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Public Use or Public Purpose?: The Ever-Changing Role of the Courts and the Legislature in Interpreting the Public Use Clause in Deciding Whether a State Can Take Private Property in Eminent Domain Proceedings for the Purpose of Promoting Private Economic Development

I. INTRODUCTION

It is well-settled that a state or federal government can seize private property for public use, provided that the private party is given a fair compensation for the taking.[1] However, the interpretation of what exactly constitutes a public use has been widely debated in nearly every jurisdiction, resulting in an expanding and contracting role of the courts in determining what takings actually are constitutional under the Fifth Amendment. The ongoing debate concerning how far a state government should be able to stretch the meaning of public use culminated in June of 2005 with the decision handed down by the United States Supreme Court in *Kelo v. City of New London*.[2] There, the Court determined that private property may be condemned in favor of private economic development.[3] This decision naturally sparked a flurry of public outrage that resulted in several states proposing legislation with the aim of preventing the most severe of consequences contemplated in *Kelo*'s dissenting opinions. To begin, this comment will trace the evolution of the United States Supreme Court's interpretation of the Public Use Clause.

The interpretation of "public use" in the Commonwealth of Pennsylvania has been far murkier than it has been in the deluge of U.S. Supreme Court decisions, almost to a point where it is dif-

1. *See* U.S. CONST. amend. V. The Fifth Amendment of the United States Constitution reads in part: "[N]or shall private property be taken for public use, without just compensation." *Id.* This prohibition has been selectively incorporated through the Fourteenth Amendment to bar any state from doing what would otherwise be prohibited by the Fifth Amendment. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 235-42 (1897). *See also* U.S. CONST. amend. XIV.

2. 125 S. Ct. 2655 (2005).

3. *Kelo*, 125 S. Ct. at 2669.

ficult to precisely ascertain the meaning of the phrase "public use" in Pennsylvania. This comment will address this issue by outlining the history of the Pennsylvania courts' interpretation of the public use clause and briefly discussing the impact of the *Kelo* decision on eminent domain law in the Commonwealth.

After outlining the interpretation of "public use" in the Supreme Court and Pennsylvania jurisprudence, this comment will analyze the changing role of the Court in determining its power to review acts of the legislature in the realm of the public use doctrine. In doing so, it will be determined whether any inconsistencies exist between the recent decisions in this area of the law as opposed to another key area of federal constitutional law, namely the interpretation of the Commerce Clause, and elucidate any readily ascertainable reasons for the inconsistencies.

Finally, this comment will examine several proposed statutes from selected jurisdictions and discuss the potential advantages and disadvantages of each to determine which, if any, is the best approach.

II. THE UNITED STATES SUPREME COURT'S EXPANDING INTERPRETATION OF THE PUBLIC USE CLAUSE

Prior to the twentieth century, there was a lack of high court cases dealing with the takings clause and the public use doctrine. The Supreme Court, therefore, had not directly dealt with the meaning of the public use clause until around the turn of the twentieth century. In *Clark v. Nash*,[4] for example, the United States Supreme Court addressed the meaning of public use in the context of a statute that authorized the widening of irrigation ditches across the private property of one landowner for the benefit of other landowners.[5] The Court, in that case, held that the use was a public one because the circumstances in the case dictated that it was a public use.[6] In other words, the term public use did not have a concrete meaning. It did not mean a literal use by the public; instead, it was a more malleable meaning that depended on the unique facts of the case in question.[7]

4. 198 U.S. 361 (1905).

5. *Clark*, 198 U.S. at 362.

6. *Id.* at 369.

7. *Id.* at 368-69 (citing Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159 (1896)). *See also* Strickley v. Highland Boy Gold Mining Company, 200 U.S. 527 (1906) (approving the condemnation of a right-of-way across the land of a private owner because the public welfare required the use of rail lines to transport raw materials). The Court in

Perhaps the most significant case that influenced the development of the current interpretation of the public use clause was *Berman v. Parker*,[8] where Congress attempted to condemn a large tract of blighted land in Washington, DC.[9] The main issue in this case was whether a state legislature with the requisite police power had the power to condemn privately owned land under the Fifth Amendment's takings clause for the purpose of relieving the blight before redistributing the property to private owners.[10]

Before addressing the Fifth Amendment issue, the Court made the determination that, because Congress had the requisite police power to determine what the valid public purpose was, public purpose could be accomplished through the use of eminent domain.[11] The appellants in this case owned an otherwise unblighted department store located in the area of the condemnation. They argued that this was simply a transfer of property between private parties and, therefore, a private use.[12] Justice Douglas rapidly dismissed that argument by explaining that the public purpose in this case was the clearing of urban blight, and the transfer of the property to another private businessman (for the purposes of redevelopment) was merely a permissible method of employing its police powers once the legislature determined a valid public purpose.[13]

The United States Supreme Court further expanded the definition of public use in *Hawaii Housing Authority v. Midkiff*.[14] *Midkiff* involved a statute that authorized the taking of property from a private owner, who happened to own a large proportion of the

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this case upheld the notion that a strict and narrow interpretation of the public use clause was the most appropriate. *Strickley*, 200 U.S. at 531.

