

From *Kelo* to *Grants Pass v. Johnson*: Public Use for Housing for the Homeless

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The Supreme Court's 2024 City of Grants Pass v. Johnson decision allows jurisdictions to address homelessness by driving unhoused people away, and some have done so in the months since the decision. For those local governments that rise to the challenge of the homelessness crisis, various statutes and regulations, such as the Fair Housing Act, reduce the choice set of properties that can be used to provide housing for the homeless. The unintended consequence of such laws is an increase in the market power of certain owners of land suitable for such housing. This Article argues that the public-use clause should be interpreted to allow jurisdictions to use the eminent-domain power to address holdouts, including those whose behavior is endogenously created or aided by the legal system. Moreover, eminent domain should also be considered an appropriate tool to deal with owners we call "hold-inclined." These landowners would be inclined to sell their land knowing it will be used for necessary but disfavored uses like emergency shelters, but they will refuse to sell voluntarily over concerns about damaging their reputation in the community. Allowing local governments to use the eminent-domain power to acquire land in this context solves the market deadlock. The trend toward narrow construction of the public-use clause after the 2005 landmark case Kelo v. City of New London should be regarded cautiously to avoid hampering governments' ability to solve pressing contemporary issues like the homelessness crisis.

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Introduction

In 2005, the Supreme Court handed down *Kelo v. City of New London*,¹ allowing local governments to use eminent domain for projects they claimed would lead to economic development. The tsunami-like public backlash afterwards prompted large-scale legislative reforms across the states that limit the eminent-domain power.² In 2024, the Supreme Court held in *City of Grants Pass v. Johnson* that a small city in Oregon could ban homeless residents from “camping” (sleeping outdoors with bedding) on public property without running afoul of the Eighth Amendment’s prohibition on cruel and unusual punishment.³ In the view of the dissenting Justices, the decision allows localities to essentially criminalize homelessness.⁴

These two seemingly unrelated Supreme Court decisions in fact intersect in one of the most critically important challenges of our times: how best to address the rising rates of homelessness across the United States. *Grants Pass* allows those local governments that are not inclined to try to address the needs of homeless residents or visitors to use municipal laws against camping to push unhoused people out of their boundaries, thus foisting the responsibility for the homeless on other localities, states, or the federal government. The public outcry against *Kelo* led many state legislatures to constrain local governments’ exercise of the eminent-domain power.⁵ Those constraints, however, may stymie those

1. 545 U.S. 469 (2005).

2. For a discussion of state legislative reform in the aftermath of *Kelo*, see generally Marc Mihaly & Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L.Q.* 703 (2011); Edward J. López, R. Todd Jewell & Noel D. Campbell, *Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 *REV. L. & ECON.* 101 (2009); Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 *SUP. CT. ECON. REV.* 237 (2009); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 *SUP. CT. ECON. REV.* 127 (2009); and Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100 (2009). Note that some observers have questioned how much the states’ responses to *Kelo* actually have changed the practice of eminent domain. See, e.g., Mihaly & Smith, *supra*, at 708-26 (categorizing states’ changes to eminent-domain powers).

3. 603 U.S. 520, 559 n.8, 560-61 (2024).

4. See *id.* at 577 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

5. See, e.g., Ronit Levine-Schnur, *Is the Government Exhausting its Powers? An Empirical Examination of Eminent Domain Exercises in New York City Pre- and Post-Kelo*, 17 *REGUL. &*

governments who do seek to address the needs of the homeless by providing emergency shelter, social services, and income-restricted affordable and supportive housing within their borders. The practical implications of the confluence of the two decisions are significant. The juxtaposition of the two holdings also is theoretically important because it illuminates some of the complexities of the holdout and “hold-in”⁶ problems the scholarship on eminent domain has identified. Teasing out those theoretical implications will ground discussions about how to constrain governments’ eminent-domain powers—in particular, how to interpret the public-use clause—more solidly in the realities of how housing for low-income households is provided in today’s real-estate market.

The law of eminent domain can affect the provision of emergency shelters and income-restricted affordable and supportive housing⁷ by making it harder for a state or local government to acquire privately owned land in order to secure its use for shelter or permanent housing.⁸ Because of restrictions on the number of public-housing units that can be built in the United States,⁹ as well as current views about the virtues of privatization or public-private partnerships, most shelters and income-restricted housing developments are owned and operated not by the government but by not-for-profit owners or for-profit housing and service

GOVERNANCE 449, 451 (2023) (empirically observing that in New York, where no law enacted post-*Kelo* constrains the state’s eminent-domain power, the state did not use this power more frequently).

6. The plaintiffs in *Kelo* can be characterized as hold-ins who genuinely do not want to sell. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 128-29 (2004) (describing “holdins” and distinguishing from “holdouts”).

7. Jurisdictions seeking to address the needs of unhoused households usually provide at least three different types of housing. The first is emergency shelter, which is often in congregate care facilities, and is intended to provide basic and temporary housing to prevent an individual from living on the streets or other public places or in private property such as abandoned buildings or vehicles, until permanent solutions are found. The second is affordable, supportive housing, which is income-restricted housing intended to pair a home with services needed to address mental illness, addiction, or other issues that if left untreated may make it difficult for a person to remain stably housed. Third is affordable housing, which is income-restricted, permanent housing at rents or prices affordable to the tenant, which is generally thought to mean that it costs no more than 30% of the household’s income. We refer to all three types as housing for the homeless, although supportive and affordable housing may be available to people whose housing was unstable, but who were housed at the time they sought more affordable or otherwise more suitable housing.

8. A government may wish to acquire undeveloped land to build new shelters or income-restricted housing, to enter into an agreement to rent a building or units within a building to provide such housing, to condemn an existing use and replace it with housing, or to condemn dilapidated or inefficient housing and replace it with more, or better-quality, housing. See, e.g., *City of Joliet v. New West, L.P.*, 562 F.3d 830, 832 (7th Cir. 2009).

9. United States Housing Act of 1937, ch. 896, § 9(g)(3), 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437g(g)); see also *Repeal the Faircloth Amendment*, NAT’L COAL. FOR THE HOMELESS, https://nationalhomeless.org/wp-content/uploads/2022/04/REPEAL-THE-FAIRCLOTH-AMENDMENT_NCH_FINAL-1.pdf [<https://perma.cc/WD38-P39Y>] (advocating for the repeal of the Faircloth Amendment, which “sets a cap on the number of units any public housing authority (PHA) could own and operate, effectively halting new construction of public housing”); *The Faircloth Amendment Blocks the Construction of Affordable Housing: It Should Be Repealed*, CTR. FOR ECON. & POL’Y RSCH. (Dec. 11, 2024), <https://cepr.net/publications/the-faircloth-amendment-blocks-the-construction-of-affordable-housing-it-should-be-repealed> [<https://perma.cc/GN46-6XTE>] (advocating for the repeal of the Faircloth Amendment).

providers. Using eminent domain to secure property for those uses therefore may fail to meet the most stringent test of public use—ownership or possession by the public.¹⁰ Further, shelters and income-restricted homes are limited to disadvantaged members of communities who meet various criteria of need. Neither emergency nor permanent housing therefore fits easily with the other commonly held criterion of public use—use by the public.¹¹ Homeless shelters and income-restricted housing are excludable and rivalrous and thus not public goods that often are presumed to require government intervention, including eminent domain.¹² Housing can be built in many places and does not typically involve aggregating large quantities of land. Thus, it is unclear whether existing theories that focus on the need for eminent domain to solve the holdout problem—such as the one that governments seeking to build roads or other megaprojects face—can readily justify the use of the eminent-domain power to build housing for the homeless.¹³

Accordingly, the leading scholarly theories about how eminent-domain powers should be circumscribed are unlikely to support the use of eminent domain for shelters or affordable housing.¹⁴ Further, many of the legislative restrictions on the government’s eminent-domain powers passed after *Kelo* was decided also likely would prevent the use of the eminent-domain power for emergency or permanent housing for homeless households.¹⁵

On the other hand, a variety of laws and regulations often tie the hands of housing authorities seeking to create homeless shelters and permanent income-restricted housing in ways that current theories and laws about how eminent domain can be used do not necessarily take into account. The Fair Housing Act may prohibit, for example, concentrating shelters or affordable housing in segregated or poor neighborhoods, which can limit the number of sites that can be used.¹⁶ Similarly, some jurisdictions have “fair siting” laws that require all

10. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 773-78 (Mich. 2004) (holding that public ownership is one of the three plausible meanings of public use).

