Tools Found in the Takings Clause: Eminent Domain in a Post-*Kelo* America

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¹ Belinda Cheek, e-mail message to author, May 2, 2015.
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ABSTRACT

In 2005, the Supreme Court of the United States made a monumental decision in Kelo v. New London (2005). The Court affirmed that interpreting economic development as being under the Public Use Clause within the Takings Clause of the Fifth Amendment was Constitutional. The Court upheld the notion that private property could be transferred to another private entity by the government. The backlash from this ruling was a tide of state legislature concerning eminent domain. However, this new state legislature seems to have opened up the door to use the Fifth Amendment to address this blight. There is no standard by which a community, neighborhood, or home can be labeled as “blighted”; and, thus, no standard by which to justify government intervention. In fact, the effect of these laws has resulted in the discrimination of the economically poor. Furthermore, with the existence of a relationship between lower income neighborhoods and minority communities, the net effect of these new domain standards is discrimination to the least of these. This article seeks to explore ways by which the Fifth Amendment, as defined by Kelo v. New London can be used as a tool to combat urban blight. Through the exploration of case briefs, legal articles, and literature addressing property and eminent domain, I find that government’s present involvement in addressing urban blight has turned unethical. I argue that there is no way up from the rut of vague definitions and loose policies that states have found themselves in. Eminent domain is a powerful tool, but it cannot remain in the box used to combat urban blight without reform. A new definition of blight must be drafted for this to happen. This definition, paired with the Fifth Amendment, will allow urban blight to be addressed in a legal, nondiscriminatory, ethical, and effective way.
Every year, it seems like there is a monumental case before the Supreme Court of the United States. Considering the nature of the Supreme Court, this is not shocking. Arguable, each case that appears before the Supreme Court has the potential to alter the fabric of the Constitutional. This is reliant on the Court’s decision. In 2005, the Supreme Court of the United States made one such decision. The Court’s ruling in Kelo v. New London (2005)\textsuperscript{2} affirmed that economic development as under the Public Use Clause within the Takings Clause of the Fifth Amendment was Constitutional. Recognizing the significance of this ruling, states implemented legal framework to address the vague terms reinforced through the Court’s ruling. While this attempt at resolving a clear problem in the system, the new legislation passed by states resulted in even more problems. Many states interpreted the standard of “public use” to mean use in the name of the neighborhood. Terms like “blighted” and “decaying” were now the hot words within the system that would justify land seizure. While it is true that “blighted” is slightly less vague then “public use”, the problem of no clear definition remains in the system. Furthermore, these new standards have resulted in practices that further discrimination and segregation. They have become tools for any corrupt official at a local level of government to use at their disposal. However, in most cases, attempts to prevent and address urban decay unintentionally end up hurting the least of these—because of these vague definitions. This thesis seeks to explore the ways by which the Fifth Amendment, as defined by Kelo v. New London, can be used as a tool to combat urban blight.

\textsuperscript{2} 545 U.S. 469 (2005).
In Part I, the background of this issue is explored. To understand the governments taking of property, a clear understanding of property itself must be outlined. The ethics and justification of eminent domain must also be looked into. Building up from there, it is vital to explore the precedence that led up to the ruling in Kelo v. New London. In Part II, the states’ responses to the Court’s ruling is examined, with special focus upon effects that these new laws have on minorities and lower-income individuals. Finally, Part III addresses whether eminent domain is an effective tool to fight urban blight.
I. BACKGROUND

"The true foundation of republican government is the equal right of every citizen in his person and property and in their management."

–Thomas Jefferson to Samuel Kercheval, 1816.

To explore the significance of how the 5th amendment is being used, a discussion on property is warranted. The question regarding what property is and how government controls and protects property is not a new one. Many philosophers, both classic and modern, have explored this concept. These philosophers put an emphasis on the importance of property in terms of government. Western philosophy attributes the core reason for the formation of government to the desire for protection. This protection pertains to the individual and that individual’s possessions. Thus, arguments are made for property being the philosophical basis of society. If there was no property and ownership of property, there would be nothing to protect. This Western foundation and belief system regarding property surmises the ethics behind government and government’s seizure of property. By analyzing the philosophical foundation and its application in the current American judicial system, the background necessary to analyze Kelo v. New London can be realized.
The significance of property is not lost to the citizens of the United States. The Declaration of Independence proclaims that there exists "inalienable rights...Life, Liberty, and the Pursuit of Happiness". Things like Life, Liberty, and the Pursuit of Happiness can be seen as rights. As philosopher John Rawls states, "Human rights, as thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition." These rights are something we own. They, themselves, can be considered part of our property.

