Deference and Judicial Review in Eminent Domain Cases

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By

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Abstract: The U.S. Supreme Court, in Kelo v. City of New London, emphasized its “longstanding policy of deference” to legislative determinations of public use. However, the Court also explicitly acknowledged that the federal Constitution sets a floor, not a ceiling, on individual rights, and that the state courts were entitled to take a less deferential approach under their own state constitutions or statutes. This manuscript examines the various ways in which public use analysis can vary between federal and state courts and among state jurisdictions and the difficult issues raised by the interplay between legislatures and courts in takings analysis. Because the U.S. 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 take on increased importance in coming years. Litigants need to understand the issues raised by judicial review of public use challenges in the state courts.

Recent developments in takings jurisprudence have highlighted important, unsettled questions in eminent domain law. Is determination of public use a legislative or a judicial question? What degree of deference do courts owe legislatures in takings determinations? What types of legislative determinations are afforded such deference? The United States Supreme Court’s decision in Kelo v. City of New London\(^1\) in 2005 opened the door to such inquiries, rather than providing the clarity commentators and lower courts had hoped for. However, one thing is clear from 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 in takings cases for state courts.

\(^1\) 545 U.S. 469 (2005).
In a 5-4 decision, the *Kelo* Court stated that, under the U.S. Constitution, economic development can be a valid public use for purposes of eminent domain law (i.e., that private property can be taken to foster an economic development project even if the property taken will ultimately be owned by another private party and not the public). The Court also stated, however, that takings in which the stated public use or purpose was a “pretext” intended to bestow “a private benefit” are unconstitutional. The Court emphasized that an “integrated” and “carefully considered” development plan would be more likely to survive judicial scrutiny, thus elevating the status and influence of the “plan” in validating the existence of a proper public use in a manner not previously seen in eminent domain law.

*Kelo*’s fractured decision seems to have raised more questions than it answered and has opened up a Pandora’s box of difficult doctrinal and theoretical questions. How, for example, does a court evaluate the true motives—i.e., was the legislature motivated by pretext or not?—behind a decision to condemn? Is it appropriate, or even possible, for a court to attempt to delve into such matters? Is the existence of a “plan” a suitable proxy for evaluating the presence or absence of pretext? 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 notions) with the *Kelo* Court’s holding that pretextual takings are unconstitutional? Under what circumstances should the courts moderate their traditionally deferential stance to inquire into the motives of the legislature? And how do state and federal courts differ in their approaches to these issues?

The difficulties posed by *Kelo* are evident in the subsequent extensive legal commentary and inconsistent state and federal court decisions on the interplay between public use determinations and judicial review. Legal commentators have examined the thorny

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2 *Id.* at 485-86 (stating that economic development can qualify as a public use and that the public benefit of such projects can be served even if a private party, not the public, is the ultimate owner of the property).

3 *Id.* at 478.

4 *Id.* at 485.

5 *Id.* at 478.
issue of determining pretext in condemnations, and have noted that the Supreme Court’s opinion could lead to local and state governments using pretextual reasons to support the exercise of eminent domain power—in effect, offering a facially valid plan to justify a taking of private property when in fact the true (impermissible and unconstitutional) motive is to benefit another private party at the expense of the condemnee.

Less attention has been focused upon the predicate question, however, of how 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 notions) with the constitutional guarantees given to private property owners? More importantly, how do we evaluate this question in light of the differing roles of the state and federal legal systems? *Kelo* itself recognized the Supreme Court’s “longstanding policy of deference” to legislative determinations of public use, but it also explicitly acknowledged that state courts might take a less deferential approach under their own state constitutions or statutes. 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. Thus, state court challenges to takings are likely to take on increased importance in coming years.

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Note that “pretext” in takings was not a new concept raised by *Kelo*. See, e.g., Goldstein v. Patacki, 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.”) (citations omitted).


8 545 U.S. at 480. See infra notes 141-51 and accompanying text (discussing *Kelo’s* treatment of deference).

9 545 U.S. at 489 (“We emphasize that nothing in our opinion precludes any *Kelo*’s placing further restrictions on its exercise of the takings power.”). See infra notes 82 and accompanying text.
Part I provides a brief overview of the evolution of the U.S. Supreme Court’s deferential review of takings cases and discusses the precedent that led to the Supreme Court’s hands-off approach in *Kelo* to judicial review of legislative determinations of public use. Part II examines the various ways in public use analysis can vary among the state jurisdictions and the thorny issues raised by the interplay between legislatures and courts in takings analyses. E.g., should public use be viewed as a “judicial” question or a “legislative” question? What role does deference play, and how does that relate to the separation-of-powers doctrine? Concluding remarks are made in Part III.

I. THE DECLINING ROLE OF THE FEDERAL COURTS IN PUBLIC USE DISPUTES

In theory, there is a tidy divide between the roles of legislatures and courts in eminent domain cases. Questions of “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 generally issues left to the legislature. Questions of whether a particular use is a “public use,” however, are generally (although not always) a question for the judiciary.

In practice, however, courts, particularly federal courts, have increasingly abdicated control over such matters to the legislature. This Section discusses the jurisprudential developments that have lead to the federal courts’ extreme deferential approach to public use challenges in eminent domain cases.

A. The Federal and State Takings Clause Baselines

The differing roles of the state and federal courts in deciding takings cases underpin the divergent outcomes often found in public use cases. The underpinnings of the eminent

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11 See infra notes 116-18 and accompanying text.

12 See generally Bird & Oswald, *supra* note 10, at 115 & n.72.
domain power are the same at both levels: state and federal legal systems each recognize the eminent domain power as an inherent and essential attribute of sovereignty.\(^{13}\)

The constraints upon governmental exercise of that power can be very different, however. 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.\(^{14}\) 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.\(^{15}\)

Initially, the U.S. Constitution’s constraint upon the use of eminent domain reached only the federal government, not the state governments or their political subdivisions. In 1896, however, the U.S. Supreme Court extended the U.S. Constitution’s protection to limit takings by states, using the Due Process Clause of the Fourteenth Amendment as the vehicle to reach that result.\(^{16}\) Thus, property owners can challenge state, as well as federal, takings under the U.S. Constitution. In addition, most state constitutions contain takings clauses requiring public use and payment of compensation, similar to the requirements found in the Fifth Amendment to the U.S. Constitution.\(^{17}\) The states are also free to impose more stringent limitations upon their own power to take, through either more restrictive state constitutional provisions or through state statutes, and many have chosen to do so.\(^{18}\) Thus,

\(^{13}\) As stated by the U.S. Supreme Court: “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.” Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924). See also Mayor of New Orleans v. United States, 35 U.S. 662 (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 was a “tacit recognition of preexisting power to take private property for public use rather than [a] grant of new power.” United States v. Carmack, 329 U.S. 230, 24142 (1946). See also Oswald, supra note 7, at 52-55.

\(^{14}\) “[N]or shall private property be taken for public use without just compensation.” U.S. Const., amend. V.


\(^{17}\) See 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01 [1] & n.9 (3d ed. 2006) [hereinafter NICHOLS] (listing state statutory and constitutional provisions).
takings initiated by state actors can be challenged in the state courts under state constitutional or statutory provisions, or in the federal courts under the federal Constitution.