11. See *id.* (discussing plausible meanings of public use).

12. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 168 (1985) (proposing the public-goods theory). In this Article, we stick to the standard definition of public goods, as this is what Epstein and economists have used. Broadening the definition of public goods would be problematic here because once the economic features no longer hold, the normative justification is also gone. Moreover, an abstract and broad understanding of public goods as any project that is good for the public would be a theory that can justify any eminent-domain action, which is broader than our normative position.

13. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61, 72-93 (1986) (proposing the holdout theory); Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, 16 J. HOUSING ECON. 309, 311-16 (2007).

14. See *infra* Part III.

15. See *id.*

16. 42 U.S.C. § 3608(e)(5) (2024); see *National Fair Housing Alliance Responds to HUD’s Withdrawal of Affirmatively Furthering Fair Housing Rule (AFFH)*, NAT’L FAIR HOUS. ALLIANCE (Mar. 5, 2025), <https://nationalfairhousing.org/national-fair-housing-alliance-responds-to-huds-withdrawal-of-affirmatively-furthering-fair-housing-rule-affh> [<https://perma.cc/U2EZ-K4YV>] (reviewing the history of proposed regulations to implement the Fair Housing Act’s Affirmatively Furthering Fair Housing mandate); see also *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S.

communities to assume the burden of their fair share of homeless shelters and/or affordable housing.¹⁷ The prevalence of disabilities amongst—and the limited incomes of—the occupants of shelters and affordable housing may make it imperative that the housing be located near accessible public transportation, which may further limit potential sites.¹⁸ Developing and operating shelters or other housing for the homeless involves considerable risk and bureaucracy. Those risks increase the chance that the land sale will fall through and may make the landowner particularly unwilling to transact with the government voluntarily.¹⁹ Last, but not least, neighborhood opposition to shelters or affordable housing may make the condemnation of many sites simply too politically costly for the local government to consider.²⁰

Our central insight is that whether a market is “thin,” and therefore susceptible to the holdout problem, is not entirely exogenous to the legal system. The prior literature assumes that the market itself determines whether a property owner has monopoly or oligopoly power. In fact, as the Fair Housing Act and other examples we just noted show, the legal system can render a market thinner. That thinning effect may make the justification for using the eminent-domain power easier—if analysts look only at the scarcity of policymakers’ choice set without regard to its cause. But if the analysis considers only market-driven

519, 546-47 (2015) (upholding disparate impact liability in a case challenging the concentration of low-income-housing tax credits in neighborhoods with high shares of Black residents).

17. See *Affirmatively Furthering Fair Housing*, CAL. DEP’T HOUS. & CMTY. DEV. (Dec. 13, 2023), <https://www.hcd.ca.gov/planning-and-community-development/affirmatively-furthering-fair-housing> [https://perma.cc/2QGC-FNDP].

18. Erin Vinoski Thomas & Chloe Vercruysse, *Homelessness Among Individuals with Disabilities: Influential Factors and Scalable Solutions*, NACCHOVOICE (June 14, 2019), <https://www.naccho.org/blog/articles/homelessness-among-individuals-with-disabilities-influential-factors-and-scalable-solutions> [https://perma.cc/V6JG-MHXS] (estimating that one in four individuals experiencing homelessness have a disability); see also Christine L. Jocoy & Vincent J. Del Casino Jr., *The Mobility of Homeless People and Their Use of Public Transit in Long Beach, California 2* (Cal. State Univ., Dep’t of Geography, METRANS Project #06-13, Apr. 2012), https://www.metrans.org/assets/research/06-13_Jocoy_final_0_0.pdf [https://perma.cc/4EWH-TY58] (“Public transportation services offer a critical outlet for homeless individuals with limited resources who must use public transit to access services, shelter, affordable housing, education, and employment.”).

19. See, e.g., Philip Garboden, Eva Rosen, Meredith Greif, Stefanie DeLuca & Kathryn Edin, *Urban Landlords and the Housing Choice Voucher Program: A Research Report*, THE POVERTY & INEQ. RSCH. LAB., JOHNS HOPKINS UNIV. 30 (May 2018), <https://www.huduser.gov/portal/sites/default/files/pdf/Urban-Landlords-HCV-Program.pdf> [https://perma.cc/G25V-9XCP] (finding that landlords in Baltimore, Dallas, and Cleveland stopped renting to Housing Choice Voucher recipients in part because they found bureaucratic procedures, like inspections, “burdensome and costly” and had negative interactions with the Public Housing Authority).

20. See Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 502-16 (1994) (explaining that victims of NIMBYism include racial minorities, low-income housing, social-service facilities, group homes, and shelters). In one survey, 70% of developers reported community opposition to affordable-housing proposals. Corianne Payton Scally, *NIMBY: Where, When, and to Which Developers It Happens*, SHELTERFORCE (Apr. 1, 2014), https://shelterforce.org/2014/04/01/nimby_where_when_and_to_which_developers_it_happens [https://perma.cc/5GK6-68YW]; see also Kate Walz, *The Color of Power: How Local Control Over Affordable Housing Shapes America*, SHRIVER CTR. ON POVERTY L. (Sep. 14, 2018), <https://www.povertylaw.org/article/the-color-of-power-how-local-control-over-affordable-housing-shapes-america-2> [https://perma.cc/7AHY-8B3R] (arguing that residential segregation exists “because local communities hold tremendous power to veto proposals for affordable housing development”).

factors to justify the use of eminent domain, the takings power may be too strictly constrained. In short, the “endogeneity” of the holdout problem complicates the discussion of holdouts and their role in justifying takings for public use.

Moreover, while our position is closest to the theory that interprets the public-use clause as constraining the use of eminent domain to those situations in which it is necessary to overcome holdouts, we think the theory is too narrow given the homelessness crisis the nation is facing and the effect that *Grants Pass* will have in allowing many localities to foist that crisis onto other jurisdictions. Our argument is that the public-use clause should be interpreted to allow using the eminent-domain power to deal with what we call the “hold-inclined” problem. Hold-inclined owners are not holdouts. Like holdouts, they refuse to sell voluntarily, but they do so not to increase the price they will receive²¹ but to protect other values like their reputations or the values of their other properties. Neither is the hold-inclined owner a hold-in who does not want to sell (often because of his psychological attachment to the property). On the contrary, hold-inclined owners are willing to sell but do not want the community to think that they did so voluntarily. As we explain below, some landowners of potential sites for housing for the homeless have more market power because of constraints the law imposes upon the market, and they exercise that power as hold-inclineds. We argue that it would be appropriate to use the eminent-domain power to take these sites in order to create sufficient land supply for housing for the homeless.

Limitations on the sites actually available for use as emergency shelters or income-restricted housing for the homeless, combined with the failure of the *Grants Pass* majority to grapple with the externality problem that jurisdictions wishing to avoid caring for the homeless can create, reveal that legislatures, the courts, and scholars need a more nuanced view of when holdout and hold-inclined problems satisfy the requirement of public use. Local governments may be divided into two types by their responses to *Grants Pass*. The first type rises to the challenges of our times and strives to create more housing for the homeless. This Article provides the legal foundation for these jurisdictions to use the eminent-domain power, when necessary, to achieve the goal. The second type, the not-in-my-backyard (NIMBY) jurisdictions, may take advantage of the *Grants Pass* decision by opting not to address the need for housing for the homeless and instead simply banning camping, which drives homeless people to friendlier jurisdictions. The arguments advanced in this Article would be of no interest to the second type. The best legal strategies to incentivize or require the second type to contribute to solving the homelessness crisis are subjects for future work.