Property can be seen as falling into two categories: personal and private. While each individual is entitled to personal property, private property is not the same. Personal property refers to one’s rights as a person. Things such as freedom of speech, having autonomy over one’s body, and freedom to things such as religion, are built upon and make up an individual’s personal property. Private property speaks to the typical assumption of what property is. This is a person’s individual belongings. In the formation of the American Constitution, government had an obligation to protect both.

Again, using Rawls as the voice of Western philosophy, people have no natural right to private property. However, certain societies will create a structure where property is placed into the hands of the individuals. This is done to “prevent this destruction”. Individuals own and maintain property, specifically land, for the purpose of preserving cultural and environmental integrity. Certain societies will create a structure where property is placed into the hands of the individual. This is seen specifically in “property-owning democracies”. Rawls explains that “in a

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property-owning democracy the aim is to carry out the idea of society as a fair system of cooperation over time between citizens as free and equal persons."6 This idea of government encouraging citizens to engage in property owning as an act of freedom is certainly true of the United States.

Western philosophy maintains that the right to personal property is a universal human right. While there are some Western philosophies, such as Marxism, that do not adhere to this premise, the United States can be seen as disregarding these theories. John Locke in his Second Treatise explains that we entered into government to protect this property saying, “The reason why men enter into society is the preservation of their property.”7 The Founding Fathers laid a foundation based on human rights and the protection of them, property included. James Madison stated, “Government is instituted to protect property of every sort...This being the end of government that alone is a just government, which impartially secures to every man, whatever is his own.”8 Thus, the importance of this issue cannot be lost in philosophical thought. Rather, it can be emphasized and understood.

The fact that in the United States an individual can own property—both personal and private— is foundational to the country as a whole. The opportunity to have property is one of the reasons that the Pilgrims traveled to the Americas in the first place. Property has remained a constant in the American dream. One could argue that the government was and is born out of this dream. The United States government and property usually coincide. Government was instituted to protect people’s rights to property. Yet, government and the individual’s rights to property do

not always coincide. Sometimes, the institution that was placed to protect the rights of individuals--government--because an entity that violates those rights it was created to protect. In the United States this can be seen through eminent domain and its abuse. This abuse goes against the very foundation that the United States of America was built upon. In the words of James Madison, “If the United States means to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.”9 It was with this mentality that James Madison presented the Bill of Rights, including the 5th Amendment, to the first Congress on June 8, 1789.

ETHICS OF EMINENT DOMAIN: UTILTIY V. INDIVIDUALISM

With an emphasis placed on the ownership of property, the ethicality of the government taking this property is called into question. It would seem as though this would be a clear violation of the ethical standards that the United States was built on. However, this is not the case. The justification for the practice of eminent domain use are summed up in words of prosperity and public benefit. At the very core of all these arguments is the idea of utility versus individualism. Should someone be able to maintain their property in the face of a decaying urban area? Furthermore, should said person be allowed to prevent the development of his or hers surroundings? The battle between utility and individualism is one that plays out quite clearly in the use of eminent domain by governments.

9 Ibid, 269.
For the United States, the desire to maintain one's property resulted in the birth of government. While government has obviously stepped up and done more—some would say out of the bounds of what is proper—the most significant goal is to protect its people. People have a right to property, and that government has a duty to protect the people's rights. However, government has a duty to protect the rights of all not, just one single individual. This is where eminent domain comes into play. The importance of this cannot be lost. Although many might cringe at the thought of the United States government taking land for its citizens, individuals in society enjoy eminent domain every day. Highways, railroads, and specific shopping centers are all examples of eminent domain use. It is vital that one recognize eminent domain is a significant part of the government and that the relationship between property, person, and government is not always so clear cut. This is due to the different ethical standards; specifically, individualism versus utilitarianism.

Individualism obviously values the individual. A person’s individual rights should be the main thing up held. Additionally, valuing this individuality leads to a person being free to do as they please so long as they do not harm other. Autonomy and respect of personhood is the core of this standard. Individualism can be seen as the founding ethical principle. Utilitarianism, on the other hand, can be cross applied to the rights of the collective. A classic utilitarian argument follows that any action is ethical if is brings about the most utility. This utility can be in the form of many different things. Pleasure, monetary gain, security—these are all things that could be a criteria for utility. Thus, the violation of one group can be justified if it is serving a greater purpose.

When the United States was first forming, the influence of John Locke could be felt in every syllable penned by the Founding Fathers. However, in recent year, a more utilitarian view
has merged. Both philosophies attempt to determine how property, government, and the public interact with each other. Both come to different conclusions. Eminent domain calls for a more utilitarian mindset. The question remains concerning how far the government can use its power for “utility” and remain ethical. This is essentially the sum of the debate regarding eminent domain use in the United States. It is clear that government should uphold individual rights. Yet, it is also clear that the government has a duty to the collective. These two obligations do not always coincide. In fact, in the case of eminent domain use, they seem to conflict.

