

Post-*Kelo* Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides, “*nor shall private property be taken for public use, without just compensation.*”¹

In *Kelo v. City of New London*, the United States Supreme Court broadly interpreted the constitutionality of eminent domain powers and allowed states to define the public purposes that justify a permissible taking of private property for public use.² Despite the protests of the dissenting justices, the majority opinion deferred to the Connecticut legislature by equating public purpose with public use and upholding economic development as a valid public purpose.³ In so ruling, the Court broadly construed the United States Constitution to permit the taking of non-blighted private property, even when private developers were the beneficiaries of the community project.⁴ A rational basis was sufficient to support the public benefits without showing a “reasonable certainty” that they would accrue.⁵ In contrast, the dissenting opinions decried the demise of the private property protections of the Fifth Amendment.⁶

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1. U.S. CONST. amend. V (emphasis added).

2. 125 S. Ct. 2655 (2005).

3. See generally *id.*

4. See generally *id.*

5. *Id.* at 2667.

6. *Id.* at 2671, 2677 (O'Connor, Thomas, J.J., dissenting).

As a result of the *Kelo* decision, state judicial interpretations of state constitutions, statutes, and ordinances will play a pivotal role in determining where the balance between property rights and economic development should be drawn. It is under this rubric that we examine the exercise of eminent domain. Part II of this article provides a historical context of the public use versus public purpose debate, including the role of the courts and legislatures in making that determination. In Part III, this article examines the majority and dissenting opinions of *Kelo*. Part IV explores judicial interpretations of constitutional and statutory authority for eminent domain in Arkansas. Finally, Part V concludes with recommendations for clarifying Arkansas law regarding the determination of what constitutes public use in the context of eminent domain takings.

II. HISTORY AND ANTECEDENT CASES

To what extent is the Fifth Amendment of the United States Constitution a limitation on government's ability to use eminent domain to take private property? The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."⁷ Should this Takings Clause be narrowly construed as a limitation on the ability of government to take private property rights or more broadly interpreted as facilitating the use of eminent domain to carry out public purposes such as economic development?⁸ To examine these issues, and to provide a context for the *Kelo v. City of New London*⁹ decision, this article explores the importance of property rights in our American heritage, traditional views of what constitutes "public use," and the role of the Supreme Court in interpreting provisions of the United States Constitution. The traditional *strict constructionist* (textual) approach is then compared to a *purposive* (contextual) approach as outlined by Justice Stephen Breyer,¹⁰ which takes a broader view of public

7. U.S. CONST. amend. V.

8. See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (Harvard Univ. Press 1985) (1943); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN (3d ed. 2002).

9. 125 S. Ct. 2655 (2005).

10. See *infra* text accompanying notes 65-75.

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use—likening it to public purpose—and which provides greater deference to legislative determinations of what falls within the scope of public benefit.

A. Traditional Importance of Property Rights

Drafters of the United States Constitution were devotees of John Locke,¹¹ who in his *Second Treatise of Government* declared protection of property rights to be the primary reason for creating a government:

in the state of nature . . . the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers . . . to join in society with others . . . for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property.

The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property . . .¹²

The colonial experience bred a generation of American leaders, many of whom were firm believers in limited government and adhered to the social contract theory of government. This was a core value upon which our constitutional government was founded. Alexander Hamilton maintained that protecting “the security of property” is one of the great objects of government.¹³ Life, liberty, and property are fundamental rights that cannot be taken without due process of law.¹⁴ In sponsoring the Takings Clause, James Madison saw the need to check those factions that had wealth to prevent them from misusing their influence on government authorities to the detriment of less powerful property owners.¹⁵ The founders, therefore, intended the Fifth

11. See Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001, 1004-05 & n.22 (2005).

12. John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in SOCIAL CONTRACT 73 (Sir Ernest Barker ed., 1972).

13. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1937).

14. U.S. CONST. amend. V.

15. See generally 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS (1980) (describing the House of Representatives Debates of 1789); William Michael

Amendment to be a limitation on when legislative authority could be used to take private property, rather than a grant of taking authority.

William Blackstone wrote that “the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.”¹⁶ In expressing the importance of property rights, the Arkansas Constitution provides that the “right of property is before and higher than any constitutional sanction”¹⁷ With respect to the United States Constitution, Justice Thomas adopted this posture in his *Kelo* dissent, emphasizing that “[s]o great . . . is the regard of the law for private property . . . that [the Constitution] will not authorize the least violation of it; no, not even for the general good of the whole community.”¹⁸ Under the strict constructionist approach, the government is only allowed to take property for “public use” and not for public necessity or other public purposes. Blackstone’s commentary notwithstanding, the taking of private property for public use has ancient origins. For example,

It was a rule of Roman law that private property could be taken for public use upon the owner’s being paid an estimated value made by good men. Magna Charta provided that no one should be deprived of his property except by the law of the land or by a judgment of his peers. The Code Napoleon of France (1807) required “a just and previous indemnity” for the taking of property for public use.¹⁹

Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-13 (1985); Coughlin, *supra* note 11, at 1005-07; *see also* THE FEDERALIST NO. 10 (James Madison).

16. WILLIAM BLACKSTONE, 1 COMMENTARIES *135.

17. ARK. CONST. art. 2, § 22.

18. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *135).

19. THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 215 (Comm. for Const. Gov’t., Inc. 1965).

B. Strict Constructionist Approach— Traditional Public Use

According to Nichols, a leading authority on eminent domain, essentially two schools of thought have emerged as to what is meant by “public use” in the Takings Clause. One court, quoting Nichols, has stated that

“supporters of one school insist that ‘public use’ means ‘use by the public’, that is, *public service or employment* On the other hand, the courts that are inclined to go furthest in sustaining public rights at the expense of property rights contend that ‘public use’ means ‘*public advantage*,’ and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, manifestly contributes to the general welfare and the prosperity of the whole community, and, giving the constitution a broad and comprehensive interpretation, constitutes a public use.”²⁰

The strict constructionist approach has adopted the narrow “public service or employment” view of public use, while the “public advantage” perspective is more likely to find support with a purposive approach to constitutional construction.

Under the strict constructionist approach, public use is a subcategory of public purpose, but not vice versa. Not all public purposes involve traditional public uses of property. One can divide government takings of private property into five basic categories: (1) acquisition for traditional public use where the government will own the property, (2) acquisition for traditional public use where regulated private owners will provide a public service, (3) condemnation of property for public welfare purposes where health or safety concerns deem the property blighted, or a social evil is to be remedied in concert with private developers, (4) taking of private, non-blighted property for other public purposes (such as economic development) where private developers are beneficiaries, and (5) *de facto*

20. Dornan v. Philadelphia Hous. Auth., 200 A. 834, 838 (Pa. 1938) (emphasis added) (quoting 1 PHILLIP NICHOLS, THE LAW OF EMINENT DOMAIN § 40, at 129-31 (2d ed. 1917)).

regulatory taking that significantly limits a landowner's use of the property.²¹ Which of these categories are constitutionally permissible as "public use," and at what point in the analysis should courts defer to the legislature?

Traditional public use dates back to colonial times, when many communities had a "commons"—an area of public use—where citizens could collectively graze their livestock.²² This served the dual public purposes of safety and preventing the destruction of private property. Examples of traditional public use (Categories One and Two) also include: (1) arteries of transportation such as roads, bridges, and canals, (2) municipal services such as sanitation districts, utilities, and public hospitals, and (3) public parks.²³ All of these properties are government-owned, used by the communities collectively, or open to use by most citizens. Echoing this sentiment, the Pennsylvania Supreme Court has stated:

“A particular enterprise, palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. . . . To constitute a public use, the property must be under the control of the public, or of

21. Category Five of the takings analysis examines de facto taking of property through regulation, but is largely beyond the scope of this article. At what point does regulation of use become tantamount to a "taking" of the property, such that just compensation should be given because the property cannot be put to economic use? Historically, the Supreme Court has looked at the extent of government regulation and the severity of the economic impact, sometimes requiring that the landowner be deprived of all economic use before the regulation was tantamount to a taking. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (holding that a moratorium on development does not constitute a per se taking of property, as such an inquiry would depend on other factors, and thus did not require compensation in this case).

22. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 34-41 (1992) (discussing the "tragedy of the commons" and overuse of public resources).

23. *See Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (providing examples of traditional public use). Justice O'Connor listed roads, hospitals, and military bases as acceptable takings of private property for public use. *Id.* (O'Connor, J., dissenting) (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *Rindge Co. v. County of L.A.*, 262 U.S. 700 (1923)). She also included railroads, public utilities, and stadiums as examples of proper public takings (where property was made available for public use or benefit). *Id.* (O'Connor, J., dissenting) (citing *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916)).

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public agencies, or the public must have a right to the use.²⁴

“Public-public takings” are Category One takings in which the government exercises its eminent domain power to take ownership of the property, after which the government itself continues to use the property.²⁵ In some of these cases, the government is already leasing the facilities.²⁶ In *Old Dominion Land Co. v. United States*, the government had erected costly buildings on land it had leased during and after World War I.²⁷ When the lease was not renewed, the United States procured the land for the public purpose of saving the cost of the building.²⁸ The Court deemed the military purpose to be a public use,²⁹ upholding the Category One taking.

Similarly, the Court considered the acquisition of land associated with the Battle of Gettysburg (upon which monuments and tablets would be erected) to be a public use.³⁰ At issue in *United States v. Gettysburg Electric Railway Co.* was whether Congress had the power to take land devoted to one public use—railroad mass transportation—and acquire it for a different public use—battlefield preservation.³¹ Although the Supreme Court found no direct constitutional authority to condemn land within the Civil Appropriations Act, it found implied power in the Necessary and Proper Clause of the United States Constitution for such a taking.³² By doing so, the Court *deferred* to Congress with regard to the quantity of land to be taken.³³ The attorney’s brief for the railroad in the *Gettysburg* case postured that there existed

24. *Dornan*, 200 A. at 839 (quoting *Twelfth St. Mkt. Co. v. Philadelphia & Reading Terminal R.R.*, 21 A. 989, 990 (1891) (reprinting the opinion from the court of common pleas)).

25. *See supra* text accompanying note 21.

26. *See, e.g., Old Dominion*, 269 U.S. at 63.

27. *Id.*

28. *Id.*

29. *Id.* (deferring to a Congressional determination that military use of a building constituted a public use); *see also Kohl v. United States*, 91 U.S. 367, 371 (1875) (recognizing that the takings power extends to acquiring property for military and other uses such as forts, armories, arsenals, navy yards, light houses, custom houses, and court houses).

30. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 679-81 (1896).

31. *Id.*

32. *See id.* at 679, 681.

33. *See id.* at 680-81.

a good deal of uncertainty and conflict as to the meaning of the words “public use,” two different classes of views existing—one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that the words are equivalent to public benefit, utility, or advantage.³⁴

Courts have long recognized the authority of government to regulate transportation³⁵ and land use.³⁶ In the context of environmental cases and regulatory taking cases, the Supreme Court has concluded that the states maintain the primary responsibility of planning the development and use of land and water resources.³⁷ In some instances, courts have delegated responsibility for providing public services to private businesses and, in turn, granted them eminent domain powers (for a Category Two taking).³⁸ Such a grant of authority to railroads was common in the latter part of the 1800s.³⁹ By the early 1900s, this industry served as the chief provider of transportation and was heavily regulated,⁴⁰ in all likelihood

34. *Id.* at 674.

35. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (illustrating an early interpretation of Congressional authority to regulate transportation under the Commerce Clause of the United States Constitution).

36. Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in V PERSPECTIVES IN AMERICAN HISTORY 329 (Donald Fleming & Bernard Bailyn eds., 1971).

37. In the past ten years, the United States Supreme Court has reexamined federalism and limited federal authority, concluding that the “authority [of] Congress under the Commerce Clause, though broad, is not unlimited.” *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001).

