreover, results vary across states considerably because various courts take various factors into account in determining whether a particular taking was for a public use. 26 AM. JUR. 2D, *EMINENT DOMAIN* § 62 (2004).

[22] *Id.* § 47. In fact, the Court "has apparently never actually decided that a particular use is private." *Id.* § 62. *See generally* 2A PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN § 7.03[1] (Julius L. Sackman & Russel D. Van Brunt eds.) (3d ed. 2005) (enumerating various factors that affect court's calculus in deciding whether a particular taking is for a public use).

[23] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 49 (2004). *See generally id.* at §§ 50–52 (identifying two courts' approaches in understanding the term "public use": (1) "public use means use by the public, or public employment" and (2) "public use means public advantage, convenience, and uses that contribute to the general welfare and the prosperity of the whole community, or a portion of it").

> the words of their eminent domain clauses. A third problem is that different locations, circumstances, and needs throughout the United States have affected the meaning of "public use." A final problem is that the word "use" is susceptible to two entirely different meanings; i.e., "employment" and "advantage." The term "employment" may mean using eminent domain only for projects where the public may use the land acquired, while "advantage" may mean using eminent domain for any project serving the public good or welfare.[24]

In general, a legislature has a right to declare what shall be deemed public use.[25] When the statute authorizes a particular taking for public use, the question to the court "is not whether the use is public, but whether the exercise of eminent domain power is rationally related to a conceivable public purpose; whether the legislature might reasonably have considered the use public; or whether the use is clearly private in nature."[26] Customarily, the courts defer to legislatures to define public use; the courts presume that a particular taking is done for public use if the legislature expressly authorizes the taking unless the legislative decision lacks a reasonable foundation.[27]

Some states' specific constitutional provisions authorize only the courts to determine without any regard to the legislature whether a particular use is public.[28] In *Johnston v. Alabama Public Service Commission*, it was noted that "[s]trictly speaking, the Legislature cannot delegate the power of eminent domain. It cannot divest itself of sovereign powers."[29] However, it has been common since the U.S. revolution for a legislature to confer the power of takings "upon corporations, public or private, upon individuals, upon foreign corporations, or a consolidated company."[30] Courts have not seriously questioned this practice probably because of the theory that "it is solely for the Legislature to judge what

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[24] NICHOLS, *supra* note 22, § 7.02[1].

[25] *See* United States *ex rel*. Tenn. Valley Auth. v. Welch, 327 U.S. 546 (1946). "Of course, the legislature cannot . . . make any use of property public use; and if it attempts to do so arbitrarily, the courts have the power to declare the attempt invalid." 26 AM. JUR. 2D, *EMINENT DOMAIN* § 61 (2004).

[26] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 48 (2004).

[27] *Midkiff*, 467 U.S. 229.

> Ultimately, the question whether the constitutional provisions against the taking of property for private use have been violated is, like all constitutional questions, for the courts; and if a court can clearly see that a particular undertaking which it is proposed to clothe with the power of eminent domain has no real and substantial relation to the public use, it is the duty of the court to intervene . . . .

26 AM. JUR. 2D, *EMINENT DOMAIN* § 61 (2004).

[28] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 61 (2004).

[29] Johnston v. Ala. Pub. Serv. Comm'n., 252 So. 2d 75, 78 (Ala. 1971).

[30] *Id.*

persons, corporations or other agencies may properly be clothed with [eminent domain] power."[31] However, some scholars have suggested that numerous delegation issues may arise in the future.[32]

The eminent domain doctrine predates the formation of the United States and can be traced back to the ancient Roman Empire. Currently, most eminent domain cases in the United States address the just compensation and not the public use requirement so that the courts usually delegate the determination of "public use" to legislatures. However, many scholars suggest that the courts' almost complete delegation of eminent domain decisions to legislatures is likely to be an important issue in the future.

## II. THE "PUBLIC USE" REQUIREMENT IN SLUM CLEARANCE, ELIMINATION OF URBAN BLIGHT, AND URBAN DEVELOPMENT CASES

The courts have particularly struggled when applying the public use requirement in slum clearance, elimination of urban blight, and economic development cases, where private actors often play an important, if not prominent, role. This Part first summarizes the difficulty in applying the public use requirement in the economic development of blighted areas and slum clearance cases. Second, it points out how the Court has struggled with the public use requirement in the *Kelo* case, particularly focusing on the debate between majority and dissent about the definition of public use, the government's role in promoting economic development, and the role of benefits to private third-party beneficiaries.

### *A. Slum Clearance, Elimination of Urban Blight, and Economic Development Cases Challenge the Public Use Requirement*

Slum clearance, elimination of urban blight, and economic development cases face numerous recurring issues. Among the many unresolved issues, some are particularly significant in the context of eminent domain: the definition of blight or slum, the benefits to private third parties, the inconsistent application of the public use test, an unclear standard for judicial review, and the uncertain role of the judiciary.

In *Berman v. Parker*, the U.S. Supreme Court explained why legislatures rely on the power of eminent domain to address such issues as slum clearance, elimination of urban blight, and urban development.[33]

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[31] *Id.*

[32] *See, e.g.*, Taylor, *supra* note 4, at 1069–76.

[33] Berman v. Parker, 348 U.S. 26 (1954). *See generally* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (tracing the history and rhetoric of urban renewal movement from early 1800s to the present).

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of its 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.[34]

Another court has described slums as

> gathering places of filth, lust, crime, disease and degeneracy where people gather under the lowest possible standards of living, crowded together in dilapidated hovels which are unsafe, unsanitary and unhealthful in a sordid atmosphere in which disease is spread; and where offspring born in such conditions are damned, from the day of their arrival in this world, to the life of their fathers.[35]

While courts agree that the extreme or "ceiling" descriptions discussed constitute blighted areas or slums, no agreement exists as to the minimal or threshold definition of blight or slums. Courts often suggest that the determination of whether an area is blighted or is a slum is a legislative question. While some courts have insisted that courts should be able to review eminent domain legislative actions,[36] the extent of the courts' review is unclear because it varies widely.

Meanwhile, many courts have recognized that slum clearance, elimination of urban blight, and urban development cases satisfy the public use requirement.[37] The courts have often allowed state legislatures[38] to

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[34] Berman, 348 U.S. at 32–33.

[35] City of Birmingham v. Tutwiler Drug Co., 475 So. 2d 458, 466 (Ala. 1985) (internal citation and quotations omitted).

[36] City of Phoenix v. Superior Court of Maricopa, 671 P.2d 387, 390–91 (Ariz. 1983) (holding "that the function of the judiciary in determining whether an area is a slum or blighted area is to review the findings of the governing body, rather than to make an original determination").

[37] *See generally* Amen v. City of Dearborn, 718 F.2d 789, 794–95 (6th Cir. 1983); Thornton Dev. Auth. v. Upah, 640 F. Supp. 1071 (D. Colo. 1986); *Tutwiler Drug*, 475 So. 2d 458; *City of Phoenix*, 671 P.2d 387; Hous. Auth. of County of L.A. v. Dockweiler, 94 P.2d 794 (Cal. 1939); People *ex rel*. Gutknecht v. Chicago, 111 N.E.2d 626 (Ill. 1953); Murray v. Richmond, 276 N.E.2d 519 (Ind. 1971); Dinwiddie v. Urban Renewal & Cmty. Dev. Agency, 393 S.W.2d 872 (Ky. Ct. App. 1965) (holding statute constitutional); Mayor & City Council of Balt. v. Chertkof, 441 A.2d 1044 (Md. 1982); Roberts v. City of Worcester, 625 N.E.2d 1365 (Mass. 1994); Schweig v. Md. Plaza Redev. Corp., 676 S.W.2d 249 (Mo. Ct. App. 1984); Monarch Chem. Works, Inc. v. City of Omaha, 277 N.W.2d 423 (Neb. 1979) (stating that the acquisitions of lands for slum elimination, slum prevention, rehabilitation of substandard areas for low-cost housing, community development, or industrial development were legitimate public uses); Mather Props., Inc. v. City of Buffalo Urban Renewal Agency, 120 A.D.2d 986 (N.Y. App. Div. 1986); Wells v. Hous. Auth. of Wilmington, 197 S.E. 693 (N.C. 1938); AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp., 553 N.E.2d 597 (Ohio 1990); Belovsky v.

delegate to housing authorities the power of eminent domain to clear slums, eliminate urban blight, and develop cities.[39] Many courts have held that while a particular property need not be blighted for the government to exercise the power of eminent domain, the court must consider the conditions of the entire area.[40] Normally, courts review takings for slum clearance or urban redevelopment cases when the government obviously acts in an arbitrary manner, in bad faith,[41] or when the plan for redevelopment is inconsistent with the authorizing statute or recognized public uses.[42] Thus, courts do not inquire into most legislative decisions unless they are obviously flawed or corrupt thus leaving the legislature almost free from any court oversight in takings.