JURISPRUDENCE OF EMINENT DOMAIN

Eminent domain can be defined as “the authority of the government to take private property for a public use as long as just compensation is paid to the owner for the taking.” 10 Eminent domain is a tool employed by the sovereign state. Eminent domain is part of the fabric of the Constitution. While the government protects the right of ownership, it must also look after the public good. Thus, the government must be empowered to take property from individuals for public good. Acquiring property for the betterment of the state or nation as a whole is in the government's jurisdiction. This speaks to the utilitarian ideals of government. While it is in place to protect individual rights, it still has the ultimate goal of looking out for the welfare of its citizens. This can be seen in looking at the Fifth Amendment. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

10 Schultz, David. Evicted!, (Santa Barbara: Praeger, 2010), 47.
public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.\textsuperscript{11}

The tail of this Amendment is referred to as the Takings Clause. Within the Takings Clause are the words “for public use”. Also known as the Public Use Clause. These clauses outline the right that the government has to take an individual’s property.

The issue of regulating government takings is not a new one. While \textit{Kelo v. New London} was monumental, there was nothing inherently new about it. An analysis of the cases cited as reasons for the ruling in \textit{Kelo v. New London} highlights the ways by which the Supreme Court had been interpreting the Takings Clause. The Takings Clause is just one part of history that influenced the \textit{Kelo} decision. At the heart of the decision in Kelo and its predecessors is the protection of private property from government—both state and federal. This protection is now found in the Takings Clause. However, this was not always the case. The beautiful legal system of the United States shows that there have been four legal eras of property protection. These four “eras” stem from different sources of limiting eminent domain. Ultimately, examination of the Marshall era, the \textit{Lochner} era, the Takings era, and, finally, the Public Use era highlights the four sources used to put boundaries around eminent domain.

While the 5th Amendment seemed like a clear statement of what constitutes eminent domain, this is never the case for the Constitution. However, there were no significant cases on the issue of eminent domain until 1833 when the Court ruled\textsuperscript{12} in \textit{Barron v. Baltimore}. The case involved the city of Baltimore being sued by a wharf owner. The owner stated that the city had

\textsuperscript{11} U.S. Const. amend. V.
\textsuperscript{12} 32 U.S. 243 (1833).
taken his property without just compensation and had, thus, violated the Fifth Amendment. Justice John Marshall, writing the majority opinion, held that the Fifth Amendment was applicable only to Federal government, not to states. The modern person reading this might assume that the property rights of citizens were left vulnerable to eminent domain abuses. However, this was not the case. During the Marshall era, the Federal law was limited, but this limitation was paired with the policy that state power was severely limited. In what can be considered the “Marshall Court”—this would be pre- to Civil War era—Article I, Section 10 of the Constitution was used to control the arm of the state. Section 10, which addresses the “Powers Prohibited to States”, follows:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The first clause, referred to as the Contract Clause, was interpreted to mean that states could not interfere with contracts. This clause was used as a way to protect the property rights of

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13 Schultz, David, 57.
14 U.S. Const., Article I, Section 10.
people from state powers. Cases such as *Dartmouth College v Woodward (1819)*\(^{15}\), highlighted the Court’s use of the Contract Clause. In *Dartmouth*, the Court decided that New Hampshire could not seize the property of Dartmouth College due to the fact that the school’s charter was a contract. Thus, the state could not interfere and the school was returned to the board of trustees. When Marshall was replaced by Chief Justice Roger Taney, the Contract Clause was not used as prevalently. However, it was still the foundation of property rights in terms of limiting eminent domain. It continued to be the main source of limiting a state from overstepping its boundaries.

The Marshall era continued several decades until the end of the Civil War. The adoption of the 14\(^{th}\) Amendment brought about a significant shift in property rights. Specifically, the Due Process clause found within Section I of the 14\(^{th}\) Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^{16}\)

The words, “without due process of law” was recognized as the Due Process Clause. The Supreme Court maintained that the Due Process Clause proclaimed that there were specific things the government—state or otherwise—could not interfere with. In the Supreme Court’s eyes, property was one of these things. An even greater source of protection for property was found in the Due Process Clause. Of cases decided based on the Due Process Clause, *Lochner v. New York (1905)*\(^{17}\) is one of the most notable. This case centered on the working hours of bakers, with the state seeking to limit it and bakers fighting it, the court declared that it was “an

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\(^{15}\) 4 Wheat. 518 (1819).
\(^{16}\) U.S. Const. amend. XIV, Section I.
\(^{17}\) 198 U.S. 45 (1905).
unreasonable, unnecessary and arbitrary interference”. While bakers’ rights in New York appear to be unrelated to eminent domain, Lochner manifests the extreme scrutiny presented under the Due Process Clause. This scrutiny was not limited to health rights of bakers. Rather, it impacted many sectors, with property rights being one of them. Government interference in property rights was not promoted. The use of the Due Process Clause as a defense for property rights marks the start of the Lochner era.