In the rest of this Article, we begin in Part I by explaining the circumstances in which state and local governments may believe they need to use eminent domain in their efforts to shelter the homeless and provide affordable or

21. Hold-inclined owners may receive more for their property if the government must use eminent domain in order to secure the property for use as a shelter or other housing, so it may be difficult to separate holdouts from hold-inclined owners in practice.

supportive housing for low-income families. In Part II, we review the current state of the law and legal theories about constraints on the use of eminent domain and explore how those would address the challenges we identified in Part I. In Part III, we argue for a more nuanced understanding of the holdout problem that eminent domain is intended in part to solve, and suggest how that understanding should inform legislation, constitutional review, and scholarship about eminent domain.

I. Why Might Eminent Domain Be Used to Provide Housing for the Homeless?

The 771,480 people experiencing homelessness at a designated point in time in late January 2024 was the highest number since the count began in 2007, and 18% higher than in 2023.²² Of those people, nearly 150,000 were under the age of eighteen, reflecting a 33% increase (or 32,618 more children) over 2023.²³

Almost 36% of those counted in 2024 were unsheltered—staying in places not meant for human habitation, like vehicles, parks, subway and bus stations, or other public spaces.²⁴ Among the 274,224 people experiencing unsheltered homelessness were almost 18,000 adults aged sixty-five or over, and more than 11,000 children under the age of eighteen.²⁵ The share of people experiencing homelessness who were unsheltered varied from 4% in New York State to 66% in California.²⁶ In eighteen states, more than 40% of those experiencing homelessness were unsheltered (and the number is probably higher because the point-in-time count is conducted in January, when unsheltered homelessness may be lower in colder states).²⁷ Slightly more than half of those experiencing unsheltered homelessness were counted in rural or suburban jurisdictions or small cities.²⁸

Many jurisdictions provide little or no shelter (and as discussed earlier, more may refuse to do so as a result of the Supreme Court’s *Grants Pass* decision). But state and local governments in many parts of the United States have tried to supply emergency shelter to address the immediate needs of people experiencing homelessness. Approximately 509,710 shelter beds were available in 2024.²⁹ The 2024 data showed that the number of those beds had increased by

22. Tanya de Sousa & Meghan Henry, *The 2024 Annual Homelessness Assessment Report (AHAR) to Congress*, U.S. DEP’T OF HOUS. & URB. DEV. 2 (Dec. 2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [<https://perma.cc/833T-PCX6>] (stating that, on a “single night in 2024,” a number of people corresponding to twenty-three of every ten-thousand people in the United States was found to be unhoused).

23. *Id.*

24. *Id.* at 2.

25. *Id.* at 82.

26. *Id.* at 8.

27. *Id.*

28. *Id.* at 12.

29. Almost 83% of the emergency beds were in shelters, while the remainder were in safe havens or transitional housing programs. All three of those types of shelters are considered temporary emergency responses to homelessness. *See id.* at 72.

20.6% over the number counted in 2007,³⁰ when the first count was conducted, compared to a 19.2% increase over the same period in the number of people experiencing homelessness.³¹ Despite that fairly large shelter inventory, there was a shortfall of more than 260,000 emergency-shelter beds for the total number of people experiencing homelessness in January 2023.³² Because many shelter beds are restricted to people meeting various criteria (such as veterans), the shortfall is likely even higher.

The problem of unsheltered homelessness is not just a matter of the shortage of emergency shelters, of course. Some people experiencing homelessness refuse to stay in shelter beds that are available because they are unable or unwilling to meet the requirements the facility imposes (such as prohibitions on pets, sobriety rules, or curfews that conflict with job requirements or other needs), do not feel safe in the shelters, or are not comfortable with the facility's religious orientation.³³ Further, shelters are only a temporary solution. Jurisdictions need more permanent supportive housing that provides services such as the mental-health care³⁴ and substance-abuse treatment that many people experiencing homelessness need.³⁵ Jurisdictions also need more permanent affordable housing³⁶ that is available, accessible, and affordable given both the low incomes

30. *Id.* at 71.

31. *Id.* at 3.

32. Tanya de Sousa, Alyssa Andrichik, Ed Pretera, Katherine Rush, Colette Tano & Micaiah Wheeler, *The 2023 Annual Homelessness Assessment Report (AHAR) to Congress*, U.S. DEP'T OF HOUS. & URB. DEV. 91 (Dec. 2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [<https://perma.cc/N2UY-BTHN>] (noting the shortfall of more than 200,000 beds in 2023). Note that de Sousa & Henry, *supra* note 22, did not update the estimate of the shortfall based upon the 2024 point-in-time count.

33. *City of Grants Pass v. Johnson*, 603 U.S. 520, 531-32 (2024).

34. Estimates of the need for mental-health care, supportive housing, and other services vary. One meta-analysis of the research estimates that approximately 67% of those experiencing homelessness have current mental-health disorders. *See* Rebecca Barry, Jennifer Anderson, Lan Tran, Anees Bahji, Gina Dimitropoulos, S. Monty Ghosh, Julia Kirkham, Geoffrey Messier, Scott B. Patten, Katherine Rittenbach, & Dallas Seitz, *Prevalence of Mental Health Disorders Among Individuals Experiencing Homelessness: A Systematic Review and Meta-Analysis*, 81 JAMA PSYCHIATRY 691, 691-99 (2024); *see also* Margot Kushel & Tiana Moore, *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness*, BENIOFF HOMELESSNESS & HOUS. INITIATIVE, UNIV. OF CAL., S.F. 60 (June 2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf [<https://perma.cc/29GP-JFZ8>] (explaining that, while 66% of those experiencing homelessness who were interviewed or surveyed reported having mental-health symptoms, only 18% of all participants had received either mental-health counseling or medications in the prior thirty days and “31% reported regular use of methamphetamines, 3% cocaine, and 11% non-prescribed opioids” while “[16%] reported heavy episodic drinking”).

35. Thomas Coombs, Amor Abdelkader, Tikal Ginige, Patrick Van Calster, Matthew Harper, Dhiya Al-Jumeily & Sulaf Assi, *Understanding Drug Use Patterns Among the Homeless Population: A Systematic Review of Quantitative Studies*, 4 EMERGING TRENDS DRUGS, ADDICTIONS & HEALTH 1, 11 (2024) (systematically reviewing twenty-five recent studies, seventeen of which were in the United States, and finding that “substance use among the homeless population had a high prevalence that had a rate of more than 50% in most studies”).

36. Housing affordable to the nation's lowest-income households is often publicly or privately owned income-restricted housing allocated to households who make less than a particular share of what the United States Department of Housing and Urban Development (HUD) determines is the “area median income” for a particular geography. *See, e.g.*, Kevin DeGood, Christian E. Weller, David Ballard & Jessica Vela, *A New Vision for Social Housing in America*, CTR. FOR AM. PROGRESS (Aug. 9, 2022),

of people experiencing homelessness³⁷ and discrimination in the rental market against those applicants using government assistance to subsidize the rent.³⁸

The challenges local governments face in addressing the problem of homelessness include a myriad of land-use constraints that are both political and legal. Today, neighborhoods protest everything from “luxury” housing³⁹ to parks and playgrounds⁴⁰ to accessory dwelling units intended to house a family’s grandparents. Similarly, siting transient shelters for low-income households down on their luck and experiencing homelessness is extraordinarily unpopular.⁴¹ People experiencing homelessness are often perceived to be (and on average are) disproportionately poor, black and brown,⁴² members of the

<https://www.americanprogress.org/article/a-new-vision-for-social-housing-in-america> [https://perma.cc/Q2UY-6XED].

