

The Interplay between the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's Takings Clause:

Is the Supreme Court's Test for "Public Use" Merely Rational Basis?

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Introduction

What part of the Constitution limits the power of eminent domain? The obvious answer is the Takings Clause of the Fifth Amendment, which states “nor shall private property be taken for public use, without just compensation.”¹ But what about the Due Process Clause of the Fourteenth Amendment.² It was not until 1978, in *Penn Central Transp. Co. v. New York*,³ that the Supreme Court matter-of-factly held that the Takings Clause of the Fifth Amendment was “of course” applicable to the states.⁴ To justify incorporation, *Penn Central* cited only one 19th century case, which itself did not mention the Fifth Amendment.⁵ Before *Penn Central*, the Court relied on the Due Process Clause to restrict the scope of state taking power.

Penn Central left two questions. First, did the Court correctly incorporate the Takings Clause against the states? Evidence exists that the framers of the Fourteenth Amendment specifically rejected including a takings clause in the amendment. Although they may have done so because they believed the Fourteenth Amendment incorporated the entire Bill of Rights, even before ratification, American courts had limited eminent domain through due process concepts that limited all exercises of police power. This leads to the second question: did *Penn Central's* “official” incorporation change eminent domain jurisprudence? It appears not, as cases since Reconstruction, whether they cite the Fourteenth or Fifth Amendments, apply equal deference to

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states. In fact, it appears the Fourteenth Amendment itself did little to change takings jurisprudence as concerns “public use.”⁶ Although the Fourteenth Amendment gave federal courts the opportunity to review state takings, the Court continued a pattern of deference to state judgments of what constitutes a proper taking.

It could be that the Court referred to the Fourteenth Amendment in state takings claims and the Fifth Amendment in federal cases; and *Penn Central Transp. Co.* was simply a change in nomenclature. After all, “it would be ‘incongruous’ to apply different standards ‘depending on whether [a constitutional] claim was asserted in a state or federal court.’”⁷ However, the Courts has applied the same “police power” analysis to constitutional challenges to condemnations by both state *and federal* condemning authorities, whether citing the Fourteenth or Fifth Amendment. Thus, if the Constitution’s limits on taking power match the contours of basic due process protection against arbitrary or irrational legislation, why is there a separate Takings Clause at all? Why did *Penn Central* make a point to state that the Fifth Amendment “of course” applied to the states, when it could have relied on the Fourteenth Amendment alone? Could not federal cases have cited the Fifth Amendment’s *Due Process* Clause?

Indeed, a minority on the Supreme Court believes that the Public Use Clause has been reduced to “little more than hortatory fluff.”⁸ The majority opinion and Justice O’Connor’s dissent in *Kelo v. City of New London* both indicate that the “for public use” portion of the Takings Clause restricts condemnations further than normal due process limits on state police power. However, Justice Thomas’s dissent argued that the majority’s broad deference to legislative judgment was to “effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”⁹ History seems to be on the majority’s side, as one struggles to find a Supreme Court case that struck down a condemnation—either state or federal, so long as

the agency had a mere rational basis for its decision to condemn. Justice Thomas acknowledged that the Court had been applying this deference test since the 19th century, but that all such decisions were simply wrong.¹⁰ Applying the *due process* conception of constitutional limits on eminent domain, American courts have always assumed *sub silentio* that the determination of proper “public use” is a decision left to states’ internal political processes.

If there were no Takings Clause, would things be any different? Perhaps the redundancy of the clause with due process explains why Reconstruction-era congressmen decided against adding a takings clause to the Fourteenth Amendment. Then again, they may have believed it unnecessary because the Fourteenth Amendment incorporated the Bill of Rights. Whatever the case, *Penn Central* neglected to address these aspects of constitutional history. One would expect the Takings Clause and the Due Process Clause to set different limits on condemnation power, because in the Constitution, “every word in the document has independent meaning, ‘that no word was unnecessarily used, or needlessly added.’”¹¹ So far, however, the two clauses are interchangeable.

Did the Framers of the Fourteenth Amendment Intend the Due Process Clause to Incorporate the Fifth Amendment’s Takings Clause?