8. 348 U.S. 26 (1954) (Douglas, J., delivered the majority opinion).

9. *Berman*, 348 U.S. at 28-30. In this case, note that because the condemnation occurred in the District of Columbia, it was the United States Congress, and not a local (state) legislature, that has the local police power to legislate within the bounds of the District. *Id.* at 31-32 (citing District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108 (1953)).

10. *Berman*, 348 U.S. at 28-32. The plan authorized the condemnation for purposes of clearing substandard conditions to improve the "public health, safety, morals and welfare" in the District of Columbia. *Id.*

11. *Id.* at 31-34.

12. *Id.* at 33.

13. *Id.* Also, the Court dismissed the landowner's charge that his land should not have been condemned alongside the other property because his property, standing alone, was not in any state of disrepair. *Id.* at 234. In dismissing this argument, the majority explained that these plans often include a refurbishment of the entire area and it would not be feasible to complete the plan should every person in the development area be allowed to thwart the condemnation of their individual property. *Id.* at 34-36.

14. 467 U.S. 229 (1984) (O'Connor, J., delivered the opinion of the Court).

land in the area, and the redistribution of the property to groups of tenants occupying the land who had applied to have it condemned.[15] Justice O'Connor restated the law announced in *Berman* and explained that the "public use requirement is coterminous with the scope of a sovereign's police powers."[16] In doing so, she reaffirmed the role of the courts as limited in their ability to look at the legislature's determination of what a public use actually entails.[17] Justice O'Connor then employed a similar analysis to conclude that the use of the land was a proper use of the state's police powers to regulate the health and welfare of the people living within its boundaries.[18] Justice O'Connor further chastised the old system of property ownership in Hawaii as an oligopoly and classified the system as creating "social and economic evils" in the form of a deficient land market, the elimination of which was a proper public purpose.[19]

Once it was determined that there was a proper public purpose, the majority in *Midkiff* had little trouble concluding that the condemnation scheme set up by the Hawaii statute was a proper exercise of eminent domain.[20] Justice O'Connor discussed the public purpose test as more of a rational basis test.[21] Justice O'Connor further stated that as long as the lawmaking body executes a legitimate plan (public use), and as long as its means-to-ends fit is close enough (i.e., where it is not considered illogical), then the Fifth Amendment taking will be deemed a proper public purpose.[22] In other words, since the condemnation of the land owned by the small faction of landowners was a rational means of carrying out a legitimate public purpose, the use of eminent domain did not run afoul of the Fifth and Fourteenth Amendments.[23]

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15. *Midkiff*, 467 U.S. at 233. The statute authorized taking of land when there was a "concentration of land ownership . . . in the hands of a few landowners who have refused to sell the fee simple titles to their lands and have instead engaged in the practice of leasing their lands under long-term leases." HAW. REV. STAT. § 516-83. The statute cites a shortage of residential land creating a negative impact on the local residents who wished to purchase the land on which they lived for a reasonable price. HAW. REV. STAT. § 516-83.

16. *Midkiff*, 467 U.S. at 240.

17. *Id.* at 240-41.

18. *Id.* at 241-42.

19. *Id.*

20. *Id.* at 242-43.

21. *Mikiff*, 467 U.S. at 242-43.

22. *Id.*

23. *Id.* Justice O'Connor further employed this reasoning to dismiss any notion that the government should at some point possess the property during the taking in order to qualify as a public use. *Id.* at 243-44.

The interpretation of public use remained relatively consistent in the federal sphere until June of 2005, when *Kelo v. City of New London* opened the floodgates, potentially allowing any and all uses to justify a taking under the Fifth Amendment.[24] The situation in *Kelo* occurred in a city that was named as a "distressed municipality" by the state of Connecticut because the local economy was considered extremely depressed due to the mass exodus of industry.[25] The situation called for an economic revitalization plan, in which several tracts of land were to be condemned and transferred to Pfizer, a pharmaceutical corporation.[26] The purpose of this taking was not a narrow cause and effect scheme, as in *Berman* and *Midkiff*; rather, the plan was more speculative – the land transfer to Pfizer would hopefully further the general economic development of the city.[27] Among those trapped in the condemnation was Susette Kelo, who owned unblighted property and had made several improvements to her waterfront home in the city.[28]

The opinion began with the majority restating the prior relevant case law with respect to the Public Use Clause, reaffirming the notion that once a proper public purpose is determined, it does not matter how that purpose is effectuated, even if it involves a transfer to a private party.[29] Writing for the majority, Justice Stevens further emphasized the notion of federalism in denoting the fact that the prior decisions regarding the definition of public purpose should be left alone since local legislatures are better equipped with knowledge of problems within their own states, and they also understand the best means to deal with those problems.[30] Furthermore, the majority rejected the Kelos' proposal that there should have been a "bright-line" rule excluding private economic development from the list of valid public purposes because Justice Stevens believed there would have been no way to logically separate economic development from other valid public purposes.[31]

Justice Stevens and the rest of the majority rejected the idea that approval of this taking would "blur the boundary between

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24. *See Kelo*, 125 S. Ct. at 2658.

25. *Id.* at 2658.

26. *Id.* at 2659.