Plaintiffs in slum clearance, elimination of urban blight, and urban development cases often argue that a taking does not constitute public use "because the lands acquired are turned over to private interests for development, [therefore] the use is not public and does not justify the exercise of eminent domain."[43] While no court has satisfactorily addressed these concerns, some courts have held that private redevelopment is no less a public use than that of railroad companies exercising eminent domain.[44] Other courts have held that the legislature may grant eminent domain powers to private developers under certain circumstances.[45]

Moreover, in slum clearance, elimination of urban blight, and urban

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Redev. Auth. of Phil., 54 A.2d 277 (Pa. 1947); Romeo v. Cranston Redev. Agency, 254 A.2d 426 (R.I. 1969) (state constitution provides that clearance, replanning, redevelopment, rehabilitation, and improvement of an "arrested blighted area" constitute a public use); Nashville Hous. Auth. v. City of Nashville, 237 S.W.2d 946 (Tenn. 1951); Davis v. City of Lubbock, 326 S.W.2d 699 (Tex. 1959); W. & G. Co. v. Redev. Agency, 802 P.2d 755 (Utah Ct. App. 1990); Mumpower v. Hous. Auth. of Bristol, 11 S.E.2d 732 (Va. 1940); Miller v. City of Tacoma, 378 P.2d 464 (Wash. 1963) (acquisition, elimination, and redevelopment of blighted areas).

[38] The federal government may exercise its eminent domain power for economic development in the District of Columbia. *Berman*, 348 U.S. 26. However, the federal government may not condemn property for economic development within a state. United States v. Certain Lands in Louisville, 78 F.2d 684 (6th Cir. 1935), *cert. den.* 297 U.S. 726 (1936).

[39] *See generally* Stockus v. Boston Hous. Auth., 24 N.E.2d 330 (Mass. 1939); Murray v. La Guardia, 52 N.E.2d 884 (N.Y. 1943), *cert. den.* 321 U.S. 771 (1944); City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio Ct. App. 1963).

[40] *See Tutwiler Drug*, 475 So. 2d 458 (condemning downtown area); Vill. of Wheeling v. Exch. Nat'l Bank, 572 N.E.2d 966 (Ill. App. Ct. 1991) (holding that the test for the taking is based on the condition of the area as a whole); *W. & G. Co.*, 802 P.2d at 755 (holding that the entire area can be condemned even if some buildings are not hazardous to health and safety). *But see* Redev. Auth. of Scranton v. Kameroski, 616 A.2d 1102 (Pa. Commw. Ct. 1992) (holding that internal finding of blighted conditions did not authorize the condemner to take the property in the area).

[41] 26 AM. JUR. 2D *EMINENT DOMAIN* § 78 (2004). *See generally Amen*, 718 F.2d 789.

[42] 26 AM. JUR. 2D *EMINENT DOMAIN* § 78 (2004); Russin v. Town of Union, 133 A.D.2d 1014 (N.Y. App. Div. 1987) (observing contradictions between the statute authorization and actual practice); Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956) (city aimed not improve low-cost housing, but to commercialize the area)).

[43] 26 AM. JUR. 2D *EMINENT DOMAIN* § 79 (2004).

[44] *See generally* Redfern v. Bd. of Comm'rs of Jersey City, 59 A.2d 641 (N.J. 1948).

[45] *See generally* Zisook v. Md.-Drexel Neighborhood Redev. Corp., 121 N.E.2d 804 (Ill. 1954).

development cases, the courts often do not distinguish between three distinct parts of public use analysis: (1) whether and what region is blighted,[46] (2) whether dealing with blighted areas constitutes public use,[47] and (3) what area needs to be[48] condemned to address the problems in the blighted region.[49]

The courts are also often inconsistent and uncertain as to what standard of review must be applied to each analysis. For example, some courts have stated that the question of necessity is not reviewable by the judiciary absent a showing of fraud or bad faith while others have found that "deference is not given to the condemning authority's finding of a public purpose and no showing of bad faith is necessary with respect to this issue" because "[t]he court determines whether the purpose for the taking is public or private."[50] Other courts have declared that the legislature determines "public needs" and "[t]he role of judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[51]

In addition, the courts in slum clearance, elimination of urban blight, and urban development takings procedure often struggle to separate the legislative role from that of the judiciary.[52] On the one hand, the "legislature, not judiciary, is the main guardian of public needs"[53] because it is "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled";[54] on the other hand, the judiciary must make sure that the legislature does not abuse the eminent domain power.[55] Consequently, many courts declare that the courts' role in determining public purpose in the eminent domain cases is "extremely narrow."[56] But not all courts agree on this view of the judiciary's limited function in takings. Nevertheless, more often than not, the courts analyze whether the legislative process was fair in determining whether to exercise the eminent

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[46] *See supra* Part II.A.

[47] *Id.*

[48] "Basically, necessity involves the selection of the location of the property to be acquired and the quantity of land required." Thornton Dev. Auth. v. Upah, 640 F. Supp. 1071 (D. Colo. 1986).

[49] *See id.* ("[T]he Colorado courts have not done a very good job in maintaining the distinction between the issues of necessity and public purpose.").

[50] *Id.*; *see also* City of Phoenix v. Superior Court of Maricopa, 671 P.2d 387, 390 (Ariz. 1983); Irby v. Tex. Elec. Serv. Co., 680 S.W.2d 883, 884 (Tex. App. 1984) (public utility case).

[51] Berman v. Parker, 348 U.S. 26, 32 (1954).

[52] *Id.* at 32–34.

[53] *Id.* at 32. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular boundary area." *Id.* at 35.

[54] *Id.* at 33.

[55] *City of Phoenix*, 671 P.2d at 390 (emphasizing that courts "are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases").

[56] *See Berman*, 348 U.S. at 33–34; *Amen*, 718 F.2d at 798.

domain power rather than considering the merits of exercising eminent domain power in the first place.[57] Thus, with respect to the matter of eminent domain, the courts have failed to provide sufficient analysis to the subject of public use.

To summarize, the courts have been struggling with slum clearance, elimination of urban blight, and economic development cases primarily with respect to five issues. First, no objective or reliable definition of blight or slum exists. Second, the courts have failed to adequately address or resolve the issue of benefits to private third parties. Third, the courts do not utilize the public use test consistently. Fourth, the extent and standard of the courts' review of legislative actions in takings is unclear. Fifth, the role of the judiciary in takings is unclear and often inadequate.

### *B. The Court's Recent Interpretation of "Public Use" in* Kelo v. New London

*Kelo v. New London*, a recent 5-4 U.S. Supreme Court eminent domain decision, highlights the courts' inability to apply the public use standard in a consistent fashion.[58] In 2000, New London approved the development of the ninety-acre parcel of land known as the Fort Trumbull area[59] as suggested by the New London Development Corporation (NLDC) in response to the city's decades of economic decline.[60] The NLDC, a private nonprofit entity with a private board of directors, had been established in 1978 to assist the city in planning economic development,[61] proposed to build a conference hotel, an "urban village" that would include restaurants and a shopping mall, new residences, a museum, research and development office space for a pharmaceutical company, other office and retail space, and parking.[62] The city designated NLDC as its development agent in charge of implementation and authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the city's name.[63]

The city aimed to "create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including

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[57] *See Berman*, 348 U.S. at 33–34.

[58] Kelo v. City of New London, 125 S. Ct. 2655 (2005). New London sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut.

[59] The Fort Trumbull area is situated on a peninsula just into the Thames River. The Fort Trumbull area is composed of approximately 115 privately owned properties and thirty-two acres of land that the naval facility had occupied in the past.

[60] *Kelo*, 125 S. Ct. at 2658–59. In particular, in 1990, a state agency designated the city a "distressed municipality." *Id.* at 2658. In 1996, the federal government closed the Naval Undersea Warfare Center located in the Fort Trumbull that had employed over 1500 people. *Id.* By 1998, the city's unemployment rate was nearly double that of the state; the city's population dropped to its lowest since 1920. *Id.*

[61] Kelo v. New London, 557299, 2002 Conn. Super. LEXIS 789, at *5 (2002).

[62] *Kelo*, 125 S. Ct. at 2659.

[63] *Id.* at 2658–60.

its downtown and waterfront areas."[64] To accomplish this, the NLDC first purchased property from willing sellers.[65] The city's development agent then initiated the condemnation proceeding against Susette Kelo and other owners for just compensation under the power of the eminent domain.[66] Kelo had lived in the Fort Trumbull since 1997, made extensive improvements to her house, and prizes it for its water view.[67] Other owners who challenged the NLDC's action had been born in the Fort Trumbull and had lived there for their entire lives.[68]

Kelo and other plaintiffs brought an action against the city in New London Superior Court, arguing among other things that NLDC's taking of property violated the public use requirements of the Fifth Amendment.[69] After a seven-day trial, the court granted a permanent restraining order prohibiting the taking of properties located in one of the parcels and denied relief as to the properties located in another parcel.[70]

On appeal brought by both sides, the Supreme Court of Connecticut held that all the city's proposed takings were valid.[71] The Supreme Court upheld the trial court's finding that the Connecticut municipal development statute authorized takings.[72] The Supreme Court also concluded that taking land as part of an economic development project constitutes public use and is in the "public interest."[73]

After granting certiorari, the United States Supreme Court, in a 5-4 decision, upheld the decision of the Supreme Court of Connecticut.[74] The Court held that the city's decision to take property for the purpose of economic development by a private party satisfied the public use requirement of the Fifth Amendment.[75] In justifying its holding, the court argued that economic development was a traditional government action that often benefited private actors.