Incorporation of the Bill of Rights is a cryptic subject.¹² There is little consensus on whether Black’s “total incorporation,”¹³ Frankfurter’s “fundamental fairness and ordered liberty,”¹⁴ or Brennan’s “selective incorporation,”¹⁵ if any, is correct.¹⁶ Concerning the Takings Clause, however, congressional records provide some insight but do not settle the question. It appears the framers of the Fourteenth Amendment understood its language as rejecting an analogue to the Fifth Amendment’s Takings Clause. This has several possible explanations: the framers believed incorporating the Takings Clause was an unwarranted interference with states’ rights; they sought to avoid redundancy because the limits of the Takings Clause were

coterminous with due process restrictions on eminent domain power; or they believed the Fourteenth Amendment incorporated the Bill of Rights entirely and thus a separate takings clause was unnecessary.

After tensions over slavery and states' rights led to the bloodiest conflict in American history, Congress divided on how best to rebuild the nation. President Andrew Johnson and his allies hoped to carry out a swift reconstruction, requiring only that southern states ratify the Thirteenth Amendment abolishing slavery, repudiate all war debts, and void ordinances of succession.¹⁷ The Radical Republicans, led by the "Dictator of Congress," Rep. Thaddeus Stevens,¹⁸ wanted to grant freed slaves full civil rights, both out of moral sentiment and to create a Republican power base.¹⁹ The "black codes"²⁰ and laws that denied freedmen entry into the states²¹ hampered the Radicals' goals, as did Supreme Court precedent favoring states rights (often regarding slavery).²² After President Johnson vetoed²³ a civil rights bill²⁴ that would have eliminated the black codes, Stevens sought to usurp power from the President. He introduced a resolution which created the Committee of Fifteen to oversee Reconstruction.²⁵ These fifteen representatives and senators drafted what became the Fourteenth Amendment.

The Committee's secret meetings became public after a clerk's journal was discovered.²⁶ Members of the committee offered draft constitutional amendments for an up or down vote.²⁷ Rather than citing the Bill of Rights, the first drafts mirrored language in the recently passed Civil Rights Act of 1866.²⁸ Subsequent drafts spoke in terms of individual and equal rights, giving Congress the power to "make all laws necessary and proper to secure to all persons in every state within the Union equal protection in their rights of life liberty and property," to secure "to all citizens of the United States in any state the same immunities and also equal

political rights and privileges,”²⁹ and providing that “all laws, state or national, shall operate impartially and equally on all persons without regard to race or color.”³⁰

The Committee then shifted its focus from “natural” rights to enumerated rights in the Constitution. Representative John Bingham of Ohio offered a new draft:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and minutes of citizens in the several states (Art. 4 Sec 2)³¹; and to all persons in the several States equal protection in the rights to life, liberty, and property (5th Amend.).³²

While Bingham’s draft directly cited the Constitution, the committee minutes indicate that it decided not to incorporate the entire Fifth Amendment. After the Committee drafted the final version of the Fourteenth Amendment,³³ Bingham proposed adding the following.

nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.³⁴

The Committee rejected this construction by a seven-to-five vote. Notably, Bingham offered this amendment by itself, not as part of a larger provision, which the Committee may have rejected for other reasons. Several days later, the Committee adopted Section 1 as it stands today.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.³⁵

Perhaps seeking to allay concerns of states’ rightists, the remarks of Congressmen indicate that they did not intend to incorporate the Bill of Rights—including the Takings Clause. Senator Lyman Trumbull of Illinois explained that Section 1 was a “reiteration of the rights set forth in the Civil Rights Bill.”³⁶ John Bingham himself explained that Section 1 was an attempt to codify the Civil Rights Act’s assurance of interstate equality and certain natural rights that had existed for some time.³⁷ However, Bingham seemed to support the “total incorporation” theory. He remarked that the Amendment would “arm the Congress . . . with the power to enforce the *bill of*

rights as it stands in the Constitution today.”³⁸ Similarly, Sen. Jacob Howard said the Amendment upheld “the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution.”³⁹ Regarding property rights, Bingham clarified that Section 1 left acquisition and transmission of property to the law of the states⁴⁰

