Property | Fall 2024
Professor Schnably
Practice Question 2: Model Answer

Preliminary Note:

This is an issue where there's a clearly applicable precedent – *Kelo*. (I do expect you to remember the case. If you happened to blank just on the name of the case, that's not a problem.) Cania is a state within the U.S., so it's bound by the Constitution, as interpreted by the Supreme Court. Because states also have constitutions, you might say something about what possible use Keyah might make of Cania's constitution, but you wouldn't more than a brief reference to state constitutional law, given limits on your time.

In discussing *Kelo* and alternatives, there's no requirement to specify which Justice said what, though if you remember the name it can be a convenient way to refer to something. What you do need to remember is what the holding/reasoning of the majority was as opposed to that of the dissents.

The question also calls on you to give your views about what the law *should* be. Since the application of the majority holding in *Kelo* is relatively straightforward here, you have a fair amount of time to address this. You would definitely want to take into account the alternatives in the *Kelo* dissents or in other cases like *Hathcock*. Further, you could just formulate your own position without mentioning any one of these separate opinions. Rather than write out a particular defense/critique of *Kelo*, I set out a number of possible points one could make. What counts is not the position you ultimately take on the merits of *Kelo*, but how insightful you are in setting out and defending your position.

Model Answer:

Keyah might argue it violates the Fifth Amendment for the government to take her property and then convey it to another private owner. It's not a taking for "public *use*," as the text of the Fifth Amendment requires. (Just compensation is also required, but it's not at issue here.) But Cane City would respond that the Supreme Court has held that "public use" is satisfied if there's some legitimate public *purpose* served by the use of eminent domain. It would also argue that *Kelo* imposed no requirement that the government end up owning the property, or that the general public have access to it.

Keyah might next argue that promoting economic development – to revitalize Cane City's depressed economy – isn't a public purpose. But Cane City would respond that *Kelo* held that promoting economic development is a legitimate function of state and local government, and is a "public purpose."

Keyah might try to distinguish *Kelo*, arguing that in fact this project is intended primarily to benefit a private actor: Wynzu Hotels. Wynzu gets a great site for a new hotel. And she's heard that Wynzu executives have been making campaign contributions to some local officials, which could raise worries about who Cane City is really trying to benefit.

The state would reply that *Kelo* was clear that it's not enough just to show a benefit to the private party. Most if not all uses of eminent domain will create some benefit for private parties, even in classic cases like taking land for a highway. If Wynzu were bribing city officials, that might show that Cane City is acting to benefit a private interest. But the rumors are about campaign contributions. So even if Wynzu is trying to influence Cane City to do something that will increase its profits, that's far from showing that the asserted benefits of the redevelopment plan are just a

pretext for benefiting Wynzu.

Keyah might raise other objections to the plan, but she would have a hard time distinguishing *Kelo*. She might argue (based on the editorial) that some experts think waterfront developments may not attract tourists. She could also argue that the plan makes no sense, given sea level rise and hurricanes. Plus if Wynzu pays low wages, that may limit the effect of its hotel in improving the local economy.

The state could reply that it's not for the courts to second-guess local and state authorities on whether a plan developed over many years is a good one. That's up to state and local governments, who know the situation better, and are elected and accountable to the electorate. All that's needed is that it's not irrational to think that Cane City's comprehensive plan for offices, hotels, condos, and new waterfront might revitalize the area.

Keyah could also argue that her house isn't blighted. But *Kelo* leaves it up to local officials to decide the exact scope of a development plan. The court doesn't decide parcel by parcel which ones are in bad shape or are needed for the plan to succeed. Susette Kelo's property was in good shape, too.

Unless there are shady dealings going on behind the scenes with Wynzu, Keyah would have a hard time winning under the U.S. Constitution, given *Kelo* and earlier cases. Keyah might look instead to the Cania state constitution to see if it has more restrictions on eminent domain than the U.S. constitution. For example, Keyah might win if the state constitution (or interpretations of it by state courts) requires that each property being taken for a redevelopment project must be physically blighted – *i.e*., in disrepair. Keyah's property is in "good shape," she says.

As for what the law *should* be …[*here you should respond to the part of the question that says Keyah is curious to know what you think the law in this area* should *be. Alternatives A-F below are possible examples. Note that the first part of the answer is 606 words; with any one of the following, the total number would be about 740-780 words. I mention word counts only to give you some sense of what might be feasible on a final exam with limited time.*]

A.

Susette Kelo got it right when she argued that "economic development" is not a legitimate public purpose under the Fifth Amendment, at least when property is being transferred from one private owner to another. This interpretation of the Fifth Amendment would protect property rights from development schemes, which in the past haven't always worked, and which are often unduly influenced by businesses that benefit from the schemes.

Even with just compensation, and even in a democracy, private property shouldn't be subject to the whims of the government except for serious reasons like highways, airports, etc. That's especially so when people's homes – property that has a sentimental value above and beyond market value – are at stake. Keyah is a good example; she may not live in the house, but she vacations there and treasures it as a gift from her Aunt Astrid.

Further, a flat ban on economic development as a proper public purpose would give the courts a clear and workable test by which to gauge the propriety of eminent domain**; OR**

B.

