

A BLESSING OR A CURSE? THE POTENTIAL IMPACT OF
POST-*KELO* LEGISLATION ON HISTORIC PRESERVATION

by

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(Under the Direction of Pratt Cassity)

ABSTRACT

The Supreme Court eminent domain case *Kelo v. City of New London* outraged the majority of Americans. The anger was due in part to misunderstandings about the facts and holding of the case. This thesis explores the history and law of eminent domain and the public use requirement for a better understanding of the *Kelo* holding as a starting point for an examination of the sources of preservationists' ambivalence toward the power of eminent domain. While eminent domain can be a powerful tool for preservation-centric developments and the acquisition of endangered properties, it also has left a tragic legacy of demolition of historic buildings in the name of blight remedy. Finally, this thesis examines the potential impact on preservation of post-*Kelo* statutes from three states: Ohio, Alabama, and Georgia.

INDEX WORDS: Historic Preservation, *Kelo v. City of New London*, Eminent Domain, Public Use, Public Purpose, Blight, *Berman v. Parker*, Urban Renewal

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DEDICATION

To Momelle

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I would like to thank Mom and Dad for their unfailing love and support.

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I. INTRODUCTION

A. THE UPROAR

On June 23, 2005, the Supreme Court handed down its decision in the case of *Kelo v. City of New London*.¹ Immediately, a furor irrupted across the country. Legislators, grasping the tenor and extent of the rage, immediately began talking about the legislation they would pass to remedy eminent domain abuse and set straight the Court's wrongheadedness that wrought such grave injustice. Hyperbole was high and the judiciary was under attack.

The first wave of reporting was invariably full of contemptuous anger. The degree of anger correlated closely with the level of misinformation about the facts and holding of the decision and the history of eminent domain.²

Public opinion was fueled by repeated media saturation that misrepresented the facts of the case as well as the holding. The media was not alone in the incitement. The Institute for Justice, the libertarian public interest law firm that argued on behalf of the property owners in *Kelo*, has also helped stoke the public's anger with an extensive public relations campaign. The Castle Coalition, an offshoot from the Institute for Justice, maintains an interactive website dedicated to eminent domain reform. An Institute for Justice attorney has documented 10,000

¹*Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

²*See* Patricia Salkin, *Irresponsible Legislating: Reeling in the Aftermath of Kelo*, 34 REAL EST. L.J. 375, 375 (2005) ("This media frenzy has caused, in many instances, an unfortunate hysteria based largely on misunderstandings of law and fact.").

instances of actual or threatened “abuse of eminent domain” in the United States over a five year period.³ The property rights movement has done an excellent job portraying a parade of horrors marching from *Berman* through *Kelo*. They have been successful in framing the entire issue as greedy developers in cahoots with corrupt politicians with a complicit court watching and winking. On the other side, the American Planning Association and local governments seem to be almost silent on the subject. Those with interests in keeping eminent domain as a tool for redevelopment must begin to accumulate and publicize positive examples of its use if they intend on making a dent on public opinion in their favor.

The vociferous reaction of the public to the *Kelo* case caught legally educated observers off-guard because, to them, the *Kelo* decision was consistent with a long line of Supreme Court precedent.⁴

B. PUBLIC MISCONCEPTIONS

The Fifth Amendment of the United States Constitution reads “nor shall property be taken for public use without just compensation.” Seizing on what they consider to be the plain meaning and effect of the words “public use,” many people assumed that the holding in *Kelo* must have been a radical distortion of precedent, when in fact it fit quite comfortably with prior holdings. The Supreme Court adopted early on a broad conception of public use, which defines

³DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2006).

⁴*Cf.* Thomas W. Merrill, *Six Myths About Kelo*, 20 PROB. & PROP. 19, 19 [hereinafter Merrill, *Six Myths*] (Jan.–Feb. 2006) (“The initial reaction by lawyers familiar with the case was one of lack of surprise. Within days, however, Internet bloggers, television commentators, and neighbors talking over backyard fences decided *Kelo* was an outrage.”).

“use” as benefit or utility.⁵ In fact, most state courts have rejected a strictly narrow use-by-the-public conception of the public use requirement in their own constitutions in favor of a broad interpretation.

Another misconception arising out of the *Kelo* decision is that it automatically permitted all governments to condemn property for private parties for economic development. This stems from a basic misunderstanding of how our system of federalism operates and the holding of the case. The decision, while binding on the federal courts, leaves state courts to interpret their constitutions and statutes as drafted by state legislatures.

One incident that has garnered press, no doubt because of its elements of just deserts, is the attempt by a California businessman to garner support in Justice Souter’s hometown of Weare, New Hampshire to use eminent domain to acquire Souter’s family homestead in order to turn it into the “Lost Liberty Hotel.”⁶ Besides the inherent malicious incivility of the attempt, the publicity stunt furthers misinformation about the *Kelo* decision. As explained below, this type of arbitrary, vindictive grab of private property would be held unconstitutional under any *Kelo* analysis.

Popular misinformation from the press and some commentators about the *Kelo* decision stands in the way of a coherent discussion about the proper role and limits on the use of eminent domain within communities.

⁵See *infra* notes 66–70 and accompanying text.

⁶John Tierney, *Supreme Home Makeover*, N.Y. TIMES, Mar. 14, 2006, at A27.

C. OVERVIEW

This thesis aims in part to clarify the holding of *Kelo*, explain its significance, and explain what it does *not* do in order to serve as a counterbalance to the shrill voices who decry the decision with either unwitting or deliberate distortion of history, law, and the workings of our federalist system. It does not follow that in so doing the thesis necessarily defends the principles of the underlying legislative decisions. In fact, the first step is realizing that a clearer understanding of the facts, precedent, and holding of the *Kelo* case does not command a decision about the ultimate issue: the wisdom of the current use of eminent domain by individual communities for economic development. As one commentator has observed in an article debunking six *Kelo* myths, “flogging Kelo is not a particularly illuminating way to start a constructive dialogue about what is right and wrong with eminent domain.”⁷

In that same vein, this thesis will not reach an ultimate decision about the soundness of the use of eminent domain in contexts other than the historic preservation context, or even whether eminent domain abuse is a real phenomenon demanding legislative remedy. That issue remains to be debated and is currently being debated, ideally with empirical evidence. The hope is that the issue will be debated with a better understanding of the history of eminent domain, the public use requirement, and the *Kelo* case; and that preservationists will join in the debate if they intend on keeping one of the most powerful tools at their disposal. To this end, preservationists can ill afford to continue to allow property rights advocates to frame the debate and supply the publicity and entire history.

⁷Merrill, *Six Myths*, *supra* note 4, at 19. Merrill writes that these “myths have been propagated about the decision . . . [and] are likely to cloud our collective judgment about how to reduce abuses of eminent domain and provide greater security for property rights, if they are not dispelled.” *Id.*

There is something larger at stake as well. The effectiveness with which property rights perspectives have dominated virtually all the reporting of the *Kelo* decision should give pause to preservationists. Historic preservation “has been one of the broadest and longest-lasting land-use reform efforts in this country,”⁸ and, as such, has always been in the sights of the property rights movement. While it would be foolish to unthinkingly and wholeheartedly support the myriad of uses of eminent domain the *Kelo* decision theoretically permits, it would be just as foolish to continue to allow the property rights perspective, with all its misinformation about the supposed history of sacred, control-free property rights, to go unchallenged. This is obviously a precarious line to tread: preservationists cannot afford to have only the property rights viewpoint heard, but they must also avoid being cast as unthinking supporters of an immensely unpopular decision.⁹

The second chapter of this thesis will lay the foundation for an understanding of the *Kelo* case historically and legally. It will roughly sketch the changing formulations of the “public use” requirement of eminent domain from the colonial period through *Kelo*. By so doing, the chapter will demonstrate that the holding of the case, far from being revolutionary, was the natural progeny of prior cases and practice. It will likewise demonstrate that the holding exhibited the proper deference to legislative and state court decisions about what constitutes a public use and the appropriate uses for eminent domain. In this regard, it was a strong statement of federalism and separation of powers usually—in other contexts—consistent with conservative legal thought.

⁸Max Page & Randall Mason, *Introduction to GIVING PRESERVATION A HISTORY* 1, 3 (Max Page & Randall Mason eds., 2004).

⁹Describing a practical way of navigating these public hazards is, thankfully, beyond the scope of this thesis. It is mentioned merely to point out that the stakes are indeed high and that preservationists must begin finding a way to so navigate.

While the second chapter charted the changes in conception of the public use requirement of eminent domain, the third chapter will explore historic preservation's relationship with and use of eminent domain. The outright purchase of historic properties was accepted by courts early on as a valid use of the eminent domain power.¹⁰ In a contemporary context expropriation of endangered properties remains an important failsafe; however, local governments are more likely to use or threaten to use eminent domain for preservation-centric economic development projects. After exploring the positive associations with eminent domain, the third chapter will examine reasons why preservationists might be uncomfortable with the *Kelo* decision. The continued condemnation and demolition of blighted property is a legacy of *Berman v. Parker* and Urban Renewal. Blight removal can be unnecessarily destructive to historic resources. Eminent domain is also used to assemble large parcels of land for large-scale development projects that do not always take into consideration historic resources. Finally, some commonly held values and interests of preservationists may make many of them uncomfortable with the use of eminent domain for economic development.

