Debates Over "Public Use" in the State Constitutional Conventions

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Historians and legal scholars alike have previously noted that the meaning of "public use" began to change in the nineteenth century, continuing into the twentieth. In the hands of some state courts, "public use" expanded from an approach dependent on "use by the public" to one that at least occasionally tolerated "use for the public benefit." This shift in meaning laid the groundwork for Berman v. Parker*, the urban-renewal decision from the United States Supreme Court that provided support for the broad reading of "public use" in the 2005 decision* Kelo v. City of New London*.*

In this Article, I focus my attention on one of the vectors for the emergence of "public benefit" conceptions of the public-use requirement: state constitutional text itself. In the nineteenth century, several states specifically authorized takings for private use in their state constitutions, usually to benefit local and economically critical industries. In other states, this approach was explicitly rejected.

Although these private-use provisions have been noted by other scholars, this Article collects and examines them as a group, including the lessons about "public use" that one might glean from the fruitful and fascinating debates that these provisions engendered among nineteenth-century lawyers at constitutional conventions. The conventions are an important site for understanding the logic underlying "public benefit" conceptions of "public use." And they might shape the future of "public use" doctrine by offering historical grounding for alternative conceptions of the line between permissible and impermissible takings, whether as a matter of federal or state constitutional law.

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Introduction

On the twentieth anniversary of *Kelo v. City of New London*,[1] it is hard to know what to add to the volumes of literature and lawmaking that the case left in its wake.[2] For a historian, one of the most fascinating aspects of *Kelo* is how the different opinions in the case use history to understand what limits the words "public use" place on the state's exercise of its eminent-domain power. Did "public use" traditionally mean something as narrow as "use by the public," or could eminent domain be used for much broader and more extensive public purposes? Justice Stevens's majority opinion states that "while many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time[,] . . . . prov[ing] to be impractical given the diverse and always evolving needs of society."[3] What replaced it was a "broader and more natural interpretation of public use as 'public purpose,'" a vision that continued through twentieth-century decisions on urban renewal and deconcentrating land ownership.[4] Although Justice O'Connor's dissent does not reference much of the nineteenth-century history, she divided valid "public uses" into three categories: takings where the government takes title, takings where the ultimate use is open to the public, and takings that are followed by a "subsequent private use" but required "to meet certain exigencies" or avoid certain harms.[5] Justice Thomas's dissent offers a much narrower reading of the history, suggesting that the nineteenth-century case law illustrates, at best, deep conflict over the narrower and broader conceptions of public use, leading to compounding errors in twentieth-century cases that culminated in the *Kelo* decision.[6]

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

2. A non-exhaustive list of favorites in the post-*Kelo* literature includes ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (2015); Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751 (2009); 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 (2006).

3. *Kelo*, 545 U.S. at 479.

4. *Id.* at 480-82.

5. *Id.* at 498-500 (O'Connor, J., dissenting).

6. *Id.* at 512-17 (Thomas, J., dissenting).

Nineteenth-century materials indeed provide an abundance of evidence for examining "public use." Take, for instance, laws authorizing private roads: both judges and scholars have considered whether laws authorizing condemnations for private pathways support a broader understanding of the eminent-domain power.[7] Additionally, scholars have considered whether the "mill-dam acts," which authorized individuals to construct dams that flooded neighboring property as long as the flooders paid a fee, serve to support a broader interpretation of "public use."[8] Many of these mills were open to the public for use in grinding corn, but as grist mills came to be replaced by manufacturing mills not open to the public at large,[9] some states moved toward a broader conception of public use as public benefit to justify continued application of the statutes. Finally—and most pertinently, for this Article—both legislatures and courts began considering whether infrastructure like ditches and canals for drainage or irrigation could qualify as a "public use," even though this infrastructure was often constructed primarily for the benefit of one or a few landowners.[10]

Although plenty of battles over condemnations for ditches and canals were fought in court, one of the other ways that lawyers and landowners sought to enshrine protections for infrastructural uses was through state constitutional change. As I and others have observed, the late nineteenth and early twentieth centuries were a period of immense state constitutional innovation and experimentation.[11] There were numerous causes for this flurry of activity. Most obviously, as new states joined in the American West, they adopted their first constitutions, and as the states that seceded during the Civil War both left and rejoined the Union, they adopted revised constitutions as well.[12] Perhaps out of fear of missing out, older states too got in on the game.[13] "There were sixty-seven state constitutional conventions in the twenty-five-year period between 1851 and 1875—compared to seventy-eight total before that date, and fifty-four in the seventy-five years that followed."[14]

Around the time of the Civil War, states began experimenting with including constitutional language that would specifically authorize some private

7. These roads technically enabled the use of eminent domain for the benefit of a private party, though they were at least in theory open to the public. *See id.*; SOMIN, *supra* note 2, at 40-41; Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 601-08 (1949). For an example of a court striking down a private-road law as violating the "public use" requirement, see *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. Sup. Ct. 1843).

8. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 169-75 (1985); Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government*, J. ECON. HIST. 232, 237-40, 243-48 (1973); SOMIN, *supra* note 2, at 40, 47-49.

9. SOMIN, note 2, at 40.

10. Scheiber, *supra* note 8, at 43-48.

11. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 355-56 (2018); Timothy Sandefur, *Eminent Domain in the Constitutions of Arizona, Washington, and Other States*, 18 N.Y.U. J.L. & LIBERTY 167, 171-72 (2024).

12. Brady, *supra* note 11, at 355-56.

13. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 8-9 (2009) (providing a table of dates of state conventions, which shows older states like Connecticut, Illinois, Massachusetts, New York, and Ohio holding conventions between 1860 and 1920).

14. Brady, *supra* note 11, at 356.

takings—uses of the eminent-domain power that were beneficial in some larger sense because they enabled resource extraction or development but that primarily benefited one or a few owners. These private-use provisions are worth studying for a few reasons. First, while there have been excellent historical excavations of "public use" cases in this period,[15] state constitutional developments and debates surrounding "public use" provide powerful illustrations of how both lawyers and laypeople understood the federal and state limitations on the power of eminent domain. These conventions were not populated solely by lawyers. Farmers, miners, merchants, and other nonlawyer delegates played a central role in shaping debates about eminent domain. Their arguments, often derived from on-the-ground experience rather than legal precedent, complicate any attempt to treat 'public use' as a purely lawyerly construct. Second, as signals, the state constitutions themselves played an important, if slightly hidden, role in expanding notions of what qualified as a "public use," alongside developments in the case law.[16] It is telling that in one of the first federal cases to endorse a somewhat broad understanding of the limits on the eminent-domain power under the federal Constitution,[17] the Supreme Court referred expressly to the new state constitutions as evidence of the evolving needs of the public for a broader conception.[18]

This Article proceeds as follows. In Part I, I trace the emergence of "private use" provisions in state constitutional text in the late nineteenth century and the uneven spread of the language in midwestern and western states. Using debates in two states as case studies—California, which rejected a "private use" provision, and Idaho, which adopted a broad one—I closely examine the arguments delegates made in favor or against provisions that would enable individuals to obtain rights over neighboring property for irrigation, mining, drainage, or other purposes.

In Part II, I derive three larger themes from this close reading of the debates. First, federal law loomed large over the discussion, with delegates alternately recognizing court holdings that limited the application of the federal Takings Clause to the states while also worrying that either broader federal law or politics constrained their options. The discussions of federal law also highlight the interpretive tensions created by the participation of nonlawyers in the conventions, offering a rare window into how ordinary citizens as well as lawyers understood constitutional text and judicial precedent. Second, the debates provide new

15. Ilya Somin in particular has traced state-supreme-court interpretations of "public use" exhaustively as a matter of state constitutional law in the nineteenth century, categorizing them along a spectrum from narrower to broader interpretations. SOMIN, *supra* note 2, at 44-47.

16. These provisions have been examined by a handful of other scholars. *E.g.*, Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 654-64 (2008). In a pair of articles, Timothy Sandefur has also discussed some of the debates that I reference and quote in this Article. *See generally* Sandefur, *supra* note 11 (looking at debates in Washington and Arizona); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use*,*"* 32 SW. U. L. REV. 569 (2003) (examining "public use" debates in California).

17. Clark v. Nash, 198 U.S. 361, 370 (1905). As Somin notes, *Clark* was a Due Process Clause decision rather than a Takings Clause decision. SOMIN, *supra* note 2, at 125.

