

WILL VIRGINIA'S NEW EMINENT DOMAIN AMENDMENT PROTECT PRIVATE PROPERTY?

INTRODUCTION

Most toddlers respect private property as private until they want it, at which point they feel justified in asserting their superior rights. The Norfolk Housing Authority recently has not behaved much differently. In fact, the Housing Authority is forcing local businessman Bob Wilson to give up his private property for an approved redevelopment plan to provide “retail space” for Old Dominion University student housing.¹ Bob’s property is neither primarily residential nor an object of blight in the neighborhood. On the contrary, Bob has owned and operated Central Radio Company on the property for fifty years, employing 100 taxpaying citizens to produce radio and surveillance parts for the United States Navy. In Mr. Wilson’s words, “You shouldn’t be able to take land from one business and give it to another. . . . That’s not fair. It’s not morally correct, it’s not legally correct.”² Nevertheless, the Housing Authority may legally be able to proceed because the Supreme Court in *Kelo v. City of New London* defined public use as encompassing economic development.³

The Supreme Court’s opinion in *Kelo* strayed far from the intention of the constitutional Framers and early judicial adherence to a narrow, more literal interpretation of the public use requirement of the Fifth Amendment’s Takings Clause. The idea that the government cannot take from *A* and give it to *B* has been an established, bedrock principle since the nation’s founding.⁴ The trend toward a broad view of public use that culminated in *Kelo* has triggered an overwhelming response from

¹ Rob Bell, *Preventing Abuses of Eminent Domain*, VIRGINIAN-PILOT, Oct. 23, 2012, at Hampton Roads 7; Douglas Kennedy, *People Speak: Business Fights to Shield Property from Eminent Domain in Virginia*, FOXNEWS.COM, July 12, 2012, <http://www.foxnews.com/politics/2012/07/12/people-speak-business-fights-to-keep-property-from-eminant-domain-in-virginia/#ixzz2Fi6KfrRi>; Brian Koenig, *Businesses, Investors Protest Eminent Domain in Virginia and California*, NEW AM. (July 14, 2012), <http://www.thenewamerican.com/economy/sectors/item/12076-businesses-investors-protest-eminant-domain-in-virginia-and-california>.

² Kennedy, *supra* note 1.

³ 545 U.S. 469, 483–84 (2005).

⁴ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

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. . . . [A] law that takes *property* from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Id.

state legislatures. Virginia initially took modest measures to strengthen its protection of property rights but finally placed a constitutional eminent domain amendment on the ballot this past November. Virginia voters approved the amendment, which took effect on January 1, 2013, and has made Virginia the twelfth state to change its constitution to bolster private property rights.⁵

Good intentions do not automatically beget good policy, however. The purpose of this Note is to analyze the efficacy of Virginia's new constitutional amendment. First, this Note provides context by examining the Framers' understanding of property rights as a central aim of government and why James Madison put this understanding into the Takings Clause. From that starting point, the practice of takings and courts' treatment of the public use requirement have evolved from a narrow, literal definition to a broad definition of what constitutes public use. Second, this Note analyzes how the Supreme Court solidified this progression in recent cases, most notably *Kelo*, and the reason behind the unparalleled response from state legislatures. Finally, this Note focuses on Virginia's post-*Kelo* actions and the amendment itself, including the Virginia courts' trend of deferring to the legislature, and will recommend a bright line rule on just compensation in order to strengthen efforts to protect property rights.

I. BACKGROUND TO *KELO V. CITY OF NEW LONDON*

A. *The Framers' Intent*

The Fifth Amendment's Takings Clause constitutionalized a right already considered an embedded common law principle. Since the nation's founding, Americans had largely believed that property rights protected all other rights.⁶ In fact, the colonists revolted partly due to British infringement of their property rights when King George III would not heed colonists' appeals to the British constitution⁷ and their

⁵ John Kramer, *Virginians Protect Property Rights*, INST. FOR JUST. (Nov. 7, 2012), <http://www.ij.org/virginians-protect-property-rights-release-11-7-2012>.

⁶ JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 17–18, 43 (3d ed. 2008). “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN IN THE PRESENT DISPUTES WITH AMERICA* 14 (4th ed. 1776). “[I]n a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen.” 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 661 (1833); see ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 59 (Student's ed. 1935).

⁷ The British constitution refers to the collection of their founding documents, including the Magna Carta and the English Bill of Rights.

inherited rights as Englishmen.⁸ After the failure of the Articles of Confederation, the states refused to ratify the Constitution without a formal surety of their rights, not content to rely solely on structural safeguards such as separation of powers and checks and balances.⁹ James Madison led the way in solidifying numerous rights Americans considered inherent in the Bill of Rights and inserted the Takings Clause into the Fifth Amendment.¹⁰ The Takings Clause declares, “nor shall private property be taken for public use, without just compensation.”¹¹

The Framers thus did not render private property rights absolute¹² but prescribed two prerequisites before the government could exercise eminent domain: the property had to be taken for public use, and just compensation was required.¹³ No notes exist of discussion or debate on the Clause itself at its formation or ratification,¹⁴ but the common law and ideological influences surrounding the Clause’s formation demonstrate the Framers’ complex understanding of how secure property rights should be, beyond their general belief that the government should protect private property.¹⁵ Justice Joseph Story called the Takings Clause the “affirmance of the great doctrine established by the common law for the protection of private property.”¹⁶

⁸ See MCLAUGHLIN, *supra* note 6, at 59; 3 STORY, *supra* note 6, at 661.

⁹ Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT’L & COMP. L. REV. 201, 245–46 (2007). The constitutional committee also thought creating a government of enumerated powers rendered a bill of rights superfluous. Henry Steele Commager, *The Achievement of the Framers*, AM. POLITICAL SCI. ASS’N (1985), <http://www.apsanet.org/imgttest/AchievementsofFramers.pdf>.

¹⁰ Boyce, *supra* note 9, at 246–48.

¹¹ U.S. CONST. amend. V.

¹² See Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 616 (1940) (“Surely if the framers of the Constitution had meant that property should not be taken for private use at all, they should have said so.”).

¹³ U.S. CONST. amend. V.

¹⁴ Boyce, *supra* note 9, at 248.

¹⁵ *Id.* at 231–32.

¹⁶ 3 STORY, *supra* note 6, at 661. American property law, in time, developed from the English common law. ELY, *supra* note 6, at 10–11. American law did not represent a perfect transplant, however.

The inferences are fairly strong that during most of the seventeenth century the colonists were too busy with the mundane, often grim, aspects of securing a beachhead on a hostile shore to reflect much upon the law as a science. A modicum of law and order was a utilitarian necessity, and that was about it.

William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 409 (1968). In legal matters, the settlers relied heavily on divine law as set forth in the Bible. PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* (1899), *reprinted in* AMERICAN CONSTITUTIONAL AND LEGAL HISTORY

The Framers cherry-picked common law principles suitable to their situation, however.¹⁷ The competing influences of republicanism¹⁸ and

14 (Leonard W. Levy ed., De Capo Press 1970). For example, in a 1657 Massachusetts case, *Giddings v. Brown*, (Mass. County Ct. 1657), reprinted in 2 HUTCHINSON PAPERS 1 (Joel Munsell ed., 1865), the court held that the plaintiff's property could not be taken by public vote for private use. *Id.* at 19. The judge, who admired the English common law, appealed to God with support from the common law, *id.*, and declared property rights a fundamental law for every subject, whose property could not be made for "the use or to be made the right or property of another man, without his owne [sic] free consent," *id.* at 2. As society developed and Britain's interest in the colonies increased, around 1700, the colonists turned more attention to the workings and sophistication of the common law. Stoebuck, *supra*, at 409–10.