While the *Kelo* holding was the proper application of the law to the facts in that case, the holding is in the process of becoming largely moot. Likewise, the complex relationship between historic preservation and eminent domain will likely change radically in some states. This is because at least forty-seven states¹¹ have pending or enacted legislation drafted in reaction to the media and public outcry following the *Kelo* decision.

The fourth chapter will analyze the post-*Kelo* eminent domain statutes of three states: Ohio, Alabama, and Georgia. These statutes illustrate different approaches to the perceived

¹⁰*See infra* notes 180–89 and accompanying text.

¹¹Press Release, Castle Coalition, Ohio Eminent Domain Task Force Releases Initial Recommendations (April 3, 2006), http://castlecoalition.org/media/releases/4_3_06pr.html.

problem of the use of eminent domain for economic development. Ohio's act establishes a moratorium on the use of eminent domain for economic development and creates a legislative task force to study the problem and make recommendations. Alabama's statute purports to prohibit takings for private uses, but keeps intact a rather large exception for economic development and urban renewal projects in blighted areas. Finally, Georgia's statute is comprehensive, altering many substantive and procedural aspects of Georgia eminent domain law. While it maintains an exception for the remedy of blight, the Georgia statute defines blight quite narrowly and eliminates the designation of blighted areas. Chapter four discusses how these statutes' provisions could have both positive and negative effects for preservation.

II. DEVELOPMENT OF EMINENT DOMAIN LAW AND THE “PUBLIC USE” REQUIREMENT

“It is not black magic, but merely one of the powers of government, to be used along with the other powers as long as some ordinary purpose of government is served.”¹²

Many misunderstandings—or distortions—about the law of eminent domain and public use surfaced after *Kelo*. On the simplest level, it is common to hear the assertion that prior to *Kelo* government could not condemn private land and transfer it to private parties under any circumstances. A riff on that misunderstanding holds that before *Kelo*—though some more accurately place the point at *Berman v. Parker*¹³—property was only taken for traditional uses, like bridges, roads, and schools. A more sophisticated misunderstanding or distortion is that *Kelo* marked the first time the Supreme Court validated a taking for economic development. This Chapter will sketch the development of the public use requirement of eminent domain through *Kelo*. In so doing, it attempts to clarify many of the misunderstandings about the *Kelo* decision, explain why the decision is not novel, and lay the foundation for a discussion of eminent domain reform.

¹²William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 597 (1972).

¹³*Berman v. Parker*, 348 U.S. 26 (1954).

A. THE POWER OF EMINENT DOMAIN

In the second edition of his definitive treatise, Nichols defines eminent domain as “the power, inherent in a sovereign state, of taking or of authorizing the taking of any property within its jurisdiction for the public good.”¹⁴ Lewis defines it as “the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the general welfare.”¹⁵ Behind these seemingly straightforward definitions is a body of scholarship that demonstrates a lack of consensus as to the origin and nature of the power as well as the exact constraints on the use of the power.

1. The beginnings of eminent domain. The historical origins of the power of eminent domain are obscure. Some place its first recorded use in the Old Testament with King Ahab’s taking of Naboth’s vineyard.¹⁶ Commentators have inferred that the Romans may have used eminent domain based on their straight roads and aqueducts, though little is definitively known.¹⁷

¹⁴1 PHILIP NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1 (2d ed. 1917).

¹⁵1 JOHN LEWIS, *EMINENT DOMAIN* § 1 (3d ed. 1909).

¹⁶*See* 1 NICHOLS ON *EMINENT DOMAIN* §1.2 (2005) (citing eighteenth- and nineteenth-century French jurist Merlin de Douai as originator of claim of biblical basis of power). Stoebuck dispenses with this notion, noting that “the king had no such legal power, for he had to have Naboth stoned to death before he could make the vineyard his.” Stoebuck, *supra* note 12, at 553. *See also* Matthew P. Harrington, “*Public Use*” and the Original Understanding of the So-Called “*Takings*” Clause, 53 *HASTINGS L.J.* 1245, 1249 n.9 (2002).

¹⁷*See* 1 NICHOLS, *supra* note 14, § 2 (noting that while sacrosanct rights of Roman citizens raise doubts about use of eminent domain, “aqueducts and straight military roads seem to indicate the existence of some form of compulsory power”); Stoebuck, *supra* note 12, at 553–54 (“The one thing that is clear enough about Roman expropriation law is that its mysteries cannot have had discernible effect on our own practice.”).

The first recorded use of eminent domain power,¹⁸ however, dates to English sewer statutes of 1427.¹⁹ Eminent domain was used in the colonies and then the states for roads and mills, sometimes with and sometimes without compensation being paid.²⁰

2. *The source of the power.* Just as its history is debated, so is the source of the power of eminent domain. An early minority theory holding that the sovereign retains an interest in the property upon original grant has been universally abandoned.²¹ The most common explanation given for the source of the power is that it is a necessary and inherent power of government.²² Many courts and commentators have traced the inherent power conception of eminent domain back to the natural law philosophies of the seventeenth- and eighteenth-century civil law writers Grotius, Pufendorf, Bynkershoek, and Vattel.²³ Other commentators have found the power to arise out of English parliamentary tradition.²⁴ Under this formulation the power is really “a power delegated to one’s representatives to consent to a transfer of property rights.”²⁵

¹⁸The eminent domain power is a legislative power, as opposed to the executive prerogative powers of the King. For a discussion of the distinction, see Stoebuck, *supra* note 12, at 562–65.

¹⁹Stoebuck, *supra* note 12, at 565.

²⁰*Id.* at 579–82.

²¹1 LEWIS, *supra* note 15, § 18; Stoebuck, *supra* note 12 at 557–59. Lewis points out that the term “eminent domain,” coined by Grotius, embodies this conception of the power. LEWIS §§ 4, 18.

²²Stoebuck, *supra* note 12, at 559. Of course, to say the power is inherent does not actually reveal from where the power comes.

²³*Id.* at 559–60.

²⁴*E.g., Id.* at 566–69. See also Harrington, *supra* note 16, at 1257 (discussing consent theory and noting that “there is little evidence that [the civil law theorists’] writings had any significant impact on English practice”).

²⁵Stoebuck, *supra* note 12, at 572.

Finally, the most hotly debated element, which was at issue in *Kelo*, is the nature of the constraint on the use of eminent domain suggested by Nichols and Lewis’s definitions above.²⁶ In addition to compensation, all jurisdictions in the United States require a public use or public benefit for a constitutionally valid use of the eminent domain power. The following section explores that public requirement.

B. THE PUBLIC USE REQUIREMENT: STATES’ NARROW & BROAD CONCEPTIONS

Although this [public use] doctrine has never figured in the constitutional cases which have aroused passionate controversy, nor in those whose names are known to the lay public, obviously it is an important part of the law of eminent domain, has interesting potentialities as a technical straitjacket on the planning of public improvements, and as a pretext for judicial review of their wisdom and advisability, and even, on occasion, as a means of obstructing needed social reform.²⁷

If the press and some commentators were to be believed, *Kelo* cleared the way for a radical extension of the government’s ability to use eminent domain by deleting the Public Use Clause from the Fifth Amendment. A common refrain holds that, until *Kelo*, eminent domain was only used for “traditional uses such as roads and schools.”²⁸ This rhetoric implies that

²⁶*Supra* note 14–15 and accompanying text.

²⁷Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 615 [hereinafter Nichols, *Meaning of Public Use*] (1940).

²⁸*See, e.g.*, Nancy McCord, *Joannou Amendment Protects Property Owners*, ROANOKE TIMES, Feb. 28, 2006, at B12 (noting bill allows “continued use of eminent domain for traditional public uses such as roads, utilities, schools, parks, etc.”). This rhetoric restricting public uses to uses such as “roads and schools, etc.” is fallacious because it uses a few clearly accepted, uncontroversial examples as illustrative of “traditional” uses, implying that a complete list of traditional uses would not deviate from these types of uses. In fact, the list of traditional

traditionally, private property would only be transferred for direct use by the public or by the government for governmental purposes. These statements are incomplete at best and misleadingly incorrect at worst. As explained below, before the ratification of the U.S. Constitution and in the early years of the new nation, eminent domain was used for two primary purposes: incidental flooding of private land for privately held mills and building private roads.²⁹ Private mills and private roads do not fit the “such as roads and schools” model, and yet are traditionally established uses of eminent domain. As Berger puts it, “[i]n the face of this history, categorical statements of courts [or commentators] that the public use requirement is an inviolable principle should probably be taken with a great deal of skepticism.”³⁰

1. The meaning of the Fifth Amendment’s Taking Clause. Despite what has been written in the popular press and by some commentators about the plain meaning of the Fifth Amendment’s Takings Clause, the origin of a public purpose restriction on the use of eminent domain, like the origin of the power of eminent domain, is less than clear. The origin, meaning, and scope of a public use limitation on eminent domain have been the subjects of a longstanding debate.