State and federal environmental laws often restrict the use of land. The ability of a landowner to develop wetlands, for example, is limited by regulations under the federal Clean Water Act where the wetlands contribute to or are part of navigable waters of the United States. *See id.* at 162. In the case of isolated bodies of water, however, states have the authority to regulate use. *See id.* at 171-72. In *Solid Waste Agency*, the Supreme Court refused to give deference to the decision of the federal Corps of Engineers not to issue a Clean Water Act § 402(a) permit to Chicago area municipalities. *Id.* These cities wanted to convert abandoned sand and gravel pits (that served as seasonal ponds for wildlife) to solid waste disposal sites. *Id.* at 162-63. While eminent domain issues were not at the forefront of this landmark decision, this case demonstrates the collective belief of the majority of the Court that states should have broad discretion in determining land use development. It also demonstrates that the Court might even be more willing to give deference to state legislative determinations than federal ones.

38. *See, e.g., Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 413-15 (1896).

39. *See* *United States v. Union Pac. R.R.*, 353 U.S. 112, 132 (1957) (Frankfurter, J., dissenting).

40. *See, e.g., Missouri Pac. Ry. Co.*, 164 U.S. at 403-04 & n.1.

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because of the belief that a private business that benefits from eminent domain powers should be regulated to ensure its activities remain consistent with the public purpose for which the taking was allowed.

In *Missouri Pacific Railway Co. v. Nebraska*, the Nebraska State Board of Transportation tried to force the railroads to surrender property for the erection of additional grain elevators, while also ordering them to cease discriminatory preferences.⁴¹ The private benefit taking was struck down by the Supreme Court, which recognized that the “taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth . . . Amendment of the Constitution of the United States.”⁴² Later, in *Thompson v. Consolidated Gas Utilities Corp.*, the Court explained “that one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”⁴³

Some law review articles have distinguished the pre-*Kelo* cases on the basis of public-public takings and public-private takings.⁴⁴ In those traditional public-use situations where the government retains ownership, one author concludes that deference to the legislative determination of public use is acceptable, though he deems such deference to be less appropriate in public-private cases if a private business acquires ownership of the property (as in Categories Two through Four above).⁴⁵ Dicta in *Gettysburg* also supports the conclusion that a stronger presumption of public use exists if the government is using the land itself (Category One) than where a private corporation will ultimately use the property.⁴⁶ Although the Supreme Court usually spoke of “public use” when deferring to

41. *Id.* at 413.

42. *Id.* at 417.

43. 300 U.S. 55, 80 (1937).

44. *See generally, e.g.*, Coughlin, *supra* note 11.

45. *See id.* at 1024-28 (arguing that two cases upon which the Supreme Court would later heavily rely in *Kelo* had missed that distinction, and as such, should be overturned as inappropriately applying the precedent of earlier cases) (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954)).

46. 160 U.S. at 680.

legislative judgments in cases prior to the early 1900s,⁴⁷ a tendency toward deference to legislative determinations of public purpose⁴⁸ evolved from the public-public context of cases, such as the 1925 case of *Old Dominion*,⁴⁹ and was then extended to public-private contexts.⁵⁰ As late as 1946, however, a divided Supreme Court could not agree on the extent to which deference should be given to legislative authorities even on a public-public taking.⁵¹

C. Judicial Review of What Constitutes Public Use

Interpretation of the Constitution has long been an accepted power of the courts. Judicial review of acts of Congress and their constitutionality has been firmly rooted in constitutional history since *Marbury v. Madison*.⁵² Even *The Federalist Papers*, explaining the need for an independent judiciary, indicated that the legislative branch of government should not be able to determine the constitutionality of its own actions.⁵³ This aspect of the government constitutes a basic tenet of the “checks and balances” in the United States Constitution.⁵⁴

Nevertheless, there has been disagreement over whether the courts or the legislature should determine what satisfies the public use or public benefit test. In the first quarter of the twentieth century, many takings cases declared that the “nature of a use, whether public or private, is ultimately a judicial

47. See generally *Brown v. United States*, 263 U.S. 78 (1923) (deferring to the legislature in a narrowly drafted opinion so as not to conflict with the Massachusetts Supreme Court decision prohibiting a taking for economic benefit to private enterprises).

48. In *Madisonville Traction Co. v. Saint Bernard Mining Co.*, the Supreme Court faced the issue of whether federal removal of an eminent domain case was proper. 196 U.S. 239, 244 (1905). The Court concluded that a state statute cannot deprive the federal courts of jurisdiction, although the Court “would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken . . .” *Id.* at 252-53. Therein, the Court began to use public nature and public purpose in conjunction with its discussion of eminent domain, despite the fact that such discussion was only dicta in that case. *Id.* at 253.

49. See generally 269 U.S. 55.

50. See generally, e.g., *Midkiff*, 467 U.S. 229.

51. See generally *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546 (1946).

52. 5 U.S. (1 Cranch) 137 (1803).

53. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

54. See *id.*

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question.”⁵⁵ If the Takings Clause is viewed primarily as a limitation on legislative authority, then the legislature should not be the judge of the boundaries on its own authority; therefore, the strict constructionist approach does not permit extensive deference to legislative determination of public use or public purpose. Instead, the judiciary should determine the constitutional appropriateness of the public use. In 1930, the Court unanimously viewed the determination to be a judicial one, adding that the power conferred must be strictly followed by municipal corporations that take private property for public use.⁵⁶ Furthermore, the Court indicated that governments must definitively specify what public use would be served when taking private property, and a “mere statement” that some public use was involved would be insufficient to satisfy the government’s burden in eminent domain cases.⁵⁷

The United States Supreme Court has, in other contexts, recognized the Fourteenth Amendment as a limitation on state governments and has asserted that the Court should determine the scope of the limitations. While citing the Eleventh Amendment as protection for state governments from having to pay money damages for violating several federal employment antidiscrimination statutes,⁵⁸ the Supreme Court nevertheless declared that the “ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch”⁵⁹ and that it is not the role of Congress to determine “what constitutes a constitutional violation.”⁶⁰ The Court incorporated the limitation in the Takings Clause in 1897, applying it against the state governments through the Fourteenth Amendment.⁶¹ Under the strict constructionist approach, it would seem equally clear that it should be the role of the courts to determine the substantive

55. See, e.g., *Rindge*, 262 U.S. at 705.

56. *Cincinnati v. Vester*, 281 U.S. 439, 446, 448 (1930).

57. *Id.* at 447.

58. See, e.g., *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 374 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Alden v. Maine*, 527 U.S. 706, 712-13, 758-59 (1999).

59. *Kimel*, 528 U.S. at 81.

60. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

61. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 228, 233-34 (1897).

meaning of the Takings Clause, and that courts have a judicial responsibility to determine the constitutional meaning of “public use” before they give deference to state legislatures (and their delegated boards) on the subsequent question of what plan best fosters those public use goals.

The strict constructionist approach would withhold deference to the legislature until after a court has made a threshold determination of whether the specific taking in question constitutes a public use.⁶² After a court has affirmed that the use is public, the courts can then defer to the legislature (or those entities with delegated authority) to determine how best to carry out that use.⁶³ This approach is exemplified by *Gettysburg*, when the Supreme Court first determined that battlefield preservation was a public use, and only after that threshold determination did the Court defer to legislative authority to determine how much land was needed to fulfill that purpose.⁶⁴

D. Purposive Approach—Legislative Deference as to What Constitutes a Public Purpose

In contrast to the narrow range of permissible uses allowed by the strict constructionist (textual) approach, the purposive (contextual) approach deemphasizes the literal text of the Takings Clause in favor of a contextual construction that seeks to fulfill the statutory purpose, discern the legislative objectives, and equate these with the “public will.” It is this method of analysis that gave rise to the cases preceding *Kelo*.

1. Justice Breyer’s Purposive Approach

In his recent book, *Active Liberty: Interpreting Our Democratic Constitution*, Justice Stephen Breyer describes his purposive approach toward statutory construction as a purpose-based method that uses “whatever tools best identify congressional purpose in the circumstances.”⁶⁵ Breyer applies

62. See Coughlin, *supra* note 11, at 1011 (criticizing the Court’s deference in *Welch* as a “depart[ure] from one of its essential jurisprudential principles”).

63. See generally *Gettysburg*, 160 U.S. 668.

64. *Id.* at 685.

65. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 99 (2005); see also generally *id.* at 85-101.

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this approach to the interpretations of both the United States Constitution and statutes, rejecting the strict constructionist approach.⁶⁶ To Justice Breyer, an “overemphasis on text can lead courts astray, divorcing law from life [while] a purposive approach is more consistent with the framework for a ‘delegated democracy’ that the Constitution creates.”⁶⁷ It is through deciphering the legislative purpose that the “will” of the people can be discerned.⁶⁸ Judges look not only to the language, but also to the history and the purpose of statutes and constitutional provisions, especially “when statutory language does not clearly answer the question of what the statute means or how it applies.”⁶⁹ Justices Breyer, Ginsburg, and Stevens often defer to the legislature’s interpretation of what constitutes public interest by giving the legislature the benefit of the doubt—even on issues of constitutionality.⁷⁰

It is this purposive approach that allows the judges to more liberally equate public purpose with public use and defer to the legislature (or its delegated local authorities) for the determination of what constitutes such public purpose. When coupled with a rational basis test, it becomes unlikely that a legislative determination of what constitutes a public purpose will fail to satisfy constitutional muster under this approach. Once the legislature has identified a public purpose and developed a plan to benefit the general welfare of citizens, the Fifth Amendment should not be a barrier to executing the plan. As long as the state government has the right to regulate land use and develop comprehensive land-use plans for the public under its police powers, it should also have the authority to “take” property to carry out those plans, as long as it justly compensates the landowner.

Application of the purposive approach is illustrated by the two cases relied on most heavily in *Kelo*—the 1954 decision in *Berman v. Parker*⁷¹ and the 1984 case of *Hawaii Housing*

66. *Id.* at 85-88, 98-101.

67. *Id.* at 85.

68. *Id.* at 99.

69. BREYER, *supra* note 65, at 85-86.

70. See Interview with Justice Stephen Breyer, United States Supreme Court Justice, held on NPR Fresh Air (Oct. 20, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4965766> [hereinafter Interview].

71. 348 U.S. 26.

Authority v. Midkiff.⁷² These cases established precedent that equated public use with public purpose and substantially narrowed the role of judicial review, by granting considerable deference to legislative determinations of what constitutes a public purpose.⁷³ Both of these cases illustrate Category Three takings, one involving redevelopment of land in a blighted area⁷⁴ and the other a correction of a social evil.⁷⁵

2. *Berman v. Parker*

To facilitate an urban renewal project, Congress authorized the government to take any necessary steps to eliminate the harmful conditions present in the District of Columbia.⁷⁶ Specifically, Congress authorized the National Capital Planning Commission to develop a comprehensive plan and granted the District of Columbia Redevelopment Land Agency the power to use eminent domain to take blighted areas.⁷⁷ For the most part, only substandard housing fell victim to the urban renewal project, but a viable department store was also condemned.⁷⁸ *Berman*, the owner of that store, argued: (1) his store was not blighted, and thus should be exempt from the taking; (2) he was being deprived of his property without due process; and (3) the statute violated the Fifth Amendment by taking his property for private development.⁷⁹

The United States Supreme Court deemed the “concept of the public welfare [to be] broad and inclusive,” recognizing that matters of public safety, public health, and morality, as well as the preservation of law and order, are within the realm of municipal police powers.⁸⁰ Justice Douglas, writing for the majority, concluded that the Fifth Amendment does not prohibit the use of eminent domain in furtherance of these powers.⁸¹ In the blighted area in question, over half of the houses had only

72. 467 U.S. 229.

73. *Id.* at 242-44; *Berman*, 348 U.S. at 32-33.

74. *See Berman*, 348 U.S. at 30.

75. *See Midkiff*, 467 U.S. at 232.

76. *Berman*, 348 U.S. at 28.

77. *Id.* at 29.

78. *Id.* at 30-31.

79. *Id.* at 31.

80. *Id.* at 32-33.

81. *Berman*, 348 U.S. at 32-33.