This seeming embarrassment of riches in terms of causes of actions does not necessarily translate to heightened protection for private property rights, however. At the federal level, the courts apply a rational basis standard of review to governmental decisions to take property—a standard that results in most legislative decisions to take being upheld when challenged in federal court. As summarized by the U.S. Supreme Court, “where the exercise of eminent domain is rationally related to any conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”\(^{19}\) The \textit{Kelo} majority reaffirmed this deferential standard of review,\(^{20}\) making it clear that the federal courts defer both to legislative determinations of public use\(^{21}\) and to state determinations of public use as well.\(^{22}\) As a practical matter, then, federal courts have provide little relief for property owners challenging takings on public use grounds.

At the state level, as the \textit{Kelo} majority noted, the state courts are free to impose whatever standard of review they deem

\(^{18}\) Id. n.10.


\(^{20}\) 545 U.S. at 488 (“‘When the legislative 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 \textit{Midkiff}, 467 U.S. at 242).

\(^{21}\) In the words of the \textit{Kelo} Court, “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.” 545 U.S. at 483.

\(^{22}\) See 545 U.S. at 482 (“emphasizing the ‘great respect’ that [federal courts] owe to state legislatures and state courts in discerning local public needs”) (citing Hairston v. Panville & Western R. Co., 208 U.S. 598, 606-07 (1908)).

The U.S. Supreme Court stated in \textit{Rindge Co. v. County of Los Angeles}, 262 U.S. 700, 705-06 (1923):

The nature of a use, whether public or private, is ultimately a judicial question. However, 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 which should be deemed public uses in any State.

Some pre-\textit{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 Redevelop Agency, 237 F. Supp.2d 112, 119 (C.D. Cal. 2001) (“Even under . . . a deferential standard . . . public use is not established as a matter of law whenever the legislative body acts.”).
appropriate. Historically, however, most state courts, like the federal courts, have applied a deferential standard of review to takings decisions. One student commentator noted 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 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 [U.S. Supreme Court’s] proposition that the legislature’s judgment is “well-nigh conclusive.”

The same commentator explained that the practical effect of the adoption of a lenient standard of review by the courts is a reduction of the courts’ role in the protection of private property rights:

Choosing a standard of review is one way, perhaps the most important way, in which courts rank competing interests. Depending upon the interest at stake, a court requires differing degrees of justification for a government action. At some point, however, deference shades into abstention, the court averring that for institutional reasons it should not reconsider the government’s decision at all. This is a common judicial practice in challenges to economic legislation, particularly tax measures, and it is the usual practice in eminent domain. While courts theoretically retain the power to determine what constitutes a public use, they assign

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this function to the political branches.\textsuperscript{24}

While this deferential standard of review has evolved to be the dominant view, especially among federal courts, it is by no means the only possible approach that courts may take. Although federal courts must adhere to the standard set by the U.S. Supreme Court, state courts are not constrained in the same manner. State courts may set higher, less deferential standards of review if they choose, and some have explicitly done so. The Michigan Supreme Court, for example, in overruling its controversial \textit{Poletown Neighborhood Council v. City of Detroit}\textsuperscript{25} decision in \textit{County of Wayne v. Hathcock},\textsuperscript{26} explicitly renounced the lower standard of review. Rather, the \textit{Hathcock} court stated: “[T]his Court has never employed the minimal standard of review in an eminent domain case. . . . Notwithstanding explicit legislative findings, this Court has always made an independent determination of what constitutes a public use for which the power of eminent domain may be utilized.”\textsuperscript{27} While the court’s pronouncement smacks somewhat of revisionist history, it was certainly within the state 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.

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.\textsuperscript{28} In such instances, some

\textsuperscript{24} Id. at 424 (footnotes omitted).

\textsuperscript{25} 304 N.W.2d 455 (Mich. 1981) (per curiam) (holding that condemning to protect jobs and economic viability was a valid public use), \textit{overruled by County of Wayne v. Hathcock}, 684 N.W.2d 765 (Mich. 2004).

\textsuperscript{26} 684 N.W.2d 765 (Mich. 2004).

\textsuperscript{27} Id. at 480 (quoting \textit{Poletown}, 304 N.W.2d at 669 (Ryan, J., dissenting) (emphasis in original)).

\textsuperscript{28} City of Norwood v. Horney, 853 N.E.2d 1115, 1140 (Ohio 2006) (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”); \textit{Kelo v. City of New London}, 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). \textit{See generally} Charles L. Siemon & Julie P. Kendig, \textit{Judicial Review of Local Government Decisions: “Midnight in the Garden of Good and Evil,”} 20 NOVA L. REV. 707 (1996); Masnerus, Note, \textit{supra} note 23, at 432-35.
state courts are more reluctant to apply a deferential standard of review and are more likely to scrutinize the government decision at issue. The Oregon Supreme Court, for example, noted:

[W]e would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.29

State courts may also fear that local officials may be more subject to undue influence from private interests30 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.31

State and federal courts thus may apply very different standards of review to legislative determinations to take for public use. As discussed next, the lenient standard of review developed by the U.S. Supreme Court in this area means that federal courts offer little refuge for property owners challenging public use determinations. However, the ability of the state courts to reject federal doctrine on judicial review of takings and to forge their own course under their own state constitutional or statutory provisions keeps alight a flicker of hope for property owners facing condemnation.

B. Kelo v. City of New London

The facts of Kelo v. City of New London were


30 See Kelo, 843 A.2d at 579 (Zarella, J., concurring in part & 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, Note, supra note 23, at 434 (“the decisions of local officials, at least more so than those made by larger bureaucracies, . . . are especially vulnerable to power private interests”) (footnote omitted).

31 See Mansnerus, Note, supra note 23, at 434 (“the parent agency cannot be expected to assess its own plan soberly, much less to account for a condemnee’s interests”).
Deference and Judicial Review in Eminent Domain Cases
February 24, 2011

straightforward. The Connecticut city of New London was identified by the state as a “distressed municipality” in 1990, with an unemployment rate nearly twice that of the rest of the state. In an effort to revitalize, the city authorized the New London Development Corporation (NLDC), a private nonprofit corporation, to assist the city in its economic redevelopment efforts. Ultimately, the NLDC came up with an ambitious plan for a mixed-use development in a waterfront location. The NLDC was able to purchase most of the property that it identified as necessary to implement its plan, but nine property owners, including Susan Kelo, refused to sell. The NLDC started condemnation proceedings. The property owners responded by filing suit to enjoin the takings in state court. The trial court issued a permanent injunction restraining the taking of certain of the parcels, but allowing the taking of others. Both sides appealed. The Connecticut Supreme Court determined that all of the takings were permissible, and Kelo and the other property owners appealed to the U.S. Supreme Court. In a 5-4 decision, the U.S. Supreme Court upheld the Connecticut Supreme Court’s decision.

Kelo presented the difficult issue of how to define “public use”: 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? Some takings clearly involve public use, but other takings present much more complicated scenarios. Justice Stevens, writing for the Kelo majority, noted that at one end of a spectrum, taking private property for the sole purpose of transferring to another private property owner is clearly unconstitutional, regardless of the compensation paid. 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 under the U.S. Constitution. 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.