Many courts and commentators simply find the origin of the public use requirement implied in the Fifth Amendment of the Constitution. The Takings Clause of the Fifth Amendment reads “nor shall property be taken for public use, without just compensation.”³¹

(by any measure) public uses should include uses such as private mill development, the creation of private roads, and, slightly later, the building of private railroad spurs.

²⁹Nichols, *Meaning of Public Use*, *supra* note 27, at 615.

³⁰Lawrence Berger, *The Public Use Requirement In Eminent Domain*, 57 OR. L. REV 203, 208 (1977).

³¹U.S. CONST. amend. V.

This assumption is problematic in multiple respects. As a first matter, the words “public use” are grammatically descriptive, not prescriptive.³² That is, a “plain reading” shows that they do not directly limit how property may be taken, but rather describe what kind of taking requires compensation.³³ As a historical matter, James Madison, the drafter of the Fifth Amendment, did not make his intentions clear, and there is little evidence from which to divine his meaning.³⁴ The issue of public use simply was not debated when Madison drafted the Fifth Amendment.³⁵ It is evident that there was no great fear of eminent domain abuse at the time the Fifth Amendment was drafted or ratified. The influences on Madison and the ratifiers are likewise not definitively known. They could have been influenced by the civil law writers or they might have had

³²See, e.g., Merrill, *Six Myths*, *supra* note 4, at 22 (“Moreover, for all his parsing of old dictionary definitions, Justice Thomas never bothered to explain why the prohibitory word ‘without’ is placed before ‘just compensation’ rather than before ‘public use’—a piece of textual evidence that seems to cut against the thesis that the clause imposes a public use requirement.”); Nichols, *Meaning of Public Use*, *supra* note 27, at 616 (“The weakness of the [implication by negative inference] argument hardly needs stressing. Surely, if the framers of the Constitution had meant that property should not be taken for private use at all, they would have so said.”). Cf. Stoebuck, *supra* note 12, at 591 (noting that disjunctive in first constitutional use of term “public use” in 1776 Pennsylvania’s Declaration of Rights precluded public use limitation on phrase “taken from him”).

³³See Harrington, *supra* note 16, at 1301 (“As a result, it appears that in proclaiming that private property shall not be taken for ‘public use,’ without just compensation, the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not.”).

³⁴See Merrill, *Six Myths*, *supra* note 4 at 21 (“Unfortunately, other than the language of the Takings Clause itself . . . , there is virtually no direct evidence about what the framers understood by the words ‘public use.’”).

³⁵See Stoebuck, *supra* note 12, at 595 (discussing Madison’s drafts of future Fifth Amendment); William Michael Treanor, *Note: The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 708–13 (1985) (discussing Madison’s drafting of Fifth Amendment).

Locke's constructive representation in mind when the Takings Clause was drafted.³⁶ Even if the term "public use" had been intended to serve as an implied limitation on the use of eminent domain, what exactly that limitation was is not clear. The point is, far from being obvious and self-evident, the actual meaning and import of the words "public use" is debatable and not easily dismissed with a dictionary and selective explications of "context."³⁷

If an originalist interpretation plays a future role in the interpretation of the public use language in the Fifth Amendment, the syntax of the Takings Clause will have to be explained and more thorough consideration will have to be given to the history of the drafting of the Fifth Amendment. We can assume the words have some meaning and force, but that meaning is still a point of genuine scholarly debate. In practical terms what matters, however, is that all courts have required some form of public use for takings, and the Supreme Court has identified the Fifth Amendment as the source of the requirement. Until the originalist judicial activists have a majority on the Court, it is more instructive to examine what precedents courts have established in interpreting a public requirement.

2. *The broad public benefit and narrow public use tests.* All courts have found a public use requirement for valid takings. The narrow conception of public use requires that the

³⁶Merrill cites Harrington in summarizing the importance of this distinction:

The English perspective emphasized the importance of the property owner's constructive consent to the taking through the owner's representation in Parliament. If the framers viewed takings this way, instead, the most plausible interpretation of 'for public use' is that it was just descriptive of the power of eminent domain, that is, a taking of property authorized by the legislature.

Merrill, *Six Myths*, *supra* note 4 at 22.

³⁷Justice Thomas, in his *Kelo* dissent, rejects a broad interpretation of the significance of the words "public use" in the federal and state constitutions. After conceding his predilection for interpretation by dictionary yields two definitions, he states that "use" must be understood in "context." *Kelo v. City of New London*, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting).

government use the property for governmental purposes or that it be used by the public. The broad conception of public use does not require the property be used directly by the public, but rather that it be of some broadly defined public benefit. While these conceptions seem relatively straightforward, Nichols notes:

Neither of the two extreme views of the meaning of public use holds good when applied to all the concrete cases which are likely to arise, each definition of public use being in some respects too broad and in others too narrow. Neither is sufficiently comprehensive to justify the taking of land for all purposes that the courts have held to be proper, while each of them leads logically to the employment of eminent domain for purposes at which the ordinary mind, both legal and lay, would instinctively revolt.³⁸

When examining early uses of eminent domain, it becomes immediately clear that the narrow use by the public test was never a universal requirement. The law favored some economic uses over others and went so far as to allow the use of eminent domain to permit condemnation for a completely private venture that furthered development. The earliest examples are the Mill Acts, which sought to encourage the development of mills by allowing mill owners to dam rivers, consequently flooding upstream property. The earliest statute, which designated a procedure for compensation for owners of upstream flooded land, was enacted by the Massachusetts colonial legislature in 1713.³⁹ While mills created pursuant to Mill Acts were often open to the public, this was not statutorily required, nor always the case.⁴⁰

These takings were allowed because they were seen as necessary to encourage development. Therefore, a broad conception of public use, though limited to building roads and mills, was originally adopted by courts. However, many courts in the nineteenth century did find

³⁸1 NICHOLS, *supra* note 14, § 40.

³⁹MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 47 (1977).

⁴⁰*See* Nichols, *Meaning of Public Use*, *supra* note 27, at 617, 619.

a normative requirement of public use in the strict sense of use by the public in order to narrow the broad reading of public use.⁴¹ But even these courts allowed exceptions.

3. *The narrowing of public use.* One telling of the development of the public use doctrine through the nineteenth century holds that courts narrowed considerably what constituted a public use.⁴² An oft cited source is the New York case, *Bloodgood v. Mohawk & Hudson Rail Road Co.*⁴³ In that case, the court held that the delegation of eminent domain power to a railroad was a valid public use. Senator Tracy disagreed with the majority, arguing that public use should require possession by a government agency, not a private party.⁴⁴

While many jurisdictions did adopt the much narrower “use by the public” definition, many did not, or had numerous exceptions to the rule. In addition to the Mill Acts cases, other strands of exception cases developed.⁴⁵ Common exceptions to the narrow use by the public conception included cases permitting condemnation for private railroad lines, mining operations, irrigation, and utilities.⁴⁶

⁴¹*Id.* at 617–18.

⁴²*See, e.g., Comment: Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 603 (1948–1949) (describing narrowing of doctrine through courts’ development of use by the public test); Nichols, *Meaning of Public Use*, *supra* note 27, at 617–18 (describing narrowing of doctrine).

⁴³18 Wend. 9 (N.Y. 1837).

⁴⁴Stoebuck, *supra* note 12, at 589–90.

⁴⁵Most *Kelo* critics seem to wholly ignore these lines of cases. Some find interesting ways of describing them, but still avoid dealing with their often-times private to private nature and economic development rationale. One respected *Kelo* critic acknowledges the problematic nature of these cases, stating that “it is important not to push too hard on the public use test, because long before the rise of the social welfare state some eminent domain takings were held to pass the public use test when the ownership of the property ended up in private hands for private uses.” Richard A. Epstein, *Kelo: An American Original: Of Grubby Particulars & Grand Principles*, 8 GREEN BAG 2D 355, n.5 at 356 (2005).

⁴⁶Stoebuck, *supra* note 12, at 590.

The nineteenth century produced a disjointed body of state public use law, with different state courts choosing either the broad or narrow test. Furthermore, industrialization and the desire for expansion and exploitation of resources riddled even narrow interpretation states with exceptions permitting the use of eminent domain for private economic development.⁴⁷ The situation had become such that “it could fairly well be said that the narrow doctrine of public use had been so tailored that it could be given lip service, and yet it did not obstruct the normal demands of industry, transportation, mining and agriculture.”⁴⁸ It was in this environment and at a time of great economic expansion that the Federal government and Supreme Court entered the eminent domain field.

C. THE FEDERAL GOVERNMENT ENTERS THE EMINENT DOMAIN ARENA

1. *The Supreme Court discovers the federal eminent domain power.* Because the takings clause of the Fifth Amendment was seen as a limit on rather than grant of eminent domain power to the federal government, the federal government did not directly use eminent domain until the Supreme Court decided *Kohl v. United States*, 91 U.S. 367 (1875). Prior to that case, states would condemn property for the federal government.⁴⁹ In *Kohl*, Justice Strong dispensed with the notion that a specific grant of the power, whether by the Constitution or Congress, was necessary for the United States to exercise eminent domain power. Instead, he found that the

⁴⁷See Stoebeuck, *supra* note 12, at 589 n.123 (“One fault of the [Yale, *Advance Requiem*] comment . . . is that it assumes the courts took the pure form of the public-use doctrine more seriously than they probably did. It is thus easy to establish the “demise” of a thing that hardly ever existed.”).

