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RECONCILING ORIGINALISM AND THE HISTORY OF THE PUBLIC USE CLAUSE

Emily A. Johnson*

The history of the Fifth Amendment's Takings Clause is virtually nonexistent. For at least the last century, the U.S. Supreme Court has interpreted its public use language broadly, allowing takings for the purposes of rectifying urban blight, facilitating land redistribution, and most recently, in Kelo v. City of New London, promoting economic benefit. In that case, Justice Thomas dissented vigorously, arguing that the Kelo Court had strayed from the original meaning of public use and urging it to return to requiring actual use by the public when property is condemned.

In light of Justice Thomas's argument that the Court had abandoned the original meaning of the Takings Clause, this Note considers whether historical evidence regarding original meaning provides a coherent limiting principle. Particularly in the area of property expropriations, the historical record does not indicate that the founding generation had a concrete conception of the extent to which the right should be protected. As a result, scholarship on both sides of the public use debate presents the best evidence supporting its particular thesis, but no piece satisfactorily incorporates all of the historical evidence. In light of these considerations, this Note concludes by proposing how to reconcile originalism as a method of Constitutional interpretation for a text with an essentially unattainable original meaning and over a hundred years of case law divorced from an originalist analysis.

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INTRODUCTION

“[Justice Thomas] doesn’t believe in stare decisis, period. If a constitutional line of authority is wrong, he would say let’s get it right.”

–Justice Scalia¹

Justice Thomas’s dissent in *Kelo v. City of New London*² perfectly illustrates Justice Scalia’s aforementioned observations. For the last century, the U.S. Supreme Court has consistently interpreted the public use language of the Fifth Amendment’s Takings Clause³ broadly.⁴ In *Kelo*, Justice Thomas advocated abandoning this precedent and returning to requiring use by the public when property is condemned, his view of the Clause’s original meaning.⁵ In light of Justice Thomas’s argument that the *Kelo* majority abandoned the original meaning of the Clause, this Note asks if originalism provides a satisfactory methodology for interpreting public use, an area where even purported originalists (like Justice Scalia) are not consistently originalist.⁶ Finally, this Note addresses the viability of originalism as a method of Constitutional interpretation where the original meaning of the text is essentially unattainable⁷ and in which over a century of case law has refrained from an originalist analysis.⁸

Before *Kelo*, the Court unanimously decided *Berman v. Parker*⁹ and *Hawaii Housing Authority v. Midkiff*,¹⁰ earlier cases addressing the

1. Jonathan Ringel, *Thomas Bio Reveals Surprising Philosophy*, DAILY REP., Aug. 2, 2004, at 1.

2. 545 U.S. 469 (2005).

3. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V (emphasis added). This Note refers to the language “for public use” as the Public Use Clause.

4. See *infra* Part II.A–B.1. This Note refers to a broad interpretation of the Public Use Clause as an interpretation that includes public benefit in the idea of public use and a narrow interpretation as literally requiring use by the public.

5. *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting). No other Justice joined Justice Thomas’s dissent. *Id.* at 505; see also *infra* note 130 and accompanying text (discussing the inconsistencies in Justice Thomas’s definition of public use, as he alternated between requiring that the public actually use the taken property and requiring only that the public have a legal right to use the property). This Note focuses on the actual use requirement, as the legal right to use property is a less stringent requirement that can overlap with purely private takings. See *infra* note 130. For a detailed discussion of Justice Thomas’s dissent, see *infra* Part II.B.3.

6. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 858 (1995) (“[E]ven originalists such as Black and Scalia are not originalists when it comes to the Takings Clause.”); see also *infra* notes 446–49 and accompanying text (explaining that the doctrine of compensation for regulatory takings is not based on the original meaning of the Takings Clause).

7. See *infra* Parts III–V.

8. See *infra* Part II.A–B.1 (showing that the last century of public use jurisprudence has relied on precedent, not a textual, structural, or historical analysis of the Takings Clause).

9. 348 U.S. 26 (1954). In *Berman*, eight members of the Court unanimously held that property could be taken for the public purpose of rectifying urban blight. *Id.* at 36. Justice Robert Jackson did not participate in the decision as he passed away prior to oral argument.

limitations of the Public Use Clause. By allowing takings for the rectification of urban blight in *Berman* and the facilitation of land redistribution in *Midkiff*, the Court held that these public benefits satisfied the Public Use Clause. The Court continued development of the public benefit idea in *Kelo* by holding that takings for economic development also satisfied the Clause's strictures.¹¹ Unlike the decisions in *Berman* and *Midkiff*, the *Kelo* ruling ignited a firestorm of controversy from all sides of the political spectrum.¹² Even Justice John Paul Stevens, the author of the majority opinion, "issued something like an apology."¹³ Legally, though, *Kelo* does not deviate from Supreme Court public use precedent.¹⁴

The state's power to take private property through eminent domain highlights the tension between individual rights and government power.¹⁵ In response to *Kelo*'s four vigorous dissenters, one scholar noted, "[T]here are very few instances of Justices so directly challenging the philosophical trend of the Court's decisions."¹⁶

See *The Life of Robert H. Jackson*, ROBERT H. JACKSON CENTER, <http://www.roberthjackson.org/the-man/> (last visited Sept. 23, 2010).

10. 467 U.S. 229 (1984). In *Midkiff*, Justice Sandra Day O'Connor, writing unanimously for eight members of the Court, held the Fifth Amendment did not prohibit takings for the purpose of eliminating concentrated property ownership. *Id.* at 245. Justice Thurgood Marshall did not participate in the *Midkiff* decision. *Id.* Following *Midkiff*, Justice O'Connor also dissented in *Kelo*, arguing that the majority's decision effectively removed the Public Use Clause from the Fifth Amendment. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting). For a discussion of Justice O'Connor's dissenting opinion, joined by Chief Justice William Rehnquist and Justices Scalia and Thomas, see *infra* Part II.B.2.

11. *Kelo*, 545 U.S. at 489–90.

12. Adam Liptak, *Case Won on Appeal (To Public)*, N.Y. TIMES, July 30, 2006, at WK3 ("The decision provoked outrage from Democrats and Republicans, liberals and libertarians, and everyone betwixt and between."); see also Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1413 (2006) ("Everyone hates *Kelo*.").

13. Liptak, *supra* note 12.

14. See Richard A. Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151, 164 (2009) ("[T]here is little doubt that the decision is consistent with . . . *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*."); John M. Zuck, Note, *Kelo v. City of New London: Despite the Outcry, the Decision is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 229–30 (2007) ("The *Kelo* decision was correct despite the criticism [F]rustration should be aimed at the entire history of eminent domain decisions . . . not with *Kelo*, a decision that did not itself change or expand the law."); see also Part II.A (discussing pre-*Kelo* public use jurisprudence).

15. See, e.g., James W. Ely Jr., "Poor Relation" Once More: *The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 53 ("Eminent domain is one of the most intrusive powers of government because it compels individual owners, without their consent, to relinquish their property."). This conflict between the individual and the state has been central throughout American history. See *infra* Part IV.A.1–2 for a discussion of how classical liberalism and republicanism, philosophies that influenced early Americans, interpreted the balance between protecting individual rights while allowing for necessary state interference.

16. Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 47–48 (2006).

For Justice Thomas, originalism provides the grounds for a total reexamination of precedent.¹⁷ In response to his *Kelo* dissent, this Note asks whether historical evidence regarding the meaning of the Public Use Clause at the time of its drafting and ratification provides a coherent limitation.¹⁸ To do so, this Note begins by examining original meaning as a method of constitutional interpretation.¹⁹ Next, this Note outlines the last century of Supreme Court public use jurisprudence, highlighting the methodologies employed by the Justices.²⁰

The following three parts detail the history of “public use,” focusing on the sources originalists review to discover the original meaning of a phrase. As a starting point, this Note examines the etymology of the phrase and the structure and placement of the Takings Clause in the Bill of Rights.²¹ Next, this Note details the drafting and ratification of the Clause, focusing in particular on the philosophies of the eighteenth century political climate and the realities of early America.²² This Note then explores how courts first interpreted public use restrictions like the one at issue in *Kelo*.²³ Throughout, this Note cites legal and historical scholarship to show that opinions vary considerably as to whether the Public Use Clause originally provided an occasional limit²⁴ or a literal limit²⁵ to the takings power.

Finally, this Note touches on another area of eminent domain law, regulatory takings, where the Supreme Court has abandoned using original meaning to interpret the Takings Clause.²⁶ This Note concludes that the absence of a satisfactory interpretation of the original meaning of “public use” cautions against using a strict originalist interpretation, like the one Justice Thomas proposed in his *Kelo* dissent.²⁷ Indeed, this Note suggests that originalist interpretation in a historical grey area may even be intellectually disingenuous because it fails to connect modern jurisprudence with “what the American People meant and did when We ratified and amended the document.”²⁸ This Note closes by proposing that even though originalism is not an appropriate mode of interpretation in this instance, the opinions in *Kelo* and its predecessors nonetheless remain faithful to the

17. See *infra* Part I for a discussion of originalism as a judicial philosophy. This Note focuses on the school of originalism associated with ascertaining the original public meaning of the constitutional text at issue, not the original intent of the founders. See *infra* notes 30–32 and accompanying text (clarifying the differences between original meaning and original intent).

18. Historical analysis is relevant to the question of original meaning because, along with text and structure, history and context can reveal the meaning of a particular clause. See *infra* notes 197–199 and accompanying text.

19. See *infra* Part I.

20. See *infra* Part II.

21. See *infra* Part III.

22. See *infra* Part IV.

23. See *infra* Part V.

24. See *infra* Parts III.B, IV.C, V.B.

25. See *infra* Parts III.C, IV.D, V.C.

26. See *infra* Part VI.A.

27. See *infra* Part VI.B.

28. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000); *infra* Part VI.B.

ideals of early Americans, thereby fulfilling one of the methodology's key goals.²⁹

I. ORIGINALISM

Part I examines the judicial philosophy of originalism. In particular, it explains how judges uncover the original public meaning of constitutional text, a methodology distinct from the branch of originalism focused on ascertaining the founders' original intent.³⁰ Indeed, original intent has been criticized for being an indeterminate and speculative exercise, as well as a practice antithetical to the framers' actual intent.³¹ These criticisms of original intent, however, do not discredit the school of originalism associated with the search for original meaning.³² Accordingly, Part I discusses the tools originalist jurists and scholars employ in practice, explains both the criticisms and benefits of the methodology, and touches on the relationship between originalism and *stare decisis*.

Originalism as a mode of constitutional interpretation is closely associated with the approaches taken by current Supreme Court Justices Scalia and Thomas, as well as other academics and commentators like former Judge Robert Bork.³³ While many associate originalism with a more conservative philosophy, be it judicial or political, there are many politically liberal scholars, like Professor Akhil Amar, who advocate for an originalist approach to Constitutional interpretation.³⁴

29. See *infra* Part VI.B; see also *infra* note 43 and accompanying text (explaining that originalism connects modern jurisprudence to the decisions the founding generation made when drafting the Constitution and Bill of Rights).

30. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7–11 (1996) (clarifying the differences between original meaning and original intent). Examining other methods of Constitutional interpretation is beyond the scope of this Note. Moreover, in practice judges frequently employ a mix of interpretive techniques. As this Note uses the purely originalist approach of Justice Thomas's *Kelo* dissent as a starting point for inquiry into the limitations of the philosophy, actual judicial practice also exceeds the scope of discussion.

31. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 496–97 (2007) (“[T]he original understanding was that original understanding was irrelevant.” (citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985))).

32. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) (“[T]he critics are wrong in believing that in discrediting intentionalism, they discredit originalism. The relevant inquiry must focus on the public understanding of the language when the Constitution was developed.”).

33. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); Amar, *supra* note 28; Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION]; Antonin Scalia, *Foreword to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi, ed., 2007) [hereinafter ORIGINALISM]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

34. Treanor, *supra* note 31, at 491.

Proponents of this approach seek to ascertain the original meaning of Constitutional text.³⁵ Specifically, the original meaning scholars and judges seek is “how the words used in the Constitution would have been understood at the time [of the document’s drafting and ratification].”³⁶ To uncover this meaning, an originalist examines the definitions of individual words in the text,³⁷ the structure of the Constitutional clause, and all relevant history—such as the ratification debates, tracts like *The Federalist*, contemporary treatises, early judicial interpretations, and the like.³⁸

Proponents of originalism argue that it constrains judicial decision making by anchoring it to a set of rules and a distinct methodology—textual, structural, and historical analysis—thus limiting the influence of an interpreter’s personal beliefs.³⁹ For example, Justice Scalia defends originalism by explaining that “[w]ords do have a limited range of meaning,” insisting that “no interpretation that goes beyond that range is permissible.”⁴⁰ He does admit, though, that originalists may not always agree on a single interpretation.⁴¹

35. See, e.g., BORK, *supra* note 33, at 144 (“What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment. . . . All that counts is how the words used in the Constitution would have been understood at the time.”); Scalia, A MATTER OF INTERPRETATION, *supra* note 33, at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

36. BORK, *supra* note 33, at 144.

37. Critically examining the text of the Constitution itself, a technique some refer to as textualism, is one of the key tools scholars use to discover the original meaning of the document. Amar, *supra* note 28, at 28–29 (“[T]extual analysis dovetails with the study of enactment history and constitutional structure. The joint aim of these related approaches is to understand what the American People meant and did when We ratified and amended the document.”). Although some scholars refer to the term “textualism” more broadly as the branch of originalism associated with the search for original meaning, see Treanor, *supra* note 31, at 496, this Note refers to textualism as a method by which the original meaning may be discovered through an examination of the definition and placement of words.

38. See BORK, *supra* note 33, at 165; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 553 (1994) (describing a four-step methodology for ascertaining original meaning); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493–95 (2005) (noting interpreters at the time of the founding would have looked to factors like “text, purpose, structure, and history”); see also STEPHEN BREYER, ACTIVE LIBERTY, INTERPRETING OUR DEMOCRATIC CONSTITUTION 7–8 (2005) (noting all judges use these same basic interpretive tools but place differing levels of emphasis on each).

39. David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 299–300 (2005); Treanor, *supra* note 6, at 856.

40. Scalia, A MATTER OF INTERPRETATION, *supra* note 33, at 24; see also Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 823 (1999) (explaining that the interpretation harmonizing ambiguous text with the rest of the Constitution should be preferred).

41. Scalia, A MATTER OF INTERPRETATION, *supra* note 33, at 45 (“I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.”). But see Monaghan, *supra* note 32, at 726

Proponents also argue that originalism prevents the judiciary from exerting power belonging to other branches of government.⁴² Further, by interpreting the Constitution in accordance with the original meaning of the text to the founding generation, originalism connects modern judicial interpretation with decision making at the time of the adoption of the Constitution and Bill of Rights.⁴³

Critics, on the other hand, point out that judicial interpretation has always been, at least in part, an exercise of discretion.⁴⁴ While advocates of originalism assert that it depoliticizes interpretation, Justice William Brennan disagreed, claiming that it ignores political and social reality: “Those who would restrict claims of right to the values of 1789 . . . turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.”⁴⁵

Critics of originalism also note that the Constitution does not claim its text is the sole point of reference in interpreting its guarantees.⁴⁶ Nor, they argue, did the framers explain how the Constitution should be interpreted or whether its meaning should be frozen at the time of the founding.⁴⁷ Finally, for purely pragmatic reasons, these critics insist that searching for original meaning is an intellectually difficult and indeterminate process that “leaves too many things too wide open and suppresses too many important considerations.”⁴⁸

The relationship between original meaning and stare decisis can be tricky for originalists.⁴⁹ For example, a longstanding interpretation of a particular

(“[O]riginalism must refer to an understanding concrete enough to provide a real and constraining guidance.”).

42. See Monaghan, *supra* note 32, at 723. Professor Alexander Bickel famously termed this ability of unelected judges to overturn legislative acts passed by the prevailing majority the “counter-majoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

43. Monaghan, *supra* note 32, at 723; Treanor, *supra* note 6, at 856; see also RAKOVE, *supra* note 30, at 9 (“[T]he argument that the original meaning, once recovered, should be binding . . . insists that original meaning should prevail—regardless of intervening revisions, deviations, and the judicial doctrine of *stare decisis*—because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787–88.”).

44. See Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 33, at 49, 59.

45. Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *ORIGINALISM*, *supra* note 33, at 55, 59.

46. See BREYER, *supra* note 38, at 117; Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 33, at 65, 77–78.

47. See BREYER, *supra* note 38, at 117; Tribe, *supra* note 46, at 77–78.

48. David Strauss, Professor, The University of Chicago Law School, Panel on Originalism and Precedent at the 2005 Federalist Society Lawyers Conference (Nov. 12, 2005), in *ORIGINALISM*, *supra* note 33, at 217, 218, 220 [hereinafter Strauss Remarks] (“[I]t is very, very hard to do originalism right, even when you have every incentive to do it right, and the chances of getting it wrong—even in something like ideal circumstances, the chances of getting it wrong are very great.”); see also BREYER, *supra* note 38, at 124 (noting that text, structure, and history often fail to provide objective guidance).

49. See Monaghan, *supra* note 32, at 727. Stare decisis is defined as, “The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY 1537 (8th ed. 2004).

Constitutional clause may vary from its original meaning.⁵⁰ Originalists as a group are not always strict about when original meaning should prevail over precedent. While most accept a version of stare decisis,⁵¹ others argue there is no Constitutional text mandating that precedent should always triumph.⁵² Professor Steven Calabresi argues that, for policy reasons, following a strict rule of stare decisis would make it difficult to correct Supreme Court decisions due to the practical difficulties of amending the Constitution.⁵³

On the other hand, Professor David Strauss takes the opposite position—that precedent is a better limiting principle for judicial overreaching than original meaning—because he believes moral and social judgments inevitably enter judicial decision making.⁵⁴ Judges who rely on precedent must be candid about when personal beliefs enter an opinion, whereas originalists, he argues, “must insist that all they are doing is implementing judgments made by someone else.”⁵⁵ Further, relying on precedent demonstrates respect for the rule of law, shows judicial restraint, and illustrates the idea that important decisions should be made by elected representatives.⁵⁶

In practice, originalism is only one way to approach interpreting the Constitution. In *Kelo*, however, Justice Thomas’s dissent squarely rejected precedent in favor of original meaning, thereby providing a rare opportunity to examine how originalism and precedent interact when the historical record is sparse and frequently contradictory.⁵⁷

50. See, e.g., Monaghan, *supra* note 32, at 727–39 (citing current interpretations of civil liberties and structural issues like federalism, the separation of powers doctrine, and the power of the presidency as instances where “the existing constitutional order is at variance with what we know of the original understanding”).

