Public Use, Exclusionary Zoning, and Democracy

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The twentieth anniversary of Kelo v. City of New London *is a good opportunity to consider the broader significance of public use for constitutional theory, and to explore parallels between the "public use" issue at stake in* Kelo *and another major issue in constitutional property rights under the Takings Clause: exclusionary zoning. This Article takes up that challenge. Part I highlights the strikingly similar history of the two issues. In both cases, there is a strong originalist argument that the policy in question—private-to-private condemnations in one case, exclusionary zoning in the other—violates the property-rights provisions of the Fifth Amendment. But, on both issues, the Supreme Court and federal courts generally have taken a highly deferential approach since the rise of Progressive and New Deal Era skepticism of property rights. Part II outlines reasons why that conventional wisdom is wrong. Judicial deference on both public use and exclusionary zoning has greatly harmed the poor and disadvantaged, particularly racial minorities. Moreover, stronger judicial review can actually further "representation-reinforcement" in two ways: by giving voice to groups excluded from the political process, and by empowering them to "vote with their feet." Finally, Part III highlights synergies between judicial enforcement of public-use limitations on eminent domain and enforcement of restrictions on exclusionary zoning.*

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Introduction

The twentieth anniversary of *Kelo v. City of New London* is a good opportunity to consider the broader significance of public use for constitutional theory,[1] and to explore parallels between the "public use" issue at stake in that case and another major issue in constitutional property rights under the Takings Clause: exclusionary zoning. In the twenty years since *Kelo*, exclusionary zoning and the housing crisis it has caused have emerged as major issues in public policy and legal debate.[2]

Kelo famously ruled that the Fifth Amendment requirement that takings must be for a "public use" does not bar the employment of eminent domain to take homes for privately owned "economic development."[3] The Supreme Court endorsed a broad definition of "public use" that included almost any disposition of condemned property that might benefit the public in some way.[4] Exclusionary zoning—defined here as regulatory restrictions on the types of housing that can be built in a given area—is a major factor in the national housing crisis, one that has increased housing costs, prevented millions of people from "moving to opportunity" and impaired economic growth and innovation.[5] The Supreme

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

2. For an overview, see Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zonin*g, 103 TEX. L. REV. 1, 5-11 (2024).

3. *Kelo*, 545 U.S. at 477-85.

4. *Id.*

5. *See generally* RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE (2023) (examining exclusionary zoning as a form of social engineering that reinforces racial disparities and exacerbates the affordability crisis); ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING (2022) (observing that exclusionary zoning policies, many of which have their roots in classism and racism, impose substantial economic costs on excluded parties); JAMES S. BURLING, NOWHERE TO LIVE: THE HIDDEN CAUSES OF AMERICA'S HOUSING CRISIS (2024) (arguing that the affordable-housing crisis is a result of residential zoning policies implemented to maintain economic and racial segregation); COUNCIL OF ECON. ADVISERS, *Increasing the Supply of Affordable Housing: Economic Insights and Federal Policy Solutions*, *in* ECONOMIC REPORT OF THE PRESIDENT 143 (2024) (summarizing the causes of, effects from, and federal solutions to persistent market failure in housing through a survey of the social-science and historical literature on the topic); BRYAN CAPLAN, BUILD, BABY, BUILD: THE SCIENCE AND ETHICS OF HOUSING REGULATION (2024) (describing the causes and impact of housing shortages); Philip G. Hoxie, Donald Shoag & Stan Veuger, *Moving to Density: Half a Century of Housing Costs and Wage Premia from Queens to King Salmon*, 222 J. PUB. ECON. 1 (2023) (finding housing costs greatly reduce labor mobility); Edward Pinto & Tobias Peter, *How Government Policy Made Housing Expensive and Scarce, and How Unleashing Market Forces Can Address It*, 25 CITYSCAPE, no. 3, 2023, at 123 (summarizing extensive evidence and history of the racial and economic effects of zoning and recommending the adoption of light-touch density policies to gradually increase the housing supply); Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS., Winter 2018, at 3 (reviewing extensive literature on the economic effects of housing regulations and recent attempts to soften zoning laws); Vicki

Court first upheld exclusionary zoning against constitutional challenge in the famous 1926 case of *Village of Euclid v. Ambler Realty*.[6]

There are striking and largely unnoticed parallels between the "public use" question decided in *Kelo* and the constitutional issues raised by exclusionary zoning.[7] This symposium contribution outlines them and considers their significance. A few previous scholars have noted similarities between exclusionary zoning and exclusionary uses of eminent domain.[8] But none have addressed the constitutional-theory issues covered in this Article, with respect to either the originalist or living-constitution interpretations of the Fifth Amendment.