⁴⁸Nichols, *Meaning of Public Use*, *supra* note 27, at 624.

⁴⁹ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 159 n.10 (1987).

Article I powers granted Congress in the Constitution necessarily implied the use of eminent domain. Otherwise, “the constitutional grants of power may be rendered nugatory . . . [and t]his cannot be.”⁵⁰ Citing the civil law writer Vattel, Justice Strong found the power to be “the offspring of political necessity; and . . . inseparable from sovereignty.”⁵¹ Thus, the federal power of eminent domain was initially established by the Court based on the nineteenth-century interpretation of the civil law writers’ notions of necessity and absolute sovereignty.

2. *The Supreme Court grapples with the source and meaning of public use.* Federal review of state public use challenges began after the ratification of the Fourteenth Amendment. The Supreme Court rejected early on the “use by the public” interpretation of the public use requirement. At the same time, the Court developed law highly deferential to state legislatures’, Congress’s, and state courts’ determinations of what constituted public use.

The Fourteenth Amendment of the U.S. Constitution, ratified in 1868, reads “nor shall any State deprive any person of life, liberty, or property without due process of law.”⁵² Prior to the Fourteenth Amendment, federal courts could not apply the public purpose requirement to the states. After the ratification of the Fourteenth Amendment, when the Court considered a public use restriction, its source was not the Fifth Amendment’s Takings Clause; the Court had not yet developed the mechanism of selective incorporation. Instead, the public use requirement was discerned directly in the Due Process Clause of the Fourteenth Amendment. While finding a

⁵⁰Kohl v. United States, 91 U.S. 367, 371 (1875).

⁵¹*Id.* at 371–72.

⁵²U.S. CONST. amend XIV, § 1.

public purpose restriction in due process, the Court was initially careful not to definitively adopt either the narrow or broad public use test.⁵³ The following cases illustrate this development.

Early on, the Court found creative ways of dodging the issue of application of an eminent domain public purpose requirement to the states. In *Head v. Amoskeag Manufacturing Co.*,⁵⁴ Justice Gray dealt with a typical Mill Act set of facts arising in New Hampshire by adopting Massachusetts Supreme Court Chief Justice Shaw's method⁵⁵ of describing the governmental power at work as an exercise of the police power⁵⁶ rather than of eminent domain.⁵⁷

The Court soon met the public use issue head-on, however, in *Missouri Pacific Railway*, decided in 1896. Justice Gray, writing for a unanimous Court, held that a state's requirement that a railway company allow a private organization of farmers to build a grain elevator on railway property ran afoul of the Fourteenth Amendment's due process clause.⁵⁸ Justice Gray did not expressly incorporate the language from the Fifth Amendment, but rather simply held that a state's taking "of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Amendment."⁵⁹ As support for his holding, Justice Gray cited without explication cases that

⁵³*An Advance Requiem, supra* note 42, at 608.

⁵⁴113 U.S. 9 (1885).

⁵⁵Nichols, *Meaning of Public Use, supra* note 27, at 621.

⁵⁶PAUL, *supra* note 49, at 169 n.68.

⁵⁷*Head v. Amoskeag Mfg. Co.*, 113, U.S. 9, 21 (1885) ("We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed . . . is within the constitutional power of the legislature.").

⁵⁸*Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896).

⁵⁹*Id.* The Fourteenth Amendment's Due Process Clause reads "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend

conceived of due process in Magna Carta “law of the land” terms.⁶⁰ Therefore, this case did not directly incorporate the public use language from the Takings Clause.

Another case decided in the same year, but after *Missouri Pacific Railway*, is sometimes credited⁶¹ with establishing the federal courts’ broader public purpose interpretation of the public use limitation. In *Fallbrook Irrigation District v. Bradley*,⁶² Justice Peckham upheld a California statute and constitutional provision that permitted the formation of irrigation districts having the power to issue bonds, collect assessments, and use the power of eminent domain to build irrigation works. Even though private parties would be the beneficiaries at the expense of other private parties, Justice Peckham used the language of the broad public use interpretation, finding that the irrigation scheme “would seem to be a public purpose and a matter of public interest.”⁶³

XIV, § 1.

⁶⁰For example, he cites, inter alia, *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (noting that “it would not lightly be presumed that the great principles of Magna Charta were to be disregarded); *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta.”).

⁶¹*E.g.*, *Kelo v. City of New London*, 125 S. Ct. 2655, 2683 (2005) (Thomas, J., dissenting). *But see Advance Requiem*, *supra* note 42, at 608–11 (noting unwillingness of Supreme Court to pick one interpretation of public requirement in early cases).

⁶²164 U.S. 112 (1896).

⁶³*Id.* at 161. One commentator has argued that this influential case should never have been considered an eminent domain case. Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 376–78 (2006). Professor Kanner’s argument that this is a taxation case and therefore should not in anyway serve as eminent domain public use precedent is ultimately unconvincing. While the facts in the case show the plaintiff’s land was condemned for failure to pay her assessment, for which she sought an injunction to block the transfer of title, her challenge was a facial challenge to the constitutionality of the statute. She argued that it was a taking of her property without due process of law in violation of the Fourteenth Amendment.

While the Court rejected the narrow interpretation of the public use requirement, it was rejecting that interpretation as embodied in notions of due process. In keeping with precedent, Justice Peckham expressly declined to apply the Fifth Amendment's Taking Clause to the case.⁶⁴ Instead, once again, the Court looked to the Fourteenth Amendment's Due Process Clause to find the applicable rule of law.⁶⁵

*Chicago, Burlington & Quincy Railroad Co. v. Chicago*⁶⁶ has been credited by some with incorporating the Fifth Amendment's Takings Clause into the Fourteenth Amendment, thus making it applicable to the states. This case was heard the same year as *Fallbrook* and *Missouri Pacific* and decided less than a year after *Fallbrook*. In the case, Justice Harlan held, without expressly naming the Fifth Amendment, that the Due Process Clause of the Fourteenth Amendment required compensation for takings. Without explicit reference to the Fifth Amendment, this resembles a substantive due process case rather than a takings case,⁶⁷ but, important for our purposes, the Court points to the case as the source of incorporation.⁶⁸

3. *Supreme Court deference.* In conjunction with the broad public use interpretation adopted early on by the federal judiciary, a precedent of deference also developed. As to what constituted a public use, the Supreme Court early on deferred to the judgments of state

⁶⁴*Id.*

⁶⁵*Fallbrook Irrig'n Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

⁶⁶166 U.S. 226 (1897).

⁶⁷See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 Geo. L.J. 813, 831–32 (1998) (noting that early “takings” cases, including *Chicago, Burlington & Quincy R.R.*, were actually substantive due process cases).

⁶⁸Most importantly, the Supreme Court points to *Chicago B & Q* as the case supporting the incorporation and applicability of the Takings Clause to the states. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 n.1 (2005).

legislatures, state courts, and Congress. *Fallbrook* hinted at the deference to come. While the *Fallbrook* Court rejected a strict use by the public interpretation of the public use requirement, it maintained that different sets of facts in different contexts would command different results. In recognition of this fact, the Court made clear that deference to state court decisions primarily and to some degree state legislative determinations was appropriate.⁶⁹ This deference was not at this point absolute, but would become nearly so well before the Court decided *Kelo*.

A preservation case arising out of the condemnation by Congress of Civil War battlefields introduced highly deferential verbiage in the Court's precedent.⁷⁰ In *United States v. Gettysburg Electric Railway Co.*,⁷¹ Justice Peckham upheld the condemnations as constitutional takings for public use.⁷² In so doing, he noted, "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."⁷³ Justice Peckham added that when the Court examines an act of Congress, the "act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably."⁷⁴

A case decided in 1946 presaged later developments and epitomized the expansive view of a public use requirement coupled with near complete deference to legislative determinations

⁶⁹*Fallbrook Irrig'n Dist. v. Bradley*, 164 U.S. 112, 160 (1896).

⁷⁰See PAUL, *supra* note 49, at 93 (discussing deference to Congress as typified by *Gettysburg*).

⁷¹*United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1869).

⁷²*Id.* at 681.

⁷³*Id.* at 680.

⁷⁴*Id.* at 680.

of public use. In *United States ex rel Tennessee Valley Authority v. Welch*,⁷⁵ the Supreme Court upheld a determination that taking land rather than constructing a new road to serve citizens living on the land was a valid public purpose.⁷⁶ The Fontana dam project in North Carolina flooded the only suitable means of ingress and egress to a large swath of land occupied by 216 families.⁷⁷ Rather than construct an expensive new road, and in order to acquire land that was part of the reservoir's watershed, the T.V.A., state and county governments, and National Park Service reached an agreement whereby the land would be acquired by eminent domain.⁷⁸ Writing for the Court, Justice Black upheld the condemnation. Citing a long list of cases illustrating the deference principle, he noted that “[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.”⁷⁹

Confusion remains among commentators as to exactly what role the Court has kept for itself in the review of public use cases. While it is an extremely deferential standard, the Court has not so abdicated its role that an irrebuttable presumption in favor of public use is created.⁸⁰

⁷⁵327 U.S. 546 (1946).

