Examining the Public Use Doctrine and Whether Expanding a Private University is a Public Use

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Examining the Public Use Doctrine and Whether Expanding a Private University is a Public Use

I. INTRODUCTION

No court has ever stated whether expanding a private university is a public use pursuant to the Takings Clause. Recently, however, a New York court indicated a reluctance to label a private university as a public use by holding that unless the legislature specifically gives eminent domain power to the private university, expanding a private university is not a valid public use under state law.

In *Kaur v. New York State Urban Development Corp.*,¹ Columbia University, in conjunction with the New York City Economic Development Corporation, tried to acquire “17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University.”² The court reasoned that because Columbia University did not possess eminent domain power, the university was not a public use and, thus, the taking violated the New York Constitution.³ The court also relied on *Kelo v. City of New London*⁴ and held that the taking violated the U.S. Constitution because the taking improperly favored Columbia University.⁵

Although the court’s reluctance to label the expansion of a private university as a public use is flawed, *Kaur* illustrates how *Kelo* can actually restrain the government’s eminent domain power⁶ despite the

² Id. at 11.
³ Id. at 25 (reasoning that if the court were to grant Columbia University “civic purpose status,” the court would be “doing that which the Legislature has explicitly failed to do”).
⁴ 545 U.S. 469 (2005); see infra Part II.A.3.
⁵ *Kaur*, 892 N.Y.S.2d at 18. (“[T]he issue of improper motive in transfers to private parties with only discrete secondary benefits to the public . . . is precisely the issue presented by [this] case.”).
⁶ Although New York’s high court reversed *Kaur* in *Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235 (N.Y. 2010), *Kaur* still stands as an example of how other state and federal courts may use *Kelo* to limit the government’s eminent domain power. The New York Court of Appeals reversed the intermediate court’s ruling based on New York law, *id. passim*, and subsequently did not mention *Kelo* or the language in *Kelo* concerning the importance of a carefully considered development plan. See infra notes 59–69 and accompanying text. The New York Court of Appeals held that, in New York, determining blight or public use are absolutely the province of the legislature, not the judiciary. *Id.* at 253. Thus, it was improper for the intermediate court to perform a de novo review of the record, conclude that there was possible bad faith in Columbia University’s favor, and conclude that the blight studies were not
popular belief that Kelo eviscerates the public use requirement. The court misinterpreted case law that, when analyzed more thoroughly, shows that possessing eminent domain power is not determinative in labeling the private university as a public use. A more logical ruling would have been education is a public use, and that if the legislature has shown that private universities are part of this public use, then it is acceptable to use eminent domain to expand a private university.

This article emphasizes that expanding a private university can be a public use, while also highlighting Kaur’s example of how Kelo can restrain the government’s eminent domain power. This article also presents two options for improving current eminent domain law. Part II discusses eminent domain law and Kelo. Part III describes the facts and holdings in Kaur. Part IV shows the method of analysis established by case law. Part IV also references the Appendix, which provides examples of state laws that are relevant to determining if a private university is a public use. Part V discusses Kaur’s example of how Kelo can restrain eminent domain and provides a couple options for improving current eminent domain law.

II. UNDERSTANDING EMINENT DOMAIN

Eminent domain is “[t]he right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state.” “American governmental entities at all levels possess some form of eminent domain power—the power to take private property interests.”

7. In Kelo, the majority opinion gave the “legislatures broad latitude in determining what public needs justify the use of the takings power,” 545 U.S. at 483, despite the dissenting justice’s fear that this broad deference standard would remove virtually all restraint on using eminent domain. Id. at 494–98 (O’Connor, J., dissenting). See Marci A. Hamilton, Political Responses to Supreme Court Decisions, 32 HARV. J.L. & PUB. POL’Y 113, 119–21 (2009); see infra note 156 and accompanying text.

8. Pollard v. Hagan, 44 U.S. 212, 223 (1845). A taking occurs when a government action substantially deprives an owner of the use and enjoyment of their property. See Loretto v. Telepromter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that permanent physical occupation is a per se taking); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–28 (1978) (showing that a taking may occur when there is a total deprivation in property value); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922) (stating that if the government regulation goes too far, it is a taking).

A. Interpreting the Public Use Requirement

The Fifth Amendment states, “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” However, the meaning of “public use” has been debated throughout history: courts have wavered between defining public use broadly to mean anything that is a “public advantage, public utility, or public purpose,” to defining it narrowly to mean “used by the public.” Currently, however, three Supreme Court cases, Berman v. Parker, Hawaii Housing Authority v. Midkiff, and Kelo v. City of New London, interpret public use broadly.

I. Berman v. Parker

In Berman, property owners challenged the constitutionality of the District of Columbia Redevelopment Act of 1945. At the time, the District of Columbia Redevelopment Act stated that

substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.

Pursuant to the District of Columbia Redevelopment Act, the local planning commission prepared a comprehensive plan involving an area in Southwest Washington D.C. called Project Area B. This plan allocated Project Area B for various purposes including low-income dwelling units.

12. Id. at 199 (internal quotation marks omitted).
17. Id. at 28 (citing District of Columbia Redevelopment Act, 60 Stat. 790 (1951) (codified as amended at D.C. Code § 6-101.01(a) (1981)) (internal quotation marks omitted).
18. Id. at 30-31.
19. Id. Following the plan’s approval, the commission certified the plan to the District of Columbia Redevelopment Land Agency for execution. Id. at 29-31. The District of Columbia Redevelopment Act created the District of Columbia Redevelopment Land Agency. Id. at 29.
Property owners who owned a department store located in Project Area B "object[ed] to the appropriation of [their] property for the purposes of the project" for two principal reasons. First, the department store was not a slum, and, thus, it was unconstitutional to take the property "merely to develop a better balanced, more attractive community." Second, the property "will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use."

The Supreme Court unanimously ruled against the property owners and held that Congress had the power to determine what constitutes a public use. The Court reasoned that this power stems from the police power and that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." Therefore, "[i]t 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."

This principle holds true even when the legislature decides to use its eminent domain power: "If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." In other words, "eminent domain is merely the means to the end" and it is solely up to Congress to determine the means, whether public or private, it will use to execute its project "once the public purpose has been established."

Accordingly, Congress not only has the power to use private enterprise to execute the public use, but Congress also has the authority to authorize these private entities to "attack the problem of the blighted parts of the community on an area rather than on a

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The agency has the power to "acquire and assemble, by eminent domain and otherwise, real property for 'the redevelopment of blighted territory . . . and the prevention, reduction, or elimination of blighting factors or causes of blight.'" Id.

20. Id. at 31.
21. Id.
22. Id.
23. Id. at 32–33, 36.
24. Id. at 32. The Court also stated, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Id.
25. Id. at 33.
26. Id. at 32.
27. Id. at 33.
28. Id.; see Thomas, supra note 10, at 61 ("Berman]sent a strong signal that the Court would recognize almost no restrictions on the concept of public use, effectively eviscerating the phrase as a constitutional restraint on government power over private property.").
structure-by-structure basis." The legislature, or an authorized private entity, may take private property that is itself "innocuous and unoffending" if it is "important to redesign the whole area . . . to eliminate the conditions that cause slums."

2. Hawaii Housing Authority v. Midkiff

In the 1960s, the Hawaii legislature decided that it was problematic that seventy-two private landowners in Hawaii owned forty-seven percent of the land in the state. To redress this problem, the legislature enacted the Land Reform Act of 1967, which allowed the Hawaii Housing Authority to condemn and acquire property from the landowners and then sell the property in fee simple to the property's current tenants.

In 1978, after the Hawaii Housing Authority held a public hearing and decided that taking certain property effectuated the Land Reform Act's public purpose, the landowners refused to comply with the order to sell their land. The landowners filed suit, asking the court to declare the Land Reform Act of 1967 unconstitutional.