The actions and statements of Bingham and other committee members leave the debate on incorporation unsettled today.⁴¹ The Committee may have rejected a takings clause either because they intended to incorporate the entire Bill of Rights or because the limits of the Fifth Amendment’s Takings Clause were coterminous with those of basic due process; thus a takings clause in the Fourteenth Amendment would have been redundant. The Supreme Court, shortly after ratification, took the Committee’s rejection of the takings amendment as evidence that the Takings Clause did not apply to the states. In striking down a condemnation challenge, the Court held the taking

may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when then *fourteenth amendment* was adopted, the provision on that subject, in immediate juxtaposition in the *fifth amendment* with the one we are construing, was left out, and this was taken.”⁴²

Rather, the Fourteenth Amendment enforced *due process* against the states, meaning,

those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.⁴³

This included only Bill of Rights provisions that had become engrained in the judicial system.⁴⁴

Apparently, the Court did not believe the Takings Clause rose to this level. It would be over 100 years after ratification until the Court officially incorporated the Fifth Amendment’s Taking Clause against the States in *Penn Central*.⁴⁵ The Fifth Amendment restricted only the national

government, as the Supreme Court made clear in 1833, leaving state exercises of police power to states' internal political processes.⁴⁶ However, despite *Davidson's* clear edict that the Fifth Amendment only applied to the federal government, the Court held that a statute could not declare "that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby transferred in B."⁴⁷ Indeed, a plethora of cases restricted the right to eminent domain under the due process clause.⁴⁸ *Chicago, B & Q. R. Co. v. Chicago*,⁴⁹ the sole case *Penn Central* relied upon to incorporate the Takings Clause,⁵⁰ did not itself mention the Fifth Amendment. After reviewing the decisions of state and federal courts,⁵¹ and legal commentary,⁵² that just compensation was an essential and historic due process limitation on state power.⁵³ *Chicago B & Q* stated that,

The requirement that the property shall not be taken for public use without just compensation is but "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost laid other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."⁵⁴

Thus, *Chicago B & Q* was not a groundbreaking precedent. It's "overruling" of *Davidson v. New Orleans* did not change the fundamental principles underlying both decisions. First, *Davidson* was a tax assessment case in which the Court expressed frustration at the feeding frenzy of litigation stemming from the recently passed Fourteenth Amendment.

[T]here exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful

construction could be furnished by this or any other court to any part of the fundamental law.⁵⁵

Further, courts for some time before *Davidson* had restricted eminent domain power through due process. Anglo-American law had limited state control over property since the Magna Carta was signed in 1215.⁵⁶ The liberal philosophy of those such as John Locke dictated that there was “natural” or “universal” right to a procedure and just compensation when the government confiscated land.⁵⁷ Although colonial America was slow to provide compensation to landowners⁵⁸ and there was a brief period in which in post-revolution states snatched land from loyalists,⁵⁹ by mid 19th Century, courts had reigned in the exercise of eminent domain power by finding a right to compensation in natural rights.⁶⁰ For centuries, “natural rights” required due process and compensation to property owners.

Normally incorporation of Bill of Rights provisions is done with great fanfare and explanation,⁶¹ but in *Penn Central*, the Court simply glossed over the issue and applied the Takings Clause to the states in a single sentence, perhaps because it felt *Chicago B. & Q.* had already done the legwork.

The issues presented by appellants are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the *Fifth Amendment*, which of course is made applicable to the States through the *Fourteenth Amendment*, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 229, 239 (1897).⁶²

The Court did not elaborate on the fact that, as discussed below, no case from the ratification of the Fourteenth Amendment to *Penn Central* ever relied on the Fifth Amendment to limit state eminent domain power.

Did the Fourteenth Amendment and Incorporation of the Fifth Amendment Change the Court's Test for Compensation and Public Use?