While acknowledging that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a

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[64] Kelo v. New London, 268 Conn. 1, 5 (2004).
[65] *Kelo*, 125 S. Ct. at 2658.
[66] *Id.* at 2658.
[67] *Id.* at 2660.
[68] *Id.*
[69] *Id.*
[70] *Id.* (relying on *Kelo*, 2002 Conn. Super. LEXIS 789).
[71] *Kelo*, 268 Conn. at 18–28 (one Supreme Court of Connecticut judge dissented).
[72] *Id*.
[73] *Id*. (relying on Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (upholding a Hawaiian statute whereby fee title was taken from lessors and transferred to lessees for just compensation to reduce the concentration of land ownership); Berman v. Parker, 348 U.S. 26 (1954) (upholding redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing was beyond repair in light of challenge from a department store owner whose store was not located in the blighted area).
[74] *Kelo*, 125 S. Ct. at 2661–69.
[75] *Id*.

particular private party,"[76] the Court emphasized that over time it has broadened its interpretation of public use[77] beyond the literal requirement that condemned property had to be put to use for the general public (known as "use-by-the-public test"). The Court noted that the narrow test is difficult to administer as it is unclear what proportion of the population needs to have access and at what price.[78] The majority argued that the narrow use by the public test is also "impractical given the diverse and always evolving needs of society."[79] The Court also emphasized that historically the Court "afford[ed] [state] legislatures broad latitude in determining what public needs justify the use of taking power."[80]

To reach its decision, the majority first argued that "[p]romoting economic development is a traditional and long accepted function of government."[81] In particular, the city's plan to coordinate a "variety of commercial, residential, and recreational uses" to develop Fort Trumbull did not differ from agricultural and mining takings cases.[82] Second the Court observed that "the government's pursuit of a public purpose will often benefit individual private parties."[83] Thus, the substantial benefits to a private developer should not affect the public use analysis.

The Court rejected a bright line rule—economic development does not constitute public use—concluding that such a rule artificially restricts the concept of public use.[84] Moreover, the Court rejected a "reasonable certainty" rule—for takings to take place there must be a reasonable certainty that expected benefits would actually accrue—because such a rule "would represent an even greater departure from [the Court's] precedent" since it would require courts to second guess municipal legislatures.[85]

The dissent pointed out that public use and just compensation

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[76] *Id*. at 2661.

[77] *Id.* at 2662 (relying on *Midkiff*, 467 U.S. at 244 ("Court has long ago rejected any literal requirement that condemned property be put into use for the general public.")).

[78] *Id*. (relying on Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 410 (1876) ("The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad.")).

[79] *Id*. at 2662 (relying Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) ("[I]nadequacy of use by the general public as a universal test.")).

[80] *Id*. at 2664 (relying on *Midkiff*, 467 U.S. at 235–44; *Berman,* 348 U.S. at 31–33).

[81] *Id*. at 2665.

[82] *Id*. (relying on Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (emphasizing the importance of agriculture and mining to the welfare of the state); *Berman*, 348 U.S. at 33 (upholding the purpose of transforming a blighted area into "well-balanced community"); *Midkiff*, 467 U.S. at 242 (upholding breaking up of oligopoly to create a normal residential land market)).

[83] *Id*. at 2666 (relying on *Berman*, 348 U.S. at 33 (benefiting one business owner at the expense of another and observing "[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects"); *Midkiff*, 467 U.S. at 242 (benefiting lessees who were previously unable to purchase their homes).

[84] *See Kelo*, 125 S. Ct. at 2666–67 (observing that no need exists to fear extreme takings where property is transferred for no good reason from one private actor to another since such cases are suspicious and the courts can sort them out on a case-by-case basis).

[85] *Id*. at 2667.

constitute constitutional protections to property owners "particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."[86] The dissent emphasized that while state legislatures draw a line between public and private uses, if the political branches were the sole arbiters of the public-private distinction, the public use requirements "would amount to little more than hortatory fluff."[87] In particular, while just compensation "prevents the public from loading upon one individual more than his just share of the burdens of government,"[88] the public use requirement "promotes fairness as well as security" by circumscribing the scope of the eminent domain power since the government can exercise it only "for the public's use, but not for the benefit of another private person."[89] Thus, it is the courts' job to check that the legislature respects these requirements.[90]

The dissent distinguished *Berman* and *Midkiff* (decisions on which the majority extensively relied) from *Kelo* by suggesting that the *Berman* and *Midkiff* decisions "*directly* achieved a public benefit" while in *Kelo*, the city did not claim that the petitioner's homes were a source of any social harm.[91] The dissent criticized the majority for including "incidental benefit to the public" such as "increased tax revenue, more jobs, [and] . . . aesthetic pleasure" to constitute public use.[92]

The dissent also suggested that the Fifth Amendment does not specify any one purpose to be legitimate when it requires it to be for a public purpose.[93] Thus, what inspired the taking is not as important as that the "private property is forcibly relinquished to new private ownership."[94] Moreover, the dissent questioned the majority's logic "that eminent domain may only be used to upgrade," because in light of the majority's opinion, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[95]

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[86] *Id*. at 2672.

[87] *Id*. at 2673.

[88] *Id*. at 2672 (relying on Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)).

[89] *Id*. (relying on Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002)).

[90] *Id*. at 2673.

[91] *Id*. at 2674–75.

[92] *Id*. at 2675; *see also id*. at 2677–86 (arguing that the majority erroneously replaces "public use" requirement with a broader "public purpose" requirement, "a restriction that is satisfied . . . so long as the purpose is 'legitimate' and the means are 'not irrational'") (Thomas, J. dissenting).

[93] *Id*. at 2676.

[94] *Id*.

[95] *Id*. ("The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."). *Id.* at 2677.

Therefore, the recent debate between the majority and dissent in the *Kelo* decision, similar to eminent domain cases involving slum clearance, elimination of urban blight, and economic development, highlights the Court's struggle to define public use consistently and systematically, to identify the government's role in promoting economic development, and to justify the consequent benefits to third parties.

## III. THE COURT'S HISTORIC INTERPRETATION OF PUBLIC USE DOCTRINE

The public use requirement is unsettled, and the Court's public use standards and analyses have varied over time and across economic sectors. However, definite trends have emerged in the debate on the interpretation of public use. Over time, both federal and state courts have increasingly relied on a broad and liberal construction of the term public use.[96]

The following subparts analyze the public use standards courts have applied to railroads, utilities, travel, and environmental cases. In particular, the subparts focus on three factors that played a prominent role in *Kelo v. New London*: (1) how the courts have defined public use and what tests the courts have applied; (2) how the courts have envisioned the government's role to promote economic development; and (3) how the courts have justified such benefits in light of the Fifth Amendment requirements when private actors substantially benefited in the process of takings. The answers to these issues vary among railroads, utilities, travel, and environmental cases.

### *A. Classic Public Use: Railroad Cases*

Since "[p]ublic transportation has long been recognized as a public use within the contemplation of the power of eminent domain,"[97] railroads in general constitute public use on the grounds that the public actually uses and benefits from them[98] (although the property condemned for railroad use does not have to be used in its entirety).[99] Moreover, the government may use the power of eminent domain to improve the operation of the railroad station.[100] In railroad cases, the definition of public use is broad, the government does not have an extensive economic development role,

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[96] NICHOLS, *supra* note 22, § 7.02[5]; *see also id*. § 7.02[6] ("legislative practice and colonial experience suggested broad legislative authority to use eminent domain to secure a variety of public uses and purposes."); *id* § 7.06 (listing numerous ways where the courts have considered various government takings to constitute "public use"). Moreover, "[c]ontemporary definitions of 'public use' in the broad sense are the result of gradual development over time." *Id.* § 7.02[6].

[97] Washington *ex rel* Devonshire v. Superior Court for King County, 424 P.2d 913, 917 (Wash. 1967).

[98] *See* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992). *See generally* 26 AM. JUR. 2D *EMINENT DOMAIN* § 78 (2004).

[99] *See* Cash v. S. Pac. R.R. Co., 123 Cal. App. 3d 974, 978 (1981).

[100] Greenwich Assocs. v. Metro. Transp. Auth., 152 A.D.2d 216 (N.Y. 1989).

and the courts often turn a blind eye to even extensive benefits for the private but highly regulated railroad industry.

The exercise of eminent domain power in railroad cases is often justified by the alleviation of pedestrian and vehicle traffic congestion,[101] development of destinations,[102] and protection or expansion of railroad terminals' architectural elements.[103] Early railroads relied on courts' expansive reading of eminent domain to operate and expand. "For courts to rule otherwise would have meant that railroads would not have existed, because they [railroads] needed the power to obtain the land required for their tracks."[104] Consequently, some courts have suggested that anticipation of an increase in future public demand should satisfy the public use requirement.[105] In *Greenwich Associates*, the court stated that the railroad "readily meets the standard of being 'rationally related to a conceivable public purpose'" after citing the extensive data the railroad company provided on conditions of congestion, inadequate garbage handling, and general unsanitary conditions.[106]

In railroad takings, the government does not have a substantive role other than facilitating the land transfer from a private owner to a railroad company in a non-arbitrary manner. For example, some courts have pointed out that it is constitutional to transfer property from one private party to another private party in a condemnation procedure "as long as the condemning authorities were rational in their positions that some public purpose was served."[107] The Supreme Court in *National Railroad Passenger Corp.* held that since the Interstate Commerce Commission did nothing "irrational," the condemnation that facilitated Amtrak's rail service served the public purpose.[108] But Justice White, who dissented, pointed out that the majority had no problem with the Interstate Commerce Commission making "no findings and no analysis" about necessity or public use.[109] Thus, in railroad cases the government plays more of the

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[101] *See id*. at 221–22; Moore v. Sanford, 24 N.E. 323, 328 (Mass. 1890); *Washington ex rel Devonshire*, 424 P.2d at 917.