51. See Tribe, *supra* note 46, at 82; see also Akhil Amar, Professor, Yale Law School, Panel on Originalism and Precedent at the 2005 Federalist Society Lawyers Conference (Nov. 12, 2005), in ORIGINALISM, *supra* note 33, at 210, 215 (proposing that, like the presumption of a statute’s constitutionality, there should be a presumption that the Court will follow its precedent).

52. Steven G. Calabresi, Professor, Northwestern Law School, Panel on Originalism and Precedent at the 2005 Federalist Society Lawyers Conference (Nov. 12, 2005), in ORIGINALISM, *supra* note 33, at 199, 200 [hereinafter Calabresi Remarks]; see *infra* note 158 (quoting Justice Thomas as saying that original meaning should prevail over precedent). Originalists of this view point out that the Supremacy Clause makes the Constitution the supreme law of the land. *Id.* But see Thomas W. Merrill, Professor, Columbia Law School, Panel on Originalism and Precedent at the 2005 Federalist Society Lawyers Conference (Nov. 12, 2005), in ORIGINALISM, *supra* note 33, at 223, 224 [hereinafter Merrill Remarks] (arguing that starting from an originalist interpretation leaves no room for stare decisis at all).

53. Calabresi Remarks, *supra* note 52, at 206–07.

54. See Strauss Remarks, *supra* note 48, at 220–22; Strauss, *supra* note 39, at 301.

55. Strauss, *supra* note 39, at 301.

56. See Merrill Remarks, *supra* note 52, at 223–24; Monaghan, *supra* note 32, at 748. While Constitutional text and statements of the framers do appear in opinions, studies show that approximately eighty percent of the authorities cited by courts are other precedents. Merrill Remarks, *supra* note 52, at 224–25.

57. See *infra* Parts III–V.

II. RECENT SUPREME COURT PUBLIC USE JURISPRUDENCE

Part II focuses on the last century of Supreme Court public use jurisprudence. It begins by briefly examining cases the *Kelo* majority cited when it held that public benefit from economic development satisfied the Public Use Clause.⁵⁸ Notably, these pre-*Kelo* cases interpreted public use broadly by relying on precedent, not by engaging in the textual, structural, or historical analyses associated with an originalist approach. Part II closes by reviewing the *Kelo* majority opinion, as well as Justice O'Connor's and Justice Thomas's dissenting opinions,⁵⁹ focusing on the interpretive methods guiding each of the analyses.⁶⁰

A. Pre-*Kelo* Jurisprudence

When it upheld the constitutionality of takings for the purpose of economic development, the *Kelo* majority relied on earlier decisions interpreting the Public Use Clause.⁶¹ Beginning near the turn of the twentieth century,⁶² the Court upheld takings without engaging in a historical analysis of the original meaning of the Clause.⁶³ The early public use cases are particularly interesting for the historical context in which they arose. Despite the post-Civil War focus on individual rights,⁶⁴ the Court at the time allowed takings where the expropriation benefited the community at large and disadvantaged individual landowners.

In *Fallbrook Irrigation District v. Bradley*,⁶⁵ for example, the Court upheld a law providing municipal corporations the ability to condemn land

58. See *infra* Part II.A.

59. Justice Kennedy's fifth vote concurrence in *Kelo* focuses on how to determine if a justification for the use of eminent domain is pretext. See *Kelo v. City of New London*, 545 U.S. 469, 490–93 (2005) (Kennedy, J., concurring). As Justice Kennedy does not weigh in on original meaning, discussion of his concurrence is outside the scope of this Note.

60. See *infra* Part II.B.

61. *Kelo*, 545 U.S. at 480–89; see *infra* notes 104–08 and accompanying text.

62. The Court's nineteenth century decision regarding a Mill Act statute in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885), also embraced a broad interpretation of public use. See *infra* notes 385–88 and accompanying text (discussing *Head* in the context of the other Mill Act cases).

63. See *infra* notes 65–71 and accompanying text.

64. See, e.g., Expert Report of Eric Foner, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (No. 97-75231), *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), available at <http://www.vpcomm.umich.edu/admissions/legal/expert/foner.html> (“Reconstruction represented less a fulfillment of the Revolution’s principles than a radical repudiation of the nation’s actual practice for the previous seven decades. . . . The underlying principles—that the federal government possessed the power to define and protect citizens’ rights . . . were striking departures in American law.”); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at xiii (1998) (“Reconstruction . . . transformed the nature of the original Bill of Rights, leaving us with something much closer to the Bill as conventionally understood today [as overwhelmingly about individual rights].”); Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 428 (Winter 2005/2006) (arguing that the Fourteenth Amendment established a principle of individual equality).

65. 164 U.S. 112 (1896).

for the establishment of irrigation districts.⁶⁶ In particular, the Court noted the law satisfied a “public purpose” since “[i]t is not essential that the entire community . . . should directly enjoy or participate in an improvement in order to constitute a public use.”⁶⁷ Later in *Clark v. Nash*,⁶⁸ the Court cited *Bradley* when holding a private individual could condemn a neighbor’s land for irrigation purposes.⁶⁹ In a later case, the Court relied on *Clark* when it affirmed a mining corporation’s right to condemn property for an aerial bucket line.⁷⁰ There, the Court explained the “use by the general public” test was inadequate for determining what constituted a public use.⁷¹

In *Bradley*, *Clark*, and *Strickley*, the Court acknowledged that determining which activities qualified as public uses varied by location.⁷² The Court also mentioned efficiencies, worrying that not allowing the takings would result in high transaction costs that could stunt economic growth.⁷³ Despite the prevailing rhetoric of individual rights,⁷⁴ public welfare concerns necessitated individual concessions.⁷⁵ Notably, none of these decisions engaged in a historical analysis to ascertain the original meaning of public use to the founding generation.⁷⁶

Fifty years later in *Berman v. Parker*,⁷⁷ the Court, faced with the question of whether urban redevelopment constituted a public use, echoed the same concerns expressed earlier in *Bradley*, *Clark*, and *Strickley*. In particular, the Court discussed the transaction costs associated with any comprehensive redevelopment plan that could not rely on the power of eminent domain.⁷⁸ Citing these precedents, the Court upheld the taking for the purpose of slum clearance.⁷⁹

Specifically at issue in *Berman* was a challenge to the constitutionality of legislation authorizing takings for the elimination of urban blight in

66. *Id.* at 160–61. The state constitution at issue provided that apportioning water, including for use in irrigation, qualified as a public use. *Id.* at 159 (citing CAL. CONST. art. 10, § 5).

67. *Id.* at 161–62.

68. 198 U.S. 361 (1905).

69. *Id.* at 369–70. Like in *Bradley*, the Utah statute at issue in *Clark* authorized the taking as satisfying a public use. *Id.*

70. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 529, 531 (1906). *Strickley* concerned the same Utah statute at issue in *Clark* that considered takings furthering mining activities public uses. *Id.* at 530–31.

71. *Id.* at 531.

72. *Id.*; *Clark*, 198 U.S. at 369; *Bradley*, 164 U.S. at 159–60.

73. *Bradley*, 164 U.S. at 161; *see also infra* notes 78, 84 (noting the *Berman* Court mentioned the same transaction cost concerns).

74. *See supra* note 64 and accompanying text.

75. *Strickley*, 200 U.S. at 531.

76. *See, e.g., id.* at 529–32 (noting that the question is answered by the *Clark* decision); *Clark*, 198 U.S. at 367–70 (relying on *Bradley* when allowing the taking); *Bradley*, 164 U.S. at 151–78 (failing to analyze the history of public use).

77. 348 U.S. 26 (1954).

78. *Id.* at 33–35.

79. *Id.* In the 1950s, slum clearance was a national movement, and the Court cited statistics suggesting the majority of the dwellings in the blighted area were uninhabitable. *Id.* at 30.

Washington, D.C.⁸⁰ A department store owner located in the area slated for redevelopment objected to the taking of his non-blighted property for transfer to a private agency for eventual private use.⁸¹ In its opinion, the Court held that improving public welfare satisfied the public use requirement.⁸² As a result of the decision, the legislature could determine the appropriate means by which to execute a redevelopment project.⁸³ The Court worried that if owners of non-blighted properties could successfully resist takings, comprehensive community development plans would be nearly impossible.⁸⁴

When validating a taking for public welfare purposes in *Berman*, the Court continued to rely on precedent to interpret the Public Use Clause.⁸⁵ In its next public use challenge, the Court upheld legislation allowing a private agency to use eminent domain to break up land oligopolies in *Hawaii Housing Authority v. Midkiff*.⁸⁶ Whereas *Berman* repeated the concerns regarding transaction costs discussed in earlier cases, *Midkiff* echoed *Berman*'s deference to legislative determinations on public use.⁸⁷

As before, the *Midkiff* Court did not explore the original meaning of the Public Use Clause but rather relied on precedent. In defining public use, the Court cited *Berman* for the proposition that legislative findings are nearly sacrosanct.⁸⁸ Specifically, when a legislature decides to exercise the takings power, "courts must defer to its determination that the taking will serve a public use."⁸⁹ Further, the Court noted that a private individual's possession of taken land does not necessarily render the taking non-public.⁹⁰ Most importantly, the Court summed up the cases beginning with *Bradley* when it stressed that it had "long ago rejected any literal

80. *Berman*, 348 U.S. at 28–30. The legislation created a private agency tasked with using eminent domain to acquire property, after which the agency could transfer parcels to private developers who promised to complete the approved redevelopment plan. *Id.*

81. *Id.*

82. *Id.* at 33; see also Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 265 (2006) (noting that the Court's detailed description of the blight in *Berman* made it hard for critics to condemn the opinion).

83. *Berman*, 348 U.S. at 34 ("We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.")

84. *Id.* at 34–35; see also Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 204 (2007) (noting that one of the most common justifications for economic development takings is the difficulties associated with assembling a large amount of property owned by numerous individuals, some of whom may hold out and gain the power either to block a project or to extract a prohibitively high price for the land).

85. See *Berman*, 348 U.S. at 33–36. The *Berman* Court saw the role of the judiciary in policing the power of eminent domain as extremely narrow. *Id.* at 32.

86. 467 U.S. 229 (1984). In Hawaii, the Polynesian immigrants who settled the islands created a system whereby the high chief controlled all land, doling it out to lower ranking citizens. All land was eventually returned to the high chief, thus eliminating private ownership. *Id.* at 232. As a result, land oligopolies prevailed into the twentieth century, significantly increasing land prices and skewing the market for private property. *Id.*

87. *Id.* at 239–40, 244; see also *supra* note 85.

88. *Id.* at 239–40 (citing *Berman*, 348 U.S. at 32–33).

89. *Id.* at 244.

90. *Id.* at 243–44.

requirement that condemned property be put into use for the general public.”⁹¹

Midkiff held that takings, by private parties for the purpose of land redistribution, did not constitute a naked transfer of property, thereby setting the stage for *Kelo*.⁹² As compared to *Berman*, where the Court associated the taking with increasing public welfare,⁹³ *Midkiff* explicitly addressed the meaning of public use when it rejected outright the literal interpretation.⁹⁴ When the Court discarded this narrow view, the opinion relied on precedent, not a historical, structural, or textual analysis of public use.⁹⁵

B. *Kelo v. City of New London*⁹⁶

Similarly, in upholding the taking at issue, the *Kelo* majority relied on public use precedent, rather than grounding the opinion in textual, structural, or historical analyses.⁹⁷ Justice O’Connor’s dissenting opinion took a different approach, largely focusing on upholding *Berman* and *Midkiff* while distinguishing *Kelo*.⁹⁸ In contrast to the majority, however, she did use historical evidence of original meaning to support her argument.⁹⁹ Finally, Justice Thomas’s dissent marked a departure in public use jurisprudence by interpreting the Public Use Clause in a purely originalist fashion.¹⁰⁰

1. The Majority Opinion

Residents of New London, Connecticut challenged the condemnation of their homes pursuant to the city’s redevelopment plan, arguing that economic development did not satisfy the Public Use Clause.¹⁰¹ In a five to four decision, with a fifth-vote concurrence by Justice Kennedy, Justice Stevens writing for the majority held that the eminent domain power

91. *Id.* at 244 (“[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”). In his *Kelo* dissent, Justice Thomas agreed that the Court had long ago rejected this literal requirement, but argued that adhering to this precedent had divorced the public use case law from its original meaning. *Kelo v. City of New London*, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) (“The Court adopted its modern reading blindly, with little discussion of the Clause’s history and original meaning . . . in cases adopting the ‘public purpose’ interpretation . . . and . . . in cases deferring to legislatures’ judgments regarding what constitutes a valid public purpose.”).

92. *See supra* note 86 and accompanying text.

93. *Berman*, 348 U.S. at 33.

94. *Midkiff*, 467 U.S. at 243–44.

95. *Id.* As discussed above, *Berman* also relied on earlier cases that failed to analyze original meaning. *See supra* text accompanying note 85.

96. 545 U.S. 469 (2005).

97. *See infra* Part II.B.1; *see also infra* note 158 (containing Justice Thomas’s disapproval of the majority’s reliance on public use precedent).

98. *See infra* Part II.B.2.

99. *See infra* notes 124–27 and accompanying text.

100. *See infra* Part II.B.3.

101. *Kelo*, 545 U.S. at 475. After years of economic decline, Pfizer’s decision to open a plant in the area spurred the project to capitalize on new jobs, tax revenue, and general urban revitalization. *Id.* at 473–75.

extended to takings for this purpose.¹⁰² In response, state legislatures immediately passed new eminent domain legislation containing more stringent limitations.¹⁰³

In evaluating the plan's constitutionality, the Court relied on the *Bradley*,¹⁰⁴ *Clark*,¹⁰⁵ and *Strickley*¹⁰⁶ precedents establishing the broad public purpose standard, rather than the literal test of use by the public.¹⁰⁷ Also citing the comprehensiveness of the redevelopment plan and the deference to legislative determinations discussed in *Berman* and *Midkiff*, the Court concluded that the economic development served a public purpose, thereby satisfying the Fifth Amendment's requirements.¹⁰⁸

The majority began by noting that two propositions were clear: first, the government could not take the property from *A* for the sole purpose of transferring it to *B*, another private party,¹⁰⁹ but second, the government could transfer property from one private party to another if the taking's purpose were "use by the public."¹¹⁰ Here, the Court explained that since the takings were exacted pursuant to a "carefully considered" development plan, the condemnations would not benefit a particular group of individuals.¹¹¹ The Court relied on *Berman* and *Midkiff* for the idea that legislative determinations of the viability of a comprehensive plan, as

102. *Id.* at 489–90. Notably, the Court emphasized that the ruling did not limit the states from placing greater restrictions on the takings power. *Id.* at 489; *see also infra* note 103 and accompanying text.

103. *See, e.g.,* James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 133 (2009) (stating that post-*Kelo*, only eight states did not enact eminent domain reform that limited its exercise for economic development purposes); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102 (2009) (noting that *Kelo* resulted in new eminent domain legislation in forty-three states, a response greater than any other Supreme Court decision).

104. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

105. *Clark v. Nash*, 198 U.S. 361 (1905).

106. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906).

107. *Kelo*, 545 U.S. at 480 & n.9 (citations omitted) (“[W]hen this Court began applying the Fifth Amendment to the States at the close of the [nineteenth] century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’ . . . We have repeatedly and consistently rejected that narrow test [of use by the public] ever since.”).

108. *Id.* at 484. The Court noted that its public use precedents had consistently deferred to legislative judgments. *Id.* at 483 (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

109. Here, the Court used the language of *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798). *See infra* notes 344, 425, 431 and accompanying text (discussing *Calder* in the context of the Mill Act cases). Even though *Kelo* interpreted public use broadly, the naked transfer of property discussed in *Calder* would still be unconstitutional according to the majority. *Kelo*, 545 U.S. at 477.

110. *Kelo*, 545 U.S. at 477. In support of its second statement, the Court explained that condemnation of land for railroads would be a common example of such a transfer. *Id.* Justice Kennedy clarified in his concurrence that the state would not be allowed to take private property under the pretext of public purpose. *Id.* at 491 (Kennedy, J., concurring). For an analysis of pretext claims post-*Kelo*, see Daniel S. Hafetz, Note, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095 (2009).

111. *Kelo*, 545 U.S. at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005)). For this statement, the Court relied on the lower court's findings that there was no evidence of illegitimate purpose in the plan. *Id.*

opposed to a piecemeal approach, would be respected.¹¹² Further, even though the plan would not open up all the condemned land to public use, the Court cited *Midkiff* when rejecting the idea that the Takings Clause required literal use by the public.¹¹³ If the Public Use Clause were read so narrowly, the majority noted, takings would become not only “difficult to administer” but also “impractical given the diverse and always evolving needs of society.”¹¹⁴

Like the cases before it, the *Kelo* majority did not discuss any historical interpretations of the Public Use Clause and instead cited prior public use case law to support its holding.¹¹⁵ In contrast, both dissents invoked originalist interpretations.

2. Justice O’Connor’s Dissenting Opinion

Justice O’Connor, the author of the unanimous *Midkiff* opinion, dissented in *Kelo*, arguing the majority had effectively removed the Public Use Clause from the Fifth Amendment.¹¹⁶ Also beginning by invoking Justice Samuel Chase’s admonition in *Calder v. Bull*¹¹⁷ that a law transferring property from *A* to *B* could not be valid, Justice O’Connor viewed the takings at issue in *Kelo* as falling neatly into that category of purely private appropriations.¹¹⁸ She noted that, whereas *Berman* and *Midkiff* emphasized the importance of legislative determinations of public purpose, in her view the Court was equipped to determine that the taking here was purely private.¹¹⁹

In contrast to the majority’s reliance on precedent, Justice O’Connor’s dissent largely focused on the perceived practical ramifications of allowing the taking at issue. Justice O’Connor would have invalidated it because otherwise, she argued, all property would be threatened with condemnation.¹²⁰ If “positive side effects [were] enough to render transfer from one private party to another constitutional,” then the Public Use Clause would not exclude any takings since “any lawful use of real private

112. *Id.* at 480–82.