The Court was right to reject Kelo's claim that "economic development" isn't a "public purpose." This limitation would be way too severe. In the exercise of their "police powers," states can take a variety of actions that promote economic development. They can rezone, give tax breaks, etc. All of this may have incidental private benefits. There's no reason to single out eminent domain

as one tool, even where a particular transfer is from one individual owner to another. The problem of hold-outs in such cases is real.

It should be up to the electorate in a democracy to decide whether the eminent domain power is being wisely used. It's also more compatible with federalism to let each state decide this question, rather than have it settled by the US Supreme Court**; OR**

C.

Justice O'Connor's interpretation of the Fifth Amendment makes more sense than the *Kelo* majority's. The state should be allowed to use eminent domain only in three cases: (1) where it will own the land, (2) where, even though the land is transferred to a private party, the public will "use" it in the sense of having access to it (as with a stadium or railroad), or (3) where the existing use of the land that is taken by eminent domain and transferred to another party is causing blight.

This approach would be desirable because it would better preserve the protection of property rights. Governments would have to show that they were addressing some kind of harm, not just rearranging ownership to achieve some kind of general benefit like "development." It would also give some meaning to "public use" or "public purpose," avoiding an interpretation so broad as to render it virtually without any teeth**; OR**

D.

Kelo got it right in terms of the Court's precedent. The Court's earlier cases gave up any attempt to limit "public use" to mean physical access. Anyway, if a local government takes property as part of a development plan, it's using that property for the plan even when it's transferring it to a private party. And limiting eminent domain to cases where the specific property is blighted would contradict *Midkiff* and *Berman*. There was no blight in *Midkiff*, for example, which was all about redistributing land ownership (with compensation, of course) to make for a less concentrated land market in Hawaii. Alternatively, one could say that in *Midkiff* and *Berman* the blight was really economic. The government was trying to revive depressed areas. But "remedying economic blight" and "promoting economic development" are one and the same thing**; OR**

E.

Justice Thomas got it right in his dissent: The Constitution should be interpreted in light of what the original Framers intended. The text is clear – it says "use," not "purpose." That means using eminent domain only in cases (a) where the state would own the land, or (b) where the land is transferred to a private owner but the public would have a legal right of access to it. Nineteenth century cases taking a broader approach are less relevant because they were well after the period when the Constitution was adopted. Justice Thomas's approach also protects the less powerful in society. The brunt of urban redevelopment projects in the past has fallen falls on the poor and on racial minorities, who have less power in the political process. It's up to the federal courts to impose limits on eminent domain to stop its abuse**; OR**

F.

Kelo was right in recognizing that originalism doesn't work well as a guide to interpreting the Constitution. "Use" *can* mean "purpose," so the text is not unambiguous. And early on in the 19th century, states seemed to authorize a similar kind of use of eminent domain as happened here. They were reading the Constitution differently from Justice Thomas' interpretation, and were closer in time to the Framers. Also, they may have believed that the Constitution's meaning can evolve as conditions change. The problem of the burden of eminent domain falling sometimes on the poor or less powerful is real, but it's not limited to cases where property is transferred to a

private party – as shown by instances where, say, highways are put through poor inner city neighborhoods, to their detriment. If these problems are going to be addressed, the answer not likely to come from asking what people thought in the late eighteenth century.

This "barebones" version of a model answer isn't as good as the longer answer, but it's meant as an example of how a shorter answer can still hit many important points. I used alternative A just for convenience. It is 438 words. The full answer above is about 775 words (depending on which alternative you count).

Keyah might argue it's a violation of the Fifth Amendment for the government to take her property and then convey it to another private owner. It's not a taking for "public *use*," as the text of the Fifth Amendment requires. But Cane City would respond that the Supreme Court has held that "public use" is satisfied if there's some legitimate public *purpose* being by the use of eminent domain.

Keyah might next argue that promoting economic development – to revitalize Cane City's depressed economy – isn't a public purpose. But Cane City would respond that *Kelo* held that promoting economic development is a legitimate government function and so a "public purpose."

Keyah might try to distinguish *Kelo*, arguing that in fact this project is intended primarily to benefit a private actor: Wynzu Hotels. She's heard that Wynzu executives have been making campaign contributions to local officials and maybe influencing them.

The state would reply that *Kelo* was clear that it's not enough just to show a benefit to the private party. Most if not all uses of eminent domain will create some benefit for private parties, even in classic cases like taking land for a highway. Even if Wynzu is trying to influence Cane City officials, that doesn't show that the plan is just a pretext for benefiting Wynzu.

Keyah might argue (based on the editorial) that some experts think waterfront developments may not attract tourists or provide jobs with good wages – not to mention the questions about developing waterfront in light of hurricanes and sea level rise. The state could reply that courts shouldn't second-guess local and state authorities, who are elected and know local situations better. It's enough that it's not irrational to think that Cane City's plan might revitalize the area.

Keyah could also argue that her house isn't blighted, but *Kelo* leaves the judgments up to the local officials about the exact scope of a development plan.

As for what the law *should* be, Susette Kelo got it right when she argued that "economic development" is not a legitimate public purpose under, at least when property is being transferred from one private owner to another.

This interpretation would protect property rights from development schemes, which in the past haven't always worked and are often the result of business lobbying. Private property shouldn't be subject to the whims of the government except for serious reasons like highways, airports, etc. That's especially so when people's homes are at stake.

Further, a flat ban on economic development as a public purpose would give the courts a clear and workable test by which to gauge the propriety of eminent domain.