One thing that made the Due Process Clause so powerful and effective was the way the Court, not only interpreted it, but developed it. The Court began to incorporate the Due Process Clause with the Fifth Amendment. In 1897, the Court overruled Barron with the decision in the case Chicago, Burlington & Quincy Railroad Co. v. City of Chicago (1897). The case involved the city of Chicago making construction plans to connect two streets. In the process, the city condemned land that was owned by Chicago, Burlington, and Quincy Railroad Co, but also individuals. The individuals were given just compensation. The railroad, on the other hand, only received one dollar. The Court ruled that the Due Process Clause made it obligatory that states give just compensation when taking private property for public use. However, this was based on the Due Process found solely in the Fourteenth Amendment. Rather, this was recognized through the Due Process Clause paired with the Due Process values seen in the Fifth Amendment. The significance of this decision should not be lost. For the first time, the Bill of Rights was seen as being applicable to states. This paved the way for a wave of cases centered on the Fifth Amendment, specifically, the Takings Clause.

18 Schultz, Evicted!, 60.
19 166 U.S. 226 (1897).
While the first case decision based on the Takings Clause occurred in 1870 with *Knox v. Lee*, the influx of cases based on the Takings Clause—and, thus, the Takings era—did not occur until the early 1900s. In 1908, the Court ruled on *Hairston v. Danville and Western Railway Co (1908)*. In this decision, the Court stated that, “We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain.” This shows the fine line the Court was walking. The Court dodged the decision regarding holding states accountable and allowing states to be autonomous when it came to eminent domain.

The Court’s balancing act would not remain. 1897 brought a new wave of takings cases. In 1922, one of these cases brought the final nudge. A full shift in paradigm started with the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*. In *Mahon*, the deeds of property owners gave them only rights to the surface soil. In light of this, the Pennsylvania Coal Company, sought to mine for coal under the homes, maintaining that this underground property was a separate estate. The Court, however, did not support this decision. The Court stated that, “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” A taking would thus lead to “just compensation.”

*Mahon* created a theory called “inverse condemnation”. At the center of this theory was the idea that if police, or government, power went too far with hindering property rights, just compensation must be paid. If this was not paid, then the action of taking was invalid.

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21 208 U.S. 598 (1908).
22 260 U.S. 393 (1922).
23 U.S. Const. amend. V.
new standard led to a spike in cases. This was an outcry from people who had not received compensation at all and, also, from people who did not see their compensation as “just”. These cases were not always “taking cases”, some of them were originally condemnation cases. Nevertheless the combination of the rulings in takings cases and condemnation cases that relied on the Fifth Amendment transformed the Takings Clause. Thus, the Takings era not only involved a prevalence of the use of the Clause, but also a time of development concerning how the Clause could be used.

Though the most recent case based on the Takings Clause was *Koontz v. St. Johns River Water Management District (2013)*, the Takings era ended in the 1950s with the start of the Public Use era. The focus began to shift from the Takings Clause to the Public Use clause within the Takings clause. In *Strickley v. Highland Boy Gold Mining Co (1906)*, Justice Holmes, delivering the majority opinion stated, “In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test.” This standard of “public use” did not remain in the system for long. In 1954, the court stated in the decision of *Berman v Parker (1954)* that “It is only the taking’s purpose, and not its mechanics” that are applicable when determining public use. In a unanimous decision, the Court declared that:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive...the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide

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25 Ibid, 2.
26 568 U.S.
27 200 U.S. 527.
that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.29

This ruling opened up the debate for what could be considered public use. The Court had done away with the standards outlined in Strickley, and replaced them with much broader terms. These terms allowed for more state actions. This was seen again in Hawaii Housing Authority v Midkiff (1984)30 when the Courts decided that the Public Use Clause was realized through the intent of the plan. The Court maintained that plans would only be problematic if they were implemented “to benefit a particular class of identifiable individuals.” However, the Supreme Court did not see an exclusive individual benefiting in Midkiff. Thus, the Public Use “era” was one of undefined terms and loosely regulated intents. It was into this vague enigma that Kelo arrived at the steps of the Supreme Court.

Kelo v. New London marked the start of a new era, and the one that is present in the system today. In 2005, the Court held that the eminent domain used to seize private property, and then give it to a private entity for development, fell under the definition of “public use” in the Takings Clause. The Court “embraced” a fluid and foggy definition of the Public Use clause. They upheld the idea that Kelo was no different than Berman or Midkiff. In fact, in response to the call for a “bright-line”, or clear definition, the Court maintained that this was “supported by neither precedent nor logic.”31 However, it is important to note that this was not a unanimous decision. In her dissenting opinion on Kelo, Justice O’Connor quoted Justice Chase writing in the opinion for Calder v. Bull (1798)32 that:

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29 Ibid.
30 467 U.S. 229.
32 3 U.S. 386 (1798).
An act of 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 few instances will suffice to explain what I mean… [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.