⁷⁶*United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 555 (1946). *See generally An Advance Requiem*, *supra* note 42, at 611–14 (discussing *Welch*).

⁷⁷*United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 548 (1946).

⁷⁸*Id.* at 550–51.

⁷⁹*Id.* at 552.

⁸⁰*See City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) (noting in the context of “excess condemnations” (pretextual takings to be sold for recoupment of expenses) that while “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 the light of local exigencies, . . . the question remains a judicial one”).

Courts and commentators should be clear about this fact. Confusion remains, however. This is in part from the sweeping language introduced in *Berman v. Parker*.

D. *BERMAN V. PARKER*: POLICE POWER MEETS EMINENT DOMAIN

1. *The case.* While it is clear that the Supreme Court rejected the narrow use by the public test of public use from the beginning, the seminal case *Berman v. Parker*⁸¹ nonetheless signaled a sea change in public use doctrine. In this case, the broad public use test and deference to legislative determinations of public use developed by the Supreme Court came together in dramatic fashion. If the Supreme Court's jurisprudence up until *Berman* made the backdrop, *Berman* built the stage for the *Kelo* decision. While the case was a watershed case critical for the *Kelo* decision, the facts of *Berman* have been misstated in the furor of *Kelo* and are therefore worth examining.

The case reviewed in *Berman*, *Schneider v. District of Columbia*, was a consolidation of two suits brought by two property owners whose properties were condemned as part of a redevelopment plan in Washington, D.C. One property was a department store, and the other was a hardware store.⁸² The redevelopment plan was executed pursuant to the District of Columbia Redevelopment Act of 1945.⁸³ The United States Congress, as sovereign of the District of Columbia, passed the act in order to target blighted territory for redevelopment. The act created the District of Columbia Redevelopment Agency, a body composed of five members,

⁸¹348 U.S. 26 (1954).

⁸²*Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953).

⁸³60 Stat. 790 (1946). *Berman v. Parker*, 348 U.S. 26, 29 (1954).

two appointed by the president, and three appointed by the District Commissioners, subject to Senate approval.⁸⁴ The act gave the Agency the power of eminent domain for the reduction of “blighted territory” in accordance with the Planning Commission’s assessment of the project area to be redeveloped.⁸⁵ The term “blighted,” however, was not defined.⁸⁶

The Act provided that once the property was condemned and assembled, the Agency would transfer title to land “devoted to public uses” to the appropriate government agency.⁸⁷ The Agency was then required to sell or lease the entire remainder of the project area “to a redevelopment company or to an individual or a partnership” with restrictions ensuring the private developer would develop according to the redevelopment plan.⁸⁸

The plaintiffs in the case challenged the constitutionality of the Redevelopment Act on two grounds.⁸⁹ First, they argued the Act permitted an unconstitutional transfer of private property to another private party for private use.⁹⁰ Second, by not defining the term “blighted areas,” the Act failed to provide a standard sufficiently definite to pass delegation principle muster.⁹¹ Additionally, they challenged the Act as applied to their property, arguing that it

⁸⁴60 Stat. 790, 793. Examples of public uses listed were streets, utilities, works, public buildings, public recreational spaces, and schools. Public housing was expressly excluded. *Id.*

⁸⁵*Id.*

⁸⁶*Berman*, at 28.

⁸⁷District of Columbia Redevelopment Act of 1945, 60 Stat. 790, 795 (1946).

⁸⁸*Id.*

⁸⁹*Schneider v. District of Columbia*, 117 F. Supp. 705, 711 (D.D.C. 1953).

⁹⁰*Id.*

⁹¹*Id.*

should be narrowly construed, and therefore not apply to their concededly non-blighted commercial property.⁹²

The D.C. District Court first held that the Act was constitutional insofar as it permitted the use of eminent domain to eliminate slums that were “the creating or perpetuating causes of conditions injurious to the public health, safety, morals and welfare,”⁹³ so long as the taking was “necessary to the elimination of the slum” or “may reasonably [have been] expected to prevent the otherwise probable development of a slum.”⁹⁴ This holding, while perhaps reaching the correct result, seemed to be reasoned from a lack of appreciation of the dual meaning of “condemnation.”⁹⁵ In a regulatory, police power context, condemnation means the official act of pronouncement that a building is unfit for habitation.⁹⁶ In an eminent domain context, condemnation simply means the exercise of the power of eminent domain.⁹⁷

With similar semantic ambiguity, Judge Prettyman used the term “public purpose” rather than public use or public benefit when referring to the broad public use test adopted by the Supreme Court.⁹⁸ Public purpose was typically the language of the police power, not eminent

⁹²*Id.*

⁹³*Id.* at 715.

⁹⁴*Id.* at 716.

⁹⁵*See* *Schneider v. District of Columbia*, 117 F. Supp. 705, 715 (D.D.C. 1953). Prettyman writes: “Since the Government can condemn such property without compensation under the police power, a fortiori it can condemn and pay reasonable compensation. Since there is power to condemn without compensation there is a power to condemn with compensation.” *Id.*

⁹⁶BLACK’S LAW DICTIONARY 310 (8th ed. 2004).

⁹⁷*Id.*

⁹⁸*Schneider*, 117 F. Supp. at 716.

domain.⁹⁹ Justice Douglas, on appeal, would repeat this intermingling of the police power and eminent domain terminology and concepts in *Berman* with significant results.

After holding the use of eminent domain to eliminate blight was a proper “public purpose,” Judge Prettyman wrote further to warn of the danger that could come of a broad concept of eminent domain that encompassed public purpose apart from necessity.¹⁰⁰ To reconcile the court’s interpretation of the public use requirement with the facts of *Schneider*, Prettyman construed the statute to only permit the use of eminent domain for the necessary removal of slums.¹⁰¹ Justice Douglas would not so limit the statute nor the power of eminent domain.

2. *The significance of Berman.* In *Berman*, Justice Douglas held the statute authorizing the redevelopment was constitutional, even if broadly interpreted to include the use of eminent domain for more than slum removal. He reached this holding by placing the limit of the public use requirement at the boundary of legitimate police power, which he likewise broadly interpreted to include aesthetic considerations under general welfare.

Prior cases recognizing public benefit as a valid public use tended to fall into easily manageable compartments that could be rationalized. The Mill Acts and mine categories of cases were treated specially because they were seen as necessary for economic development in a time of extensive economic expansion. The rail line and utility cases were likewise explained by the need for expansion as well as by the fiction that the utility or rail line could be accessed by

⁹⁹See PAUL, *supra* note 49, at 95 (Noting misapplication of police power terminology in *Berman*, not *Schneider*).

¹⁰⁰*Schneider v. District of Columbia*, 117 F. Supp. 705, 721 (D.D.C. 1953).

¹⁰¹*Id.* 718–19.

the public, when in fact they were oftentimes for purely private entities allowing no public access.¹⁰²

What Justice Douglas did in *Berman*, however, was different. He refused to cabin in the use of eminent domain with a piecemeal public use doctrine, but instead expanded it to its limits by making the power of eminent domain a tool of the police power. In so doing, and much to the lament of some,¹⁰³ he equated the public use requirement of eminent domain with the valid public purpose requirement of the police power. After noting that Congress has full legislative power over Washington, D.C., he stated, as though it naturally followed: “We deal, in other words, with what traditionally has been known as the police power.”¹⁰⁴ Eminent domain is merely one tool available for executing valid governmental purposes; it “is merely the means to the end.”¹⁰⁵

This was a new conception of the public use requirement. Before this, the public use requirement was a separate requirement, usually honored in its breach. Under Justice Douglas’s conception, the focus is on whether the end to be achieved is a proper purpose of government.

¹⁰²Nichols, *Meaning of Public Use*, *supra* note 27, at 622–23. In the case of high tension power transmission lines serving only out of state consumers, Nichols notes that some courts resorted to invoking “a purely hypothetical right of the farmers along the transmission line to insist that the power be stepped down and made available to them.”

¹⁰³*See, e.g.*, RICHARD EPSTEIN, TAKINGS 178–79 (1985) (noting the “conceptual confusion” of placing the public use requirement within the police power); PAUL, *supra* note 49, at 91 (“With one mighty obfuscation, Justice Douglas, in a decision that confused the law almost beyond redemption, dealt a devastating blow to the public use limitation upon what government can constitutionally take.”). *But see* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986) (finding illogic of Court’s statement disappears if police power refers to question of legitimate governmental ends rather than means).

¹⁰⁴*Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁰⁵*Id.* at 33.

Once that has been determined in the affirmative, the means chosen to effectuate the end, eminent domain or regulation, is valid.