32 545 U.S. at 473. The facts of this paragraph were drawn from id. at 473-77.

33 Id. at 477.

34 Id.

35 Even when state courts acknowledge the need to defer to the legislature, most bring in the notion of at least limited judicial review. In Franco v. National Capital Revitalization
Much of the difficulty, of course, lies in defining “public use,” a term that historically has been subject to varying interpretations. In the narrow, increasingly rejected, view, public use is seen as requiring that the condemned property be taken only for projects where the public may use the property acquired, such as roads, dams, parks, or schools, or where the property will be owned by the government. 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.

The U.S. Supreme Court has historically leaned toward the broad view of the public use power, although, until Kelo, it had not directly addressed the issue. The Kelo Court explicitly analyzed the two views of public use, and adopted the broader view for purposes of applying the federal Constitution. Justice Stevens wrote that “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” Rather, “public purpose” or “public benefit” suffices. Moreover, 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. The Court highlighted the “great respect” that the federal courts should pay

36 See Joseph J. Lazzarotti, Public Use or Public Abuse, 68 UMKC L. REV. 49, 59-61 (1999) (discussing the various interpretations and applications of the public use standard; Oswald, supra note 7, at 52-57 (summarizing changes in public use doctrine over time); see also Norwood v. Horney, 853 N.E.2d 1115, 1129-34 (Ohio 2006) (describing evolution of the meaning of “public use” over time).

37 2A NICHOLS, supra note 17, at § 7.02[12] (discussing the narrow view of public use).

38 Id. § 7.01[3].


40 545 U.S. at 479 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
legislatures in identifying local needs,\(^{41}\) 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. Rather, the Court historically has “afford[ed] legislatures broad latitude in determining what public needs justify the use of the taking power.\(^{42}\)

In short, the federal courts defer to the legislative branch, whether state or federal, in determinations of public use, applying the rational basis standard, a notoriously deferential standard.

The *Kelo* majority did not draw this deferential stance out of thin air. Rather, a long line of Supreme Court precedent underpins this result. In a few early cases, the U.S. Supreme Court had held that the federal courts did indeed have a real role in determining the legitimacy of a judicial review of a takings determination—that judicial review of public use determinations was both possible and desirable. For example, in *Cincinnati v. Vester*, decided in 1930, the Court stated:

> It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question of what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in light of local exigencies.\(^{43}\)

“But,” the Court went on to caution, “the question remains a judicial one which this Court must decide in performing its duty of

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\(^{41}\) *Id.* at 482 (quoting Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606-07 (1908)).

\(^{42}\) *Id.* at 483.

\(^{43}\) 281 U.S. 439, 446 (1930).
enforcing the provisions of the Federal Constitution.”

The abandonment of the substantive due process review of the *Lochner* era, however, also caused a retraction by the U.S. Supreme Court of its role in reviewing economic legislation, including takings questions. 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. In 1954, in *Berman v. Parker*, for example, the Supreme Court held that 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. 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, as “[o]nce the question of public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”

Justice Douglas, writing for the *Berman* Court, explained the relative roles of the federal courts and the legislature in public use determinations as follows:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been determined 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 . . . .

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44 Id.

45 “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 regulation.” Charles E. Cohen, *The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*, 46 Duq. L. Rev. 375, 378-79 (2008) (footnotes omitted). See generally id. at 386-400 (discussing *Lochner* and public use).


47 Id. at 33.

48 Id. at 35-36.

49 Id. at 32.
The *Berman* Court emphasized the limited role of the federal courts in reviewing takings, stating that the judiciary’s role in evaluating whether the eminent domain power “is being exercised for a public purpose is an extremely narrow one.”

Rather, the Court stated, “the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.”

The Court refused to intrude upon the legislature’s determination that slum clearance was in the public benefit, stating “the Congress and its authorized agencies have taken into account a wide variety of values. It is not for us to reappraise them.”

The U.S. Supreme Court again addressed the public use issue three decades later, in *Hawaii Housing Authority v. Midkiff*.

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. They argued, unsuccessfully, that because private parties would ultimately own the land, the taking did not serve a public use. Justice O’Connor, writing for a unanimous Court, wrote a sweeping statement of the legislature’s power to take: “The public use requirement is coterminous with the scope of a sovereign’s police powers,” and noted that “regulating oligopoly and the evils associated with it is a classic exercise of the State’s police powers.”

Although the *Midkiff* Court emphasized the unconstitutionality of “purely private takings,” 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.” The Court

50 *Id.*

51 *Id.* at 33.

52 *Id.*


54 *Id.* at 234-35.

55 *Id.* at 240.

56 *Id.* at 241-42.

57 *Id.* at 245.

58 *Id.* at 241.
explicitly grounded this lenient standard of review in concerns regarding deference and the relative roles of courts and legislatures. 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 eminent domain.”

Moreover, the Court drew no difference between state and federal legislatures in terms of the level of deference federal courts were to show:

State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. Thus, if a legislature, state or federal, determines that 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.

Justice O’Connor explained that “whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the [state] Legislature rationally could have believed that the [Act] would promote its objective.”

The *Midkiff* Court emphasized the separate and distinct roles of legislature and judiciary, stating that the courts must defer to legislative determinations of public use “until it is shown to involve an impossibility,” or “the use be palpably without reasonable foundation.” The Court saw its own role in reviewing such determinations as 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 the federal courts.”

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59 *Id.* at 244.

60 *Id.* (citations omitted).


62 *Id.* at 340 (quoting *Old Dominion Co.* v. United States, 269 U.S. 55, 66 (1925)).


64 *Id.* at 242-43.
In its decision in 2005 in *Kelo*, the Court displayed internal schisms over the proper role of the judiciary in public use questions (including a retreat from extreme judicial deference in a dissent written by Justice O’Connor, the author of the *Midkiff* opinion). The Court divided 5-4 in *Kelo*, and the case produced one concurrence and two dissents. In particular, the dissenting Justices agreed with the broad view of public use espoused by the majority.

*Kelo* was a direct challenge to the use of the eminent domain power in order to permit economic developments by private entities to go forward. Justice Stevens, writing for the *Kelo* majority, stated that “public use” meant “public purpose,” not use by the public,”65 and that promoting economic development was a legitimate public use for purposes of the federal Constitution.66 Justice Stevens seemed to recognize the can of worms that the majority was opening up by adopting the broad view of public use because he tried to narrow the holding a bit, explaining that “pretextual” public uses were constitutionally forbidden,67 nor could the municipality take private property “for the purpose of a conferring a private benefit on a particular party.”68

Justice Kennedy joined the majority, but wrote a separate concurrence. Although he did not argue that the rational basis standard of review should be completely jettisoned, he emphasized that the Takings Clause required “meaningful rational basis review.”69 He called for a heightened standard of review (i.e., a standard higher than the rational basis test set forth in *Berman* and *Midkiff*) for a narrow category of cases in which “impermissible

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65 545 U.S. at 479-80.

66 545 U.S. at 477. The *Kelo* Court’s discussion of deference is discussed in more detail infra notes 141-51 and accompanying text.

67 545 U.S. at 477 (quoting *Kelo* v. City of New London, 843 A.2d 500, 536 (Conn. 2004)). 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 491 (Kennedy, J., concurring).