While *Kelo* falls at the very end of the Public Use era, it represents, yet another turning point in the status of property right in the United States. *Kelo* bypassed the opportunity to enforce any strict definitions surrounding the Public Use clause. The vagueness surrounding Federal law on the issue makes Federal law almost nil. As Justice Thomas, dissenting, stated, “Tellingly, the phrase ‘public use’ contrasts with the very different phrase ‘general Welfare’ used elsewhere in the Constitution...The Framers would have used some such broader term if they had meant that the Public Use Clause to have a similarly sweeping scope.” This cloudy framework that we find ourselves in—in terms of takings, public use, and property rights—is an era of “Neo-Marshallism”. Meaning, there is a rise in state power. This power is operationally unrestricted by Federal law. Unlike the Marshall era, there is no reliance on the Contract Clause. Justice Stevens, writing the court opinion, even saw fit to proclaim that the Court’s “earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”

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34 *Kelo v. New London*.

35 Ibid.
II. CURRENT STATE OF EMINENT DOMAIN

“To try to achieve a decent environment without social justice is comparable to efforts to build the city beautiful by concentrating on the boulevards and ignoring the indecencies of life that exist in the densely packed slums behind the facade.”

—Robert C. Weaver, first U.S. Secretary of Housing and Urban Development

Eminent domain in itself is a just practice. There are proper methods to go about eminent domain. Furthermore, there are clear instances when eminent domain is uncontestable. Unfortunately, while just use of eminent domain is within the status quo, or the current state, the system is one wrought with problems. While these problems might have existed before, the ruling in *Kelo* highlighted, rather than resolved, the flaws in the system. This occurred through a chain of reactions to *Kelo*. States attempted to use the new leeway found in the Public Use Clause to address a looming threat—urban blight. The mixture of urban blight, takings clauses, and vague language have resulted in a knot of problems.
THE TAKINGS PROCESS

It is not lost to the author, that eminent domain has been painted as a terrible practice of government. Images of bulldozers and wrecking balls transforming homes into heaps of rubble has probable filled the readers mind. This is possibly a tool of emotional manipulation; possibly a tool used to build significance; possibly both. This picture is not a proper illustration of the proper eminent domain process. While eminent domain is part of Federal Law, it is practiced on a state level. Thus, each state has different requirements for eminent domain. Though these state laws may vary, eminent domain has certain requirements when it comes to the procedure that are consistent across the board. All eminent domain procedures follow roughly the same outline. The eminent domain process is one of notice and response. It is not a chaotic, singular event, when following proper procedures.

In order for the government to seize property, it must be condemned the land. Citizens receive notice that their property has been condemned. This condemnation does not always fall under the category of “blighted”, or “decaying”. Sometimes, the condemnation is for the building of highways or parks. In all cases, the owner is notified of the plan that requires their property. After this, the property is appraised. This is done in order to grant the owner “just compensation” upon seizure. To this the owner can respond by accepting or rejecting the governments offer. An acceptance results in the party waiving their right to sue. A rejection would result in the government taking matters to court. A rejection can stem from larger issues, such as not agreeing with one’s home being condemned, or smaller issues, such as the compensation sum

being inaccurately small. In some cases, disputes regarding the use of eminent domain are handled by an ombudsman. However, this is not the case across the board, or even the norm. These steps constitute the necessary procedure for eminent domain use.

**UNDISPUTED USES OF EMINENT DOMAIN**

With an ethical background story and an understanding of the current state of eminent domain and its process, depending on where you fall in the philosophical spectrum, it would be easy to condone eminent domain as a whole. It would be tempting to see it as a tool that the government wields to rob citizens of their rights. This thinking, however tempting it may well be, would be a mistake. Eminent domain is not without its uses. Furthermore, there are many good instances when eminent domain is used for the clear public good. There are many examples and cases that eminent domain justifies that many of us would never contest. The example of highways has been repeatedly brought up for good reason. Highways demonstrate a clear public use. Parks, are also clearly public.

The issue that arose with *Kelo* was the definition of public use being applied to private property. Public land, by definition, is for public use. Private land is an area of great debate. With most saying that it obviously for private use and benefit. *Kelo* fought against this natural inclination by declaring the process of handing property from one private entity to another Constitutional under the Public Use Clause. States recognized this problem. Thus, many states defined “public use” in their own terms. They strove to find something that would clearly be

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towards public benefit. The majority of states settled on a definition that encompassed steps towards urban renewal. States across the Union recognized the threat of urban decay. They saw eminent domain as being a tool that could fight this. This mentality resulted in state legislature stressing the use of eminent domain for to fight urban blight. Unlike highways and parks, however, fighting of urban blight was, and is, disputably for public use.