37. See, e.g., Bruce D. Meyer, Angela Wyse, Gillian Meyer, Alexa Grunwaldt & Derek Wu, *Homelessness and the Persistence of Deprivation: Income, Employment, and Safety Net Participation* 3 (Nat’l Bureau Econ. Rsch., Working Paper No. 32323, 2024) (finding that more than 90% of both sheltered and unsheltered homeless adults “were formally employed or enrolled in at least one safety net program in 2010, the year they were observed as homeless,” and that they had “low median annual earnings (about \$8,300) suggesting low-wage, sporadic work”).

38. A HUD-funded study found that in three of the five U.S. cities assessed, the landlord denial rate for vouchers was 67%. The two remaining sites with lower denial rates had source-of-income anti-discrimination laws in place. Mary Cunningham, Martha Galvez, Claudia L. Aranda, Rob Santos, Doug Wissoker, Alyse Oneto, Rob Pitingolo & James Crawford, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, U.S. DEP’T OF HOUS. & URB. DEV., at iii (Sep. 2018), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf> [https://perma.cc/8DZC-KENM]. Only about “16 states, the District of Columbia, and 106 local governments have passed laws that prohibit landlords from discriminating against tenants who receive housing choice vouchers.” See Daniel Teles & Yipeng Su, *Source of Income Protections and Access to Low-Poverty Neighborhoods*, URB. INST. 1 (Oct. 2022), <https://www.urban.org/sites/default/files/2022-10/Source%20of%20Income%20Protections%20and%20Access%20to%20Low-Poverty%20Neighborhoods.pdf> [https://perma.cc/2EFZ-88B3].

39. See, e.g., John Massengale, *I’m a New Yorker, Not a NIMBY*, COMMON EDGE (Sep. 24, 2024), <https://commonedge.org/im-a-new-yorker-not-a-nimby> [https://perma.cc/ZKH9-F6SH].

40. See, e.g., @beachboyz2men, *The Dramatic Battle Over LA’s Next Swing Set*, TIKTOK (July 19, 2024), <https://www.tiktok.com/@beachboyz2men/video/7393454469524098347> [https://perma.cc/JLR2-9BWR] (describing a two-hour forum on opposition to a proposal to put two swings and a slide in a neighborhood park).

41. See, e.g., Paul Liotta, *‘The City Wins’: Opposition to Latest Shelters Shows Difficulty in Challenging Sites*, S.I. LIVE (Mar. 27, 2021), <https://www.silive.com/news/2021/03/the-city-wins-opposition-to-latest-shelters-shows-difficulty-in-challenging-sites.html> [https://perma.cc/4XY7-Z9V5]; *Furious Residents Slam City Officials Over Shelter in Maspeth, Queens*, CBS N.Y. (Aug. 31, 2016), <https://www.cbsnews.com/newyork/news/maspeth-queens-shelter-meeting> [https://perma.cc/FD3Y-M8VK].

42. See de Sousa & Henry, *supra* note 22, at v (“People who identify as Black, African American, or African continue to be overrepresented among the population experiencing homelessness. People who identify as Black made up just 12% of the total U.S. population and 21% of the U.S. population living in poverty but were 32% of all people experiencing homelessness.” (emphasis omitted)).

LGBTQ community,⁴³ afflicted with mental-health disorders,⁴⁴ and more likely than the average person to abuse drugs or alcohol,⁴⁵ all of which makes opposition to housing for the homeless especially vociferous. The passion of the objectors makes their opposition particularly salient for elected officials. At the same time, proponents of the proposed housing⁴⁶ may not be identifiable, may not be organized as a coalition,⁴⁷ and often do not have financial stakes in the controversy equal to the homeowners or landlords who fear the proposed shelters might affect their property values.⁴⁸

The land-use system works decidedly in favor of those who oppose homeless shelters by limiting the number and location of properties zoned for multifamily housing, temporary shelters, or social-service facilities.⁴⁹ Even when a jurisdiction recognizes the need for such facilities, few parcels are typically zoned as of right for them—such that discretionary processes are needed to secure permits.⁵⁰ Those discretionary processes involve public hearings and other opportunities for protest, and they typically involve significant time and expense.⁵¹ Opponents generally can pursue legal challenges if the proposed use is approved, which involves yet more discretion and imposes even more delay and cost.⁵²

The difficulty of siting shelters and income-restricted housing goes even beyond the well-documented obstacles that developers face in getting any housing built.⁵³ Local governments and private developers seeking to build homeless shelters or income-restricted housing often face other constraints as

43. M.H. Morton, G.M. Samuels, A. Dworsky & S. Patel, *Missed Opportunities: LGBTQ Youth Homelessness in America*, CHAPIN HALL AT THE UNIV. OF CHI. 3 (2018), <https://www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf> [<https://perma.cc/GHV7-Y6MX>] (“LGBTQ youth are at more than double the risk of homelessness compared to non-LGBTQ peers.”); see also Jonah DeChants, Amy E. Green, Myeshia N. Price & Carrie Davis, *Homelessness and Housing Instability Among LGBTQ Youth*, THE TREVOR PROJECT 4 (Feb. 3, 2022), <https://www.thetrevorproject.org/research-briefs/homelessness-and-housing-instability-among-lgbtq-youth-feb-2022> [<https://perma.cc/4Y5M-44VF>] (“Overall, 28% of LGBTQ youth reported experiencing homelessness or housing instability at some point in their lives”).

44. See *supra* note 34.

45. See Coombs et al., *supra* note 35.

46. Proponents include, for example, people who need shelter or might need it in the future, residents in other neighborhoods or jurisdictions who have (or believe they have) already done their fair share to help, and advocates whose values compel them to stand up for the households who would be sheltered.

47. See, e.g., JERUSALEM DEMSAS, ON THE HOUSING CRISIS 118-37 (2024).

48. See generally WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (hypothesizing that homeowner participation in local-government politics is motivated by a desire to protect their home property values).

49. See DEMSAS, *supra* note 47, at 132-36.

50. See, e.g., Christian Britschgi, *Labyrinthine Zoning Rules Restricted Homeless Shelters During the Pandemic*, REASON (July 2022), <https://reason.com/2022/06/11/zoning-vs-the-good-samaritan/?nab=1> [<https://perma.cc/JB7M-3FLR>].

51. *Id.*

52. *Id.*

53. Those obstacles are well-documented most recently in, for example, YONI APPELBAUM, STUCK 202-23 (2025); and ROBERT C. ELLICKSON, AMERICA’S FROZEN NEIGHBORHOODS 111-131 (2022).

well. First, finding land on which these facilities might be built is difficult in many cities, where the need for schools, parks, mass transit, highways, and other critical infrastructure has consumed the stock of land the government already controls. The market for land is expensive and politically constrained, and acquisition of land by the government is subject not just to restrictions on the use of eminent domain, but also on debt limits,⁵⁴ land-use review procedures,⁵⁵ and environmental reviews.⁵⁶ Moreover, and importantly for our core argument, landowners may be reluctant to sell their land knowing that it could be put to use in a way that will generate neighborhood opposition, especially when individual or retail tenants of the landowner's other neighborhood properties may fear that they will be affected.⁵⁷ Similarly, a landowner or investor who has other property interests in the neighborhood that he may wish to sell in the future may worry about the effect that the proposed use could have on the value of those interests or on the publicity and ill will that the sale will generate.⁵⁸ Even landowners that have no other interests in the immediately surrounding area may fear the reputational effect of selling for uses that community groups, elected officials, and others may find objectionable.⁵⁹

Not just any land will do for homeless shelters. Such housing needs to be near transit, schools, job opportunities, and social-service facilities. Further, acquisition of land for temporary or permanent housing that the government is financing, building, or operating may be subject not only to market constraints and land-use rules, but also to state or local fair-siting rules, such as New York

54. See, e.g., N.Y.C. ADMIN. CODE § 25-412 (2024).

55. See, e.g., N.Y.C. CHARTER ch. 8, § 197-c (2025); CITY OF L.A. MUN. CODE § 12.32 (2024); *New Zoning Code (Chapter 1A)*, L.A. CITY PLAN. (2024), <https://planning.lacity.gov/zoning/new-code> [<https://perma.cc/8VSV-HD9N>]; MUN. CODE OF CHI. ch. 17-13 (2024) (describing Chicago's review-and-approval procedures for zoning ordinances).