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outside toilets and “64.3% of the dwellings were beyond repair”⁸² One-third of the dwelling units to be redeveloped would be low-rent housing.⁸³ The Court concluded that “those who govern the District of Columbia [may] decide that the Nation’s Capital should be beautiful as well as sanitary,” and that exercise of “the power of eminent domain is merely the means to the end.”⁸⁴ Although the land to be used for streets, utilities, schools, and recreational facilities would be transferred to public agencies, a preference was given to private enterprises for the redevelopment of the remainder of the area.⁸⁵ The Court accepted the use of private enterprise as a justifiable means for the redevelopment that did not violate the Fifth Amendment.⁸⁶

In so ruling, the Court recognized that the “role of the judiciary in determining whether [the power to take private property] is being exercised for a *public purpose* is an extremely narrow one,” and that it is “the legislature, not the judiciary, [that] is the main guardian of the public needs to be served by social legislation”⁸⁷ Without using the word “deference,” the Court, in effect, deferred to Congress.⁸⁸ The statute had asserted that this redevelopment plan could not “be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory . . . and that the acquisition and the assembly of real property . . . pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.”⁸⁹ Berman’s rationale was that to “take for the purpose of ridding the area of slums is one thing; it is quite another . . . to take a man’s property merely to develop a better balanced, more attractive community,”⁹⁰ an argument that foreshadowed the *Kelo* dilemma. However, the Court concluded that the community redevelopment programs need not be

82. *Id.*

83. *Id.* at 30-31.

84. *Id.* at 33 (citing *Gettysburg*, 160 U.S. at 679).

85. *Id.* at 30.

86. *Berman*, 348 U.S. at 33.

87. *Id.* at 32 (emphasis added).

88. *See id.* (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”).

89. District of Columbia Redevelopment Act of 1945, ch. 736 § 2, 60 Stat. 790.

90. *Berman*, 348 U.S. at 31.

piecemeal and that redevelopment plans would suffer greatly if individual owners were permitted to resist.⁹¹

3. Hawaii Housing Authority v. Midkiff

To reduce the historic “social and economic evils” of “land oligopoly,”⁹² the Hawaii legislature passed the Hawaii Land Reform Act of 1967 (“Act”).⁹³ The Act authorized the Hawaii Housing Authority (“HHA”) to condemn all or some of the lots in housing development tracts of at least five acres when a sufficient number of tenants on a tract applied for such condemnation.⁹⁴ The HHA could then sell the titles to those lots on the tract to the tenants who had applied to own the land in fee simple.⁹⁵ The United States Supreme Court concluded that the statute did not violate the Public Use Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment.⁹⁶

In *Midkiff*, the Court made use of six methods of analysis, later relied on by the Court in *Kelo*, to analyze the constitutionality of the public use requirement of the Takings Clause. They are: (1) a purposive approach, (2) a utilitarian approach, (3) a rational basis test, (4) deference to the legislature, (5) equating “public use” with “public purpose,” and (6) eminent domain as a function of state police power.⁹⁷ In its ruling, the *Midkiff* Court equated police powers with the exercise of eminent domain (rather than second guessing whether a particular exercise of eminent domain fell within those powers).⁹⁸

91. *Id.* at 34-35.

92. *Midkiff*, 467 U.S. at 241-42. “The legislature concluded that concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.” *Id.* at 232. The fact that much of the land remained in concentrated ownership of a few people was traceable to the time of the island’s original settlement by Polynesians. *Id.*

93. *Id.* at 233; HAW. REV. STAT. §§ 516-1 to -186 (Repl. 1993 & Supp. 2004).

94. *Midkiff*, 467 U.S. at 233.

95. *Id.* at 233-34.

96. *Id.* at 239. “It is worth noting 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.” *Id.* at 244 n.7.

97. *Id.* at 239-44.

98. *Midkiff*, 467 U.S. at 239-40.

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The majority made use of the purposive approach, as well as utilitarian analysis in *Midkiff*, which upheld the constitutionality of the taking.⁹⁹ Therein, the Court declared that “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”¹⁰⁰ Having determined that alleviating the social evil of land oligopoly was such a public purpose, the Court was comfortable with the state using its eminent domain power to accomplish that purpose.¹⁰¹ The *Midkiff* Court acknowledged that the taking of private property purely for the benefit of a particular private party would violate the Constitution, but concluded that the Act’s purpose was “not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose [was] not irrational.”¹⁰²

The Court also emphasized strong deference to the legislature, coupled with a rational basis test, as a factor courts should consider when judging public use.¹⁰³ Furthermore, the Court found “no exception merely because the power of eminent domain is involved.”¹⁰⁴ The Court averred that “it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”¹⁰⁵ Where the exercise of eminent domain power is “rationally related to a conceivable public purpose,” the public use requirements are satisfied.¹⁰⁶ By forming that conclusion, the Court equated public use with public purpose.¹⁰⁷ As the author of the majority opinion, Justice O’Connor further supported the deference rationale by concluding that “[j]udicial deference is required because, in our

99. *Id.* at 244.

100. *Id.*

101. *Id.* at 243. Justice O’Connor later distinguished this holding in *Kelo* by arguing that Hawaii’s elimination of a harmful use did achieve a public benefit, while the single-family homes condemned by the City of New London were not a harmful use, and therefore, no public benefit accrued. 125 S. Ct. at 2674-75 (O’Connor, J., dissenting).

102. *Midkiff*, 467 U.S. at 245.

103. *See id.* at 241, 244.

104. *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

105. *Id.* at 241 (quoting *Gettysburg*, 160 U.S. at 680).

106. *Id.*

107. *See Midkiff*, 467 U.S. at 241.

system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”¹⁰⁸ Justice O’Connor was, however, less willing to give such deference in *Kelo*,¹⁰⁹ where she disagreed with the public purpose.

Chief Justice John Marshall believed that it is the “province and duty of the judicial department to say what the law is.”¹¹⁰ Others agree that it is improper to give deference to the legislature (or a local commission) to determine the definition of public use.¹¹¹ Such scholars maintain that the *Berman* and *Midkiff* cases overlook the historic distinction between private sector ownership (presumptive nonpublic use) versus deference to the legislature when there is traditional public use with government ownership.¹¹² Both *Berman* and *Midkiff* involved the taking and redistribution of privately-owned property to other private parties.¹¹³ Such takings, when approved by the Court, lead to an increase in “the scope of this unconstrained power of eminent domain to all circumstances” by deferring to a state’s police powers that have inappropriately been equated to the state’s power of eminent domain.¹¹⁴

108. *Id.* at 244.

109. 125 S. Ct. at 2673 (O’Connor, J., dissenting). Justice O’Connor argued:

We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Id. (O’Connor, J., dissenting).

110. *Marbury*, 5 U.S. (1 Cranch) at 177.

111. *See, e.g.*, Coughlin, *supra* note 11, at 1038.

112. *See, e.g., id.* at 1024-27; *see also Kelo*, 125 S. Ct. at 2684-86 (Thomas, J., dissenting).

113. *See supra* notes 76-86, 92-102 and accompanying text.

114. Coughlin, *supra* note 11, at 1025-28 (recommending that *Berman* and *Midkiff* should be overturned as inappropriately applying the precedent of earlier cases rather than be used as broad precedent for future cases because they fail to address core individual rights protected by the Fifth Amendment); *see also Kelo*, 125 S. Ct. at 2685-86 (Thomas, J., dissenting) (arguing that the Public Use Clause was intended to limit Congress’s exercise of enumerated powers and that “*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States”).

III. KELO v. CITY OF NEW LONDON

While both *Berman* and *Midkiff* made use of the purposive approach to uphold government takings that may not have satisfied a literal interpretation of the Takings Clause, it remained unclear just how far the Court would be willing to extend this logic. Those cases at least arguably involved facts that made for situations in which it was appropriate for the Court to relax its standards for public use. However, the issue of whether private property may be taken for economic development purposes was one that forced the Court to squarely face the two competing methods of analysis in a setting in which the facts did not lend themselves to a particular outcome.

A. Background

The United States Supreme Court granted certiorari in *Kelo v. City of New London* to address the key issue of whether the city's proposed use of property acquired through eminent domain—as part of a development plan “to revitalize an economically distressed city”—is a use that “qualifies as a ‘public use’ within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.”¹¹⁵ The New London Development Corporation (“NLDC”) was established by the City of New London to help it plan economic development¹¹⁶ and was delegated eminent domain authority to the NLDC.¹¹⁷ The City of New London was particularly concerned with economic development because of the closing of the Naval Undersea Warfare Center in the Fort Trumbull area in 1996, which exacerbated decades of economic decline and augmented the local unemployment rate to twice that of the Connecticut state average.¹¹⁸

In 1998, Pfizer, Inc. (“Pfizer”) announced plans to create a pharmaceutical research facility adjacent to the Fort Trumbull area.¹¹⁹ Using bond issue funds authorized by the state, the NLDC developed six alternative plans that the state agencies

115. 125 S. Ct. 2655, 2658 (2005). The Takings Clause provides, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

116. *Kelo*, 125 S. Ct. at 2659.

117. *Id.* at 2659-60.

118. *Id.* at 2658.

119. *Id.* at 2659.

considered, focusing on the “economic, environmental, and social ramifications” of the project.¹²⁰ The New London City Council approved the final NLDC plan in 2000, after the State Office of Planning and Management had found that the project itself was “consistent with relevant state and municipal development policies.”¹²¹ The city council hoped the plan would generate one thousand jobs, increase the tax base, and revitalize the city.¹²²

This plan amassed seven parcels into a “small urban village” that included a hotel, restaurants, shopping, and “marinas for both recreational and commercial uses.”¹²³ There were to be eighty new residences within walking distance of the development (including the already established Fort Trumbull State Park), along with a river walkway, and a United States Coast Guard Museum.¹²⁴ The plan also included research and office development space adjacent to the Pfizer project.¹²⁵

Objections to condemnation regarding 15 of the 115 privately-owned properties gave rise to this lawsuit.¹²⁶ Five of the properties were rental investment properties, but the other ten were family-owned homes, including one owned by a woman who had lived in her house since 1918.¹²⁷ Plaintiff Susette Kelo was a relative newcomer who prized her waterview location, which she maintained in good condition, as did the owners of the other fourteen properties.¹²⁸ They were not being condemned because they were “blighted,” but rather simply because they fell within the development project area.¹²⁹

Although the trial court upheld the takings in the office development portion of the plan as necessary, it ruled in favor of the homeowners with respect to the properties to be used for park and marina support.¹³⁰ After both sides appealed, the Connecticut Supreme Court concluded that all of the takings

120. *Id.* at 2659 & n.2.

121. *Kelo*, 125 S. Ct. at 2659 & n.2.

122. *Id.* at 2658.

123. *Id.* at 2659.

124. *Id.*

125. *Id.*

126. *Kelo*, 125 S. Ct. at 2659-60.

127. *Id.* at 2660.

128. *See id.*

129. *Id.*

130. *Id.*

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were valid and authorized by Connecticut's municipal development statute.¹³¹ The court considered even the taking of developed land to qualify as a "public use" if taken "as part of an economic development project."¹³² The state supreme court concluded that the planning process had been thorough and the takings were "reasonably necessary" to achieve the overall plan.¹³³ While agreeing that the NLDC intended the plan to serve a valid public use, the Connecticut Supreme Court dissenters would have required a heightened standard of judicial review for takings involving economic development.¹³⁴ The United States Supreme Court "granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."¹³⁵

B. Majority Opinion

In affirming the Connecticut Supreme Court, Justice Stevens, writing for the majority, found no violation of the Fifth Amendment.¹³⁶ Justices Souter, Ginsburg, Breyer, and Kennedy joined the majority opinion,¹³⁷ and Justice Kennedy also wrote a separate, concurring opinion.¹³⁸ The Court relied heavily on *Berman v. Parker*¹³⁹ and *Hawaii Housing Authority v. Midkiff*¹⁴⁰ in concluding that the New London redevelopment project satisfied the public use requirement of the Fifth Amendment and that the eminent domain takings were permissible under the federal Constitution.¹⁴¹

The Court broadly equated public purpose with public use, stating that it "long ago rejected any literal requirement that

131. *Kelo*, 125 S. Ct. at 2660; see also CONN. GEN. STAT. ANN. §§ 8-186 to -200b (West 2001 & Supp. 2005).