18. *Clark*, 198 U.S. at 370.

evidence about the deep controversy over narrow versus broad conceptions of public use, signaling a very uneven shift toward the broader twentieth-century conception of public use that would ultimately prevail in *Kelo* and some of the decisions leading up to it. Finally, and relatedly, the debates helpfully illustrate the centrality of necessity—the hope that some principle of true need would shape the implementation of the private-takings provisions. Given the reemergence of conceptions of necessity in recent takings jurisprudence, the private-use provisions may be worth examining for a better sense of what "necessity" really meant closer to the time the Fourteenth Amendment was drafted and adopted. Apart from this more general contribution, "necessity" might offer a useful, historically grounded principle for defining permissible from impermissible takings.

A word of warning at the outset: in other work, I have sounded some cautionary notes about relying too heavily on state constitutional debate material as definitive evidence of meaning or intent, given some of the weaknesses these publications exhibit as dependable source material.[19] I continue to hold that view. In this Article, however, I am most interested in how contemporary lawyers and others argued about "public use," making it somewhat less relevant whether those arguments happened in a speech or merely a contemporary writing.[20] I offer the evidence thus not for the truth of what was asserted on any given debate floor, but at least to give a sense of roughly contemporary arguments made by those who participated in drafting their states' founding documents.

I. Different Approaches to "Private Use" Takings

A. The Beginnings of "Private Use" Provisions

As Timothy Sandefur has observed in a recent article, provisions that would ultimately end up *authorizing* takings for "private use" actually seem to have gotten their start in provisions *banning* them.[21] When Alabama seceded from the Union in 1861, its new constitution set forth that "[p]rivate property shall not be taken for private use," then set forth exceptions for private "right[s] of way" and "depots, stations and turn-outs to works of public improvement," upon payment of compensation.[22] The provision arose out of a discussion of the power of local governments to tax.[23] At the time, state and local governments were deep in

19. Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1173.

20. *See id.* at 1179 (noting that delegates in several conventions evidently submitted remarks later and "there is no guarantee that what the speakers provided was the set of remarks actually uttered on the floor").

21. Sandefur, *supra* note 11, at 177.

22. ALA. CONST. of 1861 art. III, § 30.

23. THE HISTORY AND DEBATES OF THE CONVENTION OF THE PEOPLE OF ALABAMA 293-96 (William R. Smith ed., Montgomery, White, Pfister & Co. 1861).

conflict over local subsidies to railroads and the resulting fiscal crises.[24] As delegates considered how localities might raise and spend tax revenue, it invited broader discussion of the ways government could use its powers, including the eminent-domain power, for the gain of railroads and other private parties, and whether it should.

The proponent of the provision making explicit that "[p]rivate property shall not be taken for private use," Lyman Gibbons, had particular reason to be aggrieved about this issue: he had been the plaintiff in a case about public funding of railroads in which he had become familiar with some controversy over the "public use" requirement.[25] In an earlier case Gibbons cited, *Sadler v. Langham*, the Alabama Supreme Court had held quite explicitly that "[t]he legislature cannot, either with or without compensation, take private property for private use."[26] But the Alabama court had to grapple with precedent from Pennsylvania, *Harvey v. Thomas*, suggesting there was no constitutional limit on private takings as a matter of fundamental law.[27] It seems Gibbons perceived this as a split among the states and thus sought to be clear in the new state constitution. Interestingly, three years before the Alabama convention, the Pennsylvania Supreme Court had issued a rebuke of the judge who authored *Harvey* and quite clearly indicated that takings must at a minimum be for some identifiable public purpose.[28] Nevertheless, the Pennsylvania decision led Gibbons to recommend his state ban private takings for the avoidance of doubt.

Somewhat ironically, as bans on takings for private use spread beyond Alabama,[29] states experimented with the list of exceptions in ways that started to swallow the rule. Recall that Alabama in 1861 authorized private takings only for "right[s] of way" and, somewhat elliptically, "depots, stations and turn-outs to works of public improvement."[30] In debating its constitution of 1867-68, which was ultimately rejected by voters,[31] New York delegates added a provision to their takings clause that would have enabled laws to "be passed permitting the owners or occupants of lands to construct drains and ditches for agricultural purposes across the lands of others."[32] The provision led to a fierce debate, with some proponents worrying that authorizing such a "taking for private use" would

24. For a discussion of the issue and related changes in local-government law, see David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1553.

25. Sandefur, *supra* note 11, at 177-78.

26. 34 Ala. 311, 330 (1859).

27. Harvey v. Thomas, 10 Watts 63, 66-67 (Pa. 1840).

28. Hays v. Risher, 32 Pa. 169, 177 (1858) ("The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use, and there was no occasion for Judge Gibson's remark in *Harvey v. Thomas*, 10 Watts 63, that the constitution does not forbid such taking.").

29. Sandefur's article masterfully tracks some of the spread of bans and some confusion—including an apparent clerical error in South Carolina that licensed private takings. *See* Sandefur, *supra* note 11, at 181 & nn.65-66.

30. ALA. CONST. of 1861 art. III, § 30.

31. *Constitutions and Constitutional Conventions*, N.Y. STATE ARCHIVES, https://www.archives.nysed.gov/research/constitutions-and-constitional-conventions [https://perma.cc/3T3K-KQUQ].

32. 5 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 3544 (1868).

be unconstitutional.[33] As one delegate put it: "A man may just as well ask for the use of my property to build his house upon as to ask for the use of my property to dig a ditch across . . . ."[34] Others analogized the provision to the mill-dam laws, suggesting it was no more dangerous.[35] The provision's main proponent, Abraham Conger, argued in favor of enshrining the exception in the constitution both to increase the values of lands needing drainage and to limit pools of standing water, "a source of pestilence."[36] And a supporter pointed out that other landowners were acting in extortionate ways in the absence of such a privilege, rent seeking from those desperate to drain nearby lands. Ultimately, the proposed constitution allowed the legislature to pass laws permitting takings for "necessary drains and ditches for agricultural purposes," in addition to earlier language from the 1840s providing that legislatures could authorize expropriation for private roads.[37]

The Illinois legislature expanded this New York exception authorizing private takings for drains for agricultural land, and the New York example would become influential in other states.[38] In the Illinois state constitution of 1870, a provision authorized the state legislature to "permit[] the owners or occupants of lands to construct drains and ditches, for agricultural *and sanitary* purposes, across the lands of others."[39] The italicized language was new, but the debate from New York was quoted extensively when the provision was discussed,[40] and the delegates in favor were quite clear about their intent to supersede court cases suggesting that eminent domain could not be used for private ways or drainage.[41] The provision passed with fewer fireworks than it had caused in New York, buoyed by at least one delegate who referenced the problematic swamps in his district.[42] Once on the floor, the provision did generate some disputes but did not seem to generate constitutional challenge, and it was eventually amended in 1878 both to be more specific and to add "mining" to the list of acceptable purposes for private takings.[43] The entire provision seems to have vanished when Illinois adopted its present constitution in 1970, leaving behind a much shorter article on

33. *Id.* at 3545 (statements of Mr. Church and Mr. Conger).

34. *Id.* at 3546 (statement of Mr. Spencer).

35. *Id.* at 3547 (discussing "Massachusetts" law "in regard to water power").

36. *Id.* at 3548.

37. THE AMENDED CONSTITUTION OF THE STATE OF NEW YORK, ADOPTED BY THE CONVENTION OF 1867-8, WITH THE CORRESPONDING PROVISIONS OF THE PRESENT CONSTITUTION 6-7 (Brooklyn, Standard Press 1869).

38. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1026 (Sacramento, J.D. Young, Supt. State Printing 1881) [hereinafter 2 CALIFORNIA DEBATES].

39. ILL. CONST. of 1870, art. IV, § 31 (emphasis added).

40. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1588-89 (Springfield, E.L. Merritt & Brother 1870).

41. *Id.* at 1588 (discussing *Nesbitt v. Trumbo*, 39 Ill. 110, 113 (1866)).

42. *Id.* at 1589.