27. *Id. See also supra* text accompanying notes 9 and 15.

28. *Kelo*, 125 S. Ct. at 2660.

29. *Id.* at 2663-64 (Stevens, J., delivered the opinion of the Court and was joined by Kennedy, Souter, Ginsburg, and Breyer, J.J.)

30. *Id.* at 2664.

31. *Id.* at 2665.

public and private takings," explaining that private parties often derive substantial benefits in takings cases, and this is permissible as long as the takings are performed under the pretext of a valid public purpose.[32] Justice Stevens then promptly ignored a hypothetical presented by the appellants.[33] The hypothetical asked what would happen if the Connecticut legislature made a very small step further, allowing the taking of property from one individual in favor of another individual simply because the second individual would take greater economic advantage of the property.[34]

Justice Stevens then addressed the question of whether there should be a "reasonable certainty" that the public would actually benefit from the taking.[35] The majority emphatically rejected that argument presented by the appellants because it would create a substantial division between this case and precedent.[36] As long as the taking can be classified as a proper public purpose, the Court will not inquire into the degree of certainty that the public benefit will accrue.[37]

The majority opinion concluded by rejecting the appellants' argument that the taking of their lands in particular was unnecessary to properly effectuate the condemnation scheme.[38] In so doing, Justice Stevens reaffirmed *Berman* in saying that the state legislature generally has full discretion to choose which lands it should condemn in order to carry out its scheme once a legitimate public purpose has been identified.[39]

Justice Kennedy wrote a concurring opinion to discuss situations in which there should be a presumption of invalidity where there is a question concerning whether the taking was for a valid public purpose.[40] Justice Kennedy disagreed with the proposition that there should be a *per se* presumption of invalidity in all cases because that could invalidate takings that would confer a considerable benefit upon the public.[41] Instead, Justice Kennedy suggested that some room be left for a presumption of invalidity in

32. *Id.* at 2666 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).
33. *Kelo*, 125 S. Ct. at 2666-67.
34. *Id.*
35. *Id.* at 2667.
36. *Id.*
37. *Id* at 2667-68.
38. *Kelo*, 125 S. Ct. at 2668.
39. *Id. See also supra* note 13.
40. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).
41. *Id.* at 2670.

cases where it appears there is favoritism toward a particular private party, and only an ancillary or insubstantial benefit conferred upon the public.[42]

Justice O'Connor's seething dissent echoed the most immediate concerns regarding the effect of this decision on the future of takings cases.[43] First, Justice O'Connor noted that this was not a case, such as in *Berman* or *Midkiff*, in which some social harm was eliminated through the use of the condemnation scheme.[44] Justice O'Connor, therefore, queried how the property could be taken without that justification.[45]

Justice O'Connor then discussed several propositions from the majority opinion on how a state's power of eminent domain could be limited.[46] First, she points to the majority's suggestion that the court will reserve itself a role in preventing takings that are made solely (or at least substantially) for the purpose of private benefit.[47] In her response to that proposition, Justice O'Connor dismissed it because it would not be sensible to attempt to separate out the government's considerations as to which party it intended to benefit.[48] The second issue that Justice O'Connor had with that proposition is that even if there were an incidental public benefit in cases in which the government favored a particular party, the taking would still have an impermissible effect under the Takings Clause.[49]

The second suggestion that Justice O'Connor refutes is the implicit proposition that eminent domain should only be used to improve property as opposed to impairing property.[50] Instead, Justice O'Connor dismissed this proposition as unrealistic because it would involve mere speculation as to whether the property would actually be improved by the new use.[51]

Third, Justice O'Connor rejected the proposition that takings should only be allowed where they provide a myriad of other bene-

42. *Id.*

43. *Id.* at 2671 (O'Connor, J., dissenting) (Justice O'Connor was joined in her dissent by Rehnquist, C.J., Scalia and Thomas, J.J.).

44. *Id.*

45. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting). *See also supra* text accompanying notes 10 and 19.

46. *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2676.

51. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

fits in addition to tax or economic benefits.[52] The problem that the dissent saw in this proposal is that there would be no real way to prevent takings under condemnation schemes that really provide only tax benefits under the guise of providing other ancillary benefits only as a subterfuge.[53] Justice O'Connor further rejected Justice Kennedy's solution that the people look to the states for relief in these situations, claiming that would be a mere relinquishment of the Court's duty to uphold the Constitution.[54] Most importantly, Justice O'Connor concluded by noting that the burden of this decision would disproportionately fall on those who lack influence and power in the legislative process, most notably the impoverished.[55]

Justice Thomas penned an additional dissent to argue that the original cases interpreting the public use clause in the context of transfers to private parties were improperly decided.[56] Justice Thomas discussed two particular lines of cases that led to the decisions in *Berman* and *Midkiff*.[57] First, Justice Thomas discussed the deficiency of the public purpose test originally espoused in the *Fallbrook Irrigation* case, explaining that first, it was unnecessary to decide the case under such a test because that line of cases could have simply been decided under a literal "use by the public" test.[58] Justice Thomas further chastised the "public purpose" test as being "not susceptible of principled application."[59]