Part I highlights the history of the two issues. In both cases, there is a strong originalist argument that the policy in question—private-to-private condemnations in one case, exclusionary zoning in the other—violates the property-rights provisions of the Fifth Amendment. The former violates the requirement that the use of eminent domain be for a "public use"; the latter that severe restrictions on owners' rights to use their land require "just compensation" under the Takings Clause.[9] But, in both cases, the Supreme Court and federal courts generally have taken a highly deferential approach since the rise of Progressive and New Deal Era skepticism of property rights. That skepticism was in large part driven by concerns that judicial protection for property rights is undemocratic and tends to benefit the rich at the expense of the poor and disadvantaged.

Part II outlines ways in which the traditional conventional wisdom on these two issues is wrong. Judicial deference on both public use and exclusionary

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Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism Revisited*, 35 HOUS. POL'Y DEBATES 96 (2025) (reviewing the impacts of housing supply on housing affordability and critiquing reasons for "supply skepticism"); David Schleicher, *Stuck! The Law and Economics of Residential Stability*, 127 YALE L.J. 78 (2017) (arguing that state and local microeconomic policies have created substantial barriers to interstate mobility, causing declining rates of interstate mobility which have in turn "create[d] problems for federal macroeconomic policymaking"); Joseph Gyourko, Jonathan S. Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, 124 J. URB. ECON. 103337 (2021) (analyzing how local housing-development regulation affects prices and affordability and acknowledging that such regulations can negatively impact affordability for low- and middle-income households); Ezra Rosser, *The* Euclid *Proviso*, 96 WASH. L. REV. 811, 824-49 (2021) (reviewing extensive evidence of how zoning impacts the "racial and economic status quo"); Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. (Apr. 24, 2017), https://www.brookings.edu/research/reforming-land-use-regulations/amp [https://perma.cc/PM8X-Q2FZ] (evaluating the economic impacts of land-use regulations and advocating for certain reforms); Gilles Duranton & Diego Puga, *Urban Growth and Its Aggregate Implications*, 91 ECONOMETRICA 2219 (2023) (developing an urban-growth model to assess the effect of zoning regulations on economic growth); Alex Horowitz & Ryan Canavan, *More Flexible Zoning Helps Contain Rising Rents*, PEW CHARITABLE TRS. (Apr. 17, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/04/17/more-flexible-zoning-helps-contain-rising-rents [https://perma.cc/7ZWL-ZYZ4] (considering the effect of relaxed zoning laws on rent growth).

6. 272 U.S. 365 (1926).

7. Joshua Braver and I previously noted a few parallels in Braver & Somin, *supra* note 2, at 63-64.

8. *See, e.g.*, David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 11-12 (2009); Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 853-69 (2014).

9. U.S. CONST. amend. V.

zoning has greatly harmed the poor and disadvantaged, particularly racial minorities. Moreover, stronger judicial review can actually further "representation-reinforcement"[10] in two ways: by giving voice to groups excluded from the political process and by empowering them to "vote with their feet."[11]

Part III briefly highlights some synergies between judicial enforcement of public-use limitations on eminent domain and enforcement of restrictions on exclusionary zoning. Both help empower people to live where they wish. Striking down exclusionary zoning would make it harder for local governments to keep people out; reversing *Kelo* would make it harder for them to expel those already living in the area. Opponents of exclusionary zoning could also potentially learn useful lessons from the *Kelo* experience on how litigation can be effectively combined with political action.