43. Harold W. Hannah, *History and Scope of Illinois Drainage Law*, 1960 U. ILL. L. REV. 189, 191-92.

the eminent-domain power.[44] In the meantime, Missouri held its convention in 1875, and it followed the Illinois approach to permit "drains and ditches across the lands of others for agricultural and sanitary purposes."[45] As Illinois's neighbor, Missouri too had problems with swampland.[46]

Colorado often gets billed as the innovator of private-takings provisions, and its provision got its start between 1875 and 1876.[47] Delegates in that state certainly added much more breadth to the list of exceptions, authorizing private property to be taken for private use in the case of "private ways of necessity, . . . and reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes."[48] As Timothy Sandefur has observed cogently, some inspiration for this language may have been derived from an 1866 act of Congress that authorized locating highways, ditches, and canals "for mining, agricultural, manufacturing, or other purposes" on western public lands.[49] But Colorado delegates also started with the Illinois template—providing for private takings only for "agricultural or sanitary purposes"—and methodically expanded both the means and the purposes by which such rights might be exercised.[50] They also declined to include language about such ways being "necessary."[51] This is probably for obvious reasons. Historian Gordon Bakken has noted that the makers of the Colorado constitution were writing in an acute period of economic distress. The Panic of 1873, traceable to the expansion of railroads, caused the failure and bankruptcy of many rail companies and a major economic depression.[52] The delegates could build consensus around the need to encourage mining and irrigation activity to support the new state's economy.[53] While the debates of the Colorado delegates were never recorded,[54] one can imagine those sorts of arguments in favor of the private-use provision were swirling in the air.

From other states, however, we can get a stronger sense of the specific contours of debates. In the sections that follow, I explore the fate of private-takings

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44. The current Illinois constitution has only fifteen sections in Article IV. ILL. CONST., art. IV, §§ 1-15.

45. MO. CONST. of 1875 art. II, § 20.

46. Sandefur recounts the Missouri debates in detail. Sandefur, *supra* note 11, at 190-91.

47. *See*, *e.g.*, Klass, *supra* note 16, at 657.

48. COLO. CONST. of 1876 art. II, § 14.

49. Sandefur, *supra* note 11, at 191 & n.20; *see* An Act Granting the Right of Way to Ditch and Canal Owners Over Public Land, and for Other Purposes, ch. 262, §§ 8, 9, 14 Stat. 251, 253 (1866).

50. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, at 90, 143, 205 (1907).

51. *Id.* at 206.

52. Gordon Morris Bakken, *The Impact of the Colorado State Constitution on Rocky Mountain Constitution Making*, 47 COLO. MAG. HIST. 152, 154 (1970).

53. *Id.* at 154-56.

54. Harold H. Dunham, *Colorado's Constitution of 1876*, 36 DICTA 121, 126 (1959); *see* Ames v. People *ex rel.* Temple, 56 P. 656, 662 (1899) ("Unfortunately, the debates in the constitutional convention were not reduced to writing; or, if they were, the record of the proceedings, as preserved in the office of the secretary of state, does not contain them. Much light that might have been thrown upon the intention of the framers of the various provisions, had these debates been taken down and preserved, is forever lost.").

provisions in two state conventions that ultimately went in opposite directions from one another: California in 1878 and Idaho in 1889. Although I have been strategic in examining western states in this period, I have not consulted every potential debate record back east that might contain discussions of analogous provisions.[55] Still, these two stand out from others for the depth of their records and the lengthy discussions delegates had about eminent domain for private gain.[56]

B. Rejection: The California Convention of 1878

The next state to take up a private-use provision after Colorado was California—although the state constitution would ultimately not include it. On November 8, 1878, delegates were discussing an eminent-domain provision involving rights-of-way for private corporations, like railroads. The provision would both prevent compensation awards from being offset by any "benefits" to the landowner resulting from the right-of-way and would require compensation to be assessed by a jury.[57] Both were topics of frequent discussion at constitutional conventions of the time.[58] In the middle of this debate, one delegate, John R.W. Hitchcock,[59] sought an amendment: "Private property shall not be taken for private use, with or without compensation, unless by the consent of the owner, except for right of way for drainage ditches across the lands of others for agricultural, mining, and sanitary purposes, in such manner as may be prescribed by law."[60]

Two facts about Hitchcock are worth referencing at this juncture. First, he was a farmer, not a lawyer, unlike many of his fellow delegates.[61] Second, he

55. A large number of states held conventions in the years following 1870, when the Illinois "agricultural or sanitary" language was introduced, and while I have examined many arid western states I have not comprehensively checked every journal or debate, particularly in the East and South. *See* DINAN, *supra* note 13, at 8-9.

56. Florida's records of an 1885 convention, for instance, recount the passage of a provision authorizing the legislature to condemn ways for drainage, but they contain little color. *See, e.g.*, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA, WHICH CONVENED AT THE CAPITOL, AT TALLAHASSEE, ON TUESDAY, JUNE 9, 1885, at 299, 395, 452 (Tallahassee, N.M. Bowen State Printer 1885).

57. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 349 (Sacramento, J.D. Young, Supt. State Printing 1880) [hereinafter 1 CALIFORNIA DEBATES].

58. *See generally* Louis M. Russo, Note, *From Railroads to Sand Dunes: An Examination of the Offsetting Doctrine in Partial Takings*, 83 FORDHAM L. REV. 1539, 1551-53 (2014) (discussing the nineteenth-century historical controversies over whether compensation awards to owners experiencing condemnations could be offset by the theoretical benefits to them); Sandefur, *supra* note 11, at 231-32; Wanling Su, *What is Just Compensation?*, 105 VA. L. REV. 1483, 1512-13 (2019).

59. Although he is referred to only as "Mr. Hitchcock" in the relevant portion of the debates, the staff of the California State Archives have compiled a helpful list of details about the delegates for use in searching their archival materials. Pat Ooley, *Inventory of the Working Papers of the 1878-79 Constitutional Convention*, CAL. STATE ARCHIVES 51 (2008) [hereinafter *California Inventory*], https://archives.cdn.sos.ca.gov/collections/1879/archive/1879-finding-aid.pdf [https://perma.cc/LQ2N-EQJT].

60. 1 CALIFORNIA DEBATES, *supra* note 57, at 351.

61. *See California Inventory*, *supra* note 59, at 50-56.

lived in Castoria, California, and represented the San Joaquin County area.[62] While many twenty-first-century readers probably associate California with droughts, the San Joaquin region both today and historically has had issues with flooding and drainage, particularly after winter melts in the Sierra Nevada mountains.[63] Hitchcock mentioned as much in his floor speech: "During the Winter our land is subject to overflow, and now we have no means by which we can get drainage. One individual can block up a country of ten or fifteen thousand acres of land, and you cannot buy a right of way from him."[64] Securing eminent domain for private ditches was one way to force those sales. Further, as later discussions in the convention would reveal,[65] a second development was also exacerbating floods in the San Joaquin region and others: mining debris from gold and other mineral mining was flowing down and stopping up waterways, which would lead to a great deal of later litigation and regulation.[66]

Tellingly, Hitchcock also referenced a particular reason why the convention ought to take up drainage rights: "There was a bill to cover our case, but it was inoperative because it was considered unconstitutional."[67] Hitchcock referred to neither the bill nor any case by name.[68] But a possibility is the 1876 decision of *Consolidated Channel Co. v. Central Pacific Railway Co.*, which took up a state statute that provided that eminent domain could be used for "tunnels, ditches, flumes, pipes and dumping-places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from the mines."[69] The plaintiff, owner of a gold mine, sought a ditch and flume across the land of the defendants pursuant to this law. The Supreme Court of California deemed the statute plainly violative of the law of the land (not differentiating the state and federal constitutions), distinguishing cases like those involving mills:

> It is clear from the averment of the complaint, that the object sought is the appropriation of the private property of the defendants to the private use of the plaintiff. . . . It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of

62. *Id.* at 51.

63. *Flood Protection Information*, SAN JOAQUIN CNTY., https://www.sjgov.org/department/pwk/water-resources/flood-protection-info [https://perma.cc/5FM6-RX2U].

64. 1 CALIFORNIA DEBATES, *supra* note 57, at 351.

65. 2 CALIFORNIA DEBATES, *supra* note 38, at 1025 ("Have you any debris from the mines coming down upon you?").

66. GROVE KARL GILBERT, HYDRAULIC-MINING DEBRIS IN THE SIERRA NEVADA 11-12 (1917).

67. 2 CALIFORNIA DEBATES, *supra* note 38, at 1025.

