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THE ROLE OF DEFERENCE IN JUDICIAL REVIEW OF PUBLIC USE DETERMINATIONS

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Abstract: In *Kelo v. City of New London*, the United States Supreme Court emphasized its longstanding practice of deferring to legislative determinations of public use. However, the Court also explicitly acknowledged that the U.S. Constitution sets a floor, not a ceiling, on individual rights and that the state courts are entitled to take a less deferential approach under their own state constitutions or statutes. This manuscript examines: (1) the ways in which the role of deference in judicial review of public use determinations can vary between federal and state courts and among state jurisdictions; and (2) the difficult issues raised by the interplay between legislatures and courts in public use determinations. Because the Supreme Court's deferential approach to public use disputes provides little succor to property owners challenging takings, state court challenges to takings are likely to become increasingly important. Property owners, therefore, need to understand the issues raised by deference in judicial review of public use challenges in both federal and state courts.

Introduction

Recent developments in takings jurisprudence highlight important but unsettled questions in eminent domain law. To what degree is determination of public use a judicial, rather than legislative, question? How much deference do courts owe legislatures in takings determinations? Are different types of legislative determinations afforded different degrees of deference? And how do the answers to such questions change if the taking is challenged in a state court, under a state constitutional or statutory provision, rather than in federal court under the U.S. Constitution? Although these questions are not new to eminent

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domain law and theory, they were brought to the fore by the Supreme Court's decision in *Kelo v. City of New London*.[1]

The Court's fractured 5–4 decision in *Kelo* has opened a Pandora's Box of difficult doctrinal and theoretical questions.[2] The uncertainties posed by *Kelo* are evident in the extensive legal commentary on the Court's adoption of an expansive definition of "public use" as being coterminous with "public purpose" and the thorny issue of determining pretext in condemnations.[3] Less attention has been focused upon

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[1] *See* 545 U.S. 469, 480 (2005). The facts of *Kelo v. City of New London* are straightforward. Connecticut identified the city of New London as a "distressed municipality" in 1990, with an unemployment rate nearly twice that of the rest of the state. *Id.* at 473. In an effort to revitalize, the city authorized the New London Development Corporation (NLDC), a private nonprofit entity, to assist the city in its economic redevelopment efforts. *Id.* Ultimately, the NLDC came up with an ambitious plan for a mixed-use development in a waterfront location. *Id.* at 473–75. The NLDC was able to purchase most of the property that it identified as necessary to implement its plan, but nine property owners, including Susette Kelo, refused to sell. *Id.* at 475. The NLDC started condemnation proceedings. *Id.* The property owners responded by filing suit to enjoin the takings in state court. *Id.* The trial court issued a permanent injunction restraining the taking of certain parcels, but allowing the taking of others. *Id.* at 475–76. Both sides appealed. *Id.* at 476. The Connecticut Supreme Court determined that all of the takings were permissible. *Id.* Ms. Kelo and the other property owners appealed to the U.S. Supreme Court. *See id.* at 477. The Supreme Court upheld the Connecticut Supreme Court's decision. *Id.* at 470, 490.

[2] *See id.* at 470; *see, e.g.*, Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. LAW. 563, 565 (2009) (noting that the Supreme Court's "amorphous standards" left "issues for another day"). Two aspects of *Kelo* in particular were hailed as path-breaking holdings. *See* Thomas, *supra*, at 563–64. First, the *Kelo* Court stated that under the U.S. Constitution economic development can be a valid public use for purposes of eminent domain law, even if the property taken will ultimately be owned by another private party and not the public. 545 U.S. at 484–86. Second, the Court established that takings in which the stated public use or purpose was a "pretext" intended to bestow "a private benefit" are unconstitutional, but provided no criteria for identifying pretext in this setting. *See id.* at 478.

[3] *See, e.g.*, Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 174, 184–85 (2009); Thomas, *supra* note 2, at 563–65; Daniel S. Hafetz, Note, *Ferreting Out Favoritism: Bringing Pretext Claims After* Kelo, 77 FORDHAM L. REV. 3095, 3098–3100 (2009). Different courts take varying approaches in determining whether a taking is pretextual. Kelly, *supra*, at 184–85. Some courts focus on the predicted amount of public benefits, others on the presence of comprehensive development plans, and still others on the identifiability of the condemnation's private beneficiaries. *Id.* "Pretext" in takings was not a new concept raised by *Kelo*. *See* Goldstein v. Pataki, 516 F.3d 50, 61–62 (2d Cir. 2008) ("Prior to *Kelo*, no Supreme Court decision had endorsed the notion of a 'pretext' claim, although a few lower court cases contained language suggesting that pretextual public use may be invalid."). For a discussion of the historical background of pretext challenges to takings, see Carol L. Zeiner, *When* Kelo *Met* Twombly-Iqbal*: Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. 201, 234–37 (2009). *See generally* Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV.

the predicate question, however, of how to balance the traditional deference courts give to legislative determinations of public use with the constitutional guarantees given to private property owners.[4] Under what circumstances should the courts moderate their traditionally deferential stance to inquire into the motives of legislatures? How do we balance the traditional deference given by courts to legislative determinations of the need to take property by eminent domain (a deference drawn from traditional separation of powers and institutional competency notions) with the *Kelo* Court's holding that pretextual takings are unconstitutional?

The *Kelo* Court reaffirmed the highly deferential review that federal courts afford legislative determinations,[5] ensuring that most takings will continue to receive, at best, a cursory review if challenged in federal court.[6] The Court also explicitly acknowledged that state courts might take a less deferential approach under their own state constitutions or statutes.[7] Thus, at the same time the Supreme Court slammed the federal courtroom door on property owners challenging takings, it pointed out that the state courtroom doors remain ajar.[8] As a result, state statutory and constitutional provisions are likely to take on an increasingly larger role in the protection of private property rights.[9]

Part I provides a brief overview of the evolution of the Supreme Court's deferential review of legislative determinations of public use, and discusses the precedent that led to the culmination of the Supreme Court's hands-off approach in *Kelo*. Part II addresses the manner in which the state courts' roles in judicial review of public use determinations are expanding even as the federal courts' role is contracting. Part III first examines the growing schism between the views of federal and some state courts on the proper role of courts in reviewing such determinations. Then, it examines the various ways in which public use analysis can vary among state jurisdictions and the thorny issues raised

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45 (2008) (arguing that a lack of transparency in eminent domain actions subverts the political process and may render the taking void).

[4] *See infra* notes 153–177 and accompanying text.

[5] 545 U.S. at 480; *see infra* notes 59–64 and accompanying text (discussing the Court's treatment of deference).

[6] *See* 545 U.S. at 483 (avoiding "intrusive scrutiny" and allowing legislatures "broad latitude" in public use determinations).

[7] *Id.* at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

[8] *See id.* at 489–90.

[9] *See id.* (discussing the federal judiciary's willingness to step in only to consider whether takings constitute a constitutional "public use" and noting that state constitutions and statutes may allow for stricter standards of review).

by the interplay between legislatures and courts in takings analyses. For example, should public use be viewed as a judicial or legislative question? How does deference relate to the separation of powers doctrine? Unfortunately, rather than providing the clarity for which commentators and lower courts had hoped, *Kelo* merely opened the door to such inquiries.[10] One thing is clear post-*Kelo*—although the primary battleground for protection of private property rights in recent years has been the federal courts, the pendulum is swinging back toward a greater role for state courts in takings cases.[11]

I. The Contracting Role of the Federal Courts in Public Use Disputes

In theory, there is a (somewhat) tidy divide between the roles of legislatures and courts in eminent domain cases.[12] Questions of the necessity for the taking (i.e., whether a particular public improvement should be undertaken, where it should be sited, and whether the eminent domain power should be used to acquire the property on which the improvement will be located) are issues generally left to the legislature.[13] Questions of whether a particular use is a public use are generally, although not always,[14] for the judiciary.[15]

In practice, courts—particularly federal courts—have increasingly abdicated control over public use determinations to the legislature.[16] This Part discusses the jurisprudential developments that led to the federal courts' extremely deferential approach to public use challenges in eminent domain cases and concomitant shrinking of judicial review in federal takings cases.

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[10] *See infra* notes 178–254 and accompanying text.

[11] *See infra* notes 153–177 and accompanying text.

[12] *See Kelo*, 545 U.S. at 488–89 (acknowledging the limit of the Court's authority when deciding eminent domain cases); Shoemaker v. United States, 147 U.S. 282, 298 (1892) (limiting the role of the courts in eminent domain cases to determining only whether the use is in fact a public use).

[13] *See* Robert C. Bird & Lynda J. Oswald, *Necessity As a Check on State Eminent Domain Power*, 12 U. Pa. J. Const. L. 99, 107–09 (2009); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 424 (1983) ("In the hornbook scheme, the legislature prescribes conditions under which eminent domain may be exercised and decides the necessity of acquiring any particular parcel, while the courts decide whether the public use clause has been satisfied.").

[14] *See* Bird & Oswald, *supra* note 13, at 116–18.

[15] *See Shoemaker*, 147 U.S. at 298.

[16] *See* Bird & Oswald, *supra* note 13, at 114–15, 114 n.65.

A. *The Takings Clause Baselines: Necessity v. Public Use*

The fundamental underpinnings of the eminent domain power are the same at both the state and federal levels—state and federal legal systems each recognize the eminent domain power as an inherent and essential attribute of sovereignty.[17] Actual governmental exercise of that power, however, can be very different in those two arenas.[18]

At the federal level, the Fifth Amendment to the U.S. Constitution limits the federal government's ability to exercise its sovereign power of eminent domain by prohibiting the taking of private property except for a public use and only upon payment of just compensation.[19] Both requirements must be met.[20] If the taking fails to satisfy the public use requirement, or is so arbitrary as to be a violation of due process, the exercise of eminent domain is unconstitutional and "[n]o amount of compensation can authorize" the taking.[21]

Initially, the Constitution's constraint upon the use of eminent domain reached only the federal government, not the state governments or their political subdivisions.[22] In 1896, however, the Supreme Court extended the reach of the Constitution's protections, limiting takings by states under the Due Process Clause of the Fourteenth Amendment.[23] Thus, property owners can challenge state, as well as federal, takings under the U.S. Constitution.[24]

Most state constitutions contain takings clauses with public use and just compensation requirements similar to those in the Fifth Amendment to the U.S. Constitution.[25] States, however, have the ability to im-

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[17] *See* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) ("The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State."); Mayor of New Orleans v. United States, 35 U.S. 662, 723 (1836) ("The power of appropriating private property to public purposes is an incident of sovereignty."). The Supreme Court has also stated that the Fifth Amendment to the U.S. Constitution is a "tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power." United States v. Carmack, 329 U.S. 230, 241–42 (1946); *see also* Oswald, *supra* note 3, at 52–53.