The Court unanimously ruled against the landowners. The Court relied heavily on Berman and stated, "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." Thus, absent unreasonableness, impossibility, or irrationality, the

29. Berman, 348 U.S. at 34.
30. Id. at 35.
31. Id. at 34. The Court specifically mentioned the following slum-causing conditions: "the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, [and] the presence of outmoded street patterns." Id.
32. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 232 (1984). The Midkiff Court explained that this problem arose, in part, because Hawaii's early settlers developed a feudal land system where chiefs and certain subchiefs governed the land, but the island's high chief controlled and essentially owned all the land. Id.
33. Id. at 233–34.
34. Id. at 234. The Court stated that the Land Reform Act attempted to "reduce the perceived social and economic evils of a land oligopoly" because such an oligopoly "created artificial deterrents to the normal functioning of the . . . land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." Id. at 241–242.
35. Id. at 234–35.
36. Id.
37. Id. at 231–32.
38. Id. at 240.
39. Id. at 241 (citing United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 680 (1896)).
40. Id. at 240 (citing Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).
41. Id. at 241 (upholding the taking, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose").
Court “will not substitute its judgment for a legislature’s judgment as to what constitutes a public use,” regardless of whether the Court thinks the legislative act will actually accomplish its objective.

The Court did note that courts play a role “in reviewing a legislature’s judgment of what constitutes a public use,” but stated that this role is “extremely narrow.” And in cases such as this one, where there is no purely private taking—a taking to benefit a particular class of identifiable individuals—the court will have no trouble concluding that the taking is constitutional.

The Court also clarified its stance on whether taking property for public use requires use by the general public: “It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.” The Court will only scrutinize the taking’s purpose, not the means to effectuate that purpose under the Takings Clause.


In 1990, a Connecticut state agency labeled New London, Connecticut a “distressed municipality.” By 1998, a naval center located in New London had closed, the city’s unemployment rate was nearly double the state’s unemployment rate, and its population was at a seventy-eight year low.

“These conditions prompted state and local officials to target New London . . . for economic revitalization.” In January 2000, New London approved a development plan to create new jobs, increase tax revenue, revitalize the city, create recreational areas, and capitalize on Pfizer, Inc.’s proposal to build a new facility in the city. The plan focused on ninety acres “situated on a peninsula...
that juts into the Thames River" and proposed using eminent domain to acquire the required property from owners that were unwilling to sell their property.\(^{54}\)

In December 2000, after the New London Development Corporation\(^{55}\) initiated condemnation proceedings in accordance with the city’s plan, several landowners who owned property in the area filed suit.\(^{56}\) The landowners claimed that “taking . . . their properties . . . violate[d] the public use restriction in the Fifth Amendment.”\(^{57}\) They argued that taking their property for the sole purpose of economic development expanded the definition of public use to the point that the public use requirement became meaningless.\(^{58}\)

The Court ruled against the landowners.\(^{59}\) Justice Stevens wrote the majority opinion and concluded that “the takings challenged [in this case] satisfy the public use requirement of the Fifth Amendment.”\(^{60}\) He reasoned that for over a century, the Court consistently rejected the narrow interpretation of public use and “embraced the broader and more natural interpretation of public use as ‘public purpose.’”\(^{61}\) The Court’s “jurisprudence has wisely eschewed . . . intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify” a public use.\(^{62}\) Thus, because the legislature rationally\(^{63}\) determined that New London “was sufficiently distressed to justify a program of economic

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\(^{54}\) Id. at 472, 474. The city divided the plan into seven parcels for uses including a waterfront conference hotel, shopping center, marinas, a river walk, new homes, a U.S. Coast Guard Museum, a state park, office space, and parking. Id. at 474.

\(^{55}\) The New London Development Corporation was a private, nonprofit entity established to assist New London in economic development. Id. at 473.

\(^{56}\) Id. at 475. In all, there were nine petitioners that owned fifteen properties within the redevelopment area. Id.

\(^{57}\) Id. (internal quotation marks omitted).


\(^{59}\) Kelo, 545 U.S. at 490. The Petition for Writ of Certiorari to the Supreme Court of Connecticut, Kelo v. City of New London, 545 U.S. 469 (No. 04-108), 2004 WL 1659558, at *21, stated that “most of the other cases involved condemnations pursuant to blight determinations and thus have not presented this Court with an opportunity to address eminent domain for the sole purpose of economic development.” Further, “this case presents a vital constitutional question that this Court has never before addressed: whether the public use clause of the Fifth Amendment to the U.S. Constitution authorizes the exercise of eminent domain to help a government increase its tax revenue and to create jobs.” Id. at *6.

\(^{60}\) Kelo, 545 U.S. at 484.

\(^{61}\) Id. at 480.

\(^{62}\) Id. at 483.

\(^{63}\) While Justice Stevens did not explicitly say New London’s plan was rational, he implied that the plan was rational “[g]iven the comprehensive character of the plan, the thorough deliberation that preceded [the plan’s] adoption,” and the nexus between the plan’s purpose and city’s distressed circumstance. Id. at 483–84.
rejuvenation,”64 the legislature’s determination that public purpose justifies this taking was entitled to deference.65

Justice Stevens also argued that this taking was not a purely private taking66 because New London executed a “‘carefully considered’ development plan” with “no evidence of an illegitimate purpose.”67 He acknowledged that interpreting public use to include economic redevelopment may allow the government to transfer “citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.”68 He noted, however, that this is not such a case and that worrying about a hypothetical “parade of horribles” is not sufficient to override a valid taking.69

Justice Kennedy wrote a concurring opinion and emphasized that courts should apply a rational-basis review when reviewing a legislature’s determination that a taking satisfies the public-use requirement.70 He also added that courts applying rational-basis review should strike down takings that “favor a particular party.”71 Possible indications of this impermissible favoritism include when there is no remedial comprehensive plan, when the benefits of the plan are trivial, when the government can identify each private beneficiary at the time it formulates the plan, and when the government fails to review a

64. Id. at 483.
65. Id. at 483. Perhaps anticipating public outrage over the Kelo decision, Justice Stevens qualified his three arguments by explaining that whether economic development satisfies the public use requirement is a legitimate matter for public debate. Id. at 489–90.
66. Id. at 477. The Midkiff Court stated, “A purely private taking could not withstand the scrutiny of the public use requirement” and that the Act in question did not “benefit a particular class of identifiable individuals.” Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984).
67. Kelo, 545 U.S. at 478 (citing Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004)). Justice Stevens pointed out that the Supreme Court of Connecticut held that New London’s development plan “was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather to revitalize the local economy.” Id. at n.6 (quoting Kelo, 843 A.2d at 595).
68. Id. at 486–87.
69. Id. at 486–87 & n.19. Justice Stevens stated that such a taking might “raise a suspicion that a private purpose was afoot” and if the taking is “executed outside the confines of an integrated development plan,” the taking may violate the Constitution. Id. at 487.
70. Id. at 490–91. (Kennedy, J., concurring); see also Julia D. Mahoney, Kelo’s Legacy: Eminent Domain and the Future of Property Rights, 2005 SUP. CT. REV. 103, 118–19 (2006) (citing Kelo, 545 U.S. at 491) (reasoning that “Justice Kennedy . . . expresses confidence that rational basis style review in the context of eminent domain will succeed where other instances of rational basis review have often failed.” Further, “it will provide courts with an effective tool . . . to stop government actions intended to ‘favor a particular . . . party’”).
71. Kelo, 545 U.S. at 491–93 (“A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit . . . .”). Id. at 491.
variety of alternative plans or developers.\footnote{72}

Both Justice O’Connor and Justice Thomas wrote dissenting opinions.\footnote{73} Justice O’Connor believed that the majority’s errors stemmed from errant dictum in Berman and Midkiff\footnote{74} and that permitting economic development takings will cause a slippery slope, making “all private property . . . vulnerable to being taken and transferred to another private owner.”\footnote{75} She argued that a taking is an invalid, purely private taking if the targeted property does not inflict an affirmative harm on society and if the taking of the property does not directly achieve a public benefit.\footnote{76}

Justice Thomas concluded that the majority’s decision was “simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”\footnote{77} He reasoned that the public-use requirement’s “most natural reading . . . allows the government to take property only if the government owns, or the public has a legal right to use, the