68. Later in the proceedings, Hitchcock stated that the relevant bill had been passed in 1872. *Id.*

69. Consol. Channel Co. v. Cent. Pac. R.R. Co., 51 Cal. 269, 271 (1876).

> the Constitution which permits the taking of private property for a public use after just compensation made.[70]

Even if Hitchcock was referencing some other case, it is certainly true that California courts were being confronted from the 1850s onward with questions about the constitutionality of various legislative bills that seemed to authorize condemnations for the benefit of one or a few others.[71] In the 1857 case of *Billings v. Hall*, for example, California had passed a law to settle property titles that required landowners to pay squatters the value of their improvements or else forfeit title to those squatters.[72] The majority struck down the law on the grounds that it robbed property rights from the "early pioneers of California, who encountered so many dangers and privations in settling this country."[73] It "took from them the honest acquisitions of toil and danger to enrich needy adventurers, upon the shallow pretext of policy, and under the false assumption of legislative omnipotence."[74] The dissenting judge—who would later be a delegate to the 1878 Convention[75]—wrote that the judges ought to defer to legislative judgments, and that the policy favoring squatters had resulted in "the rapid development of our agricultural resources, which now afford not only an abundance of necessaries for home consumption but leave a surplus for exportation, a result never accomplished in any other country within so short a period."[76] He criticized the majority's reliance on vague natural-justice principles to overwhelm the democratic decision-making underlying the struck-down bill.[77]

Constitutionalizing protections for "private use," then, seemed to firmly plant in the legislature the capacity to decide which private takings to authorize and the capacity to regulate them. Constitutional elaboration would bring clarity to the muddle of cases beginning with *Billings* about whether and when the power of eminent domain could be exercised to benefit another private party, as opposed to its exercise for a use or title in the government or public itself.[78] Unfortunately for Hitchcock, his amendment was ruled out of order, and private takings would receive sustained discussion only much later in the convention.[79]

About three months later, on January 15, 1879, the convention took up the report of the Committee on Water and Water Rights.[80] It recommended a provision reading: "The Legislature shall enact laws permitting the appropriators of water and the owners or occupants of land to construct levees, ditches, canals, flumes, and aqueducts, or run their water through natural channels, for

70. *Id.* at 271-72.
71. Sandefur, *supra* note 16, at 614-33.
72. 7 Cal. 1, 1-3 (1857).
73. *Id.* at 15.
74. *Id.* at 15-16.
75. Sandefur, *supra* note 16, at 615.
76. *Billings*, 7 Cal. at 25 (Terry, J., dissenting).
77. *Id.* at 26.
78. Sandefur, *supra* note 16, at 631-32.
79. 1 CALIFORNIA DEBATES, *supra* note 57, at 351.
80. 2 CALIFORNIA DEBATES, *supra* note 38, at 1024.

agricultural, mining, manufacturing, milling, domestic, drainage, reclamation, or sanitary purposes, across the land of others."[81] A lively debate ensued.

Delegates initially questioned whether the provision was important. One thought that private takings were both authorized and limited by the regular clause, providing compensation for property "taken or damaged" for public use.[82] Another, James Caples,[83] thought the clause was either redundant in light of the legislature's history of authorizing prior appropriations of water rights (and associated ditches) or beyond the power of the convention to do.[84] He believed their capacity to authorize condemnations for private use "would be in contravention of the fundamental law of the power of eminent domain" and in conflict with "the Federal Constitution and the decisions of the Federal Courts and the decisions of the Courts in England for centuries past."[85]

The debate reveals quite clearly that the primary purpose of the provision was to facilitate property drainage, "in deference to the farming interests of the State."[86] The farmers themselves appear to have disagreed about whether allowing drainage rights-of-way would help or hurt farmers—as recipients of water, on the one hand, or as those suffering ditches dug through their lands, on the other.[87] But there were clearly animating worries about a classic holdout problem. One of the advocates on the Committee on Water and Water Rights asserted that landowning parties with negotiating leverage were demanding "an exorbitant price" for drainage rights, "blackmail[ing]" the person in need of a ditch to make their land usable.[88]

Another delegate, Joseph Filcher,[89] gave an impassioned speech in defense of the provision, specifically its lawfulness under the federal Constitution. His argument rested on the public benefit conferred by the industries given the power to condemn such rights-of-way: agriculture, mining, drainage, manufacturing. He pointed to the Illinois provision,[90] as well as a New York case from 1831, *Beekman v. Saratoga & Schenectady Railroad Co*.[91] *Beekman* was an early decision under the New York constitution, which contained some broad language about "public interest" as public use in deciding that a railroad could be the beneficiary of the exercise of the eminent-domain power.[92]

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81. *Id.*

82. *Id.*; *see also* Brady, *supra* note 11 (providing a longer history of "damagings clauses").

83. *See California Inventory*, *supra* note 59, at 50.

84. 2 CALIFORNIA DEBATES, *supra* note 38, at 1024.

85. *Id.* at 1024-25.

86. *Id.* at 1025.

87. For example, when future Congressman Marion Biggs—a farmer and aspiring politician—asserted that the provision was actually not in farming interests, another farmer interjected: "Don't you live on high land?" *Id.* For more on the congressman, see *Death Claims Marion Biggs*, SACRAMENTO BEE, Aug. 12, 1910, at 7.

88. 2 CALIFORNIA DEBATES, *supra* note 38, at 1025.

89. *California Inventory*, *supra* note 59, at 50.

90. *See supra* note 39 and accompanying text.

91. 3 Paige Ch. 45 (N.Y. Ch. 1831).

92. *Id.* at 61-62, 71-75.

Opponents spoke in terms ranging from legalistic to cataclysmic. Dennis Herrington, a lawyer,[93] stood to argue that had a corporation—the "Spring Valley Waterworks"—expressly drafted this provision, it "could not have been framed more in [their] interests."[94] This was met with applause. He warned that "every man's interest will be sought to be enhanced by the use of this power of eminent domain to acquire and filch his neighbor's interest."[95] He also suggested that large waterworks would use their enhanced ability to obtain drains and ditches to subjugate the cities, requiring San Francisco to "pray [to Spring Valley] for water to cool their parching tongues."[96] A second lawyer and judge, Horace Rolfe,[97] tried to complicate the analysis by distinguishing among different forms of private use: "private use, provided there is a public interest," which ought to be permitted, but not uses by a "private individual" for "private use."[98] At long last, the question was called, and a motion to strike the entire private-use provision passed. Hitchcock made one final effort to insert a provision protecting rights to dig for manufacturing, mining, irrigation, and drainage, but it failed as well.[99]

C. Expansion: The Idaho Convention of 1889

The private-use provision met a different fate in Idaho, but not without controversy. The provision generated approximately one-hundred pages of discussion—about five percent of the printed pages of the convention debates overall.[100]

Delegates in Idaho began with the Colorado language: "Private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity and for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes."[101] It immediately met fierce opposition from delegate Albert Hagan. Hagan urged the convention to "halt" the trend for state constitutions to "go[] into the business of supporting railroad corporations and public corporations, until the poor men of the country are now subject to have their lands confiscated."[102] Another opponent quoted from Blackstone about the sanctity of private

93. *California Inventory*, *supra* note 59, at 54.

94. 2 CALIFORNIA DEBATES, *supra* note 38, at 1027.

95. *Id.*

96. *Id.*

97. *California Inventory*, *supra* note 59, at 55. Rolfe is listed as a judge in the statement of Mr. Edgerton on 2 CALIFORNIA DEBATES, *supra* note 38, at 1029.

98. *Id.* at 1028.

99. *Id.* at 1029.

100. 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 288-367 (I.W. Hart ed., Caxton Printers 1912) [hereinafter 1 IDAHO DEBATES]; 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 1606-33 (I.W. Hart ed., Caxton Printers 1912) [hereinafter 2 IDAHO DEBATES]. Both volumes are approximately one-thousand pages long.

101. 1 IDAHO DEBATES, *supra* note 100, at 288.

102. *Id.* at 305-06.

property.[103] And a third put the point this way: "You can't compel me to sell my property, if it isn't worth $50, even for $500, if I don't see fit . . . ."[104] The opposition, in other words, was in general grounded in notions of the inviolability of property rights. And it was deeply felt. As Timothy Sandefur has noted, Hagan actually ended up leaving the Idaho Convention "in protest over its failure to explicitly prohibit the private use of eminent domain."[105]

As in California, the delegates in favor worried that without a provision authorizing such uses, the economy would stagnate. As one delegate put it: "[I]n the part of the country where we live it is necessary to provide for irrigating lands. It is impossible to do it unless we provide some means of getting across the land of the proprietor above you."[106] Later, he would put it more bluntly: "If it cannot be done, then the people might as well leave this territory."[107] Notably, both sides also claimed to be on the side of the poor man. Whereas the opponents of the private-use provision claimed that authorizing private takings was a giveaway to corporations and against the small landholder, the proponents framed the problem as that of the little guy stuck negotiating against the large landholders who had arrived first.[108]

Another topic of debate was whether the private-use provision would simply be a boon for lawyers by licensing ongoing legal transfers from one neighbor to another.[109] Ultimately, proponents seemed to respond to this objection by making the provision increasingly specific.[110] The Colorado language thus morphed in Idaho to read:

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.[111]

The language may have been more specific, but it was also intentionally broader than Colorado's, at least in the view of some delegates. "[T]he constitution of Colorado is not what we want here; it is too narrow; it is not broad enough.