[18] *See Kelo*, 545 U.S. at 489 (describing differences between federal and state requirements for public use).

[19] *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[20] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–37 (2005).

[21] *Id.* at 543.

[22] *See id.* at 536.

[23] *See* Chi., B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

[24] *See Kelo*, 545 U.S. at 472 & n.1.

[25] *See* 2A Julius L. Sackman, Nichols on Eminent Domain § 7.01[1] & n.10, at 7-18 (3d ed. 2011) (listing state statutory and constitutional provisions).

pose more stringent limitations upon their own power to take through either more restrictive state constitutional provisions or state statutes.[26] Many have chosen to do so.[27] Thus, takings initiated by state actors can be challenged in state courts under state constitutional or statutory provisions, or in the federal courts under the U.S. Constitution.[28]

This plethora of causes of action does not necessarily translate to heightened protection for private property rights.[29] At the federal level, courts apply a rational basis standard of review to governmental decisions to take property—a standard that upholds legislative taking decisions in most situations.[30] As summarized by the Supreme Court in 1984: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[31] The *Kelo* majority reaffirmed this deferential standard of review,[32] making it clear that the federal courts defer both to legislative and state court determinations of public use.[33]

Deference arises in two distinct contexts in eminent domain cases: (1) determinations of public use; and (2) determinations of necessity.[34]

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[26] *Id.* § 7.10[1].

[27] *Id.*

[28] *See Kelo*, 545 U.S. at 489–90 (noting that federal review of state action is limited to ensuring compliance with the Fifth Amendment, while state power can be restricted by a state's statutes or constitution).

[29] *See* Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 Ala. L. Rev. 561, 576 (2008) (showing that federal court review of public use has been narrowed).

[30] *See Kelo*, 545 U.S. at 490 (Kennedy, J., concurring). For a discussion of the federal standard see *infra* notes 54–56, 85–100 and accompanying text.

[31] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

[32] *See* 545 U.S. at 488 ("'When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.'") (quoting *Midkiff*, 467 U.S. at 242–43).

[33] *See id.* at 482 (highlighting "the 'great respect' that [federal courts] owe to state legislatures and state courts in discerning local public needs") (citing Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606–07 (1908)). In *Rindge Co. v. County of Los Angeles*, the Supreme Court advanced a deferential position to state court judgments in determining whether a use was public or private, since the question was judicial in nature. *See* 262 U.S. 700, 705–06 (1923). The Court noted that "the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment to the U.S. Constitution, should keep in view the diversity of such conditions." *Id.* Some pre-*Kelo* decisions did note that the federal courts were not completely abdicating their role of judicial review, but such indications were rare. *See, e.g.*, 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (stating that "even under such a deferential standard, however, public use is not established as a matter of law whenever the legislative body acts"), *dismissed*, 60 F. App'x 123 (9th Cir. 2003).

[34] *See* Bird & Oswald, *supra* note 13, at 115; Oswald, *supra* note 3, at 56.

The Supreme Court addressed judicial deference in public use cases in *Shoemaker v. United States*.[35] There, the Court found that the judiciary may review a legislative decision to take private property in order to determine whether the use is public.[36] If the court identifies a public use, its inquiry ceases, and the legislature may determine "the extent to which such property shall be taken for such use" so long as there is just compensation.[37] Theoretically, necessity is a separate inquiry from public use,[38] and addresses factors that are largely factual in nature and of a type more commonly left to legislative decision making.[39] The distinction between public use and necessity is not razor-sharp, however, and the terms have a tendency to merge, making analyses unclear and the scope of the judicial role and the level of deference due uncertain.[40] All of this adds to the general confusion that permeates this area of eminent domain law.[41]

Under the necessity doctrine, the condemning authority must justify an intended taking as necessary to further a proposed public use.[42] For a host of pragmatic and theoretical reasons, including judicial respect for the independent roles of legislatures and courts, and separation of powers notions,[43] the courts have long established that issues of necessity lie within the purview of the legislature.[44] Courts typically intervene in necessity determinations only where there are clear abuses

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[35] *See* 147 U.S. at 298.

[36] *See id.*

[37] *See id.*; United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 685 (1896) (establishing that public use may be a judicial question but the quantity of land to be taken is a legislative question).

[38] *See* 1 John Lewis, Treatise on the Law of Eminent Domain in the United States § 255, at 502–03 (3d ed. 1909) [hereinafter 1 Lewis] ("Nearly all the cases . . . hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature.").

[39] *See* Bird & Oswald, *supra* note 13, at 108.

[40] *See id.* at 116–18.

[41] *See id.* at 113–18 (describing the overlap between necessity and public use, and the general confusion this causes).

[42] *Id.* at 99. Necessity implicates three distinct questions, each of which is narrowly drawn to the specific facts of the proposed taking at issue: (1) whether the legislature should pursue a particular public improvement; (2) where that improvement should be located; and (3) whether the eminent domain power (as opposed to the police power, a voluntary purchase, or other acquisition mechanism) should be used to obtain the property interests needed for the improvement. *See id.* at 108.

[43] *See id.* at 112–13.

[44] *See id.* at 109–10.

of discretion by the legislature or where a statute specifically assigns the court a role in these determinations.[45]

State courts also traditionally have drawn a distinction between whether a use is public, which they deem a judicial question, and whether the power of eminent domain should be exercised, or its necessity, which they deem a legislative question.[46] As the New York Court of Appeals explained in an 1894 case: "The legislature must be presumed to be the best judge of the necessity of public works and improvements; of how they shall be instituted and of how they should be carried on so as to best subserve public ends."[47] But, as the court went on to caution, "whether the use for which the property is to be taken is a public use, which justifies its appropriation, is a judicial question upon which the courts are free to decide."[48]

More recently, the Supreme Court of Rhode Island explicitly drew the traditional distinction between necessity and public use, stating that the "necessity and expediency" of a specific taking is a legislative question outside the purview of the court.[49] Legislative declarations of public use, by contrast, although "instructive and entitled to deference," are nonetheless subject to judicial review.[50]

Therefore, in theory, both state and federal courts have an important role to play in reviewing public use determinations.[51] The Supreme Court, however, has constricted the federal courts' role in judicial review

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[45] *See* Bird & Oswald, *supra* note 13, at 118; 2 John Lewis, Treatise on the Law of Eminent Domain in the United States § 601, at 1063 (3d ed. 1909).

[46] *See* Christopher G. Tiedeman, A Treatise on the Limitations of the Police Power in the United States Considered from Both a Civil and a Criminal Standpoint 378 (The Lawbook Exchange Ltd. 2001) (1886).

[47] *In re* City of Brooklyn, 38 N.E. 983, 989 (N.Y. 1894), *aff'd sub nom.* Long Island Water-Supply Co. v. City of Brooklyn, 166 U.S. 685 (1897). Early commentators also agreed with this view. *See, e.g.*, 1 Lewis, *supra* note 38, § 252, at 499 ("[P]rivate property can be taken only for public use, and . . . what is a public use is a question for the courts."); Tiedeman, *supra* note 46, at 378 ("It is a legislative question whether the public exigencies require the appropriation, but it is clearly a judicial question, whether a particular confiscation of land has been made for a public purpose."). Furthermore, a commentator noted that "[t]he question of necessity is distinct from the question of public use, and . . . the former question is exclusively for the legislature." 1 Lewis, *supra* note 38, § 256, at 503.

[48] *In re City of Brooklyn*, 38 N.E. at 989. The Supreme Court reached a similar conclusion in *Rindge Co. v. County of Los Angeles* in 1923: "The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers." 262 U.S. at 709.

[49] *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 96 (R.I. 2006).

[50] *See id.* at 101.

[51] *See, e.g.*, *Rindge Co.*, 262 U.S. at 705–06; Sw. Ill. Dev. Auth. v. Nat'l City Envtl., LLC., 768 N.E.2d 1, 7 (Ill. 2002).

of public use determinations to the point that such review is little more than a routine linguistic exercise.[52] *Kelo* is merely the capstone in a long progression of Supreme Court decisions leading to this endpoint.[53]

B. *Deference in the Federal Courts:* Kelo *and Its Predecessors*

The Supreme Court's decision in *Kelo* highlights the deferential stance that the federal courts take to legislative determinations of public use under the U.S. Constitution. *Kelo* addressed the difficult question of how to define public use.[54] Was a redevelopment project that resulted in property being taken from one set of private owners only to end up in the hands of another set of private owners a legitimate public use if undertaken to revitalize an economically depressed area?[55] Public use can be defined narrowly as use by the public (such as a taking for a road, dam, or school), or broadly as a public purpose or public benefit (such as a taking for blight remediation).[56] The Supreme Court historically leaned toward the broad view of the public use power, although until *Kelo* it had not directly addressed the issue.[57] The *Kelo*

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[52] *See Midkiff*, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

[53] *See* Zeiner, *supra* note 3, at 205–07.

[54] *See* 545 U.S. at 477.

[55] *See id.* at 473–75. As the *Kelo* Court recognized, some takings clearly involve public use, but other takings present much more complicated scenarios. *See id.* at 477. Justice Stevens, writing for the *Kelo* majority, noted that at one end of a spectrum, taking private property for the sole purpose of transferring it to another private property owner is clearly unconstitutional, regardless of the compensation paid. *Id.* At the other end of that spectrum, a taking for clear public use (such as a road, dam, or school), accompanied by just compensation, is clearly valid. *Id.* The difficulty lies in determining the presence of public use in the cases, such as *Kelo*, that lie in the middle of those two extremes. *See id.* at 477–80. Even when state courts acknowledge the need to defer to the legislature, most consider the notion of at least limited judicial review. In *Franco v. National Capital Revitalization Corp.*, for example, the court stated that the judiciary's role in reviewing is to "focus primarily on benefits the public hopes to realize from the proposed taking." 930 A.2d 160, 173 (D.C. 2007). At one extreme, if the property is transferred to another private party, the stated public benefits could be pretextual. *Id.* at 173–74. At the other extreme, if the trial record discloses an overwhelming public purpose that substantially benefits the public, the courts must defer to the legislature's judgment. *Id.* at 174. These extremes illustrate the easy cases; the more difficult cases lie in the middle of these two extremes. *Id.*

[56] *See Kelo*, 545 U.S. at 477, 480; Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 Urb. Law. 287, 331–32 (2010).