I. Parallel Histories

The issues of public-use limitations on eminent domain and Takings Clause constraints on zoning are almost always treated separately. But the two questions actually have important parallel histories. Both exclusionary zoning and private-to-private takings are unconstitutional under the original meaning of the Fifth Amendment, as understood both in 1791 (when the Bill of Rights was ratified) and in 1868 (when the Fourteenth Amendment made the Bill of Rights applicable to the states). But in both cases, federal courts adopted broad deference to the political process, as a result of the suspicion and devaluation of constitutional property rights that prevailed in the Progressive and post-New Deal eras. As discussed in Part II, both types of judicial deference inflicted great harm on politically weak groups, such as the poor and racial minorities.

The Takings Clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[12] This language is generally understood to impose two constraints on the government: property can only be taken for a "public use," and even then such a taking is only permissible if just compensation is paid to the owner. Even the *Kelo* Court recognized that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation."[13]

Kelo and earlier decisions endorsing a broad definition of public use[14] largely vitiated the public-use constraint on eminent domain. Similarly, rulings endorsing a narrow definition of what qualifies as a taking have weakened the

10. For the classic defense of representation reinforcement-oriented judicial review, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

11. On the value of foot voting as a mechanism of political choice, see ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM ch. 4 (rev. ed. 2022).

12. U.S. CONST. amend. V.

13. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

14. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33-35 (1954).

"just compensation" requirement and empowered local governments to engage in massive exclusionary zoning.[15]

Founding Era evidence indicates that both broad definitions of public use and the narrow approach to takings that has licensed exclusionary zoning are at odds with the original meaning and the broad understanding of property rights that prevailed during the Founding Era.

William Blackstone and John Locke—British thinkers whose views on property rights greatly influenced the Founding generation—distinguished between takings of property for publicly owned projects and those for transfer to private parties.[16] The same is true of Founding Era jurists, such as Supreme Court Justices William Patterson and Samuel P. Chase, each of whom reached that conclusion in well-known opinions.[17]

There is a similar story when it comes to exclusionary zoning. Obviously, exclusionary zoning was not a policy issue in the early republic, since it did not arise until the late nineteenth and early twentieth centuries.[18] But evidence nonetheless indicates that the Founding generation understood the Takings Clause as protecting a right to "use" property, not just a right to exclude non-owners.[19] Blackstone, in a formulation echoed by leading Founding Era jurists, wrote that "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the *free use*, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[20]

Similarly, James Madison, in introducing what became the Bill of Rights, originally included a preamble stating that "[g]overnment is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and *using* property."[21] While the preamble is not binding law, it indicates Madison's belief that the Fifth Amendment protects the right to use property.

These conceptions of "public use" and the nature of property protected by the Takings Clause are linked to the broad general value the Founders assigned to property rights. For example, John Adams emphasized that "[p]roperty must be secured, or liberty cannot exist."[22] Alexander Hamilton stated at the

15. For an overview, see Braver & Somin, *supra* note 2, at 8-11.

16. JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT §§ 138-40 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES *134-35; *see also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 38-39 (rev. ed. 2016) (discussing these sources in detail).

17. *See* SOMIN, *supra* note 16, at 37-38.

18. For an overview of the development of zoning, see SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION ch. 4 (2014); *see also* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 183-90 (2011) (recounting origins of zoning in the United States).

19. For an overview, see Braver & Somin, *supra* note 2, at 14-17.

20. 1 BLACKSTONE, *supra* note 16, at *134 (emphasis added).

21. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (emphasis added).

22. JOHN ADAMS, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

Constitutional Convention that "[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property."[23] In his famous 1792 essay on "Property," James Madison wrote that "[g]overnment is instituted to protect property of every sort."[24] Placing a high value on property rights, the Framers sought to provide them with strong protection.

A similar pattern—but with much more fulsome evidence—emerges if we consider the meaning of the Fifth Amendment as of 1868, at the time of the enactment of the Fourteenth Amendment. That Amendment made the Bill of Rights applicable against state and local governments (the level of government that conducts most takings and imposes zoning restrictions). Some originalists argue that the 1868 original meaning of the Bill of Rights is the one that controls, particularly in cases challenging state and local policies.[25]

The relevant 1868 evidence is much more extensive than that for 1791, so much so that I cannot canvas it all here. But on both public use and the right to use property, it points to strong protection for property rights. I have gone over it in detail in previous publications.[26] On public use, a combination of contemporaneous court decisions, legal treatises, and other evidence indicates that the narrow view of public use predominated.[27] On zoning, similarly diverse and extensive evidence indicates that the right to "property" protected by the Takings Clause included a broad right to use, subject only to a relatively narrow "police power" exception for uses that are harmful to public health and safety.[28] That conception of the Takings Clause would have been more than broad enough to strike down exclusionary zoning.[29]