68 *Id.* (citing *Midkiff*, 467 U.S. at 245). 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.

69 *Id.* at 491 (Kennedy, J., concurring) (italics added).
favoritism” seemed to be a risk.\(^70\)

The two dissents in *Kelo*, by contrast, argued for a narrower view of public use than that adopted by the majority. Justice O’Connor wrote a dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, in which she argued for the middle ground between the broad and narrow views, stating that property should be taken only where it “directly achieves a public benefit.”\(^71\) Justice Thomas went a step further, writing a dissent in which he argued 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.\(^72\) Moreover, Justice Thomas 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 government owns, or the public has the right to use, the taken property.”\(^73\)

Despite the efforts of the dissenters, *Kelo* stands for both 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. The net result of these two positions has been a severe retraction of the federal courts’ role in protecting private property rights. The presumption of permissibility found in the rational basis review articulated in earlier cases and affirmed in *Kelo* leads the federal courts to leave questions of public use to the legislature to decide. Post-*Kelo* decisions by the federal court appears to illustrate this view. For example, in *Goldstein v. Patacki*,\(^74\) decided in 2008, the Second Circuit stated: “[B]oth in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political

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\(^{70}\) *Id.* at 493 (Kennedy, J. concurring). He wrote: “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.” Justice Kennedy went on to note, however, that *Kelo* did not raise such concerns of impermissible favoritism because of the 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. *Id.* at 491-92.

\(^{71}\) *Id.* at 500 (O’Connor, J., dissenting).

\(^{72}\) *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.”).

\(^{73}\) *Id.* (Thomas, J., dissenting).

\(^{74}\) 516 F.3d 50 (2d Cir. 2008).
officials to the electorate, not the scrutiny of the federal courts.”

Thus, the Goldstein court concluded, federal courts leave it “to legislatures to determine, in all but the most extreme cases, whether a taking fulfills the public-use requirement.”

Similarly, the federal trial court in Hsiung v. City and County of Honolulu refused to invalidate certain city ordinances that significantly altered condemnation procedures. The court quoted Kelo and Midkiff in stating that when the legislature’s purpose is legitimate and its means rational, the federal courts are not to engage in debates over the wisdom of the takings. Should the state wish to restrict its power of eminent domain beyond that countenanced by the federal constitution, it was free to do so, but the federal courts would not interfere with the state’s sovereignty.

Many (and, most likely, the majority of) condemnations proceed at the state level, where they are undertaken by state or local governmental entities. While the avenue for challenging state takings in federal court is narrow as a result of the hands-off stance taken by the Kelo Court, property owners can and do turn to state courts, state constitutions, and state statutes for protection of private property rights. Moreover, those state constitutions and statutes can provide a higher degree of protection than that afforded by the federal constitution as the U.S. Constitution sets a minimum, not a maximum, for protection of property rights.

In particular, state courts are not bound by the U.S. Supreme Court’s determinations about what public use means in

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75 Id. at 57.

76 Id.


78 Id. at 1265 (citation omitted).

79 Id. at 1265-66.

80 Statistics on takings are notoriously hard to find because of the multitude of entities that may exercise the power and because data regarding takings are generally not tracked by those entities. See Daniel L. Chen & Susan Yeh, The Economics of Eminent Domain (Dec. 2010 draft), available at www.duke.edu/~dlc28/papers/EminentDomain.pdf, at p. 10 (“Since various levels of government, local, state, or federal, are able to invoke the power of eminent domain, it is difficult to find aggregate or even state level data on the frequency, purpose, type of properties, or type of transfer that are involved.”); GENERAL ACCOUNTING OFFICE, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 8 (Nov. 2006) (“the lack of data precludes a determination of the extent to which eminent domain has been used across the nation”).
the federal context and under the federal constitution. The *Kelo* Court itself noted this, stating:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Of course, *Kelo*’s declaration that states could set higher protections for private property rights than the federal Constitution afforded was by no means new law. Many state courts had long-recognized that their state constitutions or state statutes prohibited exercises of eminent domain that would otherwise pass federal muster. *Kelo* simply highlighted the role that state statutes and

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81 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 on the scope of the public-use clause in the federal constitution . . . .”); McCarran Int’l Airport v. Sisolak, 137 P.3d 1110, 1126 (Nev. 2006) (“states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution”) (citation omitted); Evans v. Township of Maplewood, 2007 N.J. Super. Unpub. LEXIS 2982 (noting that although *Kelo* stated the U.S. Constitution permits takings for economic development, the New Jersey Constitution “does not go so far”); Bd. of County Comm’rs v. Lowery, 136 P.3d 639, 651 (Okla. 2006) (“our state 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 noting that Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan and Maine have reached similar outcomes based on their state constitutions).

82 545 U.S. at 489.

83 As Justice Ryan noted in his widely-cited dissent in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), 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:

> That the United States Supreme Court would defer to the decisions of Congress while interpreting the Fifth Amendment or to this Court while interpreting the Fourteenth Amendment on the issue of public use, is no logical support for the proposition that this Court, in construing the Michigan constitution, should defer to the judgment of the Michigan Legislature.

*Id.* at 475. See also Bd. of County Comm’rs v. Lowery, 136 P.3d 639, 651 n.19 (Okla. 2006) (listing *pre-Kelo* decisions acknowledging greater rights under state constitutions than federal Constitution) & n.20 (listing *pre-Kelo* cases providing greater rights under
constitutions could play by announcing the limited protection now available under the federal Constitution.

*Kelo* was, in fact, 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. In this instance, the public response was one of outrage. The vocal public outcry prompted forty-three states to adopt laws that would (purportedly, at least) temper the expansive condemnation power espoused in *Kelo*. Most of these post-*Kelo* state laws focused on narrowing the broad definition of public use adopted by the *Kelo* Court and sought to limit takings for economic development and/or takings where private property was to be transferred to another private owner. A few, however, focused on the issue of judicial deference to legislative determinations and that topic has been addressed in a handful of notable post-*Kelo* state court opinions. These developments are discussed in the next Part.

II. THE EXPANDING ROLE OF THE STATE COURTS

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 U.S. Supreme Court in constitutional protections. Justice Brennan encouraged litigants to protect their individual liberties by looking beyond the U.S. Constitution, noting: “State constitutions, too, are a font of

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84 One noteworthy grass-roots effort involved a (failed) attempt to condemn Justice Souter’s home in New Hampshire to erect the “Lost Liberty Hotel” because he voted with the *Kelo* majority. See Judy Coleman, *The Power of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2.

85 See Harvey M. Jacobs & Ellen M. Bassett, *After “Kelo”: Political Rhetoric and Policy Responses*, LAND LINES, Apr. 2010, at 14, 15; 13-79F POWELL ON REAL PROPERTY § 79F:03[3] (iv) (summarizing state responses to *Kelo*). Some states were very direct in stating that their reforms were driven by anti-*Kelo* sentiment. See, e.g., 2005 AL. S.B. 68, *codified at Code of Ala. § 11-47-170(b)* (noting that the state legislature’s intent was to effectuate *Kelo*’s call to states to limit the expansive reach of takings under the Fifth Amendment under state statute or constitution if they did not like *Kelo*).