Justice Thomas then discussed a second group of cases that primarily afforded the state legislatures almost total deference as to the decision on what constitutes a proper public use or purpose.[60] Justice Thomas reasserted that the main idea of eminent domain is to limit the power of the legislatures as opposed to granting it power.[61] Justice Thomas looked to other examples of constitutional prohibitions in the Bill of Rights on the exercise of

52. *Id.*
53. *Id.* at 2676-77.
54. *Id.* at 2677.
55. *Id.*
56. *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting).
57. *Id.* at 2683-85.
58. *Id.* at 2683-84 (citing Fallbrook Irrigation v. Bradley, 164 U.S. 112 (1896)).
59. *Kelo*, 125 S. Ct. at 2683 (Thomas, J., dissenting). Justice Thomas also noted that the Supreme Court's adoption of the "public purpose" test was followed blindly in the later cases, such as *Clark*, which included little or no analysis as to why that form of the test was adopted. *Id.* (citing Clark v. Nash, 198 U.S. 361 (1905)).
60. *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting) (citing United States v. Gettysburg Electric R.R. Co., 160 U.S. 668, 680 (1896) (standing for the proposition that a legislature's decision on what constitutes a public use will be given deference unless it is irrational)).
61. *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting).

police powers, such as those afforded by Fourth Amendment in search and seizure and due process cases.[62] To Justice Thomas, it is illogical for the Court to afford the legislature little deference in those cases, while providing nearly unlimited deference to the legislature to determine what, in fact, is or is not a public use or purpose.[63]

Justice Thomas further explained that these two improper lines of reasoning combined to elicit the reasoning espoused by the writers of the majority opinion in the *Kelo* case.[64] The dissenting justice first noted that the *Berman* and *Midkiff* Courts erroneously equated eminent domain with the states' police powers because the Constitution has never required a state to provide compensation in conjunction with the exercise of its police powers.[65] Justice Thomas argued that the rules from the *Midkiff* and *Berman* cases are almost impossible to apply logically.[66] For example, a court could almost never decide that a taking was for a purely private purpose unless it determined first that the taking did not logically "advance the public interest."[67] Justice Thomas also expressed his confoundedness with the majority's belief that a literal public use interpretation would be more difficult to apply than the broader public purpose interpretation, and he nearly accused the majority of destroying a part of the Constitution.[68] Justice Thomas then concluded his dissent with a proposal that the Court return to a more literal public use interpretation and only allow takings in the cases where the governmental unit actually uses the property or where it allows the public some right to use it.[69]

III. PENNSYLVANIA'S INCONSISTENT FORMULATION OF THE DEFINITION OF "PUBLIC USE"

The Constitution of the Commonwealth of Pennsylvania also contains a Public Use Clause that has been subject to varying in-

62. *Id.* (citing Payton v. New York, 445 U.S. 573 (1980) and Deck v. Missouri, 125 S. Ct. 2007 (2005)).
63. *Kelo*, 125 S. Ct. at 2684-85 (Thomas, J., dissenting).
64. *Id.* at 2685.
65. *Id.*
66. *Id.* at 2686.
67. *Id.*
68. *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting).
69. *Id.*

terpretations.[70] However, the interpretations of the Public Use Clause in Pennsylvania have resulted in a somewhat convoluted definition of what constitutes public use or public purpose.

Among the first cases to interpret Pennsylvania's Public Use Clause was *Lance's Appeal*.[71] This case involved the condemnation of a tract of land to make way for a new railroad.[72] The Pennsylvania Supreme Court upheld the statute which provided for the taking, and in doing so explained that the Commonwealth can never exercise its power of eminent domain unless it is for a valid public purpose.[73] The court in *Lance's Appeal* defined public purpose as one that is "supposed and intended to benefit the public, ether mediately or immediately" and is one that "arises out of that natural principle which teaches that private convenience must yield to the public wants."[74] It appeared from the onset that Pennsylvania's interpretation of the Public Use Clause would correspond to the broad definition employed by United States Supreme Court throughout the twentieth century.

The Pennsylvania Supreme Court's interpretation of the Public Use Clause would then begin to contradict itself beginning with the case of *Philadelphia Clay Co. v. York Clay Co.*[75] *Philadelphia Clay Co.* involved the condemnation of a tract of land in order to construct a tramway to facilitate the transportation of raw materials for a private corporation.[76] The condemnation scheme was invalidated because the property was not used by the public in any fashion.[77] Furthermore, the court pointed out that the company that wished to force the transfer was not chartered to transport raw materials as a service for the public.[78] Here, the court began a rapid shift towards a more literal interpretation of the public use clause, but maintained a very subtle suggestion that the public use test could be satisfied if the public somehow benefited from the taking.[79] Most notably absent from this analysis was any ref-

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70. *See* PA. CONST. art I, § 10. The takings clause in Pennsylvania reads in full: "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." *Id.*

71. 55 Pa. 16 (1866).

72. *Lance's Appeal*, 55 Pa. at 17.

73. *Id.* at 25.

74. *Id.*

75. 88 A. 487 (Pa. 1913).

76. *Philadelphia Clay Co.*, 88 A. at 487.

77. *Id.* at 488.