\footnote{72. Id. at 491–92.}

\footnote{73. Id. at 494, 505.}

\footnote{74. Id. at 498, 501–02 (O’Connor, J., dissenting). Justice O’Connor explained that the language in Berman and Midkiff equating public use with the police power was dictum and stated that Kelo “demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and public use cannot always be equated.” Id. at 501–02 (internal quotation marks omitted).}

\footnote{75. Id. at 494. Justice O’Connor illustrates her fear by citing to a dissent in Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 464 (Mich. 1981), which states that by allowing economic development takings, “no homeowner’s, merchant’s or manufacturer’s property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a ‘higher’ use.” Kelo, 545 U.S. at 505. Further, “The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.” Id. at 502. Justice O’Connor also believes that people who will benefit from economic development takings will most likely be “those citizens with disproportionate influence and power in the political process, including large corporations and development firms.” Id. at 505.}

\footnote{76. Id. at 500. Justice O’Connor distinguishes this case from Berman and Midkiff by stating that in those cases the “targeted property inflicted affirmative harm on society” and that the “taking directly achieved a public benefit.” Id.; see also Mahoney, supra note 71, at 121–22 (referring to this line of reasoning by Justice O’Connor as the “harm/benefit framework”).}

\footnote{77. Id. at 506 (Thomas, J., dissenting). Justice Thomas reasons that “two misguided lines of precedent,” obscured the natural meaning of public use and subsequently misled the Court in Berman and Midkiff. Id. at 514–20. In Fallbrook Irrigation Dist. v. Bradley, the Court declared that irrigation was a matter of public interest, 164 U.S. 112, 161 (1896); however, Justice Thomas argues that the statement equating public interest with public use in Bradley was dictum and did not mean public interest equals public use. Kelo, 545 U.S. at 515. Instead, Bradley should be understood to show that because the surrounding landowners had the right to use the water, irrigation is a public use. Id. at 515–16. Second, in United States v. Gettysburg Elec. Ry. Co., where Congress wanted to take land to build Gettysburg battlefield memorials, the Court stated that “when the legislature has declared the use . . . to be a public one, its judgment will be respected by the courts.” 160 U.S. 668, 680 (1896). Justice Thomas also argues that this statement was dictum because when a government takes property for its own use and ownership, it is absolutely a public use; therefore, any legislative declaration that the Gettysburg memorials are in the public interest was irrelevant to the Court’s decision. Kelo, 545 U.S. at 517.}

property.”

B. Eminent Domain Law in New York

In 1968, the New York legislature passed the Urban Development Corporation Act ("UDCA") to eliminate blight, promote economic growth, and remedy the lack of "educational, recreational, cultural and other community facilities" in the state. To carry out this purpose, the UDCA created the Urban Development Corporation, also known as the Empire State Development Corporation ("ESDC"), and permitted the ESDC to use eminent domain power if it found that, for example, the project area consists of a facility suitable for educational or other civic purposes.

In 1975, New York’s highest court adhered to the broad definition of public use in Yonkers Community Development Agency v. Morris. When the city of Yonkers decided to take landowners' property.

78. Id. at 508. For instance, because a founding-era dictionary defined “use” to mean "employing anything to any purpose" and because the Latin root of "use" means to "make use of, avail one's self of, employ, apply, enjoy, etc.,” the Constitution's Framers must have intended "public use" to mean that “the government or its citizens . . . must actually employ the taken property.” Id. at 508–09 (quoting Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)) (internal quotation marks omitted). Justice Thomas also presented an intra-textual argument by concluding, “Elsewhere, the Constitution twice employs the word ‘use,’ both times in its narrower sense,” and that the Framers used the term “general welfare” when they wanted to indicate the broader interpretation. Id. at 509. Justice Thomas also fears a slippery slope because “[o]nce one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use.” Id. at 520.


80. Id. § 6252. The legislature stated that the lack of these facilities “threatens and adversely affects the health, safety, morals and welfare of the people of the state.” Id. The legislature further declared the UDCA’s purpose and policy:

It is further declared to be the policy of the state to promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and development of our municipalities through the correction of such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, and of areas reasonably accessible thereto the undertaking of public and private improvement programs related thereto, including the provision of educational, recreational and cultural facilities, and the encouragement of participation in these programs by private enterprise.


81. See N.Y. UNCONSOL. § 6253(6)(d) (McKinney 2010); Cine 42nd St. Theater Corp., 790 F.2d at 1036; see Kaur, 892 N.Y.S.2d at 11. The ESDC must also follow New York’s Eminent Domain Procedure Law, which ensures that the state pays just compensation, allows for public participation, encourages settlement, and adheres to the public use requirement. N.Y. UNCONSOL. § 6263; see generally N.Y. EM. DOM. PROC. §§ 101–709 (McKinney 2010).

82. 335 N.E.2d 327, 331 (N.Y. 1975).
property to remove substandard conditions, the landowners argued that their property was not substandard and that taking their property was for a private purpose: expanding Otis Elevator Company’s facilities. The court held that when “land is . . . substandard, its taking for urban renewal is for a public purpose . . . [and t]he fact that the vehicle for renewed use of the land . . . be a private agency does not . . . change the permissible nature of the taking.” In addition, it does not matter that Otis Elevator Company indicated that it would “leave Yonkers if suitable land was not found for its . . . expansion” because urban renewal inherently involves economic and private benefits and there is nothing wrong with the city and a private party benefiting from the same taking.

The court then reasoned that deciding whether urban renewal qualifies as a public use is primarily a decision for agencies under the direction of the legislature. It is true that courts should “be more than rubber stamps” in defining a public use, but courts should review an agency’s “findings only upon a limited basis”: when the agency’s decision is baseless.

III. THE FACTS AND HOLDING IN KAUR V. NEW YORK STATE URBAN DEVELOPMENT CORP.

In 2001, Columbia University (“Columbia”) began working with the ESDC and the New York City Economic Development Corporation (“EDC”) to acquire seventeen acres in West Harlem to build a new campus. The target property is near the ocean in the Manhattanville area and consists primarily of auto-related businesses, “parking lots and partially empty industrial buildings.” In August 2002, the EDC issued a plan to renew and revitalize this waterfront area to “develop a vibrant commercial and cultural district, and support academic research.”

83. Id. at 330.
84. Id. at 331.
85. Id.
86. Id. at 332–33.
87. Id.
89. Id. The target area “is bounded by and includes West 125th Street on the south, West 133rd Street on the north, Broadway . . . on the east, and Twelfth Avenue on the west.” Id. There were sixty-seven lots within the target area, and “[a]ccording to data prepared for the Plan by Ernst & Young, [fifty-four] of the [sixty-seven] lots were in ‘good,’ ‘very good[,]’ or ‘fair’ condition.” Id.
90. Id. (internal quotation marks omitted).
In 2002, Columbia began buying property in the target area, and by 2003, Columbia owned fifty-one percent of the property in the area. In 2004, Columbia, the ESDC, and the EDC discussed using eminent domain to acquire the rest of the land. Columbia hired the consulting firm Allee, King, Rosen and Fleming, (“AKRF”) to assist with the project.

Both the EDC and the ESDC prepared a blight study of the area. First, in December 2004, the EDC concluded that the area was a blight, and then in September 2006, the ESDC asked AKRF to conduct another blight study. AKRF concluded, “[forty-eight] of the [sixty-seven] lots in the study area . . . ha[d] one or more substandard condition[s]” and that the “area was substantially unsafe, unsanitary, substandard, and deteriorated.”

By 2007 Columbia owned seventy-two percent of the property in the area. The New York City Council approved rezoning the area, and the relevant state agencies approved the plan to revitalize the area. However, criticism that AKRF’s blight study was biased because of AKRF’s association with Columbia led to ESDC hiring another firm, Earth Tech, Inc., to audit and evaluate AKRF’s blight study. Earth Tech concluded that “certain buildings had further deteriorated since prior inspections” and that “a majority of the buildings and lots in the . . . area exhibited substandard and deteriorated conditions creating a blighted and discouraging impact on the surrounding community.”