86 Most commentators seem to agree that the post-*Kelo* state reforms have been largely window dressing with little or no impact upon outcomes, however. See, e.g., James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).
individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”87

Although Justice Brennan was concerned primarily with what he perceived to be erosions of individual rights under the Bill of Rights,88 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 provision equally practicable. As Justice Brennan noted, “examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”89 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 United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law.”90

Justice Brennan, in fact, presaged the Kelo aftermath when he stated:

[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying

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88 Justice Brennan’s article focused on equal protection, Brennan, *supra* note 87, at 491, procedural due process protections for governmental benefits, *id.* at 492, and the “specific guarantees of the Bill of Rights against encroachment by state action.” *Id.* at 492.

89 *Id.* at 500.

specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.\footnote{Brennan, supra note 87, at 502.}

Justice Brennan concluded with an explicit call to lawyers to consider the protections offered by state constitutions: “I suggest to the bar that, although in the past, it might have been safe for counsel to raise only federal constitutional questions in state courts, plainly it would be most unwise these days not also to raise state constitutional questions.”\footnote{Id.}


It is not really necessary, however, to dress up this development in theoretical language, however, to understand what is going on. States have always been free to grant more protection than the federal Constitution mandates. It is simply that the retreat by the U.S. Supreme Court on federal protection makes pursuit of state protections more appealing to litigants. This is precisely what we now see happening in the eminent domain arena.

Developments in the state courts post-\textit{Kelo} suggest that takings litigants are having some success in following Justice Brennan’s suggested strategy of seeking protection under their state constitutions or statutes.\footnote{See, e.g., City of Stockton v. Marina Towers LLC, 88 Cal. Rptr. 3d 909 (Cl. App. 2009) (failure to provide adequate project description in resolution of necessity renders proposed taking invalid under state statute); Mayor and City Council of Baltimore City v. Valsamak, 916 A.2d 324 (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”); McMarran Int’l Airport v. Sisolak, 137 P.3d 1110, 1126 (Nev. 2006) (finding a regulatory taking under the state constitution and noting that \textit{Kelo} recognized states may expand their citizens’ rights beyond that provided for in the U.S. constitution); Gallethin Realty Dev., Inc. v. Borough of Paulsboror, 924 A.2d 447 (N.J. 2007) (striking down a taking based on a determination by local government that land “was in need of redevelopment” on grounds...} The most prominent such example...
is a decision by the Ohio Supreme Court, *City of Norwood v. Horney*\(^95\) The *Norwood* court deliberately availed itself of *Kelo*’s invitation to view federal constitutional protections in this area as a minimum, not a maximum. In doing so, the *Norwood* court issued an unusually detailed and thoughtful decision analyzing the relative roles of the judiciary and legislature in eminent domain matters. Given the federal courts’ explicit retreat on takings issues, *Norwood* provides a constructive example of how state courts might rediscover their role in protection of property rights.

**A. City of Norwood v. Horney**

The City of Norwood is a small, mixed residential/commercial municipality completely encircled by Cincinnati, Ohio. The city began declining economically and physically in the 1960s. In 2003, in an effort to revitalize the community and after holding a number of public and town meetings,\(^96\) the City contracted with a development company, Rookwood Partners, to redevelop part of the city. Rookwood proposed to build 2000 new apartments and condominiums, over 500,000 square feet of office and retail space, and two parking facilities.\(^97\)

Rookwood acquired most of the land needed for the project through private sales. The city then started eminent domain proceedings to acquire the land of property owners who refused to sell.\(^98\) The city code permitted the use of eminent domain for urban renewal purposes only if the land involved was a “slum, blighted, or deteriorated” or “deteriorating.”\(^99\) The city hired a consulting firm, which found that the area was “deteriorating,” and then,

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\(^95\) 853 N.E.2d 1115 (Ohio 2006).

\(^96\) 830 N.E.2d at 384.

\(^97\) 853 N.E.2d at 1124.

\(^98\) *Id.* at 1125.

\(^99\) *Id.* (quoting Norwood, Ohio, Code 163.02(b) and (c) (2005)).
based upon that finding, the city began the condemnation procedure.

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 U.S. Supreme Court precedent and upheld the condemnation of the property owners’ parcels on the basis that the parcels were located within a “deteriorating area.” 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 and, second, that the redevelopment plan was a valid public use under the Ohio constitution because condemning “deteriorating land for an urban renewal project . . . is conducive to the public welfare.” In effect, the intermediate appellate court predicted the reasoning of *Kelo*, which was issued by the U.S. Supreme Court a few weeks later.

However, the Ohio Supreme Court unanimously reversed. Although the Ohio Supreme Court had *Kelo* before it at the time of its decision, it declined to adopt the U.S. Supreme Court’s reasoning, instead issuing a long and detailed opinion in which it delved into considerable detail about the nature of public use and the role of judicial deference in takings cases. The court noted the “inherent tension” between individual private property rights and the State’s power of eminent domain and the need to protect private property rights. 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.”

The *Norwood* court then noted the increasingly broad notion of public use adopted by the U.S. Supreme Court in *Kelo* and earlier cases, which had led to holdings that “general economic development is a public use.” The court addressed specifically

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101 830 N.E.2d at 388, 390.

102 *Id.* at 391.

103 853 N.E. at 1130. The Ohio Constitution actually phrases this requirement in language somewhat different from that of the federal Constitution: “Private property shall be ever held inviolate, but subservient to the public welfare. . . . [W]here private property shall be taken for public use, a compensation therefor shall . . . be made . . . .” Ohio Const. art. I, § 19.

104 853 N.E.2d at 1135.
the two issues raised in *Kelo*: (1) the degree of deference courts should afford legislative determinations of public use and (2) the scope of public use. The *Norwood* court found that earlier holdings were at least in part the result of courts erroneously affording “artificial judicial deference” to legislative determinations of public use.\(^\text{105}\) The court also 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.\(^\text{106}\) Thus, the *Norwood* court held, economic development alone cannot satisfy the public use requirement of the Ohio constitution.\(^\text{107}\)

**B. Understanding the Lessons of Norwood**

*Norwood* is worthy of scholarly attention\(^\text{108}\) because the court did not hesitate to confront directly and in detail the thorny issue of judicial deference and the scope of public use. Three key points, in particular, are highlighted in *Norwood*. First, the degree to which a court approaches the issue of public use as a judicial question influences tremendously the degree of scrutiny the taking receives from the court. The level of scrutiny, of course, greatly affects the likelihood that the taking will survive challenge.

\(^{105}\) *Id.* at 1136.

\(^{106}\) *Id.* at 1138, 1141. The court cited to a recent decision of the Michigan Supreme Court, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), in support of its argument.

\(^{107}\) 853 N.E.2d at 1142 (“An economic or financial benefit alone is insufficient to satisfy the public-use requirement . . . .”). 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 domain power. 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 a “deteriorating area” was. *Id.* at 1145. 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 exercise of eminent domain by the City of Norwood.

Second, courts vary significantly in the level of deference which they feel they need to offer to legislative determinations of public use. The degree of deference afforded varies widely between federal and state courts and among state courts, as well as evolving over time (with the trend in the direction of increased deference). And third, deference notions are closely tied to separation-of-power notions. Discussion of judicial review of public use determinations necessarily implicate the relationship between and relative roles of legislatures and courts. All three factors, taken together, have a tremendous impact on the type of judicial review afforded decisions to take.