In the cases of both zoning and public use, legal elites—and ultimately the judiciary—shifted their positions during the Progressive and New Deal eras of the early to mid-twentieth century. Progressive Era legal theorists and jurists attacked judicial protection for property rights on the grounds that it impeded rational social planning and benefited the wealthy at the expense of the poor.[30]

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23. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1911) (notes of Rufus King).

24. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

25. *See, e.g.*, KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 293-96 (2014); AKHIL REED AMAR, *Refining Incorporation*, *in* THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215, 223 (1998); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 S.D. L. REV. 729, 744-55 (2008).

26. *See* SOMIN, *supra* note 16, at 43-57 (surveying evidence on the meaning of "public use"); Braver & Somin, *supra* note 2, at 18-25 (providing evidence on the right to use property, as it relates to the constitutionality of exclusionary zoning).

27. SOMIN, *supra* note 16, at 43-57.

28. Braver & Somin, *supra* note 2, at 18-30.

29. *Id.*

30. On the Progressive critique of property rights, see, for example, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 33-64, 145-68 (1992); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 71-107 (1998); and James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255, 255 (2012).

Ultimately, the Supreme Court adopted a highly deferential approach in both areas. *Euclid*, decided in 1926, did not categorically ban all constitutional challenges to zoning ordinances. It left open the possibility that extreme restrictions might still be unconstitutional, at least on an as-applied basis.[31] In the immediate aftermath of *Euclid*, the Supreme Court seemed to limit the ruling's impact by striking down zoning in two cases.[32] But these two decisions had little effect, and *Euclid* over time became the dominant precedent in the field.[33]

Today, zoning cases under the Takings Clause are generally analyzed under the highly deferential *Penn Central* framework, which applies to most "regulatory takings" cases, and under which the government generally prevails.[34] In practice, this enables exclusionary zoning to escape takings liability.[35] "Regulatory takings" cases, where the government merely restricts the use of property, are distinct from "physical invasions," where the government seizes or occupies the property in question. Most physical invasions are automatically considered to be "per se" takings, not subject to a balancing test.[36] By contrast, under current doctrine, regulatory takings are generally subject to the deferential *Penn Central* framework, with the exception of regulatory restrictions so severe that the owner is deprived of "all economically beneficial or productive use" of his or her property.[37]

In the case of public use, the Supreme Court adopted an extremely broad definition of "public use" in *Berman v. Parker* (1954), where it upheld a private-to-private urban-renewal taking in Washington, D.C., reasoning that where the "legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[38] Suspicion of property rights and the desire to give scope for social planning played a major role in this shift.[39]

In both cases, an original meaning highly protective of property rights ultimately gave way to an extremely deferential judicial posture. And, similarly, in both cases, the shift authorized policies that inflicted grave harm on the politically weak, the poor, and minority groups.

There are, nonetheless, a few noteworthy differences between the two issues. Most obviously, if courts were to restore the narrow definition of public

31. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

32. Nectow v. City of Cambridge, 277 U.S. 183, 189 (1928); Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122-23 (1928). For an analysis of these two decisions, and their potential to limit the effects of *Euclid*, see BERNARD SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 99-102 (1997).

33. SIEGAN, *supra* note 32, at 102.

34. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (laying out a three-part test).

35. *See* Braver & Somin, *supra* note 2, at 9-10.

36. *See, e.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139, 152-53 (2021) (holding that even temporary physical invasions are per se takings); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that permanent physical occupations, even small ones, are per se takings).

37. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

38. Berman v. Parker, 348 U.S. 26, 32 (1954). For a detailed discussion of the history leading up to *Berman*, see SOMIN, *supra* note 16, at 56-60.