113. *Id.* at 478–79 (citing *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)). *But see* Ely Jr., *supra* note 15, at 61 (discussing Justice Thomas’s disagreement with the Court’s rejection of the literal interpretation); *supra* note 91 (same).

114. *Kelo*, 545 U.S. at 479.

115. *Id.* at 477–90.

116. *Id.* at 494 (O’Connor, J., dissenting). Chief Justice Rehnquist and Justices Scalia and Thomas joined her dissent.

117. 3 U.S. (3 Dall.) 386 (1798); *see also supra* note 109 and accompanying text.

118. *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting). After *Berman* and *Midkiff*, Justice O’Connor argued that there could still be unconstitutional transfers from *A* to *B*, unlike after the majority’s decision in *Kelo*, which she viewed as sanctioning purely private property transfers. *Id.* at 504. For a discussion of *Calder*, *see infra* notes 344, 425, 431 and accompanying text.

119. *Kelo*, 545 U.S. at 499–500 (O’Connor, J., dissenting).

120. *Id.* at 503 (“For who among us can say she already makes the most productive or attractive possible use of her property? . . . Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”).

property [could] be said to generate some incidental benefit to the public.”¹²¹

In an effort to preserve the rule of *Berman* and *Midkiff*, however, she identified three categories of takings allowed under the Fifth Amendment: transfer of private property to public ownership, transfer of private property to private parties who make the property available for public use, and in some circumstances, takings that serve a public purpose, even if the property will not be used by the public.¹²² Since a literal interpretation of public use was sometimes “too constricting and impractical,” the third category would preserve *Berman* and *Midkiff* by allowing takings for private use in certain circumstances.¹²³

Finally, Justice O’Connor invoked a historical argument, echoing James Madison’s justifications for proposing the Takings Clause,¹²⁴ by explaining that the public use requirement was originally intended to protect the security of property against majoritarian overreaching.¹²⁵ Specifically, Justice O’Connor quoted James Madison: “[T]hat alone is a *just* government . . . which *impartially* secures to every man, whatever is his *own*.”¹²⁶ By ignoring this limitation, Justice O’Connor concluded, the *Kelo* majority was not faithful to the original meaning of the Public Use Clause, which would have prohibited a purely private taking.¹²⁷

3. Justice Thomas’s Dissenting Opinion

Justice Thomas—in a dissent joined by no other member of the Court—criticized *Kelo*’s holding, arguing the Public Use Clause historically provided a meaningful limit on the eminent domain power¹²⁸ and accused the majority of replacing it with a “Diverse and Always Evolving Needs of Society Clause.”¹²⁹ Using a strictly originalist argument, Justice Thomas presented structural, textual, and historical evidence to assert the

121. *Id.* at 501.

122. *Id.* at 497–98. Justice O’Connor listed roads, hospitals, and military bases as satisfying the first category and railroads, public utilities, and sports stadiums as satisfying the second. *Id.*

123. *Id.* In those cases, Justice O’Connor argued that because the takings directly benefitted the public by eliminating “harmful” uses, subsequent private use of the property was irrelevant. *Id.* at 500. The majority opinion criticized Justice O’Connor’s distinction by insisting that there was nothing harmful about the use of property for a non-blighted department store in *Berman* or for mining or agriculture in the earlier cases. *Id.* at 486 n.16 (majority opinion).

124. *See infra* notes 281–83 and accompanying text.

125. *Kelo*, 545 U.S. at 496 (O’Connor, J., dissenting) (citing Alexander Hamilton’s speech to the Philadelphia Convention on June 19, 1787 in which he asserted that “the security of Property” is “one great obj[ec]t of Gov[ernment]” (1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand, ed. 1911))).

126. *Id.* at 505 (quoting James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983)) [hereinafter 14 MADISON PAPERS]; *see also infra* notes 299–302 and accompanying text.

127. *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting).

128. *Id.* at 506 (Thomas, J., dissenting).

129. *Id.*

Constitution only authorized a taking if the public could use the property, not if it realized a benefit from the taking.¹³⁰

Justice Thomas began by examining the definition of “use” in Samuel Johnson’s *A Dictionary of the English Language*, concluding the word meant “[t]he act of employing any thing to any purpose” at the time of the drafting of the Fifth Amendment.¹³¹ Accordingly, he argued, a transfer of property to a private individual without a right of public use strained the definition of “use,” even if the public benefited incidentally from the taking.¹³²

Structurally, Justice Thomas asserted that the Public Use Clause limited the takings power.¹³³ Specifically, the words “for public use,” would be surplusage otherwise,¹³⁴ especially since, in his view, the Takings Clause was not a grant of power to the government but rather a restriction on the use of its power.¹³⁵ Approaching the structural argument from another angle, Justice Thomas also compared the words “for public use” to the other two appearances of “use” in the Constitution¹³⁶ in Article I, Section 8,¹³⁷ and Article I, Section 10.¹³⁸ In both instances, Justice Thomas asserted that the document utilized “use” in a narrow sense, not a broad one.¹³⁹ He next contrasted these appearances of “use” to the term “general Welfare” appearing elsewhere in the Constitution,¹⁴⁰ arguing that the founders would

130. *See id.* at 506–14. In his dissent, Justice Thomas alternated between requiring the public’s actual use of the property and its legal right to use the property. *Compare id.* at 508 (“[T]he public has a legal right to use . . . the property . . .”), *and id.* at 521 (“[T]he public has a legal right to use the taken property . . .”), *with id.* at 521 (“[T]he government may take property only if it *actually uses* or gives the public a legal right to use the property.”) (emphasis added). Actual use is a far more stringent requirement than legal use; property the public has a legal right to use can be put to purely private uses. *See* David L. Breau, *Justice Thomas’ Kelo Dissent, or “History as a Grab Bag of Principles,”* 38 MCGEORGE L. REV. 373, 375 n.20 (2007). This Note focuses on the actual use requirement.

131. *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting) (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)). Justice Thomas later conceded that Johnson’s *Dictionary* listed multiple definitions of “use,” including entries defining the word more broadly. *See id.* at 509; *see also infra* notes 169–71 and accompanying text (listing all nine definitions of “use” in Johnson’s *Dictionary*).

132. *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting).

133. *Id.* at 507.

134. *Id.* (“It cannot be presumed that any clause in the constitution is intended to be without effect.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

135. *Id.* at 511.

136. *Id.* at 509.

137. Article I, Section 8, Clause 12 grants Congress the power “[t]o raise and support Armies, but no Appropriation of Money to that *Use* shall be for a longer Term than two Years.” U.S. CONST. art. I, § 8, cl. 12 (emphasis added).

138. “[T]he net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the *Use* of the Treasury of the United States.” U.S. CONST. art. I, § 10, cl. 2 (emphasis added).

139. *Kelo*, 545 U.S. at 509 (Thomas, J., dissenting).

140. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the *general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”) (emphasis added); U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power to . . . provide for the . . . *general Welfare* of the United States.”) (emphasis added).

have used this broader term if public benefit were the only limitation on the takings power.¹⁴¹

After his structural and textual analysis, Justice Thomas analyzed early common law¹⁴² and state eminent domain decisions¹⁴³ to support the idea that the original meaning of public use was not synonymous with public benefit. For Justice Thomas, the founding generation embraced the classically liberal tradition of protecting fundamental rights, including the right to property, from government appropriation.¹⁴⁴ Relying on William Blackstone, Justice Thomas discussed English common law's prohibition against taking private property solely for the purposes of public benefit.¹⁴⁵ Additionally, Justice Thomas, like the majority and Justice O'Connor, cited the *Calder* language to insist that the founding generation thought the government could not effect a purely private transfer.¹⁴⁶

Examining early state decisions regarding the constitutionality of the Mill Acts,¹⁴⁷ Justice Thomas argued that the statutes largely comported with the theory that public use originally limited the takings power.¹⁴⁸ He distinguished unfavorable case law¹⁴⁹ by arguing that the presence of statutes requiring the flour mills to remain open to the public rendered the Clause satisfied.¹⁵⁰ To explain the later extension of the Mill Acts to entirely private entities not open to the public, Justice Thomas contended

141. *Kelo*, 545 U.S. at 509 (Thomas, J., dissenting).

142. *See infra* Parts IV.A.3, IV.B.3.

143. *See infra* Part V.

144. *See Kelo*, 545 U.S. at 511–12 (Thomas, J., dissenting). *See infra* Part IV.A.1 for a discussion of classical liberalism.

145. *Kelo*, 545 U.S. at 510 (Thomas, J., dissenting) (“So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *135)). *But see infra* text accompanying notes 256–59 (discussing Blackstone’s acknowledgement of the legislature’s power to use eminent domain without articulating a substantive limit).

146. *Kelo*, 545 U.S. at 510–11 (Thomas, J., dissenting) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798)). Contrary to the majority, Justice Thomas considered *Calder*’s proscription applicable to all purely private takings, regardless of whether any incidental public benefit accrued. For the majority, the Public Use Clause would only proscribe private takings if no substantial public benefit occurred as a result. *See supra* note 109 and accompanying text.

147. The term “Mill Acts” refers in aggregate to several state and local statutes in the late eighteenth and early nineteenth centuries allowing owners of water-powered mills to flood or condemn upstream lands if the owners paid the affected landowners just compensation. *See infra* Part V.A (explaining that early courts were inconsistent about their approaches to these statutes).

148. *Kelo*, 545 U.S. at 511–14 (Thomas, J., dissenting).

149. Unfavorable for Justice Thomas were Mill Act cases in which courts interpreted public use limitations broadly and upheld takings under the statutes. *See infra* Part V.A.1.

150. *See Kelo*, 545 U.S. at 511–14 (Thomas, J., dissenting). *But see* *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 481 (1832) (holding that the Mill Act satisfied the Public Use Clause, even though the statute did not require the mill to allow public access); *infra* note 388 (explaining that only some states had statutes requiring mill owners to allow the public to use the facilities).

that those instances were too far removed temporally from the founding to be probative of the original meaning of the Public Use Clause.¹⁵¹

Finally, Justice Thomas argued that the Court abandoned the original meaning of the Public Use Clause when it adopted a public benefit interpretation, deferring to legislative judgments of what satisfied this limitation.¹⁵² Justice Thomas insisted that it would be inappropriate for the Court to defer to a legislative determination of a quintessentially legal question.¹⁵³ Additionally, he argued that the “public purpose” test began as dicta in *Bradley*,¹⁵⁴ and the Court subsequently followed the test blindly without thorough analysis.¹⁵⁵ Justice Thomas insisted that this public purpose test could not be applied in a principled manner, thus providing no coherent limiting principle to the takings power.¹⁵⁶ Specifically, he took issue with the last century of Public Use jurisprudence as “wholly divorced from the text, history, and structure of our founding document.”¹⁵⁷ To remedy the problem, Justice Thomas advocated overruling precedent and returning to his view of the original meaning of the Public Use Clause by requiring taken land to be actually used by the public.¹⁵⁸

III. THE TEXT AND STRUCTURE OF THE PUBLIC USE CLAUSE

Textual analysis is an important tool used by originalists to analyze the Constitution.¹⁵⁹ Many judges and scholars begin a search for original meaning by closely scrutinizing the Constitutional text in question, including researching historical word definitions and comparing a clause’s terms to other parts of the document.¹⁶⁰ Accordingly, Part III begins by providing background on how to determine what words meant in

151. *Kelo*, 545 U.S. at 513 (Thomas, J., dissenting). He explained that the constitutionality of these private takings were contested in courts, with some courts authorizing takings for public purposes and others adhering to a narrow view of public use. *Id.* at 513 & n.2 (comparing *Dayton Gold & Silver Mining Co.*, 11 Nev. 394, 409–10 (1876), a case that upheld the broad interpretation of public use as public benefit, with nine cases decided between 1832 and 1907 adhering to requiring actual use by the public). *But see infra* notes 382–84 and accompanying text (discussing an 1814 case interpreting the public use language broadly); *infra* notes 365–67 (noting that all Mill Act citations are susceptible to temporal criticism).

152. *Kelo*, 545 U.S. at 514–15 (Thomas, J., dissenting).

153. *Id.* at 517–18 (observing that courts would not defer to the legislature on other Constitutional questions such as whether a search of a home would be reasonable, when a prisoner could be shackled during sentencing, or if the Due Process Clause protects property).

154. *See, e.g., id.* at 515 (“[T]o bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest” (quoting *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896))).

155. *Id.* at 516.

156. *Id.* at 520.

157. *Id.* at 523.

158. *Id.* (“The Court relies almost exclusively on this Court’s prior cases to derive today’s far-reaching, and, dangerous, result. . . . When faced with a clash of constitutional principle and a line of unreasoned cases . . . we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.”).

159. *See supra* note 37.

160. *See Calabresi & Prakash, supra* note 38, at 553.

contemporary eighteenth century usage.¹⁶¹ It concludes by detailing the arguments advanced by scholars who prefer a broad interpretation of the Clause and those who favor a narrow one.¹⁶²

A. *The Definition of “Use” in the Eighteenth Century*

Engaging in a close reading of the Public Use Clause requires contemporary dictionaries from the founding generation. Samuel Johnson’s *A Dictionary of the English Language* was the most important source of such definitions from its first printing in 1755 until the latter part of the nineteenth century.¹⁶³ Indeed, Americans at the time of the founding relied on Johnson’s work as a seminal authority on language.¹⁶⁴ Thus, Johnson’s *Dictionary* is the standard source for ascertaining word definitions at the time of the drafting and ratification of the Constitution and Bill of Rights.¹⁶⁵

Before Johnson began his dictionary, he created a comprehensive plan detailing how he would accomplish the project, which included an explanation of how he would determine the order of definitions for a given word.¹⁶⁶ The first definition would have a word’s “natural and primitive signification,” followed by its consequential, metaphorical, comparative, poetical, and peculiar meanings, in that order.¹⁶⁷ To illustrate the definitions, Johnson also included quotations from writers who used or introduced particular words.¹⁶⁸

The third edition of Samuel Johnson’s *A Dictionary of the English Language*, published in 1766, provides nine definitions for the noun “use.”¹⁶⁹ The first definition is, “The act of employing any thing to any purpose.”¹⁷⁰ In order, the other definitions listed for the word “use” are: “Qualities that make a thing proper for any purpose,” “Need of; occasion on which a thing can be employed,” “Advantage received; power of receiving

161. *See infra* Part III.A.

162. *See infra* Part III.B–D.

163. HENRY HITCHINGS, *DR JOHNSON’S DICTIONARY: THE EXTRAORDINARY STORY OF THE BOOK THAT DEFINED THE WORLD 2* (2005). Although there were other dictionaries at the time, “In the second half of the eighteenth century, and for most of the nineteenth, [the dictionary] enjoyed totemic status in both Britain and America.” *Id.* Indeed, “for 150 years ‘the dictionary’ meant Johnson’s *Dictionary*.” *Id.*

164. *Id.* at 230.

165. *Id.*

166. SAMUEL JOHNSON, *THE PLAN OF A DICTIONARY OF THE ENGLISH LANGUAGE* (1747), available at <http://andromeda.rutgers.edu/~jlynch/Texts/plan.html>.

167. *Id.*

168. *Id.*; *see also* HITCHINGS, *supra* note 163, at 95.

169. 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (3d ed. 1766).

170. *Id.* This first definition has “Locke” written next to it. *Id.* In his *Kelo* dissent, Justice Thomas cites the fourth edition of Johnson’s *Dictionary*, published in 1773, which has an identical first definition of “use.” *See supra* note 131 and accompanying text. Justice Thomas also notes additional definitions of “use” in the 1773 dictionary that are identical to the 1766 version: “[c]onvenience” or “help” and “[q]ualities that make a thing proper for any purpose.” *Kelo v. City of New London*, 545 U.S. 469, 509 (2005) (Thomas, J., dissenting).

advantage,” “Convenience; help,” “Usage; customary act,” “Practice; habit,” and “Custom; common occurrence.”¹⁷¹

B. Broad Interpretations of the Text and Structure of the Public Use Clause

When examining text and structure, some scholarship concludes that the Public Use Clause should not be read literally. Indeed, looking at Johnson’s definition of “use” shows that the word’s first, “natural” definition actually includes the idea of “purpose.”¹⁷² One commentator pointed out that using this definition to construe public use narrowly requires focusing only on the first half of the definition—the “act of employing”—thereby excluding the last half that specifically mentions “purpose.”¹⁷³

Further, textual interpretations often ignore the multiple definitions of “use” in the *Dictionary*. Even though Johnson’s first definition supposedly contained the word’s most natural and significant meaning, the founding generation might have understood the phrase to be referring to one of the eight other definitions of the word,¹⁷⁴ especially since no other definition of “use” would necessarily exclude a broad public purpose interpretation.¹⁷⁵

Structurally, the word “use” appears two other times in the Constitution.¹⁷⁶ In response to those who compare its appearance in the Public Use Clause to these instances in the Constitution,¹⁷⁷ Dean William Michael Treanor insists that interpreting Constitutional structure in this manner can be misleading.¹⁷⁸ By restricting the comparison of “use” to its appearances in the Constitution, one forgoes an opportunity to examine the word’s usage in other eighteenth century sources.¹⁷⁹ Another scholar agrees that the comparison could be misleading as there is no evidence supporting the notion that the drafters of the Constitution saw themselves as using terms of art.¹⁸⁰ Rather, the Constitution was written in simple language that everyone could understand.¹⁸¹

171. 2 JOHNSON, *supra* note 169.

172. *See supra* notes 167, 170 and accompanying text.

173. Breau, *supra* note 130, at 376 (arguing that it is hard to defend a literal interpretation of public use with a definition that “itself defines ‘use’ in terms of ‘purpose’”).

174. Breau, *supra* note 130, at 376–77 & n.38 (“For a word such as ‘use’ that has nine definitions, order alone does not indicate how significant or common each definition was at that time.”).

175. *See supra* text accompanying note 171.

176. *See supra* notes 137–38 and accompanying text.