132. *Kelo*, 125 S. Ct. at 2660.

133. *Kelo v. City of New London*, 843 A.2d 500, 552, 558 (Conn. 2004) [hereinafter *Kelo I*].

134. *Id.* at 587-92.

135. *Kelo*, 125 S. Ct. at 2661.

136. *Id.* at 2668.

137. *Id.* at 2658.

138. *Id.* at 2669-71 (Kennedy, J., concurring).

139. 348 U.S. 26 (1954).

140. 467 U.S. 229 (1984).

141. *Kelo*, 125 S. Ct. at 2661-68.

condemned property be put into use for the general public.”¹⁴² The majority rejected the “use by the public” test (coined by some scholars as the “employment”¹⁴³ test) as “impractical given the diverse and always evolving needs of society.”¹⁴⁴ The broader view of public use as public purpose (sometimes called the “advantage”¹⁴⁵ test) evolved at the end of the nineteenth century, and, according to the majority, the narrower test has been consistently rejected since then.¹⁴⁶ By ruling as it did, the Court rejected a strict construction of the Takings Clause, much to the chagrin of the dissenting judges.¹⁴⁷

For the majority, the outcome of this case rested on the determination that the city’s development plan served a public purpose.¹⁴⁸ Where the primary benefit is to stimulate jobs and revitalize the community, rather than to benefit a particular person or entity, the Takings Clause permits local governments to make long-term leases to yet-to-be determined private developers and tenants.¹⁴⁹ The Court reached this conclusion after expressly recognizing a limit on the government’s power to condemn private property—the city could not take private property from one person for the direct purpose of transferring it to another private person for private benefit.¹⁵⁰ Both the majority opinion and Justice Kennedy’s concurrence acknowledged that private property cannot be taken under the pretext of a public purpose, and Justice Kennedy noted that, even under a rational basis test, such impermissible takings should be stricken, especially where the public purpose is merely incidental to the benefits conferred on private parties.¹⁵¹

The *Kelo* plan, however, was not pretextual. It was one in which the takings were “executed pursuant to a ‘carefully considered’ development plan,” which the Court found had

142. *Id.* at 2662 (quoting *Midkiff*, 467 U.S. at 244).

143. See SACKMAN, *supra* note 8, at § 7.02[1], at 7-25.

144. *Kelo*, 125 S. Ct. at 2662.

145. See SACKMAN, *supra* note 8, at §7.02[1], at 7-25.

146. *Kelo*, 125 S. Ct. at 2662-63 (citing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1886)).

147. See *id.* at 2671, 2677 (O’Connor, Thomas, J.J., dissenting).

148. *Id.* at 2665.

149. See *id.*

150. *Id.* at 2661.

151. *Kelo*, 125 S. Ct. at 2661; *id.* at 2669 (Kennedy, J., concurring).

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fostered the necessary public purpose for the following two reasons:¹⁵² (1) a Connecticut “statute . . . specifically authorize[d] the use of eminent domain”¹⁵³ in order “to meet the needs of industry and business;”¹⁵⁴ and (2) the city carefully considered several plans before settling on this comprehensive plan aimed at fostering community benefits, such as new jobs and an increased tax base, which the city could not implement on a piecemeal basis.¹⁵⁵ Thus, both the city’s economic rejuvenation plan as well as the city’s determination that eminent domain was necessary to that plan were beneficiaries of the Court’s deference.¹⁵⁶ As a result, the economic development in question constituted a public purpose, and the use of eminent domain—even to take non-blighted property—did not violate the public use requirements of the Fifth Amendment.¹⁵⁷

The majority bolstered its conclusion that the economic development at issue constituted a public purpose by looking to its own prior decisions.¹⁵⁸ The Court explained that it had viewed arteries of transportation, such as railroads, as traditional public uses, even if owned by private entities as the property was, in fact, ultimately used by the public.¹⁵⁹ However, the Court pointed out the problems of such a standard, noting the difficulty of distinguishing between transportation and other facilities used by the public, such as hotels.¹⁶⁰ Such difficulties prompted the Court to “embrace[] the broader and more natural interpretation of public use as ‘public purpose.’”¹⁶¹ As other examples broadly interpreting public use as public purpose, the majority cited: (1) the Court’s approval of the use of eminent domain for aerial lines between mines across private land,¹⁶² (2) *Midkiff*’s approval of the “eliminati[on of] the ‘social and

152. *Id.* at 2661 (quoting *Kelo I*, 843 A.2d at 536).

153. *Id.* at 2665.

154. CONN. GEN. STAT. ANN. § 8-186 (West 2001).

155. *Kelo*, 125 S. Ct. at 2659, 2665.

156. *Id.* at 2664-65.

157. *Id.* at 2665.

158. *Id.*

159. *Id.* at 2661.

160. *Kelo*, 125 S. Ct. at 2661-62 & n.7 (citing *Dayton Gold & Silver Mining Co. v. Seawell*, No. 805, 1876 WL 4573, at *10 (Nev. 1876)).

161. *Id.*

162. *Id.* at 2664 & n.11 (citing *Strickley*, 200 U.S. at 531 (“Justice Holmes’ opinion for the Court stressed ‘the inadequacy of use by the general public as a universal test.’”)).

economic evils of a land oligopoly,”¹⁶³ and (3) *Ruckelshaus v. Monsanto Co.*, holding that enhancing competition in the pesticide industry was a valid congressional purpose, even though private entities would be the primary beneficiaries.¹⁶⁴ From this discussion, the Court concluded that “economic development is a traditional and long accepted function of government” that should not be distinguished from other appropriate public purposes.¹⁶⁵

The majority declined to review the case with heightened scrutiny or a bright-line test for measuring public purpose.¹⁶⁶ It rejected the test offered by the landowners, which would have required “reasonable certainty” that the expected public benefits would actually accrue, because it viewed a postponement of judicial approval until the assurance of the plan’s success to be impractical and a significant obstacle to the implementation and success of the plan.¹⁶⁷ While agreeing with this conclusion as applied to the *Kelo* case, Justice Kennedy’s concurrence left open “the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings” involving the risk of impermissible favoritism to private parties.¹⁶⁸ Justice Kennedy would, however, generally apply the majority’s “rational-basis test . . . to review economic regulation[s]”¹⁶⁹

Combining the use of the broad public purpose test with the notion of legislative deference, the majority viewed the role of the courts in determining what constitutes public purpose to be a narrow one.¹⁷⁰ “Once the question of the public purpose has been decided, the amount and character of land to be taken for the project . . . to complete the integrated plan rests in the discretion of the legislative branch.”¹⁷¹ In reaching this

163. *Id.* at 2664 (quoting *Midkiff*, 467 U.S. at 241-42).

164. *Id.* (citing 467 U.S. 986, 1014-15 (1984), and interpreting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a-136y (2000)).

165. *Kelo*, 125 S. Ct. at 2665.

166. *Id.* at 2667-68.

167. *Id.*

168. *Id.* at 2670 (Kennedy, J., concurring). Justice Kennedy declined to enlighten the reader as to what circumstances “might justify a more demanding standard” *Id.* (Kennedy, J., concurring).

169. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

170. *Id.* at 2663.

171. *Id.* at 2668 (quoting *Berman*, 348 U.S. at 35-36).

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conclusion, the Court included within the parameters of public purpose situations where: (1) the property would be owned by the public, (2) the property would be used by the public, and (3) private parties were the primary beneficiaries and the public benefit was secondary.¹⁷² In fact, the Court emphasized that “public purpose will often benefit individual private parties”¹⁷³ (as was the case with the land redistribution in *Midkiff*¹⁷⁴) and “that public ownership is [not] the sole method of promoting the public purposes of community redevelopment projects.”¹⁷⁵

The Court in *Kelo* relied most heavily on the precedent of *Berman*, both for support of legislative deference and for examination of the redevelopment plan as a whole, rather than one piece at a time.¹⁷⁶ In both *Kelo* and *Berman*, the Court rejected the piecemeal approach, reasoning that in order for the redevelopment plan at issue to be successful, the respective cities must be able to execute a comprehensive, coordinated plan in its entirety.¹⁷⁷ Just as *Berman* included a non-blighted department store within the blighted area,¹⁷⁸ *Kelo* included non-blighted housing within the economic redevelopment area.¹⁷⁹ Neither majority was willing to exempt these properties from condemnation.¹⁸⁰ Although the *Kelo* Court could have distinguished *Berman* and limited its application either to the correction of a social health and safety problem or to the unique circumstances of our nation’s capital, it chose not to construe *Berman* so narrowly.¹⁸¹

Although allowing a very broad definition of public purpose to satisfy the public use component of the Fifth Amendment, the majority expressly stated “that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the

172. *See id.* at 2662-68.

173. *Id.* at 2666.

174. *See generally* 467 U.S. 229.

175. *Kelo*, 125 S. Ct. at 2666 (quoting *Berman*, 348 U.S. at 34).

176. *Id.* at 2663-65.

177. *Id.* at 2663, 2665; *Berman*, 348 U.S. at 34-35.

178. *Berman*, 348 U.S. at 31.

179. *Kelo*, 125 S. Ct. at 2660.

180. *Id.* at 2668; *Berman*, 348 U.S. at 35.

181. *See Kelo*, 125 S. Ct. at 2665 n.13.

federal baseline.”¹⁸² Thus, the states, if they so choose, can restrict their own use of eminent domain by providing private property owners with greater protections as a matter of state law.

C. Justice Breyer’s Unwritten Opinion—A Key to Understanding the Majority Position

If Justice Breyer had written the majority opinion in *Kelo*, he would have identified the majority’s rationale as the purposive approach to constitutional construction.¹⁸³ Application of this approach to the Fifth Amendment reveals that: (1) economic redevelopment is a legitimate public purpose, which satisfies the rational basis test; (2) deference is given to legislatures (and their delegated local authorities) to determine how best to carry out the economic redevelopment; (3) eminent domain provides a means of accomplishing that public purpose by acquiring the land necessary to accomplish the redevelopment; and (4) the only remaining Fifth Amendment hurdle would be to provide the private property owner with just compensation. In his NPR interview, Justice Breyer indicated that he and Justices Ginsberg and Stevens often defer to the legislature’s interpretation of what constitutes a public purpose, and they therefore give the legislature the benefit of the doubt, even on issues of constitutionality.¹⁸⁴

This purposive approach embraces a greater willingness on the part of the courts to focus on evolving modern needs by viewing economic development as within the public interest and as an expression of the public will. It further considers the assurance of just compensation as a primary purpose of the Takings Clause. In *Kelo*, the majority opinion adopted this approach.¹⁸⁵ In contrast, the strict constructionist would limit takings to situations that comply with the specific text of the Fifth Amendment, namely when the property would be reserved for “public use.” Such a view, often promoted by Justices Thomas and Scalia, forms the basis for the dissenting opinions in *Kelo*.¹⁸⁶

182. *Id.*

183. See BREYER, *supra* note 65, at 85.

184. See Interview, *supra* note 70.

185. See generally 125 S. Ct. 2655.

186. See generally *id.* at 2671-87 (O’Connor, Thomas, J.J., dissenting).

D. Dissenting Opinions

Justice O'Connor authored a dissenting opinion, in which Chief Justice Rehnquist, and Justices Scalia and Thomas joined.¹⁸⁷ Justice Thomas also wrote a separate dissent.¹⁸⁸ The dissenting Justices viewed the Fifth Amendment as a limit on governmental takings, distinguished public use from public purpose, and were more reluctant to defer to the legislature for the determination of what constitutes such a use.¹⁸⁹

In her dissent, Justice O'Connor emphasized two distinct limitations on government action built into the Fifth Amendment—public use and just compensation—both of which are “safeguards against excessive, unpredictable, or unfair” exercises of eminent domain.¹⁹⁰ She advocated a stricter construction of the Takings Clause with regard to public use, as well as recognition that purely private-private takings violate the limitation imposed on government in the Takings Clause.¹⁹¹ Furthermore, she considered the plan to be too vague, especially with respect to the “park support” use associated with the parcel involving Kelo's property, and was skeptical because it was developed by a private board rather than a public entity.¹⁹²

Justice O'Connor's paramount concern was the need to correct social evils associated with land use policies that disadvantage the poor and the middle class,¹⁹³ in essence making a “social justice” argument.¹⁹⁴ From a public policy perspective, her position in both *Midkiff* and *Kelo* is clear and consistent.¹⁹⁵ Her judicial philosophy is less coherent, as her majority opinion in *Midkiff* included very broad deference to the legislature, while her opinion in *Kelo* was less willing to grant such deference.¹⁹⁶

187. *Id.* at 2671 (O'Connor, J., dissenting).