39. *See* SOMIN, *supra* note 16, at ch. 2.

use, takings that are no longer considered to be for a public use could no longer be done at all, even with compensation. Private-to-private takings of the kind at issue in cases like *Berman* and *Kelo* would be categorically banned if those precedents and others like them were reversed. By contrast, if exclusionary zoning is ruled to be a taking, it could still potentially be done, so long as the government compensates owners. Elsewhere, Joshua Braver and I have argued that a compensation requirement would at least prevent local governments from imposing exclusionary zoning over large areas, as the costs would be prohibitive.[40] But exclusionary zoning could still persist in limited form.

Another distinction between the two situations is that "public use" may be more readily susceptible to a clear bright-line rule than exclusionary zoning. If the Supreme Court overturns *Kelo* and *Berman*, it could simply adopt the traditional "narrow" view of public use, under which takings are barred unless the property is used for a government-owned facility, or by a private entity that has a legal obligation to serve the entire public.[41] A similar relatively clear rule might be achieved in the field of exclusionary zoning if the Supreme Court were to rule that such restrictions on housing construction are a per se taking.[42] But it would be a bit less clear than the "narrow" view of public use, as there may be uncertainty at the margin about exactly which zoning restrictions constrain housing, and whether some fall within the "police power" exception to takings liability.[43]

Alternatively, the Court could keep exclusionary-zoning issues within the *Penn Central* framework, but make it less deferential in various ways.[44] That approach would disrupt precedent to a lesser degree, but would create more uncertainty, at least initially. There are also possible balancing-test approaches to reversing or limiting *Kelo* and *Berman*, such as requiring the government to provide stronger evidence that the supposed public benefit to be created by a taking really will materialize, and imposing heightened judicial scrutiny on such claims.[45] Unlike a restoration of the "narrow" definition of public use, this approach would require more case-specific factual inquiries by judges, and might create some legal uncertainty.

II. Democracy and Representation-Reinforcement

Traditional skepticism of judicial protection for property rights emphasizes fears that such intervention undermines democracy and benefits the wealthy at the expense of the relatively poor.[46] "Representation-reinforcement" theory—most famously advocated by John Hart Ely—holds that judicial review should

40. *See* Braver & Somin, *supra* note 2, at 59.
41. *See* SOMIN, *supra* note 16, at 6-7, 35-72, 243-44 (outlining this approach)
42. *See* Braver & Somin, *supra* note 2, at 57-58 (advocating this approach).
43. See *id*. at 25-30 (discussing the exception and its possible scope).
44. *See id.* at 58-59 (describing how this can be done).
45. *See* SOMIN, *supra* note 16, at 214-17 (discussing and criticizing this option).
46. *See supra* Part I.

generally be limited to focusing on protecting access to the democratic process, and restricting policies that harm groups that cannot effectively represent themselves in the political system, such as discriminated-against minorities.[47] Both private-to-private takings, authorized by cases like *Berman* and *Kelo*, and exclusionary zoning, authorized by *Euclid* and its progeny, ended up victimizing hundreds of thousands of people who often lacked effective political representation. Far from promoting democratic values, these rulings actually undermined them.

The broad definition of "public use" upheld in *Berman* paved the way for urban-renewal and "blight" condemnations that forcibly displaced hundreds of thousands of people—most of them poor and minorities.[48] Between 1949 and 1973, some two-thirds of those displaced by urban-renewal takings were Black.[49] To many, urban renewal became known as "Negro removal."[50] Noted Black writer and political activist James Baldwin said that "urban renewal . . . means moving the Negroes out. It means Negro removal, that is what it means."[51]

The racial distribution of victims of urban-renewal takings links them to classic issues of representation-reinforcement, which focuses on protecting minority groups. But there is another sense in which the representation-reinforcement problem here is even more blatant. Since most uses of eminent domain are adopted by local governments, those forced out of the community by means of condemnation are generally not able to punish the offending local officials at the ballot box, as they are likely to no longer be present by the time of the next election. This creates a representation-reinforcement problem in some ways more serious than that facing a minority group that is unpopular but that still has the vote.[52] The latter could still potentially exercise some influence through voting, while people expelled from the community entirely cannot. As Justice Thomas put it in his *Kelo* dissent, "[i]f ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' . . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects."[53]

The tendency to disproportionately victimize the poor, minorities, and politically weak arises in "economic development" condemnations of the kind

47. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-77 (1980).

48. For overviews, see SOMIN, *supra* note 16, at 88-89, and Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 5-23 (2003).