[57] *See Kelo*, 545 U.S. at 477–80; *see, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (noting "the inadequacy of use by the general public as a universal test" for public use); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161–63 (1896) (stating that

Court explicitly adopted the broader view of public use in the Fifth Amendment as a public purpose.[58]

More importantly for the objectives of this Article, the *Kelo* Court emphasized the minor role that the federal judiciary plays, and the starring role that the legislature and state courts play, in determining what the public good demands.[59] In so doing, the *Kelo* Court made clear the high degree of judicial deference to legislative determinations of public use in federal takings cases.[60] The Court highlighted the "'great respect'" that the federal courts should pay legislatures in identifying local needs,[61] stating: "'When the legislature's purpose is legitimate and its means not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than the debate over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.'"[62] Rather, the Court historically has "afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power."[63] In short, the federal courts defer to the legislative branch, whether state or federal, in determinations of public use and apply a rational basis standard of review that is notoriously deferential.[64]

The deferential approach to public use determinations evolved over time.[65] Early federal decisions, in fact, stressed that determinations of public use were judicial, not legislative, questions.[66] In *Fallbrook Irrigation District v. Bradley*, decided in 1896, the Supreme Court noted that legislative determinations of public use are not conclusive but rather public use is a question that the justices "must decide . . . in accordance with [their] views of constitutional law."[67] In 1908, the Supreme Court, in *Hairston v. Danville & Western Railway Co.*, stated further that "[t]he one and only principle in which all courts seem to agree is that the na-

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public use means furthering a public interest); NICHOLS, *supra* note 25, § 7.02[2]–[3], at 7-29 to -37 (discussing broad and narrow views of eminent domain).

[58] 545 U.S. at 479–80. Justice Stevens, writing for the majority, stated that "this 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" *Id.* at 479 (quoting *Midkiff*, 467 U.S. at 244). Rather, public purpose or public benefit suffices. *Id.* at 480.

[59] *See id.* at 489–90.

[60] *See id.* at 488–90.

[61] *See id.* at 482 (quoting *Hairston*, 208 U.S. at 606–07).

[62] *Id.* at 488 (quoting *Midkiff*, 467 U.S. at 242–43).

[63] *See id.* at 483.

[64] *See Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

[65] *See id.* at 479–83 (majority opinion).

[66] *See, e.g.*, *Hairston*, 208 U.S. at 606; *Shoemaker*, 147 U.S. at 298.

[67] 164 U.S. at 159.

ture of the uses, whether public or private, is ultimately a judicial question."[68]

The Court soon began to chip away at the notion that public use determinations were judicial questions. In 1923, the Court indicated in *Rindge Co. v. County of Los Angeles* that although public use is a judicial question, "the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State."[69] Similarly, in *Cincinnati v. Vester*, decided in 1930, the Court emphasized the role of the courts in making public use determinations under Fourteenth Amendment takings questions.[70] Nonetheless, the Court also acknowledged the expertise of legislatures and state courts in identifying local needs and making judgments about public use in light of those needs.[71] Yet, the Court went on to caution, "the question [of what is a public use] remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."[72]

The abandonment of the substantive due process review of the *Lochner* era, however, caused the Supreme Court to retract its role in reviewing economic legislation, including takings questions.[73] In its famous footnote four in *United States v. Carolene Products Co.*, the Supreme Court indicated that fundamental individual rights, such as free speech and religious freedom, would receive a higher degree of due process scrutiny than property rights.[74] Although state actions that potentially infringed upon fundamental rights would receive heightened scrutiny (strict or intermediate), economic legislation was to be presumed valid and to be reviewed under a cursory rational basis test.[75]

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[68] 208 U.S. at 606.

[69] *See* 262 U.S. at 705–06.

[70] *See* 281 U.S. 439, 446 (1930).

[71] *Id.*

[72] *Id.*

[73] Charles E. Cohen, *The Abstruse Science:* Kelo*,* Lochner*, and Representation Reinforcement in the Public Use Debate*, 46 Duq. L. Rev. 375, 391–99 (2008). "The *Lochner* era . . . refers to a period spanning from roughly the 1870s through the late 1930s, when the Supreme Court employed a now-discredited interpretation of the Due Process Clause of the Fourteenth Amendment to invalidate a significant number of government economic and public welfare regulations." *Id.* at 378–79.

[74] *See* 304 U.S. 144, 152–53, 152 n.4 (1938).

[75] *See id.* at 152, 152 n.4 ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to pre-

The *Carolene Products* stance quickly translated into reduced protection for property rights in the eminent domain area.[76] For example, in 1946, the Supreme Court stated in *United States* ex rel. *Tennessee Valley Authority v. Welch*: "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[77] Justice Felix Frankfurter wrote a concurring opinion in *Welch* emphasizing that public use remained a judicial question, and suggesting that the majority undoubtedly recognized this.[78] The majority's deferential language, however, is a prescient precursor to later eminent domain cases decided by the Court.[79]

Certainly, by the middle of the twentieth century, the Court began defining its role in evaluating legislative determinations of public use in increasingly narrow terms. For example, the Supreme Court held in *Berman v. Parker* that "[t]he concept of the public welfare is broad and inclusive" enough to allow the use of eminent domain to achieve any legislatively permissible end.[80] The *Berman* Court unanimously upheld the taking of a department store in furtherance of an urban redevelopment plan for a blighted neighborhood, despite the property owners' objections that their property was not blighted.[81] Justice William Douglas, writing for the Court, explained the relative roles of the federal courts and the legislature in public use determinations: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ."[82] The *Berman* Court emphasized the limited role of the federal courts in reviewing takings,

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clude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[76] *See, e.g.*, *Carmack*, 329 U.S. at 242–43 (demonstrating deference to legislative authority on a takings decision); *Welch*, 327 U.S. at 552 (showing deference to a legislative decision unless "it is shown to involve an impossibility").

[77] 327 U.S. at 551–52.

[78] *Id.* at 557–58 (Frankfurter, J., concurring) ("I assume that . . . the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence.").

[79] *See* Cohen, *supra* note 73, at 380–83 (discussing significant modern public use cases and the Supreme Court's increasing deference to the legislature); Mansnerus, *supra* note 13, at 428–32 (summarizing the evolution of the property and personal rights dichotomy in U.S. law).

[80] 348 U.S. 26, 33 (1954).

[81] *See id.* at 31, 35–36.

[82] *See id.* at 32.

finding that the judiciary's role in evaluating whether the eminent domain power "is being exercised for a public purpose is an extremely narrow one."[83] The Court refused to interfere with the legislature's determination that slum clearance was in the public benefit, stating "Congress and its authorized agencies have . . . take[n] into account a wide variety of values. It is not for us to reappraise them."[84]

The Supreme Court again addressed the public use issue three decades later in *Hawaii Housing Authority v. Midkiff*.[85] Large landowners who controlled most of the privately-owned land in Hawaii challenged a state plan to condemn their land and sell it in fee to tenants then in possession.[86] The plaintiffs unsuccessfully argued that, because private parties would ultimately own the land, the taking did not serve a public use.[87] Writing for a unanimous Court, Justice Sandra Day O'Connor wrote a sweeping endorsement of the legislature's power to take: "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers"[88] and "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[89]

Although the *Midkiff* Court emphasized the unconstitutionality of "purely private taking[s],"[90] it also specifically adopted the rational basis standard for reviewing public use questions, stating that a taking would be upheld if it was "rationally related to a conceivable public purpose."[91] The *Midkiff* Court couched this standard of review in very broad terms, stating that the federal courts must defer to a legislative determination of public use "'until it is shown to involve an impossibility'"[92] or "'the use be palpably without reasonable foundation.'"[93] The subsequent role of the federal courts in reviewing such determinations is very narrow: "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in

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[83] *Id.*

[84] *Id.* at 33.

[85] *See* 467 U.S. at 229–31.

[86] *See id.* at 232–35.

[87] *See id.* at 243–44.

[88] *Id.* at 240.

[89] *Id.* at 242.

[90] *Id.* at 245.

[91] 467 U.S. at 241.

[92] *See id.* at 240 (quoting Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).

[93] *See id.* at 241 (quoting *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680).

the federal courts."[94] The Court further explained that a state legislature meets the public use requirement if it *could* have rationally believed that the legislation would meet its intended goal, regardless of whether the legislation actually does so.[95]

Moreover, the *Midkiff* Court explicitly grounded its lenient standard of review in concerns regarding deference and the relative roles of courts and legislatures.[96] The Court explained that "[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[97] Furthermore, the Court drew no distinction between state and federal legislatures in terms of the level of deference that federal courts were required to show.[98] Consequently, the Court advocated deference to any legislature, state or federal, which decided that the takings power was warranted to serve a public use.[99]

As a result, for the past several decades, federal courts have provided little relief for property owners challenging takings on public use grounds.[100] The federal courts' deferential stance spread to many state courts as well, resulting in a severe contraction in the ability of property owners to challenge public use determinations.[101] As one student commentator summarized a quarter-century ago:

> [Courts] treat legislative authorization as raising the presumption that a public use exists. Most courts ask at some point whether the condemning authorities were "arbitrary and capricious," or, conversely, whether they might rationally have considered the proposed use to be public. Some courts have made clear their refusal to interfere unless a condemnation was undertaken in bad faith. Most do not articulate a single

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[94] *See id.* at 242–43.

[95] *See id.* at 242. One concern is that the general parameters of the rational basis test can lead to virtual rubberstamping of legislative decisions. *See* Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 Pepp. L. Rev. 335, 360–62 (2006) (stating that the presumption of permissibility found in rational basis review "usually motivates trial judges to see no evil, hear no evil, and speak no evil in such cases, even when [the cases] fail the 'smell test'").

[96] *See* 467 U.S. at 242–44.

[97] *Id.* at 244.

[98] *Id.*

[99] *Id.*

[100] *See* Cohen, *supra* note 73, at 377–78.

[101] *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457–58 (Mich. 1981) (discussing the limited role of the court in reviewing legislative decisions regarding eminent domain); Lopez, *supra* note 29, at 567–73 (summarizing the history of state courts' deferential stance towards public use determinations).

> test but in practice tend toward the soft side of a rational defense standard. They uphold any condemnations not shown to be "wholly arbitrary" or "manifestly irrational," or they cite the [Supreme Court's] proposition that the legislature's judgment is "well-nigh conclusive."[102]

The commentator also explained that the practical effect of the adoption of a lenient standard of review is a reduction of the courts' role in the protection of private property rights.[103] The commentator noted that "[a]t some point, however, deference shades into abstention, the court averring that for institutional reasons it should not reconsider the government's decision at all."[104] Theoretically, courts still have the power to evaluate whether a particular use is public, yet they have chosen to leave these determinations to the political branches.[105]

While the Supreme Court's extreme deference to legislative determinations of public use was not eliminated in *Kelo*, it did show signs of erosion.[106] The Supreme Court unanimously agreed that they should generally not attempt to "second-guess" the wisdom of local legislatures.[107] The *Kelo* Court splintered sharply, however, over the degree and type of deference appropriate in such instances—including a retreat from extreme judicial deference in a dissent written by Justice O'Connor, the author of the *Midkiff* opinion.[108]

Writing for the *Kelo* majority, Justice John Paul Stevens stated that public use in the Fifth Amendment meant public purpose, not use by the public,[109] and that promoting economic development was a legitimate public purpose.[110] Justice Stevens seemed to recognize the dan-

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[102] Mansnerus, *supra* note 13, at 426 (quoting City of Oakland v. Oakland Raiders, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring in part and dissenting in part)); *Berman*, 348 U.S. at 32 (footnotes omitted).