Colonists understood the common law through Sir Edward Coke's writings. *Coke on Littleton*, the first volume of the *Institutes of the Laws of England* (1600–1615), served as the colonial lawyer's main treatise and source for the rights of Englishmen. Stoebuck, *supra*, at 406; BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 12 (2001). Early English law revolved around the land and ultimately the king's prerogative, since all landowning subjects held tenurial rights in relation to the sovereign. ELY, *supra* note 6, at 11. As the sovereign, the king could take land according to his pleasure, but King John's unparalleled abuse resulted in the Magna Carta. By signing the Magna Carta, "the birthright of the people of England," 1 WILLIAM BLACKSTONE, COMMENTARIES *128, the king agreed not to commit its enumerated grievances, many of which dealt with property, SIEGAN, *supra*, at 8 (quoting ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 112 (1966)). Coke brought the forgotten provisions of the Magna Carta into the limelight through the *Institutes*, including Chapters 19 and 21 prohibiting government agents from taking specific goods without payment, 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, 33–34 (photo. reprint 1986) (1797), and implementing partial recognitions of the compensation principle. ELY, *supra* note 6, at 23.

Sir William Blackstone's *Commentaries* (1765–1769) gained popularity in the colonies as another source of authority on the common law. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 450, 456 (2006). Blackstone admired Coke and agreed with Coke's interpretation of property rights, the absolute right of which should be among the principal aims of society. BLACKSTONE, *supra*, at *138. Blackstone affirmed the compensation principle, as society's best interests lie in protecting private property rights; an owner could be separated from those rights only through "full indemnification and equivalent for the injury thereby sustained." *Id.* at *139. Blackstone described property as an "absolute right, inherent in every Englishman . . . which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution." *Id.* at *138. Despite these statements on property, Blackstone possessed a strong view of sovereignty and the absolute authority of the sovereign to take private property, a view that the Framers eventually rejected. *Id.* at *160 (describing sovereignty as an "absolute despotic power"); see also Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 5–7 (2006) (discussing Blackstone's views and contrasting them with James Madison's essay on property rights).

¹⁷ *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 143–44 (1829). Features of the colonial landscape necessitated customization of the common law. For instance, the abundance of land in America rendered property ownership a real possibility for the layman, whereas English land remained concentrated in the hands of a few, thus resulting in differing assumptions about property. ELY, *supra* note 6, at 11. According to Justice Joseph Story,

emerging Lockean liberalism¹⁹ played important roles in the quality of property rights.²⁰ Framers subscribing to republicanism found government takings more acceptable than those leaning toward the more liberal Lockean view because republicans believed that individuals must sacrifice for the necessity of society.²¹ Lockean liberalism, by contrast, emphasized the rights of the person, and that the government existed mainly to defend those sacred rights.²² Despite the diversity in the quality of property rights influenced by these trending ideas, which often impacted the Framers' statements regarding property, the Framers generally held a high regard for private property and sought to maintain a limited government through the Takings Clause.²³

The Framers conveyed this high regard for property and the government's limited role during the Philadelphia Convention of 1787. For instance, delegate Gouverneur Morris stated, "Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness*, 27 U.S. (2 Pet.) at 144.

¹⁸ William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1063 (2009). Rooted in English oppositional thought, republicanism represented the idea that individual interests stood subservient to the state, which must promote virtue. *Id.* Benjamin Franklin demonstrated the republican perspective when he wrote: "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing." Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert Henry Smyth ed., 1907).

¹⁹ Thomas P. Peardon, *Introduction to JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT*, at xix (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690). Beginning with the premise that a person first holds property rights in his person, Locke reduced all rights to the right of property, which led him to conclude that "[t]he great and chief end . . . of men's uniting into commonwealths and putting themselves under government is the preservation of their property." JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 70–71 (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690).

²⁰ *See* Boyce, *supra* note 9, at 231–32. Republicanism exalted virtue and sacrifice for the good of society, whereas Lockean liberalism emphasized the individual. *Id.* at 233–34. For republicanism, property rights derived from society; property rights came from nature for Lockean liberalists. *See id.* at 237. While the Framers did not identify themselves to either of the ideologies, their statements tend to give away their leaning on the subject of property rights. *Id.* at 235. Republicanism and Lockean liberalism do not represent distinct categories but rather trending philosophies of the day. *See id.* at 233.

²¹ *Id.* at 235.

²² *Id.* at 239.

²³ *See id.* at 231–32; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 827, 836 (1995) [hereinafter *Original Understanding*].

society.”²⁴ John Rutledge agreed: “The gentleman last up had spoken some of his sentiments precisely. Property was certainly the principal object of society.”²⁵ Later during the Convention, Pierce Butler and Charles Pinckney both declared that government was instituted mainly to protect property.²⁶

Other Founding Fathers further supported the importance of property rights. Madison stated, “Government is instituted to protect property of every sort; . . . [t]his being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”²⁷ Jefferson’s conception of private property fluctuated, but in the end, he ultimately agreed with Locke’s view of property, writing that “a right to property is founded in our natural wants, in the means with which we are endowed to satisfy these wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings.”²⁸ According to John Adams, “The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”²⁹ Adams stated further that “[p]roperty must be secured, or liberty cannot exist.”³⁰

B. Historical Exercise of Eminent Domain

The historical exercise of eminent domain mirrors the complexity of the Framers’ opinions regarding the quality of property as courts have navigated the treatment of takings. On the rare occasions when colonial governments exercised the power of eminent domain before the Revolution, the governments used the power primarily to establish

²⁴ 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 278–79 (Jonathan Elliot ed., J. B. Lippincott Company 1891).

²⁵ *Id.* at 279.

²⁶ *Id.* at 296, 303. According to Pierce Butler, “[G]overnment . . . was instituted principally for the protection of property, and was itself to be supported by property.” *Id.* at 296.

²⁷ James Madison, Property (1792), in 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906).

²⁸ Letter from Thomas Jefferson to P.S. Dupont de Nemours (Apr. 24, 1816), in 11 THE WORKS OF THOMAS JEFFERSON 519, 522 (Paul Leicester Ford ed., 1905).

²⁹ JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, in 6 THE WORKS OF JOHN ADAMS 3, 9 (Charles Francis Adams ed., 1851).