1. Public Use as a “Judicial Question”

The Norwood court discussed the relative roles of the courts and legislature in takings cases in some detail. The court explained that the lower courts had mistakenly interpreted the standard of review in takings cases as one of absolute deference to legislative determinations.\textsuperscript{109} Rather, the proper standard of review in Ohio requires that the court conduct an independent review of the legislature’s decision to take.\textsuperscript{110} As the Norwood court put it, “‘defining the parameters of the power of eminent domain is a judicial function.’”\textsuperscript{111} Moreover, the court went on to state:

There can be no doubt that our role—though limited—is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state takes no more than that necessary to promote the public use, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose.\textsuperscript{112}

The Norwood court acknowledged that legislatures should be afforded broad discretion in eminent domain matters, but noted that “it is for the courts to ensure that the legislature’s exercise of

\textsuperscript{109} 853 N.E.2d at 1138-39

\textsuperscript{110} Id.

\textsuperscript{111} Id. at 1137 (quoting Worthington v. Columbus, 796 N.E.2d. 920 (Ohio 2003)).

\textsuperscript{112} Id. at 1138 (citations omitted).
power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or in bad faith.\textsuperscript{113} The court emphasized the independent role of the judiciary,\textsuperscript{114} framing this role in the context of “the courts’ traditional role as guardian of constitutional rights and limits.”\textsuperscript{115}

When we examine the law of other states, we see variation on how the issue of public use as a judicial question is addressed. Although some state constitutions\textsuperscript{116} and statutes\textsuperscript{117} provide that public use is a judicial question, in other instances the courts

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 1138-39 (“we thus act with deference to legislative pronouncements, but we are independent of them”); see also id. at 1137 (“A court’s independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent upon a private entity.”).
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} See, e.g., ARIZ. CONST. art. 2, § 12 (“Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use is to 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 (“whenever an attempt is made to take private property for 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. § 4 (property shall not 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”) (post-\textit{Kelo} amendment); MISS. CONST. art. 3, § 17 (“whenever 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 (“when 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 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 (“the term “public use” is to be defined by the General Assembly”).
  \item \textsuperscript{117} See ARIZ. REV. STAT. ANN. § 12-1132 (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”); 66 OKLA. ST. § 57 (2010) (“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. §§ 5.015 (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”); REV. CODE WASH. § 8.12.090 (“Whenever an attempt is made to take private property, for a use alleged to be public . . . ., the question of whether the contemplated use be really public shall be a judicial question . . . .”).
\end{itemize}
themselves address this issue. The notion of public use as a judicial question has also evolved substantially over time, especially at the federal level. Early federal decisions, for example, indicated that determinations of public use were judicial, not legislative questions. In 1908, in *Hairston v. Danville & Western Ry. Co.*, the U.S. Supreme Court stated that “the one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question.”

By 1925, however, the Supreme Court had started to supplant this notion with language that limited the role of the judiciary, although the limitation was generally posed in the nature of a need for judicial deference to legislative determinations in takings situations, rather than a wholesale abandonment of the notion of public use as a judicial question. In 1946, the Supreme Court stated in *United States ex rel. Welch*: “We think 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.” Although the concurring and dissenting judges in *Welch* expressed their views that public use remained a judicial question, and that the majority undoubtedly realized this, the language is a prescient precursor to later eminent domain cases decided by the Supreme Court. The Berman-Midkiff-Kelo line of cases put paid to the notion of

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118 See, e.g., Rhode Island Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87, 96 (R.I. 2006) (stating “[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); Bassett v. Swenson, 5 P.2d 722, 725 (Idaho 1931) (what is a “public use” is a judicial question); Logan v. Stogdale, 23 N.E. 135, 135 (Ind. 1890) (“whether the use is a public one is a judicial question, and not a legislative one”).

119 208 U.S. 598 (1908).

120 Id. at 606.

121 See, e.g., Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (a legislative determination of public use is “entitled to deference until it is shown to involve an impossibility”).

122 327 U.S. 546, 551-52 (1946).

123 Id. at 556 (Reid, J., dissenting).

124 Id. at 557-58 (Frankfurter, J., concurring).

public use as a judicial question at the federal level,\textsuperscript{126} however, and today the federal courts have essentially ceded their role on this issue to the legislature.

State courts—even those without explicit constitutional or statutory provisions on point—are more likely than federal courts to treat “public use” as a judicial question. State courts are more apt to see a meaningful role for themselves in reviewing whether a particular taking satisfies the public use requirement, and they tend to resist attempts by state legislatures to reduce judicial power in this arena.\textsuperscript{127} So, for example, the Rhode Island Supreme Court, in \textit{Rhode Island Dev. Corp. v. The Parking Co.},\textsuperscript{128} emphasized “the rebuttable nature of the legislative determination of public use”\textsuperscript{129} and affirmed the role of judicial review when owners challenged public use: “Although we accord deference to the findings of the condemning authority in a declaration of condemnation as well as the enabling statute upon which the takings rests, these findings are far from dispositive.”\textsuperscript{130} Rather, the court must examine “the particular facts and circumstances” of each case.\textsuperscript{131} Although the court must approve those takings “designed to protect the public health, safety, and welfare,” even if the taking results in “an incidental benefit to private interests,”\textsuperscript{132} the court emphasized that public use nonetheless is a judicial question that requires the court

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\item \textsuperscript{126}See supra Part I. A.
\item \textsuperscript{127}See, e.g., High Ridge Ass'n, Inc. v. County Comm'r's of Carroll County, Maryland, 660 A.2d 951 (1995) (whether a use is a public use is a judicial question, and the legislature cannot simply declare a use to be public); Lakehead Pipe Line Co. v Dehn, 64 N.W.2d 903 (1954) (“The question of whether the proposed use is a public use is a judicial one.”) (quoting Cleveland v Detroit, 33 N.W.2d 747 (1948)).
\item \textsuperscript{128}892 A.2d 87 (R.I. 2006).
\item \textsuperscript{129}Id. at 101.
\item \textsuperscript{130}Id. at 104.
\item \textsuperscript{131}Id.
\item \textsuperscript{132}Id. The court ultimately struck down the taking, finding it was motivated by an impermissible desire to increase revenue and not a legitimate public purpose. See generally Bird & Oswald, supra note 10, at 113-22 (discussing relationship between public use and necessity).
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to carefully scrutinize the good faith and due diligence on the part of the condemnor. 133

Many courts draw a sharp distinction between whether a use is public (“public use”), which they deem a judicial question, and whether the power of eminent domain should be exercised (“necessity”), which they deem a legislative question. As the New York Court of Appeals explained in 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. Of the necessity for the exercise of the right of eminent domain, the legislature is the judge . . . . 134

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.” 135

The Rhode Island Dev. Corp. court explicitly drew this traditional distinction between “necessity” and “public use,” 136 stating that the “necessity and expediency” of a specific taking is a legislative question outside the purview of the court. 137 Legislative declarations of “public use,” by contrast, while “instructive” and “entitled to deference,” are nonetheless subject to judicial

133 892 A.2d at 104-05.