56. See N.Y. ENV'T CONSERV. LAW § 8-0101 et seq. (McKinney 2024); see also *State Environmental Quality Review Act: Frequently Asked Questions for Local Officials*, N.Y. STATE DEP'T OF STATE (2024), <https://dos.ny.gov/system/files/documents/2024/09/seqr-faq-for-local-officials.pdf> [<https://perma.cc/B5HZ-K45C>] (answering dozens of questions regarding procedures government agencies in New York must follow whenever they enact rules regarding, or take discretionary action over, projects that affect the environment).

57. Ruschell Boone, *Maspeth Residents March to Hotel Owner's Home to Protest 'Warehousing' Homeless in Their Neighborhood*, SPECTRUM NEWS N.Y. 1 (Sep. 25, 2016), <https://ny1.com/nyc/all-boroughs/news/2016/09/24/maspeth-residents-march-to-hotel-owner-s-home-to-protest--warehousing--homeless-in-their-neighborhood> [<https://perma.cc/EPN4-L6FR>]; Laura Nahmias, *After Protests, de Blasio Administration Scales Down Maspeth Shelter Plan*, POLITICO (Oct. 11, 2016), <https://www.politico.com/states/new-york/city-hall/story/2016/10/de-blasio-administration-folds-on-maspeth-shelter-106261> [<https://perma.cc/9E5A-8J5Z>].

58. Robert Pozarycki, *Protests, Politics and False Promises: The Definitive, Six-Year History of the Glendale Homeless Shelter War*, QNS (Aug. 26, 2019), <https://Qns.Com/2019/08/Protests-Politics-and-False-Promises-the-Definitive-History-of-the-Glendale-Homeless-Shelter-War> [<https://perma.cc/G42R-M83S>].

59. For examples of the kinds of media attention that can be focused on those involved in providing shelter, see, for example, David Brand, *Pressed for Shelter Space, NYC Turns to Notorious Landlords with Ties to Mayor's Chief of Staff*, CITY LIMITS (July 18, 2022), <https://citylimits.org/pressed-for-shelter-space-nyc-turns-to-notorious-landlords-with-ties-to-mayors-chief-of-staff> [<https://perma.cc/TX7K-S6S6>]; and Amy Julia Harris, *He Made the 'Worst Landlords' List, But New York Relies on Him*, N.Y. TIMES (Dec. 20, 2021), <https://www.nytimes.com/2021/12/20/nyregion/nyc-homeless-levitan-de-blasio.html> [<https://perma.cc/2FLS-LNSC>].

City's Fair Share Criteria.⁶⁰ It also may be subject to the federal Fair Housing Act's Affirmatively Furthering Fair Housing mandate,⁶¹ or to state or local environmental-justice and racial-equity requirements.⁶²

Once land (or an option to buy land) is secured, the permitting process for the building must begin, with all of the restrictions and political controversy those processes involve.⁶³ Efforts to permit shelters have resulted in protests not just at the site, but at the homes or places of worship of owners and government officials proposing or supporting the proposal and, indeed, have involved violent acts against the property of those officials.⁶⁴ Politicians understand that they can lose an election over their policies on temporary or permanent housing and social services for families and individuals who are unhoused.⁶⁵ Many proposals are abandoned because of the cost and risk involved in the process. Even those that persist become exponentially more expensive because they can be held up for more than a decade by the land-use processes and legal challenges to permits granted in those processes.⁶⁶

Grants Pass threatens to make a Herculean feat even more difficult. By holding that the "Eighth Amendment . . . does not authorize federal judges to . . . dictate this Nation's homelessness policy,"⁶⁷ the Court allows jurisdictions

60. N.Y.C. CHARTER ch. 6, §§ 203-204 (2025); Jacob Bogitsh, Annie Levers & Robert Callahan, *Fair Share? Siting New York City's Municipal Facilities*, OFF. OF THE N.Y.C. COMPTROLLER, BUREAU OF POL'Y & ORG. (Nov. 9, 2023), <https://storymaps.arcgis.com/stories/0bb62803d9d44ade81f16de2cdc378e4> [<https://perma.cc/AR67-C7QM>].

61. 42 U.S.C. § 3608(e)(5); *see also* NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 154 (1st Cir. 1987) (holding that Title VIII imposes on HUD a duty to do more than merely refrain from discriminating and that HUD's failure to affirmatively further Fair Housing Act policies is subject to judicial review); Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (describing duties imposed on HUD to address discrimination); Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 820 (3d Cir. 1970) (same).

62. *See, e.g.*, Racial Equity Achieves Results (REACH) Amendment Act of 2020, D.C. LAW 23-181 (codified at D.C. CODE § 2.1471.02); David Brand, *Council Votes to Make Racial Impact Studies Part of NYC Land Use Process*, CITY LIMITS (June 18, 2021), <https://citylimits.org/council-votes-to-make-racial-impact-studies-part-of-nyc-land-use-process> [<https://perma.cc/5S87-SS28>]. For a discussion of how people experiencing homelessness face environmental injustices, *see generally* Erin Goodling, *Intersecting Hazards, Intersectional Identities: A Baseline Critical Environmental Justice Analysis of US Homelessness*, 3 ENV'T & PLAN. E: NATURE & SPACE 833 (2020).

63. *See, e.g.*, DEMSAS, *supra* note 47, at 134-36.

64. *See, e.g.*, Max Parrott, *Glendale Homeless Shelter Protesters Take the Fight to the Landlord's House and Temple*, QNS (Apr. 15, 2019), <https://qns.com/2019/04/glendale-homeless-shelter-protesters-take-the-fight-to-the-landlords-house-and-synagogue> [<https://perma.cc/5GQL-ZXJ5>]; *Concerned About New Shelters, Protesters Demonstrate Outside Home of NYC Homeless Services Commissioner*, CBS NEWS N.Y. (Mar. 18, 2019) <https://www.cbsnews.com/newyork/news/homeless-shelters-new-york-city-department-of-homeless-services-eric-ulrich-steve-banks> [<https://perma.cc/6X7Q-XTRT>].

65. Michael S. Goldberg, *US Mayors Say Homelessness Crisis Falls to Them, But They Lack Support and Funding*, B.U. TODAY (Jan. 20, 2022), <https://www.bu.edu/articles/2022/us-mayors-lack-support-funding-for-homelessness-crisis> [<https://perma.cc/46KN-ZKKG>].

66. Even when the local government wins all the lawsuits, the litigation may delay the project long enough to allow opponents to finally find a sympathetic ear in a later administration. *See, e.g.*, Samantha Maldonado & Katie Honan, *Adams Nixes Senior Apartments at Elizabeth Street Garden, Stunning Housing Advocates*, THE CITY (June 23, 2025), <https://www.thecity.nyc/2025/06/23/elizabeth-street-garden-haven-green> [<https://perma.cc/2464-53K5>].

67. City of Grants Pass v. Johnson, 603 U.S. 520, 560 (2024).

to do what too many have always done through exclusionary zoning—foist the responsibility for housing lower-income residents onto other local governments.⁶⁸ Even where land might be available and suitable for the temporary and permanent housing needed to address the crisis of homelessness, the jurisdictions in which that land sits therefore may simply refuse to allow it to be used for emergency or permanent housing for the homeless, putting even more pressure on the land available to jurisdictions that do step up to house those who need housing.

II. Can Existing Public-Use Theories Accommodate Housing for the Homeless?

In this Part, we survey the scholarly literature to extract their interpretations of public use and whether these accounts would justify using eminent domain for creating homeless shelters.