³⁰ JOHN ADAMS, DISCOURSES ON DAVILA, in 6 THE WORKS OF JOHN ADAMS 227, 280 (Charles Francis Adams ed., 1851).

public roads or buildings.³¹ In fact, appropriating private land for public roads comprised the most common taking.³² In so doing, the colonists simply carried on a norm from their English roots that aligned with the prevailing ideology—republicanism.³³ Unimproved land presented an acceptable target for eminent domain because the abundance of land rendered unimproved land less valuable; thus, the benefit of a public road would likely outweigh the landowner's loss.³⁴ Unimproved land increased in value as the colonies developed, however, and many began to think that takings of even unimproved land should require compensation similar to that provided for takings of improved land.³⁵

No colonial charter expressly required compensation for a taking,³⁶ but, by the beginning of the Revolution, land values had increased and compensation for takings “was well established and extensively practiced.”³⁷ The first mandated compensation appeared in the 1641 Massachusetts Body of Liberties, which required compensation for taking personal property.³⁸ Soon after, the Province of Carolina contemplated adoption of the Fundamental Constitutions of Carolina, which required compensation for the seizure of real property.³⁹ As time progressed and land values increased, compensation became the norm. For instance, New Jersey awarded compensation for land taken to build main highways in 1765, and Virginia compensated a taking for building the town of Suffolk.⁴⁰ Just compensation clauses then appeared in the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, the Northwest Ordinance of 1787,⁴¹ and, of course, the United States Constitution.⁴²

³¹ *Kelo v. City of New London*, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting); ELY, *supra* note 6, at 24.

³² William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985).

³³ *Id.* at 694.

³⁴ ELY, *supra* note 6, at 24.

³⁵ *Id.*

³⁶ See *Original Understanding*, *supra* note 23, at 785–86.

³⁷ William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 579 (1972).

³⁸ *Original Understanding*, *supra* note 23, at 785.

³⁹ *Id.*

⁴⁰ ELY, *supra* note 6, at 24.

⁴¹ Daniel A. Ippolito, Comment, *An Originalist's Evaluation of Modern Takings Jurisprudence*, 26 SETON HALL L. REV. 317, 327 (1995).

⁴² U.S. CONST. amend. V.

After the Constitution's ratification in 1787, federal and state courts grappled with the definition of public use.⁴³ The modest exercise and development of eminent domain came primarily from the states, not the federal government.⁴⁴ The few projects the federal government undertook requiring assertion of eminent domain over private property clearly required compensation.⁴⁵ State courts, however, navigated the area of eminent domain with little precedent or authority beyond their state constitutions.⁴⁶ Originally, private property takings could only satisfy the public use requirement of the Takings Clause by fitting into the category of public ownership or direct use by the public.⁴⁷

Under the first takings category—public ownership—the government takes private property “for its own public uses.”⁴⁸ For example, in *Kohl v. United States*, the first federal eminent domain case appearing before the Supreme Court,⁴⁹ the Court upheld a taking in Cincinnati to build a post office.⁵⁰ Acknowledging the government's eminent domain power as “the offspring of political necessity” to execute its functions, the Court listed several qualifying public uses, including “forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses.”⁵¹

⁴³ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 504–05 (2006). Public use became a new addition to most state constitutions after the Revolutionary War. It was not until 1868 that the Fourteenth Amendment made the Fifth Amendment applicable to the states. *Kelo v. City of New London*, 545 U.S. 469, 511–12 (2005) (Thomas, J., dissenting).

⁴⁴ Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 342 (2001).

⁴⁵ ELY, *supra* note 6, at 76.

⁴⁶ Cohen, *supra* note 43, at 504–505.

⁴⁷ *Kelo v. City of New London*, 545 U.S. 469, 508–09, 511–12 (2005) (Thomas, J., dissenting); Werner, *supra* note 44, at 342 (“[C]ourts read the public use requirement fairly literally.”).

⁴⁸ *Kohl v. United States*, 91 U.S. 367, 374 (1875).

⁴⁹ See *Kohl*, 91 U.S. at 373; Werner, *supra* note 44, at 342 & n.49 (noting that *Kohl* was the first eminent domain decision reviewed by the Supreme Court).

⁵⁰ *Kohl*, 91 U.S. at 374, 378.

⁵¹ *Id.* at 371–72. “[T]he takings power has been used to facilitate a direct public use like creating parks, supplying safe drinking water, or providing means of transport like railroads, canals, or roads.” Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. C.R. L.J. 81, 85 (2004); see also *Rindge Co. v. County of L.A.*, 262 U.S. 700, 707–08 (1923) (highway); *Chi., Milwaukee & St. Paul Ry. Co. v. City of Minneapolis*, 232 U.S. 430, 441 (1914) (canal); *Hairston v. Danville & W. Ry.*, 208 U.S. 598, 605, 608 (1908) (railroad); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 689 (1897) (taking of a privately owned water supply system); *Shoemaker v. United States*, 147 U.S. 282, 322 (1893) (land for a public park).

The second type of taking—public use—allows the government to appropriate and transfer private property to a private entity, but only for its use in serving the public.⁵² For example, railroad companies and utilities qualified *because* they supplied services equally to the general public.⁵³ The government could not merely transfer private property from one private party to another. As the Supreme Court emphasized in *Calder v. Bull*:

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. . . . [A] law that takes *property* from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.⁵⁴

In adherence to this fundamental principle and their high regard for private property rights, courts initially held to the standard that public use required actual use, or right to use, by the public.⁵⁵ For instance, in *Missouri Pacific Railroad Co. v. Nebraska*, the Supreme Court negated the state's eminent domain power because the taking was not for a public use.⁵⁶ Additionally, in *Cincinnati v. Vester*, the Court barred an excess condemnation, since the purpose of widening the road would not reach the full extent of the property sought.⁵⁷

Common carriers and public utilities, such as mills, fit this public use description.⁵⁸ At the founding, corporations faced an easier time meeting the public use description because most corporations were formed through government charters for the purpose of serving the

⁵² See *Kelo v. City of New London*, 545 U.S. 469, 497–98 (2005) (O'Connor, J., dissenting).

⁵³ Werner, *supra* note 44, at 343.

⁵⁴ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Chief Justice John Marshall wrote: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

⁵⁵ See *Calder*, 3 U.S. (3 Dall.) at 388 (discussing analogous situations that would equate to a nonpublic use taking without just compensation); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310, 315–16 (1795) (stating that just compensation must be given for a public use taking and that takings should only occur in "cases of absolute necessity, or great public utility"); Cohen, *supra* note 43, at 505; Werner, *supra* note 44, at 343.

⁵⁶ 164 U.S. 403, 416–17 (1896).

⁵⁷ 281 U.S. 439, 440–41, 448–449 (1930).

⁵⁸ See Cohen, *supra* note 43, at 501–02.

public; laws of incorporation were only beginning to develop.⁵⁹ The Mill Acts effectively authorized mill owners to condemn upper riparian owners' land by flooding and to pay compensation in order to construct their dams.⁶⁰ These mills have been called "public utilities" because state governments heavily regulated them and required that they serve the general public.⁶¹ Courts justified these private-to-private transfers because of their mandate to serve all customers and the consequent benefit to the general public.⁶²

The narrow definition soon expanded to fit the demands of industrialization as state legislatures sought to encourage economic progress.⁶³ Courts upheld public use reaching an ultimate purpose or benefit as state legislatures stretched the Mill Acts to encompass non-mill entities.⁶⁴ Judicial concern for property rights sparked a small movement to return to the narrow view of public use in the mid-nineteenth century.⁶⁵ Scholars disagree on the success of that movement,⁶⁶ but by the twentieth century, the broad view crowded out narrow interpretations of the public use.⁶⁷ The Supreme Court did not grant certiorari to many eminent domain cases, but when it did, the Court reaffirmed this trend toward the broad view, signaling the march down the slippery slope to today's loose takings approach.⁶⁸ In fact, Justice Holmes declared in *Mt. Vernon-Woodberry Cotton Duck Co. v.*

⁵⁹ *Kelo v. City of New London*, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) (explaining that the connection to a government charter made fitting the public use category easier.).