177. *See, e.g., supra* notes 136–39 and *infra* notes 188–89 and accompanying text.

178. Treanor, *supra* note 31, at 523–24.

179. *Id.*

180. Shaun A. Goho, *Process-Oriented Review and the Original Understanding of the Public Use Requirement*, 38 SW. U. L. REV. 37, 47 n.50 (2008).

181. *Id.*

C. *Narrow Interpretations of the Text and Structure of the Public Use Clause*

Other scholarship concludes that the text and structure of the Public Use Clause require a narrow reading instead. Such an interpretation, according to this school, conforms more closely to the historical, as well as modern, meaning of the term.¹⁸² In particular, Professor Eric Claeys cites Johnson's primary definition of "use," combined with Johnson's definition of "public" as "[b]elonging to a state or nation; not private,"¹⁸³ to assert that the Clause "requires the public to *employ* the asset in question, and do so for *ends chosen by the public*."¹⁸⁴ Through examining the definitions of both "public" and "use" together, instead of exclusively focusing on the word "use," he argues that the combination of meanings necessarily excludes the idea of private use.¹⁸⁵

Structurally, by comparing the appearances of the word "use" in the Constitution, Professor Claeys insists that Article I, Section 8¹⁸⁶ and Article I, Section 10¹⁸⁷ both contemplate an idea of "use" that does not include the concept of "purpose."¹⁸⁸ Specifically, these provisions direct appropriations of money, and the text intends for the U.S. Army and the U.S. Treasury, respectively, to direct the employment of the funds, rather than having the funds spent on purposes only secondarily useful to the institutions.¹⁸⁹ Thus, from a comparative structural perspective, he argues the Public Use Clause should be interpreted more narrowly in accordance with those other clauses in the Constitution.¹⁹⁰

D. *Comparing the Broad and Narrow Interpretations*

When originalist scholars closely examine the text of the Public Use Clause to determine whether its original meaning contemplated the idea of public benefit, the primary eighteenth century definition actually defined "use" in terms of "purpose."¹⁹¹ In contrast to Justice Scalia's assertion that words frequently have an easily discernable meaning,¹⁹² identical dictionary definitions lead scholars to substantially different conclusions.¹⁹³

182. See, e.g., Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 896.

183. 2 JOHNSON, *supra* note 169.

184. Claeys, *supra* note 182, at 896. Professor Claeys does admit, like scholars who argue for a broad interpretation, that the word "use" also had several other meanings according to Johnson's *Dictionary* and other eighteenth century sources, including several definitions closer to the idea of purpose. *Id.*

185. *Id.*

186. See *supra* note 137.

187. See *supra* note 138.

188. Claeys, *supra* note 182, at 897.

189. *Id.*

190. *Id.*; see also *supra* note 40 (explaining that if text is ambiguous, an interpretation that harmonizes it with the rest of the Constitution is preferred).

191. See *supra* note 170 and accompanying text.

192. See *supra* notes 40–41 and accompanying text.

193. Compare *supra* note 173 and accompanying text, with *supra* notes 184–85 and accompanying text.

Those advancing a broad interpretation argue that a strict limit cannot be found if “use” and “purpose” are essentially synonymous.¹⁹⁴ On the other hand, those interpreting public use narrowly take an entirely different approach, combining the meanings of “use” and “public” to argue that, when read together, the resulting definition explicitly proscribes private uses.¹⁹⁵

Structural interpretations pose similar difficulties, especially as scholars do not even agree that a Constitutional comparison is an appropriate method of analysis.¹⁹⁶ These textual and structural analyses of the Public Use Clause do not clarify what limitation, if any, the founding generation saw in the Clause. When faced with inconsistent evidence from these sources, originalists next examine the historical record to ascertain what early Americans would have understood the Clause to mean at the time of its drafting and ratification.

IV. THE HISTORY OF PUBLIC USE IN AMERICA

Part IV provides the historical background on which originalist scholars and jurists rely.¹⁹⁷ To shed light on the original meaning of public use, Part IV recounts the philosophies and ideologies important to the founding generation as well as early American attitudes towards property, including a discussion of the details of the drafting and ratification of the Takings Clause.¹⁹⁸ For the originalist, examining this type of historical evidence reveals the context through which the Public Use Clause would have been understood in the late eighteenth century.¹⁹⁹ Finally, Part IV closes by examining how modern scholars have interpreted the historical evidence to support either a broad or narrow interpretation of public use limitations.²⁰⁰

A. *Legal and Ideological Influences on the Founding Generation*

The values held by early Americans influence how scholars interpret the original public meaning of Constitutional text.²⁰¹ Two dominant political philosophies of the late eighteenth century—classical liberalism and classical republicanism—espoused contradictory ways of interpreting the individual’s relationship to the state and the legislature’s ability to act on behalf of the citizens, key questions in evaluating what public use limitations could have meant to members of the founding generation.

194. *See supra* note 173 and accompanying text.

195. *See supra* notes 184–85 and accompanying text.

196. *See supra* notes 178–81 and accompanying text.

197. Since the text of the Public Use Clause does not explicitly require actual use of condemned land, *see supra* Part III, originalist scholars also examine historical sources to ascertain the original meaning of the words to the founding generation. *See Calabresi & Prakash, supra* note 38, at 553; Rappaport, *supra* note 38, at 1494.

198. *See infra* Part IV.A–B.

199. Rappaport, *supra* note 38, at 1493–94 (explaining originalist methodology).

200. *See infra* Part IV.C–E.

201. *See, e.g., infra* notes 342–44 and accompanying text (noting that scholars who interpret the Public Use Clause narrowly often cite John Locke as an inspiration to the founding generation).

Professor Margaret Jane Radin described the difference between the ideologies succinctly when she noted, “If we see the government as ‘them’ we adopt a ‘liberal’ theory of politics, and if we see the government as ‘us’ we adopt a ‘republican’ theory of politics.”²⁰² For Professor Radin, viewing the government as “them” embodies the liberal ideal of protecting individual rights from exploitation, while viewing the government as “us” illustrates the republican ideal of promoting the common good over individual benefit.²⁰³ Professor Radin’s distinction also encapsulates the differences in how the philosophies interpreted the role of the legislature. For example, republicans conceived of the body as effectively representing all citizens²⁰⁴ while liberals were more skeptical, requiring the consent of the populace to validate legislative acts.²⁰⁵

Recent historical scholarship has stressed that a single major philosophical paradigm did not dominate political thought at the time of the drafting and ratification of the Bill of Rights.²⁰⁶ Indeed, both philosophies influenced the founding generation’s concept of property rights.²⁰⁷ The following two sections explore classical liberalism and republicanism in their most straightforward form, even though, in practice, members of the public were not purists in either ideology. Finally, this section closes with a discussion of English common law’s prohibitions on the expropriation of private property—another significant influence on the founding generation.

1. Classical Liberalism and the Importance of Individual Rights

Stated simply, classical liberalism promoted an individual’s self-interest over that of the common good.²⁰⁸ Liberals asserted that since individual rights existed pre-politically, a legitimate government could never abrogate them.²⁰⁹ Early American liberals viewed natural rights and the social contract as key concepts in political thought.²¹⁰

202. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1693 (1988).

203. *Id.*

204. *See infra* notes 234–35 and accompanying text.

205. *See infra* note 218 and accompanying text.

206. R.B. BERNSTEIN, *THE FOUNDING FATHERS RECONSIDERED* 34 (2009) (“In their attempts to interpret the American Enlightenment, modern historians often seek to assert the primacy of one or another body of thought or experience It is all but impossible to make a convincing case for any single candidate”); DAVID A. SCHULTZ, *PROPERTY, POWER, AND AMERICAN DEMOCRACY* 12 (1992) (“[A] thinker of the [founding generation] could even be attracted simultaneously to contradictory or even mutually exclusive concepts.”); Treanor, *supra* note 6, at 823 (“[T]here is now near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s.”).

207. Lopez, *supra* note 82, at 245 (“The influences of these competing theories, republicanism and liberalism, pervade the theoretical and jurisprudential history of eminent domain.”); *see also* Treanor, *supra* note 6, at 823; *infra* notes 281–83 and accompanying text (noting James Madison’s writings employed a mix of both philosophies).

208. Treanor, *supra* note 6, at 821.

209. *Id.*; *see also infra* note 212 and accompanying text.

210. *See* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 45 (1992).

Greatly influencing the founding generation's liberal ideology, John Locke's theories specifically addressed these issues.²¹¹ For Locke, a "State of Nature" existed prior to government wherein all men were equal, possessed equal rights, and remained subject to natural law.²¹² The shortcomings of this State of Nature would lead to uncertainty and limited protection for individual rights and private property.²¹³ In exchange for remedying these deficiencies, individuals would surrender some of their liberties to the civil government.²¹⁴ Protection of property was key to understanding why individuals submitted to the state: "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*"²¹⁵

The development and enforcement of the law—shortcomings in the pre-political state—would be the responsibility of the government.²¹⁶ Although Locke saw the legislature as the most important component of the state,²¹⁷ he also noted legislative acts required the consent of citizens, either directly or through their representatives, to be valid.²¹⁸ Early Americans drew on Locke's social compact theory in the years following the Revolution to explain and to justify their new form of government.²¹⁹

As for property, liberals viewed it as an essential individual right.²²⁰ Indeed, while the legislature could exercise eminent domain,²²¹ liberal

211. *Id.* at 27 ("American writers cited Locke on natural rights and on the social and government contract . . ."); Stephen A. Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903, 913 & n.76 (1989) (reviewing G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815–35 (1988)) (explaining historians have used the phrase "*John Locke et praeterea nihil*"—"Through John Locke and no other teachers"—to describe the liberal philosophy associated with the American Revolution).

212. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1690), reprinted in JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 4–15 (Peter Laslett ed., Cambridge Univ. Press 1967). In this State of Nature, Locke proposed that individuals could acquire private property by intermixing their individual labor with communal property. *Id.* at § 26–27.

213. Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 545 (2007).

214. LOCKE, *supra* note 212, at § 123 ("[T]he enjoyment of the property he has in this state [of nature] is very unsafe, very insecure. This makes him willing to quit a Condition, which however free, is full of fears and continual dangers . . . he seeks out, and is willing to joyn in Society with others . . . for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property.*"). It is essential to note that Locke's definition of property was not limited to a physicalist conception of land or material possessions; rather Locke used the term to describe the set of rights held in the state of nature as something "which Men have in their Persons as well as Goods." *Id.* at § 173.

215. *Id.* at § 124.

216. *Id.* at § 131.

217. *Id.* at § 134 (describing the legislature as "*the supream power* of the Commonwealth").

218. *Id.* at § 138–40, 142; see also *infra* notes 221–23 and accompanying text.

219. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 283 (1998) ("[O]nly such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.").

220. See *id.* at 219; see also Ely Jr., *supra* note 15, at 40 ("[The Framers] felt that property rights and liberty were indissolubly linked.").

thought placed restrictions on the power by requiring legislative prerogatives to serve legitimate ends.²²² For example, an act that violated the principles of the social compact would be void.²²³ To justify these property expropriations—that is, instances when the state abrogated a pre-political right—liberals turned to the compensation principle. Accordingly, in a liberal view, government could only legitimately expropriate property by compensating the individual for his loss.²²⁴ Like the compensation principle, liberals might have also viewed public use as a similar constraint in order to preserve and protect individual rights.²²⁵

2. Classical Republicanism and the Importance of the Common Good

Classical republicanism looked to antiquity, particularly the Roman republic, for inspiration.²²⁶ Ultimately, the philosophy concluded that the ancient republics had been destroyed from within by “luxury” and “love of refinement,” rather than from outside invasions.²²⁷ This led early republicans to envision a society in which members would sacrifice personal concerns for the benefit of the common good.²²⁸ In contrast to liberalism’s emphasis on the individual, republicanism stressed the benefit of all citizens.²²⁹

221. See WOOD, *supra* note 219, at 404 (noting that property could be taken from an individual with his consent or that of his elected representative); see also *infra* notes 246, 308 and accompanying text (explaining common law restrictions on the legislative exercise of eminent domain).

222. Gaba, *supra* note 213, at 563.

223. See WOOD, *supra* note 219, at 404–05; see also *infra* note 344 (explaining Justice Samuel Chase’s similar admonition in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

224. WOOD, *supra* note 219, at 405; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 322 (1991) [hereinafter WOOD, *RADICALISM*].

225. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 15 (1985); Ely Jr., *supra* note 15, at 54 (“Consistent with their high regard for private property as the bedrock of individual liberties, the Framers of the Bill of Rights restricted the exercise of eminent domain by imposing the ‘public use’ and ‘just compensation’ constraints in the Fifth Amendment.”); *infra* notes 342–44 and accompanying text (discussing scholarship asserting that liberals would have considered public use to be an explicit limitation on the takings power).

226. BAILYN, *supra* note 210, at 25; WOOD, *supra* note 219, at 49–51. In particular, the founders focused specifically on Roman writers who discussed the empire’s corruption and subsequent decline. WOOD, *supra* note 219, at 51.

227. WOOD, *supra* note 219, at 52–53; see also BAILYN, *supra* note 210, at 25–26 (“[American colonists] saw their own provincial virtues—rustic and old-fashioned, sturdy and effective—challenged by the corruption at the center of power, by the threat of tyranny, and by a constitution gone wrong.”).

228. WOOD, *supra* note 219, at 53.

229. See, e.g., *id.* at 53–54 (“The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution. . . . in which the common good would be the only objective of government.”); Treanor, *supra* note 6, at 821 (noting that republican theory emphasized that individual rights are subject to the interests of the common good); Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 350 (1999) (explaining that republicans believed the government’s primary object was to advance the “*res publica*,” or common good); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699 (1985) [hereinafter Treanor, Note] (arguing that the

Whether the achievement of this benefit required the subordination of individual interests to those of society²³⁰ or rather active participation in public affairs,²³¹ republicans thought that the public had a single, easily ascertainable common good.²³² Accordingly, “what was good for the whole community was ultimately good for all the parts.”²³³ Since individual interests were always subordinate to the public good, legislative acts could also be expected to reflect these overarching societal goals.²³⁴ Republicans of the founding generation would likely have deferred to legislative determinations.²³⁵

Regarding private property specifically, republican views reflected two different goals.²³⁶ On one hand, republicans saw property as potentially antithetical to the promotion of the public good, remaining skeptical of the pursuit of economic self-interest.²³⁷ On the other, republicans also thought of property—specifically land—as a prerequisite for participation in government, largely because of the independence of landowners from those without such economic security.²³⁸ Such ownership in land, they believed, enabled citizens to make objective political decisions.²³⁹

Applying the ideas espoused by classical republicanism and liberalism to the text of the Takings Clause potentially shows what early Americans would have understood public use to mean. For example, the Takings Clause reflects two important republican goals: self-denial for the good of the society and deference to legislative determinations.²⁴⁰ In this vein, the Public Use Clause could simply reflect the republican goal of contributing to and promoting the common good.²⁴¹

republican ideology centered on a belief in the common good and the idea of society as “an organic whole”).

230. WOOD, *supra* note 219, at 53–54.

231. Siegel, *supra* note 211, at 916.

232. WOOD, *supra* note 219, at 57–58.

233. *Id.* at 58. Professor Gordon Wood further noted that, “Ideally, republicanism obliterated the individual.” *Id.* at 61.

234. Lopez, *supra* note 82, at 244; Treanor, Note, *supra* note 229, at 700–01 (“As the voice of the people, the legislature could be trusted to perceive the common good and to define the limits of individual rights.”).

235. Lopez, *supra* note 82, at 244.

236. Treanor, *supra* note 6, at 821.

237. Siegel, *supra* note 211, at 920; Treanor, *supra* note 6, at 821; *see also supra* text accompanying note 227.

238. WOOD, RADICALISM, *supra* note 224, at 234, 269; Siegel, *supra* note 211, at 920; Treanor, *supra* note 6, at 821; Sales, *supra* note 229, at 355–56; Treanor, Note, *supra* note 229, at 699.

239. WOOD, RADICALISM, *supra* note 224, at 269 (“Landed property was the most important such guarantee of autonomy because it was the least transitory, the most permanent form, of property. Such proprietary property was designed to protect its holders from external influence or corruption, to free them from the scramble of buying and selling, and to allow them to make impartial political judgments.”).

240. Lopez, *supra* note 82, at 247, 250 (“The public use clause reflects republicanism: an individual property owner is required to sacrifice her property interest for the good of the public at the request of the government if the property taken is to be put to a ‘public use.’”).

241. *See supra* notes 228–29 and accompanying text.

On the other hand, the Just Compensation Clause is more likely to have been justified on classically liberal grounds.²⁴² Indeed, requiring compensation for expropriated property reflected this ideology by requiring the government to acknowledge an individual's sacrifice.²⁴³ Accordingly, the Public Use Clause may also have been an additional method of protecting individual rights against state interference.²⁴⁴

3. Influences from English Common Law

In addition to liberal and republican philosophies, English common law's limitations on eminent domain provide important background when seeking to understand the founding generation's view on property expropriations. In his eighteenth-century treatise on the common law, William Blackstone directly addressed these limitations on the individual right of private property.²⁴⁵ Specifically, Blackstone noted that the legislature had the exclusive right to exercise the power of eminent domain: "[When land is required] the legislature *alone* can . . . interpose, and compel the individual to acquiesce. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power . . . which *nothing but the legislature can perform*."²⁴⁶

While acknowledging the legislature possessed the power of eminent domain, Blackstone simultaneously echoed the protections of the Magna Carta for private property²⁴⁷ and classical liberal sentiment regarding the importance of individual rights²⁴⁸ when stating, "So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."²⁴⁹

In England, while the Magna Carta generally prohibited the Crown from taking private property,²⁵⁰ important exceptions did exist in which the monarch could expropriate land.²⁵¹ Technically speaking, though, the

242. See *supra* note 224 and accompanying text.

243. Lopez, *supra* note 82, at 247–48.

244. See *supra* note 225 and accompanying text.

245. 1 BLACKSTONE, *supra* note 145, at *134–36. Blackstone defined property as "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at *134.