In December 2008, the ESDC concluded that the project qualified as a civic purpose pursuant to the UDCA, and in February 2009, landowners challenged the taking. The landowners argued that expanding a private university is not a civic purpose under the UDCA and is not a public purpose under the Takings Clause. The court held that the taking violated the Takings Clause, that the blight studies
were flawed, and that Columbia was not a public use.104

A. The Kaur Court Applies Kelo and Holds That This Taking Violates the Takings Clause

The Kaur court ruled against Columbia, the EDC, and the ESDC.105 The court relied on Berman, Midkiff, and Kelo to reason that the term “public use” in the Takings Clause is broad and that determining whether a project constitutes a public use is primarily the legislature’s decision.106 The court decided, however, that deference to the ESDC’s determination in this case was not appropriate. Following the logic of the Yonkers court and because Justice Kennedy’s concurring opinion in Kelo stated that takings involving impermissible favoritism are subject to increased scrutiny,107 the Kaur court decided that courts should “be more than rubber stamps” in determining public use.108

The court reasoned that Justice Kennedy’s notion of impermissible favoritism “[was] precisely the issue presented [in this] case”; thus, the court intensified its review and focused on different factors that might indicate impermissible favoritism.109 For instance, in Kelo, New London was depressed, and subsequently the city decided to act; however, in this case, the ESDC decided to act in Columbia’s favor before performing a blight study.110 Second, in this case, no government agency committed any public funds to the project.111 Third, Columbia funded “every document constituting the [ESDC’s] plan,” including the initial blight studies.112 Finally, the ESDC considered only one alternative to the revitalization plan and the ESDC knew Columbia’s identity at the time it contemplated its plan.113

104. Id. at 15, 22–23.
105. Id. at 11.
106. Id. at 16–18.
107. Kaur, 892 N.Y.S.2d at 18–19; see supra Part II.A.3.
108. Kaur, 892 N.Y.S.2d at 16; see supra Part II.B.
109. Kaur, 892 N.Y.S.2d at 18. The Kaur court stated that “it was the specific aspects of the New London planning process that convinced [Justice Kennedy] to side with the plurality in deference to the legislative determination.” Id. at 19.
110. Id. at 18. The court highlighted that the fact “the only purportedly unbiased or untainted study that concluded that Manhattanville was blighted . . . was not completed until 2008; the point at which the ESDC/Columbia steamroller had virtually run its course.” Id. at 19.
111. Id. (“Columbia underwrote all of the costs of studying and planning for what would become a sovereign sponsored campaign of Columbia’s expansion.”).
112. Id. at 20.
113. Id. at 19–20.
B. Blight Studies Must be Independent and Free of Underutilization Analysis

The court scrutinized the ESDC’s blight study and held that blight studies must be independent, credible, and not account for underutilization, and the court frowned upon the ESDC’s commitment to “allow Columbia to annex Manhattanville” before establishing blight and upon the fact that the ESDC’s second blight study was merely an evaluation of the first blight study.

Further, the ESDC’s blight study did not account for the fact that Columbia owned much of the property in the area. Because the court found that Columbia wanted to label this area as blighted, Columbia allowed buildings to remain vacant, water infiltration problems to go unfixed, and building code violations to continue over many years. The court stated, “[i]t is apparent from the record that ESDC had no intention of determining if Manhattanville was blighted prior to, or apart from, Columbia’s control of the area.”

The court also reasoned that the ESDC’s first blight study was flawed. For instance, the blight study accounted for things like unpainted walls, loose awning supports, and other safety and zoning violations, which, the court reasoned, are common characteristics throughout New York City. And the study did not account for important factors such as “real estate values, rental demand, and rezoning applications.”

Finally, the court categorically rejected any blight study based solely on underutilization. The court concluded that basing a blight study on an area’s underutilization “transforms the purpose of blight removal from the elimination of harmful . . . conditions . . . to a policy affirmatively requiring the ultimate . . . development.”

114. Id. at 23, 26.
115. Id. at 21.
116. Id. at 20–22; see supra notes 98–100 and accompanying text.
118. Id.; but see Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 253, (N.Y. 2010) (“Appellate Division disregarded the Urbitran blight study commenced in 2003 . . . at a time when Columbia was only beginning to purchase property in the area.” The Urbitran study found that “there was ‘ample evidence of deterioration of the building stock in the study area’ and that ‘substandard and unsanitary conditions were detected in the area’”).
119. Id.
120. Id. at 22.
121. Id.
122. Id.
123. Id. at 22–23.
124. Id. at 23.
C. Expanding a Private University Is Not a Civic Purpose and Violates the New York Constitution

The court held that expanding a private university is not a civic purpose under the UCDA for two reasons. First, “Columbia [was] virtually the sole beneficiary of the Project”; therefore, “the public benefit [was] incrementally incidental to the private benefits of the Project” and there was no civic purpose involved. Second, designating a private university as a public use depends on whether the legislature grants eminent domain power to the private university.

The court relied on University of Southern California, v. Robbins, where, after the California legislature granted eminent domain power to tax-exempt educational institutions, a private university wanted to use eminent domain to acquire the grounds surrounding a library. The California court stated that higher education “is recognized as a most important public use” and permitted the private university to use eminent domain. The Kaur court reasoned, after discussing Robbins, “[w]ere we to grant civic purpose status to a private university for purposes of eminent domain, we [would be] doing that which the Legislature has explicitly failed to do . . . [and] that decision is solely the province of the state legislature.”

IV. EXPANDING A PRIVATE UNIVERSITY MAY BE A PUBLIC USE

The Kaur court reasoned that since Columbia was the sole beneficiary of the taking and since the legislature has not given eminent domain power to Columbia, the taking did not serve a public use. The court, however, ignored and misinterpreted case law that actually shows that expanding a private university may be a public use.

125. Id. at 24. The court did not explain its conclusion that Columbia was the sole beneficiary. The court acknowledged a prior case that upheld expanding the New York Stock Exchange through eminent domain because of the expansion’s public benefits including increased tax revenue, job opportunities, and enhancing “New York’s prestigious position as a worldwide financial center,” but the court simply distinguished this case by concluding, “Here, Columbia is virtually the sole benefit of the Project.” See id. at 24 (citing In re Fisher, 730 N.Y.S.2d 516, 517 (N.Y. App. Div. 2001)).

126. Id.


128. Id. at 166–67.

129. Kaur, 892 N.Y.S.2d at 25; but see Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 253, (N.Y. 2010) (holding that pursuant to state law, the “development of a new Columbia University campus was supported by a sufficient public use, benefit or purpose”).


131. The New York Court of Appeals decision that reversed Kaur, Kaur, 15 N.Y.3d 235; see supra note 6, reversal strengthened this article’s assertion that private universities are a
First, the court ignored case law that shows that having a sole private beneficiary should not invalidate a taking. For instance, in \textit{Yonkers}, the court upheld a taking based on blight that, not only benefitted a single private company, but also seemed to be motivated by the private company’s threat.\textsuperscript{132} The \textit{Yonkers} court reasoned, “[t]he fact that the vehicle for renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible [sic] nature of the taking.”\textsuperscript{133}

The court also glazed over another New York case where the court had upheld an expansion of the New York Stock Exchange through eminent domain. In \textit{In re Fisher}, the court held that expanding the New York Exchange was a public use because the expansion would provide public benefits including a substantial increase in tax revenue, job opportunities, and enhancing “New York’s prestigious position as a worldwide financial center.”\textsuperscript{134} The \textit{Kaur} court acknowledged this case but simply distinguished this case by concluding, “[h]ere, Columbia is virtually the sole beneficiary of the Project[,] . . . [and t]his alone is reason to invalidate the condemnation especially where, as here, the public benefit is incrementally incidental to the private benefits of the Project.”\textsuperscript{135} The court took no effort to consider that expanding Columbia may offer the same public benefits that expanding the New York Stock Exchange would provide (e.g., substantially increasing taxes, jobs, and prestige).