⁶⁰ *Id.* at 512.

⁶¹ Cohen, *supra* note 43, at 501–02.

⁶² *Id.* at 502.

⁶³ Werner, *supra* note 44, at 343.

⁶⁴ Cohen, *supra* note 43, at 506–07; *see, e.g.*, *Boston & Roxbury Mill Dam Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 480 (1832) (stating that individual property "protected in its enjoyment, saving only when the public want it . . . for some necessary and useful purposes."); *Scudder v. Trenton Del. Falls Co.*, 1 N.J. Eq. 694, 729 (Ch. 1832).

⁶⁵ Cohen, *supra* note 43, at 507.

⁶⁶ *Id.* at 507–08.

⁶⁷ *Id.* at 508–09.

⁶⁸ *See, e.g.*, *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 607 (1908); *Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 252 (1897); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 689 (1897). In *Hairston*, the Supreme Court affirmed a Virginia ruling upholding a public use taking of land for a railway spur track. *Hairston*, 208 U.S. at 605, 609. The Court's deference to the state court shows stirrings of the broad approach: "[t]he propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State is expressed [in precedent]." *Id.* at 607.

Alabama Interstate Power Co. that—when analyzing public use—merely evaluating use by the general public is “inadequa[te].”⁶⁹

Rindge Co. v. County of Los Angeles further illustrates the Supreme Court’s step toward the broad view and foreshadowed the Court’s broad deferential approach.⁷⁰ First, the Supreme Court declared, “[t]he necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature.”⁷¹ Second, the Supreme Court held that the government could take private property in anticipation of future public use, even if that use never materialized.⁷² This standard permitted the government to condemn property, not by a showing of necessity, but rather by a showing of possible future need.⁷³ Finally, the Supreme Court reiterated that public use did not require direct, or even substantial, public enjoyment in an improvement.⁷⁴

The broad view of public use continued to expand, fitting easily with the 1920s urban redevelopment movement and later New Deal projects.⁷⁵ The government initiated many programs to encourage economic development and erase blight from neighborhoods.⁷⁶ These programs increased during the Great Depression and continued, with courts approving the takings as public use because the programs achieved a public advantage.⁷⁷

C. Modern Exercise of Eminent Domain: The Legislature Knows Best

1. Berman v. Parker

Berman v. Parker signaled a culmination of the trend toward the broad view, as the Supreme Court took a backseat to the legislature’s determination of public use, which in *Berman* meant blight removal.⁷⁸ In *Berman*, the Court held that the government could take and transfer the

⁶⁹ 240 U.S. 30 (1916).

⁷⁰ 262 U.S. 707 (1923); Werner, *supra* note 44, at 344 (“The deferential modern view began to take shape in 1923 with the Supreme Court’s decision in *Rindge Co. v. County of L.A.*”).

⁷¹ *Rindge Co.*, 262 U.S. at 709.

⁷² *Id.* at 707; *see also* Werner, *supra* note 44, at 344 (explaining the practical effect of the Court’s holding in *Rindge Co.*).

⁷³ *See Rindge Co.*, 262 U.S. at 707.

⁷⁴ *Id.*

⁷⁵ *See* Cohen, *supra* note 43, at 510.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 348 U.S. 26, 32–33 (1954); *see also* Daniel C. Orlaskey, *The Robin Hood Antithesis—Robbing from the Poor to Give to the Rich: How Eminent Domain is Used to Take Property in Violation of the Fifth Amendment*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 515, 518 (2006); Whitehead & Hardin, *supra* note 51, at 86–87.

plaintiff's property to a private redeveloper because the legislature decided the entire area needed to be redeveloped.⁷⁹ Congress passed the District of Columbia Redevelopment Act authorizing, among other things, redevelopment of "substandard housing and blighted areas."⁸⁰ The first project under the Act, "Area B," entailed redeveloping a Washington, D.C. slum housing community in which 64.3% of all the dwellings could not be repaired, and many others lacked basic functions such as bath and heating.⁸¹ The plaintiff, Berman, owned a department store within the designated area that did not imperil the health or safety of the public or otherwise contribute to the surrounding slum conditions.⁸²

Berman argued that condemnation of his well-kept store could not be a constitutional taking because it amounted to "taking from one businessman for the benefit of another businessman," a transfer for private use.⁸³ The Supreme Court, however, rejected the argument, stating that the judiciary only checks for a public end.⁸⁴ Courts must defer to the legislature's expertise in determining the means to achieve the end, which could include private ownership.⁸⁵ "[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."⁸⁶ Because blight removal fell within the purview of public welfare, the Court left the taking of Berman's commercial property to the legislature's judgment.⁸⁷ Thus, the Court upheld the Act as constitutional.⁸⁸ In a sense, Berman simply came to be in the wrong place at the wrong time.

2. *Hawaii Housing Authority v. Midkiff*

The next private takings case before the Supreme Court, *Hawaii Housing Authority v. Midkiff*,⁸⁹ followed *Berman*'s lead, but this time public use included correcting a market deficiency.⁹⁰ In *Midkiff*, the Court upheld the government's scheme to take property from the landowning few and redistribute it in order to even out the residential

⁷⁹ *Berman*, 348 U.S. at 31, 36.

⁸⁰ *Id.* at 28.

⁸¹ *Id.* at 30.

⁸² *Id.* at 31, 34.

⁸³ *Id.* at 33.

⁸⁴ *See id.* at 32–34.

⁸⁵ *Id.*

⁸⁶ *Id.* at 33.

⁸⁷ *Id.* at 32–33.

⁸⁸ *Id.* at 31, 36.

⁸⁹ 467 U.S. 229 (1984).

⁹⁰ *Id.* at 232–33; *see also* Orlaskey, *supra* note 78, at 518.

fee simple market as a “conceivable public purpose” and a valid public use taking.⁹¹ In reviewing and reversing the Court of Appeals, which held that no public use existed due to a lack of government use, the Supreme Court stated, “The Court long ago rejected any literal requirement that condemned property be put into use for the general public. . . . [I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”⁹² The Court was content to leave the means completely to the determination of state legislatures.⁹³

II. *KELO V. CITY OF NEW LONDON*

A. *Kelo v. City of New London*

Kelo v. City of New London effectively deleted the public use requirement from the Takings Clause by asserting that takings for economic development provide “incidental public benefits” and, therefore, qualify as a public use, or more accurately “public purpose.”⁹⁴ In *Kelo*, a five-to-four majority upheld a private property taking by the New London City Council according to a carefully prepared, comprehensive plan to revitalize a “distressed municipality” because the taking “unquestionably serve[d] a public purpose.”⁹⁵ Just as in *Berman* and *Midkiff*, the Court asserted the need for judicial review to take a backseat and “afford[] legislatures broad latitude in determining what public needs justify the use of the takings power.”⁹⁶

To address New London’s economic decline as a distressed municipality, the New London Development Corporation (“NLDC”) acquired ninety acres pursuant to a development plan in January 1998.⁹⁷ Under the plan, the NLDC would lease the property to private developers for the construction of Fort Trumbull State Park, a riverwalk, hotel and conference center, residences, a museum, parking, and other facilities to revitalize the economy.⁹⁸ The NLDC expected these developments to generate up to 2,300 permanent jobs and annual property tax revenues between \$680,000 and \$1.2 million.⁹⁹ The very

⁹¹ *Midkiff*, 467 U.S. at 233, 241.