At the same time that Justice Douglas expanded the boundaries of the public use restriction by extending it to the boundaries of the police power, he likewise stretched the police power beyond its previously understood boundaries. The police power had always been a malleable and indefinite concept, best described in what it did not permit. At the turn of the nineteenth century, however, it had been gradually expanded, usually under the “general welfare” category of legitimate police power use. Justice Douglas broke new ground for the Supreme Court by recognizing the validity of aesthetic considerations as a valid public purpose under the police power. Noting that the usual list of valid applications of the police power “merely illustrate the scope of the power and do not delimit it,”¹⁰⁶ he wrote that the “concept of the public welfare is broad and inclusive.”¹⁰⁷ In an oft-quoted passage Justice Douglas wrote:

The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹⁰⁸

While Justice Douglas’s approval of Congress’s use of eminent domain to execute the valid public purpose of planning for aesthetics was unequivocal, he asserted that this determination was really in the domain of Congress.¹⁰⁹ In deciding the police power ends proper, “the legislature, not the judiciary, is the main guardian of the public needs to be served

¹⁰⁶*Id.* at 32.

¹⁰⁷*Id.* at 33.

¹⁰⁸*Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹⁰⁹*Id.* at 32.

by social legislation.”¹¹⁰ This was a forceful repetition of the well-established doctrine of deference to legislative determinations of public use, reinforced by due process rational basis review language.

E. THE ACME OF DEFERENCE: *HAWAII HOUSING AUTHORITY V. MIDKIFF*

Berman dissolved the public use requirement into the valid public purpose requirement of the police power and firmly established the notion of an expansive, evolving conception of the public welfare as well as the deference to legislative determinations of valid public purpose. If there was any doubt about these points after *Berman* because of the novelty of the change in public use doctrine or because of the broad language used by Justice Douglas, it was removed by Justice O’Connor’s definitive statements in the next landmark Supreme Court public use case, decided in 1984. In *Hawaii Housing Authority v. Midkiff* a unanimous Court held the use of eminent domain in breaking up traditionally feudal concentrated land holdings in Hawaii did not violate the public use clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment.¹¹¹

The facts of *Midkiff* were unusual. In Hawaii, fee simple ownership of non-government owned property was concentrated in very few hands.¹¹² The Hawaii legislature found this

¹¹⁰*Id.*

¹¹¹*Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984). Justice Marshall took no part in the consideration or decision of the case.

¹¹²47% of all property was owned by 72 private landowners, while 49% was owned by the state and Federal governments. *Midkiff*, at 232. Much of this land was held by foundations that leased the land for longterm leases below market price, the money of which was used to provide money for education of native Hawaiians. Kanner, *supra* note 63, at 355.

concentration had a negative impact on the housing market in a variety of ways.¹¹³ The legislature devised a scheme that would permit condemnation when twenty five eligible tenants¹¹⁴ living on single family lots in developmental tracts of at least five acres desired to purchase the land they leased.¹¹⁵

Faced with compulsory arbitration to negotiate the sale of their property, the trustees for the Kamehameha Schools brought suit for declaratory judgment and to enjoin the enforcement of the arbitration order.¹¹⁶ Using the *Berman* “police power/due process analysis,”¹¹⁷ the District Court held the Hawaii Land Reform Act’s goals were within the state’s police power, and the means chosen were not shown to be “arbitrary with respect to every possible economic rationale for the statute stated and unstated.”¹¹⁸ The act was therefore constitutional.

Distinguishing the facts in the case from those in *Berman*, the Court of Appeals for the Ninth Circuit reversed the district court’s decision. Without articulating the significance, the court reasoned that the plan in *Berman* to change the use of the land, as opposed to just the ownership of the land in *Midkiff*, was a sufficient distinction with which to distinguish the instant

¹¹³*Midkiff*, 467 U.S. at 232.

¹¹⁴An eligible tenant is defined as “one who, among other things, owns a house on the lot, has a bona fide intent to live on the lot or be a resident of the State, shows proof of ability to pay for a fee interest in it, and does not own residential land elsewhere nearby.” *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 234 n.1 (1984).

¹¹⁵*Id.* at 233.

¹¹⁶*Midkiff*, 467 U.S. at 234–35.

¹¹⁷*Midkiff v. Tom*, 483 F. Supp. 62, 67 (D. Haw. 1979).

¹¹⁸*Id.* at 70.

case from *Berman*,¹¹⁹ thereby holding the Act unconstitutional.¹²⁰ In so doing, the court downplayed the broad language and police power analysis clearly at the core of the *Berman* decision, stating that “*Berman* does not paint with so broad a brush.”¹²¹ The court described the ends, i.e., the breaking up of an oligarchic land ownership system, as a mere rationalization for a naked transfer of property from A to B.¹²² In other words, it mistook the means for the end.

In her decision for the Supreme Court,¹²³ Justice O’Connor reversed the court of appeals and overwhelmingly embraced Douglas’s reasoning in *Berman*, noting that *Berman* was the “starting point” for the Court’s constitutional analysis.¹²⁴ Quoting at length Douglas’s declaration of the police power basis for analysis and discussion of deference to legislative determinations of proper police power purposes, O’Connor concluded: “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”¹²⁵

Justice O’Connor likewise followed *Berman*’s deference to legislative decisions of what constituted a valid public use, noting that while courts play a role in reviewing legislatures’ determinations of proper public use, it is “an extremely narrow one.”¹²⁶ In terms of deference to the legislative determination that eminent domain was the proper means to carry out a proper

¹¹⁹Midkiff v. Tom, 702 F.2d 788, 796–98 (9th Cir. 1983).

¹²⁰*Id.* at 798. The court also selectively cited precedent to reach the relatively bizarre conclusion that deference only applied to Congress, not state legislatures. *Id.*

¹²¹*Id.* at 796.

¹²²*Id.* at 798.

¹²³Midkiff v. Haw. Hous. Auth., 467 U.S. 229 (1984).

¹²⁴*Id.* at 239.

¹²⁵*Id.* at 240.

¹²⁶*Id.* at 240 (*quoting* *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

public purpose end, Justice O'Connor likewise followed *Berman's* rational basis standard, noting that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."¹²⁷ *Midkiff* was the last contentious Supreme Court land use public use case until *Kelo v. City of New London*, argued in 2005.

Therefore, this was the state of public use law affairs when the Supreme Court decided *Kelo*. There was precedent requiring some sort of vaguely defined public benefit; the holding and dicta of *Berman*, which changed the analysis of how that public benefit might be ascertained, while firmly establishing who is primarily responsible for so ascertaining; and *Midkiff*, which restated *Berman's* holding and dicta, solidifying it into a regime of broad public purpose and rational basis deference to legislative determinations of public purpose and the appropriateness of eminent domain as a means for executing the public purpose. Regardless of whether one views the state of public use law prior to *Kelo* as a "crazy- quilt pattern" constructed of a "haphazard accumulation of rules,"¹²⁸ a wooden rehearsal of anachronistic exceptions created by outdated policy considerations necessitated by industrialization,¹²⁹ or a reasonable and reasoned expansion to meet the needs of government in modern society, one cannot maintain with any historical support that the holding of *Kelo* was novel or surprising.

¹²⁷*Id.* at 241.

¹²⁸Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63–64 (1962).

¹²⁹*Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (Thomas, J., dissenting); Kanner, *supra* note 63, at 379–80.

F. *KELO V. CITY OF NEW LONDON*

In *Kelo v. City of New London*,¹³⁰ homeowners challenged the constitutionality of the condemnation of their property for a comprehensive economic development project on ninety acres of land on the Thames River in the city of New London, Connecticut.¹³¹ The Fort Trumbull area plan was developed in an attempt to reverse decades of economic decline in the city. The economic situation had only deteriorated further since a state agency designated the city a “distressed municipality” in 1990.¹³² By 1998 the city’s unemployment rate was almost twice the state’s rate, and the city’s population was at its lowest point since 1920.¹³³

In January of 1998, the state authorized bonds and authorized the New London Development Corporation (NLDC), a private nonprofit economic development corporation established in 1978, to acquire land to execute the redevelopment plan that was to be prepared. The next month, the international drug corporation Pfizer announced it would be constructing a global research facility bordering to the southern end of the project area.¹³⁴ In May, the city council authorized the NLDC to submit its plans to various state agencies for review.¹³⁵ After

¹³⁰*Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

¹³¹*Id.* at 2658.

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.* at 2659.

¹³⁵*Id.*



Figure 1. Fort Trumbull Redevelopment Plan Area

obtaining approval from the state agencies, the NLDC finalized its integrated development plan for the Fort Trumbull area.¹³⁶

The Fort Trumbull redevelopment plan area included the United States Naval Undersea Warfare Center, which had closed in 1996, the regional water pollution control facility, as well

¹³⁶*Id.*

as some commercial and residential property.¹³⁷ The redevelopment plan would divide the area into seven parcels having a wide variety of uses.¹³⁸ The NLDC would maintain ownership of the underlying land, leasing the parcels to private developers that would develop according to the plan.¹³⁹

The city council approved the plan in 2000¹⁴⁰ and authorized the NLDC to acquire the properties. The NLDC board voted to use eminent domain to condemn the property of holdouts in the plan area.¹⁴¹ In November of 2000, the NLDC filed condemnation proceedings against the parties who brought the action challenging the condemnations.¹⁴²

¹³⁷*Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004).

¹³⁸The uses on the parcels included: a waterfront hotel, conference center, and health club open to the public, and marinas; a residential area with eighty units and space set aside for a Coast Guard museum; 90,000 square feet of “technology research and development office space” with parking; a public park with a marina; 140,000 square feet of office, retail, and parking space; and “water-dependent commercial uses.” One small parcel was reserved for “additional office or research and development use.” *Id.* at 509–10.