[103] Mansnerus, *supra* note 13, at 424.

[104] *Id.*

[105] *Id.*

[106] *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

[107] *See id.* at 488–89 (majority opinion); *id.* at 498–99 (O'Connor, J., dissenting); *id.* at 520 (Thomas, J., dissenting).

[108] *See id.* at 482–83 (majority opinion); *id.* at 497 (O'Connor, J., dissenting); *Midkiff*, 467 U.S. at 231.

[109] *See* 545 U.S. at 479–80.

[110] *See id.* at 483–84. "Public use" is a term that historically has been subject to varying interpretations. *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1129–36 (Ohio 2006) (describing the evolution of the term "public use"); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 59–63 (1999) (discussing various interpretations and applications of the public use standard); Oswald, *supra* note 3, at 52–57 (summarizing changes in the public use doctrine over time). In the narrow and increasingly rejected view, public use is seen as requiring that the condemned property be taken only for projects where the

gers inherent in adopting the broad view of public use—he tried to narrow the holding by clarifying that pretextual public uses were constitutionally forbidden[111] and that the municipality could not take private property "for the purpose of conferring a private benefit on a particular private party."[112]

The *Kelo* Court directly addressed the issue of deference in judicial review of public use determinations.[113] The *Kelo* majority emphasized the Court's "longstanding policy of deference to legislative judgments" of public use.[114] The majority grounded its position in notions of federalism, stressing the "'great respect'" that the federal courts "owe to state legislatures and state courts in discerning local public needs."[115] The Court summarized as follows: "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[116] The majority therefore adhered to the rational relationship test that it traditionally applies to takings—asking if the taking is rationally related to a conceivable public purpose.[117]

Justice Anthony Kennedy's concurrence did not argue that the rational basis standard of review should be completely jettisoned, but emphasized that the public use clause required "*meaningful* rational-basis review."[118] He called for a heightened standard of review—a higher standard than the rational basis test set forth in *Berman* and *Midkiff*—for

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public may use the property acquired, such as roads, dams, parks, or schools. *See* NICHOLS, *supra* note 25, § 7.02[1]–[2], at 7-26 to -32. Under the broader view, public use is treated as coterminous with public purpose or public advantage, thus allowing the condemnation of private property to further the public good or general welfare, or to secure a public benefit. *See id.* § 7.02[3], at 7-33 to -37.

[111] *See* 545 U.S. at 478. Justice Kennedy, who joined the 5–4 majority opinion, wrote a separate concurrence in which he agreed "that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring).

[112] *See id.* at 477. The Court stated that "a one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487.

[113] *See id.* at 480.

[114] *Id.*

[115] *Id.* at 482 (quoting *Hairston*, 208 U.S. at 607). In *Kelo*, the local legislature found that economic development would lead to increased jobs and tax revenue as well as revitalization of an economically depressed city, even though all concerned agreed that the plaintiffs' properties were not themselves blighted. *See id.* at 472, 475.

[116] *Id.* at 483.

[117] *See Kelo*, 545 U.S. at 488.

[118] *See id.* at 492 (Kennedy, J., concurring) (emphasis added).

a narrow category of cases in which "impermissible favoritism" seemed to be a risk.[119]

The two dissents in *Kelo*, by contrast, took a much narrower view of the appropriate degree of deference.[120] Justice O'Connor wrote a dissent, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, in which she took strong issue with the majority's treatment of deference, finding that the lax standard espoused by the majority rendered the public use clause a virtual nullity.[121] She underscored the point that for the public use requirement to remain meaningful, there was need for some independent judicial check on how the political branches construed public use.[122] Justice O'Connor explained: "We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But where the political branches are the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."[123] Justice O'Connor acknowledged that in certain circumstances property could be taken to be used for purposes that ultimately turned out to be private.[124] She also acknowledged that the Court would defer to legislative judgments about public purpose.[125] But, in order to preserve the integrity of the Fifth Amendment, she argued, the courts must retain and use their "extremely narrow" role in reviewing legislative determinations of what constitutes a public use.[126]

Justice Thomas's dissent went a step further, arguing that a public use existed only when the public had the legal right to use the property after the taking—in effect adopting the narrow view of public use.[127] He provided a detailed analysis of the development of the Supreme

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[119] *Id.* at 493 ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."). Justice Kennedy noted, however, that *Kelo* did not raise such concerns of impermissible favoritism because of ample evidence that the city had planned the project with the goal of economic development and without the intent to benefit any particular private party. *See id.* at 491–92.

[120] *See id.* at 497 (O'Connor, J., dissenting); *id.* at 517 (Thomas, J., dissenting).

[121] *See id.* at 494, 503 (O'Connor, J., dissenting).

[122] *See id.* at 497.

[123] *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting). Justice O'Connor also argued for the middle ground between the broad and narrow views of public use, stating that property should be taken only where it "*directly* achieve[s] a public benefit." *See id.* at 500.

[124] *See id.* at 499.

[125] *See id.*

[126] *See id.* at 500 (quoting *Midkiff*, 467 U.S. at 240).

[127] *See id.* at 521 (Thomas, J., dissenting) ("[T]he government may take property only if it actually uses or gives the public a legal right to use the property.").

Court's deferential stance on legislative determinations of public use,[128] characterizing the Supreme Court's stance on both the adoption of the broad definition of public use and deference as deriving from "two misguided lines of precedent."[129] He wrote that "[t]here is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a 'public use.'"[130] As a result, the Court's position on judicial review of property rights was inherently inconsistent and incongruous: "[I]t is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property."[131] He concluded that "it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights."[132] Justice Thomas thus explicitly reclaimed a significant role for judicial review, stating: "[A] court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property."[133]

The majority opinion in *Kelo* stands for both the adoption of the broad view of public use at the federal level and confirmation of a deferential standard of review by federal courts of public use determinations.[134] The net result of the combination of these two positions has been a noticeable contraction in the federal courts' role in protecting private property rights.[135] The presumption of permissibility found in the rational basis review affirmed in *Kelo* leads the federal courts to leave questions of public use to the legislature and gives discontented property owners little to pursue in the way of judicial redress in federal court.[136]

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[128] *See id.* at 515–20.
[129] *See Kelo*, 545 U.S. at 519 (Thomas, J., dissenting).
[130] *Id.* at 517.
[131] *Id.* at 518 (citation omitted).
[132] *Id.* at 517–18.
[133] *Id.* at 517.
[134] *See id.* at 480 (majority opinion).
[135] *See* Hafetz, *supra* note 3, at 3102–06.
[136] *See Kelo*, 545 U.S. at 480, 487–88.

C. *Deference in the Lower Federal Courts Post-*Kelo

Post-*Kelo*, federal court decisions reflect the deferential stance toward legislative takings mandated by the *Berman*, *Midkiff*, and *Kelo* line of precedent. For example, in *Goldstein v. Pataki*, decided in 2008, the Second Circuit noted that the federal courts' focus shifted over the past century: "[B]oth in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts."[137] Thus, the *Goldstein* court concluded, the federal courts should look at what type of government action creates a taking and what amount of compensation is needed to be just.[138] The federal courts, however, should leave the public use determination to the legislature "in all but the most extreme cases."[139] The Second Circuit acknowledged that the federal courts do play a role in the public use debate, but noted that the role "is 'an extremely narrow one.'"[140]

In *Carole Media LLC v. New Jersey Transit Corp.*, also decided in 2008, a public corporation established by the New Jersey legislature was sued for revoking billboard licenses without proper compensation.[141] The Third Circuit made it clear that the court would defer to the legislature so long as there was not a glaring example of a transfer for pure private gain.[142] And, once a public purpose was shown, the court essentially abandoned any further duty to review the legislature's actions, stating "the Supreme Court has made it clear that the means of executing the [challenged] project are for the [legislature] alone to determine, once the public purpose has been established."[143]

Similarly, in 2010, in *Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, the First Circuit acknowledged that there is a place for challenges to takings but emphasized that it was not the courts' place to second-guess legislative determinations of the best mechanisms for accomplishing clear public policy objectives.[144] The court concluded that "[p]ublic policy disagreements about the best of several rational means

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[137] 516 F.3d 50, 57 (2d Cir. 2008).
[138] *Id.* at 57.
[139] *Id.*
[140] *Id.* (quoting *Berman*, 348 U.S. at 32).
[141] 550 F.3d 302, 304–05 (3d Cir. 2008).
[142] *See id.* at 309–11.
[143] *Id.* at 311 (quoting *Berman*, 348 U.S. at 33).
[144] 604 F.3d 7, 18–19 (1st Cir. 2010).

to accomplish legitimate public purposes are not the grist of a Takings Clause claim."[145]

Likewise, in *Hsiung v. City & County of Honolulu* the federal trial court refused to invalidate certain city ordinances that significantly altered condemnation procedures.[146] The court quoted *Kelo* and *Midkiff* in stating that when the legislature's purpose "is legitimate, and its means are not irrational," the federal courts are not to engage in debates over the wisdom of the takings.[147] Should the state wish to restrict its power of eminent domain beyond that countenanced by the U.S. Constitution, it was free to do so, but the federal courts would not interfere with the state's sovereignty.[148]

II. The Expanding Role of the State Courts in Public Use Cases

Kelo is one of those relatively rare Supreme Court opinions where the American public not only took note of what the Court said, but reacted passionately to the Court's decision.[149] In this instance, the public response was one of outrage.[150] The vocal public outcry prompted forty-three states to adopt laws that would (purportedly, at least) temper the expansive condemnation power espoused in *Kelo*.[151] Most of these post-*Kelo* state laws focused on narrowing the broad definition of public use adopted by the Supreme Court—the state laws sought to limit takings for economic development and takings where private property was to be transferred to another private owner.[152] A few state statutes, how-

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[145] *Id.* at 18. The court emphasized the "necessarily deferential" standard of review applied to public use questions. *Id.* (citing *Midkiff*, 467 U.S. at 242–43; *Pataki*, 516 F.3d at 57–58).

[146] 378 F. Supp. 2d 1258, 1260–61, 1265–66 (D. Haw. 2005).

[147] *Id.* at 1265–66 (quoting *Kelo*, 545 U.S. at 488 (quoting *Midkiff*, 467 U.S. at 242–43)).