[102] *See* Offield v. N.Y., New Haven & Hartford R.R. Co., 203 U.S. 372 (1906) (holding that improvement of the railroad was a public use because the railroad linked Boston and the western part of the nation, and because it was the only railroad over which the goods could be transported in all weather and during all seasons); Union Lime Co. v. Chi. & Northwestern R.R. Co., 233 U.S. 211 (1914) (upholding the statute to extend the spur track); *see also Washington ex rel Devonshire*, 424 P.2d at 917 (holding that a paramagnet easement is justified to allow the public to reach a new civic center).

[103] *See Greenwich Assocs.*, 152 A.D.2d at 221–22; Mo. Pac. R.R. Co. v. 55 Acres of Land Located in Crittenden County, 947 F. Supp. 1301, 1313 (E.D. Ark. 1996).

[104] Jennifer Maude Klemetsrud, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 792–95 (1999).

[105] *See Mo. Pac. R.R. Co.,* 947 F. Supp. at 1313.

[106] *See Greenwich Assocs.,* 152 A.D.2d at 221–22.

[107] *See* Nat'l R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 422 (1992).

[108] *Id*. at 422–23.

[109] *Id*. at 426–28 (White, J., dissenting).

role of a facilitator rather than that of an active promoter of any goals such as economic development.

In railroad cases, private railroad companies directly benefit from takings; in fact, the government often delegates railroad companies to carry out the takings. While "the fact that private industry may benefit in some incidental way does not prevent an entity from exercising its eminent domain power" in railroad cases, the courts often turn a blind eye to even extensive benefits so long as the public benefit is present.[110] In *Greenwich Associates*, the court, arguing that private benefits did not exclude private enjoyment, overlooked that some portions of railroad-acquired land would be leased to other companies like Federal Express, UPS, "and others who do not have the power of eminent domain."[111] Similarly in *Moore*, the court refused to assess the chances of land speculation stating "[e]ven if it be true . . . [that the railroad company] expects to sell its land to advantage, many enterprises of great public utility are of advantage to individuals."[112] In addition, railroad companies, while private, have been heavily regulated throughout U.S. history and have often been considered "common carriers."[113] Thus, in railroad cases the private but highly regulated railroad companies are beneficiaries of direct takings.

Therefore, the classic railroad cases rely on an expansive definition of public use—either use by the public or great public benefit. Although the government has heavily regulated the railroad companies, it usually delegates the takings power to the railroad companies, with the courts allowing private railroad companies to benefit directly and substantially in takings.

### *B. Utility Cases: Drainage, Flood Control, Levees, Light, Heat, Power, Gas, Electricity, Sewage, and Pipelines*

As governmental activity increased over time, "public utility" gained an expansive meaning especially "where states had a strong desire to encourage exploitation of natural wealth and to increase industrial

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[110] *See Mo. Pac. R.R. Co*., 947 F. Supp. at 1313–14; *see also* Hendersonville Light & Power Co. v. Blue Ridge Interuban Ry. Co., 243 U.S. 563 (1917) (holding that railroad's condemnation of water rights incident to land river constitutes public use); Union Lime Co. v. Chi. & Northwestern Ry. Co., 233 U.S. 211 (1911) (explaining that the fact the private party bore all initial costs did not affect public use because all consumers benefited from reduced prices of the goods the company produced); Chicago & Northwestern Ry. Co. v. OCHS, 249 U.S. 416 (1919) (rejecting that requiring the railroad company to contribute two thirds of the total cost makes the taking for private use).

[111] *Mo. Pac. R.R. Co.*, 947 F. Supp. at 1313–14.

[112] Moore v. Sanford, 24 N.E. 323, 328 (Mass. 1890).

[113] *See* Jeffery M. Heftman, *Railroad Right-Of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1406–08 (2002) (observing that initially railroads acquired land required for construction of trackage through state or federal condemnation proceedings, while later railroads expanded primarily through private negotiations).

development."[114] Since the government has historically encouraged the development of utilities, it has justified the takings for utilities purposes on the basis of public necessity or public dependency. Similar to the railroad industry, the government merely facilitates the takings while the utility company, often heavily regulated and recognized as a natural monopoly, plays an active role in carrying out the takings.[115] The courts often justify the benefits to private utility companies as incidental.[116]

Courts rarely address what constitutes public use in utility cases because just compensation, not public use, is more often at issue in these cases.[117] In fact, the state constitutions often enumerate various utility needs as public use[118] and the courts uniformly hold utility uses to constitute public use.[119] Often utility uses constitute public use because such uses serve the interests of many people in the state.[120]

Public necessity often justifies utility use as public use. As one court explained:

> *The very nature of the business of furnishing electric energy* [or any other utility] *determines that the use . . . is a public one*. Under our present way of living, electricity is essentially necessary in order to enable our citizens to carry one their every day activities and pursue their accustomed manner of living.[121]

Thus the courts have discouraged thinking about utility goods as "commodities for private consumption."[122] Rather, because society is so dependent on utility uses to carry out normal activities, the courts typically declare utility cases to constitute public use.

The government has historically promoted utility industries in all states

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[114] Klemetsrud, *supra* note 104, at 792–93.

[115] William P. Barr & Henry Weissmann, *The Gild That Is Killing the Lilly: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protection of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 432–34 (2005).

[116] *See id.* at 433–34 ("Utility regulation is regarded by most judges and commentators as something of a dark science whose mysteries are impenetrable to the uninitiated.").

[117] *See* Thompson v. City of Osage, 421 N.W.2d 529 (Iowa 1988); Johnson v. Steele County, 60 N.W.2d 32 (Minn. 1953); *In re* Petition of Dreosch, 47 N.W.2d 106 (Minn. 1951); Hill v. City of Hanahan, 316 S.E.2d 681 (S.C. App. 1984).

[118] *See* Walker v. City of Warner Robins, 422 S.E.2d 555 (Ga. 1992) (observing that Georgia's Constitution designates "storm water and sewage collection and disposal systems" as a public use).

[119] Washington *ex rel*. Northwestern Elec. Co. v. Superior Court, 183 P.2d 802, 806 (Wash. 1974) ("We have uniformly held that the acquisition of properties by a public utility district, for the purpose of furnishing electricity to the public, is a public use.").

[120] Shedd v. N. Indiana Pub. Serv. Co., 188 N.E. 322, 325 (Ind. 1934) (holding that providing electricity constitutes public use despite an incidental benefit to people of a neighboring state).

[121] *Washington ex rel. Northwestern Elec. Co.*, 183 P.2d at 806–07 (quotations and citations omitted).

[122] Kennedy v. Yates Petroleum Corp., 725 P.2d 572, 574 (N.M. 1986) ("Indeed, if water is the life blood of our agricultural and domestic activity, so it may be said that oil and gas are the fuel that keeps our economy moving.").

as a part of industrial development,[123] and the government has heavily regulated it.[124] The courts have often observed that in deciding to allow private municipal corporations to provide utilities, the legislature determined that a government-regulated natural monopoly makes more sense than allowing competition because of high fixed costs in the utility industry.[125] And the courts do not question legislative determination as to what constitutes a natural monopoly.[126] Thus, as in railroad cases, while the government has historically heavily regulated the utility industry, in takings procedures, the government merely facilitates the takings.

The courts have held in utility cases that "public use and public benefit are not synonymous terms."[127] Public incidental benefits are of no importance because public use "implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies."[128] However, courts often stress that since the functions of utilities are often delegated to private agencies to be carried out, the "courts look to the substance rather than to the form, to the end[s] rather than means. If in the end the property is devoted to the public use, the mere agency or instrumentality through which that result is accomplished is a matter of no concern."[129] Thus, similar to railroad cases, the courts often deem direct benefits to private but heavily regulated utility companies to be incidental. To reach this result, the courts compare disproportionately high public benefits to the utility company's private benefits; while the latter is high in absolute terms, it is relatively small compared to the former.

Therefore, the government has justified takings for utilities purposes on the basis of public necessity or public dependency; at the same time, the government has often delegated takings to the utility company. Similar to railroad cases, the courts often justify the benefits to private utility companies as incidental.

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[123] *See, e.g.*, Johnston v. Ala. Serv. Comm'n, 252 So. 2d 75, 79 (Ala. 1971) (arguing that over time as the United States' industries expanded, the public use interpretation became broader) (Bloodworth, J., dissenting).