⁹² *Id.* at 244–45.

⁹³ *Id.* at 244.

⁹⁴ 545 U.S. 469, 494, 498 (2005) (O’Connor, J., dissenting).

⁹⁵ *Id.* at 470, 473, 484 (majority opinion).

⁹⁶ *Id.* at 483.

⁹⁷ *Id.* at 473–75.

⁹⁸ *Id.* at 474 & n.4.

⁹⁹ *See Kelo v. City of New London*, 843 A.2d 500, 510 (Conn. 2004), *aff’d*, 545 U.S. 469 (2005).

next month, the Pfizer Corporation announced that it would build a research facility next to Fort Trumbull.¹⁰⁰ “The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract.”¹⁰¹ Susette Kelo and eight other homeowners lost their property, not due to blight, but simply because they were located within the plan’s perimeter.¹⁰²

In protesting the condemnation as an abuse of public use takings, the homeowners first argued that the Court should adopt a bright line rule that economic development could never constitute a valid public use, otherwise no distinction would remain between private and public takings.¹⁰³ The homeowners argued that the economic development rationale is also dangerous because it justifies any taking that would put the property in the hands of a party with higher revenue potential.¹⁰⁴ Second, the homeowners argued that even if the Court did not institute a bright line rule, the Court should link the taking to a showing of “‘reasonable certainty’ that the expected public benefits will actually accrue.”¹⁰⁵

In rejecting each of the homeowners’ arguments, the Court explicitly acknowledged its broad approach and rephrased the issue as to whether the development plan meets a public purpose, instead of a public use.¹⁰⁶ The Court affirmed the government’s traditional interest in economic development and its belief in deferring to the city’s determination on the means, which might include ownership by a private entity, to meet the public end.¹⁰⁷ The Court asserted that “[w]hen the legislature’s purpose is legitimate,” the reasonable certainty standard only adds layers of impracticality and delays to accomplishing a benefit for the public.¹⁰⁸ The Court left the window open, however, for states to impose greater limits on eminent domain if they chose to do so.¹⁰⁹

¹⁰⁰ *Kelo*, 545 U.S. at 473.

¹⁰¹ *Id.* at 474.

¹⁰² *Id.* at 475.

¹⁰³ *See id.* at 484–85.

¹⁰⁴ *Id.* at 486–87.

¹⁰⁵ *Id.* at 487.

¹⁰⁶ *Id.* at 480.

¹⁰⁷ *Id.* at 482 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42, 244 (1984)).

¹⁰⁸ *Id.* at 488 (quoting *Haw. Hous. Auth.*, 467 U.S. at 242–43).

¹⁰⁹ *Id.* at 489.

B. Kelo's Legacy

1. Implications and States' Response

Kelo effectively handed the wild card to the government by making public use—or more accurately public purpose—mean whatever the legislature wants it to mean. The broad view in *Berman*, *Midkiff*, and finally *Kelo* has effectively erased any semblance of restriction the Framers intended through the public use limitation. By completely deferring to the legislature, the Court has surrendered its role, intended by the Framers, as protector of minority interests and property rights, has opened the door to new abuses, and has introduced inefficiencies into the market. The implications of the Court's decision unhinge the foundation of property rights, and thus have generated a strong response from the states.

In just one year after *Kelo*, 5,783 actual or threatened government condemnations of private property occurred, compared to just 10,282 over the five-year period between 1998 and 2002.¹¹⁰ Of these 5,783 actual and threatened condemnations, threatened takings have increased while actual condemnations have decreased, likely because homeowners feel no hope of winning after *Kelo*.¹¹¹ No property, whether residential or commercial, is safe when economic development qualifies as public use.¹¹²

All property now stands vulnerable unless states intervene, and many have. To combat the assault on private property rights, states have taken advantage of their freedom to craft stronger restrictions on the government's ability to take and transfer private property for private uses under the banner of public purpose.¹¹³ Eleven states (besides Virginia) have amended their constitutions,¹¹⁴ and almost all of the states have passed legislation on eminent domain.¹¹⁵

¹¹⁰ DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 2 (2006), available at <http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf>.

¹¹¹ See *id.* at 2–3.

¹¹² See, e.g., *id.* at 3–4.

¹¹³ DICK M. CARPENTER II & JOHN K. ROSS, DOOMSDAY? NO WAY: ECONOMIC TRENDS AND POST-KELO EMINENT DOMAIN REFORM 9 (2008), available at http://www.ij.org/images/pdf_folder/other_pubs/doomsday-no-way.pdf.

¹¹⁴ See CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO 50 (2007), available at http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

¹¹⁵ See CARPENTER II & ROSS, *supra* note 113, at 2 (noting that forty-two states had passed some form of eminent domain reform by the end of 2007).

The Virginia legislature responded to *Kelo* initially with modest statutory measures.¹¹⁶ In 2006, the General Assembly passed minor measures affecting the Housing Authorities Law, but did nothing to modify the broad definition of what could qualify as blight.¹¹⁷ Blight thus remained an expansive vehicle for private entities to obtain private property through eminent domain and call it a public purpose because of economic development. In 2007, the General Assembly narrowed the definition of blight and public use to refer to traditional public uses.¹¹⁸ The Norfolk Redevelopment Housing Authority received an exemption until July 1, 2010, however.¹¹⁹ Overall, the Castle Coalition survey awarded Virginia with a B+ for its efforts post-*Kelo* but ended its analysis by suggesting a need for permanent change in the form of an amendment to the constitution,¹²⁰ which still allowed the General Assembly to define “public use.”¹²¹

2. *Hoffman Family, L.L.C. v. City of Alexandria*

In the most recent takings case to reach the Supreme Court of Virginia, the Court took an approach similar to the *Kelo* Court, despite explicit statements in a footnote that *Kelo* did not apply.¹²² In *Hoffman Family, L.L.C. v. City of Alexandria*, the Court affirmed the taking as a valid public use because, regardless of incidental benefits accruing to a neighboring developer, the property would be exclusively utilized for a storm water sewer system pursuant to the city’s comprehensive development plan.¹²³ The General Assembly allows local governments to condemn private property for public uses, provided that the government first passes a resolution stating the public use and the necessity of that use.¹²⁴ To meet this requirement, the city stated that it needed Hoffman’s commercial property in order to implement its master development plan, including completion of the approved Mill Race project.¹²⁵

¹¹⁶ CASTLE COALITION, *supra* note 114, at 50. In the year following *Kelo*, the Virginia General Assembly tweaked its takings law, but the broad definition of blight did little to restrict private property takings for economic development. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ VA. CONST. art. I, § 11 (amended 2013).

¹²² *Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 731 & n.7 (Va. 2006).

¹²³ *Id.* at 730–31.

¹²⁴ VA. CODE ANN. § 15.2-1903(B) (2012).

¹²⁵ *Hoffman*, 634 S.E.2d at 725.