78. *Id.*

79. *Id.*

erence to the original broad public purpose test adopted by the court in *Lance's Appeal.*[80]

Less than one month after the decision in the *Philadelphia Clay Co.*, the Pennsylvania Supreme Court further contradicted itself by abandoning the broad interpretation of the Public Use Clause in favor of a narrow, literal interpretation in the case of *Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia.*[81] This case involved the condemnation of property belonging to one business merely to transfer it to another business after placing building restrictions on the parcel of land.[82] The reasons provided in the statute that would authorize the condemnation were specifically "to protect such . . . parkways . . . their environs, the preservation of the view, appearance, light, air, health or usefulness thereof."[83] In other words, the condemnation was for the mere purpose of improving aesthetics of the land near the highway.[84]

In adopting a new test in the Commonwealth for determining if property was taken under the pretext of a valid public use, the court completely abandoned the public purpose test, and elected to take a strict literal interpretation to the clause.[85] Justice Mestrezat demonstrated his suspicion of legislative and judicial abuse by saying:

> If, however, public benefit, utility or advantage is to be the test of a public use, then, as suggested by the authorities, the right to condemn the property will not depend on a fixed standard by which the legislative and judicial departments of the government are to be guided, but upon the views of those who at the time are to determine the question. There will be no limit to the power of either the Legislature or the courts to appropriate private property to public use, except their individual opinions as to what is and what is not for the public advantage and utility.[86]

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80. *Id. See also supra* text accompanying note 69.
81. 88 A. 904 (Pa. 1913).
82. *Pa. Mut. Lif. Ins.*, 88 A. at 905.
83. *Id.*
84. *Id.*
85. *Id.* at 907. The literal "use by the public" test was favored over one that interpreted the public use clause as meaning "public utility or advantage." *Id.* (citing Arnsperger v. Crawford, 61 A. 413, 415 (Md. 1905)).
86. *Id.* at 907. Curiously enough, the Pennsylvania Supreme Court adopted the literal interpretation, whereas the United States Supreme Court firmly rejected that test as insufficient. *See supra* note 7.

With this ruling, the original broad public purpose analysis performed by the court in the mid nineteenth century appeared all but forgotten. Since the condemnation scheme would have been carried out in the form of a transfer to another private individual, the fact that it was performed merely to aesthetically improve the area resulted in the scheme being struck down.[87]

In *Pioneer Coal Co. v. Cherrytree & Dixonville R.R. Co.*,[88] the Pennsylvania Supreme Court would once again ignore precedent and expand the definition of public use that it set when it dealt with a governmental taking of land to benefit a private coal company.[89] The court held this taking to be a public use, even though the vast majority of the public would not use the property.[90] The court justified this holding by stating that "the life, happiness, and prosperity of the people of Pennsylvania depend to a very large degree upon getting the coal supply of the state out of the mines . . . ."[91] This essentially broadened the strict definition of public use the court had adopted in *Pennsylvania Mutual Insurance Co v. City of Philadelphia.*[92]

In *Dornan v. Philadelphia Housing Authority*,[93] the city of Philadelphia enacted a condemnation scheme to reconstruct areas that were deemed slums in order to "[provide] sanitary dwelling accommodations for persons of low income."[94] Since the plan provided for the immediate transfer of property to a private party, it was naturally argued that the land was not taken for a public use within the meaning of the public use clause as it appears in both the Pennsylvania and the United States Constitutions.[95] The Pennsylvania Supreme Court responded to that complaint by explaining that "what constitutes a public use necessarily var[ies] with changing conceptions of the scope and functions of government, so that to-day [sic] there are familiar examples of such use which formerly would not have been so considered."[96] The court further explained the argument that the circumstance in which

87. *Pa. Mut. Life Ins.*, 88 A. at 908.
88. 116 A. 45 (Pa. 1922).
89. *Pioneer Coal Co.*, 116 A. at 45.
90. *Id.* at 48.
91. *Id.*
92. *See supra* note 81. The court in *Pioneer Coal* also overlooked the notion that the product of the transported natural resources would eventually be used by the public to satisfy energy needs.
93. 200 A. 834 (Pa. 1938).
94. *Dornan*, 200 A. at 837.
95. *Id.* at 838.
96. *Id.* at 840.

the new houses would not be used by the entire public was "lacking legal significance" because there are many occasions in which buildings are constructed and for use only by a portion of the public, yet should nevertheless be considered a public use.[97]

The fact that the court began to expand the definition from the hard and fast rule set forth in 1913 reflects an ignorance of the rationale set forth in *Pennsylvania Mutual Insurance Co.* In a reminder of the court's decision in *Pennsylvania Mutual*, the specific concerns articulated by the court were to limit the power of other courts and the legislature in defining what exactly constituted a public use.[98] The courts in *Pioneer Coal Co.* and *Dornan* cited rationale that conflicted with *Pennsylvania Mutual*.[99] The courts allowed the rule to be adjusted by the courts to reflect the changing needs of society as time progresses, without directly overruling the original strict interpretation.[100]