246. *Id.* at *135 (emphasis added). Blackstone also noted that eminent domain is a power "the legislature indulges with caution." *Id.*

247. MAGNA CARTA, cl. 39 (1215), reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 11, 17 (Richard L. Perry & John C. Cooper eds., 1991) [hereinafter SOURCES OF OUR LIBERTIES] ("No free man shall be . . . dispossessed . . . except by the legal judgment of his peers or by the law of the land.").

248. See *supra* Part IV.A.1.

249. 1 BLACKSTONE, *supra* note 145, at *135; see also *supra* note 145 and accompanying text (explaining that Justice Thomas also relies on this quote in his *Kelo* dissent). To explain this statement, Blackstone offered an example of building a new road through private property, which would be beneficial to the public, but noted "the law permits no man . . . to do this without consent of the owner of the land." 1 BLACKSTONE, *supra* note 145, at *135.

250. See *supra* note 247; see also 1 BLACKSTONE, *supra* note 145, at *135.

251. For example, the King could use a subject's property when it was necessary for the realm's defense or if he could assert superior title. See Matthew P. Harrington, "Public Use"

Crown could not actually take title to seized property.²⁵² As explained above, the power to divest an owner of title to property resided in Parliament alone.²⁵³ When Blackstone confirmed this principle,²⁵⁴ however, he did not articulate any substantive limit on eminent domain, other than that it should be exercised cautiously.²⁵⁵

Because Blackstone accepted the legislature's power to take property,²⁵⁶ interpreting his statement about the "great . . . regard of the law for private property"²⁵⁷ is difficult. On one hand, Blackstone could have been describing the limited takings power held by the Crown, rather than the more expansive one held by Parliament.²⁵⁸ On the other, Blackstone's statement could also be read to proscribe all takings for public benefit instead of public use.²⁵⁹ Like classical liberalism and republicanism, English common law does not definitively answer the question of what limitation public use provided early Americans.

B. *The Early American Experience*

While philosophy and the English experience undoubtedly influenced the founding generation, other uniquely American conditions also contributed to the founding generation's views on property rights. This section begins by examining state antecedents to the federal Takings Clause, followed by a detailed discussion of its drafting and ratification. It closes by exploring the writings of Blackstone's American counterpart, Chancellor James Kent.

1. State Antecedents to the Takings Clause

Not every state constitution contained a clause equivalent to the Public Use Clause of the Fifth Amendment, though the experience in some colonies caused citizens to be particularly wary of property expropriations. Accordingly, some early state constitutions did include additional substantive protection for property rights.

The Pennsylvania and Virginia Constitutions were the first early American constitutions to use the term "public use" in 1776.²⁶⁰ Later, the

and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245, 1259 (2002); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562–63 (1972).

252. Harrington, *supra* note 251, at 1259–60 (noting that, when necessary for defense, the subject still owned the land while the Crown used it, whereas the Crown already held title to the property in the other case).

253. *See supra* note 246 and accompanying text; *see also* Harrington, *supra* note 251, at 1260, 1264 (arguing the power of eminent domain resides in the legislature because takings require consent of the owner, which must be achieved directly or through his legal representatives).

254. 1 BLACKSTONE, *supra* note 145, at *135.

255. *Id.*; *see also* Goho, *supra* note 180, at 51.

256. *See supra* note 246 and accompanying text.

257. *See supra* note 249 and accompanying text.

258. *See* Breau, *supra* note 130, at 385.

259. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 510 (Thomas, J., dissenting).

260. PA. CONST. of 1776, art. VIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES,

New Hampshire Constitution of 1784 paralleled Pennsylvania's language.²⁶¹ While the first "public use" language did appear constitutionally prior to Madison's proposal for the Bill of Rights,²⁶² the historical record lacks documentary evidence explaining whether these provisions actually originally limited the states' power of eminent domain.²⁶³ Importantly, three state or territory constitutions also had provisions more explicitly linking the power of eminent domain and the concept of public use: Vermont,²⁶⁴ Massachusetts,²⁶⁵ and the Northwest Territory.²⁶⁶

Fear of legislative overreaching was likely an underlying reason for the potentially more restrictive public use language in the constitutions of Vermont, Massachusetts, and the Northwest Territory.²⁶⁷ The unique historical experiences in these territories shed light on the language. Because of competing claims to Vermont land by both New York and New Hampshire, Vermont citizens were especially interested in the protection of property rights.²⁶⁸ Since the New York legislature had actually tried to

TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3081, 3083 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] ("[N]o part of a man's property can be justly taken from him, or applied to *public uses*, without his own consent, or that of his legal representatives.") (emphasis added); VA. CONST. of 1776, § 6, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra*, 3812, 3813 ("[A]ll men . . . cannot be taxed or deprived of their property for *public uses*, without their own consent, or that of their representatives so elected . . .") (emphasis added); *see also* Stoebuck, *supra* note 251, at 591 ("The words 'public use' first appeared constitutionally in 1776 in Pennsylvania and Virginia.").

261. N.H. CONST. of 1784, pt. I, art. XII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 2453, 2455 ("[N]o part of a man's property shall be taken from him, or applied to *public uses*, without his own consent, or that of the representative body of the people.") (emphasis added).

262. *See infra* note 281 and accompanying text (referencing a 1789 Madison speech proposing various amendments).

263. Stoebuck, *supra* note 251, at 592 ("[T]he . . . evidence is not sufficient to establish that the drafters consciously intended such limitation.").

264. VT. CONST. of 1777, ch. 1, art. II, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 3737, 3740 ("That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken *for the use of the public*, the owner ought to receive an equivalent in money.") (emphasis added). The Vermont Constitution of 1786 has identical language. VT. CONST. of 1786, ch. 1, art. II (1787), *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 3749, 3752. The people of Vermont only ratified the later constitution. Stoebuck, *supra* note 251, at 592.

265. MASS. CONST. of 1780, pt. I, art. X, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 1888, 1891 ("[N]o part of the property of any individual can, with justice, be taken from him, or applied to the public uses, without his own consent, or that of the representative body of the people. . . . [W]henever the public exigencies require that the property of any individual should be appropriated to *public uses*, he shall receive a reasonable compensation therefor.") (emphasis added).

266. Northwest Ordinance of 1787, art. 2, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note at 247, at 395 ("No man shall be deprived of his . . . property, but by the judgment of his peers, or the law of the land, and *should the public exigencies make it necessary*, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.") (emphasis added).

267. *See* Treanor, Note, *supra* note 229, at 702-04, 706-08.

268. *Id.* at 703-04.

deprive Vermont residents of their land, the Vermont Constitution manifested skepticism toward unchecked legislative power and contained provisions especially protective of individual rights, particularly property.²⁶⁹

In Massachusetts, citizens were similarly disillusioned with legislatures because special interest groups dominated state politics.²⁷⁰ In particular, citizens feared the legislature would not provide adequate protection for property because of concern over the debtor-creditor laws and confiscation of loyalist property.²⁷¹

Although the public use language in the Vermont and Massachusetts Constitutions loosely parallels language in the Fifth Amendment's Takings Clause,²⁷² the Northwest Ordinance used more restrictive language, allowing eminent domain only in cases where "public exigencies [made] it necessary, for the common preservation."²⁷³ This provision was likely added because of Congressional fear that the territorial legislature would rescind land grants.²⁷⁴

The presence of state constitutional public use provisions protecting property against legislative interference can support the argument that early Americans adopted a more liberal view of protecting individual rights from government abrogation through establishing requirements for takings.²⁷⁵ Specifically, if public use originally provided a strict limitation on the exercise of eminent domain, an individual's private property would face less risk of condemnation.

Still, when examining these early constitutional provisions protecting property from legislative overreaching, one sees that property was heavily regulated both before and after the Revolution.²⁷⁶ While regulation is a

269. *See id.* at 702–03. The property protections in Vermont were part of a broader ideological shift in the state that specifically emphasized increased protection for individual rights against government overreaching. *Id.* at 703–04. *But see* Harrington, *supra* note 251, at 1277 (arguing that following the Revolution, Americans had widespread faith in legislatures).

270. *See* Treanor, Note, *supra* note 229, at 706.

271. *Id.* at 706 & n.65.

272. Compare U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation"), with VT. CONST. of 1786, ch. 1, art. II (1787), reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 3737 ("[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."), and MASS. CONST. of 1780, pt. I, art. X, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 260, at 1888 ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor").

273. Northwest Ordinance of 1787, art. 2, reprinted in SOURCES OF OUR LIBERTIES, *supra* note at 247, at 395.

274. *See* Treanor, Note, *supra* note 229, at 707.

275. *See, e.g., infra* notes 343–44 and accompanying text (noting scholarship advocating this theory).

276. *See, e.g.,* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–81 (1996) [hereinafter Hart, *Colonial Land Use Law*] (listing land use regulations, including affirmative use requirements, aesthetics and community planning, and regulations for fencing, mining, riparian land, and wetlands); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of*

substantively different power than takings, longstanding, extensive land use regulation in the colonies counters the idea that Americans of the founding generation believed in robust protection of individual property rights.²⁷⁷ Indeed, this evidence can support the argument that early Americans adopted a more republican view of public use, allowing takings (and land use regulation) simply because it benefited the populace at large.

2. The Drafting and Ratification of the Takings Clause

There is little evidence of why the Takings Clause was included in the Bill of Rights. No state ratifying convention proposed the Clause.²⁷⁸ There are no records of debates in either House of Congress or any of the states regarding its meaning.²⁷⁹ In the most specific instance of an early commentator addressing the potential original meaning, St. George Tucker opined in 1803 that the Takings Clause was likely included in the Bill of Rights to protect against arbitrary military seizures, which early Americans experienced at the hands of the British during the Revolution.²⁸⁰

The history of the Takings Clause's drafting and ratification is brief. Madison explained in a 1789 speech that his proposed amendments served a twofold purpose, each embracing a distinct ideology: first, the Bill of Rights would protect individuals by creating enforceable rules, and second, it would act as a public statement of national aspirations.²⁸¹ By protecting individual rights through setting forth rules for an ideal society, the amendments fulfilled both classically liberal and republican goals. From a liberal perspective, the Bill of Rights would define and protect the

the Takings Clause, 94 Nw. U. L. REV. 1099, 1116 (2000) [hereinafter Hart, *Land Use Law in the Early Republic*] (listing similar categories of land use regulations).

277. Harrington, *supra* note 251, at 1298; Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2059 (2004) [hereinafter Harrington, *Regulatory Takings*]; John F. Hart, *The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 23 (1995).

278. See Amendments Proposed by the States (June 8, 1789), *reprinted in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL [HR-116] 12–26 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 4 DOCUMENTARY HISTORY] (listing amendments proposed by the conventions).

279. Treanor, *supra* note 6, at 791.

280. *Id.* at 791–92 (“[The Takings Clause] was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war.” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (St. George Tucker ed., Lawbook Exchange Ltd. 1996) (1803))). St. George Tucker was the first legal scholar to propose an interpretation of the Clause. *Id.* at 791.

281. See Treanor, *supra* note 6, at 837; see also James Madison, Amendments to the Constitution (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 196, 204–05, 207 (Charles F. Hobson et al. eds., 1979) [hereinafter 12 MADISON PAPERS].

individual against the state.²⁸² At the same time, it would inform the populace of American values.²⁸³

Madison's initial proposed language for the Takings Clause read: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."²⁸⁴ The select committee assigned to examine the amendments altered Madison's language slightly to its current form.²⁸⁵ The House of Representatives approved the amendment as written on August 24, 1789.²⁸⁶ When the Senate considered the proposed amendment containing the Takings Clause on September 4, 1789, it altered the language of the Double Jeopardy Clause but agreed to the rest of the amendment without comment.²⁸⁷ After resolving the differences between the House and Senate proposals affecting other portions of the Bill of Rights, Congress sent the amendments to the states for ratification on September 24, 1789.²⁸⁸

As the drafting and ratification history is sparse, the writings of James Madison, the draftsman of the Takings Clause, are particularly important sources when seeking to discover the original meaning of "public use."²⁸⁹ When Madison discussed amending the Constitution, he explained that his proposed amendments covered only topics Congress would consider

282. James Madison, Amendments to the Constitution (June 8, 1789), in 12 MADISON PAPERS, *supra* note 281, at 207 ("[I]ndependent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive . . .").

283. *Id.* at 204–05 ("[P]aper barriers . . . have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it maybe one mean to controul the majority from those acts to which they might be otherwise inclined."). *But see* BERNSTEIN, *supra* note 206, at 57 ("Madison . . . retained skepticism about the power of a written declaration of rights to protect liberty in the face of a determined majority . . .").

284. James Madison, Amendments to the Constitution (June 8, 1789), in 12 MADISON PAPERS, *supra* note 281, at 201. Madison originally intended for the amendments to be inserted into the text of the Constitution itself, not appended as a separate document. *Id.* His proposed Takings Clause was numbered fourth and was to be inserted in Article I, Section Nine between Clauses Three and Four after what would become the Double Jeopardy Clause, the Self-Incrimination Clause, and the Due Process Clause, respectively. *Id.*

285. H.R. COMM. REP. ¶ 8 (July 28, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 278, at 29. The committee also renumbered the Takings Clause to the eighth proposal. *Id.*

286. First Session (Aug. 24, 1789), *reprinted in* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: HOUSE OF REPRESENTATIVES JOURNAL 165, 166–67 (Linda Grant De Pauw et al. eds., 1977) [hereinafter 3 DOCUMENTARY HISTORY].

287. First Session (Sept. 4, 1789), *reprinted in* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: SENATE LEGISLATIVE JOURNAL 153, 154 (Linda Grant De Pauw et al. eds., 1972).

288. First Session (Sept. 24, 1789), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 286, at 227, 228–29. The amendments were renumbered after ratification in 1791 to reflect the current order because the states approved only ten of the original twelve proposals. U.S. CONST. amend. V; AMAR, *supra* note 64, at 8.

289. *See* Treanor, *supra* note 6, at 791. This section does not review Madison's writings in an effort to uncover his subjective intent in including the Takings Clause among his proposals for the Bill of Rights. Rather it explores his writings to illustrate what Madison and early Americans might have felt about substantive protection for private property.

uncontroversial.²⁹⁰ This statement, combined with the lack of debate in the House, Senate, or states on the inclusion of the Takings Clause, lends credence to the argument that the Takings Clause might simply have served as an uncontroversial statement of the status quo on eminent domain, which seemed to contemplate some, but not too much, protection for private property.²⁹¹

Along that vein, Madison's *Federalist No. 10* argued even before the Constitution's ratification that a strong federal republic was the best means of controlling factions and competing interests.²⁹² In particular, Madison pointed out that those with property and those without had distinctly different concerns.²⁹³ Government inevitably created winners and losers, and a federal system would most effectively counteract a group's ability to seize and maintain control of the government, a task that would be easier to accomplish at a more localized level.²⁹⁴ Since the political process would provide adequate structural protection for property interests, *Federalist No. 10* suggested that Madison, as well as other early Americans, might not have seen additional substantive protections for property as necessary.²⁹⁵

Nonetheless, examining other Madison writings shows that he thought physical property—particularly land and slaves—might need substantive protection from the political process.²⁹⁶ Indeed, the inevitable population increase could potentially make landowners a minority, subject to the whims of non-landowners who might pass redistributive legislation.²⁹⁷ In this way, some early Americans might also have thought that physical property interests needed additional protection beyond what the political process already provided.²⁹⁸

Finally, Madison's writings after the ratification of the Bill of Rights continued to draw a distinction between the types of property requiring additional protection. In particular, his essay *Property* responded to Alexander Hamilton's proposed economic programs.²⁹⁹ In the tract, Madison conceived of property as more than a mere physical object, describing it as including several intangibles such as opinions, safety, and

290. Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 MADISON PAPERS, *supra* note 281, at 219 (“[The proposed amendments are] limited to points which are important in the eyes of many and can be objectionable in the eyes of none.”); Letter from James Madison to Thomas Jefferson (June 30, 1789), in 12 MADISON PAPERS, *supra* note 281, at 272 (“Inclosed is a copy of sundry amendments to the Constitution Every thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided.”).

291. *See infra* note 315 and accompanying text.

292. *See* THE FEDERALIST NO. 10, at 57–61 (James Madison) (Lawbook Exch. & Martino Publishing 2001).

293. *Id.* at 55.

294. *Id.* at 60–61.

295. Treanor, *supra* note 6, at 842–43.

296. *Id.* at 847.

297. *Id.* at 849.

298. *Id.* at 851; *see also* Treanor, Note, *supra* note 229, at 708 (“[The Takings Clause] was to apply . . . only to physical takings.”).

299. Treanor, *supra* note 6, at 838.

free choice.³⁰⁰ Madison directly invoked the language of the Takings Clause to distinguish between physical and other types of takings,³⁰¹ criticizing the spirit of Hamilton's economic program, a non-physical taking, as inconsistent with the goals of the Takings Clause.³⁰² This statement demonstrates Madison, as well as other early Americans, might have contemplated a more robust role for the Takings Clause in protecting individuals.

Examining the drafting and ratification history of the Takings Clause provides few answers as to its original meaning. Further, ascertaining a cohesive Madisonian theory on property proves equally elusive. Madison's stated goals in proposing the Bill of Rights encapsulated two different philosophical ideals: classical liberalism and classical republicanism. Further, Madison suggested in some contemporary writings that property did not need additional substantive protection and in others that physical property, especially land, just might. In the years after the Bill of Rights, Madison's *Property* envisioned an even more liberal view of the Takings Clause as protective, at least in spirit, of individual rights.

3. American Common Law

American eminent domain doctrine did not stray far from traditional English law.³⁰³ Like Blackstone's treatise, Chancellor Kent's *Commentaries on American Law* discussed early American views on private property.³⁰⁴ Initially published in four volumes between 1826 and 1830,³⁰⁵ Kent's *Commentaries* played an integral role in establishing American common law.³⁰⁶

In describing private property, Kent echoed Blackstone and the English tradition when noting, "[N]o man [can] be deprived of his property without his consent"³⁰⁷ As for eminent domain, Kent emphasized that the power "gives to the legislature the control of private property for public uses, and for public uses only."³⁰⁸

Kent went on to explain that the legislature had the power to determine when "public uses require[d] the assumption of private property,"³⁰⁹ explaining that a taking would be unconstitutional if it were "for a purpose

300. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 MADISON PAPERS, *supra* note 126, at 266.