Under the Mill Race project, Hoffman's neighbor and private developer, Trammell Crow Company, would erect a high-rise residential apartment building on Trammell's adjacent property.¹²⁶ A four by six foot, underground storm box culvert, however, sat on Trammell's property.¹²⁷ Building around the culvert would have forced Trammell to decrease the apartment building's square footage and thus prevent Trammell from realizing \$2.09 million.¹²⁸ The city would not allow Trammell to construct on top of the culvert, so Trammell turned its attention to acquiring a portion of Hoffman's property in order to move the culvert.¹²⁹ When Hoffman refused to sell, Trammell enlisted the city's help in condemnation, agreeing to cover the city's condemnation and legal expenses.¹³⁰

During trial, Hoffman argued that but for the Mill Race project (and thus a private use), the city would not have attempted to move the box culvert.¹³¹ Expert testimony showed that the box culvert functioned properly and at full capacity at its pre-condemnation location.¹³² In fact, moving the box culvert would decrease the storm water system's capacity.¹³³ The city said it preferred to situate utilities along public streets, but one expert admitted that a road grid could have been built while leaving the old box culvert in place.¹³⁴ Hoffman argued that the city did not have a public purpose.¹³⁵

The Supreme Court of Virginia rejected Hoffman's argument, primarily because the city met the requirement of passing a resolution stating its public purpose.¹³⁶ The court specified that public use would be a facts and circumstances test, but facts and circumstances related only to the property itself, not any effect the project might have on neighboring properties.¹³⁷ Second, the statement of the use's necessity was a legislative function not open to judicial review unless an arbitrary decision or fraud appeared.¹³⁸ The court declared:

¹²⁶ *Id.* at 731 (Hassell, C.J., dissenting).

¹²⁷ *Id.*

¹²⁸ *Id.* at 733.

¹²⁹ *Id.* at 731.

¹³⁰ *Id.* at 731, 733.

¹³¹ *Id.* at 725, 727 (majority opinion).

¹³² *Id.* at 732 (Hassell, C.J., dissenting).

¹³³ *Id.*

¹³⁴ *Id.* at 725–26 (majority opinion).

¹³⁵ *Id.* at 725.

¹³⁶ *Id.* at 727–28.

¹³⁷ *Id.* at 729.

¹³⁸ *Id.* at 728.

Courts do not inquire into the issue of a locality's good faith in initiating condemnation proceedings if the locality's purpose is clearly stated in the resolution or ordinance. Thus, condemnation proceedings are not decided based on "the purposes and plans that may be hidden in the minds of the [locality] undertaking to condemn for a public purpose, but by the validity of what is to be done and may be done as shown by the record in the proceedings."¹³⁹

Starting from the premise that legislative determinations of public use are correct, the court affirmed the condemnation because the focus of the public use must be on the condemned property, not on the effect on neighboring properties.¹⁴⁰ "Thus, if the record supports a conclusion that the property proposed for condemnation will be a public use acquired for a public purpose, the fact that neighboring property owners will benefit from that use *is irrelevant*."¹⁴¹ The court concluded that the box culvert met the public use test because it was part of the city's storm water sewer management system.¹⁴²

Justice Hassell dissented, referring back to the precedent of Virginia courts holding that public purpose takings pose an appropriate question for judicial review.¹⁴³ To decide whether the taking satisfies a public use, Virginia courts must analyze the surrounding circumstances to ascertain whether public interest dominates any private gain.¹⁴⁴ Examining surrounding circumstances, precedent shows that the inquiry includes property not subject to the condemnation.¹⁴⁵ Thus, by limiting the inquiry only to the condemned property, Justice Hassell concluded that the majority deviated from precedent and rendered judicial review meaningless.¹⁴⁶ "[T]he majority applied an incorrect test when determining whether public benefit . . . dominated the private gain to the developer."¹⁴⁷

¹³⁹ *Id.* (alteration in original) (citations omitted) (quoting *Light v. City of Danville*, 190 S.E. 276, 282 (Va. 1937)).

¹⁴⁰ *Id.* at 729.

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.*

¹⁴³ *Id.* at 733–34 (Hassell, C.J., dissenting) (quoting *Ottofaro v. City of Hampton*, 574 S.E.2d 235, 237 (Va. 2003)).

¹⁴⁴ *Id.* at 734.

¹⁴⁵ *See id.* at 736; *City of Richmond v. Dervishian*, 57 S.E.2d 120, 123–24 (Va. 1950).

¹⁴⁶ *Hoffman*, 634 S.E.2d at 736 (Hassell, C.J., dissenting).

¹⁴⁷ *Id.* at 731.

III. ANALYSIS OF VIRGINIA'S EMINENT DOMAIN AMENDMENT

A. Virginia's Eminent Domain Amendment

Public concern for private property rights in the wake of *Kelo* and for limited government finally prompted Virginia to address eminent domain through a constitutional amendment.¹⁴⁸ Virginia's eminent domain amendment replaces the current language, "nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly,"¹⁴⁹ with:

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.¹⁵⁰

Virginia's eminent domain amendment makes laudable improvements to protect private property rights from the abusive takings tendencies by the government. It demonstrates a strong beginning by acknowledging private property as a fundamental right. The amendment also provides for lost revenue and property, adds language to communicate clearly to the judiciary that a condemnor must prove public use, and states what cannot constitute public use.¹⁵¹

B. Legislative Deference Weakens Virginia's Eminent Domain Amendment

In light of the judicial trend of deference to the legislature, the phrase "[n]o more private property may be taken than necessary to

¹⁴⁸ See Fredrick Kunkle, *Eminent Domain Vote May Affect Public Projects*, WASH. POST, Nov. 8, 2012, at A45.

¹⁴⁹ VA. CONST. art. I, § 11 (amended 2013).

¹⁵⁰ VA. CONST. art. I, § 11.

¹⁵¹ *Id.*

achieve the stated public use”¹⁵² represents one of the amendment’s most glaring loopholes. In *Berman*, *Midkiff*, and *Kelo*, the Supreme Court executed its “extremely narrow” role of ensuring that a public purpose existed and deferred to the legislature on the means necessary to accomplish that purpose.¹⁵³ Similarly, the *Hoffman* majority limited its inquiry of the judicial question of public use to the facts and circumstances of the property, and not facts and circumstances pertinent to the condemnation.¹⁵⁴ The *Hoffman* majority emphasized deference to the legislature’s definition of necessity.¹⁵⁵ Virginia’s new constitutional provision restricts takings only to those “*necessary* [for] public use,” but provides no standards or definitions for what is or is not “*necessary*.”¹⁵⁶ Thus, the phrase does little to prevent abuse, since the Virginia courts will likely still defer to the legislature to define what is necessary. The amendment does not arrest the judiciary from diluting its duty to keep the legislature in check to protect the property rights of individuals.

The last clause placing the burden of proving public use on the condemnor also does not counteract this error. The clause helps to remove the presumption of the correctness of legislative public use determinations.¹⁵⁷ The effectiveness of the clause, however, depends on the definition of public use, which can toughen or ease the burden of proof. Virginia’s amendment increases the condemnor’s burden by specifically naming uses that cannot qualify as public, such as private gains, private benefits, or economic development.¹⁵⁸ The amendment, however, does not do enough to increase the burden of proof when it states, “not for public use if the primary use is for . . . private benefit.”¹⁵⁹ As a result, the *Hoffman* decision likely would remain unchanged under the new amendment because the majority interpreted precedent to restrict the *Hoffman* inquiry to the property itself, and not all circumstances surrounding the taking. Because the city planned to take Hoffman’s property for a public use, the court refused to inquire into the neighboring developer’s substantial gain.¹⁶⁰ Therefore, the amendment does not sufficiently increase the burden on the condemnor because it

¹⁵² *Id.*

¹⁵³ *Berman v. Parker*, 348 U.S. 26, 32 (1954); see *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

¹⁵⁴ *Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 729 (Va. 2006).