IV. THE FLUCTUATING ROLE OF THE COURTS IN REVIEWING LEGISLATIVE DECISIONS

Since the turn of the twentieth century, the role of the courts in reviewing legislative decisions throughout has been subject to great fluctuation. The courts started by taking an almost overbearing role while giving no deference to the legislatures. Subsequently, that role has eroded to the point that the courts have surrendered their power to the legislatures, whom they believe to be better equipped to handle the problems. However, in certain situations, the courts have re-asserted their constitutional authority to review legislative determinations in order to prevent legislatures from overstepping their constitutional limitations. The cases dealing with the public use clause have, to this point, followed the same format, but curiously the courts have yet to re-

97. *Id.* The court specifically produced jails and poorhouses as examples of buildings which the entire public does not use. *Id.* Also, the court in this case cited several United States Supreme Court decisions, including those that were ignored in the Philadelphia Mutual case, namely *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896). *Dornan*, 200 A. at 840. *See also supra* note 7.

98. *See supra* text accompanying note 81.

99. *See supra* text accompanying notes 84-86 and 90. The rule generated in the *Pioneer Coal* and *Dornan* cases would later be restated as a "public purpose" test. *See* Belovsky v. Redevelopment Authority of City of Philadelphia, 54 A.2d 277 (Pa. 1947) (holding the taking of private property to cure urban blight is a valid public purpose, despite the transfer of property to a private corporation to undertake the development).

100. *See supra* text accompanying notes 84-86 and 90.

assert a role in preventing legislatures from having unfettered discretion in determining what constitutes a public use.

The judiciary's wavering between asserting a passive role and an active role in defining "public use" is best illustrated by the handling of the commerce clause cases in the United States Supreme Court. Beginning in the early twentieth century, the Court began with a literal interpretation of the Commerce Clause in cases such as *Hammer v. Dagenhart*.[101] In that case, the Court struck down a federal law prohibiting the interstate commerce of products that were created through child labor.[102] In striking down the legislation, Justice Day opined that the law was regulating the manufacture of goods rather than the interstate commerce of goods.[103] Since the manufacture of goods did not fit the definition of interstate commerce (in other words, dealing with "traffic and intercourse"), the law was an impermissible exercise of legislative power under Article I of the United States Constitution.[104]

This literal approach to the law taken in *Hammer v. Dagenhart*, comports with the Pennsylvania Supreme Court's handling of *Pennsylvania Mutual*. There, the court employed the more literal interpretation, creating a test that effectively would have struck down any taking that did not amount to a literal public use.[105] There was a deficiency of United States Supreme Court cases dealing with takings prior to *Clark v. Nash* in 1905 due to a lack of federal regulation with regards to eminent domain.[106]

The second step of the evolution of the United States Supreme Court's role in reviewing legislative schemes can be found in *United States v. Darby*.[107] In that case, the Court began to relinquish its power in reviewing legislative determinations in the context of labor law, more specifically a statute that prohibited the interstate shipment of lumber if workers who earned below the minimum wage requirements had manufactured it.[108] The Court

101. 247 U.S. 251 (1918).
102. *Hammer*, 247 U.S. at 268.
103. *Id.* at 271-72.
104. *Id.* at 273-74. *See also* U.S. CONST. art. I, § 8, cl. 3.
105. *See supra* note 81 and accompanying text.
106. The lack of United States Supreme Court cases dealing with state-run condemnation schemes stems from the fact that the Fifth Amendment did not apply to the states until it was selectively incorporated to apply to the states through the Fourteenth Amendment in 1897. *See supra* note 1. It remains to be seen whether the United States Supreme Court would have adopted a more literal interpretation of the Public Use Clause had it been able to review state imposed condemnation schemes prior to that date.
107. 312 U.S. 100 (1941).
108. *Darby*, 312 U.S. at 105.

decided to uphold the statute despite the fact that the employees in this case were involved in the manufacture of the product.[109] The majority concluded that the manufacture of goods impacted interstate commerce.[110] In other words, the Supreme Court eliminated a literal distinction between manufacturing and the transportation of goods, directly overruling *Hammer v. Dagenhart*, and read a more liberal rule that extended it beyond the literal meaning of the word commerce. With the broader, more encompassing meaning of the word commerce, the power of the legislature would grow exponentially, resulting in an almost unchecked ability to legislate on nearly any matter they desired.[111]

The contracting role of the courts in reviewing legislation under the Commerce Clause is very similar to the contracting role adopted by the courts in takings cases in Pennsylvania via *Pioneer Coal Co.* and *Dornan* and also in the federal sphere in light of *Clark v. Nash.*[112] The effect of the High Court's refusal to reassert a role in reviewing legislative determinations would naturally have the same effect in eminent domain cases as it did in Commerce Clause cases: it allows nearly unfettered discretion to name anything a public use. The *Kelo* case has seen the farthest extension of the public use clause to date by the legislature.[113]

The final step in Commerce Clause cases involved a situation in which the United States Supreme Court stepped in and reasserted a role in reviewing legislation which took the farthest and remote extension of the Commerce Clause. In *United States v. Lopez,*[114] the Supreme Court reviewed a statute that, under the guise of the Commerce Clause, made it unlawful to possess a firearm in a school zone.[115] The Supreme Court found the relationship between

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109. *Id.* at 29-43.