[148] *Id.*

[149] *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (holding that the city's condemnation was for the "public use"); Judy Coleman, *The Powers of a Few, the Anger of the Many*, Wash. Post, Oct. 9, 2005, at B2.

[150] *See* Coleman, *supra* note 149, at B2. One noteworthy failed grass-roots effort involved an attempt to condemn Justice Souter's home in New Hampshire because he voted with the *Kelo* majority. *See id.*

[151] *See* Harvey M. Jacobs & Ellen M. Bassett, *After "*Kelo*": Political Rhetoric and Policy Responses*, Land Lines (Lincoln Inst. of Land & Pol'y, Cambridge, Mass.) Apr. 2010, at 14, 15. Alabama was one state that narrowed the broad definition of public use as a direct response to anti-*Kelo* sentiment. *See* Ala. Code §§ 18-1B-1 to -2 (2011) (noting that the state legislature's intent was to limit the expansive reach of takings under state statutes "in light of the decision and certain opinions recently announced by the United States Supreme Court").

[152] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2114–48 (2009) (describing the different types of legislative responses from

ever, focused on the issue of judicial deference to legislative determinations, which state courts have addressed in a handful of notable post-*Kelo* opinions discussed below.

A. *State v. Federal Views on Deference*

Nationwide, many condemnations proceed at the state level, where they are undertaken by state or local governmental entities.[153] Although the avenue for challenging state takings in federal court is very narrow as a result of the *Kelo* Court's hands-off deferential approach,[154] property owners can and do turn to state courts, state constitutions, and state statutes for protection of private property rights.[155] Moreover, those state constitutions and statutes can provide a higher degree of protection than that afforded by the U.S. Constitution, which sets a minimum, not a maximum, for protection of property rights.[156]

In particular, state courts are not bound by the Supreme Court's determinations concerning public use in the federal context or under the Constitution, nor are they bound by federal notions of deference.[157] The *Kelo* Court noted this, stating that "nothing in our opinion

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states). Most commentators, however, seem to agree that the post-*Kelo* state reforms are largely window dressings with little or no impact upon outcomes. *See, e.g.*, Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. 709, 712 (surveying new state laws in response to *Kelo* and concluding that political action is ineffective in addressing problems caused by eminent domain); Somin, *supra*, at 2103–05 (summarizing state legislative reforms passed in response to *Kelo* and explaining how the reforms are generally ineffective).

[153] Statistics on takings are notoriously hard to find because of the multitude of entities that may exercise the power, and because data regarding takings is generally not tracked by those entities. *See* Daniel L. Chen & Susan Yeh, *The Economic Impacts of Eminent Domain* 3 (Mar. 2012 draft), *available at* www.duke.edu/~dlc28/papers/EminentDomain.pdf ("Few centralized sources of data document the condemnation of property across jurisdictions exist since various levels of government, local, state, and federal, are able to invoke the power of eminent domain."); U.S. Gov't Accountability Office, GAO-07-28, Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited 8 (2006) (noting that "the lack of data precludes a determination of the extent to which eminent domain has been used across the nation").

[154] *Kelo*, 545 U.S. at 482–83.

[155] *See* Somin, *supra* note 152, at 2114–21 (describing state statutes on eminent domain); *infra* notes 157, 160–171 and accompanying text (examining state court cases and state constitutions and discussing their respective protection of private property rights).

[156] *See* State v. Sieyes, 225 P.3d 995, 1003 (Wash. 2010) ("Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling and afford greater protection under their own constitutions.").

[157] *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1136 (Ohio 2006) ("In addressing the meaning of the public-use clause in Ohio's Constitution, we are not bound to follow the United States Supreme Court's determinations of the scope of the Public Use Clause

precludes any State from placing further restrictions on its exercise of the takings power," and observing that many states had indeed imposed public use requirements "stricter than the federal base line."[158] Subsequent state court opinions likewise have remarked on the higher degree of protection potentially available under state constitutions or state statutes.[159]

Of course, *Kelo*'s declaration that states could set higher protections for private property rights than the U.S. Constitution afforded was by no means new law.[160] *Kelo* simply highlighted the role that state statutes and constitutions could play by announcing the limited protection available under the U.S. Constitution and explicitly pointing to state law as an alternative.[161] Many state courts had already recognized that their state constitutions or state statutes prohibited exercises of eminent domain that would pass muster under the U.S. Constitution.[162]

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in the federal constitution . . . ."); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126 (Nev. 2006) (providing that "'states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution'") (quoting State v. Bayard, 71 P.3d 498, 502 (Nev. 2003)); Bd. of Cnty. Comm'rs v. Lowery, 136 P.3d 639, 651 (Okla. 2006) (noting that the state's "constitutional eminent domain provisions place more stringent limitations on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution," and that Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine have reached similar outcomes based on their state constitutions) (citation omitted); Evans v. Twp. of Maplewood, No. L-6910-06, 2007 N.J. Super. Unpub. LEXIS 2982, at *23–28 (Law Div. July 27, 2007) (noting that although the Supreme Court has stated that the U.S. Constitution permits takings for economic development, the New Jersey Constitution "does not go so far").

[158] 545 U.S. at 489.

[159] *See, e.g.*, *Norwood*, 853 N.E.2d at 1136 (differentiating between the Takings Clause in the Ohio Constitution and "the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause."); *McCarran*, 137 P.2d at 1126 (stating that under the Nevada Constitution the first right established is "the protection of a landowner's inalienable rights to acquire, possess and protect private property" to which there is no federal corollary provision).

[160] *See* 545 U.S. at 489.

[161] *Id.*

[162] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, at 475 (Mich. 1981) (Ryan, J., dissenting), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). As Justice Ryan noted in his dissent in *Poletown*, the deferential stance on review of public use determinations adopted by federal courts in no way mandates a similar level of deference by the state courts. *Id*; *see* Bailey v. Myers, 76 P.3d 898, 903 (Ariz. Ct. App. 2003) ("The federal constitution provides considerably less protection against eminent domain than our Constitution provides."); *Lowery*, 136 P.3d at 651 nn.19, 20 (listing pre-*Kelo* decisions acknowledging greater rights either under state constitutions or under state statutes); Karesh v. City Council of Charleston, 247 S.E.2d 342, 344 (S.C. 1978) ("While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision."); Manufactured Hous. Cmtys. of

The Michigan Supreme Court, for example, in overruling its controversial *Poletown Neighborhood Council v. City of Detroit*[163] decision in *County of Wayne v. Hathcock* in 2004, explicitly renounced the rational basis standard of review.[164] The court stated that it had "*never* employed the minimal standard of review in an eminent domain case" and "always made an *independent* determination of what constitutes a public use for which the power of eminent domain may be utilized."[165] Although the court's pronouncement smacks somewhat of revisionist history, it was certainly within the Michigan Supreme Court's purview to reject the rational basis standard and to adopt a higher, less deferential standard of review under its own state constitution.[166]

Although it may seem obvious that state courts can impose higher standards and afford greater protection under state law, it is a point that needs periodic reiteration, as state courts (and likely, the lawyers who argue before them) do occasionally lose sight of this important principle. There are numerous examples in which state courts have mistakenly asserted they were constrained by the Supreme Court's deferential stance.[167]

Wash. v. State, 13 P.3d 183, 190 (Wash. 2000) ("[T]he structural differences allow Washington courts to forbid the taking of private property for private use even in cases where the Fifth Amendment may permit such takings.").

[163] 304 N.W.2d at 459–60 (per curiam) (holding that condemning to protect jobs and economic viability was a valid public use).

[164] 684 N.W.2d at 785.

[165] *Id.* (quoting *Poletown*, 304 N.W.2d at 475 (Ryan, J., dissenting) (emphasis in original)).

[166] *See id.*

[167] *See, e.g.*, Lockridge v. Adrian, 638 So. 2d 766, 771 (Ala. 1994) ("Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."); Natural Res. Comm'n of Ind. v. AMAX Coal Co., 638 N.E.2d 418, 429 (Ind. 1994) (assessing the constitutionality of a taking only in terms of the U.S. Constitution and not the Indiana Constitution); New Orleans Redev. Auth. v. Burgess, 16 So. 3d 569, 575 (La. Ct. App. 2009) (holding that *Midkiff* "enunciated the respect which the courts *must* give to the legislative branch") (emphasis added) (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984)); *Poletown*, 304 N.W.2d at 459 (stating that under *Berman*, "when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive'") (quoting *Berman*, 348 U.S. at 32); City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 10–11 (Nev. 2003) (suggesting the court is bound by *Midkiff*'s standard of legislative deference); City of Long Branch v. Brower, MON-L-4987–05, 2006 WL 1746120, *18 (N.J. Super. Ct. Law Div. June 22, 2006), *aff'd in part, rev'd in part sub nom.* City of Long Branch v. Anzalone, A-0067–06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (holding that according to *Midkiff* "[t]he courts are constrained to defer to the governing body"); *see also* Michael Bindas et al., *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 Gonz. L. Rev. 1, 3 (2011) ("Because there is frequently a more extensive body of law interpreting the Federal Constitution, lawyers may tend to focus their

Over three decades ago, Justice William J. Brennan, Jr. wrote an influential *Harvard Law Review* article about what he saw as a regrettable retraction by the Supreme Court in constitutional protections.[168] Justice Brennan encouraged litigants to protect their individual liberties by looking beyond the U.S. Constitution, noting that state constitutions often provide greater protections of individual liberties than federal law.[169] As Justice Brennan noted, state courts have often deviated from Supreme Court opinions despite similar or even identical language in their state constitution and the U.S. Constitution.[170] In the words of the Hawaii Supreme Court: "While this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the [U.S.] Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law."[171]

Although Justice Brennan was concerned primarily with what he perceived to be erosions of individual rights under the Bill of Rights,[172] the concerns he raised are equally applicable in the context of the Takings Clause—and the solution he offered of seeking protection under state, rather than federal, constitutional provisions is equally practicable.[173] Justice Brennan, in fact, presaged the *Kelo* aftermath and subsequent state-level rejection of *Kelo*'s holding when he suggested that state court judges and practitioners should closely scrutinize federal decisions in the eminent domain realm before using them to interpret state constitutional counterparts.[174] Justice Brennan concluded with an explicit call for lawyers to consider the protections offered by state constitutions, stating that "it would be most unwise these days not also to raise state constitutional questions."[175]

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arguments on what is required by the Federal Constitution, and treating the state constitution as simply a restatement of the Federal Constitution.").

[168] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 490–91 (1977).

[169] *Id.* at 491. Justice Brennan articulated a similar thought in a dissent in Michigan v. Mosley. 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (noting that states have the power to "impose higher standards" for "police practices under state law than is required by the Federal Constitution").