The court then misinterpreted the non-mandatory authority of \textit{Robbins}, which the court believed to show that possessing eminent domain is determinative in deciding if a private university is a public

\begin{footnotes}
\footnote{132. Yonkers Cnty. Dev. Agency v. Morris, 335 N.E.2d 327, 331–33 (N.Y. 1975); see supra notes 82–87 and accompanying text. The \textit{Kaur} court did cite to \textit{Yonkers} to show that courts should “be more than rubber stamps” in determining whether a project is a public use, \textit{Kaur}, 892 N.Y.S.2d at 16 (quoting \textit{Yonkers}, 335 N.E.2d at 333), but the court ignored the complete reasoning in \textit{Yonkers}. Along with the reasoning that courts should be more than rubber stamps, the \textit{Yonkers} court reasoned that determining what qualifies as a blight is “vested in the agencies and the municipalities” and that “courts may review their findings only upon a limited basis.” \textit{Yonkers}, 335 N.E.2d at 332. The \textit{Yonkers} court then concluded its reasoning by showing that if the government presents an adequate basis for its public use determination, courts should permit the taking. \textit{Id.} at 333–34.}
\footnote{133. \textit{Id.} at 331 (emphasis added).}
\footnote{135. \textit{Kaur}, 892 N.Y.S.2d at 24.}
\end{footnotes}
use. 136 Robbins, however, shows that education is a public use. 137 If the legislature, which is entitled to deference in determining a public use, “has enacted . . . laws appropriately designed to make effectual the ideal” that higher education through private means is a public use, then courts should permit the taking. 138 Granting eminent domain power was, in Robbins, just one way the California legislature could effectuate the ideal that a private university constitutes a public use; thus, the Kaur court misinterpreted Robbins when it determined that absent an explicit grant of eminent domain power, Columbia is not a public use.

The Kaur court also attempted to use another New York case, Board of Education, Union Free School District No. 2 v. Pace College, to show that having eminent domain power is determinative of the legislature’s belief of whether a private university is a public use. 139 However, Pace had nothing to do with this contention. In Pace, a school board wanted to condemn and take a private college’s land. 140 The private college, which did not have eminent domain power, relied on the doctrine of prior public use and claimed that public-use lands are immune from eminent domain unless the condemnor is the state itself. 141 The court, however, held that the doctrine of prior public use only applies when “a property owner . . . has been granted a power to condemn equivalent to that of the petitioning condemnor”; thus, the fact that the legislature did not give eminent domain power to the private college means the private college did not have power equivalent to the condemnor. 142 Therefore, though the court in Pace held that possessing eminent domain power may be important in applying the doctrine of prior public use, the Pace court’s holding had nothing to do with whether possessing eminent domain is

137. The court stated that, “[t]he framers of our State Constitution gave recognition to the high importance of education,” and then quoted California’s Constitution: “[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of [education].” Id. (quoting CAL. CONST. art 9, § 1).
138. Id. The court also stated this in another way: Granting eminent domain power to the private university was simply the procedure the legislature used in this case to show the university was a public use. Id. Thus, when a court considers that the legislature bears the burden of determining “whether or not the purpose served is a public purpose,” courts should consider whether “the procedure which has been followed . . . by the [l]egislature . . . is in conformity with the purpose declared by the [c]onstitution and the object which it sought to attain.” Id.
141. Id. at 164.
142. Id. at 164, 166.
determinative of the legislature’s belief that a private university constitutes a public use. If anything, *Pace* is only relevant because the court stated in dicta that private colleges serve an important public purpose.\(^{143}\)

Because the *Kaur* court wrongly reasoned that possessing eminent domain power was the only way to show whether a private university was a public use,\(^ {144}\) the court did not consider other ways the New York Legislature could effectuate the ideal that a private university is a public use. For instance, New York’s UDCA clearly states that the legislature wants to promote the welfare of the people and sound growth of municipalities by clearing or redeveloping both blighted areas and areas reasonably accessible to “public and private improvement programs . . . including the provision of educational . . . facilities, and the encouragement of participation in these programs by private enterprise.”\(^ {145}\) This is because the legislature believes “there is a serious need throughout the state for adequate educational . . . facilities, the lack of which threatens and adversely affects the health, safety, morals and welfare of the people.”\(^ {146}\) The UDCA also explicitly permits takings for civic projects, which it defines as projects “designed and intended for the purpose of providing facilities for educational . . . or other civic purposes.”\(^ {147}\)

Therefore, the UDCA provides a clear example of a law that is “appropriately designed to make effectual th[e] ideal” that education, even through private enterprise, is a public use.\(^ {148}\) The *Kaur* court should have reasoned, similarly to the court in *Robbins*, that education is a public use, and that, as evidenced by the UDCA (or some other appropriate means), the legislature has effectuated a belief that private universities are part of this public use. Thus, the court should have held that expanding Columbia is a public use. The Appendix provides examples of other state laws that could effectuate the ideal that a private university is a public use.

\(^{143}\) *Id.* at 166–67.

\(^{144}\) Under *Robbins*, a court must look for any appropriately designed law that shows that the legislature believes education through private means is a public use. Univ. of S. Cal. v. Robbins, 37 P.2d 163, 165 (Cal. Dist. Ct. App. 1935); see *supra* notes 136–37 and accompanying text.

\(^{145}\) N.Y. UNCONSOL. LAW § 6252 (McKinney 2010); see *supra* notes 79–81 and accompanying text.

\(^{146}\) N.Y. UNCONSOL. LAW § 6252.

\(^{147}\) See *id.* §§ 6252, 6253(6)(d).

\(^{148}\) *Robbins*, 37 P.2d at 165.
V. AS DEMONSTRATED BY Kaur, THE MAJORITY OPINION IN Kelo CAN RESTRAIN THE GOVERNMENT’S EMINENT DOMAIN POWER

When the Kaur court applied Kelo to reach its holding that using eminent domain to expand Columbia violated the Takings Clause, the court demonstrated that Kelo can be a meaningful restraint on eminent domain power and that Kelo’s majority approach provides some advantages over the dissents’ approaches. Although the Kelo’s majority seems to advocate a simple rational basis review, the court reasoned that suspicion of impermissible favoritism requires courts to intensify its scrutiny. Kaur’s example of this ability to apply a “rational basis plus” review standard contradicts the popular belief that Kelo “eviscerates” the public use requirement and permits any taking, any time.

The majority opinion, however, is not perfect. Because the majority opinion advocates evaluating takings on a case-by-case basis without a bright-line rule, different courts may interpret the opinion differently, providing less predictability. To remedy this, state and local governments should consider enacting compensation and necessity standards.

149. See Kelo v. City of New London, 545 U.S. 469 (2005). To hold the taking unconstitutional, the Kaur court focused heavily on Justice Kennedy’s concurring opinion; however, the court probably could have reached the same result by focusing on Justice Stevens’s reasoning that a private taking executed outside of a “carefully considered,” “comprehensive,” and “integrated” development plan may “raise a suspicion that a private purpose was afoot.” Id. at 477–78, 484, 487; see supra note 66–67 and accompanying text.

150. Although Justice Kennedy used the term “impermissible favoritism” in his concurring opinion, the majority opinion stated that a purely private taking, or a taking to benefit identifiable individuals, is void. See supra notes 66–72 and accompanying text.

151. Kelo, 545 U.S. at 491–92.

152. See supra notes 105–13 and accompanying text.


A. The Disadvantages of Applying the Alternative Approaches Laid out in Kelo, and the Advantages of Applying the Kelo Majority’s Approach

Justice O’Connor’s and Justice Thomas’s dissenting opinions in Kelo express the fear that the majority opinion will “victimize the weak” and open the eminent-domain floodgates, allowing all property to be taken “so long as it might be upgraded.” Justice O’Connor agrees with the majority that the term “public use” is broad and that it is important to defer to “legislative judgments about public purpose,” but argues that unless there is a direct harm and direct benefit associated with the taking, the taking violates the public use requirement. However, this direct harm, direct benefit test is unclear. It seems possible that if property taking, which is by itself both innocent and unoffending, to end broad social problems, such as blight or a land oligopoly, qualifies as a direct harm under this test, then different courts may hold that almost any conceived social harm satisfies the test. Abiding by this broad test may create a situation where any taking is permissible so long as the government can successfully argue that the taking does not fall into an enumerated exception, such as takings for purely economic development.