AN ANALYSIS BLIGHT

The word ‘blight’ stems from a horticulture reference. It was first used to refer to a small, microscopic insect that harmed plants. Brown, dead spots would appear on the leaves of plants. From there, the spots would spread, and, in the end, the plant would die. These plants were considered blighted. The term “blighted” has moved from the world of botanists, to that of urban planners and local politicians. It is now used to describe specific areas of cities where there is prevalence of crime, poverty, and disease. The premise of blight is more than just a rundown building. It is an area of decay that, if not addressed, will spread. Technically, blight can occur in any city or town. Rural, suburban, urban—any part of a state can suffer from blight. However, urban blight is the type that is addressed in the responses of states to Kelo. Regardless of whether this is from a prevalence of urban decay in comparison to that of rural, it is necessary to focus on urban blight in the framework of Kelo.

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39 Ibid.
The implications of Kelo were not lost to many states. In her dissenting opinion, Justice O’Connor writes “Today the court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private power, so long as it might be upgraded”. Many states recognize the O’Connor’s points. Seeing the impact of a virtually undefined Public Use clause, states implemented legislature to deal with these issues. The passing of Kelo was like an unofficial call for state action. Looking at the state reactions from Kelo, three such reactions can be identified: legislature that defines public use in terms of urban development, legislature that prevents party “B” from receiving land, and, finally, no legislature at all. The background for these laws was, many times, arbitrary. States did not have a pattern in terms of passing laws concerning property rights. Furthermore, if they did, there was no link to the states response to Kelo.40

States like Alabama changed state law so that eminent domain could only be used for urban renewal and development. Other states, such as Arizona, completely outlawed the use of eminent domain where the property would go to a private party or developer. However this legislation still failed to address the issue the idea that we still do not know what public use is. This lack of federal definition cannot be solved at the state level. States chose to use the language of “urban blight” to define what constitutes “public use”. Unfortunately, the term “blighted” is vague in itself. While things like a fall in economy and a rise in crime seem like viable

definitions of blight, a closer examination highlights that these terms are also subjective. Furthermore, it lends itself to corruption. With the definition of public use surrounding the “use of taking”, or the plan for development, state and local governments can misconstrue the clause and use it for their own benefit. Often, these redevelopment plans have negative impacts on minorities. It can also be seen as having harmful impacts on the poor. Because many states changed their state legislature to use eminent domain only in the case of urban blight, the use of eminent domain has been a type of systemic tool for discrimination against the very people states seek to protect. There is no official definition of blight, legal or otherwise. Because of this, the assignment of an area being as such is arbitrary. Thus, the concept of a “blighted” area has been arbitrarily left to states and, even, local governments. Ultimately, we are left with a loose definition of Public Use that led to legislature limiting it to the boundaries. Yet, it is often unclear what blight is, and even more certain what Public Use is.

A Problem of Discrimination

The result of discrimination against minorities is a result of America’s past. This type of systemic discrimination is emphasized through the emphasis on blight. The occurrence of urban decay and blight does not stem from a singular source. Often, the cause of this decay involves city specific factors. Racist institutions, such as slavery have led to the demographics of cities today. With the emancipation of the slaves in 1862, and the Great Migration, thousands of citizens entered the housing market. However, many people did not want to sell property to

41 Sharp, Elaine B. and Donald Haider-Markel, "At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision".
former slaves, and many of those that did charged higher prices. The property available to African-American citizens at that time was limited to a specific area of that city. As time went on, African-American landownership was limited to specific geographical areas. When the cities experienced growth, the property values of homes in these areas were significantly behind other, similar, white neighborhoods. Thus, property owned by former slaves and migrating African-Americans was placed at a lower value and limited to certain areas. Initially, black neighborhoods were also ignored when it came to public services. Things such as medical services and clean water were not offered. The result was an increase in disease and poverty among black communities. Seeing black communities with a prevalence of disease gave the white majority even more of an incentive to segregate their neighborhoods and to discriminate against African-Americans. This was done regardless of the fact that neglect from white communities was a primary cause of the situation. Ultimately, this resulted in specific areas having lower socioeconomic statuses and a lack of resources. With the direct correlation between socioeconomic status and crime, it should be no wonder that these areas became overrun with violence.