[170] Brennan, *supra* note 168, at 500.

[171] State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974).

[172] Brennan, *supra* note 168, at 492. Justice Brennan's article focused on equal protection, procedural due process protections for governmental benefits, and the "specific guarantees of the Bill of Rights against encroachment by state action." *Id.* at 491–92.

[173] *See id.* at 491–92, 502–04.

[174] *Id.* at 502.

[175] *Id.*

Scholars subsequently labeled the movement toward increased state protection of individual rights based on state constitutional provisions "new judicial federalism."[176] It is not really necessary to expound on the development of such theoretical language, however, to understand the trend. States have always been free to grant more protection than the U.S. Constitution mandates.[177] It is simply that the retreat by the Supreme Court on federal protection of private property rights makes pursuit of state protections more appealing to litigants, thus bringing heightened attention to state activities. This is precisely what we now see happening in the eminent domain arena.

B. *State Court Approaches to Deference*

Post-*Kelo* developments in state courts suggest that takings litigants are having some success in following Justice Brennan's suggested strategy of seeking protection under their state constitutions or statutes.[178] The most detailed post-*Kelo* analysis of the role of deference in state takings is found in *City of Norwood v. Horney*, a 2006 decision by the Ohio Supreme Court.[179] The *Norwood* court deliberately availed itself of

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[176] *See* Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1191–94 (1977); *see also* Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 341 (2004); Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 AM. U. L. REV. 457, 459–60 (2005); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1098–99 (1997).

[177] *See Kelo*, 545 U.S. at 489.

[178] *See, e.g.*, City of Stockton v. Marina Towers LLC, 88 Cal. Rptr. 3d 909, 925 (Ct. App. 2009) (failing to provide adequate project description in resolution of necessity renders proposed taking invalid under state statute); Mayor of Balt. City v. Valsamaki, 916 A.2d 324, 356 (Md. 2007) (striking down a city's attempt to use quick-take condemnation procedures for an urban renewal project because of lack of evidence that the buildings at issue were "immediately injurious" to public health and safety, and noting that "the evidence presented below of public use was sparse"); *McCarran*, 137 P.3d at 1126 (finding a regulatory taking occurred under the state constitution and noting that *Kelo* recognized that states may expand their citizens' rights beyond those provided in the U.S. Constitution); Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 449 (N.J. 2007) (striking down a taking based on a determination by the local government that land was in need of redevelopment on grounds that state constitution permitted government redevelopment of only blighted areas); *Lowery*, 136 P.3d at 650–51 (stating that takings for economic development purposes do not satisfy the state constitution or state statute); Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006) (finding that the state constitution and case law provide property owners with more protection than the U.S. Constitution because the state applies the narrower rather than the broader definition of public use).

[179] 853 N.E.2d at 1129–42. *See generally* Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561 (2008) (noting *Norwood* as an example of a post-*Kelo* reform); Andrew S. Han, Note, *From* New London *to* Norwood*: A Year in the Life*

Kelo's invitation to view federal constitutional protections in the takings area as a minimum, not a maximum.[180] In so doing, the *Norwood* court issued an unusually detailed and thoughtful decision analyzing the relative roles of the judiciary and legislature in eminent domain matters.[181] Given the federal courts' explicit retreat on takings issues, *Norwood* provides a constructive example of how state courts might rediscover and revitalize their role in protection of property rights.[182]

Norwood, like *Kelo*, involved a taking for economic redevelopment purposes.[183] The trial court found that the use of eminent domain for purposes of urban renewal was constitutional as a valid public use under both Ohio and Supreme Court precedent, and upheld the condemnation of the property owners' parcels.[184] The Ohio Court of Appeals affirmed, noting first that the finding of the city council regarding the deteriorating nature of the area was entitled to judicial deference[185] and, second, that the redevelopment plan was a valid public use under the Ohio Constitution.[186] In effect, the intermediate appellate court foreshadowed the reasoning of *Kelo*, which was issued by the U.S. Supreme Court a few weeks later.[187]

However, the Ohio Supreme Court unanimously reversed.[188] The court did not hesitate to confront directly and in detail the thorny issue of the degree of deference courts should afford legislative determinations of public use.[189] Although *Kelo* was issued before *Norwood*, the

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of Eminent Domain, 57 DUKE L.J. 1449 (2008) (discussing the Ohio Supreme Court's repudiation of *Kelo* in *Norwood*); Case Note, *Eminent Domain-Public Use-Ohio Supreme Court Holds That Economic Development Cannot by Itself Satisfy the Public Use Limitation of the Ohio Constitution*—City of Norwood v. Horney, *853 N.E.2d 1115 (Ohio 2006)*, 120 HARV. L. REV. 643 (2006) (examining the facts, holding, and importance of the case).

[180] *Norwood*, 853 N.E.2d at 1122.

[181] *See id.* at 1122, 1137–42.

[182] *See id.* at 1129.

[183] *Id.* at 1122; *see Kelo*, 545 U.S. at 472.

[184] Norwood v. Horney, 830 N.E.2d 381, 391 (Ohio Ct. App. 2005), *overruled by* 853 N.E.2d 1115.

[185] *Id.* at 388, 394.

[186] *See id.* at 391.

[187] *See Kelo*, 545 U.S. at 489–90.

[188] *Norwood*, 853 NE.2d at 1153.

[189] *See id.* at 1137. The *Norwood* court also specifically addressed the other major issue raised in *Kelo*—the scope of public use. *See id.* at 1135–36. The court highlighted the risk of expanding public use to include takings intended solely for economic development purposes, finding that such a broad notion of public use would have the effect of eradicating the public use limitation of the Ohio Constitution. *See id.* at 1135–36. Thus, the *Norwood* court held that economic development alone cannot satisfy the public use requirement of the Ohio Constitution. *Id.* at 1142. The court then turned to the city's finding that the area was "deteriorating" to determine whether that finding would justify the use of the eminent

Ohio Supreme Court declined to adopt the U.S. Supreme Court's reasoning, instead issuing an opinion in which it delved into considerable detail about the nature of public use and the role of judicial deference in state takings cases.[190] The court noted the "inherent tension" between the state's power of eminent domain and the need to protect individual private property rights.[191]

Norwood and similar recent state court decisions highlight two key insights into judicial deference to the legislature in eminent domain cases. First, the degree to which a court specifically and openly approaches the issue of public use as a judicial question influences the degree of judicial scrutiny the taking receives.[192] The degree of scrutiny affects the level of deference afforded legislative decision making and the likelihood that the taking will survive a challenge.[193] Second, deference notions are closely tied to separation of powers principles.[194] Discussion of judicial review of public use determinations necessarily implicates the relationship between, and relative roles of, legislatures and courts.[195] Both factors, taken together, have a significant impact on the type of judicial review afforded to takings decisions and upon the degree of judicial protection offered to private property rights within a given jurisdiction.

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domain power. *Id.* at 1145. The court found first that the term "deteriorating area" was void for vagueness because the city code failed to provide property owners and city officials with a sufficient definition of what constituted a "deteriorating area." *Id.* Second, the court found that regardless of its void-for-vagueness finding, the standard was impermissible under Ohio precedent because it allowed the city to exercise the power of eminent domain based on a prediction that the property might pose a future threat. *Id.* The city code deemed an area "deteriorating" if it was or would be "deteriorating," or was "*in danger of* deteriorating." *Id.* Thus, the court struck down the City of Norwood's exercise of eminent domain. *Id.* at 1146.

[190] *See id.* at 1122, 1130–46.

[191] *Id.* at 1130–31. The Northwest Ordinance initially, and the Ohio Constitution subsequently, limited the state's power of eminent domain based on "equitable considerations of just compensation and public use." *Id.* at 1130. The Ohio Constitution actually phrases this requirement in language somewhat different from that of the U.S. Constitution: "Private property shall ever be held inviolate, but subservient to the public welfare . . . . [W]here private property shall be taken for public use, a compensation therefore shall first be made . . . . " OHIO CONST. art. I, § 19.

[192] *See Norwood*, 853 N.E.2d at 1136–42; *infra* notes 196–223 and accompanying text.

[193] *See Norwood*, 853 N.E.2d at 1136–42; *infra* notes 196–206 and accompanying text.

[194] *See Norwood*, 853 N.E.2d at 1137–42; *infra* notes 224–254 and accompanying text.

[195] *See Norwood*, 853 N.E.2d at 1137–42; *infra* notes 224–254 and accompanying text.

1. Public Use as a Judicial Question

The degree to which a state court explicitly views public use as a judicial question has an observable impact on the degree of protection afforded to private property rights within a jurisdiction. This is an instance where the vocabulary used by the court greatly influences the outcome. *Norwood* is a prime example. The *Norwood* court discussed the relative roles of the courts and legislature in takings cases in detail.[196] The Ohio Supreme Court explained that the state's lower courts had mistakenly interpreted the standard of review in takings cases as one of absolute deference to legislative determinations.[197] Rather, the proper standard of review in Ohio requires that the court conduct an independent review of the legislature's decision to take.[198] As the *Norwood* court noted, it is the role of the judiciary to delineate the limits of the legislature's eminent domain power.[199] Moreover, the court recognized that although its role is limited, it is crucial in reviewing state actions to ensure that the state takes no more than necessary to promote the public use, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or criminal purposes.[200]

The *Norwood* court also acknowledged that legislatures should be afforded broad discretion in eminent domain matters; however, courts must ensure that the legislature's actions remain within the scope of its authority, which is not abused or used in bad faith.[201] The court emphasized the independent role of the judiciary, framing this role in the context of "the courts' traditional role as guardian of constitutional rights and limits."[202]

By couching its role in these terms, the Ohio Supreme Court put review of public use determinations squarely under the purview of the courts, not the legislature.[203] Other states vary in how they approach

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[196] *Norwood*, 853 N.E.2d at 1137–39.

[197] *Id.* at 1136, 1138.

[198] *Id.* at 1138.

[199] *Id.* at 1137.

[200] *Id.* at 1138.

[201] *Id.* Justice Zarella also addressed this in his partial concurrence and partial dissent in the Connecticut Supreme Court's decision in *Kelo. See* 843 A.2d 500, 581, 582 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff'd*, 545 U.S. 469 (2005). Although Justice Zarella conceded that "[i]t is well established that judicial deference to determinations of public use by state legislatures is appropriate," he noted that "[n]evertheless, judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility." *Id.* at 581–82.

[202] *Norwood*, 853 NE.2d at 1138–39 (stating that "we thus act with deference to legislative pronouncements, but we are independent of them").

[203] *See id.* at 1138.

this issue. Although some state constitutions[204] and statutes[205] provide that public use is a judicial question, in other instances the issue is broached through judicial opinions.[206] The bottom line is that a surprising number of states have constitutional, statutory, or case law language clearly assigning review of public use determinations to the judiciary.