[124] Barr & Weissmann, *supra* note 115, at 432–34 (arguing that regulatory agencies engage in takings when they undercompensate private utilities companies); *see also* Bentzion S. Turin, *Eastern Philosophy: A Constitutional Argument for Full Stranded Cost Recovery by Deregulating Electric Utilities*, 36 HOUS. L. REV. 1411, 1414–19 (1999) (tracing a history of regulating electrical utility industry); Shelley Ross Saxer, *Government Power Unleashed: Using Eminent Domain To Acquire Public Utility or Other Ongoing Enterprise*, 38 IND. L. REV. 55, 60–64 (2005) (tracing utility regulating history from government-created natural monopolies to recent deregulations).

[125] *Washington ex rel. Northwestern Elec. Co.*, 183 P.2d at 810–11.

[126] *Id*. at 809–10. *But see Johnston*, 252 So. 2d at 80 (arguing that additional limitations must be placed when private corporations carry out eminent domain to make sure that the public purpose is served) (Bloodworth, J., dissenting).

[127] Phillips v. Foster, 211 S.E.2d 93, 96 (Va. 1975) (relying on Richmond v. Carneal, 128 Va. 388, 393 (1921)) (holding in favor of landowners and against a drainage developer).

[128] *Phillips,* 211 S.E.2d at 96.

[129] *Shedd*, 188 N.E.2d at 326.

### *C. Travel Cases: Highways, Streets, Roads, and Bridges*

The courts have interpreted "public use" in travel takings literally and broadly to mean potential "use by the public." In travel cases, the government has a more active role than in the previous two categories and has historically emphasized economic development stemming from additional highways, streets, roads, and bridges. Unlike railroad and utility cases, the unintended third-party beneficiaries in travel cases tend to be accidental and insubstantial as they are not directly involved in takings; courts often declare such unintended third-party beneficiaries as incidental.

In general, highways, streets, roads, and bridges constitute public use[130] because they are literally "used by the public" to travel from one destination to another.[131] So the roads become "a part of the public road system" and the "public would be entitled to use it to go to and from the businesses and residences located on it."[132] However, it is the potential use, not actual use, that courts analyze in travel and navigation cases.[133] That is, the test is "how many have a full and unrestricted right in common to use [the roads]."[134] Indeed, as the Maryland Supreme Court noted, "[t]he public character of a road does not depend on the degree of public necessity or convenience that requires it, the extent to which the public uses it, or the number of persons that it accommodates."[135]

In taking private property in travel cases, the government often emphasizes numerous economic benefits to various localities such as connecting "two . . . dead-end town roads so that traffic could flow east and west . . . [and] to permit more efficient and economic maintenance, particularly during the winter plowing season."[136] Thus, the government in travel cases plays a relatively active role in facilitating economic activities and investing in infrastructure.

However, travel cases often have unintended third-party beneficiaries. These unintended third-party beneficiaries are usually those individuals or entities who benefit disproportionately and are not usually subcontractors or private companies as is the case with railroad and utilities companies. Rather, these unintended third-party beneficiaries tend to be more accidental and insubstantial. For example, unintended third-party beneficiaries emerge in travel cases when a new road leads to one's house and hence increases the value of the house. Since independent agencies, not these individuals or entities, exercise eminent domain power, courts

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[130] 26 AM. JUR. 2D, *EMINENT DOMAIN* §§ 54, 67, 70 (2004).
[131] Anne Arundel County v. Burnopp, 478 A.2d 315, 319 (Md. 1984).
[132] *Id.* at 320.
[133] *Id.* at 319; *see* Greenwood County v. McDonald, 394 S.E.2d 325, 326–27 (S.C. 1990).
[134] *Greenwood County*, 394 S.E.2d at 326.
[135] *Anne Arundel,* 478 A.2d at 319.
[136] Cersosimo v. Town of Townsend, 431 A.2d 496, 498 (Vt. 1981).

often declare them incidental and do not change the public use analysis.[137]

In interpreting public use broadly in travel cases, the courts often emphasize potential "use by the public." In travel cases the government plays a more active role in emphasizing the economic benefits the takings facilitate and the courts often declare unintended third-party beneficiaries as incidental.

### *D. Environmental Cases: Hunting, Fishing, Irrigation, and Mining*

While the courts have inconsistently defined public use in hunting, fishing, and mining cases, the courts consider irrigation to be a public use.[138] In environmental cases, the courts are likely to engage in economic analyses, such as the most productive use of the land, and are likely to question whether the private sector should benefit, especially when no large public beneficiary, like a community or a region, benefits from takings.[139]

The courts are split as to what constitutes public use in mining,[140] fishing, and hunting cases.[141] In *Branch v. Oconto County*, the court held that "[h]unting is one of the uses of water which are recognized as public purpose" especially when the hunting ground at dispute "was the highest land and provided the most-advantageous way to get to the lake."[142] Yet, in *Arkansas State Game and Fish Commission v. Gill*, the court held that upgrading the quality of the ducks' habitat to improve local public duck hunting does not constitute public use and the state game and fish commission could not exercise the eminent domain to obtain lands for such a purpose.[143] Relying on its precedent, the court observed "it is not the

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[137] *See* Duryea v. E. Hampton, 172 A.D.2d 752 (N.Y. App. 1991); Waldo's Inc. v. Johnson City, 74 N.Y.2d 718, 721 (1989) (declaring third party unintended beneficiary as merely incidental).

[138] 26 AM. JUR. 2D, *EMINENT DOMAIN* §§ 72, 82, 83 (2004) (stating that conflicting authority exists as to whether property can be taken by eminent domain for mining and public hunting or fishing, while the courts usually consider irrigation for public use).

[139] "Most states' constitutions contain provisions expressly addressing natural resources and the environment." Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002) (listing the relevant provisions of each state constitution).

[140] *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (holding that mining corporation taking of a right of way for an aerial bucket line across a placer mining constitutes public use).

[141] 26 AM. JUR. 2D, *EMINENT DOMAIN* § 83 (2004).

[142] Branch v. Oconto County, 109 N.W.2d 105, 107–09 (Wis. 1961) (holding that duck hunting is a public use and the legislature may authorize the county to exercise the power of eminent domain). Similar authority exists in mining cases. *See* NL Indus., Inc. v. Eisenman Chem. Co., 645 P.2d 976 (Nev. 1982) (holding that mining is public use because it is of the paramount interest to the state).

[143] Ark. State Game and Fish Comm'n v. Gill, 538 S.W.2d 32, 33–34 (Ark. 1976) (holding that improving the duck killing capabilities does not constitute public use because "the State cannot, under the guise of a game refuge, take the property of private citizens and then convert the property to a public hunting ground to satisfy the sporting instincts of other citizens") (quoting Hampton v. Ark. State Game & Fish Comm'n, 238 S.W.2d 950, 955 (Ark 1951)).

duty of the Commission to acquire lands by eminent domain in order to establish shooting grounds where the public may kill migratory fowl."[144]

Unlike the hunting, fishing, and mining cases, a court would be more likely to find a public purpose for takings for irrigation purposes. The public purpose is usually apparent since the irrigation systems tend to benefit entire agricultural communities or geographical areas[145] as opposed to a few selected individuals who enjoy fishing and hunting. In *Smith v. Arkansas Irrigation Company*, the court held that the rice farm irrigation project constituted public use because the "abundant supply of water suitable for irrigation purposes is imperative" especially in the region where the livelihood and existence of the entire area depends on existence of a good irrigation system.[146] Moreover, the courts usually find an extensive list of public benefits to justify takings in irrigation cases.[147]

Yet, in environmental cases, the courts are likely to engage in economic analyses such as the most productive use of the land and are likely to question whether the private sector should benefit. Courts often analyze whether the current owner or proposed public ownership would promote a more economically efficient use of land in environmental cases.[148] In *Peavy-Wilson Lumber*, the court observed that in contrast to "parks and playgrounds in congested areas where the public generally can enjoy them and the governing authority can care for them and give needed police protection," the land in dispute was located in an "uninhibited and remote area which is sought to be taken from the owner, who is gainfully using it, to make it available to others for hunting and fishing."[149] Thus, here the court implied that the current owner is more productive in its land use than the public would be after the proposed taking.

The court engaged in a similar productive-use-of-land analysis in *Smith* when the court contrasted the ownership benefits of one individual to the regional benefits of the irrigation system.[150] The court observed that the irrigation system would also increase the community's rice productivity "in consequence of which farmers generally within the rice

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[144] *Id.* (quoting *Hampton*, 238 S.W.2d at 955).

[145] *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 113 (1896) (noting that in states like California providing water for irrigation purposes is public use).

[146] Smith v. Ark. Irrigation Co., 142 S.W.2d 509, 510–11 (Ark. 1940).

[147] *See* Associated Enters. v. Toltec Watershed Improvement Dist., 656 P.2d 1144, 1148–49 (Wyo. 1983) (holding that the irrigation is for public use). "There are features in the plan designed to benefit a public. These features are a land treatment measure, which will control erosion and sedimentation rates; flood prevention; 600 fishermen-days annually; attraction of people to other recreation facilities in the area; and help stabilizing the economy in the community." *Id.* at 1149.

[148] *See* Clark v. Nash, 198 U.S. 361 (1905) (holding that since the ditch enabled the individual to use the water on his land making his land valuable and fertile, the taking was for public use); Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947); *Smith*, 142 S.W.2d at 510–11.