188. *Id.* at 2677 (Thomas, J., dissenting).

189. *See generally id.* at 2671-87 (O'Connor, Thomas, J.J., dissenting).

190. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting).

191. *See id.* at 2671 (O'Connor, J., dissenting).

192. *See id.* at 2671-72 (O'Connor, J., dissenting).

193. *Id.* at 2677 (O'Connor, J., dissenting).

194. For a passionate address discussing how courts should base decisions more on “social justice” and less on technicalities of the law, see Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L.J. 18 (2003).

195. *See Kelo*, 125 S. Ct. at 2677; *Midkiff*, 467 U.S. at 241-42.

196. *See Kelo*, 125 S. Ct. at 2673; *Midkiff*, 467 U.S. at 244.

In *Kelo*, Justice O'Connor stated that governments violate the constitutional public use requirement when "private property is forcibly relinquished to new private ownership."¹⁹⁷ But a private-private taking also occurred in *Midkiff* where the government took land from rich landlords and sold it to those who had previously been tenants.¹⁹⁸ Apparently, such government action failed to bother Justice O'Connor in *Midkiff* because it was correcting "social and economic evils."¹⁹⁹ In *Kelo*, however, Justice O'Connor wrote that it was simply wrong "to transfer property from those with fewer resources to those with more."²⁰⁰ While the moral distinction may be clear, does a legal distinction necessarily follow?

Justice O'Connor attempts to draw one. In order to properly constitute public use, the benefit to the public has to be primary, rather than incidental or secondary.²⁰¹ In fact, she stated:

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.²⁰²

Such reasoning by the majority, in Justice O'Connor's view, abandons "long-held, basic limitation[s] on governmental power."²⁰³ She found support from Justice Fitzgerald of the Michigan Supreme Court, who, in dissent, criticized the purposive approach to the Takings Clause:

"Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is

197. See *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

198. See *Midkiff*, 467 U.S. at 233-34.

199. *Id.* at 241.

200. 125 S. Ct. at 2677 (O'Connor, J., dissenting).

201. See *id.* at 2671 (O'Connor, J., dissenting).

202. *Id.* (O'Connor, J., dissenting).

203. *Id.* (O'Connor, J., dissenting).

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immune from condemnation for the benefit of other private interests that will put it to a 'higher' use."²⁰⁴

In addressing the question of exactly how much deference to afford state legislatures, Justice O'Connor averred, "We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."²⁰⁵ This sentiment is also echoed in Justice Thomas's dissent: "If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution."²⁰⁶

Justice O'Connor adopts a much different judicial position as a strict constructionist in her *Kelo* dissent than she did as an advocate of extremely broad legislative deference in her majority opinion in *Midkiff*.²⁰⁷ As mentioned, one difference in the underlying facts is that a social evil was being corrected in *Midkiff*, while no such social evil underlay the economic redevelopment plan in *Kelo*. However, this difference in the facts is hardly enough to justify the difference in her opinions. In the end, the two opinions leave one primary question to be answered: who should determine what constitutes a public use—the courts or the legislature?

In *Midkiff*, Justice O'Connor wrote that "legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power,"²⁰⁸ and the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"²⁰⁹ In fact, she only required eminent domain to be "rationally related to a conceivable public purpose"²¹⁰ and considered "the legislature, not the judiciary, [to be] the main guardian of the public needs to be served by

204. *Id.* at 2677 (O'Connor, J., dissenting) (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464 (Mich. 1981) (Fitzgerald, J., dissenting)).

205. *See Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

206. *Id.* at 2678 (Thomas, J., dissenting).

207. *See id.* at 2671 (O'Connor, J., dissenting); *Midkiff*, 467 U.S. at 244.

208. *Midkiff*, 467 U.S. at 244.

209. *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

210. *Id.*

social legislation” and saw “no exception merely because the power of eminent domain is involved.”²¹¹

Though Justice O’Connor acknowledged her *Midkiff* opinion in *Kelo*,²¹² attempts to distinguish it are not persuasive. There is little in *Midkiff* to suggest that the broad deference given to the legislature to determine what constitutes public purpose is limited only to the particular facts of that case.²¹³ If the deference barn door had not been thrown open so wide in *Midkiff*, it would have been easier for the Court to distinguish *Berman* as being *sui generis* because of the unique conditions of Washington D.C., but the repetition of nearly unqualified deference in *Midkiff* makes it difficult for the Court to take back that unqualified deference in *Kelo*.²¹⁴

Both dissents in *Kelo* recognized the distinction between a government’s police power and eminent domain power.²¹⁵ According to Justice O’Connor, “when deciding if a taking’s purpose is constitutional, the police power and ‘public use’ cannot always be equated.”²¹⁶ Local governments retain broad police power to regulate the use of property—with zoning as a prime example—in a manner aimed at improving the health, safety, and welfare of its constituency.²¹⁷ But it does not necessarily follow that the power of eminent domain can always be used for those purposes. Eminent domain is not a police power; it evolves from a different source and is constitutionally limited to being used only to take private property for “public use” and not for additional uses that government may otherwise regulate through its police powers.²¹⁸

211. *Id.* at 239-40 (quoting *Berman*, 348 U.S. at 32). At least in *Midkiff*, Justice O’Connor apparently disregarded the pertinent constitutional provision from her native Arizona, which provides, “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.” ARIZ. CONST. art. II, § 17.

212. *See Kelo*, 125 S. Ct. at 2674-75 (O’Connor, J., dissenting).

213. *See Midkiff*, 467 U.S. at 244-45.

214. *See id.*

215. *Kelo*, 125 S. Ct. at 2674-75 (O’Connor, J., dissenting); *id.* at 2678 (Thomas, J., dissenting).

216. *Id.* at 2675 (O’Connor, J., dissenting).

217. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 394-95 (1926); *see also Midkiff*, 467 U.S. at 241-42.

218. *See Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting).

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Justice Thomas viewed the *Kelo* decision as “simply the latest in a string of . . . cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”²¹⁹ According to him, the “question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power.”²²⁰ In addition, Justice Thomas saw the courts confusing public use with public purpose, public use with public necessity, and nuisance with eminent domain.²²¹ He averred that the Courts in *Berman* and *Midkiff* relied on dicta to adopt a public purpose approach and that they confused these concepts with discussion of deference to reach inappropriate results that effectively negated the original intent of the Takings Clause.²²²

As a strict constructionist, Justice Thomas argued that the Court should return to the original intent of the Constitution, which he saw as protecting private property rights.²²³ His opinion emphasized that the Takings Clause is a limitation on government action, not a grant of power.²²⁴ Had the Founders wanted to use broader language (instead of public use) they could have spoken of the general welfare, as they did in the Preamble to the Constitution.²²⁵ Justice Thomas averred that the “most natural” and strict reading of the Public Use Clause is to allow “government to take property *only if* the government owns, or the public has a legal right to use, the property”²²⁶ He viewed this “actual use test” as much easier to administer than the majority’s “public purpose test.”²²⁷ Furthermore, if the Public Use Clause were so strictly interpreted, the question of legislative deference would no longer be pertinent—“public use” would be defined by the Constitutional language itself.

219. *Id.* at 2678 (Thomas, J., dissenting).

220. *Id.* at 2685 (Thomas, J., dissenting).

221. *See id.* at 2679-81 (Thomas, J., dissenting) (concluding that the common law allows elimination of uses that are against the public welfare through nuisance law—without resorting to the separate concept of eminent domain).

222. *See id.* at 2682-86 (Thomas, J., dissenting).

223. *Kelo*, 125 S. Ct. at 2678 (Thomas, J., dissenting).

224. *Id.* (Thomas, J., dissenting).

225. *Id.* at 2679-80 (Thomas, J., dissenting).

226. *Id.* at 2679 (Thomas, J., dissenting) (emphasis added).

227. *Id.* at 2686 (Thomas, J., dissenting).

Like Justice O'Connor, Justice Thomas referenced the social implications of the *Kelo* decision, noting the unequal impact of displacement on low income non-whites in urban renewal projects.²²⁸ Justice Thomas agreed with Justice O'Connor that the deferential standard regarding public use "encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms' to victimize the weak."²²⁹ As a result of the majority opinion in *Kelo*, Justice Thomas concluded that "[t]hough citizens are safe from the government in their homes [under the Fourth Amendment], the homes themselves are not."²³⁰

IV. DETERMINING PUBLIC USE IN ARKANSAS

As Justice William Brennan has advocated, the federal Constitution provides the floor for protection of individual rights and state constitutions provide the ceiling.²³¹ In *Kelo v. City of New London*, the Supreme Court held that its "authority . . . extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution" and left it to the states to discern what was permissible under state law.²³² While the Fifth Amendment now apparently permits private property to be taken for economic development, *Kelo* did not determine whether such a use is permitted by the Arkansas Constitution. In this section, we explore the question of whether the Arkansas Supreme Court has already answered the question and, if not, what insights it has given on the issue from which reasonable inferences can be drawn.

228. *Kelo*, 125 S. Ct. at 2686-87 (Thomas, J., dissenting).

229. *Id.* at 2687 (Thomas, J., dissenting) (quoting *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting)).

230. *Id.* at 2685 (Thomas, J., dissenting).

231. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 495 (1977); see also generally Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883 (2006).

232. 125 S. Ct. 2655, 2668 (2005).

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The Arkansas Constitution recognizes the state's right of eminent domain,²³³ but, in a separate constitutional section, also provides that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."²³⁴ However, preceding the latter provision is a clause unique to the Arkansas Constitution: "The right of property is before and higher than any constitutional sanction"²³⁵ It is under the ambit of these constitutional provisions that the case law in Arkansas on "public use" must be considered.

A. *Raines* as the Seminal Case on Eminent Domain

Any examination of Arkansas law on the meaning of public use in the context of eminent domain must begin with the Arkansas Constitution as well as the Arkansas Supreme Court's 1967 decision of *City of Little Rock v. Raines*.²³⁶ The precise definition of public use in *Raines* is not exactly clear.²³⁷ Nevertheless, this case has provided support for the notion that a taking purely for economic development does not constitute a public use in a variety of venues, including a recent opinion of the Arkansas Attorney General²³⁸ and even the Supreme Court of Connecticut's decision in *Kelo I*.²³⁹ In order to properly understand the accuracy of these characterizations, it is necessary to examine the factual background of *Raines* itself.

In 1965, the City of Little Rock sought to condemn property, purportedly for the purpose of constructing a port, an industrial park, and related facilities.²⁴⁰ The landowners asserted that the city was actually taking the land to establish an industrial park, which they contended was a private use and

233. ARK. CONST. art. 2, § 23 ("The State's ancient right of eminent domain . . . is herein fully expressed and conceded").

234. ARK. CONST. art. 2, § 22.

235. ARK. CONST. art. 2, § 22.

236. 241 Ark. 1071, 411 S.W.2d 486 (1967).

237. See *infra* text accompanying notes 269-70.

238. See Op. Ark. Att'y Gen. No. 2005-150, 2005 WL 2108682, at *4-5 (2005) [hereinafter Attorney General Opinion].

239. See *Kelo I*, 843 A.2d 500, 532 (Conn. 2004). The Connecticut Supreme Court stated, "We acknowledge that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow view of their public use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes." *Id.* (footnote omitted).