301. *Id.* at 267–68 ("If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties . . . such a government is not a pattern for the United States.").

302. Treanor, *supra* note 6, at 839.

303. Harrington, *supra* note 251, at 1270; see also *supra* Part IV.A.3.

304. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *317–54 (1873).

305. Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 443 (1993).

306. *Id.* at 462.

307. 2 KENT, *supra* note 304, at *323.

308. *Id.* at *339 (emphasis added).

309. *Id.* at *340.

not of a public nature.”³¹⁰ As Kent used both “public uses” and “purpose . . . of a public nature” when describing legislative limitations on eminent domain, it is unclear if he contemplated literal use by the public as an express limitation. As examples of instances when a taking would be unconstitutional, he discussed taking property from *A* to give to *B* or under the pretext of public use, neither of which clarifies whether Kent thought property could legally be taken for public purposes.³¹¹

Despite this language seeming to limit the takings power, Kent also noted that, “[T]here are many cases in which the rights of property must be made subservient to the public welfare.”³¹² He described a situation where roads could be cut through cultivated land without the owner’s consent because “the interest of the public is deemed paramount to that of any private individual.”³¹³ Further, when describing a check on the legislative power of eminent domain, Kent cited the compensation principle, rather than public use limitations.³¹⁴ Accordingly, Kent’s documentation of American common law in the years following the founding yields no definitive answers on whether early Americans considered public use to be a limitation on the power of eminent domain.

C. *Broad Interpretations of the History of Public Use*

Scholars advocating a broad interpretation of the original meaning of public use focus more on the early American experience than on legal and philosophical influences from Britain. Through examining early state constitutions and the drafting and ratification history of the Takings Clause, they argue nothing in the record indicates that the original meaning required literal use. Specifically, they agree that, although takings required some kind of public benefit, early Americans never insisted on actual possession or use of the appropriated property by members of the public.³¹⁵

The constitutions of Massachusetts, Vermont, and the Northwest Territory all contained public use language prior to the Fifth Amendment.³¹⁶ To distinguish the early state antecedents, one commentator notes the language of the state provisions differs from the federal Takings Clause by seemingly requiring, in addition to the public use, a condition precedent to the exercise of the takings power.³¹⁷ Specifically, the Vermont constitution speaks of “necessity” while Massachusetts and the Northwest Territory require “public exigencies.”³¹⁸

310. *Id.*

311. *Id.*

312. *Id.* at *338.

313. *Id.* at *339.

314. *Id.*

315. Buckner F. Melton, Jr., *Eminent Domain, “Public Use,” and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 80 (1996).

316. See *supra* notes 264–66 and accompanying text.

317. Breau, *supra* note 130, at 381–82.

318. See *supra* notes 264–66.

The lack of similar language in the Fifth Amendment Takings Clause might suggest that it is less restrictive than the state counterparts.³¹⁹

Along these lines, Professor Gordon Wood recounts how the new state governments aggressively asserted themselves post-Revolution, especially with respect to furthering economic growth. For instance, he uses the example of the City of New York, explaining that after acquiring the power of eminent domain, it no longer had to concern itself with “whose property is benefited . . . or is not benefited.”³²⁰ Professor Wood concludes that in the years following independence, “The power of the state to take private property was now viewed as virtually unlimited—as long as the property was taken for exclusively public purposes.”³²¹

As for the Takings Clause itself, scholars interpreting it broadly argue that the complete lack of debate about it shows that early Americans were nonchalant about its limitations. In particular, neither the colonial nor revolutionary experiences had created any pressing concerns among Americans regarding eminent domain.³²² As one commentator noted, “[W]hile the British were scoundrels in a thousand ways, they never abused eminent domain. They surely would have been accused of it if they had.”³²³

In terms of seeking substantive Constitutional protection for property, these scholars point to evidence showing that early Americans were more worried about regulations affecting property value, than with actual physical appropriations. For example, Professor Matthew Harrington asserts that federalists were mainly concerned with the potential to devalue property through either debtor relief legislation or printing of paper currency.³²⁴ On the other hand, anti-federalists wanted to limit the federal government’s taxation power.³²⁵ This absence of demand for protection from eminent domain showed a lack of concern on the part of early Americans that physical property rights would be abrogated.³²⁶

Furthermore, these scholars argue that the term “public use” is used descriptively, not as a limiting principle, in the text of the Takings Clause.³²⁷ Given Madison’s eloquence, he could have phrased the Takings Clause explicitly to make public use an express limitation, if that were its original meaning.³²⁸ Indeed, after the ratification of the Bill of Rights,

319. Breau, *supra* note 130, at 382.

320. WOOD, *RADICALISM*, *supra* note 224, at 188 (quotation marks omitted).

321. *Id.*; see also Harrington, *supra* note 251, at 1252–53.

322. Harrington, *Regulatory Takings*, *supra* note 277, at 2079.

323. Stoebuck, *supra* note 251, at 594; see also Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 17 (1980) (“Eminent domain was one prerogative the British had not been charged with abusing in the New World.”).

324. Harrington, *supra* note 251, at 1288.

325. *Id.* at 1289.

326. Treanor, *supra* note 6, at 835; see also Harrington, *Regulatory Takings*, *supra* note 277, at 2067–68 (noting that over two hundred amendments were proposed by state ratifying committees, yet none had to do with the expropriation or direct regulation of land).

327. Stoebuck, *supra* note 251, at 591.

328. 1 JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES*, at ii (1888) (“The language of the [Takings Clause] does not indicate [that public use was

Madison commented in an essay that the Fifth Amendment limited the government from taking property “*directly* even for public use,”³²⁹ thereby implying that government had the power to take property for reasons beyond public use.³³⁰

As the Takings Clause moved through the drafting and ratification process, no debate occurred in either the House or the Senate on its guarantees.³³¹ The changes made to the text were purely stylistic, not substantive.³³² Scholars assert this is especially compelling evidence because members of both Houses of Congress made alterations to many of Madison’s other proposals.³³³ Silence here indicates that the Takings Clause was likely a confirmation of the status quo, wherein actual use by the public did not limit the power of eminent domain.³³⁴ Further, they argue, the lack of debate also lends credence to the idea that the founding generation thought the Takings Clause, as written, adequately protected private property.³³⁵

D. *Narrow Interpretations of the History of Public Use*

Scholars who assert that the Public Use Clause originally limited the state’s power of eminent domain also focus on evidence from the historical record. Through examining early state constitutions and founding era political philosophy, they insist that literal use is the only reading of the Public Use Clause that gives effect to all the words in the text. To construe the words broadly would ignore not only *Marbury v. Madison*’s warning that all words of the Constitution should be considered³³⁶ but also the ideals of classical liberalism, a significant political philosophy at the time of the founding.

In response to those who believe the Fifth Amendment Public Use Clause contains less restrictive limitations than early state constitutions, scholars advocating a narrow approach argue that constitutional public use language

originally intended to operate as a limitation]. . . . If the intent had been to make the words, *public use*, a limitation, the natural form of expression would have been: ‘Private property shall not be taken *except* for public use, nor without just compensation.’”). Cf. Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1101 (noting that Madison would have included land use regulation in the Takings Clause if he had intended the principle of just compensation to apply to regulatory takings).

329. James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, *reprinted in* 14 MADISON PAPERS, *supra* note 126, at 267.

330. Goho, *supra* note 180, at 63 (noting that the word “even” suggests a difference between takings that are for a public use and those that are not).

331. *See supra* notes 286–88 and accompanying text.

332. Harrington, *supra* note 251, at 1286; Harrington, *Regulatory Takings*, *supra* note 277, at 2078; William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 641 (2008) (arguing changes were likely intended to bring the Takings Clause in line with its precursors that almost uniformly used the word “take” or a variant); *see also supra* notes 284–85 and accompanying text (showing Madison’s initial proposal for the Takings Clause).

333. Harrington, *supra* note 251, at 1294.

334. Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1133; Treanor, *supra* note 6, at 782; *see also infra* notes 414–16 and accompanying text.

335. Harrington, *supra* note 251, at 1287; Melton, Jr., *supra* note 315, at 80.

336. *See supra* note 134 and accompanying text.

is always restrictive, rather than descriptive.³³⁷ These scholars insist the presence of such language cannot support an interpretation that effectively ignores the words of the text by allowing takings for public benefit.³³⁸ The public use language of state constitutions, they argue, must originally have functioned as a limit on the taking of property, otherwise the phrase would be surplusage.³³⁹

In addition to the public use language, the Vermont, Massachusetts, and Northwest Territory constitutions all contained provisions suggesting that “necessity” or “public exigency” represented conditions precedent to the exercise of the takings power.³⁴⁰ Even if a state could point to these types of exigent circumstances necessitating a taking, these scholars assert that public use also imposed an additional substantive limit.³⁴¹ This argument suggests that early Americans thought the takings power should be used sparingly and only in critical circumstances, rather than employed broadly to support social and economic goals.

In support of a narrow interpretation, scholars also analyze the influence of political philosophy, particularly classical liberalism, on the founding generation. Under classical liberal ideology, the state could never legitimately abrogate individual rights, including the right to property.³⁴² Generally, scholars who assert public use is an explicit and literal limitation on the takings power consider John Locke and liberal thinkers, who viewed government as an entity with limited powers, to be the primary inspiration for early Americans.³⁴³ These scholars argue that the founding generation agreed with the Lockean idea that government must abide by the same moral rules as those whom it governs.³⁴⁴

337. See, e.g., Epstein, *supra* note 14, at 163 (“The prohibition on taking for public use is categorical, not squishy.”); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 600 (1949) (explaining that “use by the public” was a limitation of natural law that did not even need to be explicitly stated).

338. Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use”*, 32 SW. U. L. REV. 569, 588 n.95 (2003) (arguing that those who interpret the Public Use Clause broadly violate the fundamental notion that the Constitution must be read to give effect to all of its words).

339. Claeys, *supra* note 182, at 897.

340. See *supra* notes 317–18 and accompanying text.

341. Claeys, *supra* note 182, at 897; Sandefur, *supra* note 338, at 574–75. Procedurally, Sandefur proposes that the legislature’s job was to evaluate the necessity of the taking, subject to judicial review of whether the taking was for public use. Sandefur, *supra* note 338, at 575.

342. Sandefur, *supra* note 16, at 3; Sandefur, *supra* note 338, at 583; see also Claeys, *supra* note 182, at 894 (noting Locke warned that eminent domain could not exist without the consent of the governed).

343. EPSTEIN, *supra* note 225, at 15–16 (“The Lockean system was dominant at the time when the Constitution was adopted.”); see also Sandefur, *supra* note 338, at 579–80.

344. Sandefur, *supra* note 16, at 3. Sandefur presents the debate between Justices Chase and James Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), as an example. See Sandefur, *supra*, at 9–12. Justice Chase represented the Lockean perspective when he stated, “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” *Calder*, 3 U.S. (3 Dall.) at 388. Justice Chase offered the example of “a law that takes property from A. and gives it to B” as the quintessential example of such an invalid exercise of authority.

Finally, these scholars argue that the founders, particularly Madison, were especially concerned with factions, or the ability of a majority to make, enforce, and interpret the law.³⁴⁵ A taking can seem particularly arbitrary, especially if the appropriation singles out an individual landowner. To protect minorities from potential majority abuse of the eminent domain power, a public use limitation was therefore necessary, scholars argue, to protect citizens against this kind of overreaching.³⁴⁶ If the public use limitation were construed broadly instead, it would eliminate an important check contained in the Constitution: to protect the minority against the whims of the politically powerful.³⁴⁷

E. Comparing the Broad and Narrow Interpretations

Very different ideologies influenced early Americans at the time of the nation's founding. Classical liberalism and classical republicanism espoused opposite concepts of the ideal relationship between the individual and the state.³⁴⁸ By elucidating individual liberties, the Bill of Rights shows the influence of classical liberalism on the framers.³⁴⁹ At the same time, the Takings Clause in particular embodies classical republicanism's focus on the common good by requiring individual property owners to sacrifice personal property for the benefit of society at large.³⁵⁰

When scholars emphasize the founding generation's liberal leanings, the outcome naturally leads to a narrow interpretation of public use to protect individual rights of private property.³⁵¹ Nonetheless, it is impossible to characterize the founding generation as entirely liberal or entirely republican,³⁵² and thus the tenants of neither philosophy provide authoritative evidence regarding the original meaning of eminent domain limitations.

Early treatises on English and American common law also do not draw a coherent line between a literal interpretation of public use and a broader interpretation that includes public benefit.³⁵³ For example, Blackstone acknowledged the legislative ability to take property—without articulating a substantive limit—while simultaneously extolling that the law's great regard for private property would not allow infringements, even for the

Id. Justice Iredell responded by questioning the validity of the argument that “a legislative act against natural justice must, in itself, be void.” *Id.* at 398 (Iredell, J., concurring).

345. Sandefur, *supra* note 338, at 587; *see also supra* notes 292–94 and accompanying text.

346. Sandefur, *supra* note 338, at 587–88.

347. *Id.* at 588–89 & n.95.

348. Compare Part IV.A.1, with Part IV.A.2.

349. *See supra* notes 208–09 and accompanying text.

350. *See supra* note 240 and accompanying text.

351. *See supra* notes 343–44 and accompanying text.

352. *See supra* notes 206–07 and accompanying text.

353. *See supra* notes 246–59, 307–14 and accompanying text.

common good.³⁵⁴ Likewise, Chancellor Kent described limitations on the power of eminent domain in terms of both use and purpose.³⁵⁵

Several state constitutions drafted prior to the Bill of Rights included public use language similar to the federal Takings Clause. Unlike the federal Takings Clause, however, the Vermont, Massachusetts, and the Northwest Territory constitutions also included language that required necessity or exigent circumstances as a prerequisite to use of the eminent domain power.³⁵⁶ While scholars disagree on whether this language makes it more or less certain that public use was an additional, stringent limitation,³⁵⁷ it is clear that several of the early state constitutions reflected local circumstances that were not present at a national level.³⁵⁸ At a national level, the British had not abused the power of eminent domain vis-à-vis the colonies, whereas citizens in states like Vermont had actually been subject to attempts to appropriate land by the New York legislature.³⁵⁹ Like political philosophy and common law practices at the founding, the early state constitutions do not provide a clear answer as to the original meaning of the federal Public Use Clause.

Additionally, the sparse history of the Takings Clause's drafting and ratification does not aid in the search for its original meaning. Some interpret the lack of evidence as confirmation that the Takings Clause did not add any additional substantive limitations to the state's ability to exercise the power of eminent domain.³⁶⁰ These scholars argue that public use was synonymous with public benefit in early America.³⁶¹ In contrast, scholars who interpret the Clause narrowly insist that reading it this way blatantly disregards the text of the Amendment.³⁶²

In the case of public use, the text, structure, and history of the Takings Clause provide no authoritative meaning on what kind of limitations it places on the power of eminent domain. With these sources yielding inconsistent conclusions on original meaning, originalists look to see if early judicial interpretations present a coherent idea of how early Americans viewed public use limitations.

V. EARLY JUDICIAL INTERPRETATIONS OF PUBLIC USE

Part V examines judicial interpretations of the Mill Acts, a group of statutes legalizing eminent domain by private actors for the purpose of

354. *See supra* notes 249, 253–55 and accompanying text.

355. *See supra* notes 309–10 and accompanying text.

356. *See supra* notes 264–66 and accompanying text.

357. *See supra* notes 317–19, 340–41 and accompanying text.

358. *See supra* notes 267–74 and accompanying text.

359. *See supra* notes 268–69, 322–23 and accompanying text.

360. *See supra* notes 331–35 and accompanying text.

361. *See* Melton, Jr., *supra* note 315, at 85 (“[T]he doctrine . . . is consistent with the original American concept, which appeared in colonial, revolutionary, and early national days, that while ‘public use’ was necessary, ‘public use’ actually meant public benefit—of almost any conceivable kind.”).

362. *See supra* notes 337–39 and accompanying text.

public economic benefit.³⁶³ These cases provide a close analogy to the question of public use in *Kelo*.³⁶⁴ Despite most decisions occurring several decades after the founding,³⁶⁵ scholars and jurists in search of the original meaning of the Public Use Clause frequently cite precedent from the Mill Act cases, even decisions from the late nineteenth century, to support either a broad³⁶⁶ or a narrow³⁶⁷ interpretation of public use.³⁶⁸ Accordingly, the temporal relevance of the decisions is a criticism applying equally to all scholars relying on Mill Act case law.

Because the Supreme Court held in the early nineteenth century that the Takings Clause applied only to expropriations by the federal government, not the states, property protections remained subject to state law during that time.³⁶⁹ However, after the passage of the Fourteenth Amendment to the Constitution following the Civil War, the Court gradually began applying the protections in the Bill of Rights to the states, eventually incorporating the Takings Clause in 1897.³⁷⁰ Since the first adjudications of federal takings did not occur until 1875,³⁷¹ state law and eminent domain practice at the time of the drafting and ratification of the Takings Clause are the relevant decisions to review when interpreting its original meaning.³⁷²

A. *The Mill Acts*

The Mill Acts collectively refer to a group of similar statutes, enacted in several colonies and states,³⁷³ that essentially transferred the power of

363. *See infra* Part V.A.

364. While courts in the nineteenth century were faced with public use challenges by a variety of regulated industries, railroads or utilities for example, the Mill Acts closely parallel the modern context as the takings there were necessary for private economic growth. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 34 (1977).

365. *See infra* Part V.A.1–2; *see also* Ely Jr., *supra* note 15, at 54 (“The Supreme Court had little occasion to address the ‘public use’ requirement until the late nineteenth century.”). The Mill Act decisions are in some cases quite far temporally removed from 1780s–1790s and traditionally would not be particularly probative of original meaning. *See supra* notes 36–38 and accompanying text. Nevertheless, these decisions provide scholars the opportunity to examine how courts historically approached the issue of public use when it intersected with economic benefit, without addressing common carrier regulations. Interpretations of public use—both broad and narrow—relating to other private entities subject to regulations, like railroads, are beyond the scope of this Note.

366. This section will refer to a broad interpretation of the Mill Acts as instances in which courts used a public benefit standard to uphold the constitutionality of the statute at issue.

367. This section will refer to a narrow interpretation of the Mill Acts as instances in which courts required actual use by the public to uphold the constitutionality of the statute at issue.