¹⁵⁵ *Id.* at 728.

¹⁵⁶ VA. CONST. art. I, § 11 (emphasis added).

¹⁵⁷ See *Hoffman*, 634 S.E.2d at 729.

¹⁵⁸ VA. CONST. art. I, § 11.

¹⁵⁹ *Id.*

¹⁶⁰ *Hoffman*, 634 S.E.2d at 730.

would not rectify the cases that gave rise to the amendment in the first place.

Societies are wise to follow the subsidiarity principle, keeping decision-making within local governments situated the closest to the citizens affected by those decisions. Empowered local governments still need to be held accountable, however. The delegates to the Constitutional Convention in 1787 did not include a bill of rights in their draft for a number of reasons, an important one being the structural safeguards, such as checks and balances.¹⁶¹ Accountability between the branches comprised one of the strongest lines of defense in the Framers' understanding.¹⁶² Relying wholly on the subsidiarity principle and deferring to the legislature's definition of public use results in careless neglect of an essential check on abusive legislative powers that the Framers intended the judiciary to exercise.

Further, a correctly functioning republic of limited government committed to individual liberty requires a judiciary to guard minority rights from encroachment by the majority. The Framers respected the will of the majority, but knew that a democratic republic could not exist without keeping individual rights equal, independent of a person's majority or minority stance.¹⁶³ Because the majority can easily suffocate minority interests, the judiciary's structure, with lifetime tenure to make it sufficiently independent of conflict, pressures, and trends of the time, renders Article III judges uniquely situated to handle the task of keeping the legislative body and the majority in check.¹⁶⁴ Justice O'Connor refers to this necessary check in *Kelo*:

We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction,

¹⁶¹ Boyce, *supra* note 9, at 245–46; Shlomo Slonim, *The Federalist Papers and the Bill of Rights*, 20 CONST. COMMENT. 151, 151–52 (2003).

¹⁶² See Boyce, *supra* note 9, at 246.

¹⁶³ See THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961). “In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.” James Madison, Speech in the Virginia State Convention of 1829–’30, on the Question of the Ratio of Representation in the Two Branches of the Legislature (Dec. 2, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 51, at 51–52 (Philadelphia, J.B. Lippincott & Co. 1865). Madison did not try to create a system where the minority could halt the majority on a whim but rather a system where individual minority rights would not be destroyed. See THE FEDERALIST NO. 10 *supra*, at 75–76.

¹⁶⁴ THE FEDERALIST NO. 78, at 464–65 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Alexander Hamilton stated that constitutional protections and limitations could “be preserved in practice no other way than through the medium of courts of justice,” which must “guard the Constitution and the rights of individuals from the effects of those ill humors which . . . sometimes disseminate among the people themselves.” *Id.* at 465, 468.

the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.¹⁶⁵

Removing the judiciary's ability to review legislative determinations results in a defenseless minority in the face of majority will. Experience confirms the Founders' fears and demonstrates the necessity of judicial review.

First, eminent domain decisions most often affect minority groups, such as low-income individuals¹⁶⁶ and nonprofit organizations that do not generate much revenue relative to other entities. For instance, churches make easy targets. Pastors concerned with leading their congregations and relying on voluntary giving to remain fiscally viable often remain segregated from other pastors and do not have the resources to lobby the government for certain outcomes.¹⁶⁷ Because churches are often poorly equipped or unable to present strong opposition to eminent domain, they become popular, easy takings victims when local governments decide that the church property could be better used by a profit-generating enterprise. These groups desperately need the judiciary to fulfill its role and ensure minority interests have a voice in the midst of the majority's will.

Second, deferring to the legislature for its expertise neglects an important safeguard needed because of the fallibility of human nature. Imperfect individuals comprise the legislature, so it would be foolish to treat the body of those individuals as politically omnipotent. Powerful positions attract a certain corresponding ambition, and the judiciary must take a more active role to ensure against a superseding will. Imperfect people likewise compose the judiciary, but the safeguard lies in using "ambition . . . to counteract ambition."¹⁶⁸ The legislature makes the laws, whereas the judiciary reviews cases and controversies.¹⁶⁹ With these different roles, the two branches also remain accountable to different sources; the people can elect a new legislature, and the

¹⁶⁵ *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

¹⁶⁶ See H.R. REP. NO. 112-401, at 11, 13 (2012).

¹⁶⁷ See *City to Seize Church by Eminent Domain*, WORLDNETDAILY.COM (Mar. 11, 2006), <http://www.wnd.com/2006/03/35198/>. In addition, churches are at a unique disadvantage because attempts to influence legislation may threaten their tax exempt status. See I.R.C. § 501(c)(3) (2006).

¹⁶⁸ THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1961). "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." *Id.*

¹⁶⁹ See VA. CONST. art IV, § 1, art VI, § 1.

legislature can impeach members of the judiciary.¹⁷⁰ Thus, the structure of the two branches allows a healthy power struggle to effect checks and balances on power. While human error remains possible, our system of government requires checks and balances to offset the danger of tyranny by the majority.¹⁷¹

The Supreme Court of Virginia did not act to protect Hoffman's minority rights when the court sidestepped all external, surrounding circumstances, an integral part of the public use inquiry.¹⁷² The majority failed to consider the motivating reason for taking Hoffman's property to relocate the box culvert, even when testimony and evidence unequivocally demonstrated that only the Mill Race project motivated the taking.¹⁷³ The box culvert did not need repair; in fact, relocating the culvert would have reduced the storm water system's capacity.¹⁷⁴ The court refused to consider this evidence because it determined that "the question of the necessity . . . of resorting to the exercise of the power of eminent domain is a legislative function."¹⁷⁵ As a result, the court failed to protect a minority interest against an interested developer and the city council.

This deference to the legislatures appears even more troubling considering the deference legislatures afford the judiciary. The view that the courts decide constitutionality and the meaning of the Constitution represents the dominant view in today's society.¹⁷⁶ In an exchange between Professor Bradley Jacob and United States House Representative Jerrold Nadler during a hearing before the Constitution Subcommittee of the House Judiciary Committee, Nadler stated: "The courts will tell us exactly what our authority is and whatever it is, it is, and that is how far it will go."¹⁷⁷

When both branches defer to the other, no checks and balances come to bear at all, and minority interests stand unprotected. If Virginia courts hold to *Hoffman's* precedent, the question of necessity will remain with the legislature without effective judicial review. Additional

¹⁷⁰ See VA. CONST. art IV, §§ 2, 3, 17, art VI, § 10.

¹⁷¹ THE FEDERALIST NO. 51, *supra* note 168, at 319. "In republican government, the legislative authority necessarily predominates." *Id.*

¹⁷² *Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 734–36 (Va. 2006) (Hassell, C.J., dissenting).

¹⁷³ *Id.* at 733.

¹⁷⁴ *Id.* at 732.

¹⁷⁵ *Id.* at 728 (majority opinion).

¹⁷⁶ Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2706 (2003).