Unfortunately, in many cities, such as Chicago, this trend in housing has not been broken and has continued for decades. The discrimination spurred by this has resulted in a completely separate source of blight. This is structural discrimination. Many cities have passed laws that, while not blatantly racist, have promoted the segregation of a certain group from social benefits. These benefits, such as healthcare and affordable housing, resulted in specific areas not being able to progress. This lack of progress, in turn, led to that section of the city’s decay. It has also

extended to other races. These areas of lesser value and access to resources have become hot spots for minorities. Thus, those areas of cities that are now inhabited by many different minority races, are prone to be blighted through their heritage.

They are also more susceptible to be labeled as blighted. Two neighborhoods, one minority and one white, could be in the same state of decay. Yet, the white neighborhood would be seen as being capable of lifting itself out of decay. The minority neighborhood, on the other hand, would be placed under the label of blight. From there, eminent domain use could proceed.

*A Problem of Segregation*

This is not solely a race issue. The lowest socioeconomic class is being affected by urban renewal that employs eminent domain. Many areas during the industrial revolution experienced population growth. When industry moved into a city, so did people. These people came in search of jobs and opportunity. Many brought their families with them. Unfortunately, industry is not full proof. When industries in these cities failed, or even succeeded, they brought the whole town with them. These cities had built themselves upon this industry. In turn, they were not able to sustain themselves when the industry fell. Cities still contained the families and the population that a thriving industry brought. However, without a thriving industry to maintain them, these cities began to deteriorate. While this deterioration was sometimes contained to a certain part of the city that had relied on the industry, many times, the city as a whole would decay. Thus, whole cities have experienced blight.

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44 Bruegmann, *Sprawl*, 129.
The label of being a blighted area is meant to spark social intervention—specifically from government. Blighted areas of a city reflect poorly on a city. Not only are they hard on the eyes, but they also lower the property value of surrounding neighborhoods.\textsuperscript{46} They financially harm the city as a whole. They can also be perceived as areas where the local government is failing the townspeople on a social and economic level. Because of this, many cities have implemented local policies to solve for blight. Currently, local government is trying to solve urban blight and decay. These tactics taken by smaller, local governments, and the urban planners of larger cities, have seen some success. However, this success has not abolished the issue of blight. In fact, in general, despite some cases of success, it has been ineffective. In many cases, it has led to gentrification. Using things such as forced integration that fail to achieve its goals.\textsuperscript{47} Eminent domain has been ineffective in dealing with blight, it has brought about negative effects. Specifically, urban planning policies have resulted in practices that are inherently discriminatory.

The definitions, if any, of blight are not consistent across the board. Not only is it not consistent, but it is also unstable. Furthermore, the arbitrary nature is the foundation of the systemic racism and segregation that is seen in other urban planning policies. White neighborhoods experiencing low standards of living conditions are thought of as having the capabilities and the drive to restore their neighborhoods. Because of this, they are not labeled as blighted. However, neighborhoods populated by minorities are not treated the same. Minority neighborhoods are seen as blighted, and are labeled as such.\textsuperscript{48} This treatment is in contrast to their white counterparts. Likewise, the treatment of the wealthy in contrast to those of a much

\textsuperscript{46} Hartman, Chester and Gregory Squires, \textit{The Integration Debate: Competing Futures for American Cities}, (New York: Routledge, 2009).
\textsuperscript{47} Ibid.
\textsuperscript{48} Prakash, “Racial Dimensions of Property Value Protection under the Fair Housing Act”. 
lower income status is extremely problematic. Because these areas are labeled as “blighted”, the government then has the rights to try to remedy this. Often, this is done through the previously cited methods. The majority of these methods have been unsuccessful and, furthermore, damaging.
III. IMPLICATIONS AND APPLICATION

“A sum can be put right: but only by going back till you find the error and working it afresh from that point, never by simply going on.”

—C.S. Lewis, The Great Divorce.

A case can be made for the government’s involvement in community building. Surely, government can be said to be one of the only forces that has the resources and influence to actually address something as vast as urban decay. While this may be true on a federal scale, the findings of this research seek to challenge this notion. The increased involvement of government—local and otherwise—in addressing the issue of urban blight has led to more problems than neighborhoods restored. Attempts to mold government into a tool to fend of the looming threat of blight has resulted in a legislative system of blight response that violates both standards of ethics that such laws were built upon. The sacred lines between public and private use have been blurred. This crossing of foundational boundaries has not resulted in a thriving metropolitan, but rather, a landscape wrought with decaying building occupied by similar faces. However, this reality need not be accepted. Changes to the definition of blight will allow for the Takings Clause to, once again, be associated with public good and benefit.
QUESTIONING EMINENT DOMAIN USE

Looking at the state reactions from *Kelo*, three reactions can be identified: legislature that defines public use in terms of urban development, legislature that prevents party “B” from receiving land, and, finally, no legislature at all. Each of these reactions led to a different method for solving urban blight. Obviously, the states that have used the Public Use Clause as a means to fight blight have run into the systemically discriminatory practices afore mentioned. On the other hand, the states that have outlawed private parties from benefiting from eminent domain have opened up the doors for the public to fight urban decay communally. Lastly, the states that have not passed any legislature are like sitting ducks, waiting for a takings case to come to their Supreme Court. The current situation leaves states in a place where the impacts of their legislature may never be resolved.49 However, Courts can seek to turn things around. *Kelo* has given states immense power. Currently, states have been wary of this and have implemented laws that have backfired.50 The existence of these laws are not necessarily a bad thing. The problem lies in the fact that current eminent domain standards cannot be relied upon as a way to address urban blight. In this case, domain standards must be reformed, or government must back out of the process of urban renewal.