This especially may become a problem if a court compares this test to some historically acceptable takings. For example, Justice Stevens and Justice Thomas, who were on opposite sides in the Court’s ruling in Kelo, cited the early Mill Acts as an example of a traditional use of eminent domain. These Mills Acts authorized mill owners to flood upstream land even though the flooded land was not a direct harm on society. Thus, if a court attempts to justify these historically acceptable takings in light of Justice O’Connor’s test, a court may reason that the harm required by Justice O’Connor’s test includes stifled community growth or any other far-reaching social harm.

Justice Thomas argued that the Court should re-think how it interprets public use; he argued that interpreting public use narrowly

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155. Kelo, 545 U.S. at 522 (Thomas, J., dissenting).
156. Id. at 494 (O’Connor, J., dissenting).
157. Id. at 499–500 (O’Connor, J., dissenting); see supra notes 74–76 and accompanying text.
158. Id. at 500.
159. While Justice O’Connor probably would not extend her test this far, her test is unclear and different courts may interpret her test in different ways.
160. Kelo, 545 U.S. at 479 n.8 (majority opinion); Id. at 512 (Thomas, J., dissenting).
161. Id. (Thomas, J., dissenting) (the Mill Acts “authorized the owners of grist mills . . . to flood upstream lands”).
“embodie[s] the Framers’ understanding.”162 But this assertion fails to restrain eminent domain power and fails to protect the weak or the “poor.”163 While Justice Thomas states that the public use requirement’s “most natural reading . . . allows the government to take property only if the government owns, or the public has a legal right to use, the property,”164 this requirement does not protect the weak or the poor, it simply limits a few ways in which the government can use the land after the taking; nothing differentiates taking property in poor communities from taking property in more politically affluent communities.

Applying Justice Thomas’s interpretation of public use also inevitably creates either an over-inclusive or an under-inclusive problem.165 Narrowly defining public use may create an over-inclusive problem, because it may prohibit extremely important takings merely because the taking would result in private ownership; it would not matter how much society could benefit from the taking or how strongly the legislature feels the taking is necessary. In the end, if it is not efficient or realistic for the government to retain title, or for the public to have a legal right to use the property, society will not get the benefit of the taking.

On the other hand, applying Justice Thomas’s test may create an under-inclusive problem because different courts may define government ownership differently and broadly. “Government owns” could mean that the government must own and occupy the property or that a private party could use the property temporarily as long as the government retained title. Additionally, Justice Thomas’s requirement

162. Id. at 509–10 (Thomas, J., dissenting). Although analyzing the truth of the different opinions in Kelo is beyond the scope of this Article, it seems appropriate to note that history can be interpreted in a number of different ways. For a historical perspective on interpreting public use different from Justice Thomas’s view, see Schultz, supra note 11, at 197–209. It seems probable that nothing is necessarily wrong with Justice Thomas’s dissenting opinion, or with any of the other opinions in Kelo; instead, the Public Use Doctrine’s hazy history makes modern eminent domain law—or each of the four opinions in Kelo—simply victims of ambiguity. See generally Shaun A. Goho, Process-Oriented Review and the Original Understanding of the Public Use Requirement, 38 SW. U. L. REV. 37, 87 (2008) (concluding that “[a]n examination of the original understanding of the public use requirement reveals that it provides no support for the narrow ‘use by the public’ test . . . [and that] it also does not support the notion that legislatures should have unlimited discretion in deciding on the reasons to use eminent domain”).

163. Kelo, 545 U.S. at 521–22. (Thomas, J., dissenting). Justice Thomas argues that the majority opinion will encourage the rich and affluent to “victimize the weak” and will exacerbate the lop-sided effects eminent domain has on minorities and poor communities. Id. at 522 (Thomas, J., dissenting).

164. Id. at 508 (Thomas, J., dissenting).

165. See John Fee, Eminent Domain and the Sanctity of Home, 81 NOTRE DAME L. REV. 783, 797 (2006) (stating that the approach is “overinclusive because they would prohibit the taking of any property through eminent domain for private redevelopment” and “underinclusive because they would leave [property] vulnerable to eminent domain for most . . . purposes”).
permits takings if the public has the legal right to use the property, not just if the government owns the property. It is possible that courts could also interpret “legal right to use” broadly, allowing the government to take any property and transfer it to any private owner on the condition that, at least to some degree, it remains open to the public. To illustrate, nothing in Justice Thomas’s opinion would stop New York City from taking property for “Negro removal”166 to create Central Park because the government owns the park,167 and nothing would stop the City of Detroit from uprooting an entire neighborhood to make room for a Cadillac-manufacturing plant, so long as the government required General Motors to provide public tours.168

The majority opinion, alternatively, provides significant advantages over Justice O’Connor’s and Justice Thomas’s approaches. The majority opinion advocates for a broad definition of public use, refuses to distinguish prior precedent,169 and focuses on “whether the record demonstrates a public purpose for the taking.”170 And while focusing on the inspiration behind the taking may be questionable171 and may fail to provide a predictable eminent domain rule, the majority’s approach provides an effective tool for prohibiting questionable takings because a court can focus on the government’s actions leading up to the taking, instead of just focusing on the taking’s end result.

Kaur, and other post-Kelo decisions, provide examples of how courts can use the majority opinion to restrain the government’s eminent domain power. In Mayor and City Council of Baltimore v. Valsamaki, the city established a renewal plan to eliminate blight, and as part of the plan, the city attempted to take a three-story commercial building.172 The building’s owner challenged the taking and the court

166. See Kelo , 545 U.S. at 522 (quoting Wendell E. Pritchett., The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 YALE L. & POL’Y REV. 1, 47 (2003)).
169. See supra note 61 and accompanying text. The majority opinion seems to be the only opinion that adheres to “over a century of . . . case law,” Kelo , 545 U.S. at 490, because both Justice O’Connor and Justice Thomas state that the majority came to its decision after being misled by “errant language,” id. at 501 (O’Connor, J., dissenting), and “misguided lines of precedent,” id. at 519 (Thomas, J., dissenting).
171. Kelo , 545 U.S. at 502–04 (O’Connor, J., dissenting) (“Why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place?”).
172. 916 A.2d 324, 327–29 (Md. 2007).
sided with the owner. The court applied Kelo and reasoned that, though the city had a renewal plan, the plan presented "sparse" evidence that the taking was a public use: "It is virtually impossible to determine the extent of the [public use] when no one knows the who, what, and whether of the future use of the property." The court explained that "[i]t is not enough . . . for the City to simply say that it is conducting urban renewal and leave it at that," instead, the "government . . . must provide some assurance that the urban renewal will constitute a public use or public purpose."

In Rhode Island Economic Development Corp. v. Parking Co., a private company and an airport attempted to renegotiate a deal that permitted the private company to operate a parking garage near the airport. The negotiations stalled and, subsequently, the airport asked the Rhode Island Economic Development Corporation to condemn and take a temporary easement in the garage. The airport argued, in part, for the bright-line rule that taking property that resulted in government ownership was a public use. But the court reasoned that Kelo "stressed the condemning authority’s responsibility of good faith and due diligence before it may start its condemnation engine." The court concluded that the "preparatory efforts" by the city in Kelo "stand in stark contrast to [the airport’s] approach" in this case, which demonstrates that the airport hastily tried to use eminent domain, after stalled negotiations, to retaliate against the private company and gain control of the parking garage at a discount price. The court emphasized that determining whether something is a public use "must be decided on a case by case basis, 'in light of the particular facts and circumstances of that case.'"

These two cases, and Kaur, show that Kelo majority’s approach provides an effective tool for restraining the government’s eminent domain power. By enabling courts to focus on the government’s actions, not just on the outcome of the taking, courts may to consider each taking—"in all fairness and justice"—and on a case-by-case

173. Id. at 326–27.
174. Id. at 351, 353.
175. Id. at 348 (emphasis added).
177. Id. at 93.
178. Id. at 102.
179. Id. at 104.
180. Id.
181. Id. (citing In re Advisory Opinion to Governor, 324 A.2d 641, 647 (R.I. 1974)).
182. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").
basis. On the other hand, Justice O’Connor’s and Justice Thomas’s approaches may curb the court’s ability to prohibit takings that involve, for example, bad faith, deficient planning, or unfair action by the government.