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103. *Id.* at 292-93.
104. *Id.* at 294.
105. Sandefur, *supra* note 11, at 192 n.25.
106. 1 IDAHO DEBATES, *supra* note 100, at 290.
107. 2 IDAHO DEBATES, *supra* note 100, at 1611.
108. 1 IDAHO DEBATES, *supra* note 100, at 360.
109. *Id.* at 294.
110. *Id.* at 327-28; 2 IDAHO DEBATES, *supra* note 100, at 1612-15.
111. IDAHO CONST. art. III, § 1.

We want something that will cover every industry."[112] The Idaho Supreme Court has several times remarked on the unusual breadth of this provision among those that were passed in all the other states.[113]

D. Spread and Decline

Although no other state would follow the breadth of Idaho's approach, others continued to adopt private-use provisions—albeit unevenly. There were three different outcomes in states besides Idaho in 1889 alone. Wyoming adopted Colorado's formulation when it held its constitutional convention simultaneous with Idaho,[114] and the debates do not contain any discussion of the provision. That same year, Washington held its second convention. (Its first in 1878, had not been acted upon by Congress, and in any event, it had no private-use provision.)[115] Washington ended up adopting a more conservative private-use provision than either Colorado or Idaho, much more similar to the language from Illinois back in 1870: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes."[116] While the debates on the provision were not particularly deep, some controversy over the "private ways of necessity" language does seem to have arisen.[117] There was an effort to strike that portion on the ground that purchasers of landlocked or remote land should have to negotiate for those rights upon purchase, but it was overcome by opponents who argued that "the idea was to allow right of way from isolated farms to public roads."[118] Also in 1889, Montana's delegates rejected the private-use language from Colorado but adopted language defining as public uses both private roads and the rights-of-way necessary to exercise appropriated water rights.[119]

At Arizona's first constitutional convention in 1891, the draft tackled the question of private use by expressly defining which uses should count as public:

> Sec. 26: Private property shall never be taken or damaged except for public use, and not then without due compensation therefor.

112. 2 IDAHO DEBATES, *supra* note 100, at 1623.

113. Sandefur, *supra* note 11, at 193-94 & n.133 (citing cases).

114. WYO. CONST. art. I, § 32.

115. Sandefur, *supra* note 11, at 232.

116. WASH. CONST. art. I, § 16.

117. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 502-06 (Beverly Paulik Rosenow ed., Book Publ'g Co. 1962).

118. *Id.* at 504.

119. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA, JULY 4TH, 1889, AUGUST 17TH, 1889, at 120-24, 156-57 (State Publ'g Co. 1921) [hereinafter MONTANA DEBATES]; MONT. CONST. of 1889, art. III, § 15 ("The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use and the right of way over the lands of others for all dithes [sic], drains, flumes, canals, and acqueducts [sic], necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.").

> Sec. 27: The following are declared to be public uses: Private ways of necessity, and for reservoirs, drains, flumes, ditches, roads, railroads, tramways, telephone and telegraph lines, pipe lines, sewers, electric lines, and bucket lines, on or across the lands of others for the purpose of agriculture, mining, milling, domestic, live stock, or sanitary purposes.[120]

With its recognition of things like telegraph and electric lines as public uses, Arizona's provision would have been quite a bit broader than Idaho's, but it was never to be. Arizona's first bid for statehood was rejected, and when the state was ultimately admitted—after its convention in 1910—the language was identical to Washington's, with the addition only of the word "mining": "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic and sanitary purposes."[121]

Before Arizona's ultimate acceptance into the Union, two additional states would take up private takings, again with different outcomes. In Oklahoma's convention of 1906-07, the delegates adopted a provision allowing private takings "for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes."[122] A decade before that, in 1895, Utah held a constitutional convention after numerous false starts toward statehood.[123] In debating other parts of the takings clause, delegates in Utah first raised the Washington provision as the model[124] and then discussed adding the Colorado language verbatim.[125]

The debates followed much the same tenor as in other states, pitting economic need against the sanctity of private property. But the Utah delegates were comparatively legally informed. One delegate brought copies of treatises on eminent domain to the floor, noting that states with the ordinary "public use" language had reached different conclusions about whether the digging of ditches for irrigation or mining purposes was constitutional.[126] He quoted extensively from

120. Sandefur, *supra* note 11, at 233 (quoting ARIZ. CONST. of 1891, art. II, §§ 26-27).

121. ARIZ. CONST. of 1912, art. II, § 17. Sandefur notes that this seems to have generated limited debate. Sandefur, *supra* note 11, at 235.

122. OKLA. CONST. art. II, § 23. This was the language then in use in Illinois's constitution, as amended in 1878. *See supra* note 43 and accompanying text. For Oklahoma's minimally detailed proceedings, see generally PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA HELD AT GUTHRIE, OKLAHOMA, NOVEMBER 20, 1906 TO NOVEMBER 16, 1907 (Muskogee Printing Co. 1907).

123. *See* Adam Brown, *The Utah Constitution is 'Distinctively Undistinctive,'* STATE CT. REP. (Feb. 26, 2025), https://statecourtreport.org/our-work/analysis-opinion/utah-constitution-distinctively-undistinctive [https://perma.cc/PP9W-CXE7] (noting that "[o]bjections to polygamy and theocracy led Congress to decline statehood petitions in 1849, 1856, 1862, 1872, 1882, and 1887").

124. 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 337 (Star Printing Co. 1898) [hereinafter 1 UTAH DEBATES].

125. *Id.* at 339.

126. *Id.* at 341 (citing California, Pennsylvania, and West Virginia as states that had rejected a broad view of "public use").

an 1876 decision in Nevada, *Dayton Gold & Silver Mining Co. v. Seawell*,[127] that had also been discussed in Montana's and Utah's conventions.[128] *Dayton* interpreted Nevada's "public use" requirement to mean "public utility, benefit and advantage," citing the mill-dam acts as evidence that public benefit should be construed broadly to favor uses for mining, drainage, and the like.[129] Delegates pored over the text of the Idaho, Montana, Washington, and Wyoming constitutions.[130] Finally, after many days of discussion (and much procedural maneuvering), the private-use language was struck.[131] One of the last delegates to speak against the provision noted that including it might jeopardize their chances at statehood, should the President decide it conflicted with any guarantee in the United States Constitution.[132]

After Arizona's constitutional convention in 1910, the process of state constitutional lawmaking slowed significantly.[133] That is one reason that the fights over private-use provisions seem to have subsided—but hardly the only one. There is a more banal reason: those who would argue in favor of broad conceptions of "public use" were starting to win significant court victories, including one in the Supreme Court, making the need to protect private uses at the state level through constitutional language less acute.[134] In the next Part, I will turn to some enduring themes we might nevertheless glean from these debates.

II. Themes on "Public Use" from the "Private Use" Debates

A. The Unclear Status of the Federal Constitution

As private-use provisions got their origins, and through their ultimate spread and decline, the application of the *federal* Constitution to the states was a grave and difficult question for many delegates. Famously, in the 1833 decision of *Barron v. City of Baltimore*, the Supreme Court unequivocally held:

> [T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.135

127. 11 Nev. 394 (1876).
128. MONTANA DEBATES, *supra* note 119, at 122; 1 UTAH DEBATES, *supra* note 124, at 341.
129. *Dayton*, 11 Nev. at 408-10.
130. *Id.* at 403; MONTANA DEBATES, *supra* note 119, at 347.
131. 1 UTAH DEBATES, *supra* note 124, at 641-50.
132. *Id.* at 647. The provision that was adopted is UTAH CONST. art. I, § 22.
133. *See* DINAN, *supra* note 13, at 10.
134. *See* SOMIN, *supra* note 2, at 56; Clark v. Nash, 198 U.S. 361 (1905).
135. 32 U.S. (7 Pet.) 243, 250-51 (1833); *see also* Billings v. Hall, 7 Cal. 1, 5-6 (1857) (explaining that the federal Constitution had no bearing on the state's regulation of "their own internal or domestic affairs").

The case often cited as incorporating the Takings Clause against the states was decided only in 1897,[136] but given the fact that incorporation still generates modern controversy,[137] it is probably safe to assume that the issue was far from settled even by the time Arizona was debating its constitution in 1910.