110. *Id.*

111. *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding under the Commerce Clause a statutory limitation on how much wheat a farmer was allowed to farm and harvest).

112. *See supra* text accompanying notes 6-7, 86, and 90.

113. *See supra* text accompanying note 26.

114. 514 U.S. 549 (1995).

115. *Lopez*, 514 U.S. at 549. The rationale extended by Congress in this situation was that violent crime substantially impacts interstate commerce. *Id.* at 560. For example, people are less likely to travel to areas that are perceived to be riddled with violent crime. *Id.* Furthermore, the negative impact on education would likely result in an "adverse impact on the Nation's economic well-being." *Id.*

the Commerce Clause and gun control too tenuous and struck down the regulation.[116]

The United States Supreme Court's stance in *Lopez* represented a power shift back to the courts in order to prevent the legislature from moving beyond its constitutional authority. The Court in *Kelo*, on the other hand, had an opportunity to limit the most speculative and remote interpretations of the Public Use Clause to date. The condemnation scheme in *Kelo* only provided for a potential economic benefit to the city, compared to what was needed before.[117] While it is certainly within the purview of the states legislatures to determine what constitutes a proper public use, the power to do so is not absolute. The United States Supreme Court had little trouble in reasserting its constitutional role with respect to the Commerce Clause cases, but failed to do so with respect to the Public Use Clause. It remains to be seen how the Pennsylvania Supreme Court would rule a case similar to *Kelo*, as the issue has yet to arise in the Commonwealth.[118]

V. OUTLINE AND EVALUATION OF INDIVIDUAL STATES' RESPONSES TO *KELO*

Since it the United States Supreme Court has failed to assert a stern role when enforcing the Takings Clause with respect to the Public Use Clause of the Fifth Amendment, the onus is upon the states to formulate rules designed to prevent remote and far-reaching legislative definitions of public use.[119] While Pennsyl-

116. *Id.* at 559-60. The Court reasoned that first of all, the activity regulated in this case was not economic, and furthermore there was no showing as to how possession of a gun in a school zone would impact other states, and therefore interstate commerce. *Id.*

117. *See supra* text accompanying note 26. Contrast this with situations in which the public received an immediate benefit, such as natural resources, the repair of a defective real estate market or the immediate elimination of unsanitary living conditions. *See supra* note 15. *See also supra* text accompanying notes 9, 83-84.

118. There is currently a case in the Court of Common Pleas of Philadelphia, *Down Under GFB Inc. v. City of Philadelphia,* in which the City of Philadelphia condemned privately-owned land to create an extended driveway for the FedEx corporation. Shannon P. Smith, *Suit against Philadelphia to Test 'Kelo' Decision*, Legal Intelligencer (Oct. 6, 2005), *available at* http://www.law.com/jsp/newswire_article.jsp?id=1128503111087.

119. The states are permitted to provide greater, but not lesser, protection than that afforded by the federal government with respect to the Bill of Rights. *See* Commonwealth v. Edmonds, 586 A.2d 887, 894 (Pa. 1991) (citing Commonwealth v. Sell, 470 A.2d 467 (Pa. 1983)) (stating the proposition the state may afford more protection than the minimum amount given by the federal Constitution in the context of a Fourth Amendment search and seizure case). *See also* Commonwealth v. Yastrop, 768 A.2d 318 (Pa. 2001) (citing examples of various jurisdictions that afforded more protection than the minimum federal Constitutional standards in the context of search and seizure cases). While the United States Su-

vania has not introduced any legislation to date which would limit the scope of the Public Use Clause, the *Kelo* case has sparked enough outrage to result in legislation being introduced in several states. The approaches range from state constitutional amendments calling for outright bans on takings for economic activities to increased compensation for takings that cite economic development as the reason for the taking. This section evaluates several proposed solutions from various jurisdictions.

The first and most restrictive approach includes an outright ban on takings where the cited public use is economic development. Several states have proposed constitutional amendments to this effect. For example, Alabama has proposed a constitutional amendment prohibiting takings for purposes of economic development.[120] Florida has proposed to eliminate economic development as a justification for public use.[121] Likewise, Georgia is proposing a constitutional amendment making it unlawful to use eminent domain to transfer property to a private party in order to increase tax revenue, and prohibits economic development as a justification.[122]

Some states are also proposing simple legislation that would have the same effect. Two examples of simple legislation to this effect are competing bills from California. An assembly bill excludes from the definition of "public use" any "taking or damaging" of private property for private use, including, but not limited to, situations in which the property would be used for economic development.[123] Alternatively, a senate bill prohibits the use of eminent domain to "acquire owner-occupied residential real property" if it is to be transferred to another private party.[124]

These statutory schemes would obviously have the effect of eliminating situations similar to *Kelo*; however, some of them are likely drafted too broadly. For example, in Alabama and Georgia, the proposed amendments banning all economically-motivated takings, will likely have the effect of eliminating some takings

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preme Court chose not to give more protection in takings cases dealing with the Public Use Clause, any jurisdiction is permitted to give an increased amount of protection to individuals.