[149] *Peavy-Wilson Lumber Co.*,31 So. 2d at 487.

[150] *Smith*, 142 S.W.2d at 510–11.

belt will be benefited."[151]

Because in irrigation cases the ultimate beneficiary is the entire community or sometimes even a large region, the incidental private beneficiaries are not prominent; thus, the courts rarely consider the incidental private beneficiaries in irrigation cases. However, the courts tend to be more concerned with such beneficiaries in mining, hunting, and fishing cases because in this case the population that receives the benefits is relatively small and identifiable. For example, in *W.S. Ranch Co. v. Kaiser Steel Corp.*, the court held that a coal mine, a private corporation, should not have the power of eminent domain because no public purpose or benefit exists in conferring public water to aid the coal mine.[152] In reaching its decision, the court concluded that the coal mining industry lacked "public character" after the court has carefully considered "the precise industry of coal mining."[153]

Therefore, while the courts consider irrigation to be a public use, they have inconsistently defined public use in hunting, fishing, and mining cases.[154] In deciding environmental cases the courts consider the most productive land use and are likely to question the private sector benefits, especially when no large public beneficiary such a community or a region benefits from takings.

The table below summarizes the findings in Part III with respect to: (1) the definition of "public use," (2) the government's role, and (3) unintended third-party beneficiaries.

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[151] *Id.* at 510.

[152] W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), *rev'd on other grounds*, 391 U.S. 593 (1968).

[153] *Id.* at 261–62.

[154] 26 AM. JUR. 2D, *EMINENT DOMAIN* §§ 72, 82, 83 (2004) (stating that conflicting authority exists as to whether property can be taken by eminent domain for mining and public hunting or fishing while the courts usually consider irrigation for public use).

| | **Definition of "public use" usually includes:** | **Government's role:** | **Unintended Third-Party beneficiaries:** |
|---|---|---|---|
| **Railroad Companies** | -Use by public<br><br>-Public Benefit<br><br>-Development of important destinations<br><br>-Future demand | -Government delegates takings to railroad companies<br><br>-Government heavily regulates railroad industry | -Railroad companies benefit directly<br><br>-Courts consider railroad companies as "incidental" unintended third-party beneficiaries |
| **Utility Companies** | -Interests of many<br><br>-Public necessity and dependence on utilities; utility does not provide commodity for private consumption | -Government encourages development of utility industry<br><br>-Government delegates takings to utilities companies<br><br>-Government heavily regulates utility industry | -Utility companies benefit directly<br><br>-Courts consider utility companies as "incidental" or unintended third-party beneficiaries |
| **Travel and Navigation Purpose** | -Use by public<br><br>-Potential, not actual, use matters | -Government plays an active role in takings<br><br>-Government focuses on economic development | -Indirect unintended third-party beneficiaries<br><br>-Courts consider unintended third-party beneficiaries not involved in takings as "incidental" |
| **Environmental Purpose** | -Irrigation constitutes public use because benefits entire | -Government plays active role in takings | -Courts consider unintended third party beneficiaries |

| | | | |
|---|---|---|---|
| | region; hunting, fishing, and mining cases often do not constitute public use | -Government focuses on local development; courts rely on productive land use analysis | who not involved in takings "incidental"<br><br>-Courts more concerned with unintended third-party beneficiaries in hunting, fishing, and mining cases than irrigation cases |

## IV. DISCUSSION: HISTORIC INCONSISTENCIES IN "PUBLIC USE" DOCTRINE AS APPLIED TO SLUM CLEARANCE, URBAN DEVELOPMENT, LOW-COST HOUSING, AND ECONOMIC DEVELOPMENT CASES

The comparison of slum clearance, elimination of urban blight, and economic development cases to railroad, utilities, travel, and environmental cases suggests that the slum clearance, elimination of urban blight, and urban development cases rely on a very expansive regional definition of public use[155] that is inadequate for protecting private property from powerful interest groups. The courts' focus on the productive use of the land[156] as opposed to economic development further makes the slum clearance, elimination of urban blight, and urban development cases more likely to be influenced by powerful interest groups. More importantly, similarly to railroads and utilities cases, the government delegates much power to developers who directly benefit from takings; however, unlike railroad and utility companies, the government does not regulate developers as extensively.[157] Therefore, slum clearance, elimination of urban blight, and economic development cases define and approach the public use issue in an inconsistent manner when compared to railroad, utilities, travel, and environmental cases.

### *A. Use by the Public Versus Regional Benefits to a Selected Few*

The slum clearance, elimination of urban blight, and urban development cases rely on an expansive public use definition. Many scholars have suggested that the industrial revolution led to the expansive

[155] *See supra* Part II.A.
[156] *Id.*
[157] *See supra* Parts II.A, III.A–B.

definition of public use where the public use is equated to economic "public good"[158] and that this approach is contrary to early strict due process interpretations of public use.[159] Interestingly, while almost all recent slum clearance, elimination of urban blight, and economic development takings cases rely on this expansive definition that equates public use to public good without requiring access to the public at large,[160] most railroad, utilities, and travel cases justify takings on the basis that the takings product would be accessible to the public at large.[161] Railroad, utilities, and travel cases stress the literal public use of the condemned properties as well as the goods that are produced as a result of the takings.[162] This literal "public use" presumes a public access that makes a takings product available to the public at large once the product is produced.[163] Only in irrigation cases do courts find that local benefits are sufficient.[164]

The environmental cases, in particular irrigation cases, have expanded this application a step further.[165] The courts in irrigation cases emphasize the local benefits[166] as opposed to benefits or access to the public at large as the courts in railroad, utilities, and travel cases emphasized.[167] In so doing, the courts have deviated even further from the original strict definition of public use. Many scholars have argued that this rationalization of public use makes takings more likely to be influenced by powerful local interests groups and encourages rent-seeking behavior.[168]

Therefore, the slum clearance, elimination of urban blight, and urban development cases more closely resemble irrigation cases than other categories as to how they define public use than railroad, utilities, and travel cases. By the nature of the use, slum clearance, elimination of urban

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[158] *See* McFarland*, supra* note 2, at 144–48; Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 344–46 (2001) ("[T]he public use clause no longer protects the property rights of minorities from majoritarian abuse."); Stephen J. Jones, *Trumping Eminent Domain Law: An Argument For Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 291 (2000) ("The industrial revolution, however, marked the gradual erosion of property rights in the latter half of the nineteenth century.").

[159] *See* McFarland, *supra* note 2, at 144–48; Werner, *supra* note 158, at 344–46; Benjamin D. Cramer, *Eminent Domain for Private Development – An Irrational Basis for Erosion of Property Rights*, 55 CASE W. RES. 409, 410–13 (2004) (observing that over time the Court replaced the earlier restrictive approach with a more expensive public benefits test); Jones, *supra* note 158, at 293–96.

[160] *See supra* Part II.A.

[161] *Supra* Parts III.A–C.

[162] *Id.*

[163] *Id.*

[164] *Supra* Part III.D.

[165] *Id.*

[166] *Id.*

[167] *Supra* Parts III.A–C.

[168] *See, e.g.*, McFarland*, supra* note 2, at 149–50 (illustrating how the land was transferred to Donald Trump to build a parking garage for the Trump Plaza Casino); Werner, *supra* note 158, at 344–46; Cramer, *supra* note 159, at 415–20 (describing municipal rent-seeking).

blight, and urban development are local.[169] Not surprisingly, interest groups' influence on local politics and takings is a serious consideration with many slum clearance, elimination of urban blight, and urban development takings[170] often leading to rent-seeking behavior.[171] In slum clearance, elimination of urban blight, and urban development cases, the courts rely on an unusually expansive definition of public use that equates public use and public good without requiring the benefits to be accessible to the public at large.[172]

### *B. The Nation's Economic Development Versus Productive Use of Land*

According to their local expansive definition of public use, the courts in slum clearance, elimination of urban blight, and urban development cases stress a productive use of land.[173] Stress on productive land use is relatively unusual and is relied upon only in irrigation cases.[174] Most other cases stress the nation's economic development as a motivation.[175]

Railroad, utilities, and travel cases rely on national economic development to justify the takings.[176] The courts in these cases argue that these sectors build infrastructure to allow the United States to develop economically.[177] Yet environmental cases, particularly irrigation cases, often rely on the productive land use argument.[178] But even in environmental cases, the courts are usually suspicious of a productive-use-of-land argument in hunting, fishing, and mining cases.[179] Moreover, many scholars have expressed a concern with productive land use analyses because such analyses often fail to account for all costs such as the "intangible emotional value of property."[180]

The slum clearance, elimination of urban blight, and urban development cases often rely on the productive land use argument, unlike railroad, utilities, and travel cases.[181] This relatively unusual approach is not satisfying as an expansive regional definition of public use because it

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[169] *See supra* Part II.A.
[170] *See, e.g.*, McFarland*, supra* note 2, at 149–50; Cramer, *supra* note 159, at 415–20.
[171] *See* Werner, *supra* note 158, at 351–56.
[172] *See supra* Part II.A.
[173] *Id.*
[174] *See supra* Part III.D.
[175] *See supra* Parts III.A–C.
[176] *Id.*
[177] *Id.*
[178] Though sometimes even environmental cases rely on economic development arguments. *See supra* Part III.D.
[179] *Id.*
[180] McFarland*, supra* note 2, at 151 (the analysis "is based on the faulty premise that property has only monetary value").
[181] *See supra* Part II.A.

makes it more likely that takings are not being driven by a concern for the public, but by those of a powerful interest group.