This uncertainty about the role of the federal Constitution was evidently hanging over the debates in several states. In California, one delegate stood to assert that their convention was bound by "the Constitution of the United States[, which] is as much over us as it is over the State Legislature."[138] Another countered that "at least among some lawyers" it was debatable whether the Takings Clause "is a limit only upon Congress or the Government of the United States."[139] Several delegates in both California and Idaho discussed the reach and limits of *Barron v. Baltimore*.[140]

Nevertheless, while there were exceptions,[141] delegates still thought themselves bound by *some* general or federal legal principle in prescribing the reach of the eminent-domain power. Some sought to shoehorn the interests at stake into the Contract Clause, which clearly applied to laws passed by states, characterizing the private-use provision as an interference with the land grants to the owners who would now suffer expropriated ditches and canals across their properties.[142] In a somewhat comical moment, a delegate spoke in passionate terms about the Fifth Amendment as a limit on the state's eminent-domain power before correcting himself: "[I]t violates that fifth amendment to the Constitution of the United States, where it says—I do not mean the fifth amendment; I mean that clause which says that no State shall pass a law impairing the obligation of contracts."[143]

In other instances, delegates referenced the notion that fundamental law put guardrails on the state's power to deprive people of property, concerns that today sound in substantive due process.[144] An Idaho delegate suggested a deep conflict between the state constitution's preamble purporting to protect property and its later provision authorizing takings for private uses: he stated that the "convention . . . is in the position of a cow which gives a bucket of good milk and then kicks it over."[145] Separating the Takings Clause from the Due Process Clause has proven to be a decades-long battle.[146] As Ilya Somin has observed, several of the

136. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236-37 (1897); *see* Ann Woolhandler, Julia D. Mahoney & Michael G. Collins, *Takings and Implied Causes of Action*, 2023-24 CATO S. CT. REV. 249, 249 n.2 (citing that decision as the basis of incorporation).

137. *See* SOMIN, *supra* note 2, at 70-71.

138. 2 CALIFORNIA DEBATES, *supra* note 38, at 1025.

139. *Id.* at 1026.

140. *Id.*; *see id.* at 1029.

141. A personal favorite came from Montana in 1889, where a delegate asserted that their private-use provision under debate "is in violation of the Constitution of the United States," but that they ought to do it anyway. MONTANA DEBATES, *supra* note 119, at 122.

142. *Id.* at 1026.

143. *Id.* at 1028; 1 IDAHO DEBATES, *supra* note 100, at 320.

144. *E.g.*, 2 CALIFORNIA DEBATES, *supra* note 38, at 1024-25.

145. 1 IDAHO DEBATES, *supra* note 100, at 291.

146. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (lamenting "regrettably imprecise" language in earlier opinions conflating the two clauses).

major early cases at the federal level that endorsed a seemingly broad view of "public use" as "public purpose"—*Falbrook Irrigation District v. Bradley* and *Clark v. Nash*—were substantive-due-process cases rather than takings cases, which could affect their precedential value.[147] Both *Falbrook* and *Clark* were extensively discussed in the *Kelo* majority opinion, and both intriguingly involve the very sorts of irrigation ditches at issue in all the private-use debates.[148] Although it might not matter much to the ultimate outcome whether one uses due process or the Takings Clause to understand the "public use" limitation,[149] the convention evidence strongly suggests that delegates did not understand the Takings Clause as a limit but did perceive some fundamental-law limitation on the eminent-domain power.

There is another intriguing feature of the discussions of the federal Constitution in convention debates. In the states where "private use" provisions were adopted, but more generally in the west, the drafters were often not lawyers. In Colorado, for example, only fifteen of the thirty-nine delegates had legal training.[150] On occasion, the debates illustrate quite powerfully the potential divergence among different populations' understandings of constitutional text. This divergence is significant. In both statutory and constitutional contexts, interpreters seek the "ordinary meaning" or "historical ordinary meaning" of language.[151] Historical ordinary meaning may be especially important to originalists seeking what "words would have communicated to people at some past time."[152] But there is an important question latent in that sentence: which people? As Marco Basile has put it, "[o]rdinary meaning depends on the relevant perspective—say, the everyday meaning that words might convey for most speakers of the language or the everyday meaning that those same words might convey to the profession of lawyers and judges . . . ."[153] Adding to the complexity, even "layperson" speakers might also interpret words differently when encountered in a legal context—attempting to ascertain technical legal meaning—than they might in other contexts.[154]

In several volumes of debates, one finds evidence of anxiety among the participants in constitutional conventions about lack of legal training. As the private-use provision was debated in Utah, one delegate lamented that in determining the constitutionality of the provision, "[t]he proper committee here would be the committee on federal relations, but without any disrespect to those

147. SOMIN, *supra* note 2, at 123-25 (discussing *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); and *Clark v. Nash*, 198 U.S. 361 (1905)).

148. Kelo v. City of New London, 545 U.S. 469, 480 & n.9 (2005).

149. SOMIN, *supra* note 2, at 125-26 (considering whether it might make a difference).

150. Bakken, *supra* note 52, at 154.

151. *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 729 (2021).

152. *Id.*

153. Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 VA. L. REV. 135, 153 (2024).

154. *See generally* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 PENN. L. REV. 365 (2023) (empirically demonstrating that "ordinary" people are sensitive to legal context and whether the term is legal or nonlegal in interpreting words).

gentlemen, they are not lawyers."[155] Disagreements among lawyers in Idaho about private use led one nonlawyer to consult the cases himself: "[E]ven the lawyers in this convention seem to differ—they are at variance upon this question—and for the benefit of the convention and members here who are not lawyers, . . . I have taken some pains to examine authorities upon this question . . . ."[156] In ascertaining the "historical meaning" of constitutional provisions, these debates can thus offer a rare window into how nonlawyers of the past thought about the words of constitutions and even the legal material shaping their meaning.

When limited to the discussions of the private-takings provisions, it is somewhat challenging to ascertain with confidence whether nonlawyers systematically thought about language differently than lawyers within a given state, let alone across states. Complicating matters, many nonlawyer delegates had been or became politicians, suggesting perhaps more facility or interest in the law than the average person.[157] And it is sometimes hard to disentangle interest-group politics from genuine interpretive disagreement—is a "farmer's standpoint" on the text really how a farmer might understand it, or is it what one farmer wanted the text to accomplish?[158]

This short Article—focused, as it is, on the private-takings provisions—must leave for future work a fuller consideration of how interpretation might be shaped by the participation of nonlawyers in constitutional conventions. When compared with federal law, there is much less work on originalism and historical meaning in the state constitutional context.[159] There is the possibility that a state's "public" at a point in history might understand text differently than a more national public,[160] whether because of local events or perhaps the character of its population, and that might be reflected in its delegates. In other work, I am examining state-court decisions that discuss state-specific "framers"—the Madisons of states from Idaho to Massachusetts.[161] The vocations and backgrounds of delegates might be particularly salient in states with that tradition.

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155. 1 UTAH DEBATES, *supra* note 124, at 646.

156. 1 IDAHO DEBATES, *supra* note 100, at 315.

157. *See supra* notes 84-96 and accompanying text.

158. *Cf.* Brady, *supra* note 11, at 371 (quoting a South Dakota farmer at his state's constitutional convention who presented the "farmer's standpoint" on the eminent-domain provision).

159. Brady, *supra* note 19, at 1171.

160. *Cf. id.* at 1188 (describing Thomas Cooley's suggestion that courts determine meaning by looking at the issues before the state's people). An interesting case illustrating how different state publics might understand language—though not precisely analogous—is *Capriglione v. State* ex rel. *Jennings*, 279 A.3d 803, 808 (Del. 2021), which defined "infamous crime" in the state constitution. Pennsylvania and Arkansas had defined "infamous crime" in their states before a United States Supreme Court case. But Delaware had adopted the language in its convention *after* the Supreme Court decision, so the Delaware courts followed the federal interpretation and declined to follow the interpretations of that language in Pennsylvania and Arkansas.

161. *See, e.g.*, Planned Parenthood Great Nw. v. State, 171 Idaho 374, 393 (2023) (discussing individual delegates' backgrounds).

B. Public Use, Public Benefit

The second lesson that the debates teach is also not a surprise: the question of what counted as a "public use" in the late nineteenth century and first years of the twentieth was complicated and close.[162] Opinions on the floor ran the gamut, from strict interpretations of public use to far broader ones. Opinions differed as to whether private uses like private roads or irrigation ditches had to be open to the public at large, some number of persons, or individual persons or corporations.[163]

To a limited extent, one could read the trajectory of the provisions to presage the gradual move in the twentieth century toward a broad conception of public use as "public purpose." Following the private-use provision among the states, one observes its nascent beginnings in states like Alabama, New York, Illinois, and Missouri before 1875,[164] then its modest expansion in Colorado in 1876. But here the success story grows complicated. California rejected the provision in 1878, and four states in 1889 arrived at variants of different breadths. Utah resoundingly rejected the private-use provision in 1895, and Oklahoma and Arizona adopted modest versions in the first decade of the twentieth century. In other words, this messy history hardly looks like an inevitable march toward *Kelo*, but neither does it move the needle in that case appreciably as evidence of how contemporaries understood federal law.