120. H. B. 117, 2005 1st. Spec. Sess. (Ala. 2005). Specifically enumerated in this bill are economic development to increase tax revenue and the creation of jobs. *Id.* However, those two activities are not exhaustive. *Id.*

121. H.R. J. Res. 31, 108th Sess. (Fla. 2005).

122. H.R. Res. 87, 148th Assemb. (Ga. 2005).

123. Assemb. B. 590, 2005 Leg. (Cal. 2005).

124. S. B. 1026, 2005 Leg. (Cal. 2005).

that would otherwise be permissible, such as cases that produce multiple outcomes like economic development as an ancillary effect. The most carelessly drafted is the California Senate Bill, as it would effectively prevent states from taking in any situations, especially in urban renewal projects, which always result in a transfer to a private party. The better approaches are more carefully worded. For instance, the proposed bill in Georgia forbids property from being transferred to private parties only when the main purpose of the condemnation is the increase of tax revenue or economic development.

Some states have taken a different, more limited approach, allowing for some economically-motivated takings. For example, Massachusetts has proposed a law that prohibits the taking of property if the reason behind the taking is related to economic development.[125] The bill, however, still provides for situations in which the purpose of the taking is to repair urban blight.[126] Likewise, Texas has proposed somewhat more complex legislation prohibiting the taking of private property for economic development, yet still allowing for eminent domain takings for purposes of "community development" and also situations in which blighted land is to be remedied.[127] Notably, however, the proposed legislation specifically spells out that traditional eminent domain cases, such as utilities and transportation-related projects are still permissible.[128] Michigan, meanwhile, is proposing a ban on any economically-motivated takings where the primary beneficiary of the taking is a private party.[129]

These approaches are likely to prove to have the most desired effects with respect to opponents of the *Kelo* decision. The limited approaches also appear to be more of a middle ground with respect to private parties and governments wishing to complete urban renewal projects. It is evident that the Michigan approach would work in most cases, but in cases such as *Kelo*, it may be difficult to ascertain who the primary beneficiary of a taking would be. On the other hand, while Texas's approach is carefully worded, it is unnecessary to specifically enumerate public utilities and high-

125. H.D. R. 4662 184th Gen. Ct. (Mass. 2005).
126. *Id.*
127. S. B. 62, 79th Legis. (Tex. 2005). The bill also excludes any type of eminent domain that is intended to be carried out as a subterfuge in actually benefiting a private party. *Id.*
128. *Id.*
129. H.R. J. Res. N, 93d Legis. (Mich. 2005).

ways as permissible uses, as they have always been recognized as legitimate justifications for the takings

The third and least restrictive approach has been attempted in New York. Essentially, it provides no prohibition on takings for private economic development and instead focuses on the compensation element of the takings clause.[130] Rather than implementing an outright ban on economically-motivated takings or takings which primarily benefit private parties, the New York Senate proposes an increase on the required compensation given for such takings.[131] Specifically, the statute requires the owner of a home to be compensated with 150% of the fair market value of the property, and in the cases where the owner is temporarily displaced, he would get 150% of the rental value of the property.[132]

While this novel concept could have the effect of discouraging economically motivated takings, in most economic development cases, the private party that benefits is generally one that is in a superior economic position. If it is more expensive to take a piece of land for economic development purposes, it may discourage some private parties from initiating condemnation proceedings, but it overall will not have a drastic impact on the takings cases it was designed to impact. The only real benefit of this statutory scheme appears to be that the displaced condemnees will derive a much greater profit than they would if they were to sell their land on the open market.

While the United States Supreme Court's role in preventing takings that are remotely related to public uses has been significantly limited, it remains to be seen whether many of the states, particularly Pennsylvania, will follow suit. Currently, Pennsylvania once again has two opportunities to assert a role in preventing such takings: one is in the pending case in Philadelphia, and the other would be an opportunity to introduce legislation aimed at preventing such takings.[133] It is unlikely that a court would uphold a taking where the public use is so remote (even more remotely related to public uses than the situation in *Kelo*), such as the case in Philadelphia where the condemnation is focused on transferring private property to create an extended driveway to benefit a private corporation. The best approach to prevent any

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130. S. B. 5946, 228th Leg. Sess. (N.Y. 2005).

131. *Id.*

132. *Id.*

133. *See supra* note 115.

ambiguity in the Commonwealth would be to adopt a precisely-worded prohibition on economically motivated takings, but leaving several options to allow for necessary takings that would be prohibited by an outright ban.[134]

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134. At the time the final edits were completed to this comment, legislation was formally signed into effect by Governor Rendell on May 4, 2006 that allows taking of private property for private development only if the land was found to be blighted. *See e.g.* S.B. 881, 189th Gen. Assem. Reg. Sess. (Pa. 2005); 26 PA. CONS. STAT. §204 (this section, titled "eminent domain for private businesses prohibited," greatly limits the exercise of the eminent domain to take private property in order to use it for a private enterprise). *See also Rendell Signs Bills Limiting Use of Eminent Domain*, PHILA. INQUIRER, May 5, 2006, *available at* 2006 WLNR 7691570. Apparently, the solution recently signed into law would take care of most of the concerns generated by *Kelo*; however, it remains to be seen if this solution is too restrictive.