134 In re City of Brooklyn, 38 N.E. 983, 989 (N.Y. 1894), aff’d, 166 U.S. 685 (1897). Early commentators also agreed with this view. See, e.g., 1 John Lewis, A Treatise on the Law of Eminent Domain in the United States 499 (“Private property can taken only for public use, and . . . what is a public use is a question for the courts.”) and 503 (“The question of necessity is distinct from the question of public use, and . . . the former question is exclusively for the legislature.”) (3d ed. 1909); 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) (“It is a legislative question whether the public exigencies require the appropriation, but it is a clearly a judicial question, whether a particular confiscation of land has been made for a public purpose.”). See generally Bird & Oswald, supra note 10.

135 Id.

136 See supra note 134 and accompanying text.

137 892 A.2d at 96.
review. As the court explained, “[I]t is not the function of this Court to dissect a legislative declaration to glean a public purpose; nor will we engage in a syllogistic exercise in order to conclude that a particular taking was for a valid public purpose.” Rather, the court will strike down takings shown to be arbitrary, capricious, or in bad faith.

2. Federal v. State Court Deference

One thing that all of the Justices in Kelo, both majority and dissenting, agreed upon was that the U.S. Supreme Court should generally not attempt to “second-guess” the wisdom of local legislatures. As the Kelo majority noted, the Supreme Court has a longstanding policy of judicial deference to legislative determinations of what the public needs. However, the Kelo Court splintered sharply over the degree and type of deference appropriate in such instances.

The majority, of course, adhered to the rational relationship test that it traditionally applies to takings (i.e., was the taking rationally related to a conceivable public purpose?). The general parameters of the rational basis standard can lead to virtual rubber-stamping of legislative decisions.

Justice Kennedy’s concurrence agreed with the majority’s deferential rational relationship test, but also stated that a court applying this test should nonetheless strike down a private taking with only pretaxual or incidental public benefits “just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly

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138 Id. at 101.
139 Id. at 103.
140 Id. at 104-05.
141 See 545 U.S. at 488; id. at 499 (O’Connor, dissenting); id. at 520 (Thomas, J., dissenting).
142 In Kelo, the local legislature found that economic development would lead to increased jobs and tax revenue, and revitalization of an economically depressed city, even though all concerned agreed that the plaintiffs’ properties were not themselves blighted.
143 See Gideon Kanner, The Public Use Clause: Constitutional Mandate or “Horatory Fluff?”, 33 Pepp. L. Rev. 335, 363 (2006) (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”).
intended to injure a particular class of private parties, with only incidental or pretextual public justifications.\textsuperscript{144} Unlike the majority, Justice Kennedy did not reject out of hand the possibility of a more stringent standard for a more narrowly drawn category of takings:

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. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.\textsuperscript{145}

Justice O’Connor’s dissent, by contrast, took strong issue with the majority’s treatment of deference:

We give considerable deference to legislatures’ determinations about what governmental activities would benefit 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 horatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.\textsuperscript{146}

Justice O’Connor acknowledged that in certain circumstances, property could be taken to be used for purposes that ultimately turned out to be private. She also acknowledged that the Court would defer to legislative judgments about public purpose. But, she wrote, in order to preserve the integrity of the Fifth Amendment, the courts must retain and use their “extremely narrow” role in reviewing legislative determinations of what is a

\textsuperscript{144} 545 U.S. at 491 (Kennedy, J., concurring).

\textsuperscript{145} \textit{Id}. at 493 (Kennedy, J., concurring).

\textsuperscript{146} \textit{Id}. at 497 (O’Connor, J., dissenting).
public use.\textsuperscript{147}

Justice Thomas, in his dissent, provided a detailed analysis of the development of the Supreme Court’s deferential stance on legislative determinations of public use.\textsuperscript{148} He characterized 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.”\textsuperscript{149} He wrote that “[t]here is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a ‘public use,’”\textsuperscript{150} and concluded that the Court’s position on judicial review of property rights was inherently inconsistent and incongruous:

[I]t is backwards to adopted 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 individual’s traditional rights in real property.”\textsuperscript{151}

Post-\textit{Kelo} federal court decisions, of course, reflect the deferential stance toward legislative takings mandated by the \textit{Berman-Midkiff-Kelo} line of precedent. For example, the Second Circuit stated in 2008, in \textit{Goldstein v. Pataki},\textsuperscript{152} that the federal courts’ focus has shifted over the past century. The courts look at what type of government action creates a taking and what amount of compensation is needed to be “just,” but leave the public use requirement to the legislature “in all but the most extreme cases.”\textsuperscript{153} The Second Circuit acknowledged that the federal courts do play a role in the public use debate, but noted that, in the words of \textit{Midkiff} and \textit{Berman}, that role “is ‘an extremely narrow one.’”\textsuperscript{154}

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  \item \textsuperscript{147} \textit{Id.} at 500 (O’Connor, J., dissenting).
  \item \textsuperscript{148} \textit{Id.} at 520 (Thomas, J., dissenting).
  \item \textsuperscript{149} \textit{Id.} at 519 (Thomas, J., dissenting).
  \item \textsuperscript{150} \textit{Id.} at 518 (Thomas, J., dissenting).
  \item \textsuperscript{151} \textit{Id.} at 519 (Thomas, J., dissenting).
  \item \textsuperscript{152} 516 F.3d 50 (2d Cir. 2008).
  \item \textsuperscript{153} \textit{Id.} at 57, 58.
  \item \textsuperscript{154} \textit{Id.} (citing \textit{Midkiff}, 40-7 U.S. at 240; \textit{Berman}, 348 U.S. at 32).
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Similarly, in *Pena v. Fortuno*, decided in 2010, the First Circuit stated: “Public policy disagreements about the best of several rational means to accomplish legitimate public purposes are not the grist of a Taking Clause claim.” The court emphasized the “necessarily deferential” standard of review applied to public use questions.

However, state courts can, and many do, reject the deferential stance taken by the federal courts. The Ohio Supreme Court in *Norwood*, while acknowledging the role of judicial deference to legislative determinations, also emphasized the importance of the state courts not abandoning their role in public use questions:

> The scrutiny by the courts in appropriation cases is limited in scope, but it clearly remains a critical constitutional component. The sovereign right to take property may be conferred by the legislature on municipalities, which enjoy broad discretion in determining whether a proposed taking serves the public. But it is for the courts to ensure that the legislature’s exercise of power is not beyond the scope of its authority and that the power is not abused by irregular or oppressive use, or use in bad faith.

Justice Zarella also addressed this in his partial concurrence / partial dissent in the Connecticut Supreme Court’s decision in *Kelo*. While Justice Zarella conceded that “it is well established that judicial deference to determinations of public use by state legislatures is appropriate,” he noted that “judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility.”

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155 604 F.3d 7 (1st Cir. 2010).

156 *Id.* at 18.

157 *Id.* (citing *Midkiff*, 467 U.S. at 242-43; *Goldstein v. Pataki*, 516 F.3d 50, 57, 58 (2d Cir. 2008)).

158 853 N.E.2d at 1138.