B. Options for Improving Kelo’s Restraint on the Government’s Eminent Domain Power

Despite the fact that Kelo may serve as a real restraint, the majority opinion’s standard-based approach fails to provide the predictability that a bright-line rule would provide. Improving how well the government and affected parties can predict the validity of a taking may encourage settlement, limit the number of contested condemnation proceedings, and promote the government’s due diligence. To remedy this lack of predictability in Kelo, state and local governments should consider enacting compensation and necessity standards.

Enacting compensation standards may make takings more predictable because these standards would compel the government to consider carefully the taking before initiating condemnation proceedings. While the Takings Clause’s just-compensation requirement merely requires the government to pay market value for the property, new state and local compensation standards could require the government to pay higher amounts of compensation depending on factors such as the property’s use or how long the owner has owned the property. These standards should provide some level of predictability, enabling the government to know how much “just compensation” it will have to pay before it initiates condemnation proceedings. Thus, basic economics and the fear of paying too much for a taking may force the government to find out how much it will have to pay for the taking before initiating condemnation proceedings. High prices may also create an incentive to consider other alternatives to satisfy the government’s need. As a result, the government’s actions are more likely to parallel the carefully considered plan in Kelo and, consequently, the government will have a probable assurance that the taking is valid before the government initiates condemnation.

183. Justice Stevens, in a post-Kelo speech, “expressed the belief that the clamor ‘that greeted Kelo is some evidence that the political process is up to the task of addressing’ eminent domain issues.” Mahoney, supra note 70, at 125 (citing Justice John Paul Stevens, Judicial Predilections, Address at the Clark County Bar Association (Aug. 18, 2005)). It is possible that post-Kelo legislative action aimed at remedying flaws in Kelo “could recast the Court’s opinion in Kelo as a prudent act of restraint that served as a catalyst for popular deliberation.” Id.

Another way state and local governments could increase predictability is to enact necessity standards. “[N]ecessity . . . requires that a condemnor justify a proposed taking as [reasonably] necessary for furthering a proposed public use.” Although determining whether a taking is necessary is the legislature’s job, courts may intervene and hold the legislature accountable if the legislature enacts a necessity-standard statute.

To illustrate, in Rawls v. Leon County, a Florida court demonstrated that determining necessity is initially a legislative function, but that when the law enables a landowner to challenge the necessity of the taking, “the issue of necessity becomes ultimately a judicial question” with the burden resting on the government. In Florida, a “condemning authority must show a necessity for the taking as a condition precedent to the valid exercise of the power of eminent domain.” This requirement corresponds with a Florida statute stating, “[t]hose having the right to exercise the power of eminent domain may file a petition” showing “that the property is necessary for that public use.”

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185. Cf. Fee, supra note 165, passim (proposing a compensation standard that accounts for how long a homeowner has owned his home; thus, making the compensation requirement more “just” because it accounts for the homeowner’s non-pecuniary losses such as sentimental value and detachment from the community).

186. In eminent domain, the necessity doctrine does not require absolute necessity; it only requires reasonable or rational necessity. Robert C. Bird & Lynda J. Oswald, Necessity as a Check on State Eminent Domain Power, 12 U. PA. J. CONST. L. 99, 99, 116 (2009); see Robert C. Bird, Reviving Necessity in Eminent Domain, 33 H ARV. J.L. & PUB. POL’Y 239, 270–71 (2010) (equating necessity review with a less drastic means test that asks “whether the condemnor’s purpose can be accomplished through less intrusive governmental means”). In addition to increasing predictability under Kelo, necessity standards might also have other advantages such as finding creative solutions to suit the condemnor’s needs and increasing government accountability. See id. at 277–78.


188. Id. at 105–13; see R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 96 (R.I. 2006). Bird and Oswald also demonstrated that, while determining necessity was the legislature’s job, determining public use was the court’s job. Bird & Oswald, supra note 186, at 105–113; see generally Kelo v. City of New London, 545 U.S. 469, 517–18 (2005) (Thomas, J., dissenting) (reasoning that “[t]here is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a ‘public use’”).

189. Bird & Oswald, supra note 186, at 111–12.

190. 974 So. 2d 543, 546–47 (Fla. Dist. Ct. App. 2008). The court reasoned that in evaluating necessity, courts should consider factors such as “cost, environmental factors, long-range area planning, safety considerations and the existence of alternative routes.” Id. at 547. The court held that the county demonstrated a reasonable necessity for taking landowner’s property. Id.

191. Id. at 546.

192. FLA. STAT. § 73.021 (2009); see Mayor and City Council of Baltimore v. Valsamaki, 916 A.2d 324, 328–29 (Md. 2007) (applying a Baltimore city code with similar language to Florida’s statute to invalidate a taking). Arizona provides another example of a necessity requirement. Arizona civil procedure requires that “before property may be taken, it shall appear
Therefore, similar to how compensation standards may increase predictability, enacting necessity standards may increase predictability under *Kelo*. Because the government bears the burden of proof to show necessity, the government will be forced to make some sort of reviewable record that can sufficiently prove necessity before the government initiates condemnation proceedings. As the court in *Rhode Island Economic Development Corp. v. The Parking Co.* stated, “it is not the function of [the courts] to dissect a legislative declaration to glean a public purpose”; therefore, the government bears the burden of doing its “due diligence before it may start its condemnation engine.”¹⁹³ Thus, the government is more likely to develop a carefully considered development plan or record, especially if a legislature enacts specific necessity standards such as a requiring that a condemnor justify taking the property in lieu of alternative options.

**V. Conclusion**

*Kaur* demonstrates that *Kelo* may effectively restrain the government’s eminent domain power despite the popular belief that *Kelo* eviscerates the public use requirement. By requiring that a record must demonstrate a public purpose for the taking, *Kelo* provides courts with an effective tool to prohibit unfair and unjust takings. While this approach provides little predictability because courts will evaluate takings on a case-by-case basis without a bright-line rule, it may be advantageous to allow a court to review the government’s actions that lead up to the taking instead of confining the court’s review to the result of the taking. Plus, by collaborating legislatively imposed compensation and necessity standards with the majority opinion in *Kelo*, predictability may increase.

Even though the *Kaur* court provided a good example of how *Kelo* could restrain eminent domain power, the *Kaur* court provided a bad example of showing whether a private university is a public use. Equating public use with whether the private university possesses eminent domain power ignores other ways the legislature could effectuate the belief that private universities are part of the education ideal. Education is a public use, and that if the legislature has, through any appropriate means, effectuated the belief that private universities are part of this public use, then it is acceptable to use eminent domain

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¹⁹³ 892 A.2d at 103–04; see supra notes 179–81 and accompanying text.
to expand a private university.

Chad Olsen*
APPENDIX: EXAMPLES OF LAWS RELEVANT TO DETERMINING IF THE
STATE LEGISLATURE BELIEVES PRIVATE UNIVERSITIES ARE A PUBLIC
USE

Arkansas

ARK. CODE. ANN. § 6-61-202(b) (2003) (illustrating how
Arkansas’s entire education code encourages private universities to
participate in carrying out the goal of “continued development of
Arkansas”: “The board shall encourage the cooperation of private
institutions of higher learning in its efforts to plan more effectively for
the coordinated development of higher education in this state”).

California

CAL. EDUC. CODE § 94801(b) (West 2003) (showing that, in
addition to the legislature granting private universities eminent domain
power, see id. § 94500, “[p]rivate postsecondary schools can
complement the public education system and help develop a trained
workforce to meet the demands of California businesses and the
economy”).

Connecticut

CONN. GEN. STAT. §10a-6(b)(4) (2009) (stating that one of the
state’s higher education goals is “to assure the fullest possible use of
available resources in public and private institutions of higher
education”).

Florida

FLA. STAT. § 1005.01 (2009) (“The Legislature encourages
privately supported higher education and intends to aid in protecting
the health, education, and welfare of persons who receive educational
services from independent postsecondary educational institutions in
this state.”).