¹³⁹*Id.* at 510.

¹⁴⁰The Supreme Court of Connecticut noted that, pursuant to statute, the development plan was also approved by the state department of economic and community development, the state department of environmental protection, the state office of policy and management, and the Southeastern Connecticut Council of Governments. *Id.* at 510 n.8.

¹⁴¹*Kelo*, 843 A.2d at 510–11.

¹⁴²*Id.* at 511.

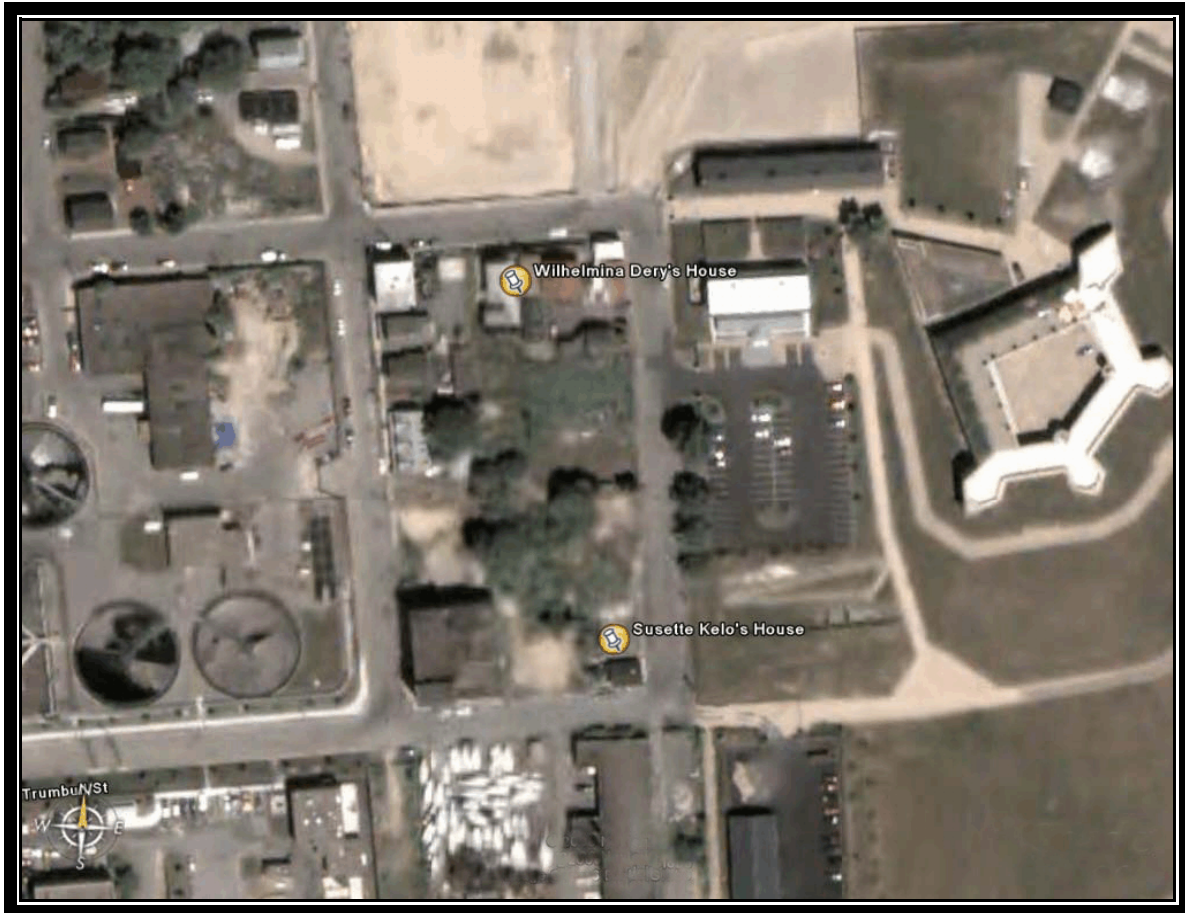


Figure 2. Kelo & Derys' Block

The plaintiffs argued, *inter alia*, that the takings were not for a public use, and therefore violated the Takings Clause of the Fifth Amendment, as applied to the state through the Fourteenth Amendment's Due Process Clause.

Finding the particular use arbitrary and unreasonable,¹⁴³ the trial court granted a permanent injunction to, and dismissed the condemnation proceedings against, the plaintiffs owning property in the parcel slated for "park support."¹⁴⁴ The court upheld the constitutionality of the condemnation action as applied to plaintiffs owning property in the parcel slated for high

¹⁴³Kelo v. City of New London, 2002 WL 500238, at *88 (Conn. Super. Ct. 2002).

¹⁴⁴Kelo v. City of New London, 843 A.2d 500, 511 (Conn. 2004).

technology research and development office space and parking, but granted a temporary injunction pending appeal.¹⁴⁵

The Supreme Court of Connecticut affirmed in part and reversed in part the judgment of the trial court, holding that all of the proposed takings were valid.¹⁴⁶ Three judges dissented. The dissenters would have imposed a heightened standard of judicial review for economic development takings. They would have granted no deference to the legislature and would have placed the burden on the government to prove by “clear and convincing evidence that the public benefit anticipated in the economic development agreement [would be] reasonably ensured.”¹⁴⁷

The United States Supreme Court granted certiorari.¹⁴⁸ In a five to four decision, the Court affirmed the Connecticut court’s judgment.¹⁴⁹ A concurrence by Justice Kennedy, an impassioned dissent by Justice O’Connor, and a dissent by Justice Thomas accompanied Justice Stevens’ decision of the Court.

1. The decision. Justice Stevens’ decision broke little new ground. He noted that over a century of case law dictated the Court hold that New London’s proposed condemnations were for a public use within the meaning of the Fifth Amendment.¹⁵⁰ Citing *Midkiff*, Stevens noted that the narrow use by the public test had long since been rejected.¹⁵¹ Therefore, contrary to petitioners’ assertions, the fact that parts of the project would not be open to public was of no

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 574.

¹⁴⁷*Kelo*, 843 A.2d at 602.

¹⁴⁸*Kelo v. City of New London*, 542 U.S. 965 (2004).

¹⁴⁹*Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

¹⁵⁰*Id.* at 2668.

¹⁵¹*Id.* at 2662.

consequence. The real test was whether the plan served a public purpose,¹⁵² and the proper conception of the public purpose test was, in accordance with *Berman* and *Midkiff*, one featuring deference to legislative judgments.¹⁵³

Justice Stevens's decision was also consistent with the longstanding Supreme Court public use case law arising out of principles of federalism, of deference to state legislature and court determinations of public purpose.¹⁵⁴ Local conditions might command very different public purposes, and state legislatures and courts are in the best position to determine what those needs are as well as their reasonableness. Stevens noted: "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."¹⁵⁵

Contrary to conventional wisdom, Justices Stevens's decision set express and implied limits to the deference afforded legislatures and state courts. Taking property purely for the purpose of conferring a private benefit on a private party would, as always, continue to be forbidden.¹⁵⁶ Likewise, the same private takings for private benefit would not be tolerated if the government offered a merely pretextual public purpose as justification for the taking.¹⁵⁷ By contrast, the takings at issue in *Kelo* were "executed pursuant to a 'carefully considered'

¹⁵²*Id.* at 2663.

¹⁵³*Id.*

¹⁵⁴*Id.* at 2664.

¹⁵⁵*Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005).

¹⁵⁶*Id.* at 2661.

¹⁵⁷*Id.*

development plan,”¹⁵⁸ and there was no evidence of an illegitimate purpose.¹⁵⁹ Justice Stevens’s focus on the carefully considered comprehensive plan has been read by some as actually narrowing the public use test somewhat by requiring a showing of careful deliberation.¹⁶⁰

2. *Justice Kennedy’s concurrence.* Justice Kennedy’s concurrence indicated that he would not foreclose the possibility of some form of heightened scrutiny of a narrow category of takings. He wrote: “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.”¹⁶¹ Following the basic judicial principle of only deciding the case before him, Kennedy wrote that *Kelo* “is not the occasion for conjecture as to what sort of cases might justify a more demanding standard.”¹⁶² Instead, he explained why the Court was correct in applying the *Berman* and *Midkiff* standard of review to the facts presented in *Kelo*. The fact that the “taking occurred in the context of a comprehensive development plan meant to address a city-wide depression,” and that the record indicated “elaborate procedural requirements” were followed were significant in assuaging pretextual taking concerns.¹⁶³

3. *Justice O’Connor’s dissent.* Justice O’Connor’s dissent has been the most widely quoted for its apocalyptic premonitions. Acknowledging that the Court gives “considerable

¹⁵⁸*Id.* (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

¹⁵⁹*Id.*

¹⁶⁰John D. Echeverria, *Some Thoughts on Kelo and the Public Debate Over Eminent Domain*, GEO. ENVTL. L. & POL’Y INST. (Geo. U. L. Center) July 22, 2005 at 2.

¹⁶¹*Kelo v. City of New London*, 125 S. Ct. 2655, 2670 (2005) (Kennedy, J., concurring).