### *C. Direct Versus Indirect Unintended Third-Party Beneficiaries*

Numerous commentators have been concerned with private parties that benefit from takings because such private parties may constitute a powerful interest group that could gain considerably from takings at the public's expense.[182] This danger is even more prominent when the taking's direct beneficiary facilitates the takings. In general, the analysis above suggests that the courts are not comfortable with private third parties involved in takings directly benefiting from such takings.[183] In particular, while railroad and utility companies directly benefit from takings they facilitate,[184] in travel and environmental cases the third-party beneficiaries usually do not participate in takings.[185] Yet the government's heavy regulation of railroad and utilities industries assures that the takings procedure is properly executed and that the public's interests remain paramount.[186] Slum clearance, elimination of urban blight, and urban development cases involve direct benefits to those involved in the takings. Furthermore, as the government does not regulate developers nearly as heavily as it does railroad and utility companies, developers are more likely to consider their interests over those of the public.

In railroad and utilities cases, the railroad and utilities companies that are involved in takings are direct beneficiaries of the takings.[187] That is, the government authorizes the railroad and utility companies to carry out the takings for the railroads and the utility companies' purpose.[188] However, the government's heavy regulation of railroad and utility companies through various regulatory mechanisms for institutions such as natural monopolies[189] arguably counterbalances the influence of obvious self-interest on the part of railroad and utilizes companies.

In contrast, travel and environment cases involve indirect incidental unintended third-party beneficiaries, for example, the owner of a house who benefits more than others from a new road that leads to his or her

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[182] *See, e.g.*, *Eminent Domain – Nongovernmental Takings – Michigan Supreme Court Holds That Government Cannot Take Land to Develop a Private Office Park*, 118 HARV. L. REV. 1769, 1775 (2005) ("A more fundamental problem is the extent of accountability necessary to render a private entity worthy of receiving government-condemned land.").

[183] *See supra* Part III.A–B.

[184] *Id.*

[185] *See supra* Parts III.C–D.

[186] *See supra* Parts III.A–B.

[187] *Id.*

[188] *Id.*

[189] *Id.*

house.[190] The government does not heavily regulate the main takings participants in travel and environment cases as it does in railroad and utility cases.[191] In fact, for environmental cases, the courts are more concerned about unintended third-party beneficiaries in fishing, hunting, and mining than for irrigation cases because the former beneficiaries are more likely to participate in takings.[192] Thus, the courts are rarely concerned with unintended third-party beneficiaries in travel and environmental cases.

The slum clearance, elimination of urban blight, and urban development cases resemble railroad and utility cases as the private party that facilitates takings directly benefits from takings in both cases. However, unlike railroad and utility cases, the government in clearance, elimination of urban blight, and urban development cases does not regulate urban developers as heavily as it does railroad and utility companies. For example, imposing restrictions suitable for the regulation of a natural monopoly on urban developers is unheard of, and the government never sets developers' profits. Therefore, the developers who often execute takings are more likely to participate at the expense of public interest.

In light of the comparison to railroad, utilities, travel, and environment cases, the slum clearance, elimination of urban blight, and urban development cases are aberrational because they rely on an unusually expansive definition of public use. This expansive definition is arguably dated and is contradictory in its application, given that we no longer live during the industrial revolution. Moreover, in slum clearance, elimination of urban blight, and urban development cases, the government is more concerned with the productive use of land than national economic development and does little to regulate developers who often facilitate the takings and enjoy substantial benefits from them. Consequentially, in light of the significant danger that the powerful interest groups pose, the Court's insistence on deferring to legislation in *Kelo* on defining blight, determining public use, and determining necessity is surprising.

## V. CLEAR "PUBLIC USE" TEST WHERE THE JUDICIARY HAS A CLEARLY DEFINED ROLE AND ABILITY TO REVIEW LEGISLATIVE DETERMINATIONS

Since the expansive industrial revolution-based definition of public use is unnecessary, outdated, and arguably unsupported,[193] order to protect the

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[190] *See supra* Parts III.C–D.

[191] *Id.*

[192] *See supra* Part III.D.

[193] *See* Jones, *supra* note 158, at 291–97; Sara B. Falls, *Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After Hawaii Housing Authority v. Midkiff*, 44 WASHBURN L.J. 355, 369–70 (2005) ("The text of the Takings Clause in the Fifth Amendment does not support overly broad interpretations of the public use requirements.").

institution of private property, which is closely intertwined with one's personal rights,[194] this article suggests that the courts must engage in a three-step strict public use analysis when private parties directly benefit from takings.[195] In so doing the courts would merely review the important steps in the legislative process and not the substance of takings.[196]

Traditionally the court has analyzed eminent domain cases by considering: (1) whether the government action constitutes a taking at all; (2) whether the use is for a public purpose; and (3) whether the government has provided just compensation.[197] To adequately deal with the second prong of public use, the court must strictly and separately analyze legislative determination as to (1) what constitutes blight, (2) what constitutes a narrow public use definition that includes public access, and (3) what property was necessary for taking to remedy the blight in cases where blight has been determined to exist and the private party that participates in takings benefits directly. This approach to public use ensures that the neutral evaluator, the judge,[198] acts as a check on private interest that could jeopardize the public interest.[199] Moreover, clearly defining and separating the public use analysis into three separate steps, as opposed to dealing with an amorphous "public use" concept that can be twisted to suit the interests and circumstances of an interested third party, ensures that each taking is thoroughly and systematically reviewed.

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[194] Many scholars have suggested a link between private property and personal rights. *See* McFarland*, supra* note 2, at 151–59 ("This false dichotomy between personal right and property rights is even more perplexing in light of the founders' understanding of the inseparability of the two rights."); Jones, *supra* note 158, at 309 ("The judicial distinction between personal rights and property rights is delusive and erroneous.").

[195] *E.g.*, slum clearance, elimination of urban blight, and urban development cases; *see supra* Part IIA.

[196] Courts often analyze the fairness of the process as opposed to substantive policy issues. *See, e.g.*, Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 436 (1993) ("As courts have come to recognize . . . [the] reality in the course of applying the fairness test, they have shifted the fairness inquiry from substance to process.").

[197] Scholars have observed that the "just compensation" requirement alone is insufficient to safeguard private property. *See* Cramer, *supra* note 159, at 429–30.

[198] While some argue that the legislature is in the best position to efficiently determine public use, many scholars have pointed out that "the Constitution does not exist to promote efficiency." Cramer, *supra* note 159, at 428. Moreover, the meaningful judicial review "ensures compliance with constitutional limitations on government action" and maintenance of separation of powers. *Id.*; *see also* Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409, 424–44 (1983) (arguing for an independent judicial determination as to whether the public use requirement has been met).

[199] The most common safeguards for a delegation of governmental power would be a lack of any private interest in the party to whom the power was delegated, a parallel interest between the delegate and the public, and for the delegate to include all those affected by the decision. Other safeguards include state agency review, liability in damages to those harmed by a misuse of the delegated power and the requirement that the delegate be specially qualified to act pursuant to basically fair procedures. Taylor, *supra* note 4, at 1072 (suggesting Lawrence Berger's two-part analysis for the court to ensure that private actors are held publicly accountable to the same degree as the public officials) (relying on Lawrence Berger, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986)).

First, as discussed above, scholars have suggested that there is no consistency as to how the legislature determines whether a given area constitutes a blighted area,[200] and thus much room exists for abuse if the courts were completely defer to the legislature on this issue as the Court in *Kelo* suggested. However, if the court were to apply some minimum objective definition of blight, that is, if the court were to establish a floor as to what constitutes blight, or evaluate the process of how the determination of blight was reached, the opportunity for private third parties' abuse would be substantially diminished. For example, a more objective standard would require deteriorating conditions for a certain number of years, repeated but failed honest government attempts to remedy a blight, documented extensive migration from blighted area, and so on.[201] Such objective standards are needed due to

> the effect that . . . [taking] may have upon poor people. Not all neighborhoods, not all poor neighborhoods are blighted. But the one thing that all poor neighborhoods share in common is that they don't produce much in the way of tax revenue, so you're going to put poor neighborhoods and working class neighborhoods . . . in jeopardy . . . . And that's why so many organizations are concerned about the rights of senior citizens and the rights of minorities and poor folks . . . .[202]

Thus, if the government has to meet at least a minimal burden as to what constitutes a blighted area, the room for abuse and rent-seeking would be substantially reduced.

In *Kelo*, it is unclear how extensive New London's process was in determining whether the area at issue was blighted. While it is true that the area has consistently under-performed in terms of economic return to the city, it is unclear whether the city attempted to solve the economic problems in good faith, or at all, for that matter. To evaluate whether the existence of the blight decision was reached in good faith, the Court should have forced the city to produce the evidence and documentation of extensive and repeated good faith efforts to remedy the economic problems that have repeatedly failed. For example, the city might produce the

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[200] *See* Pritchett, *supra* note 33 (tracing the history and rhetoric of urban renewal movement from early 1800s to present); *see also* Jennifer J. Kruckeberg, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 573–78 (2002) (arguing that future blight is definitely inadequate basis for takings).