240. *Raines*, 241 Ark. at 1074-75, 411 S.W.2d at 489.

therefore in violation of the Arkansas and United States Constitutions.²⁴¹ The trial court concluded that the takings in question were not for a port facility, but instead were for industrial sites for sale to private industries and that this use was not a “public purpose or use permitted by the Constitution of the State of Arkansas under the right of eminent domain of the City of Little Rock, Arkansas.”²⁴² The Arkansas Supreme Court deferred to the trial court’s determination on the characterization of the use and accordingly concluded “that the use [was] not a public one for which the power of eminent domain may be exercised.”²⁴³

In reaching its conclusion, the Arkansas Supreme Court framed the issue in *Raines* as “whether the City of Little Rock has the authority to exercise the power of eminent domain to take private property for use as an industrial park.”²⁴⁴ It further divided this issue into “two legal questions: (1) Has the power of eminent domain been delegated to the city for this purpose?” and “(2) Is the use for this purpose a public use satisfying constitutional requirements for the exercise of the power?”²⁴⁵

1. Delegation of Power

With respect to the first question, the City of Little Rock contended that the taking in question was well within its eminent domain power based on a number of constitutional provisions and state statutes.²⁴⁶ The court began its discussion by reviewing “certain fundamental principles of the law of eminent domain, especially as it relate[d] to municipal corporations.”²⁴⁷

241. *Id.* at 1073, 411 S.W.2d at 488.

242. *Id.* at 1074, 411 S.W.2d at 488 (quoting the lower court decision).

243. *Id.* at 1083-84, 411 S.W.2d at 493.

244. *Id.* at 1073, 411 S.W.2d at 488.

245. *Raines*, 241 Ark. at 1073, 411 S.W.2d at 488.

246. *Id.* at 1077-78, 411 S.W.2d at 490. In support of its argument, the City of Little Rock provided the following support: (1) Act 9 of 1960, implementing Amendment 49 of the Arkansas Constitution “authorizing cities and counties to issue bonds and levy taxes” in order to secure and develop industry, (2) Act 231 of 1937 as amended by Act 189 of 1947, “authorizing cities to purchase, construct, establish and operate ports, harbors and barge terminals,” (3) Act 167 of 1947, “authorizing cities to create port authorities,” (4) Act 206 of 1963, implementing Amendment 18 to the Arkansas Constitution and providing “for the levy of a city tax . . . for securing the location of factories, industries and river transportation and facilities,” and (5) Act of March 9, 1875, as amended. *Id.*

247. *Id.* at 1078, 411 S.W.2d at 490.

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Recognizing the power of eminent domain under the Arkansas Constitution as “an attribute of, and inherent in, a sovereign state,” the court referenced, but did not discuss in detail, the constitutional provision that the “right of property is before and higher than constitutional sanction.”²⁴⁸

The court next examined the question of whether the state had delegated to the City of Little Rock the power of eminent domain sufficient to allow it to take private property and put it to use as an industrial park.²⁴⁹ It reiterated the longstanding principles of Arkansas law that cities “have no inherent powers and can exercise only (1) those expressly given them by the state through the constitution or by legislative grant, (2) those necessarily implied for the purposes of, or incident to, these express powers and (3) those indispensable (not merely convenient) to their objects and purposes.”²⁵⁰ Accordingly, the court determined that, if the city had the power to acquire property for an industrial park, such power would have to derive from either the Arkansas Constitution or state statutes.²⁵¹ Further, the Arkansas Supreme Court concluded that the authority for such grants must be “clearly expressed” and “should be strictly construed” against the City of Little Rock as a “derogation of the common right,” with reasonable doubts about the existence of such power resolved against the municipality.²⁵²

In the context of these “cardinal principles,” the court examined the city’s contentions with respect to its alleged sources of power.²⁵³ The Arkansas Supreme Court concluded that each potential source was insufficient to constitute a delegation of the power of eminent domain to the City of Little Rock to take land and put it to use as an industrial park.

248. *Id.* at 1078, 411 S.W.2d at 490-91.

249. *Raines*, 241 Ark. at 1079-80, 411 S.W.2d at 491.

250. *Id.* at 1079, 411 S.W.2d at 491.

251. *Id.*

252. *Id.* at 1079-80, 411 S.W.2d at 491.

253. *Id.* at 1080, 411 S.W.2d at 491.

[W]e find no delegation to the city of the power of eminent domain by the state under which this taking can be sustained, *if indeed the state has any such power in view of the use to which the property would be put. A state cannot grant greater powers to a municipal corporation than it possesses.*²⁵⁴

The court also observed, “If the people of Arkansas desire to confer the power on municipalities to acquire private property by eminent domain for industrial development, they should do so in clear and unmistakable language in view of the provisions of our constitution.”²⁵⁵

2. The Definition of Public Use

Once the court had come to a resolution on the issue of delegation, it also discussed at length the definition of public use and the history of Arkansas law on this issue.²⁵⁶ Although unnecessary to its ruling, the court took this opportunity to raise the question of whether condemned land used as an industrial park would violate the public use requirement of Article 2, section 22 of the Arkansas Constitution.²⁵⁷

Raines confirmed that “private property cannot be taken for private use, even under the authority of the legislature.”²⁵⁸ The *Raines* court discussed the case of *St. Louis, Iron Mountain & Southern Railway Co. v. Petty*²⁵⁹ in which the Arkansas Supreme Court drew the following distinction between public and private uses:

“A railway cannot exercise the right of eminent domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual, or a collection of individuals less than the public, that stamps it as a private use, and private property cannot be taken for private use. The fact that the railway’s

254. *Raines*, 241 Ark. at 1082, 411 S.W.2d at 493 (emphasis added).

255. *Id.* at 1086, 411 S.W.2d at 494-95.

256. *See id.* at 1082-85, 411 S.W.2d at 493-94.

257. *Id.* at 1083-85, 411 S.W.2d at 493-94.

258. *Id.* at 1083-84, 411 S.W.2d at 493.

259. 57 Ark. 359, 21 S.W. 884 (1893).

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business would be increased by the additional private facilities is not enough to make the use public.”²⁶⁰

In *Cloth v. Chicago, Rock Island & Pacific Railway Co.*, however, the Arkansas Supreme Court said that a use is not private simply because some, or even all, of the cost of construction may be paid by individuals, even if these individuals are the greatest beneficiaries of the taking.²⁶¹ On this basis, the court in *Cloth* concluded that the railroad could, consistent with the public use requirement of the Arkansas Constitution, condemn real property for the purpose of constructing a freight depot.²⁶² The court reached this conclusion in spite of the fact that certain citizens of the town of Brinkley agreed to pay a portion of the compensation for the property.²⁶³

In another case, *Ozark Coal Co. v. Pennsylvania Anthracite Railroad*, the railroad used its delegated power of eminent domain to acquire the necessary right-of-way for a rail line to its coal mine.²⁶⁴ The landowner contended that the proposed line was a private enterprise.²⁶⁵ However, the court ruled in favor of the railroad, concluding it had appropriately used its power of eminent domain with respect to a “public enterprise” use, “provided the public has the right to use it.”²⁶⁶ The court went on to note that it did not have to go as far as other courts have in “holding that the operation of a coal mine or manufacturing plant constitutes a public necessity or enterprise” sufficient to justify the exercise of eminent domain.²⁶⁷ *Raines* also cited *Ozark Coal* to support the notion that the question of whether a use is public or private is a judicial determination.²⁶⁸ In *Ozark Coal*, the court quoted, with approval, the following language from *Petty*:

260. *Raines*, 241 Ark. at 1083, 411 S.W.2d at 493 (quoting *Petty*, 57 Ark. at 365, 21 S.W. at 885).

261. 97 Ark. 86, 89, 132 S.W. 1005, 1007 (1910).

262. *Id.* at 87-89, 132 S.W. at 1006.

263. *Id.*

264. 97 Ark. 495, 498, 134 S.W. 634, 635 (1911).

265. *Id.* at 499, 134 S.W. at 635.

266. *Id.* at 500, 134 S.W. at 636.

267. *Id.* at 501, 134 S.W. at 636.

268. *Raines*, 241 Ark. at 1083, 411 S.W.2d at 493.

“If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it not by permission, but by right, its character is public. When once the character of the use is found to be public, the court’s inquiry ends and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user.”²⁶⁹

The Arkansas Supreme Court has had more difficulty, however, in defining exactly what characteristics a use must possess in order to be considered public. Citing *Cloth* and *Petty*, the court in *Raines* offered the following ambiguous definition of public use:

Private property can be taken under the power of eminent domain only for a public use. For a use to be public it is necessary that the public shall be concerned in the use to be made thereof and the purpose for which the property is to be used must in fact be a public one.²⁷⁰

Notwithstanding the ambiguity in the quotation, the *Raines* court distinguished taxing authority from taking authority.²⁷¹ In support of its position, the City of Little Rock relied on two Arkansas cases in which the court had viewed industrial development as a public purpose for the specific question of whether the expenditure of tax funds was legitimate.²⁷² The court held, however, that the question of what constitutes a public use for the purposes of eminent domain is a separate question, and the fact that a project is one for which public funds may be legitimately “expended is not a sufficient basis for finding that use of the property is a public use justifying the taking of private property.”²⁷³

269. *Ozark Coal Co.*, 97 Ark. at 500, 134 S.W. at 636 (quoting *Petty*, 57 Ark. at 365, 21 S.W. at 885).

270. *Raines*, 241 Ark. at 1083, 411 S.W.2d at 493 (citing *Cloth*, 97 Ark. 86, 132 S.W. 1005; *Petty*, 57 Ark. 359, 21 S.W. 884).

271. *Id.* at 1084-85, 411 S.W.2d at 494.

272. *Id.* at 1084, 411 S.W.2d at 494 (citing *Hackler v. Baker*, 233 Ark. 690, 346 S.W.2d 677 (1961); *Wayland v. Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960)).

273. *Id.* at 1085, 411 S.W.2d at 494.

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The City of Little Rock also argued in *Raines* that the rulings of the Arkansas Supreme Court in urban renewal cases supported its contention that a taking for an industrial development site constituted a public use, despite the fact that in those cases the private property taken was subsequently transferred back to private individuals.²⁷⁴ The distinction, according to the *Raines* court, was that the urban renewal cases achieved the public use of remediating blight—also the primary focus of the *Berman v. Parker* decision.²⁷⁵ Remediation was accomplished by taking property and clearing slums, notwithstanding the fact that some of the property was ultimately transferred back into private hands.²⁷⁶ In rejecting Little Rock's argument, the court noted that the sole purpose of the city's acquisition of property in *Raines* was to sell it to private industries.²⁷⁷

In a subsequent case, *Hale v. Southwest Arkansas Water District*, the Arkansas Supreme Court was again faced with the question of when private benefits preclude the classification of a taking as a public use.²⁷⁸ There, the water district sought to condemn a right-of-way for a canal to transport water from Millwood Dam Reservoir to a Nekoosa-Edwards Paper Company plant south of Ashdown.²⁷⁹ The paper company was the only customer of the water district at that time.²⁸⁰ The landowners "contended that the taking was for private rather than public use, which is prohibited by article 2, section 22 of the Constitution of Arkansas."²⁸¹ The court concluded that the water district was in the same position as the railway company in *Petty*, i.e., "obligated to serve any member of the public desiring its services"²⁸² The proposed use of the canal by the water distribution district was for a public purpose, given the

274. *Id.* at 1085-86, 411 S.W.2d at 494 (citing *Rowe v. Housing Auth. of Little Rock*, 220 Ark. 698, 249 S.W.2d 551 (1952); *Hogue v. Housing Auth. of N. Little Rock*, 201 Ark. 263, 144 S.W.2d 49 (1940)).

275. *Raines*, 241 Ark. at 1086, 411 S.W.2d at 494; *see also* *Berman v. Parker*, 348 U.S. 26, 28 (1954).

276. *Raines*, 241 Ark. at 1086, 411 S.W.2d at 494.