While historically a right to compensation has always been a part of Anglo-American jurisprudence,⁶³ due process limits on the legislature's ability to decide which takings are valid "public uses" are less clear. The Fifth Amendment specifically states "for public use," indicating that it may impose additional requirements upon fundamental due process, which historically warranted only just compensation. Nonetheless, federal courts have granted broad discretion to state legislatures concerning public use. There are few examples of state courts applying a strict "actual use by the public" test,⁶⁴ but generally the presence of a valid "public benefit" justified transfers to private owners.⁶⁵ The Mill Acts and the private road acts, both of which delegated taking power to private individuals, were "crucial evidence that the founding generation accepted the public-benefit theory."⁶⁶ Reluctant to interfere with states' internal political processes, this test essentially reduces the "public use" inquiry to a rational basis evaluation of state action.⁶⁷

Post-Reconstruction courts relied on due process to impose the historically-available just compensation requirement while reviewing alleged "public uses" briefly for rational bases. In *Fallbrook Irrigation Dist. v. Bradley*,⁶⁸ the Court rejected landowners' due process challenges to an irrigation program that benefitted private parties. The Court began by noting that the "*Fifth Amendment* which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government as has many times been decided."⁶⁹ The Due Process Clause of the Fourteenth Amendment, however, meant "the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."⁷⁰ Nonetheless, this due process review was strictly limited, and the Court offered the agency great deference and upheld the taking.⁷¹

The due process test for public use appears to mirror the rational basis test applicable to any exercise of state police power. Nearly every case following *Fallbrook* mentioned the Court's role in defining public use, but ultimately deferred to the state's judgment.⁷² It was not until 1930, in *Cincinnati v. Vester*⁷³ that the Court struck down a taking for want of a proper public purpose. In that anomalous situation, however, the city council's condemnation resolution stated *no* purpose for the taking, which the Court struck down as arbitrary.⁷⁴ It would have likely struck down an action with no stated purpose even outside the condemnation context.⁷⁵ When it decided *Penn Central*, the Supreme Court had established two precepts. First, the Fifth Amendment did not apply to the states. Second, due process only allowed the Court to spot check "public uses" for rational bases, as with any exercise of police power.

Penn Central's incorporation of the Fifth Amendment did not change these principles. This is expected because the Court simply assumed *Chicago B & Q* and its progeny had incorporated the Takings Clause years ago. Post-*Penn Central*, the Court followed the same pattern of deference to states on the "public use" question. In *Hawaii Housing Auth. v. Midkiff*,⁷⁶ the Court upheld the state's attempt to break up a land oligopoly because, "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers"⁷⁷ and that "where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff* cited a number of non-condemnation decisions holding that "the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective."⁷⁸

Interestingly, *Midkiff* opined in a footnote that "the *Fourteenth Amendment* does not itself contain an independent "public use" requirement. Rather, that requirement is made binding

on the States only by incorporation of the *Fifth Amendment's* Eminent Domain Clause through the *Fourteenth Amendment's* Due Process Clause.”⁷⁹ However, if this were true, this public use requirement appears nugatory, as the Court continued to defer to states on public use under due process. Further, forgetting the incorporation debate for a moment, the Court has treated the Public Use Clause identically in federal cases, deferring to legislative and executive determinations of proper purposes. In *U.S. ex rel. Tenn. Valley Auth. v. Welch*,⁸⁰ the Court gave legislative determinations of public use “nearly immunity from judicial review” when it held that determinations of Congress and federal agencies are binding. *Ruckelshaus v. Monsanto*,⁸¹ another federal case, noted, “So long as the taking has a conceivable public character, ‘the means by which it will be attained is . . . for Congress to determine.’”⁸² It appears this “independent public use requirement” is devoid of meaning in both federal and state takings cases.

Kelo attempted to backtrack from *Midkiff*, but ultimately reemphasized that the Takings Clause and due process are redundant. Although the “question presented is whether the city’s proposed disposition of this property qualifies as a ‘public use’ within the meaning of the *Takings Clause of the Fifth Amendment to the Constitution*,”⁸³ the Court’s analysis looked suspiciously like simple rational basis.