A. Narrow Views of Public Use

Many economic-minded scholars have argued that the eminent-domain power (more specifically, the public-use clause) should be constructed as a tool to overcome the “holdout” problem amongst property owners.⁶⁹ The holdout problem arises when a land parcel is essential to a land-assembly effort or a development project or when a parcel is not essential, but its absence from the project will make development costs much higher.⁷⁰ The famous “nail houses”

68. See, e.g., Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 390-402 (1977); S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 724 (N.J. 1975). See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing how jurisdictions have engaged in exclusionary zoning).

69. See Merrill, *supra* note 13; Thomas J. Miceli, *Free Riders, Holdouts, and Public Use: A Tale of Two Externalities*, 148 PUB. CHOICE 105, 106 (2011); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 71 (8th ed. 2011); Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993); THOMAS J. MICELI, *THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE* 33 (2011); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 530 (2009). Cf. Thomas W. Merrill, *The Misplaced Flight to Substance*, 19 PROBATE & PROP. 16, 18 (2005) (proposing to “reinforce the procedural protections” for owners of condemned property rather than tying the hands of governments regarding the permissible ends of eminent domain).

70. Various scholars have proposed ways to solve holdout problems by mechanisms other than eminent domain. See, e.g., Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1467 (2007); Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1490 (2016) (proposing the floating fee, under which “the estate in land that an owner holds is not immutably moored to a fixed set of geographic coordinates, but instead represents a portable claim over equivalent property”); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1433-44 (2005) (proposing entitlements subject to self-made options); Lee Anne Fennell, *Property and Precaution*, 4 J. TORT L. 1, 35 (2011) (proposing a system under which a landowner holds an entitlement subject to an index-priced option); Abraham Bell & Gideon Parchomovsky, *Governing Communities by Auction*, 81 U. CHI. L. REV. 1, 11-12 (2014); ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 54-55 (2018) (proposing that every property is accompanied by a call option through which anyone willing to exercise the option can simply pay the strike price set by the property owner).

in China,⁷¹ where a single homeowner refuses to relocate while all the neighbors move out, and the development can take place only around the house, are a good illustration of holding out. The holdout landowners are willing to sell, but they delay signing off to acquire the lion's share of profits.

As a first cut, homeless shelters appear to fit uneasily to the holdout theory of public use. Homeless shelters, unlike transportation infrastructure or other large and integrated development projects, do not generally require a large swath of land. Presumably, housing for the homeless can be sited in many different locations within a jurisdiction; thus, given that the potential sellers of land to public or private parties who operate housing for the homeless are presumably infinite, no property owners should be considered holdouts in this context.

Dan Kelly argues that because private parties can use secret buying agents to overcome the holdout problem, it is unnecessary for the government to exercise its eminent-domain powers on behalf of private parties. Using the eminent-domain power may even be harmful because there is inherently a risk that it will result in some landowners being forced to give up their land in exchange for insufficient compensation. Thus, the scope of public use should be interpreted in a way that will not justify the use of the eminent-domain power on behalf of private parties.⁷² To create shelters or permanent housing for the homeless, however, it is often infeasible for local governments to hide behind buying agents. Jurisdictions are subject to media scrutiny, and they generally lack the authority to constitute secret entities. More specifically, the law requires freedom-of-information disclosures,⁷³ open meetings,⁷⁴ and public hearings on budgets.⁷⁵ Moreover, commitments to community engagement and transparency⁷⁶ may make secret buying agents normatively problematic.

Richard Epstein argues for another narrow theory that equates public use with public goods in the economic theory.⁷⁷ Public goods that are nonrivalrous and nonexcludable (e.g., national defense) are rarely provided by the private

71. See, e.g., Shitong Qiao & Frank Upham, *The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform*, 100 IOWA L. REV. 2479, 2505 (2015).

72. See Daniel B. Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORN. L. REV. 1, 4-7 (2006).

73. State freedom-of-information laws are catalogued by the National Freedom of Information Coalition. *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COAL., <https://www.nfoic.org/state-freedom-of-information-laws> [<https://perma.cc/B8JV-PEPZ>].

74. For a general explanation of state open-meeting acts, see *What is the Open Meetings Act?*, CIVICPLUS (Oct. 24, 2023) <https://www.civicplus.com/blog/am/what-is-the-open-meetings-act> [<https://perma.cc/Z9T9-HXZT>]. For a catalog of open-meetings laws by state, see *Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide> [<https://perma.cc/ZXT4-LYHH>].

75. For an explanation of the type of public-engagement processes required in, for example, North Carolina, see Kara Millonzi, *Notices and Public Participation in the Budgeting Process*, UNIV. OF N.C. SCH. OF GOV'T (May 18, 2015), <https://canons.sog.unc.edu/2015/05/notices-and-public-participation-in-the-budgeting-process> [<https://perma.cc/M7BS-3RJ5>].

76. See Kelly, *supra* note 72, at 5.

77. See EPSTEIN, *supra* note 12, at 166.

sector;⁷⁸ hence, the exercise of the eminent-domain power can be justified to secure goods that are otherwise unavailable on the market. However, using the eminent-domain power to provide housing for the homeless would presumably fail the test under the public-good theory, as shelters and permanent housing are rivalrous and excludable (and thus are typical private goods).

A third school of thought interprets public use literally. As described in the model eminent-domain law published by the Institute for Justice, “‘Public use’ means exclusively: (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by a public agency; (2) the possession, occupation and ownership of land necessary for operations of a utility that serves the general public”⁷⁹ These restrictive criteria would prohibit the use of eminent domain to house the homeless because it would be a stretch to argue that housing for the homeless serves the general public⁸⁰ and because, in practice, private entities often operate homeless shelters. It might be argued that private hospitals serve only the sick but are nevertheless considered to serve the general public. On the other hand, everyone gets sick once in a while, but the probability of becoming homeless for most people is close to zero. Behind a veil of ignorance, anyone could worry that they might become homeless, so perhaps the rule should allow the exercise of eminent domain to address even very low-probability needs. But this way of thinking could justify almost any land use as serving the general public, which is not what the proponents of this view would accept. To sum up, under the literal interpretation of the public-use clause, the eminent-domain power cannot be used to solve the challenges of housing the homeless.

Finally, some scholars have argued for a complete ban on condemnations for economic-development projects based on the possibility that these takings will be abused to advance private interests.⁸¹ However, homeless shelters are not justified as economic-development projects, and although such projects sometimes include, or are paired with, permanent income-restricted housing,

78. For an exception, see the study by Ronald Coase, Nobel Laureate in Economics, on the lighthouse as an example of government service, Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

79. *Model Eminent Domain Legislation*, INST. FOR JUSTICE § 100.01 (Apr. 1, 2021), <https://ij.org/wp-content/uploads/2021/04/04-01-2021-Model-Eminent-Domain-Legislation-for-Remediation-of-Blight-and-Necessity.pdf> [<https://perma.cc/GE6L-LB2T>]; see also Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 879 (2004) (arguing that a government taking satisfies the public-use requirement in two circumstances: (1) if the public (that is, the government) retains ownership of the property or (2) if the government transfers the property to a private entity that then must provide public access to the property and is subject to common-carrier regulation).

80. Homeless shelters arguably serve the general public indirectly through addressing the externalities of homelessness. Such indirect functions, however, could be used to justify almost any public project.

81. See, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 187 (2007); Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1007; ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 204-31 (2015); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 543 (2005).

such housing is rarely the main driver of the project. A restriction on the exercise of eminent domain for economic development therefore should not be a significant hurdle to governmental efforts to provide housing for the homeless.