277. *Id.*

278. 244 Ark. 647, 648, 427 S.W.2d 14, 15 (1968).

279. *Id.* at 647-48, 427 S.W.2d at 15.

280. *Id.* at 648, 427 S.W.2d at 15.

281. *Id.*

282. *Id.* at 649-50, 427 S.W.2d at 15-16.

fact the facility would be available “for all other customers who might demand service,” even though at the time of the condemnation the project only served one paper company.²⁸³ In *Hale*, the court quoted with approval the following language from *Petty*, giving deference to the Arkansas General Assembly:

“To be public the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it not by permission but of right, its character is public. When once the character of the use is found to be public, the court’s enquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user.”²⁸⁴

B. Public Use Versus Public Necessity

The *Raines* court also concluded that public use and public necessity are not interchangeable concepts.²⁸⁵ The City of Little Rock, relying on *Woollard v. State Highway Commission*²⁸⁶ and *State Highway Commission v. Saline County*,²⁸⁷ contended that the determination by the legislative body, of the necessity for the use, should close the inquiry by the courts.²⁸⁸ In rejecting that argument, the court noted that in those cases the “public use” status of the takings was not in question as both involved highway construction projects; rather, the “necessity” of the takings was the focal issue.²⁸⁹

The most recent Arkansas case dealing with the public necessity issue, as distinguished from public use, is *Pfeifer v. City of Little Rock*.²⁹⁰ The *Pfeifer* case involved the taking of land for the Clinton Presidential Library and focused on three issues: the necessity of the taking, the delegation question, and the issue of bad faith.²⁹¹ First, the landowner argued that the

283. *Hale*, 244 Ark. at 650-51, 427 S.W.2d at 16.

284. *Id.* at 649, 427 S.W.2d at 15 (quoting *Petty*, 57 Ark. at 365, 21 S.W. at 885).

285. *See* 241 Ark. at 1084, 411 S.W.2d at 493.

286. 220 Ark. 731, 249 S.W.2d 564 (1952).

287. 205 Ark. 860, 171 S.W.2d 60 (1943).

288. *Raines*, 241 Ark. at 1084, 411 S.W.2d at 493 (citing *Woollard*, 220 Ark. 731, 249 S.W.2d 564; *Saline County*, 205 Ark. 860, 171 S.W.2d 60).

289. *Id.*

290. 346 Ark. 449, 57 S.W.3d 714 (2001).

291. *Id.* at 453, 57 S.W.3d at 716.

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city did not need all of his property.²⁹² However, the court determined that the landowner failed to meet his burden on that claim and therefore resolved the necessity issue in favor of the City of Little Rock.²⁹³

As in *Raines*, the *Pfeifer* court's analysis of the issue of the city's source of authority focused on the delegation question.²⁹⁴ *Pfeifer* maintained "that the City did not have the authority to condemn his property [for] a city park [and] then lease portions of the property to a private entity and the federal government for a library and meeting complex."²⁹⁵ The court noted that a municipality's ability to act is only derived through grants of power from the legislature and the state constitution.²⁹⁶ The court determined that Little Rock had, in fact, been delegated sufficient authority to both condemn the property and subsequently lease it as part of the development plan.²⁹⁷

Finally, the *Pfeifer* court addressed the issue of bad faith.²⁹⁸ *Pfeifer* argued that the city could not take property that it later intended to resell to a private entity for a profit.²⁹⁹ In response, the court cited *Selle v. City of Fayetteville*,³⁰⁰ which supported its conclusion that this issue becomes a question of bad faith on the part of the city.³⁰¹ The court noted "that a municipality cannot claim one purpose for the use of the property and attempt to accomplish a different purpose, particularly when the hidden purpose is to condemn land and then resell it to a private entity."³⁰² The court's analysis focused on the question of whether the city was acting in bad faith in its description of the purpose for which it was condemning the land, rather than on the question of whether such condemnation would pass constitutional muster as a public use.³⁰³ In the end, the court

292. *Id.*

293. *Id.* at 463, 57 S.W.3d at 723.

294. *Id.*; see also generally *Raines*, 241 Ark. 1071, 411 S.W.2d 486.

295. *Pfeifer*, 346 Ark. at 463, 57 S.W.3d at 723.

296. *Id.* (citing *Raines*, 241 Ark. at 1078, 411 S.W.2d at 491).

297. See *id.* at 466, 57 S.W.3d at 725.

298. *Id.* at 467, 57 S.W.3d at 726.

299. *Id.*

300. 207 Ark. 966, 184 S.W.2d 58 (1944).

301. *Pfeifer*, 346 Ark. at 467, 57 S.W.3d at 726.

302. *Id.*

303. See *id.* at 468, 57 S.W.3d at 726-27.

concluded that the landowner had failed to establish that the city had abused its discretion or acted in bad faith.³⁰⁴

C. Burden of Proof, Deference to the Legislature, and Standard of Review

Several Arkansas Supreme Court decisions have discussed: (1) the burden of proof in a takings case, (2) the deference to be given the legislature in its determination of what constitutes a public use, and (3) the appellate standard of review of a trial court's determination of whether a particular use is public or private.³⁰⁵ In *City of El Dorado v. Kidwell*, the landowner contended that condemnation of his property for the construction of a sewer line by the City of El Dorado was not a public purpose, but rather was for the sole benefit of the owners and developers of a new subdivision.³⁰⁶ On appeal, the Arkansas Supreme Court identified the burden as follows:

The burden was not on the City to prove the public purpose—the statute under which the City proceeded and the resolution of the City Council accomplished that purpose. Rather, the burden was on the landowner to prove that the taking was not for a public purpose; and with such burden understood, we examine the evidence.³⁰⁷

In so ruling, the court in *Kidwell* relied on its decision in *Woollard*, noting that in *Woollard* “the landowners ‘shouldered a heavy burden of proof in attempting to persuade the courts’ that the taking was not for a public purpose.”³⁰⁸ The Arkansas Supreme Court's reliance on *Woollard* was probably misplaced because, as it later pointed out in *Raines*, the issue in *Woollard* was a question of necessity, not public use.³⁰⁹ Nevertheless, in *Kidwell*, where the issue was public purpose or public use, the court determined that in Arkansas “the burden [is] on the

304. *Id.* at 461, 463, 57 S.W.3d at 722-23.

305. *See generally, e.g., City of El Dorado v. Kidwell*, 236 Ark. 905, 370 S.W.2d 602 (1963).

306. *Id.* at 906, 370 S.W.2d at 603.

307. *Id.* at 907, 370 S.W.2d at 604.

308. *Id.* (quoting *Woollard*, 220 Ark. at 734, 249 S.W.2d at 566).

309. *Raines*, 241 Ark. at 1084, 411 S.W.2d at 493.

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landowner to prove that the taking was not for a public purpose

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In so doing, the court in *Kidwell* placed great emphasis on the fact that the legislature had delegated the power of eminent domain to the condemning authority and that the city had used it for that authorized purpose.³¹¹ Such a legislative enactment, coupled with a municipal resolution authorizing the condemnation, “accomplished that purpose,” thereby relieving the city of any burden to prove that the purpose was in fact public.³¹² This decision leads to the conclusion that the legislature, in delegating the authority, as well as the city, in exercising that authority, were entitled to significant deference on this issue.

In *Raines*, the court did not directly discuss the burden of proof with respect to the public use issue.³¹³ The court’s language, however, implies that legislative conclusions relative to public use are entitled to a presumption of validity, but that the legislature must make its intentions clear for the presumption to apply.³¹⁴ The court appeared to say that if the legislature had clearly delegated authority for the use of eminent domain for an industrial development, and declared such use to be public (in the statute), then the trial court should presume that use to meet the public use requirement of the Arkansas Constitution. This presumption would, of course, be subject to the court’s obligation to ultimately determinate whether such use was actually public.³¹⁵

310. *Kidwell*, 236 Ark. at 907, 370 S.W.2d at 604.

311. *Id.*

312. *Id.*

313. *See generally* 241 Ark. 1071, 411 S.W.2d 486.

314. In *Raines*, the court distinguished prior cases in which the legislative grants of authority at issue had contained clear statements of the public use involved. *Id.* at 1085, 411 S.W.2d at 494. The court stated, “Those Acts granted the power of eminent domain in specific words and stated that the objectives were not only public purposes, but public uses.” *Id.* at 1086, 411 S.W.2d at 494. Additionally, in the next paragraph, the court stated as a coda, “If the people of Arkansas desire to confer the power on municipalities to acquire private property by eminent domain for industrial development, they should do so in clear and unmistakable language in view of the provisions of our constitution.” *Id.* at 1086, 411 S.W.2d at 494-95.

315. *See id.* at 1083, 411 S.W.2d at 493.

The *Raines* court reviewed the trial court's findings by the clearly erroneous standard.³¹⁶ The *Kidwell* court had also stated that it would "test [the trial court's] judgment on equitable principles."³¹⁷ A recent unpublished opinion of the Arkansas Court of Appeals reaffirmed that the "issue of public purpose will be reviewed on appeal using equitable principles."³¹⁸

D. The Implications of *Raines* and Emerging Public Use Issues

The *Raines* opinion has been the subject of much discussion in the debate over what constitutes a public use.³¹⁹ In a law review article written shortly after the *Raines* decision was handed down, the author (future federal judge for the Eastern District of Arkansas, Stephen Reasoner) concluded that in *Raines*, "the Arkansas court made it clear that despite its liberality in interpreting what constituted 'public use,' it would not depart from its enunciated doctrine and [would not] embrace the 'public purpose' or 'beneficial use' concept."³²⁰ In light of the *Kelo* decision, the Arkansas Attorney General was asked to render his opinion as to whether a city in Arkansas could "use its power of eminent domain to take private property for a private enterprise[.]"³²¹ The Attorney General's negative response was based, in substantial part, on his interpretation of the public use discussion in the *Raines* opinion.³²² The Attorney General concluded, "Nothing . . . indicates any retreat from the view expressed by the *Raines* court that economic development *alone* is not an allowable underlying public use for purposes of eminent domain."³²³

A number of news articles published since *Kelo* have included Arkansas in a list of several states that, purportedly,

316. See *Raines*, 241 Ark. at 1077, 411 S.W.2d at 490; see also ARK. R. CIV. P. 52(a).

317. *Kidwell*, 236 Ark. at 906, 370 S.W.2d at 603.

318. *Smith v. City of Fort Smith*, No. CA 03-592, 2004 WL 740024, at *4 (Ark. Ct. App. Apr. 7, 2004).

319. See, e.g., Stephen M. Reasoner, *Eminent Domain—Public Use—Rights of Way*, 22 ARK. L. REV. 211 (1968).

320. *Id.* at 213.

321. See Attorney General Opinion, *supra* note 238, at *1.

322. *Id.* at *6.

323. *Id.* at *13.

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preclude economic development takings in the absence of blight.³²⁴ Perhaps the genesis of these articles is the Connecticut Supreme Court, which acknowledged in *Kelo I* “that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow view of their public use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes.”³²⁵

At least two Arkansas Supreme Court cases subsequent to *Raines* have addressed that court's language on public use.³²⁶ In *Daniels v. City of Fort Smith*, the court, in a case not involving eminent domain, construed the public use discussion in *Raines* as creating, “in effect . . . a distinction between the terms ‘public purpose’ and ‘public use.’”³²⁷ However, in a case decided three years later, the Arkansas Supreme Court called the public use discussion in *Raines* “dictum.”³²⁸ Whether the public use discussion in *Raines* is obiter dictum or a part of the decision itself has been the subject of some discussion.³²⁹

324. See, e.g., Maura Kelly Lannan, *States Move to Curb Eminent Domain Seizures*, TIMES REC. (Fort Smith, Ark.), July 20, 2005, at 10A.

325. *Kelo I*, 843 A.2d 500, 532 (2004) (citing *Raines* in support of its conclusion) (footnote omitted).

326. See *Dowling v. Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983); *Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238 (1980).