[201] *See* Kruckeberg, *supra* note 200, at 573–78 (urging the courts to either apply a heightened standard to review already blighted conditions or require existence of multiple conditions to define a blighted area).

[202] Transcript of Oral Argument, Kelo v. New London, 125 S. Ct. 2655 (2005) (No. 04-18), *available at* 2005 U.S. TRANS. LEXIS 11, at *50–*52 (rebuttal argument by Scott G. Bullock on behalf of petitioners).

evidence of failed attempts to attract businesses to the area even after substantial tax breaks have been offered. The Court should have also analyzed how the city determined that the area was blighted. That is, were interested private parties such as NLDC part of the process of determining whether the areas was blighted or did the independent special committee, agency, or some other neutral third party determine that the area was blighted? Clearly, relying solely on NLDC's evaluation of the area and recommendations is problematic because of the conflicts of interests that exist since NLDC benefits from the development project.

Second, many scholars have suggested that given the inherent interdependence between the property rights and personal rights, property rights must be deemed "fundamental enough" to be protected by "strict scrutiny"[203] especially when the private party benefits substantially as is the case in *Kelo*. Thus, the courts must systematically review legislative public use determinations.[204] This is especially the case when private parties who directly benefit from takings execute the takings. In these situations, the courts must use a strict definition of public use—that is, the takings are necessary for national economic development or the goods produced from the takings are accessible to the public at large.[205] In *Kelo*, the analysis of the benefits did not include the losses that the displaced would experience. Those forced to relocate businesses will suffer loss of revenue before being able to relocate and start business again; those forced to leave their dwellings may not be able to find another place to live with what they received in compensation. The elimination of a "blighted" residential area without making suitable arrangements for those displaced is something that the courts must consider, as it must the displacement of businesses and the destruction of a community identity. The courts should also carefully balance other factors such as the value of land that is not incorporated into the market price of land, land uniqueness,[206] possibility of ulterior motives,[207] or the community's interest in proposed use.[208]

In *Kelo*, it is unclear whether the public benefits from the takings; at

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[203] *E.g.,* McFarland*, supra* note 2, at 156–57 (pointing out that other Fifth Amendment protections are afforded a strict scrutiny); Cramer, *supra* note 159, at 422–27; Jones, *supra* note 158, at 311–14.

[204] McFarland*, supra* note 2, at 159–61 (advocating that the court takes into account "1) the importance of the right at issue; 2) the extent of the deprivation; 3) the importance of the state interest being advanced; and 4) the extent to which the means used fit the state interest."); Werner, *supra* note 158, at 357 ("Meaningful application of Public Use Clause can reduce the value of the condemnation decision by limiting the power of government officials to transfer wealth and dispense favors."); Kruckeberg, *supra* note 200, at 578–81 (arguing that the courts are capable to perform simple economic inquiries as to whether a public will benefit from a particular public-private taking).

[205] *See, e.g.*, Cramer, *supra* note 159, at 425–36 (urging the court to adopt a public use standard in which "the governmental interest be 'compelling,' rather than having to be 'required' or 'necessary'").

[206] *See* Kruckeberg, *supra* note 200, at 569–70.

[207] *See id.* at 570–72.

[208] Mansnerus, *supra* note 198, at 449–50.

the very least, it is unclear whether the benefits to the private sector are not greater than the benefits to the public. The Court should have analyzed what factors the legislature considered in determining whether the taking was for public use. Did the legislature consider that some people have resided for a long time or have been born there in the area at issue? How likely is it that NLDC, a private corporation with a private board of directors that is leasing land to a private developer for ninety-nine years for $1 a year,[209] has ulterior motives? Here, it would be useful for the court to know whether the legislature conducted open and public hearings; who had an opportunity to testify; whether NLDC or any other private party controlled the process; whether the determination of public use was fair; whether reputable experts were consulted; what concrete benefits the legislature expected from takings; what concrete sacrifices or losses the legislature expected from takings; and what fair process the legislature used to balance the competing factors. In essence, there should be a separation between those who propose actions involving eminent domain and those who approve these actions. A possible solution beyond the role of the courts is the presenting of the action of eminent domain to the voting populace, who arguably would be the most affected by such an action. A public referendum would provide the most suitable forum for such actions, since it would provide the opportunity to balance the infringement of the rights of the potentially displaced against the possible benefits accruing to the community. Ultimately, in considering the validity of an eminent domain judgment, the courts should examine as well the participation of the public and not only the governmental bureaucracy in evaluating the degree to which the public benefited.

Third, no systematic way exists for the courts to determine what property is necessary to be taken to address the issue of blight.[210] The issue is most important when private-public taking occurs with property that is not even located in the blighted area.[211] In such cases the court must rely on a heightened standard to determine whether the takings are truly necessary or if there are other ways to address the problems in the blighted area because, as discussed above, the potential abuse by private third-party beneficiaries is large.

In *Kelo*, the Court should have considered whether the city engaged in a fair process of determining how extensive an area was justified for takings to improve the economics of the blighted area. The city should have considered whether, for every unit of land it takes, the benefits to the

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[209] Transcript of Oral Argument, Kelo v. New London, 125 S. Ct. 2655 (2005) (No. 04-18), *available at* 2005 U.S. TRANS. LEXIS 11, at *50–*51 (rebuttal argument by Scott G. Bullock on behalf of petitioners).

[210] *See supra* Part II.B.

[211] *Id.*

public outweigh the costs. It may well have been that to improve New London's situation required only minimal taking and not the entire blighted region needed to have been taken. In such cases, the Court must evaluate what steps the city would follow in educating itself about the extent of takings necessary, evaluate different options, and consider the costs and benefits of such options. The Court should have looked at whether the city consulted reputable disinterested experts, conducted public hearings, and made decisions independently from private influences. In *Kelo*, the city should have done an especially careful inquiry in New London because the takings at issue involved a non-blighted area where Kelo's and Kelo's neighbors' property is located. Since the takings of private property outside of a blighted area are more likely to only marginally contribute to economic development of a blighted region, the city was more likely to be influenced by the interests of private actors, and takings are likely to be more costly since non-blighted area residents are more likely to invest into their property. Thus, the city should have demonstrated that it was even more careful in evaluating the takings in non-blighted area.

Some scholars have suggested a seemingly higher standard as to when public-private takings should be permissible.[212] For example, Michael J. Coughlin suggested that private-public takings should be permissible only "(1) where a 'public necessity of the extreme sort' requires a public-private taking, and (2) where condemned property in private hands remains subject to public oversight."[213] The standard, however, does not solve the current problem. First, "public necessity of the extreme sort" is a term as equally ambiguous as "public use," "public purpose," "public good," or "public utility." Substituting one ambiguous term for another does not ensure that the taking where a private party substantially benefits is fair. Second, public oversight is costly and contradicts the current deregulation trend.[214] Third, it may be desirable to have private-public takings as the private sector may be more efficient in completing certain tasks. Public necessity of the extreme sort and public oversight may deter many such legitimate projects. Therefore, the proposed standard is too ambiguous and may deter legitimate public-private takings. Since the core problem with private-public takings is the possibility of corruption and rent-seeking behavior, a thorough judicial review, while it would impose additional administrative costs in the form of increased judicial reviews, would serve as another safeguard to ensure that that the proposed private-public takings is in the public interest and not merely motivated by rent-seeking.

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[212] *See, e.g.*, Michael J. Coughlin, *Absolute Deference Leads to Unconstitutional Governance: The Need For a New Public Use Rule*, 54 CATH. U.L. REV. 1001 (2005).

[213] *Id.* at 1004.

[214] *See supra* Part III.D.

## VI. CONCLUSION

In tracing the logic behind the slum clearance, elimination of urban blight, and economic development cases and comparing them to railroad, utilities, travel, and environmental cases, it is clear that the courts have utilized an inconsistent approach to public use where the source of the inconsistency arises when the economic interests of private parties and those of public entities with the power to authorize eminent domain coincide. Recent examples of eminent domain where a public party authorizes the taking over of private property for the use of another private party suggests that the essential nature of eminent domain takings has been transformed from one where there is a clear public benefit in terms of increased utility to one where the benefit is motivated by purely financial considerations. More significantly, the era of the exercise of eminent domain for social considerations, for example, the taking over of private property for the creation of a (at least nominally) real benefit as in the creation of low income public housing ahs been supplanted by the destruction of housing that is by definition affordable with nothing compensate for it. Consequently, the public use requirement has become obsolete because it fails to provide a reliable check against arbitrary takings. In order to protect the public from rent-seeking, the courts must employ a proposed three-step public use analysis. Thus, the courts must determine whether the legislative process at the following three important steps of condemnation was fair: (1) determination of blight conditions, (2) determination of public use and weighting of all costs and benefits, and (3) determination of necessity, especially when the property at issue is located outside of the blighted region. The courts' scrutiny of important legislative steps in takings will lead to legislative takings that are fair and are less likely to be dictated by self-interested private parties.