368. *See infra* Part V.B–D.

369. *See* *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

370. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238–41 (1897).

371. *Kohl v. United States*, 91 U.S. 367, 371–72 (1875).

372. Treanor, *supra* note 6, at 859–63 (arguing that early state law and practice is relevant for evaluating original understanding). *But see infra* note 448 and accompanying text (justifying a departure from the original meaning by examining instead the post-incorporation time period).

373. *See* *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17–18 (1885) (listing twenty-nine states, as of 1885, that had Mill Acts or had previously enacted such statutes). Delaware,

eminent domain to private actors—generally riparian landowners—to facilitate the building of water-powered mills.³⁷⁴ The statutes typically either authorized the mill owner to condemn neighboring land, compensating the landowner for title to the property, or allowed the mill owner to pay damages to the landowner for flooding resulting from damming the river.³⁷⁵

Benefit to the public from these takings by private actors accrued indirectly by enabling the development of local industry, instead of directly by allowing literal public use of the land.³⁷⁶ In the case of some flour mills, though, the public benefited more directly because locals sometimes had a right granted by statute to use the facility to grind their grain.³⁷⁷ In general, as this section details, courts in the early nineteenth century allowed the takings for reasons of providing economic benefit, while later courts required the public to make actual use of the taken land.³⁷⁸

1. Decisions Upholding Takings Under the Mill Acts

Around the turn of the nineteenth century, landowners faced with losing property as a result of condemnations under the Mill Acts began to challenge the statutes, resulting in some courts upholding the laws by articulating a broad concept of public use.³⁷⁹ In many ways, these opinions

Maryland, Massachusetts, New Hampshire, North Carolina, Rhode Island, and Virginia enacted statutes authorizing such takings in the seventeenth or eighteenth centuries, prior to the drafting and ratification of the Bill of Rights. *Id.* Delaware later repealed its condemnation provision in 1773. See John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719–1859*, 27 J. LEGAL STUD. 455, 461 (1998) (arguing that the reason for the repeal seems to have been a desire to protect existing mills from crowding, rather than a rejection of the condemnation power). Similarly, Maryland repealed its condemnation provisions in 1766. See Hart, *supra* note 277, at 21–22 (positing that the repeal did not reflect a commitment to preserve private property as a similar condemnation procedure for ironworks facilities, rather than flour mills, remained intact).

374. Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1116. These statutes took a variety of forms in each state, and the differences between them are beyond the scope of this Note.

375. *Id.*

376. See Hart, *Colonial Land Use Law*, *supra* note 276, at 1267; Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1117 & n.134.

377. Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1117 & n.134; see also 1 LEWIS 1888, *supra* note 328, at 246 & n.3 (noting Alabama, Delaware, Georgia, Kentucky, and North Carolina statutes explicitly required the mills to grind the public's flour); *infra* note 388 (listing states without public access statutory requirements).

378. Compare *infra* Part V.A.1 (discussing cases that interpreted public use broadly from 1814–1885), with *infra* Part V.A.2 (discussing cases that interpreted public use narrowly from 1832–1903).

379. See, e.g., *Olmstead v. Camp*, 33 Conn. 532, 546 (1866) (interpreting “public use” as “appropriat[ion] of private property by the state . . . for purposes of great advantage to the community”); *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 481 (1832) (holding that the Mill Act related to public exigencies and thus satisfied the Massachusetts Public Use Clause, even though the public had no legal right to use the mill); *Great Falls Mfg. Co. v. Fernald*, 47 N.H. 444, 452 (1867) (noting that public use does not require unrestricted access to the entire community); *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 729 (1832) (refusing to declare a statute authorizing condemnation by private manufacturing mills unconstitutional on public use grounds because “[t]he ever varying

can be seen as the forerunners to later Supreme Court jurisprudence interpreting the Public Use Clause to require only a valid public purpose, generally determined by the legislature.³⁸⁰

By allowing takings for public benefit, courts focused on the underlying purpose of appropriating the land, rather than scrutinizing the actual intended use of the property.³⁸¹ In *Stowell v. Flagg*,³⁸² for example, an 1814 court noted that since mills were of particular importance to early public development, lands damaged by the flooding necessary to harness water power satisfied the public use requirement.³⁸³ Notably, the court's decision did not focus on how the flooded land would further private industry.³⁸⁴

The Supreme Court addressed the Mill Acts near the end of the nineteenth century.³⁸⁵ The case concerned an action for damages under New Hampshire's statute, where the individual landowner challenged the Act as an unconstitutional taking of his property.³⁸⁶ The Court upheld the statute's constitutionality, noting that it had not deprived the plaintiff of his property without due process because it was a valid exercise of legislative judgment.³⁸⁷ In particular, the Court stated that the validity of eminent domain under the Mill Acts had long been upheld as satisfying the public use requirement since harnessing water power for manufacturing purposes benefited the public.³⁸⁸

Finally, in a case outside of the traditional water-powered mill context, the Nevada Supreme Court upheld takings used to support the state's burgeoning mining industry.³⁸⁹ In doing so, the *Seawell* court considered the necessity of eminent domain and whether the appropriation would

condition of society is constantly presenting new objects of public importance and utility" so what constitutes public use may vary according to time and location).

380. See *supra* Part II.A.

381. Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 633 (1940).

382. 11 Mass. (11 Tyng) 364 (1814).

383. *Id.* at 366 n.a.

384. *Id.* at 366–68. The court did, however, question the motives of the legislature in providing strong protection for private mill owners. *Id.* at 366 n.a. It is unclear in the opinion if the Massachusetts statute allowed the public to use the mill, but it is likely that it did. See HORWITZ, *supra* note 364, at 49 (“[The *Stowell* court] was merely questioning the prudence of the legislative judgment, while never doubting that mills were public in terms of whom they served.”).

385. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

386. *Id.* at 10, 12. The plaintiff based his takings claim on the Fourteenth Amendment's Due Process and Equal Protection Clauses, not the Fifth Amendment, presumably because the Fifth Amendment had yet to be incorporated and valid against the states. *Id.* at 12; see also *supra* note 370 and accompanying text (noting the Court did not incorporate the Takings Clause against the states until 1897).

387. *Head*, 113 U.S. at 26.

388. *Id.* at 19. While the New Hampshire statute required the mill be open for public use, *id.* at 10 n.*, the Court noted that, “[T]he statutes of many states are not so limited.” *Id.* at 19 (naming specifically Massachusetts, Pennsylvania, Virginia, and Kentucky as well as many New England and western states for not explicitly requiring public use in Mill Act statutes).

389. *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 398–99 (1876).

contribute to the public benefit.³⁹⁰ The court defended using a broad interpretation of public use, arguing that a narrow requirement could lead to perverse results.³⁹¹ Indeed, the *Seawell* court argued that the broad interpretation contained more limiting principles than a test focusing literally on public use.³⁹²

The court closed its opinion by referencing the founding generation, declaring that courts would be making an assumption if they presumed the original meaning of public use required actual public use of the condemned land.³⁹³ In reaching this conclusion, the court surveyed case law to show that previous judicial decisions had also eschewed a literal interpretation of public use.³⁹⁴ The *Seawell* court's statements about original meaning show that even courts temporally closer to the founding than the *Kelo* Court considered determining the original meaning of the Public Use Clause to be a speculative exercise.

When courts faced with challenges to the Mill Acts interpreted the public use language broadly, they generally emphasized the benefit to the public from allowing the takings, rather than focusing on the involvement of private actors in the appropriations. Instead of engaging in textual or historical analysis, these courts largely relied on precedent to hold that the public benefit from the exercise of eminent domain satisfied public use restrictions.³⁹⁵

2. Decisions Striking Down Takings Under the Mill Acts

When courts interpreted the Mill Acts narrowly, the opinions generally emphasized the intended use of the taken land, instead of focusing on the purpose of the taking.³⁹⁶ These narrow interpretations emerged after the broad interpretations³⁹⁷ and advocated reading public use literally to limit the takings power.³⁹⁸ In particular, an early interpretation of public use in 1837 questioned whether a broad interpretation provided any limitation on takings at all: “When we depart from the natural import of the term ‘public

390. *Id.* at 411. Echoing later jurisprudence, the court referred to assemblage problems as a primary reason compelling the use of eminent domain. *Id.*; see also *supra* notes 78, 84 and accompanying text (discussing assemblage problems in *Berman v. Parker*, 348 U.S. 26 (1954)).

391. *Seawell*, 11 Nev. at 410–11 (“If public occupation and enjoyment . . . furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizens for the purpose of building hotels and theaters. . . . [T]his view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals.”).

392. *Id.*

393. *Id.* at 408 (“I think it would be an unwarranted assumption upon our part to declare that the framers of the constitution did not intend to give to the term ‘public use’ the meaning of public utility, benefit and advantage.”).

394. *Id.* at 400–08.

395. See *supra* notes 388, 394 and accompanying text.

396. Nichols, Jr., *supra* note 381, at 626–27.

397. See *supra* note 378 and accompanying text.

398. In contrast, cases advocating a broad interpretation questioned whether literal use provided such a limitation. See *supra* note 391 and accompanying text.

use,' and substitute . . . public utility, public interest, common benefit, general advantage or convenience, or . . . public improvement, is there any limitation which can be set to the . . . appropriation of private property?"³⁹⁹

Some courts simply invalidated the takings made pursuant to the Mill Acts, instead of finding the statutes unconstitutional. For example, in *Harding v. Goodlett*,⁴⁰⁰ plaintiffs sought to condemn land for mills producing flour, lumber, and paper.⁴⁰¹ The court held that building the flour mill was simply pretext for the use of the condemnation power because the other mills would be purely private operations.⁴⁰² In a different example from Vermont, a mill owner petitioned the court to increase his ability to flood a neighbor's property.⁴⁰³ The court held that the taking was not for public use because the statute did not require the mill owner to provide service to the public at his facility.⁴⁰⁴ Accordingly, the taking was a purely private transfer, not a condemnation for use by the public.⁴⁰⁵

Courts also went beyond invalidating takings to hold some Mill Acts unconstitutional.⁴⁰⁶ For example, the Supreme Court of Michigan declared a statute encouraging the building of "water power manufactories" unconstitutional.⁴⁰⁷ The court noted that the statute "should require the use to be public in fact . . . it should contain provisions entitling the public to accommodations."⁴⁰⁸ Similarly, the Supreme Court of Illinois declared a statute authorizing condemnations for the benefit of "any public grist mill, saw mill or other public mill" unconstitutional.⁴⁰⁹ Specifically, the court noted the statute authorized the taking of private property for uses other than public ones.⁴¹⁰ In particular, the court defined public use as "something more than a mere benefit to the public," such as the right "to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."⁴¹¹

399. *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 60–62 (N.Y. 1837) (Tracy, Sen., concurring). In support of his opinion, Senator Tracy cited case law in addition to historical authorities, such as European civil law philosophers, Blackstone, and Kent. *Id.* at 56–61, 75–76.

400. 11 Tenn. (3 Yer.) 40 (1832).

401. *Id.* at 41.

402. *Id.* at 53–54. The court noted, however, that the taking would be valid for the flour mill. *Id.* at 52 ("The grist-mill is a public mill.").

403. *Tyler v. Beacher*, 44 Vt. 648, 649 (1871).

404. *Id.* at 652–53.

405. *Id.* at 653.

406. *See, e.g., Sadler v. Langham*, 34 Ala. 311, 333–34 (1859) (invalidating a statute authorizing condemnations because the statute covered all mills, not exclusively public flour mills); *Loughbridge v. Harris*, 42 Ga. 500, 505 (1871) (invalidating a statute on the grounds that it allowed private actors to exercise eminent domain and because mills were not an appropriate public use).

407. *Ryerson v. Brown*, 35 Mich. 333, 334, 342 (1877).

408. *Id.* at 338.

409. *Gaylord v. Sanitary Dist. of Chicago*, 68 N.E. 522, 523–24 (Ill. 1903) (quoting the Illinois Mill Act statute).

410. *Id.* at 526. The court noted, however, that the statute would be valid for flour mills. *Id.*

411. *Id.* at 524.

B. *Broad Interpretations of the Mill Act Cases*

Scholars frequently rely on the Mill Act cases to show how early courts interpreted public use requirements, especially with respect to statutes that promoted economic growth via the takings power. Scholarship advocating a broad interpretation of public use argues that courts did not narrow the concept until the mid-nineteenth century.⁴¹² At the turn of the century—the relevant time period, scholars claim, for an inquiry into original meaning—statutes such as the Mill Acts were “common, rarely contested, and universally upheld.”⁴¹³ While public use was necessary to the exercise of the power of eminent domain, public use and public benefit were synonymous at the time of the founding.⁴¹⁴

While twenty-nine states had Mill Act statutes in the eighteenth and nineteenth centuries, over half of the colonies also had these statutes prior to the drafting and ratification of the Bill of Rights.⁴¹⁵ Such widespread approval of statutes granting private actors the power of eminent domain at the time of the founding lends credence to the argument that the early Americans entertained a broad definition of “public use” that included encouraging public economic benefit.⁴¹⁶ A treatise even noted that, “[The Mill Acts] cannot be justified upon principle without virtually expunging the words public use from the constitution.”⁴¹⁷

C. *Narrow Interpretations of the Mill Act Cases*

Scholars who believe that public use should be interpreted narrowly seek to distinguish the Mill Act cases supporting the broad view. They acknowledge that in many cases, early courts did uphold takings made

412. Goho, *supra* note 180, at 55 & n.99 (noting that the use by the public requirement originated in Senator Tracy’s concurring opinion in *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 60–61 (N.Y. 1837) (Tracy, Sen., concurring)); Harrington, *supra* note 251, at 1252 (“[T]he so-called ‘public use’ requirement is really a rather late innovation in the law . . . mainly found in nineteenth and twentieth century American cases.”); Nichols, Jr., *supra* note 381, at 617 (identifying the 1840s and 1850s as the time period in which courts began to use a more narrow interpretation).

413. Goho, *supra* note 180, at 55.

414. Melton, Jr., *supra* note 315, at 85.

415. See *supra* note 373 (listing seven out of the thirteen colonies with Mill Acts prior to the founding). Delaware and Maryland had repealed their respective Mill Acts by this date, although likely for reasons not associated with concerns about eminent domain and private property. See *supra* note 373.

416. See HORWITZ, *supra* note 364, at 47 (“The various acts to encourage the construction of mills offer some of the earliest illustrations of American willingness to sacrifice the sanctity of private property in the interest of promoting economic development.”); Melton, Jr., *supra* note 315, at 82–83 (noting that even though the Mill Acts explicitly took property from A to give to B, the Acts continued to be upheld for decades following the founding); Nichols, Jr., *supra* note 381, at 617 (“Public benefit . . . was long generally regarded as sufficient to establish public use.”); see also Ely Jr., *supra* note 15, at 55 (“[I]n the late nineteenth century both state and federal courts gradually adopted a broader reading of governmental authority to acquire private property. The constitutional norm of ‘public use’ was increasingly equated with the more expansive concept of ‘public benefit’ or ‘interest.’”).

417. 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 559–60 (3d ed. 1909).

pursuant to the Mill Acts. When this happened, they insist, statutes always required the mills to serve the public.⁴¹⁸ In this sense, mills were akin to public utilities or common carriers, entities that could legitimately exercise the power of eminent domain for public use.⁴¹⁹ Similarly, some suggest in the alternative that the statutes were simply a carry-over from the colonial period,⁴²⁰ and courts upheld them based on precedent, even though a strict public use test would have required invalidation.⁴²¹

Approaching the cases from another perspective, Professor Richard A. Epstein argues that takings upheld under the Mill Acts, or in turn of the century Supreme Court jurisprudence,⁴²² are substantively different from a case like *Kelo*. In those instances, the land taken for upstream flooding, irrigation, or mining differed substantially from a residential property possessing immeasurable personal value for the owner.⁴²³ Specifically, Professor Epstein views the earlier cases as instances in which “the private holdout risk was enormous, but the loss of subjective value to the landowner was negligible,” in contrast to the far more personal losses in *Berman*, *Midkiff*, and *Kelo*.⁴²⁴

Proponents of a narrow interpretation also criticize scholars who ignore two early decisions, *Calder v. Bull*⁴²⁵ and *Vanhorne’s Lessee v. Dorrance*,⁴²⁶ both stating in dicta that property cannot be taken for private uses.⁴²⁷ Courts decided both *Calder* and *Vanhorne’s Lessee* within a decade of ratification of the Takings Clause, and the timing suggests that they are substantially more probative of original meaning than the Mill Act precedent.⁴²⁸ In *Vanhorne’s Lessee*, Justice William Patterson declared

418. EPSTEIN, *supra* note 225, at 172 & n.24; Sandefur, *supra* note 16, at 15; Sandefur, *supra* note 338, at 600; cf. Claeys, *supra* note 182, at 921 (discussing the court’s holding in *Ryerson v. Brown*, 35 Mich. 333 (1877), that a statute was unconstitutional because it did not require use by the public). Many of the first Mill Acts required that the mills serve the local communities. See *supra* note 377 (listing states that required mills to remain open to the public).

419. Sandefur, *supra* note 16, at 16.

420. See, e.g., *supra* text accompanying notes 412–13 (explaining that a broad interpretation prevailed at the turn of the eighteenth century).

421. See EPSTEIN, *supra* note 225, at 172–74; Note, *supra* note 337, at 604–05; see also Sandefur, *supra* note 338, at 600–01 (noting several states repealed the statutes for violating the public use limitation).

422. See *supra* notes 65–75 and accompanying text (examining cases where the Supreme Court upheld takings for the purposes of furthering irrigation and mining).

423. Richard A. Epstein, *Kelo: An American Original*, 8 GREEN BAG 2D 355, 360 (2005); Epstein, *supra* note 14, at 166.

424. Epstein, *supra* note 14, at 166.

425. 3 U.S. (3 Dall.) 386 (1798). In *Calder*, the Court decided if a Connecticut law granting a new hearing in a will dispute was an ex post facto law forbidden by the Constitution. *Id.* at 386–87. Justice Chase rejected the idea that there were no limitations on the power of the legislature, citing naked transfers of property as an inherent restriction. *Id.* at 386–91; see also *supra* note 344 (quoting the exchange between Justices Chase and Iredell).