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community. . . given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review.⁸⁴

Further, the property owners’ proposed test that a “reasonable certainty” that public benefits accrue from a taking represented an

even greater departure from our precedent. “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”⁸⁵

Justice Thomas's vigorous dissent, railing against cases dating back to *Fallbrook Irrigation*, argued that *Kelo* was "simply the latest in a string of our cases construing the *Public Use Clause* to be a virtual nullity, without the slightest nod to its original meaning."⁸⁶ Arguing that "The Court adopted its modern reading blindly,"⁸⁷ Justice Thomas reasoned that *Fallbrook Irrigation* and its progeny were simply wrong.⁸⁸ *Berman* and *Midkiff* "erred by equating the eminent domain power with the police power of the states"⁸⁹

Justice O'Connor's dissent tried to find a middle ground that would not render "the *Public Use Clause* redundant with the *Due Process Clause*, which already prohibits irrational government action."⁹⁰ Noting that *Midkiff* made "[t]he 'public use' requirement [] coterminous with the scope of a sovereign's police powers,"

Berman and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for 'public use' for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated."⁹¹

She tried to distinguish those cases as eliminating a harmful use of land, whereas *Kelo* was taking property from productive owners.⁹² Ultimately, however, her opinion failed to consider that all these cases were part of a long line of precedent deferring to states on public use.

Perhaps the *Kelo* majority was right. The Committee of Fifteen may have decided not to include a takings clause in the Fourteenth Amendment because they recognized that it would have been redundant to the Due Process Clause. But if in *federal* takings the scope of the Fifth Amendment's Due Process Clause is coterminous with the Takings Clause, why would the Founding Fathers have added it? Did they simply want to emphasize the restriction on eminent domain? The point is that not much has changed. *Kelo* identified two takings that would never pass constitutional muster; "purely private" takings,⁹³ and takings under the "mere pretext of a

public purpose.⁹⁴ But these types of takings would be excludable under bare due process, and the latter is an example of the type of condemnation the Court struck down in *Vester*.⁹⁵

Conclusion: Why This Matters.

Incorporation of the Bill of Rights is an incredibly immense topic. It is debatable whether the Court properly incorporated the Fifth Amendment's Takings Clause in *Penn Central*, considering the drafters' enigmatic rejection of such a clause in the Fourteenth Amendment and the Court's historical reliance on due process in limiting the power of eminent domain. More important, however, is the fact that the Supreme Court's analysis of taking power does not diverge when it applies the Takings Clause versus due process. Unlike most incorporation cases, *Penn Central* or *Chicago B & Q*, whichever is the official "incorporator" of the Takings Clause against the states, changed little. *Chicago B & Q* may have given federal courts the power to scrutinize *state* condemnations, but it did so without referring to the Takings Clause. Decades of decisions citing these provisions are highly interchangeable. This leads one to believe that the Fifth Amendment's Taking Clause is nugatory; the just compensation clause because compensation was always an inherent part of natural rights and fundamental due process;⁹⁶ the public use clause because it is merely a reiteration of the substantive due process idea that the government may not take arbitrary or unreasoned actions. If this is so, practitioners facing constitutional takings claims should be aware that general arguments against exercises of police power under due process are just as relevant as arguments specific to the Takings Clause.

I do not intend this paper, or the longer article I hope to write, as a diatribe against *Kelo*'s purported evisceration of whatever was left of the Public Use Clause. Rather, I hope what the reader takes away is that despite nearly a century and a half of case law attempting to define the scope of the Takings Clause and the Fourteenth Amendment, the result is that the Supreme Court

subjects exercises of the eminent domain power to what is essentially a rational basis standard. This is true even though the Court has attempted to hold the Public Use Clause out as something more in *Kelo*. Justice Thomas argued *Kelo* and the cases that preceded it were wrong, but I am not so sure, considering that the Committee of Fifteen rejected a Takings Clause, and that historical limits on “public use” always deferred to states except in cases of extreme arbitrariness or irrationality. It may simply be that the Takings Clause of the Fifth Amendment, or at least the Public Use Clause, was redundant from its drafting.

Notes

¹ U.S. CONST. amend. V.

² “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. § 1.

³ 438 U.S. 104 (1978).

⁴ *Id.*, at 122.

⁵ *Id.* (citing *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226 (1897)).

⁶ Although this brief paper is limited to the issue of public use, I hope to expand on the just compensation element of the Takings Clause in a longer article. I have found thus far that like the public use requirement, tests for “just compensation” have not been influenced much by the Fourteenth or Fifth Amendments. In fact, the right to just compensation is a principle hundreds of years old, stemming from “natural rights” theories of due process. Thus, the incorporation or non-incorporation of the Takings Clause would not have had much of an effect on this age old rule of Anglo-American jurisprudence.

⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

⁸ *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O’Connor, J., dissenting).

⁹ *Id.*, at 494.

¹⁰ *Id.*, at 505-523 (Thomas, J., dissenting).

¹¹ *Id.*, at 496 (O’Connor, J., dissenting) (quoting *Wright v. United States*, 302 U.S. 583, 588 (1938)).

¹² For a detailed analysis of the incorporation debate, *See McDonald*, 130 S. Ct. at 3033-3034 and n. 9 (Supreme Court has not adopted one perspective on incorporation to the exclusion of any other); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN L. REV. 5 (1949); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (Univ. of Okla. Press, 1989); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. L. HIST. 305 (1988); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

¹³ See *Betts v. Brady*, 316 U.S. 455, 474-75 (1942) (Black, J., dissenting); *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting); *Duncan v. Louisiana* 391 U.S. 145, 162-71 (1968) (Black, J., concurring).

¹⁴ See *Adamson* 332 U.S. at 59-68 (Frankfurter, J., concurring); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

¹⁵ See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274-76 (1960) (separate opinion of Brennan, J.); *Cohen v. Hurley*, 366 U.S. 117, 154-60 (1961) (Brennan, J., dissenting); *Malloy v. Hogan*, 378 U.S. at 1. (separate opinion of Brennan, J.).

¹⁶ For a detailed discussion of these perspectives, see Amar, note 12 *supra*.

¹⁷ BENJAMIN B. KENDRICK, ED., *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION*, 39TH CONGRESS, 1865-1867 134 (Columbia University 1914).

¹⁸ He was also the chair of the House Ways of Means Committee and a leader of the effort to impeach President Johnson. See HANS LOUIS TREFOUSSE, *THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN* (Univ. of N. Carolina Press 1997).

¹⁹ *Kendrick*, note 17 *supra*, at 136-137.

²⁰ *Id.*, at 213; WILLIAM A. DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865-1877* 54-59 (Harper & Row 1962).

²¹ Philip Hamburger, *Privileges or Immunities* 21-23; 48-49 (March 16, 2010) (unpublished manuscript, on file with the Northwestern University Law Review).

²² See *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 58 U.S. (18 How.) 272 (1856).

²³ President Johnson's Veto of the Civil Rights Act, 1866, available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf

²⁴ An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27-30 (April 9, 1866) Chap. XXXI.

²⁵ Cong. Globe, 39th Cong., 1st Sess., 4-6 (1865-66).

²⁶ *Kendrick*, note 17 *supra*, at 17-21.

²⁷ *Id.*, at 37-129.

²⁸ Civil Rights Act of 1866, Section 1, 42 U.S.C. § 1981. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

²⁹ *Kendrick*, note 17 *supra*, at 56.

³⁰ *Id.*, at 46.

³¹ U.S. CONST art. 4, §. 2, cl. 1 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This is commonly known as the "Comity Clause."

³² *Kendrick*, note 17 *supra*, at 61.

³³ *Id.*, at 82.

³⁴ *Id.*, at 82; 85.

³⁵ *Id.*, at 106.

³⁶ JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 161 (Univ. of Ill. Press 1965).

³⁷ *Globe*, note 25 *supra*, at 1089.

³⁸ *Id.*, at 1088.

³⁹ *Id.*, at 2765.

⁴⁰ *Id.*, at 1088. “As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States.” The Fourteenth Amendment only ensured that any person who had “acquired property not contrary to the laws of the State, but in accordance with its law” should be “equally protected in the enjoyment” of his property.

⁴¹ See note 12 *supra*.

⁴² *Davidson v. New Orleans*, 96 U.S. 97, 105 (1878).

⁴³ *Murray’s Lessee*, 59 U.S. at 276-277.

⁴⁴ *Hurtado v. California* 110 U.S.516, 528-531 (1883); *Davidson*, 96 U.S. at 104.

⁴⁵ 438 U.S. at 104.

⁴⁶ *Barron v. Baltimore*, 32 U.S. 243 (1833); DAVID ANDREW SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 25-26 (Transaction Publishers 1992); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH L. REV 567 (1972).