Georgia

GA. CODE ANN. §§ 20-3-202 to -203 (2009) (creating the Private
Colleges and Universities Authority, which performs both “an
essential governmental function” and “an essential public function” to
assist “institutions for higher education”).
Idaho

Idaho Code Ann. § 33-128 (2008) ("The legislature finds that there is a need for expanded educational experiences including a need for additional positive science education experiences for the youth of this state. The legislature finds that it is in the public interest to encourage science education opportunities through cooperative efforts with private nonprofit organizations.").

Illinois

110 Ill. Comp. Stat. Ann. 210/3 (West 2009) (enabling nonpublic institutions of higher learning to receive institutional grants in an amount based on factors such as the number of enrolled students).

Indiana

Ind. Code § 21-17-3-1 (2009) ("The general assembly recognizes that the [higher education] private school is an essential part of the educational system.” This chapter was created in part for the benefit of “the general public.”).

Iowa

Iowa Code Ann. §§ 261A.2–.4 (West 2003) (creating the Higher Education Loan Authority for private institutions because “it is essential that this and future generations . . . be given the fullest opportunity to learn and to develop their intellectual . . . capacities,” which, in turn, will benefit the people of Iowa, increase commerce, enhance welfare, and improve living conditions).

Maryland

Md. Code Ann., Educ. § 10-211(a) (LexisNexis 2008) ("The nonpublic institutions of higher education in the State are an important educational resource and are vital to the provision of postsecondary education in the State.").

Michigan

Mich. Comp. Laws Ann. § 390.921a (West 1997) (stating that "there exists in this state a need for the financing of educational facilities at private or nonpublic, nonprofit institutions of higher learning"; that “it is a valid public purpose to lend money to or participate in the lending of money to these educational institutions for
the acquisition or alteration of, or energy efficiency improvements to, educational facilities within this state”; and that “the authority and powers conferred by this act constitute a necessary program and serve a valid public purpose”).

**Minnesota**

MINN. STAT. ANN. § 136A.61 (West 2008) (explaining that the legislature enacted the Minnesota Private and Out-of-State Public Postsecondary Education Act because “private not-for-profit and for-profit institutions of postsecondary education and the existence of legitimate private colleges and universities are in the best interests of the people of this state”).

**Mississippi**

MISS. CODE ANN. § 37-104-3 (2007) (stating that the legislature enacted the Mississippi Educational Facilities Authority Act for Private, Nonprofit Institutions of Higher Learning because providing private universities with the means to assist the people of the state is essential to the state and is a public purpose).  

**Nebraska**

NEB. REV. STAT. § 85-1702 (2008) (showing that “it is of the utmost importance that private institutions of higher education . . . be provided with . . . means of assisting . . . youth” because “it is essential that . . . youth be given the greatest opportunity to learn” and because it will benefit the people by increasing commerce and welfare).  

**Nevada**

NEV. REV. STAT. § 394.125 (2007) (“It is the policy of this State to encourage and enable its residents to receive an education commensurate with their respective talents and desires. The Legislature recognizes that privately owned institutions offering elementary, secondary and postsecondary education . . . perform a necessary service to the residents of this State.”).
New Hampshire

N.H. REV. STAT. ANN. §§ 195-D:1, D:3 (2008) (enabling any nonprofit postsecondary educational institution to participate with the New Hampshire Health and Education Facilities Authority, whose purpose is to increase the welfare of the people of the state by ensuring that educational institutions have the means necessary to educate youth).

New Jersey

N.J. STAT. ANN. § 18A:3B-2 (2010) (declaring that the legislature believes institutions of higher education are valuable and that “the State benefits from a coordinated system of higher education that includes public and private institutions”).

New Mexico

N.M. STAT. ANN. § 21-23-2 (LexisNexis 2007) (showing that the legislature created the Post-Secondary Educational Institution Act “to improve the quality of private post-secondary education”).

New York

N.Y. UNCONSOL. LAW § 6252 (McKinney 2010) (declaring the legislature’s belief that “there is a serious need throughout the state for adequate educational . . . facilities, the lack of which threatens and adversely affects the health, safety, morals and welfare of the people,” and that the legislature approves remediying this problem by redeveloping areas reasonably accessible to “public and private improvement programs . . . including the provision of educational . . . facilities, and the encouragement of participation in these programs by private enterprise”).

North Carolina

N.C. GEN. STAT. § 116-201 (2009) (stating the legislature’s intent for creating the State Education Assistance Authority was “to assist qualified students to enable them to obtain an education beyond the high school level by attending public or private educational institutions” because “it is in the public interest and essential to the welfare and well-being of the State . . . to foster and provide financial assistance to properly qualified students in order to help them to
obtain an education beyond the high school level”).

_North Dakota_

N.D. CENT. CODE § 15-10.1-01 (2003) ("To make the most provident utilization of state institutions of higher education and private colleges . . . it is desirable to provide means which will enable a student . . . to obtain desired courses in the most expedient manner and at the least possible cost.").

_Ohio_

OHIO REV. CODE ANN. § 3377.01, .02 (2004) (creating the Ohio Higher Educational Facility Commission to enhance educational opportunities and facilities in non-profit educational institutions, “thereby promoting the employment opportunities, economic welfare, public health and general welfare of the people”).

_Oklahoma_

OKLA. STAT. ANN. tit. 70, § 2631 (West 2005) (creating the Oklahoma Tuition Equalization Grant Program “to maximize use of existing educational resources and facilities within this state, both public and private” by awarding grants to residents enrolled in private or independent institutions of higher education).

_Oregon_

OR. REV. STAT. §§ 351.001, .003 (2009) (stating that to encourage political, economic, and cultural well-being, “Oregonians need access to post-secondary education opportunities throughout life in a variety of forms,” and that these “educational needs will be best met in an environment in which public and independent schools are recognized as critical for meeting those needs”).

_Pennsylvania_

24 PA. CONS. STAT. ANN. §§ 6901.501-.503, (2006) (approving college savings bonds to enhance the welfare of the people by enhancing educational opportunities through “[a]ll public and private colleges and universities located within this Commonwealth”).
Rhode Island

R.I. Gen. Laws § 16-57-2 (2001) (authorizing a system of financial assistance to enable qualified students to attend “public or private educational institutions” because enabling students to attend higher education institutions and appropriating funds to higher education institutions serve a public purpose).

South Carolina

S.C. Code Ann. § 59-109-20 (2004) (declaring that the legislature enacted the Educational Facilities Authority Act for Private Nonprofit Institutions of Higher Learning because it is the policy of the state to enhance the welfare of the people through assisting essential institutions of higher education).

South Dakota

S.D. Codified Laws §§ 13-55A-1, 13-55B-3 (2004) (showing that giving financial aid and tuition equalization grants to students that attend “public and private nonprofit and proprietary institutions, including four-year colleges and universities,” is in the public interest).

Tennessee

Tenn. Code Ann. §§ 49-7-802, -803 (2009) (establishing a higher education trust program for the advancement and improvement of higher education, including private universities, because higher education in this state is an essential governmental function and purpose of this state).

Texas

Tex. Educ. Code Ann. § 54.6001 (Vernon 2006) (stating that it is an urgent public necessity to assist young Texans in receiving a higher education through public or private facilities, and that it is important “to preserve the partnership between the state and private or independent institutions of higher education”).
Virginia

VA. CODE ANN. § 23-30.39 (2006) (enacting the Educational Facilities Authority Act to assist higher educational institutions, including private institutions, in providing the facilities needed to educate the public, which the legislature believes is essential to the welfare of the people).

Washington

WASH. REV. CODE ANN. § 28B.07.010 (West 2009) ("Adequate educational opportunities are essential to the . . . well-being of the state . . . . Washington’s . . . private nonprofit higher education institutions are a necessary part of the state’s higher educational resources. They provide educational diversity and choice for all residents of the communities in which they are located . . . .")

West Virginia

W. VA. CODE ANN. §§ 18B-1-1a, -1-2 (LexisNexis 2009) (giving the legislature’s findings concerning public and other post-secondary higher education institutions, including nonprofit institutions: “post-secondary education is vital to the future of West Virginia” and “providing access to a high-quality and affordable post-secondary education is a state responsibility”)