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[204] *See, e.g.*, ARIZ. CONST. art. 2, § 17 ("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."); COLO. CONST. art. II, § 15 ("[W]henever 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."); LA. CONST. art. I, § 4 (stating that no property shall be taken "by any private entity authorized by law to expropriate, except for a public and necessary purpose" and "in such proceedings, whether the purpose is public and necessary shall be a judicial question"); MISS. CONST. art. 3, § 17 ("[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."); MO. CONST. art. I, § 28 ("[W]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."); OKLA. CONST. art 2, § 24 ("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."); WASH. CONST. art. 1, § 16 ("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 . . . . "). *But see* VA. CONST. art I, § 11 ("[T]he term 'public uses' [is] to be defined by the General Assembly . . . .").

[205] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12–1132 (2011) (establishing that in takings, "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"); OKLA. STAT. tit. 66 § 57 (2011) ("In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question . . . ."); OR. REV. STAT. § 35.015 (2011) (limiting the circumstances under which private property can be taken, and providing that "[a] court shall independently determine whether a taking of property complies with the requirements of this section, without deference to any determination made by the public body"); WASH. REV. CODE § 8.12.090 (2012) ("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 . . . .").

[206] *See, e.g.*, City of Little Rock v. Raines, 411 S.W.2d 486, 493 (Ark. 1967) ("Whether or not a proposed use for which property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts."); Bassett v. Swenson, 5 P.2d 722, 725 (Idaho 1931) (holding that what is a "public use" is a judicial question); Logan v. Stogdale, 24 N.E. 135, 136 (Ind. 1890) ("Whether the use is a public one is a judicial question, and not a legislative one . . . ."); R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 96 (R.I. 2006) (stating that "[i]t is well settled in this state that whether a taking constitutes a public use is a judicial question" and citing cases in support).

Thus, state courts—even those without explicit constitutional or statutory provisions on point—are more likely than federal courts to treat public use determinations as a judicial question.[207] Often, state courts see a meaningful role for themselves in reviewing whether a particular taking satisfies the public use requirement and resist attempts by state legislatures to reduce judicial power in this arena.[208] For example, the Rhode Island Supreme Court, in *Rhode Island Economic Development Corp. v. Parking Co.*, emphasized "the rebuttable nature of the legislative determination of public use" and affirmed the role of judicial review when owners challenged public use decisions.[209] The court must examine the particular factors in each case and approve those takings "designed to protect the public health, safety and welfare," even if the takings incidentally benefit private interests.[210] The court emphasized that public use is nonetheless a judicial question that requires careful scrutiny of the good faith and due diligence on the part of the condemnor.[211] In addition, the court declined to blindly defer to conclusory legislative statements of public use.[212]

Even when state statutory or constitutional language gives an explicit role to the courts in evaluating public uses, a court may reduce its role through judicial interpretation. The Washington Constitution, for

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[207] *Compare Berman*, 348 U.S. at 32 (stating that the federal judiciary has an "extremely narrow" role in public use determinations), *with* High Ridge Ass'n, Inc. v. Cnty. Comm'rs of Carroll Cnty., Md., 660 A.2d 951, 956–57 (Md. Ct. Spec. App. 1995) (stating that public use determinations are judicial questions and the legislature cannot simply declare a use to be public), *and* Lakehead Pipe Line Co. v Dehn, 64 N.W.2d 903, 911 (Mich. 1954) ("'The question of whether the proposed use is a public use is a judicial one.'") (quoting Cleveland v. City of Detroit, 33 N.W.2d 747, 750 (Mich. 1948)).

[208] *See, e.g.*, *High Ridge Ass'n*, 660 A.2d at 955–57 (emphasizing that whether a use is a public use is a judicial question); *Lakehead Pipe Line Co.*, 64 N.W.2d at 911 (stating that it is the role of the judiciary to determine whether the proposed use is a public use). However, some state courts still view questions of public use as a legislative question. *See, e.g.*, Mount Laurel Twp. v. Mipro Homes, LLC, 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005) ("Whether a taking is for a public use 'is largely a legislative question beyond the reach of judicial review except in the most egregious cases.'") (quoting Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 93 (N.J. 2002)).

[209] 892 A.2d at 101.

[210] *Id.* at 104. The court ultimately struck down the taking, finding it was motivated by an impermissible desire to increase revenue and not a legitimate public purpose. *Id*; *see* Bird & Oswald, *supra* note 13, at 113–22 (discussing the relationship between public use and necessity).

[211] *R.I. Econ. Dev. Corp.*, 892 A.2d at 104–06.

[212] *Id.* at 103 ("[I]t is not the function of this Court to dissect a legislative declaration to glean a public purpose . . . . [W]e . . . continue to endorse 'the well-established rule that what constitutes a public use is a judicial question.'") (quoting Romeo v. Cranston Redev. Agency, 254 A.2d 426, 434 (R.I. 1969)).

example, appears to have a very clear statement of a substantial judicial role in reviewing takings determinations: "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 . . . ."[213] Despite this seemingly clear language regarding the primacy of the judicial role in determining public use, the Washington Supreme Court has interpreted the judicial role to be narrower. In *HTK Management, LLC v. Seattle Popular Monorail Authority*, decided mere months after *Kelo*, the majority of the Washington Supreme Court stated that legislative declarations of public use are "not dispositive," but nonetheless are "entitled to great weight."[214] This was soon followed by the court's decision in *Central Puget Sound Regional Transit Authority v. Miller*, where the majority stated that it would "show great deference to legislative determinations."[215] Thus, litigants seeking protection in state court must look beyond constitutional or statutory language to figure out the degree to which a court will involve itself in public use disputes.[216]

As discussed above, federal courts have a strong policy of deference to legislative determinations of public use.[217] By contrast, state courts can, and many do, reject such a deferential stance.[218] The Ohio Supreme Court in *Norwood*, while acknowledging the role of judicial deference to legislative determinations, also emphasized the importance of not abandoning the judicial role in public use questions, noting that courts must ensure the legislature does not exceed its authority or abuse its power.[219]

Some courts seem to find it easier to employ judicial review in pretextual challenges. For example, in *County of Hawai'i v. C&J Coupe Family Ltd. Partnership*, the condemning county argued that the court was only obligated to determine whether the condemnor "'*might reasonably have considered the use public, not whether the use is public.*'"[220] The Hawaii Supreme Court, however, stated that the lower courts had an obligation

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[213] WASH. CONST. art. 1, § 16.

[214] 121 P.3d 1166, 1175 (Wash. 2005) (citations omitted).

[215] 128 P.3d 588, 593 & n.2 (Wash. 2006).

[216] *See id.* at 593 n.2; *HTK Mgmt.*, 121 P.3d at 1175.

[217] *See Kelo*, 545 U.S. at 480; *Midkiff*, 467 U.S. at 240–41; *Berman*, 348 U.S. at 32; *supra* notes 76–117 and accompanying text.

[218] *See Norwood*, 853 N.E.2d at 1138.

[219] *Id.*

[220] 198 P.3d 615, 637 (Haw. 2008) (quoting Haw. Hous. Auth. v. Chiyo Ajimine, 39 Haw. 543, 549 (1952)).

under both the state and U.S. constitutions to consider whether the asserted public purpose behind the taking was pretextual.[221] Although economic development cases seem to attract the most allegations of pretext, the court noted that even "classic" public uses such as roads (the issue in this case) were subject to challenges on these grounds.[222] Similarly, in *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court stated that the judiciary's role was to look for the government's real reasons for a taking and not to defer to governmental "lip service" or post-hoc justifications.[223]

2. Deference as a Separation of Powers Issue

The level of judicial deference in takings cases can also be viewed as a separation of powers issue. The Washington Supreme Court, for example, noted in *Miller* that the court's deferential standard of review evolved "[o]ut of respect for a coordinate branch of government," and was thus a separation of powers notion.[224] Unfortunately, this issue cuts both ways—in favor of both a more deferential *and* a less deferential review of public use determinations. The separation of powers doctrine requires that each branch of government respect the relative roles of the other branches. Conversely, the doctrine also requires that no branch relinquish its power or role to another.

The notion of the appropriate balance of power between the legislature and the judiciary permeates early articulations of eminent domain law.[225] Philip Nichols, the author of an influential early treatise on eminent domain law, emphasized the importance of courts not intruding into the legislatures' realm, stating "[t]he exercise by a court of the power to nullify the wishes of the representatives of the people, enacted into law in solemn form, is indeed full of grave responsibility and not to be called into play indiscriminately."[226] Nichols articulated an early version of the rational basis standard of review for public use, stating that the issue "is not whether the use for which the property is taken is pub-

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[221] *Id.* at 638 (noting that the presumption that the legislature's purpose is valid is not "unfettered," and that under appropriate circumstances courts may consider whether a purported public use is pretextual).

[222] *Id.* at 647.

[223] 939 A.2d 331, 338 (Pa. 2007).

[224] 128 P.3d at 593.

[225] 1 Philip Nichols, The Law of Eminent Domain: A Treatise on the Principles Which Affect the Taking of Property for the Public Use §§ 10–14, at 34–47 (2d ed. 1917).

[226] *Id.* § 10, at 34.

lic, but whether the legislature might reasonably consider it public."[227] Nichols acknowledged, however, that a court's duty was to declare unconstitutional any taking that lacked any "real and substantial relation to the public use."[228]

The *Norwood* court viewed the separation of powers doctrine as enforcing, not limiting, the court's role in public use disputes.[229] The court noted that while the judiciary should afford some deference to legislative determinations of public use, the separation of powers doctrine would be violated if the judiciary simply acquiesced in every instance to the legislature's invocation of the police power.[230] Each branch has its own respective role to play, and it ought not to abdicate that role to another branch.[231] As the *Norwood* court stated, "[d]eferential review is not satisfied by superficial scrutiny."[232] Rather, "the separation-of-powers doctrine 'would be unduly restricted' if the state could invoke the police power to virtually immunize all takings from judicial review."[233] Thus, the court concluded that although a court's ability to scrutinize takings cases is limited, "it clearly remains a critical constitutional component."[234]

The U.S. Supreme Court seems to have adopted the opposite view, essentially stating that the remedy to abusive governmental action often lies in the ballot box and not the federal courtroom.[235] In an 1876 decision, *Munn v. Illinois*, the Court stated that the way to protect against the legislature's potential abuse of economic regulation is through "the polls, not . . . the courts."[236] Similarly, the Second Circuit noted in *Goldstein v. Pataki* that "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts."[237]

Commentators, too, have argued that respect for the relative roles of the co-equal branches of government should lead courts to be reti-

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[227] *Id.* § 52, at 154.