⁴⁷ *Davidson*, 96 U.S. at 102.

⁴⁸ See Note 72 *infra*.

⁴⁹ 166 U.S. 226 (1897).

⁵⁰ 438 U.S. at 122.

⁵¹ *Chicago B. & Q.*, 166 U.S. at 229; 235-239 (citing *Davidson*, 96 U.S. at 97; *Sweet v Rechel*, 159 U.S. 380, 398 (1894); *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 519 (1893); *Searl v. School Dist*, 133 U.S. 553, 562 (1890); *Sinnickson* 17 N.J. Law at 145; *Gardner*, 2 Johns. Ch. 162.

⁵² *Id.*, at 240-241 (citing WILLIAM BLACKSTONE, COMMENTARIES, *138-139; THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS, *559).

⁵³ *Id.*, at 241. Of course, *Chicago B & Q* did cite *Scott v. City of Toledo*, 36 F. 385, 396 (Cir. Ct. N.D. Ohio, W.D. 1888), which mentioned that the Fourteenth Amendment was “clearly intended to place the same limitation upon the power of the states which the Fifth Amendment had placed upon the authority of the federal government.” 166 U.S. at 238-239. However, the breadth of both decisions is dedicated to due process.

⁵⁴ *Id.*, at 236 (citing WILLIAM BLACKSTONE, COMMENTARIES, *138-139; THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS, *559).

⁵⁵ *Davidson*, 96 U.S. at 104.

⁵⁶ Magna Carta, ch. 29 (ch. 39 in 1215). “NO Freeman shall be taken or imprisoned, or be diseased of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”

⁵⁷ *Schultz*, note 46 *supra* at 24; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH L. REV 567 (1972).

⁵⁸ No fully implemented pre-revolution colonial charter or document included any compensation for takings. William M. Treanor, *The Original Understanding Of The Takings Clause And The Political Process*, 95 COLUM. L. REV. 782, 785-786; 790 (1995). However, early state constitutions may have lacked eminent domain clauses because it was though unnecessary to express fundamental rights and early Americans relied on state legislatures to protect their rights, rather than courts. Nathan Alexander Sales, *Note: Classical Republicanism And The Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 360 (1999). See also *Schultz*, Note 46 *supra*, at 25-26.

⁵⁹ *Id.*, at 790 (citing FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9192; n. 71 (Univ. Press of Kansas 1985)).

⁶⁰ J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71; 75-77 (1930-31); Treanor, Note 58 *supra*, at 792-793; 865; See, e.g., *Gardner v. Village of Newburgh* 2 Johns. Ch. 162 (N.Y. 1816) (even if statute authorizing taking power was constitutional, "natural equity" demanded compensation for those who lost riparian rights to state water system); *Sinnickson v. Johnson*, 17 N.J. Law 129, 145 (1839) ("This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.").

⁶¹ See *Gitlow v. New York*, 268 U.S. 652 (1925) (first amendment); *McDonald*, 130 S. Ct. at 3020 (second amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (fourth amendment warrant requirements); *Malloy v. Hogan*, 378 U.S. at 1 (fifth amendment against self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment double jeopardy); *In re Oliver*, 333 U.S. 257 (1948) (sixth amendment public trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment confrontation); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment jury trial); *Robinson v. California*, 370 U.S. 660 (1962) (eight amendment cruel and unusual punishment).

⁶² 438 U.S. at 122.

⁶³ See Schultz, note 46, *supra* at 24-26; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 567 (1972).

⁶⁴ See Sales, note 63 *supra*, at 346-347 (citing *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9 (N.Y. 1837)).

⁶⁵ *Kelo*, 545 U.S. at 479 (citing *Fallbrook Irrigation*, 164 U.S. at 158-164; *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906)).

⁶⁶ Sales, note 64 *supra*, at 366.

⁶⁷ Schultz, note 46 *supra*, at 25-26; See also William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 698-699 (1985).

⁶⁸ 164 U.S. 112 (1896).

⁶⁹ *Id.*, at 158.

⁷⁰ *Id.*

⁷¹ *Id.*, at 159-160.