160 *Id.* at 582.
Some courts seem to find it easier to employ judicial review in the context of challenges of pretext. For example, in *County of Hawaii 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.” The Hawaii Supreme Court, however, stated that the lower courts had an obligation under both the state and U.S. constitutions to consider whether the asserted public purpose behind the taking was pretextual, 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.” 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 present in this case) were subject to challenges on these grounds. Similarly, in *Middletown Twp. 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.

3. 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. Unfortunately, this issue cuts both ways—in favor of both a more deferential and a less deferential review of public use determinations. On the one hand, the separation of powers doctrine requires that each branch of government respect the relative roles of the other branches. On the other hand, 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 permeate early articulations of eminent domain law. Philip Nichols, the author of an influential

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161 198 P.3d 615 (Haw. 2008).
162 *Id.* at 638.
163 *Id.* at 647.
164 939 A.2d 331 (Pa. 2007).
165 *Id.* at 338.
early treatise on eminent domain law, stated: “The 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.”
Nichols, in fact, articulated an early version of the rational basis
standard of review for public use, stating: “[T]he question, as it
presents itself to the courts, is not whether the use for which the
property is taken is public, but whether the legislature might
reasonably consider it public.” Nichols acknowledged, however,
that the court’s duty was to declare unconstitutional any taking
“the purpose for which” lacked any “real and substantial relation to
the public use.”

The Norwood court viewed the separation-of-powers
d Doctrine as enforcing, not limiting, the courts’ role in public use
disputes. 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. Each branch has its own respective role to
play, and it ought not to abdicate that role to another branch.
“[D]eferential review,” the Norwood court stated, is not satisfied
by superficial scrutiny.”

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.” Thus, the court concluded, “The scrutiny by the courts
in appropriation cases is limited in scope, but it clearly remains a
critical constitutional component.”

The U.S. Supreme Court seems to adopt the opposite view,
essentially stating that the remedy lies in the ballot box and not the
federal courtroom. The Court stated in an 1877 decision in Munn v.
Illinois: “We know that [economic regulation] is a power which

166 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN: A TREATISE ON THE PRINCIPLES
WHICH AFFECT THE TAKING OF PROPERTY FOR THE PUBLIC USE 34 (2d ed. 1917).
167 Id. at 154.
168 Id. at 155.
169 853 N.E.2d at 1137.
170 Id.
171 Id. (citing U.S. ex rel. TVA v. Welch, 327 U.S. 546, 556-57 (1946)).
172 Id. at 1138.
may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people should resort to the polls, not to the courts.” 173 Similarly, the Second Circuit noted in Goldstein v. Pataki: 174 “[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.” 175

Commentators, too, have argued that respect for the relative roles of the co-equal branches of government should lead courts to be reticent in intruding too far into legislative decisionmaking. 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 just 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. 176

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

Relying upon the political process is no panacea, however, as we have no assurance that elected officials are either wiser or more impartial in their decision-making than the courts or even that the political process is effective in constraining their behavior. Professors Riker & Weingast wrote:

> [N]either the Court nor legal scholarship has provided the theoretical underpinnings for the presumption of the adequacy of legislative

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173 Munn v. Illinois, 94 U.S. 113, 134 (1877).

174 516 F.3d 50 (2d Cir. 2008).

175 Id. at 57.

judgment and, indeed, neither has even asked whether legislative judgment really works. Fundamental questions remain unanswered: What protection is there against members of today’s majority from providing private, redistributive benefits to themselves under the guise of political purposes, and at the expense of some minority of owners and the efficiency of production? . . . Given that legislative power can be abused, how do we distinguish between legitimate public purposes and those undertaken solely for private redistribution? May not the articulation of public benefits simply be rhetorical window dressing to rationalize private redistribution? And, given this possibility, is it reasonable to require, as the Court announced in *Munn*, that those who against particular regulations must appeal to the polls, not to a court?\textsuperscript{177}

However, Riker and Weingast go on to write 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.”\textsuperscript{178} Riker and Weingast thus identified the problem in clear and compelling terms, but did not provide a solution.

Horatory calls for greater supervision of the legislative process by the judiciary are common, but roadmaps for doing that effectively and appropriately are harder to devise. Professor James Ely, for example, argued that the courts must oversee the democratic process, while conceding that when the court is convinced that the majority is not abusing the process, the legislative determination should stand.\textsuperscript{179} The vexatious question, of course, is how does a court determine that the process is not being abused?

These problems, inherent in the relative roles of courts and


\textsuperscript{178} Id. at 400.

\textsuperscript{179} JAMES ELY, THE GUARDIAN OF EVERY OTHER RIGHT (2007).
Legislatures, are laid out in stark relief in the takings arena. 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. As legislatures have increasingly turned their attention to socio-economic regulation, however, the courts have become even more deferential to legislative determinations of the proper ends of government. In large part, this can be traced to notions of separation of powers—questions regarding the proper ends of government “demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake,” and so the courts often defer to the “more democratic” branches—the legislature and the executive branch—to address these difficult political questions.

In sum, although notions of separation-of-powers and the respective roles of judiciary and legislature no doubt underlie much of the analysis in this area, those concepts are only marginally helpful in delineating where the lines between judicial and legislative questions should be drawn in the takings arena.

III. CONCLUSION

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

James Madison wrote in The Federalist Papers that “[g]overnment is instituted no less for the protection of the

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180 See Thomas Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 64 (1986).

181 Id. at 67.

182 Id.

183 Id.
property, than of the persons, of individuals.” Contrary to this lofty statement of 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, and perhaps reflects the declining stature given to property rights by the federal courts vis-à-vis other types of rights, such as privacy or rights afforded to accused criminals. 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 what is fair or by calling upon states to adopt more stringent standards if they or their citizens object to the lax federal approach or more lenient federal judicial standard of review. 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 because of the constitutional guarantee of just compensation. Perhaps courts see the just compensation as an equivalency to private property rights, even though property owners do not. At the end of it, though, speculation about the federal courts’ motivations is unproductive in terms of the extent and type of relief property owners can hope for from the federal courts. We can see that the Supreme Court itself is not completely comfortable with where its path has taken it; e.g., the schism in *Kelo* and the *Kelo* majority’s effort to avoid the more pressing problems created its lenient standard of review by articulating a pretext exception that is hard to articulate and difficult to apply.

Although we could propose new rules for the Supreme Court to adopt in this context, such proposals do little to assist property owners facing difficult challenges takings today. The only

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184 The Federalism Papers No. 54 (J. Madison) (available at www.thefoundingfathers.info/federalistpapers/fedindex.htm).

185 Justice Thomas made precisely this point in his dissent in *Kelo*: “We would not defer to a legislature’s determination of the various circumstances that establish, for example, 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.” 545 U.S. at 476 (citations omitted).

186 See generally Cohen, supra note 45, at 401-06 (discussing why just compensation alone does not suffice to justify the use of eminent domain).
realistic advice we can give such property owners is to turn to the state courts. As Justice Brennan pointed out, “state courts no less than federal courts are and ought to be the guardians of our liberties,”\textsuperscript{187} and “[w]ith federal scrutiny diminished, state courts must respond by increasing their own.”\textsuperscript{188}

Under current takings doctrine, state courts certainly offer more hope for property owners challenging takings than do federal courts. Although the state rules are hardly 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.

\textsuperscript{187} Brennan, supra note 87, at 491.

\textsuperscript{188} Id. at 503.