49. MINDY THOMPSON FULLILOVE, EMINENT DOMAIN & AFRICAN AMERICANS 2 (2007); *see also* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962, at 8 (1964) ("Most of the people who are seriously affected by the [federal urban renewal] program come from low-income, minority groups . . . .").

50. SOMIN, *supra* note 16, at 88.

51. *Id.*

52. For more detailed discussion of this point, see *id.* at 100-02.

53. Kelo v. City of New London, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

upheld in *Kelo*, as well as blight and urban-renewal takings.[54] In *Kelo* itself, a group of lower-middle-class property owners and other residents were forcibly displaced to make way for a project that served the interests of Pfizer, a politically influential pharmaceutical firm.[55]

There is a similar story with exclusionary zoning. In the years after *Euclid*, exclusionary-zoning rules were extensively used to exclude the poor and minorities.[56] The Supreme Court had forbidden explicit racial segregation in zoning in its 1917 ruling in *Buchanan v. Warley*.[57] But many jurisdictions were able to use facially neutral zoning restrictions to circumvent *Buchanan* by adopting single-family zoning and other rules that increased the cost of housing, and thereby priced out most Black people and other minorities.[58]

Indeed, this result was predicted by the lower-court decision in *Euclid*, which the Supreme Court overruled. Federal District Judge David C. Westenhaver analogized the exclusionary-zoning rules in *Euclid* to the racial segregation in *Buchanan* and predicted that "the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants."[59] He noted the "blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section," which could be used to justify such restrictions.[60] Using zoning to promote racial and ethnic segregation was, Judge Westenhaver believed, a natural extension of the tendency of exclusionary zoning "to classify the population and segregate them according to their income or situation in life."[61] The judge's bigoted assumptions about the effects of an "invasion" by "colored or certain foreign races" should not obscure the validity of his prediction.

As with the use of eminent domain for private-to-private takings, exclusionary zoning raises serious representation-reinforcement problems. Both have a history of victimizing minorities and the poor.[62] In addition, the primary victims of exclusionary zoning—like those of the use of eminent domain—are people unable to effectively participate in the political process through voting.

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54. *See* SOMIN, *supra* note 16, at 101-02.

55. For a detailed account, see *id.* at ch. 1. Additionally, see generally JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009), which narrates the story of Susette Kelo's battle to keep her home.

56. For overviews of how zoning was used to promote segregation, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 39-58 (2017); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 85-100 (2018); and Christopher Silver, *The Racial Origins of Zoning: Southern Cities From 1910-40*, 6 PLANNING PERSPS. 189, 190-201 (1991).

57. 245 U.S. 60 (1917).

58. *See* works cited *supra* note 56.

59. Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

60. *Id.*

61. *Id.* at 316.

62. *See supra* text accompanying notes 48-61.

Whereas victims of blight and economic-development takings are unable to participate in the political process because they have been forced out of the relevant community, victims of exclusionary zoning are unable to do so because they are prevented from moving there in the first place.[63] The situation is therefore a perfect example of John Hart Ely's concern about the "ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out."[64] Here, the "ins" are "NIMBY" ("not in my backyard") current residents of the community who back exclusionary zoning, while the "outs" are those who could potentially move in if property owners were free to build new housing in response to demand.[65]

To be sure, in both the eminent-domain and zoning cases, victims could potentially still exercise political influence by lobbying for state or federal legislation to change matters. But this sort of argument overlooks the much greater difficulty of influencing higher-level governments, and would—if applied consistently—eliminate representation-reinforcement rationales for judicial review of almost any local-government actions, at least if they can be overridden by state or federal authority.[66]

In addition, Ely recognized the importance of a "right to relocate" as an element of effective representation.[67] He thought of it as a tool for people in the political minority in one region to be able to move to another area more closely aligned with their preferences, thereby "escaping an incompatible majority."[68] In earlier work, I have outlined the broader significance of "foot voting" as a mechanism of political choice that has major advantages over traditional ballot-box voting.[69] Most notably, foot voters are empowered to make individually decisive choices about what policies they wish to live under (as opposed to individual ballot-box voters only having an infinitesimally small chance of influencing electoral outcomes), and they have much better incentives to make well-informed decisions.[70]

To the extent that protecting Ely's "right to relocate" or foot voting more generally is an element of representation-reinforcement, that argues for stronger judicial review of both eminent domain and exclusionary-zoning policies. The former can impede foot voting by forcing people out of the communities they prefer to live in. The latter does so by preventing them from joining those communities in the first place.