⁷² See, e.g., *Wight v. Davidson*, 181 U.S. 371, 384 (1901) (rejecting the notion that Fifth Amendment decisions applied to Fourteenth Amendment takings analysis); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (citing *Fallbrook Irrigation Dist.*, 164 U.S. at 159) (rejecting a public use challenge because "the people of a State, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their weight with the state courts"); *Strickley*, 200 U.S. at 530-31 (rejecting a public use challenge, concluding that so long as state law authorized a taking, there was no violation of due process); *Offield v. New York, New Haven, & Hartford R. Co.*, 203, U.S. 372 (1906) (upholding condemnation of shares of railroad stock despite public use challenge); *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 606-607 (1908) (in upholding condemnation for a private spur track, stated, "Although determining public use is ultimately a judicial question," recent decisions "show how greatly we have deferred to the opinions of state courts on this subject, which so closely concerns the welfare of their people."); *Union Lime Co. v. Chicago & N.W. R. Co.*, 233 U.S. 211, 218 (1914) (upholding condemnation, stated, "The State through its highest court declares the use to be a public one, and we should accept its judgment unless it is clearly without ground."); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (rejecting public use challenge to condemnation by power company); *Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co.*, 243 U.S. 563 (1917) (rejecting public use challenge based on railroad using surplus power from condemned river to sell as electricity); *Green v. Frazier*, 253 U.S. 233 (1920) (rejecting

Fourteenth Amendment taking challenge to taxation, which was based on the grounds that the taxes benefitted private economic development); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (dicta stating that the Fifth and Fourteenth Amendments merely “presuppose” that takings are for public use, and mandate only compensation); *Rindge Co. v. Co. of Los Angeles*, 262 U.S. 700, 706 (1923) (upholding condemnation of land for private road and regarding “with great respect the judgments of state courts upon what should be deemed public uses in any State”); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 669, 678 (1923) (the necessity and expediency of taking property for public use is a legislative determination and “not a judicial question.”).

⁷³ 281 U.S. 439 (1930).

⁷⁴ *Id.*, at 449.

⁷⁵ See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) for an elaboration on the rational basis standard for exercises of police power not affecting fundamental rights.

⁷⁶ 467 U.S. 229 (1984).

⁷⁷ *Id.*, at 240 (citing *Berman v. Parker*, 348 U.S. 26, 31-33 (1954)).

⁷⁸ *Id.*, at 242 (quoting *Western & Southern Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 671-672 (1981); citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979)). The rational basis test for “public use” is also the approach Justice Kennedy adopted in his *Kelo* concurrence. 545 U.S. at 490 (Kennedy, J., concurring).

⁷⁹ *Midkiff*, 467 U.S. at 244, n. 7.

⁸⁰ 327 U.S. 546 (1946).

⁸¹ 467 U.S. 986 (1984).

⁸² *Id.*, at 1014 (quoting *Berman*, 348 U.S. at 33).

⁸³ *Kelo*, 545 U.S. at 472 (citing U.S. Const. Amend. V).

⁸⁴ *Id.*, at 483-484.

⁸⁵ *Id.*, at 487-488 (quoting *Midkiff*, 467 U.S. at 242).

⁸⁶ *Id.*, at 506 (Thomas, J., dissenting).

⁸⁷ *Id.*, at 514-515 (Thomas, J., dissenting).

⁸⁸ *Id.*, at 515-516.

⁸⁹ *Id.*, at 519 (Thomas, J., dissenting) (citing *Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32).

⁹⁰ *Id.*, at 503 (O’Connor, J., dissenting) (citing *Lingle v. Chevron*, 544 U.S. 528 (2005)).

⁹¹ *Id.*, at 501-502 (O’Connor, J., dissenting) (quoting *Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32).

⁹² *Id.*

⁹³ *Kelo*, 545 U.S. at 477-478 (citing *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Calder v. Bull*, 3 U.S. 386 (1798)).

⁹⁴ *Id.*, at 478. The Court did not offer any exemplary cases regarding “pretextual” takings.

⁹⁵ *Kelo*, 545 U.S. at 487, n. 17. The court noted this taking was invalid for “lack of a reasoned explanation and that “these types of takings may also implicate other constitutional guarantees.” The Court cited *Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) (taking invalid on equal protection grounds).

⁹⁶ See note 6 *supra*.