A NEW DEFINITION OF BLIGHT

It would be tempting to throw out the use of eminent domain in addressing blight altogether. It is clear that it is not working. In fact, it is projecting a system based on systemic discrimination. The result, a reality that is not better at best and even more in need at worst. Ethical standards that focus on individualism will highlight the fact that specific individuals are being caused harm by these procedures. Utilitarian ethics will point to the fact that it is leading to gentrification, discrimination, and a type of growth that tends to be unsustainable. The illusion of an escape from poverty is perhaps more detrimental than poverty itself; for poverty can be fought, but an illusion is accepted as reality. The inclination to do away with the use of eminent domain in this instance would be—for a lack of original analogies—to throw the baby out with the bath water.

Though, the majority of this thesis has focused on the faults found within the eminent domain process in addressing urban decay in the United States, the attempt to reclaim domain as tool should not be halted. Eminent domain offers a unique opportunity for the government to step in and address one of urban America’s biggest issues. This uniqueness is not being optimized because of the vague language surrounding the definition of “urban blight”. If the source of the problem is vague terms, then vague terms must be addressed. Problems with something does not warrant the complete neglect of said thing. By creating a new, solid definition of “urban blight”, eminent domain can live up to its potential of working for the good of the community by fighting urban decay.

51 Hartman, Chester and Gregory Squires, The Integration Debate: Competing Futures for American Cities.
Problems with the current definition of “urban blight” revolve around several things. First, there is no definition at a Federal level. Thus, there is no standard nationwide. Each state is open to define the term. While some states have done this, the majority have left it open to local government. This must be resolved. An indisputable, Federal standard for blight must be implemented. Leaving this standard open to local and state governments has left a loophole-turned-mechanism on the shelf for malicious state and local government officials. Setting a Federal standard was met with apprehension because of state’s rights. Yet, the rights of individuals should surely be upheld above that of even states.

Second, the issue of discrimination and segregation must be addressed. While this might seem like a big problem to tackle, in an undergraduate thesis no less, by creating stipulations or standard on what specifies blighted area. The current definition is failing to protect all citizens. Homeowners that are racial minorities or lower income are currently vulnerable to the system. In order to protect them, a new policy must be implemented. It is not necessarily about protecting specific races or individuals of specific economic classes. It is about equality. Each individual should be held to the same standard and hold the same type of protection when it comes to eminent domain use in the fight against blight. This can be done by redefining blight in a way that protects all people. Specifically, by requiring that a building must be abandoned in order for it to be condemned. This assumes that each individual who is capable of owning a property is also capable of lifting out of blight. It does not discriminate because the absence of an individual is foundational. One could argue that this paints a better picture of blight. It starts with a few abandoned homes, and then spreads to building upon building. This would protect groups. For the individual, another protection can be found by creating a definition that states it must be a blighted area. Essentially, a blighted area is just that, an area. It is not one or two rundown
homes. It is a block or strip of city that represents a type of decay that could be contagious to the city as a whole. A new definition of urban blight can be seen as:

*A compact and contiguous area in which property, in the form of homes, establishments, and land, are abandoned in way that is harmful to the development and sustainability of the city.*

This definition allows for states and local governments to use eminent domain in a way that fights against blight, but does not infringe upon the rights of individuals. Property that has been abandoned, by individuals or entities, such as banks, can now be used for the public good. The renewal of something that has been ignored and disregarded by their owner is not something for the inhabitants of cities to find issue with. Surely, transforming these destitute lots will be for the public benefit and can be considered a public use.
IV. CONCLUSION

A year after *Kelo v. New London*, President George W. Bush attempted to add qualifiers to the Takings Clause through Executive Order 13406. This was not met with success. However, this does not mean that there is no hope for the use of eminent domain in the process of urban renewal. By exploring the background, status quote, and implications for the future, hope for this process should be realized. A broken system cannot always be fixed. Thankfully, this is not the case with the use of eminent domain in combating urban blight. With a new, focused definition of “blight”, the Fifth Amendment can break free from the post-*Kelo* sea of ambiguity, and move forward to the forefront of urban renewal.

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BIBLIOGRAPHY