Ely spoke only of a "right to relocate,"[71] which covers exclusionary zoning more obviously than the use of eminent domain. The latter, of course, does not

63. This point is developed in detail in Braver & Somin, *supra* note 2, at 34-43.
64. ELY, *supra* note 10, at 103.
65. Braver & Somin, *supra* note 2, at 34-35.
66. For more on this point, see *id.* at 36-37.
67. ELY, *supra* note 10, at 178.
68. *Id.* at 178-79.
69. *See* SOMIN, *supra* note 11, at ch. 1.
70. *Id.*
71. ELY, *supra* note 10, at 178.

prevent relocation, but actually compels it. But to the extent that the purpose of the "right to relocate" is to enable citizens to live in a community with policies that fit their preferences, it is natural to combine it with a right against forcible expulsion. The two are mutually reinforcing.

III. Synergies

The two applications of Fifth Amendment rights considered in this Article have natural synergies. These synergies apply to both the original-meaning issues involved and the representation-reinforcement ones. In addition, advocates of zoning reform could potentially learn useful lessons from the experience of the *Kelo* case and post-*Kelo* eminent-domain reform.

From an originalist standpoint, the right to use at stake in zoning cases is a natural complement to the right to be protected against the use of eminent domain. Both arise from a broad conception of the importance of property rights that prevailed in the Founding Era and in 1868.[72]

Moreover, the two rights are mutually reinforcing. The right to use is greatly diminished if the property in question can be condemned at any time for virtually any purpose. Similarly, rights against condemnation have less value if the owner's right to use the land in question is severely restricted, as it often is by exclusionary zoning. The right to use property and the right to protect it against condemnation are two sides of the same coin.[73]

There are also crucial synergies when it comes to representation-reinforcement. As discussed above,[74] both rights protect people who otherwise have little political influence. Moreover, both help forestall policies that harm people who otherwise cannot participate in the relevant local political processes. Restrictions on eminent domain reduce the ability of local governments to expel people, while enforcement of Takings Clause constraints on exclusionary zoning helps prevent the government from barring people from joining the community in the first place.

Albert Hirschman famously described "voice" and "exit" as two alternative mechanisms people have to influence the policies they live under and exercise influence over the institutions that govern them.[75] The former refers to the ability to exercise influence within an institution, while the latter is the right to leave the institution for one that better fits one's preferences and needs.[76] Restoring a narrow definition of "public use" would help prevent people from losing their "voice" option in the community through expulsion. Strengthening protection

72. *See supra* Part I.

73. For a more detailed analysis of how the right to use is linked to other aspects of property rights, see Ilya Somin, *The Right to Use Private Property*, *in* RETHINKING THE LAW OF PRIVATE PROPERTY 68, 69-73 (Jan G. Laitos ed., 2025).

74. *See supra* Part II.

75. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 1-20 (1970).

76. *Id.* at chs. 2-3.

against exclusionary zoning would increase exit options by enabling more people to move to locations with better institutions and opportunities.

The originalist case for enforcing a narrow definition of "public use" and protecting the right to use property under the Takings Clause has broad overlap with the representation-reinforcement case. But the two are not completely symmetrical. The latter implies somewhat narrower protection for property rights than the former.

A focus on representation-reinforcement might imply Takings Clause protection against exclusionary zoning only in cases where local governments restrict housing construction, as opposed to other types of land uses.[77] Restrictions on commercial land uses do not impede foot voting and mobility to anything like the same degree. Similarly, a representation-reinforcement approach might give heightened protection against eminent domain to residential property, since the condemnation of non-residential land uses is less likely to result in exclusion of residents from the community.[78] By contrast, an originalist approach would rest on the general principle that the Takings Clause protects a right to use, whether that use is residential or not.[79]