[228] *Id.* § 52, at 155.

[229] *See* 853 N.E.2d at 1137.

[230] *Id.*

[231] *See id.* at 1148–50.

[232] *Id.* at 1137.

[233] *Id.* (quoting U.S. *ex rel.* TVA v. Welch, 327 U.S. 546, 556–57 (1946) (Reed, J. concurring)).

[234] *Id.* at 1138.

[235] *See* Munn v. Illinois, 94 U.S. 113, 134 (1876).

[236] *Id.*

[237] 516 F.3d 50, 57 (2d Cir. 2008).

cent in intruding too far into legislative decision making.[238] As noted by Professor John Hart Ely:

> When a court invalidates an act of the political branches on constitutional grounds . . . it is overruling [the legislature's] judgment, and normally doing so in a way that is not subject to "correction" by the ordinary law making process. Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.[239]

Thus, the reluctance to interfere with the political process may at least partially explain the refusal of some courts to review public use determinations.

Moreover, relying upon the political process is no panacea as there is no assurance that elected officials are either wiser or more impartial in their decision making than the courts, or that the political process is effective in constraining legislators' behavior.[240] Professors William Riker and Barry Weingast note that "neither the Court nor legal scholarship has provided the theoretical underpinnings for the presumption of the adequacy of legislative judgment and, indeed, neither has even asked whether legislative judgment really works."[241] Riker and Weingast, however, go on to conclude that heightened judicial scrutiny is not the answer either: "Judicial scrutiny that allows judges to substitute their own logic for that of the legislature merely transfers the problem of unpredictability and insecurity of economic rights from the legislature to the judicial stage; it does not solve the problem of protecting rights."[242] Riker and Weingast identified the problem in clear and compelling terms, but the solution remains much more elusive.

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[238] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 4–5 (1980).

[239] *Id.*

[240] *See* William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures,* 74 VA. L. REV. 373, 378–79 (1988).

[241] *Id.* at 378. The authors note a number of unanswered questions, including what protection exists against majorities providing benefits to themselves "under the guise of political purposes," how to "distinguish between legitimate public purposes and those undertaken solely for private redistribution," and whether the "articulation of public benefits" is merely "rhetorical window dressing to rationalize private redistribution." *Id.* at 379.

[242] *Id.* at 400.

Indeed, hortatory calls for greater supervision of the legislative process by the judiciary are common, but roadmaps for doing that effectively and appropriately are hard to devise. Professor John Hart Ely, for example, argued that courts must oversee the democratic process, while conceding that when a court is convinced that the majority is not abusing the process, the legislative determination should stand.[243] The vexatious question, of course, is how does a court determine that the process is not being abused?

In addition, the level of the governmental unit making the taking decision can also affect the standard of review applied by state courts. To many commentators and state courts, the more local the governmental unit involved in the taking, the more likely that abuse of the political process may occur.[244] In such instances, some state courts are more reluctant to apply a deferential standard of review and are more likely to scrutinize the government's decision.[245] The Oregon Supreme Court, for example, explained that because local governments are not comparable to state and federal legislatures, local governing decisions should not be presumed valid and "shielded from less than constitutional scrutiny by the theory of separation of powers."[246]

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[243] *See* Ely, *supra* note 238, at 101–04.

[244] *See Kelo*, 843 A.2d 500, 581 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (public use determinations by state legislative bodies are entitled to more deference than taking decisions by local public authorities); *Norwood*, 853 N.E.2d at 1138 (noting that while the state may delegate the eminent domain power to municipalities, the courts must then ensure that "the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner"). *See generally* Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil*," 20 Nova L. Rev. 707, 710 (1996) (stating that a lack of judicial enforcement at the local level contributes to a lack of "incentive for local governments to do a 'good' job"); Mansnerus, *supra* note 13, at 432–35 (arguing that the risk of abuse of power increases as the level of the government unit involved decreases).

President James Madison also recognized the heightened risk of abuse that flows from more localized decision-making. The Federalist No. 10, at 59 (James Madison) (E.H. Scott ed., 2002).

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Id.

[245] Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 26 (Or. 1973), *overruled on other grounds by* Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980).

[246] *Id.*

State courts may also fear that local officials may be more subject to undue influence from private interests[247] or that even a local condemning authority acting in "good faith" will fail to be objective when evaluating the wisdom of expropriating property to implement an economic development that it itself developed.[248] Another potential abuse that may arise from local takings decisions, identified by Professor William Fischel, is that "[l]ocal governments are more prone to majoritarianism," due to less diverse electorates and fewer constitutional checks on majority rule than exist at higher levels of government.[249] Thus, local decisions to take pose the risk of overreaching by the majority as well as the potential for abuse by well-connected special interest groups.

The problems inherent in the relative roles of courts and legislatures are laid out in stark relief in the takings arena.[250] As described by Professor Thomas Merrill, historically, public use analysis has focused upon the ends—the purpose to which the property will be put once taken—as opposed to the means by which the government achieves its goal.[251] As legislatures have increasingly turned their attention to socioeconomic regulation, however, the courts have become even more deferential to legislative determinations of the proper ends of government.[252] In large part, this can be traced to notions of separation of powers—questions regarding the proper ends of government to "demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake,"[253] and so the courts often defer to the "more democratic" legislative and executive branches to address these difficult political questions.[254]

In sum, although notions of separation of powers and the respective roles of the judiciary and legislature underlie much of the analysis

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[247] *See Kelo*, 843 A.2d at 579 (Zarella, J., concurring in part and dissenting in part) ("Because public agencies must work hand in glove with private developers to achieve plan objectives, the taking agency may employ the power to favor purely private interests."); Mansnerus, *supra* note 13, at 434 (stating that "the decisions of local officials, at least more so than those made by larger bureaucracies . . . are especially vulnerable to power private interests").

[248] *See* Mansnerus, *supra* note 13, at 434 ("[T]he parent agency cannot be expected to assess its own plan soberly, much less to account for a condemnee's interests.") (citations omitted).

[249] William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

[250] *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 64–66 (1986).

[251] *Id.* at 64.

[252] *See id.*

[253] *Id.* at 66–67.

[254] *Id.* at 68.

in this area, these concepts are only marginally helpful in delineating where the lines between judicial and legislative questions should be drawn in the takings arena.

Conclusion

The relative roles of the state and federal courts in protecting private property rights are shifting. Half a century of Supreme Court precedent has established that property owners run grave risks in relying upon the U.S. Constitution or the federal courts for protection of their property interests in takings cases.[255] It is perhaps too soon to sound a death knell for federal protection of property rights, as *Kelo* was a divisive 5–4 decision, and even slight shifts in the Court's composition could alter future holdings in this area.[256] Nonetheless, current property owners can count on little relief from the federal courts when it comes to their claims of unconstitutional takings.[257]

James Madison wrote in *The Federalist Papers* that "[g]overnment is instituted no less for the protection of the property, than of the persons of individuals."[258] Contrary to this lofty statement about the sanctity of private property, the stance regarding property rights protection that has evolved in recent decades in the federal courts in general, and in the Supreme Court in particular, is a curiously weak one.[259] This perhaps reflects the declining stature given to property rights by the federal courts vis-à-vis other types of rights, such as privacy rights or rights afforded to accused criminals.[260] As Justice Thomas noted in his dissent in *Kelo*, it is hard to imagine the Supreme Court declining to address issues of alleged improprieties in police procedures in criminal cases by deferring to legislative determinations of fairness, or by calling upon

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[255] *See supra* notes 44–117 and accompanying text.

[256] *See Kelo*, 545 U.S. at 470. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined in the majority opinion, Justice Kennedy filed a concurring opinion, Justices O'Connor, Rehnquist, Scalia, and Thomas joined in a dissenting opinion, and Justice Thomas filed a dissenting opinion.

[257] *See supra* notes 44–117 and accompanying text.

[258] The Federalist No. 54, at 267 (James Madison) (Terence Ball ed., 2003). Other scholars have attributed the work to Alexander Hamilton. *See* Federalist No. 54, Thomas: The Library of Congress, http://thomas.loc.gov/home/histdox/fed_54.html (last visited Apr. 20, 2012) (noting that either James Madison or Alexander Hamilton wrote Federalist No. 54).

[259] *See* The Federalist No. 54, *supra* note 258; *Kelo*, 545 U.S. at 517–18 (Thomas, J., dissenting).

[260] *See Kelo*, 545 U.S. at 517–18 (Thomas, J., dissenting).

states to adopt more stringent standards.[261] Yet, that is precisely what we find in the takings field.

Perhaps federal courts do not feel the same need to protect rights in eminent domain cases because of the constitutional guarantee of just compensation.[262] Perhaps courts see the just compensation as an equivalency to private property rights, even though property owners do not.[263] Speculation about the federal courts' motivations, however, is unproductive with respect to the extent and type of relief property owners can hope for from the federal courts.[264] We can see that the Supreme Court itself is not completely comfortable with where its path has taken it, as illustrated by both the split in *Kelo* and the *Kelo* majority's effort to avoid the more pressing problems created by its lenient standard of review—providing a pretext exception that is hard to articulate and difficult to apply.[265]

Although we could propose new rules for the Supreme Court to adopt in this context, such proposals do little to assist property owners facing the difficult task of challenging takings today. The only realistic advice we can give such property owners is to turn to the state courts.[266] Justice Brennan, in a call to state courts to increase their own levels of scrutiny, stated that "state courts no less than federal courts are and ought to be the guardians of our liberties."[267]

Under current takings doctrine, state courts certainly offer more hope for property owners challenging takings than do federal courts.

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[261] *Id.* (stating that the Court "would not defer to a legislature's determination . . . when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest by the Due Process Clause") (citation omitted); *see also* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62 ("The Supreme Court does not defer to legislative decisions regarding criminal procedures or the enjoyment of free speech. In fact, among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy deference to legislatures.").

[262] *See* U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

[263] *See* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981) (Condemnors "cannot be made whole by monetary just compensation . . . . [P]roperty may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity, status—yes, and security too . . . ."). *See* Cohen, *supra* note 73, at 401–06 (discussing why just compensation alone does not suffice to justify the use of eminent domain).

[264] *See supra* notes 49–115 accompanying text.

[265] *See Kelo*, 545 U.S. at 470, 478; *supra* notes 109–136 and accompanying text.

[266] *See supra* notes 153–177 and accompanying text.

[267] Brennan, *supra* note 168, at 491.

Although the state rules are not completely cast in terms favorable to property owners, the growing recognition by state courts of their power to reject federal doctrine, and to grant more exacting review of legislative decisions to take, offers hope for greater scrutiny of legislative actions and greater protection of property rights in the future. It is a nascent trend, to be sure, but nonetheless a promising one for property owners.