327. *Daniels*, 268 Ark. at 160-61, 594 S.W.2d at 240. In this case, the court was called on to determine “whether the Arkansas Prevailing Wage Law applie[d] to work on a commercial construction project . . . financed pursuant to an Act 9 industrial development bond issue.” *Id.* at 159, 594 S.W.2d at 239. The Arkansas Prevailing Wage Law required that no less than a minimum prevailing hourly wage rate be paid to workmen employed on behalf of any public body engaged in the construction of “public works.” *Id.* Public works, under the statute, were defined as all works constructed for “public use.” *Id.* The trial court concluded that the project in question was not a public work. *Id.* The Director of Labor contended that the project was constructed for a public purpose (creation of jobs and improvement of economic conditions) and, accordingly, fell within the definition of “public works” based on the contention that the terms “public purpose” and “public use” are synonymous. *Daniels*, 268 Ark. at 160, 594 S.W.2d at 240. The city relied on the decision in *Raines* and the court's conclusion therein that the fact that “a project is one for which public funds may be expended is not a sufficient basis for finding that the use of the property is a public use justifying the taking of private property.” *Id.* at 160, 594 S.W.2d at 240 (quoting *Raines*, 241 Ark. at 1085, 411 S.W.2d at 494).

328. *Dowling*, 278 Ark. at 145, 644 S.W.2d at 266.

329. *Id.* Obiter dictum is a discussion or comment in an opinion unnecessary to the decision reached in the opinion. *Green v. State*, 343 Ark. 244, 251, 33 S.W.3d 485, 490 (2000). Black's Law Dictionary explains that “[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.” BLACK'S LAW DICTIONARY 541 (4th ed. 1968). In *McLeod v. J.E. Dilworth Co.*, the court

In *Raines*, once the supreme court had determined that the legislature had not delegated authority to the City of Little Rock to condemn land for the purpose of creating an industrial park, all rulings necessary to the outcome of the case had been decided.³³⁰ Therefore, the discussion by the Arkansas Supreme Court in *Raines* of the public use issues was, in fact, unnecessary to the decision of the case. As such, under the longstanding rule in Arkansas “that no constitutional question is ever to be considered as decided in any case unless that question is necessary for decision in the case,”³³¹ it seems apparent that the *Raines* court did not determine as a matter of law whether a taking for industrial park use (much less economic development in general) qualifies as a public use under the constitution. Nevertheless, in a post-*Kelo* opinion, the Arkansas Attorney General stated that it is “not at all clear” that the constitutional language in *Raines* was dictum.³³²

The next opportunity for the Arkansas Supreme Court to issue a definitive ruling on the question of the constitutionality of takings for economic development purposes may well come in the context of Amendment 78 to the Arkansas Constitution and its implementing legislation.³³³ Amendment 78 allows cities and counties to form districts for the purpose of financing redevelopment projects for blighted areas. The General Assembly subsequently passed implementing legislation with respect to Amendment 78, which included the power “to condemn property for the purposes of implementing the project plan.”³³⁴ The question arises whether the condemnation of private property for the purposes described in Amendment 78 and its implementing legislation is constitutionally permissible under the public use requirement of the Arkansas

noted that obiter dictum in one decision is not to be seized on as the “ratio decidendi” in a subsequent decision. 205 Ark. 780, 784, 171 S.W.2d 62, 64 (1943).

330. See 241 Ark. at 1083-84, 411 S.W.2d at 493.

331. *McLeod*, 205 Ark. at 784, 171 S.W.2d at 64; see also *Haase v. Starnes*, 323 Ark. 263, 273, 915 S.W.2d 675, 680 (1996); *Little Rock Rd. Mach. Co. v. Jackson County*, 233 Ark. 53, 56, 342 S.W.2d 407, 408 (1961); *Winston v. Personal Fin. Co. of Pine Bluff*, 220 Ark. 580, 589, 249 S.W.2d 315, 320 (1952).

332. Attorney General Opinion, *supra* note 238, at *10 n.13.

333. ARK. CODE ANN. §§ 14-168-301 to -322 (Supp. 2005).

334. See ARK. CODE ANN. § 14-168-304(7)(A).

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Constitution.³³⁵ In the context of Article 2, sections 22 and 23, the passage of Amendment 78 and its implementing legislation squarely placed into focus the issue of the constitutionality in Arkansas of the exercise of the power of eminent domain for redevelopment purposes.

V. RECOMMENDATIONS

Arkansas constitutional provisions include high regard for private property rights, and those rights should not be easily circumvented, even when a delegated authority is exercising its eminent domain power to take property for public use. What constitutes public use has been the subject of exhaustive discussion nationally.³³⁶ In light of the aforementioned analysis, the authors make the following recommendations:

(1) *Judicial Question*: The threshold question of what constitutes “public use” is a constitutional issue, and, as such, should be answered by the judiciary, without deference to the legislature. This should be made clear by the Arkansas Supreme Court, the General Assembly, or, if necessary, an amendment to the Arkansas Constitution.

(2) *Certainty of Language*: The Arkansas Constitution should directly clarify whether public purpose, public use, or public necessity—or all three—are proper bases for takings. If the government is to be permitted to take private property for economic development, then the Arkansas Constitution should

335. In an opinion dated August 30, 2005, the Arkansas Attorney General concluded that because Amendment 78 did not mention eminent domain, the constitutionality of the delegation of that power under the implementing legislation would be subject to constitutional scrutiny under the provisions of Article 2, section 22 of the Arkansas Constitution. Attorney General Opinion, *supra* note 238, at *4. The Attorney General opined that even though Amendment 78 authorizes a particular type of project, that “does not necessarily confer any expanded power with regard to eminent domain in connection with such projects,” and that legislation authorizing the exercise of eminent domain with respect to such projects “is subject to the same limitations and restrictions as any other statutorily authorized power of eminent domain.” *Id.* (citing *Raines*, 241 Ark. at 1080, 411 S.W.2d at 491; *Shellnut v. Arkansas State Game & Fish Comm’n*, 222 Ark. 25, 28, 258 S.W.2d 570, 573 (1953); *Priest v. Mack*, 194 Ark. 788, 790, 109 S.W.2d 665, 666 (1937); *State ex rel. City of Little Rock v. Donaghey*, 106 Ark. 56, 63, 152 S.W.2d 746, 748 (1912)).

336. See, e.g., David C. Wilkes & John D. Cavallaro, *This Land is Your Land? Eminent Domain's Public Use Limitation*, 77-Oct. N.Y. St. B.J. 10 (2005).

be amended to address that issue directly, rather than leave it to the courts or the legislature to take a circuitous route in justifying economic development under the current constitutional language, “public use.”

(3) *Clear Delegation and No Presumption*: Whether a taking is for economic development or “traditional public use” (even in the absence of any specific new constitutional provision):

(a) The taking authority should be delegated to the government entity in clear and specific language; and

(b) The rebuttable presumption favoring the legislature, which has evolved through case law, should be abolished. The legislature should not be granted deference on the issue of whether the character of the use is public.

Several states have enacted constitutional provisions declaring that the public use question is to be determined by the judicial branch without regard to legislative assertions. For example, the Missouri Constitution provides that “the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.”³³⁷ Using similar language, Oklahoma’s Constitution states, “In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.”³³⁸ Arizona and Washington share constitutional language, which states, “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”³³⁹ If the people of Arkansas wish to make it clear that the courts are the judge of what is considered a public use, rather than the legislature, they should consider adding constitutional language similar to that used by these states in their constitutions.

337. MO. CONST. art. I, § 28.

338. OKLA. CONST. art. II, § 24.

339. ARIZ. CONST. art. II, § 17; *see also* WASH. CONST. art. I, § 16.

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Numerous cases have (often inappropriately) equated terms such as public use, public purpose, and public necessity.³⁴⁰ Courts must be careful not to mislabel economic development as a public use when it is actually a public purpose. In addition, courts should realize that the power of eminent domain is a separate sovereign power of government, rather than a police power. These fundamental distinctions need to be maintained, and words should not be distorted from their actual meaning. If the people of Arkansas wish to authorize the exercise of eminent domain for economic development projects, or for other public purposes, they need to state as much in their constitution. If public use and public purpose are to be deemed as interchangeable concepts, then the constitution needs to make that point explicitly. Such assumptions should not be left to the courts, forcing them to sort through the various approaches to constitutional and statutory construction. For example, the State of Washington expressly provides in its constitution that “the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.”³⁴¹ Assuming that in Arkansas the constitutional standard remains that protection of property rights has the “highest priority” and can only be taken for a public use, it will be difficult to justify economic development under a strict construction of that standard. The authors of this article take no position on the policy question of whether eminent domain should be permitted for economic development; what we do maintain is that the point should be addressed specifically and clarified directly.

Delegation of the power of eminent domain to cities and boards, or private entities to accomplish public uses or public purposes should be clear and specific. Even when the language is clear and specific, that should not itself create a presumption favoring the taking, nor should it create deference to the legislative body. Courts should neutrally consider the constitutionality of the taking without inserting a presumption that both confuses the issue and potentially undermines the Arkansas Constitution’s express language that “[t]he right of property is before and higher than any constitutional sanction . .

340. *See* *Novi v. Robert Adell Children’s Funded Trust*, 659 N.W.2d 615, 618 (Mich. Ct. App. 2002) (noting the “fog of terminology” on this issue).

341. WASH. CONST. art. I, § 16.

. . .³⁴² Once the parameters for what constitutes a public use have been set in the constitution and determined by the courts, then and only then should there be deference to the legislature regarding how that public use should be implemented.

Kelo v. City of New London provides that the Fifth and Fourteenth Amendments of the United States Constitution are not a barrier to a broad reading of the Public Use Clause, but that the states are free to take a narrower reading.³⁴³ The *Kelo* decision has prompted the creation of task forces in many states to study a myriad of issues involving eminent domain, including the question of what does or should constitute “public use.”³⁴⁴ At least half of the states are considering changing their laws to provide a stricter interpretation of public use; some have even “strictly curtail[ed] the ability of governments to take private property for economic development.”³⁴⁵ The recommendations

342. ARK. CONST. art. 2, § 22.

343. 125 S. Ct. 2655, 2668 (2005).

344. See, e.g., FINAL REPORT AND RECOMMENDATIONS OF THE MISSOURI EMINENT DOMAIN TASK FORCE, Dec. 30, 2005, available at <http://www.mo.gov/mo/eminentdomain/finalrpt.pdf>. The Task Force recommended that affected property owners be brought into the process earlier and provided with better information. *Id.* at 10. It also suggested that courts, when considering how much compensation would be just, should consider not only fair market value, but also heritage value as well as relocation costs. *Id.* at 16. The Task Force further advised that “the definition of blight be tightened so that condemning authorities have to make some additional determinations . . . before land can be blighted for eminent domain.” Finally, it recommended that “public use” be defined by the following language:

Notwithstanding any other provision of law to the contrary, neither this state nor any political subdivision thereof nor any other condemning entity shall use eminent domain unless it is necessary for a public use. The term ‘public use’ shall only mean the possession, occupation, and enjoyment of the land by the general public, or by public agencies; or the use of land for the creation or functioning of public utilities or common carriers; or the acquisition of abandoned or blighted property.

The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, standing alone, shall not constitute a public use.

Id. at 22; see also 2 Keane & Beane Attorneys Named to Eminent Domain Task Force, Dec. 14, 2005, http://westchester.com/index2.php?option=com_content&do_pdf=1&id=6033 (reporting that New York State Bar Association President A. Vince Buzard has appointed a task force to study the effect of *Kelo* on eminent domain law in New York).

345. *Our View: Eminent Domain Task Force’s Report Should Be Arriving Soon*, SPRINGFIELD NEWS-LEADER, Sept. 2, 2005, at 8A; see also Lannan, *supra* note 324 (citing Texas and California as states with proposed constitutional amendments to ban taking private property for economic development, and Alabama as considering a bill to “prohibit city and county governments from using eminent domain to take property for retail, office or residential development”).

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we have offered are designed to frame the issues so that the response Arkansas makes to the decision in *Kelo* is the result of a thoughtful and deliberative process.