While the convention evidence on "public use" from private takings is thus as mixed as any other from the nineteenth century, there is a greater possibility that evidence from state conventions might affect state-court interpretations of the "public use" provisions of their state constitutions. In the wake of the *Kelo* decision, courts in several states decided to interpret the term "public use" in their state constitutions differently than the Supreme Court had in *Kelo*.[165] The private takings debates *do* provide some good evidence of state-level understandings of "public use" at the time each state's constitution was written, which could license broader or narrower variations on the eminent-domain power in a given state.

One can also see three smaller trends in the debates about public purpose during private-takings battles. One speaks more to the history of state constitutionalism than to histories of property rights: state constitutional lawmaking

162. *See* SOMIN, *supra* note 2, at 36 (calling evidence about the meaning of "public use" as broad or narrow from both the Founding and later nineteenth century "far from unequivocal"); *id.* at 44 (noting that there "was indeed considerable divergence over the interpretation of public use clauses in different states"). Somin nevertheless concludes that all the evidence taken and weighed together counsels in favor of a narrow interpretation of "public use" as an originalist matter.

163. *E.g.*, 1 IDAHO DEBATES, *supra* note 100, at 332 ("Why is it a public use to take a man's land and give the use of it to a railroad corporation for transporting passengers? Is it because of the man's wealth? Not at all. Is it because all men may ride on it as they choose? Not at all. It is because thereby the public interests will be provided for and the public benefit secured; that is the legal principle that underlies the whole question of public use . . . .").

164. *See supra* Section I.A.

165. SOMIN, *supra* note 2, at 136, 141-64, 173-78; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 204-05 (2018).

operated as an important and powerful check on judicial decisions striking down legislation. Both the Idaho and the California debates referenced the need to constitutionalize irrigation and drainage protections, lest a judge strike down legislation passed to accomplish the same end.[166] This mirrors other changes in takings law during the same period. New language requiring compensation for *damaging*, not just taking property, was another major modification to the state takings clauses made during many of the same conventions. These changes were motivated in several states by a Pennsylvania Supreme Court decision denying compensation to a cathedral that had been left on top of a large bluff by digging in the streets that technically did not appropriate any of the church's land.[167]

A second lesson might be drawn from examining the authorities that delegates considered important. In assessing a mass of evidence from a historical period, how ought we decide which sources were most influential, or loomed largest in the minds of contemporaries? A sort of majority-rules principle, which we might use to balance the cases in different states reaching different results?[168] The writings of great treatise authors on the subject, and the opinions that they espoused?[169] In reading the debates themselves, it is striking that some state-court decisions seem to have held particular weight at various conventions. *Dayton Gold & Silver Mining Co. v. Seawell*,[170] which would ultimately get its own footnote in the *Kelo* decision,[171] was cited and discussed in at least two separate conventions.[172] In the spirit of trying to understand not just available sources, but also the weight they should be accorded, state constitutional debates might offer some guidance on the most influential authorities.[173]

My final observation is about the discussions of land and topography in the debates. Many delegates who spoke in favor of the private-use provisions recognized some degree of departure from law back east but justified it on the basis of geographic difference.[174] As one delegate put it in Montana in 1889, a private-use provision would be "a departure from the ancient land marks. But we live in a different country, and are surrounded by a different climate and a different soil

166. 2 CALIFORNIA DEBATES, *supra* note 38, at 1025; 1 IDAHO DEBATES, *supra* note 100, at 290.

167. Brady, *supra* note 11, at 359-60, 365 & nn.94, 120.

168. For example, Somin asserts that "[t]he legally knowledgeable observer of 1868 would [] be aware that the narrow interpretation of public use was the majority among state courts at the time." SOMIN, *supra* note 2, at 67.

169. *Id.* at 54-55 (noting that treatise writers Thomas Cooley and John Lewis both endorsed narrower views of the meaning of "public use").

170. 11 Nev. 394 (1876).

171. Kelo v. City of New London, 545 U.S. 469, 479 n.7 (2005).

172. 1 UTAH DEBATES, *supra* note 124, at 341; MONTANA DEBATES, *supra* note 119, at 122.

173. *Cf.* Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the* Commentaries, 104 VA. L. REV. 1359, 1364 (2018) (using materials from Founding Era legal education to demonstrate that while Blackstone was available in the Founding Era, it was far less well known and studied than other sources).

174. It is worth mentioning that this could cut in both directions. A Montanan against the private-use provision was not influenced by Wyoming having endorsed it, because he considered Wyoming "sparsely settled" by comparison. MONTANA DEBATES, *supra* note 119, at 354.

from that which exists where the common law had its birth."[175] In a later federal case, *Clark v. Nash*,[176] the Supreme Court considered the constitutionality under the federal Due Process Clause of an individual's efforts to enlarge an irrigation ditch across a neighbor's property. In upholding the owner's right, per a state statute authorizing as much, Justice Peckham emphasized the importance of geography. "In some states, probably in most of them," a narrow view of public use "would be sound."[177] But in some states, as "the result of some peculiar condition of the soil or climate, or other peculiarity of the state," a more liberal construction ought to be upheld.[178]

In multiple regards, scholars have already recognized this sort of reasoning to justify exercise of the eminent-domain power for very limited private uses. Richard Epstein understood the outcome in *Clark* as owing to the fact that "the private holdout risk was enormous, but the loss of subjective value to the landowner was negligible."[179] This is a classic version of the bilateral-monopoly problem, where one landowner can hold out and functionally extort the party seeking to purchase the right.[180] Perhaps the expansion to "private use" can best be understood as a very limited expansion of the takings power to accommodate that sort of circumstance in a region and climate where optimal land use depended on it. In the next Section, I turn to the principle often invoked to distinguish lawful private takings from unlawful ones: "necessity."

C. Necessity Revisited

The importance of allowing private takings only where there is true "necessity" comes up repeatedly in debates across different states. In the words of one Idaho delegate: "The case of necessity should be clearly set out and established and defined, that is to say a man should not be allowed wantonly to condemn his neighbor's land for any purpose whatever."[181] This sentiment dovetails with the discussions cited earlier in *Clark* and *Dayton*: the lurking justification behind the private-use provisions was not one of ultimate deference to legislative judgments about what qualified as a public use but rather the creation of flexibility for legislatures to provide for rights-of-way in circumstances really requiring it.

An old common-law chestnut—the easement by necessity—also came up in multiple conventions. Today, twenty-first-century bar-prep students will know

175. *Id.* at 122.

176. 198 U.S. 361(1905).

177. *Id.* at 367.

178. *Id.* at 368.

179. Richard A. Epstein, *Public Use in A Post*-Kelo *World*, 17 SUP. CT. ECON. REV. 151, 166 (2009).

180. Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 197 (2017). Yun-chien Chang has taken up whether this is properly considered a true bilateral monopoly or something else in law-and-economics terms. Yun-chien Chang, *Hybrid Rule: Hidden Entitlement Protection Rule in Access to Landlocked Land Doctrine*, 91 TUL. L. REV. 217, 238-39 (2016).

181. 1 IDAHO DEBATES, *supra* note 100, at 346.

that many states recognize a landlocked owner's right to an easement to reach a public road over the land of a neighbor, provided certain conditions (like title tracing to a common grantor) are met.[182] A number of states also authorize "statutory easements" even where those formalities do not exist. Interestingly, true easements by necessity are generally provided to the landlocked owner gratuitously, but statutory easements generally require the landlocked owner to compensate the affected neighbor.[183] To support their arguments in favor of a private-takings provision, California delegates pointed to easements by necessity.[184] The same came up in Idaho: "Suppose you have a farm inside of another or other farms; has not the law for a hundred years or more given you the right of way across one farm to another?"[185] Even though records of the Washington debates are quite vague, necessity caused some kind of argument on the floor: proponents of an exception to the private takings ban for "private ways of necessity" argued that "the idea was to allow right of way from isolated farms to public roads," while opponents thought those isolated owners should have bargained for those rights when they bought the farm in the first place.[186]

Convention evidence thus offers historical grounding for a route not taken in *Kelo*: a middle ground between "use by the public" and the broad conception of "public purpose" found by the majority. In private-use debates, several delegates seem to have understood "public use" to encompass some degree of "public benefit" but only when tied to a notion of necessity: the idea that for the eminent-domain power to be invoked, the need of the beneficiary and the interest of the public must both clear some sort of threshold.