Advocates of zoning reform can also learn from the *Kelo* experience about how to combine constitutional litigation with political-reform efforts.[80] Although the *Kelo* case was a defeat for property-rights advocates at the Supreme Court, it attracted widespread public attention to the problem of eminent-domain abuse and led forty-five states to enact reform laws.[81] Though about half the new laws were largely ineffective, this was still significant progress.[82] In the aftermath of *Kelo*, several state supreme courts repudiated the decision as a guide to the interpretation of their state-constitutional public-use clauses.[83]

An appropriate case challenging the constitutionality of exclusionary zoning could similarly capture public attention and bolster political-reform efforts.[84] It might also stimulate state courts to change state-constitutional doctrine on zoning issues. "YIMBY" ("yes in my backyard") zoning-reform advocates might also be able to learn from the *Kelo* experience under which reforms enacted by referendum were generally stronger and more effective than those enacted through state-legislative processes—a result possibly attributable

77. *See* Braver & Somin, *supra* note 2, at 61-62.

78. For arguments that homes deserved heightened protection, see, for example, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 131-32 (2012); DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 168-69 (2007); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 987-88, 991-92 (1982); and D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 295-300 (2006). For my critique of such ideas, see SOMIN, *supra* note 16, at 212-13.

79. Braver & Somin, *supra* note 2, at 12-24 (outlining an originalist rationale for a right to use); *see also* Somin, *supra* note 73, at 75-91 (discussing the originalist case for a right to use in detail).

80. For a more detailed discussion, see Braver & Somin, *supra* note 2, at 63-64.

81. *See* SOMIN, *supra* note 16, at chs. 4-5.

82. *Id*.

83. *See id.* at ch. 7 (reviewing cases).

84. Braver & Somin, *supra* note 2, at 63-64.

to the fact that referendum initiatives are less susceptible to being watered down by interest-group lobbying.[85] Zoning reformers should consider relying on referenda in states where this is legally feasible.[86]

Finally, while *Kelo* reaffirmed the broad view of public use, the closeness of the 5-4 decision shattered the previous seeming judicial consensus on this issue, and created the possibility of *Kelo* being overruled in the future.[87] In recent years, four Supreme Court Justices have expressed interest in revisiting *Kelo*.[88]

A well-developed legal challenge to the constitutionality of exclusionary zoning could have a similar galvanizing effect. Elsewhere, Joshua Braver and I have explained how judicial review of exclusionary zoning could be greatly strengthened even without overruling *Euclid* or any other existing Supreme Court precedent.[89]

Euclid could be sidelined by simply ruling that it does not apply to takings cases brought under the Public Use Clause of the Fifth Amendment, and is instead limited to cases brought under the Due Process Clause of the Fourteenth Amendment; indeed, *Euclid* does not even ever mention the Fifth Amendment.[90] As discussed earlier, the Supreme Court could impose tighter scrutiny on exclusionary zoning either by ruling that such regulations are per se takings, or by making the *Penn Central* balancing test less deferential.[91]

Conclusion

There are multiple important parallels between the public-use issue at stake in *Kelo v. City of New London* and constitutional issues involving the Takings Clause and exclusionary zoning. The two are similar from the standpoint of both originalism and representation-reinforcement theory. Strengthening judicial protection for both rights would create valuable synergies and provide important benefits for property owners and for the poor and disadvantaged in our society.

85. SOMIN, *supra* note 16, at 157-60, 174-75.

86. For a list of states with initiative and referendum processes, see *Initiative and Referendum Processes*, NAT'L COUNCIL OF STATE LEGISLATURES (July 9, 2025), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes [https://perma.cc/4C2K-2TZ7].

87. *See* SOMIN, *supra* note 16, at 237-41.

88. *See* Ilya Somin, *Three Supreme Court Justices Signal Willingness to Reconsider* Kelo v. City of New London, REASON: VOLOKH CONSPIRACY (July 3, 2021, 12:30 AM) https://reason.com/volokh/2021/07/03/three-supreme-court-justices-signal-willingness-to-reconsider-kelo-v-city-of-new-london [https://perma.cc/9ZBP-U3LJ] (discussing three current Justices who indicated such interest in 2021, and one more who did so previously).

89. Braver & Somin, *supra* note 2, at 57-60.

90. *Id.* at 60-61.

91. *See id.* at 57-59; discussion in Part I, *supra*.