B. Broad Views of Public Use

Other scholars take a broader view of the public-use clause. Abraham Bell and Gideon Parchomovsky argue that a narrow construction of public use encourages governments to rely on other tools (e.g., zoning laws, taxes, etc.) that do not require that property owners be compensated to achieve the same outcome.⁸² Along this line of thought, we can imagine that if local governments that struggle to provide emergency shelters and permanent housing cannot use the eminent-domain power, they may try other, perhaps even less desirable, means to secure land.⁸³ It is not clear, however, whether effective alternatives might exist. For example, inclusionary zoning (that is, giving additional building capacity in exchange for developers' provision of shelters or permanent housing for the homeless) would encounter similar, if not stronger, opposition from the local communities.⁸⁴ In any event, such a "detour" does not guarantee that housing for the homeless will be sited in the most appropriate locations or in the most effective models.⁸⁵

82. See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1416 (2006). Cf. Epstein, *supra* note 77, at 152 (arguing that the issue of takings cannot be separate from the general issue of zoning).

83. New York City's experiment with so-called "cluster" shelters, in which the City rented a number of units in a rent-stabilized building to serve as housing for the formerly homeless, is an example of such a tactic. See, e.g., Nathan Tempey, *Thousands of Rent-Stabilized Apartments at Risk as NYC Phases Out Controversial Homeless Shelter Program*, GOTHAMIST (June 29, 2017), <https://gothamist.com/news/thousands-of-rent-stabilized-apartments-at-risk-as-nyc-phases-out-controversial-homeless-shelter-program> [<https://perma.cc/WZR5-LTZ3>].

84. Gerald Dickinson argued for inclusionary takings legislation which "would trigger remedial *affordable housing* action to mitigate the phenomenon of exclusionary condemnations in dense urban areas and declining suburban localities. An inclusionary takings statute would also mandate that local municipalities and private developers provide *affordable housing* in new developments benefiting from eminent domain takings." Gerald S. Dickinson, *Inclusionary Takings Legislation*, 62 VILL. L. REV. 135, 136 (2017) (emphasis added); see also Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 882 (2014) (arguing to use a variety of tools such as land-assembly districts and community-benefit agreements to achieve inclusionary eminent domain so as to preserve affordable housing); Aaron Mackay, *The Living Constitution: Why the Supreme Court Must Part Ways With Exclusionary Eminent Domain*, 99 IND. L.J. 619, 636-38 (2024) (arguing that using eminent domain to facilitate the creation of affordable housing is consistent with the *Kelo* ruling). Our position and proposal to use eminent domain to create affordable housing is close to Dickinson's, though Dickinson's proposal has a much broader stroke and scope than ours. In addition, Dickinson's proposal is not tied to the endogeneity of thin markets that is created by fair siting and other rules limiting what land is available for shelters.

85. For example, many inclusionary zoning regimes require the "inclusionary" income-restricted housing to be mixed in randomly with the market-rate housing to avoid "poor doors" or "poor floors" that stigmatize the residents of the affordable housing. But shelters are configured much differently to allow efficient delivery of social services, as are the permanent supportive housing that many formerly homeless individuals need.

Bill Fischel endorses⁸⁶ the hands-off position the courts took in *Poletown Neighborhood Council v. City of Detroit*⁸⁷ and *Hawaii Housing Authority v. Midkiff*.⁸⁸ He proposes a test with two stages. The first stage inquires whether “the project being funded is consistent with the traditional use of eminent domain in the state.”⁸⁹ The second stage, relevant to the question here, “gives the community a chance to justify a nontraditional use that transferred the property to a private owner.”⁹⁰ Housing for the homeless, however, is unlikely to be favored by the community.

Jed Rubinfeld argues that “public use” should be read as specifying which takings of property, although otherwise constitutional, require compensation. For example, when a state orders the destruction of contaminated trees,⁹¹ it need not pay compensation not because there is no “taking” but because the state does not put the trees into “use.” Reading “public use” in this way avoids rendering “public use” meaningless and duplicative of the “legitimate state interest” test of the Due Process and Equal Protection Clauses.⁹² Under Rubinfeld’s theory, the public-use requirement does not impose a substantive restraint on the government’s exercise of eminent domain, including in our context of homeless shelters or permanent income-restricted housing. That said, this construction of the public-use clause is too broad in our view, as we believe that generally speaking, the public-use clause should impose *some* substantive constraint on the use of the eminent-domain power. Under the Rubinfeld formulation, New York City may, out of concern for the population density and development density of Manhattan, impose a permanent moratorium against development on any currently vacant land in Manhattan. As the state does not put such land to use, Rubinfeld’s theory would not require just compensation for the landowners.

C. Intermediate Views on Public Use

Some scholars hold an interpretative approach that sits in the middle by making the public-use test context dependent. Horton and Levesque, based on Justice Kennedy’s concurrence in *Kelo*, set out a ten-factor test to be applied to every condemnation to determine if the public-use requirement has been satisfied:

86. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 74-75 (1995).

87. 304 N.W.2d 455, 457 (Mich. 1981) (holding as constitutional the 1980 City of Detroit’s condemnation of an entire neighborhood to make room for a new General Motors plant).

88. 467 U.S. 229 (1984) (holding as constitutional Hawaii’s Land Reform Act of 1967, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees).

89. William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 949.

90. *Id.*

91. The example here comes from *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

92. See Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077, 1079-80 (1993).

(1) Will a public body own or operate the property? (2) How specific is the stated use? (3) Is it reasonably possible the stated use will actually succeed? (4) Is the stated use clearly a pretext? (5) Does the public gain outweigh any private gain? (6) Is there clearly improper favoritism? (7) Is there clearly improper targeting of a disfavored group? (8) Is the particular property in question on the periphery of the project? (9) Is there a comprehensive plan that any private developer must follow? (10) Were any private beneficiaries known at the time of the vote to condemn?⁹³

A well-considered plan for homeless shelters or permanent income-restricted housing should pass this test. In addition, Nicole Garnett argues for means-end scrutiny of government exercises of eminent domain, which “abandons rational-basis review and require[s] the government to link the means by which it acquires land to the *particular* purpose (rather than a conceivable one) for the acquisition.”⁹⁴ A concrete plan to house the homeless again should pass this test.

While these factors and considerations are valid and helpful, they do not distinguish thoughtful plans to house the homeless from more opportunistic and abusive schemes to secure land for private profit at the property owner’s and government’s expense. History unfortunately provides many examples of profiteering off the desperation of the unhoused, so any plan to use eminent domain to acquire land needed to house the homeless should be rigorously interrogated. But the suggested ten-point test is geared more to assessing the concreteness of the plans to use the land than to ensuring how the proposed housing will balance the need to meet the emergency, be fair to neighbors, achieve equity and fair-housing goals, and avoid political disasters. Given the fierce resistance to housing for the homeless, and opponents’ use of the courts to delay and deter, the misfit between the dangers eminent domain poses in the homelessness context and the ten-point test is likely to render the use of eminent-domain power so prone to litigation that it becomes useless.

III. Allowing the Use of Eminent Domain to Address Hold-Inclineds

We propose that the public-use clause be interpreted to allow the use of the eminent-domain power to combat both the holdout and hold-inclined problems. This position makes our interpretation of public-use broader than the theories in Section II.A, narrower than those in Section II.B, and crisper than those in Section II.C. We do not favor a very broad interpretation of the public-use clause, given the danger that the eminent-domain power can be abused by overly optimistic or short-sighted officials and private developers looking to acquire property on the cheap. Indeed, the broad exercise of eminent domain may create,

93. See Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1426-27 (2016).

94. See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 938 (2003).

rather than ameliorate, the problem of displacement and homelessness, as the history of urban renewal made all too clear.⁹⁵ Low-rent apartment buildings and houses often are the least costly, both economically and politically, to condemn to make way for other projects without providing an offsetting increase in housing supply for lower-income households.⁹⁶

On the other hand, the existing narrow theories fail to account for the particular challenges of thin markets resulting from the panoply of restrictions imposed upon the siting of housing for the homeless. The law of eminent domain needs to take into account the practical realities of providing housing for those who might otherwise be homeless. Otherwise, eminent domain may become yet another roadblock in the way of meeting the needs of households most vulnerable to housing instability.