426. 2 U.S. (2 Dall.) 304 (1795). In a circuit court decision, Justice William Patterson examined a title dispute over lands in Pennsylvania. *Id.* at 304–06. In the course of the decision, he discussed the ability of the legislature to expropriate property. *Id.* at 310–12.

427. Sandefur, *supra* note 338, at 589 n.98.

428. See *id.*

that, “The preservation of property then is a primary object of the social compact,”⁴²⁹ adding that, “Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen . . . and vest it in another?”⁴³⁰ In *Calder*, Justice Chase echoed similar sentiments when he declared that a law taking property from *A* to give to *B* would be invalid.⁴³¹

D. Comparing the Broad and Narrow Interpretations

Judicial interpretations of the Mill Acts show there was little consistency to how courts interpreted public use limitations throughout the nineteenth century. Whether the words were viewed narrowly or broadly depended largely on time, and frequently also on location and circumstance. Since state courts employed an ad hoc approach, cases supporting a narrow definition and ones applying a broader conception can both easily be cited in support of a particular theory of the original meaning of the Public Use Clause.⁴³²

These broad and narrow interpretations of the Mill Acts illustrate why ascertaining the original meaning of the Public Use Clause is difficult. In particular, when interpreting the words “public use,” courts frequently cited precedent from earlier decisions instead of engaging in a historical inquiry on the original meaning of the phrase.⁴³³ While it is certain that early decisions regarding the validity of takings under the statutes interpreted public use broadly,⁴³⁴ it is also true that these cases generally dealt with entities required by statute to serve the public.⁴³⁵ It is equally true that the decisions interpreting public use strictly did not appear until later in the nineteenth century,⁴³⁶ and proponents of a broad interpretation insist that this is not the appropriate time period in which to inquire about original

429. *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 310.

430. *Id.* at 312. Justice Patterson also noted that the legislature could take property from *A* and give to *B* upon payment of compensation and determination of necessity. *Id.* at 312. Nonetheless, Justice Patterson used the words “public purposes,” “good of the community,” “public exigencies,” and “necessity of a state” in the opinion, suggesting that they were synonymous with “public use.” *Id.* at 310–11.

431. *Calder*, 3 U.S. (3 Dall.) at 388; *see also supra* note 344. In *Kelo v. City of New London*, 545 U.S. 469 (2005), Justice Stevens, writing for the majority, did not consider the taking at issue to be equivalent to the type of “purely private taking” proscribed by *Calder*. *Id.* at 477–78 (quoting *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

432. *See, e.g.*, *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 400–01 (1876) (“The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases.”); Lopez, *supra* note 82, at 261 (“[T]he result in any given case was, to say the least, unpredictable.”); Note, *supra* note 337, at 605–06.

433. *See supra* notes 388, 394 and accompanying text. *But see* *Harding v. Goodlett*, 11 Tenn. (9 Yer.) 41, 52 (1832) (citing Blackstone for the proposition that eminent domain should be exercised with great caution).

434. *See supra* note 378.

435. *See supra* notes 418–19 and accompanying text. *But see supra* note 388 (listing states without statutory public access requirements).

436. *See supra* note 378.

meaning.⁴³⁷ What remains undisputed by scholars and courts is that the cases evaluating the Mill Acts are inconsistent at best, and precedent supporting either a broad or narrow interpretation can easily be found.⁴³⁸ Because of these inconsistencies, the Mill Act cases do not provide a coherent understanding of the original meaning of public use.

Comparing and contrasting the historical record as a whole shows that scholarship on both sides of the public use debate cannot satisfactorily account for all of the evidence on original meaning. Those who advocate for a broad interpretation have very persuasive arguments based on the many definitions of “use,” the influence of classical republicanism, the lack of changes during the ratification process, and early Mill Act precedent. On the other hand, those who advocate for a narrow interpretation have persuasive arguments based on the influence of classical liberalism, interpreting the Clause to give effect to all of its words, and cases preceding the Mill Acts. Nonetheless, neither the broad nor the narrow interpretation can satisfactorily explain the comprehensive history of the Clause.

VI. RECONCILING ORIGINALISM AND THE HISTORY OF THE PUBLIC USE CLAUSE

This Note has shown that the historical record regarding takings is discrete, yet scholars present drastically different views of the original meaning of the Public Use Clause.⁴³⁹ The history reviewed by this Note does not get an originalist any closer to explaining whether Justice Thomas’s dissent portrays an accurate picture of early American attitudes regarding public use. Comparing physical takings and regulatory takings jurisprudence, though, provides an interesting contrast.⁴⁴⁰ Finding that regulatory takings also eschewed originalism, this Note closes by proposing that originalism is not an ideal method of interpretation when there is no constraining historical guidance.⁴⁴¹

A. *A Foray Into Regulatory Takings*⁴⁴²

While this Note does not purport to examine regulatory takings jurisprudence in detail, comparing takings law as a whole reveals

437. See *supra* notes 412–16 and accompanying text. *But see supra* note 365 and accompanying text (explaining that all Mill Act cases are temporally distant from the founding, a criticism applying equally to scholarly interpretations both broad and narrow).

438. See *supra* note 432 and accompanying text.

439. See *supra* Parts III–V.

440. See *infra* Part VI.A.

441. See *infra* Part VI.B.

442. The doctrine of regulatory takings refers to instances when regulations (e.g., zoning) affect property value, as opposed to losses suffered as a result of direct physical appropriations. JON W. BRUCE & JAMES W. ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* 678 (6th ed. 2007). The main question in this context is whether a regulation of land use constitutes a taking, as opposed to whether the taking is constitutional. *Id.* In regulatory takings cases, courts must decide whether property owners should be compensated for the difference in property value as a result of the regulation or whether compensation should be reserved for physical takings exclusively. *Id.*

inconsistencies in the use of original meaning as a method of Constitutional analysis. Before *Kelo*, Supreme Court public use jurisprudence squarely rejected originalism, favoring instead reliance on precedent.⁴⁴³ In *Kelo*, the majority opinion continued the trend of eschewing an originalist approach,⁴⁴⁴ while Justice Thomas's dissent advocated overruling precedent to return to original meaning, claiming that the Court's public use jurisprudence was "wholly divorced from the text, history, and structure of our founding document."⁴⁴⁵

A substantial number of scholars agree that the application of original meaning to regulatory takings cases is inverted. This view is based on the same history discussed in Part IV, that the Clause originally only contemplated compensation for physical expropriations, never for regulatory takings.⁴⁴⁶ In *Lucas v. South Carolina Coastal Council*,⁴⁴⁷ even Justice Scalia's majority opinion, in which Justice Thomas joined, admitted that "[in the past] it was generally thought that the Takings Clause reached only a 'direct appropriation' of property."⁴⁴⁸ Indeed, the doctrine of compensation for regulatory takings is based on the precedent set in *Pennsylvania Coal Co. v. Mahon*,⁴⁴⁹ not on the original meaning of the Takings Clause.

443. See *supra* note 388 and accompanying text (noting the Court in *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885), stated the validity of eminent domain under the Mill Acts had long been upheld as satisfying the public use requirement for benefiting the public); see also Part II.A (explaining that the cases beginning with *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and ending with *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), did not engage in any textual, structural, or historical analysis when holding that public benefit satisfied the Public Use Clause).

444. See *supra* note 115 and accompanying text.

445. See *supra* text accompanying note 157.

446. See Gaba, *supra* note 213, at 575; Harrington, *Regulatory Takings*, *supra* note 277, at 2055; Hart, *Land Use Law in the Early Republic*, *supra* note 276, at 1101; Treanor, *supra* note 6, at 782; Treanor, Note, *supra* note 229, at 711. *But see* EPSTEIN, *supra* note 225, at 102.

447. 505 U.S. 1003 (1992); see Ely Jr., *supra* note 15, at 43–44 ("In short, the famous 1922 decision of *Pennsylvania Coal v. Mahon*, in which the Court endorsed the emerging concept of a regulatory taking, was hardly an innovation. Rather, it reflected the desire of the Framers for robust protection of the rights of property owners . . .").

448. *Lucas*, 505 U.S. at 1014 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871)). Justice Scalia later wrote that not compensating regulatory takings that eliminated all property value "[was] inconsistent with the historical compact recorded in the Takings Clause." *Id.* at 1028. Nonetheless, he admitted that "[t]he practices of the States prior to incorporation . . . included outright physical appropriation of land without compensation." *Id.* at 1028 n.15 (citation omitted). While Justice Scalia acknowledged that the Takings Clause originally applied only to physical deprivations of property, he argued that the post-incorporation time period was the relevant inquiry to justify *Lucas's* holding. *Id.* at 1028 & n.15. *But see supra* note 372 and accompanying text (explaining why early state cases on public use are the relevant judicial decisions for an inquiry into the original meaning of the Takings Clause).

449. 260 U.S. 393 (1922); see also *Dolan v. City of Tigard*, 512 U.S. 374, 406–07 (1994) (Stevens, J., dissenting) ("Justice Holmes charted a significant new course, however, when he opined that a state law making it 'commercially impracticable to mine certain coal' had 'very nearly the same effect for constitutional purposes as appropriating or destroying it.'" (quoting *Mahon*, 260 U.S. at 414)); *Lucas*, 505 U.S. at 1014–15 ("Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property

Opining on physical appropriations and regulatory takings requires analysis of the same Constitutional clause: “[N]or shall private property be taken for public use, without just compensation.”⁴⁵⁰ Advocating an originalist approach for physical takings⁴⁵¹ but a non-originalist approach to regulatory ones⁴⁵² seems, at a minimum, contradictory. In contrast to Justice Scalia’s observation that opened this Note, Justice Thomas accepts judicial interpretations “wholly divorced from the text, history, and structure of our founding document”⁴⁵³ in some instances but not in others.

Limiting the social and moral judgments of jurists is an important reason for employing originalist methods.⁴⁵⁴ The inconsistent application of originalism to the Takings Clause, however, questions this justification. Comparing decision making in physical and regulatory takings cases shows original meaning may also function to disguise personal judgments. For example, resorting to originalism to protect property owners from expropriations but ignoring original meaning to ensure compensation for regulations affecting value seems more consistent with a political philosophy than a judicial one. As with the unsatisfactory historical analysis of public use, this inconsistency in constitutional adjudication of the Fifth Amendment Takings Clause also lends credence to this Note’s contention that originalism is not an appropriate method of interpretation for the Public Use Clause.

B. *Originalism Cannot Provide a Meaningful Limitation in Public Use Cases*

Proponents of originalism believe the interpretive method not only links judicial interpretation to the original meaning of the text but also constrains the judiciary’s ability to insert personal judgments into decision making.⁴⁵⁵ Using the Public Use Clause as a case study, this Note has shown that both of those justifications for originalism fail in this particular context.

was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. . . . These considerations gave birth in that case to the oft-cited maxim that, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’” (quoting *Mahon*, 260 U.S. at 414–15)); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting) (“[T]he holding in [*Mahon*] today discounted by the Court has for 65 years been the foundation of our ‘regulatory takings’ jurisprudence.”); Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence*”: *The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 616–17 (1996).

450. U.S. CONST. amend. V.

451. That is, an analysis of the language “for public use.”

452. That is, an analysis of the language “taken.”

453. See *supra* text accompanying note 157.

454. See *supra* note 39 and accompanying text.

455. See BERNSTEIN, *supra* note 206, at 145 (“[T]he certainty of history’s command is the most reliable restraint.”); *supra* notes 39–43 and accompanying text. It is important to clarify that this Note does not argue that originalism is not a valid method of Constitutional interpretation in general. Rather, it explains, specifically in the context of the Public Use Clause, that when the doctrine fails to achieve its goals, it is not an appropriate method of interpretation.

For example, no scholarship on the original meaning of public use has adequately accounted for all the contradictory elements of the historical record.⁴⁵⁶ In light of this incoherence, originalism fails to connect modern judicial interpretation to “what the American People meant and did when We ratified and amended the document.”⁴⁵⁷ This Note has explained that particularly in the area of property expropriations, the historical record does not indicate whether the founding generation had a concrete conception of the extent to which the rights should be protected. As a result, the scholarship presents the best evidence supporting arguments on both sides of the debate, and although there are individually persuasive arguments for both narrow and broad interpretations, no piece satisfactorily incorporates all of the historical record.

Furthermore, the Court has consistently eschewed original meaning when interpreting the Public Use Clause for physical deprivations of property,⁴⁵⁸ as well as the Takings Clause for regulations affecting the value of property.⁴⁵⁹ In rendering a decision on regulatory takings, Justices Scalia and Thomas acknowledged the Takings Clause did not originally apply to such regulations.⁴⁶⁰ Inviting the Court to return to originalism in one aspect of eminent domain law but not in all aspects seems more tailored to preserving a consistent political philosophy on takings than a judicial philosophy on the advantages of originalist interpretation.⁴⁶¹

Only three physical appropriations cases have reached the Supreme Court since the 1950s, and given *Kelo*'s ruling and deference to legislative determinations,⁴⁶² it seems unlikely that one will reach the Court again. Still, in response to the claims in Justice Thomas's *Kelo* dissent that the original meaning of the Public Use Clause required use by the public, this Note proposes two answers.

First, as discussed above, the traditional search for original meaning has failed in this particular context. Even though Justice Scalia recognizes originalists sometimes reach different conclusions regarding original meaning,⁴⁶³ the accounts presented by scholars vary widely and do not provide a satisfactory explanation of the entire history of the Public Use Clause. Second, the piecemeal application of originalism to takings cases shows that the methodology might not be fulfilling its goal of excising personal judgments from decision making.

456. See *supra* Parts III–IV.

457. See *supra* note 37; see also BERNSTEIN, *supra* note 206, at 109 (explaining that, even in the first ten years after the Constitution's ratification, “the workings of the new Constitution raised problems that its framers and ratifiers did not anticipate . . . problems that cast new and disturbing light on some of their most cherished ideas . . .”).

458. See *supra* Part II.A.

459. See *supra* Part VI.A.

460. See *supra* note 448 and accompanying text.

461. BERNSTEIN, *supra* note 206, at 147 (“[Originalism] thus decays from being a restraint on judicial discretion to becoming a cloak for judicial discretion; judges mold history as they choose to support their interpretation and then impose the onus for an unpopular decision on the dead past.”).

462. See *supra* note 103 (explaining the state legislative response to *Kelo*'s ruling).

463. See *supra* note 41 and accompanying text.

In an effort to reconcile originalism with the history of the Public Use Clause, this Note suggests that the Court's current approach aligns with a broader idea of original meaning than the one associated with a detailed textual, structural, and historical analysis.⁴⁶⁴ This Note shows that while the public use case law relies on precedent that does not employ a traditional originalist analysis, still "the existing constitutional order is" not "at variance with what we know of the original understanding."⁴⁶⁵

Specifically, the Fifth Amendment to the Constitution primarily addresses issues of legal procedure.⁴⁶⁶ Further, the protection of minority interests through republican government represented a major theme of early America.⁴⁶⁷ In *Kelo*, this scenario played out when the Court deferred to legislative determinations of public use, specifically noting that the states retained the power to substantively change the level of protection for private property.⁴⁶⁸ In response, almost every state legislature reevaluated its laws regarding eminent domain.⁴⁶⁹ In this way, the Court's ruling allowed individuals to participate in deciding the appropriate level of substantive property protection.

When public use is the deciding factor in the validity of a taking, both broad interpretations and narrow ones have line drawing problems.⁴⁷⁰ The use versus purpose distinction is simply not always clear or easy to apply in practice. Protection of property through legislative deference places the power in the hands of the people to decide what warrants substantive protection, while preserving judicial oversight for instances in which the process failed to protect an individual. Interpreting current public use jurisprudence in this manner seems far more consistent with the Fifth Amendment's emphasis on procedure and early Americans' goals for democratic government, while also remaining far simpler than searching for a coherent explanation of the inconsistent history of the Public Use Clause.

CONCLUSION

The government's power to take an individual's private property for public use, provided just compensation is paid to the owner, highlights the tenuous boundary between individual rights and the common good. While

464. Despite Professor Monaghan's warning that "[o]riginalism must refer to an understanding concrete enough to provide a real and constraining guidance," this Note must reconcile the history and the methodology at a conceptually broader level since there is no clear and concrete understanding of the original meaning of public use. *See supra* note 41.

465. *See supra* note 50 and accompanying text.

466. The current Fifth Amendment contains the Grand Jury Clause, the Double Jeopardy Clause, the Self-Incrimination Clause, the Due Process Clause, and the Takings Clause. U.S. CONST. amend. V.

467. *See supra* notes 292–94, 345–47 and accompanying text; *see also* WOOD, RADICALISM, *supra* note 224, at 322–23 ("Protecting private property and minority rights from the interests of the enhanced public power of the new republican governments eventually became . . . the great problem of American democratic politics.").

468. *See supra* notes 102–03, 108 and accompanying text.

469. Ely, Jr., *supra* note 103, at 133–34; Somin, *supra* note 103, at 2102.

470. *See, e.g., supra* notes 391, 399 (offering examples of line drawing problems identified by Mill Act courts).

the majority's opinion in *Kelo* did not stray from public use precedent, Justice Thomas's dissent chastised the Court for abandoning the original meaning of the Public Use Clause. This Note suggested that Justice Thomas's interpretation of the Clause's original meaning is not foolproof. The historical record and the scholarship interpreting it show that the founding generation did not possess a definite conception of how far the government's power of eminent domain extended. Accordingly, this Note proposed that traditional originalist Constitutional interpretation is ill suited for a documentary provision with an ambiguous history, primarily because the historical record may be cited selectively in support of either a broad or narrow "original" meaning. Simply put, original interpretation in a historical grey area fails to achieve the doctrine's goals of limiting personal influence on judicial decision making.

This Note concluded by proposing that originalism as an idea can be reconciled with the history of the Public Use Clause. Specifically, when the *Kelo* majority stressed that state legislatures could grant more substantive protection to property owners, the resulting changes in state eminent domain law epitomized the virtues of the federal republic created by the founding fathers. Localities were able to choose the appropriate level of substantive protection for property rights with the Constitution providing a minimum level of process protection. In this way, the *Kelo* decision's adherence to stare decisis actually exemplified the original goals of the founding generation.