¹⁷⁷ Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 NEB. L. REV. 795, 826 n.131 (2006).

language in the constitutional amendment might marginally counteract that outcome. Currently, the more constrictive definition of public use somewhat narrows the definition, and thus what might be necessary under that definition. The language, however, does not specifically address the question of necessity and leaves room for courts to continue the broad view of legislative deference to a likely deferential legislature. Another clause with requirements for what the judiciary cannot consider “necessary” could be a valuable addition to the amendment, if at the very least, to emphasize the point that the judiciary must take a more active approach to ensure that the taking is in fact necessary.

C. Toward a More Adequate Solution Through Just Compensation

The courts’ acceptance of the broad view of public use has eroded the limitation purpose of the public use requirement as intended by the Framers. Their track record of legislative deference demonstrates that courts cannot be trusted to protect minority interests from eminent domain abuse. Virginia’s eminent domain amendment does not sufficiently prevent the courts from deferring to the legislature. The current inadequacy of the public use requirement therefore compels attention to the just compensation limitation to protect property rights.

In the interest of fully protecting property rights, Virginia’s legislature should propose a constitutional amendment defining “value of the property taken”¹⁷⁸ to mean 150% of the fair market value, instead of simply fair market value. Virginia’s Constitution includes as just compensation “lost profits and lost access, and damages to the residue caused by the taking” but allows the General Assembly to define what “lost profits” and “lost access” mean.¹⁷⁹ In the end, the General Assembly itself determines what it must pay.¹⁸⁰ Other states stipulate a bright line rule for compensation; for example, Indiana requires the condemnor to compensate takings of principal residences with 150% of the fair market value and takings of agricultural land with 125% of the property’s fair market value.¹⁸¹ Michigan also requires compensation of 125% of the fair market value for principal residences.¹⁸² A better safeguard for property

¹⁷⁸ VA. CONST. art. I, § 11.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ IND. CODE ANN. § 32-24-4.5-8(1)(A)(i), (2)(A) (Westlaw through 2013 Legis.). Despite this provision, Indiana earned a “B” on its Castle Coalition report card for property protection because of a loophole allowing economic development takings for certified technology parks. CASTLE COALITION, *supra* note 114, at 18.

¹⁸² MICH. COMP. LAWS ANN. § 213.23(3)(5) (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.).

rights in Virginia lies in a bright line rule for the value of the property for three reasons.

First, compensation of 150% of the fair market value better accounts for the owner's subjective value than fair market value compensation alone. Subjective value cannot be quantified. According to principles of opportunity cost, an owner in possession of property values holding it more than the money the owner might receive in exchange. Otherwise, the owner would already have put the property on the market. The reasons an owner could hold onto the property are numerous. For instance, an owner might have sentimental value in a home,¹⁸³ find the location best suitable for a business venture, or be too busy to sell. An owner who chooses to hold the property communicates that the owner does not value the current fair market value more than maintaining possession. Thus, a mark-up on fair market value focuses on providing more full compensation to an owner who prefers to keep the property but must give it up when the government exercises eminent domain.

Second, compensation of 150% of the fair market value secures property rights by preserving property prices. Many view society's power of eminent domain and an owner's property rights as opposing interests that must be balanced. For example, one scholar purports that "[e]minent domain procedures . . . seek[] to limit the harm to individual property owners while procuring increased social utility for the community."¹⁸⁴ In actuality, though, one taking of private property directly and proportionately affects all other property rights because eminent domain renders property rights insecure and affects investment choices. Owners have less incentive to make substantial investments in their property when the government wields the threat of eminent domain, so the uncertainty would tend to lower market prices. A 150% mark-up would benefit society by reducing the number of takings and restraining the government to take only necessary property, thus preserving property values.

Third, the 150% mark-up from fair market value provides just compensation because of the unequal bargaining power between the government and the individual citizen. Judge Posner stated that the only

¹⁸³ See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 494–95 (2005) (O'Connor, J., dissenting). One petitioner's home had been in her family for more than 100 years; in fact, she was born in that home in 1918. *Id.* That petitioner's son owned the home next door, which he received as a wedding gift. *Id.*

¹⁸⁴ Ryan Frampton, *Kelo v. New London and the State Legislative Reaction: Evaluating the Efficacy and Necessity of Restricting Eminent Domain for Economic Redevelopment at the State Level*, 4 RUTGERS J.L. & PUB. POL'Y 730, 730 (2007); see also *id.* at 735.

justification for eminent domain rested in the holdout problem.¹⁸⁵ Experience shows, however, that the government has exercised its power of eminent domain as a threat and not solely a measure of last resort. For example, the Supreme Court denied certiorari of *Didden v. Village of Port Chester*,¹⁸⁶ in which the Second Circuit affirmed dismissal of a property owner's claim for relief from a condemnation proceeding because the statute of limitations had expired.¹⁸⁷ A pharmacy chain approached the owner looking to set up its business on the owner's premises, situated partially within a redevelopment district designated four years earlier.¹⁸⁸ No condemnation proceedings occurred, however.¹⁸⁹ Soon after the discussions, the designated developer threatened the owner with condemnation if the owner did not meet the developer's demand for \$800,000 and a partnership in the pharmacy project.¹⁹⁰ When the owner refused, the developer initiated the condemnation process two days later.¹⁹¹

Even when the condemnor does not make overt threats, the citizen knows that the government wields the power of eminent domain and will exercise it if the parties cannot come to a favorable agreement. The property owner faces an uneven playing field. The government, naturally, will not offer more than the property's fair market value and will likely argue for a lower amount. The government's access to eminent domain gives the government more leverage in negotiations; thus, property owners are automatically disadvantaged. Requiring compensation of 150% of the fair market value would help to even that imbalance. If the government acted arbitrarily in taking private property by channeling it toward more private uses,¹⁹² then at least the property owner's interests would be more secure because the owner, at a minimum, would receive more than the fair market value.

CONCLUSION

The Framers intended the public use and just compensation requirements to serve as important limitations to protect private

¹⁸⁵ GARY S. BECKER & RICHARD A. POSNER, UNCOMMON SENSE 57 (2009) (describing holdout problem as the situation that may arise from a landowner holding out and refusing to sell except for an exorbitant price).

¹⁸⁶ 173 F. App'x 931 (2d Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

¹⁸⁷ *Id.* at 932–33.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 933.

¹⁹¹ *Id.*

¹⁹² See *Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 730–31 (Va. 2006). Incidental benefits motivated the taking. *Id.*

property rights. They also envisioned a judiciary that would act to ensure that the majority did not overpower the minority. The courts, however, have since loosened the public use definition to the point where economic development qualifies as public use and each individual property owner's minority rights do not receive effective protection. The Virginia legislature has made good progress toward regaining ground in defending property rights, and the recent constitutional amendment represents an important move in that direction. Virginia's property rights will not be as secure as intended, however, until the legislature turns its attention to creating a bright line rule for just compensation.

Another amendment to the constitution requiring compensation of 150% of the fair market value would be the best measure to protect private property rights in Virginia, especially considering the trend of the judiciary and the legislature to defer to the other branch. A 150% mark-up of the fair market value of the property would alleviate some of the loss in subjective value that governments can neither quantify nor compensate. The mark-up would also better preserve property prices for all homeowners. Finally, the bright line compensation would counteract the government's bargaining advantage and would ensure that the homeowner would receive more value when facing the likely inevitable property taking. The automatic compensation of 150% of the fair market for takings of private property provides the best strategy to reinforce private property rights for the citizens of Virginia.

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