More specifically, we argue that there are two scenarios in which the use of eminent domain to create homeless shelters should be allowed. First, some owners of potential sites are holdouts. An unduly narrow interpretation of the public-use clause actually fosters the abuse of market power because the few “bottom of the barrel” developers willing to put their land to use for shelters are able to extract enormous rents due to the shortage of land that can be purposed for homeless shelters or permanent income-restricted housing, for reasons elaborated above. Therefore, the use of the eminent-domain power in this context is essentially combating monopoly.⁹⁷

Second, some owners of potential sites are hold-inclined. Potential sellers of land that could be used for emergency or permanent housing for the homeless are far fewer than a casual observer might think. Constraints resulting from fair-housing and fair-siting requirements, along with locational requirements and financial and political risks involved in the development of housing for the homeless,⁹⁸ increase the bargaining power of landowners who own the most ideal sites. In addition, a social norm against selling property to operators of homeless shelters or permanent income-restricted housing may prevent landowners who expect to stay connected with the community from selling—or at least make them reluctant to sell *voluntarily*.⁹⁹ As such, these landowners are not the typical holdouts, but neither are they typical hold-ins. Rather, these landowners (hold-inclineds) are privately willing to sell but publicly resistant to part with their properties for fear of damaging their reputation within the community. They would like to sell at the going price but do not want to be perceived as selling

95. See Michèle Alexandre, “Love Don’t Live Here Anymore”: *Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENV’T AFFS. L. REV. 1, 24 (2008) (proposing to redefine public purpose more narrowly to better protect the interests of “economically marginalized people,” and specifically to prevent their displacement as a result of economic development takings).

96. Cf. David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 7 (2009) (arguing that condemnations that work to exclude low-income households from middle or upper-class neighborhoods or localities, whether intended to or not, should be subject to a heightened-level of scrutiny).

97. See POSNER, *supra* note 69, at 71.

98. See *supra* notes 53-66 and accompanying text.

99. See *supra* notes 57-59 and accompanying text.

willingly. If they are forced to sell through the government's exercise of the eminent-domain power, they may escape the social sanction.

These dynamics do not exist, at least to the same degree, in the traditional context of assembling land for public utilities, nor in the economic-development setting. No prior work, to our knowledge, has engaged with these dynamics, which provide more justification for the use of the eminent-domain power than the traditional holdout theory. Essentially, the use of eminent domain can take the heat off of these wary owners. The eminent-domain power is needed, not to force these landowners to sell, as they are in fact secretly willing to sell, but to give those owners "cover." The use of eminent domain provides such landowners an excuse for ceding land for the purpose of creating locally undesirable land uses (LULUs).

Moreover, on a broader level, giving state and local governments more power to use eminent domain to acquire land for housing the homeless can reduce neighborhoods' concerns that they will be forced to bear a disproportionate burden in hosting such housing. Without the threat of eminent domain, every neighborhood knows that other neighborhoods or jurisdictions may be able to escape their obligations by claiming not to have suitable land. Allowing government more power to secure land in every neighborhood within a local government—or every jurisdiction within a state—to house the homeless can thus help ensure a fairer distribution of shelters. Neighborhoods may worry that if they open the door to homeless shelters and income-restricted housing, they will become the only host for such housing.¹⁰⁰ Therefore, neighborhoods may resist proposed projects by, for instance, securing zoning so restrictive that no such housing is economically feasible.¹⁰¹ If a jurisdiction can use eminent domain to acquire the necessary land, cooperative neighborhoods would not have to worry as much about being asked to do more than their fair share, and therefore might fight siting proposals less. Having the eminent-domain power makes it easier for governments to insist on fairer siting of emergency shelters and other housing across all neighborhoods.

Our proposal does contain some potential for government abuse, but we believe that there exist several mitigating factors that can help minimize the potential for this abuse. It is possible, for example, that governments seeking to exercise eminent domain broadly for emergency or permanent housing for the homeless could create the thin market that they could then use to justify eminent

100. See, e.g., Julia Perkins, *Neighbors Fight 'Ludicrous' Plan for Homeless Shelter at Former Danbury Motel*, NEWSTIMES (Sep. 26, 2021), <https://www.newstimes.com/local/article/Neighbors-fight-ludicrous-plan-for-homeless-16485729.php> [<https://perma.cc/V8DU-4ZH5>] ("Neighbors said they want to support homeless individuals, but that the shelter is bigger than Danbury needs. The shelter will end up serving the region—a burden Danbury shouldn't have to take on alone, they argued."); see also Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORN. L. REV. 1001, 1029 n.145 (discussing the consequentialist arguments that burdens such as those that locally undesirable land uses impose should be distributed fairly in part because people are more likely to bear their fair share of burdens if they believe others who are similarly situated will do the same); Been, *supra*, at 1068, 1069-70 (discussing dispersion approaches "designed to reassure neighborhoods that they will not receive more than their fair share of group homes").

101. DEMSAS, *supra* note 47.

domain (by zoning land restrictively, for example). This concern could be addressed through requirements that the government seeking to use the eminent-domain power (1) document the specific problems that create a shortage of suitable sites and (2) assess what other steps could be taken to make more land available. But many of the requirements that might make land unavailable for emergency or permanent housing for the homeless are imposed by other levels of government, or are necessary for broader goals, so any such fine-tuning will need to be carefully crafted. Moreover, jurisdictions could abuse their power by using the pretext of housing the homeless to exercise eminent domain then allowing the land to be used for some other purpose. But this potential for abuse could be managed with time limits and options for the original owner to repurchase the land (time limits would have to take into account the delays inherent in siting LULUs).

Our proposal focuses on the challenges of providing emergency and permanent housing for the homeless, rather than proposing a more universal theory about the appropriate limits to the use of eminent domain. That focus is driven in part by the threat that *Grants Pass* will allow exclusion of the homeless to repeat the history of exclusionary zoning aimed at black and brown and lower-income households. It is also driven by the concern that considerable experience in working within the existing regime is required to understand the ways in which legal and practical constraints may affect a land market. There may be other contexts in which theories about holdouts are too narrow to account for those constraints. But understanding which contexts pose that concern requires case-by-case analysis by those steeped in the details of the legal and market regimes at issue. Housing for the homeless is a particularly acute problem because of the vociferousness of the opposition to providing shelter, the interplay of racism and classism with that opposition, the myriad of federal, state, and local regulations that govern shelters and affordable housing, the small number of for-profit providers involved (with considerable controversy) in providing shelters, the number and scale of factors that drive the extent and timing of homelessness, and many other particular features of the problem of homelessness. But there may be other areas in which similar factors would make owners of property hold-inclined to such a degree that the law of eminent domain should take the problem into account. We hope our proposal will generate other examples of hold-inclined owners and spur further refinement of the theories of eminent domain to account for the challenges those examples reveal.

Conclusion

Grants Pass empowers jurisdictions to exclude the homeless, while post-*Kelo* restrictions on eminent domain hobble those willing to help. Narrow readings of public use ignore the fact that the scarcity of suitable sites for emergency or permanent housing for the homeless is often created by law, politics, and social norms—not just by markets. This oversight makes it harder to address homelessness where it is most urgent.

Our concept of the hold-inclined owners (who are willing to sell privately but constrained by reputational or relational costs) captures a recurring barrier in these legally thinned markets. Interpreting the public-use clause to permit the exercise of eminent domain to address both holdouts and hold-inclined owners would give committed jurisdictions a crucial tool to secure sites that private service providers could use to house the homeless—while procedural safeguards can guard against abuse.

Constraints on the power of eminent domain should not be a relic of urban renewal excesses nor a casualty of anti-*Kelo* backlash. Properly tailored, that power can be a precise instrument for solving one of our most intractable public problems and ensuring that every community shares in the responsibility to house the unhoused.