There is good evidence, both from some of the debates and from cases like *Clark v. Nash* and even *Dayton Gold & Silver Mining*, that such a principle was operative.[187] In *Clark*, the Supreme Court authorized an irrigation ditch over one party's land for the benefit of another but where the individual already held an interest in nearby water and where his land "otherwise would remain absolutely valueless."[188] Indeed, the Court did not want to be misread: "[W]e do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all case where the taking may promote the public interest and tend to develop the natural resources of the state."[189] Instead, the taking was licensed only because it was "absolutely necessary to enable him to make any use whatever of his land."[190] Indeed, *Clark* even acknowledged the

182. Chang, *supra* note 179, at 229; THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, PROPERTY: PRINCIPLES AND POLICIES 995 (4th ed. 2022).

183. Chang, *supra* note 179, at 229-31, 240-41.

184. 2 CALIFORNIA DEBATES, *supra* note 38, at 1028.

185. 2 IDAHO DEBATES, *supra* note 100, at 1614.

186. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, *supra* note 117, at 504.

187. *See supra* note 88 and accompanying text.

188. Clark v. Nash, 198 U.S. 361, 369 (1905).

189. *Id.*

190. *Id.*

Western constitutions' private-takings provisions as an important expression of the urgent need for the eminent-domain power in such circumstances.[191]

In *Dayton*, similarly, the Nevada Supreme Court sustained the exercise of eminent-domain power for a mine on three separate grounds: (1) geographic necessity, given the barren mountains; (2) the employment they offered to hundreds of men; and (3) perhaps most importantly, the fact that the sites "necessary" for use in mining transport were "confined to fixed localities."[192] The court took pains to distinguish "hotels" or "theaters" from mines or railroads; while all are "a benefit to the public," rights-of-way for mines and railroads had to be run on particular routes. In contrast,

> In the building of hotels and theaters the location is not necessarily confined to any particular spot, and it is always within the reach of capital to make the proper selection, and never within the power of any individual, or individuals, however stubborn or unreasonable, to prevent the erection of such buildings. The object for which private property is to be taken must not only be of great public benefit and for the paramount interest of the community, but the necessity must exist for the exercise of the right of eminent domain.[193]

Here is the bilateral-monopoly problem again: whereas one could find any old location for a theater, one could not plant a mine or a workable railroad route in any old spot. This suggests that "necessity" could both enable and constrain uses of the eminent-domain power for private benefit and incidental public gain.

The discussions of necessity in the private-use debates offer additional evidence about the historical meaning of "necessity" in defining permissible "public uses" specifically. "Necessity" was clearly meant to be a limiting principle in Idaho.[194] In Colorado, delegates actually struck the term "necessary" in their constitutional provision—perhaps worried it would thwart development in a period of great economic stress.[195]

Of course, as any torts scholar knows, necessity can be a slippery concept.[196] And it is having a moment in property and takings law more generally, as the concept has been invoked in major decisions involving the limits on

191. *Id.* at 370 ("The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states, arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated.").

192. Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394, 409 (1876).

193. *Id.* at 411.

194. 2 IDAHO DEBATES, *supra* note 100, at 1611.

195. *See supra* note 51 and accompanying text.

196. *See* John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 480-82 (2015); *see also* RESTATEMENT (FOURTH) OF PROPERTY, Vol. 2, Div. I, Ch. 1. Trespass to Land, § 1.20 (Reporters' Note), at 237 (A.L.I, Preliminary Draft No. 6, Aug. 30, 2019) ("The scholarly literature on the private necessity privilege is vast.").

government powers to authorize access to property or to cause damage to property in various exigent circumstances.[197] When and whether "emergency takings" require compensation is a contested question; in general, the answer is that they do not.[198] Further, courts have not always been clear about the level of "necessity" required to invoke the government's privilege to destroy property without paying compensation.[199]

The private-takings debates offer some color for understanding this debate over compensation in takings law more generally. No delegates seriously entertained the idea that those seeking to condemn ditches or rights-of-way for any purpose—be it domestic or mining—should be excused from having to compensate the owner affected. Necessity was acting as a limit on the uses to which the state's power might be put, but not as an excuse to avoid liability. The exception—true common-law easements by necessity, which generally require no compensation to the owner who must suffer a road across their property—was derived from a wholly different principle. Easements by necessity were granted gratuitously to correct a mistake a past grantor made, since one could fictionally infer that their true intent would be to make the land reachable and productive.[200] No nineteenth-century lawyer I have found made a similar argument to justify condemning ditches, canals, or the like without compensation on the basis of necessity, despite the enormous importance and need for water and food on the nascent frontier.

Conclusion

In this Article, I have sought to shed light on one small historical chapter in the long history that led to *Kelo*: the enshrining in state constitutional text of language codifying a broader approach to "public use," in fact, by explicitly protecting the exercise of eminent domain for some "private uses." Through examining constitutional conventions across various states, this Article has confirmed what other evidence also suggests: that the evolution toward broader "public benefit" conceptions of "public use" was neither linear nor inevitable but rather a product of regional economic necessities and shifting legal thought.

Collecting this material, and comparing across different states, one can also bear witness to both historical puzzles and enduring ones. Delegates struggled to understand the relationship between state laws and federal constitutional protections—typical for the period but a feature that suggests one must use nineteenth-century state evidence with some caution if trying to derive federal meaning.

197. Cedar Point Nursery v. Hassid, 594 U.S. 139, 161 (2021); Baker v. City of McKinney, 84 F.4th 378, 385 (5th Cir. 2023).

198. *See generally* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 396 (2015) (tracing exhaustively the history of emergency destruction, from the conflagration rule onward, and arguing for a partial compensation rule in cases where government destroys property out of necessity).

199. *See* Recent Case, *Constitutional Law—Fifth Amendment—Fifth Circuit Rejects Takings Claim Under "Necessity Exception,"* 137 HARV. L. REV. 2408, 2408 (2024).

200. *See* Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 80 (2005).

Moreover, the debates reflect general uncertainty and lack of consensus about whether public use had a narrow or broad meaning and what, if anything, justified a shift in favor of the broad. Finally, across several states, but not all, delegates viewed necessity as a limiting principle that might prevent the most egregious abuses of "private use" takings.

Famously, the epilogue following *Kelo* is especially tragic: though the decision licensed the use of eminent domain for broad "public benefit," the development *Kelo* authorized never produced the public benefits that the government promised.[201] The private-takings debates do not offer any clear, smoking-gun evidence that would have changed the outcome in that case. The evidence here, like that from other nineteenth-century sources, is mixed and complex. It supports neither simplistic deference to legislative judgments of "public use" nor the conclusion that nineteenth-century lawyers would have understood takings to be limited to government or public uses. Equally important, the private-use debates remind us that constitutional meaning was forged not only in courtrooms but also in settings where farmers, miners, and other nonlawyers helped to draft state constitutions. Their contributions underscore that constitutional text might be understood differently across different types of communities.

Although the debates over "public use" do not provide conclusive evidence for overturning *Kelo*, the evidence from the private-use debates could shape some post-*Kelo* developments. First, if *Kelo* is ever revisited—although that will not be happening in the near future[202]—the debates and contemporary cases do suggest alternative guiding principles for using necessity to differentiate a limited category of legitimate "public benefit" takings from those that are truly private giveaways.[203] And second, to the extent state courts are seeking evidence in interpreting "public use" as a matter of state constitutional law, the debates over private uses offer the potential to support states in developing their own narrower or more expansive approaches.[204] While there might not need to be fifty different definitions of "public use" in the fifty states, the private-use debates do illustrate that a century before the *Kelo* decision or any of its aftermath, the different landscapes, inhabitants, and characteristics of different states really did yield different understandings of when the eminent-domain power should be wielded—and to benefit whom. And the debates illustrate more than regional variation: they reveal how constitutional text and meaning emerged from the work of lawyers and lay-people alike. Today, as well, both legal challenges and popular views will determine what comes after *Kelo*.

201. SOMIN, *supra* note 2, at 232-37.

202. Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency, 145 S. Ct. 1428 (2025) (denying certiorari in a case seeking to revisit *Kelo*).

203. *See supra* Section II.C.

204. *See supra* notes 163-165 and accompanying text.