¹⁶²*Id.*

¹⁶³*Id.*

deference to legislatures' determinations about what governmental activities will advantage the public," she asserted that there are limits: if "the political branches [were] the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."¹⁶⁴ Grasping for a limiting principle, she noted that there must be some form of judicial check on the interpretation of public use.¹⁶⁵

Justice O'Connor attempted to distinguish the facts in *Kelo* as outside of her holding in *Midkiff*, which was in turn reasoned from *Berman*. Her contention was that in those cases the public use requirement was valid because the government was attempting to alleviate an affirmative harm, oligarchic land holding and blight, respectively. This contention is unconvincing in a number of regards. As a factual matter, she did not discuss how the designation of New London as a distressed municipality was different or less important than the conditions in *Berman*,¹⁶⁶ in which Justice Douglas made no distinction between slums, blight, and unblighted property.¹⁶⁷

More fundamentally, in *Kelo*, the element she claimed was the basis of the *Midkiff* and *Berman* decisions, the remedy of an affirmative harm, was in fact unnecessary to those holdings.

¹⁶⁴*Kelo*, 125 S. Ct. 2673 (O'Connor, J., dissenting).

¹⁶⁵*Id.*

¹⁶⁶James C. Smith, *Supreme Court Refuses to Hamstring Local Governments*, 20 PROB. & PROP. 17, 18 [hereinafter Smith, *Hamstring*] (Jan.–Feb. 2006).

¹⁶⁷*See id.* at 18–19:

There was nothing wrong with Mr. Berman's department store; indeed, the government conceded it was not blighted and did not contribute at all to the slum characteristics of the surrounding neighborhood. Whether the Hawaiian landlords in *Midkiff* were 'harming' their tenants and society is debatable, to say the least. If they were, the harm they were causing by refusing to sell their properties to tenants does not look much different from the harm New London homeowners were causing by refusing to sell to the builder of the office park. In each case, the challengers of the government's program were simply putting their own self-interest above that of their neighbors.

Her discussion of the regulation of “oligopoly and the evils associated with it” directly followed her statement of the law that the exercise of the power of eminent domain must be rationally related to a conceivable public purpose.¹⁶⁸ The next two sections in which she discusses the evils of oligopoly and the state’s use of eminent domain to break up the oligopoly merely applies the rational basis test described just prior. In other words, the discussion was an acknowledgment by the Court that the end goal was a valid public purpose, and that the use of eminent domain was rationally related to that valid public purpose. If she were to have remained consistent with her acceptance of the *Berman* “conterminous” public use and scope of police power formulation, it would have commanded she join Stevens’s decision for the Court unless she could have found the increase of prosperity and replanning of the New London waterfront an improper end of government. The use of eminent domain to transfer private property from A to B was merely the means to that permissible governmental end, and was rationally related to that end. As it stands, the most frequently quoted language from the *Kelo* case, comes from the least consistent opinion.

4. *Justice Thomas’s dissent.* The foundation of Justice Thomas’s dissent was a return to the supposed original intent of the “public use” language. He asserted that the Court’s reliance on prior cases was faulty, the result of rote repetition without explication of an original misinterpretation of precedent.¹⁶⁹ To him, the language and meaning of the words “public use” in the Takings Clause were clear: property absolutely could not be taken unless the public had the right to use the property.¹⁷⁰ Justice Thomas maintained that *Berman* and *Midkiff* must be

¹⁶⁸*Midkiff v. Haw. Hous. Auth.*, 467 U.S. 229, 241 (1984).

¹⁶⁹*Kelo v. City of New London*, 125 S. Ct. 2655, 2683 (2005) (Thomas, J., dissenting).

¹⁷⁰*Id.* at 2679.

overruled.¹⁷¹ If Justice Thomas's opinion had prevailed, it would have meant a radical reworking of the entire body of federal public use law.

¹⁷¹*Id.* at 2686.

III. EMINENT DOMAIN AND HISTORIC PRESERVATION

I spy with my little eye
Anything here that I can buy?
I see a little thatched cottage
Looking so neat
With compulsory purchase we can buy it up cheap.
Then we'll pull up the floor boards,
Tear down the walls,
Rock the foundations,
Until the house falls.
Like a pack of cards,
Crashing to the ground.
Then we'll build a row
Of identical boxes
And sell them all off at treble the profits.
Demolition.¹⁷²

A. *KELO* AMBIVALENCE

Unlike the property rights organizations such as the libertarian Institute for Justice, which is leading the charge for eminent domain reform, preservationists, individually and collectively, do not have a unified position about *Kelo* or the use of eminent domain for economic development. There are good reasons for the ambivalence towards eminent domain felt by many preservationists.

One thing is certain, regardless of whatever position they take, preservationists have reason to be wary of joining the chorus on either side. The goals of preservation and the goals of

¹⁷²THE KINKS, *Demolition* (Sung by Flash and His Cronies in Their Den), on PRESERVATION: ACT I (RCA 1973).

modern planning and municipal governance, while arguably closer than they once were, are not always the same. Therefore, it would be unwise for preservationists to wholeheartedly adopt the perspective of the American Planning Association or local governments on the matter of eminent domain. Similarly, while preservationists are closer with property rights advocates on this issue than they have been with any other issue, it would be unwise to be overly enthusiastic about cultivating alliances with people or groups whose agenda frequently includes the removal of all land use controls, preservation regulation included.¹⁷³ Preservation is not a unified movement, and preservationists will have to determine individually their true beliefs towards eminent domain in different fact situations, but there is nonetheless the need to come to a general consensus about the best eminent domain policies for historic preservation in a variety of situations.

This chapter explores historic preservation's relationship to eminent domain. It examines the positive and negative aspects of the relationship between eminent domain and historic preservation in separate, symmetrical sections. Each section breaks into three parts. The first

¹⁷³“Simply put, we'll do whatever it takes to protect every American home, small business and house of worship from the government and its corporate allies. We urge you to join us in the fight Historical landmarking can sometimes protect a property from condemnation. Be aware that if your property is designated as a landmark, you will be sharply limited in what changes and improvements you can make to the property, and there may be limits on future use of it. You should look into your state's laws on historical landmarks. Some property owners facing eminent domain have found a lot of support and advice in the historical landmarks agency. Others have found it less helpful. However, getting the support of the historical landmarks agency or of local history professors or others who know about your property's historical significance can be very helpful in arguing against the condemnation of your property. This is an avenue worth pursuing.” Online FAQ, Castle Coalition, <http://www.castlecoalition.org/HandsOffMyHome/index.html>;
“Through each victory—whether in the legislature, the court, the ballot box or the court of public opinion—we get closer to restoring the vision of our Founding Fathers: that property rights are an essential part of a free society, and that they are worthy of our respect and protection.” Institute for Justice website, http://www.ij.org/publications/liberty/2006/15_1_06_d.html.

describes the historical backdrop of *Berman* and Urban Renewal. The second section looks at the practical application of eminent domain in relation to historic preservation. Finally, the third section examines the relationship in terms of values and interests. The contrast is presented to explain the ambivalence felt by many preservationists towards the *Kelo* decision. It also lays the foundation for a discussion of how legislation passed in the wake of *Kelo* might impact preservation.

B. USES OF EMINENT DOMAIN FURTHERING PRESERVATION OBJECTIVES

1. *The positive legacy of Berman.* Preservation owes a historical debt to the power of eminent domain in an indirect way. *Berman v. Parker*¹⁷⁴ was a landmark eminent domain case that served to many as the green light for bolder historic resource regulation. The irony is, of course, obvious: this was, after all, a case that cleared the way for the worst excesses of Urban Renewal and modern planning. At the same time that it cleared the way for Urban Renewal, however, it cleared the way for regulation of aesthetics, something many states and localities had been wary of using out of constitutional concerns.¹⁷⁵ This had the effect of unmooring historic preservation from its stodgy, historic- associative constraints.

In a perverse way, the use of eminent domain by redevelopment agencies permitted by *Berman* played a part in bolstering preservation efforts by catalyzing the preservation

¹⁷⁴*Berman v. Parker*, 348 U.S. 26 (1954).

¹⁷⁵See Christopher J. Duerkson & David Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in *A Handbook on Historic Preservation Law* 1, 7 (1983) (noting that while local preservation ordinances were virtually always upheld prior to *Berman*, state courts regularly struck down land use controls based solely on aesthetic considerations).

movement.¹⁷⁶ In this way, “preservation as a city planning strategy began as a reaction to urban renewal . . . [which] connoted comprehensive strategies that rebuilt central business districts into functionalist, modern systems.”¹⁷⁷ It goes without saying that on balance the harm done by the destruction of resources through Urban Renewal and the Interstate program outweighed the benefits to preservation recruiting and organization created by the destruction.

2. *Practical applications.* In the United States there is a long history of government using eminent domain to further preservation objectives. One of the earliest means of public preservation was through direct government acquisition of resources solely for the purpose of their preservation. All levels of government have undertaken this strategy for protecting endangered or unprotected resources.

States and local governments used eminent domain sparingly to protect historic resources early in the preservation movement. Usually, the state or local government pledged funds for voluntary purchase of endangered properties rather than use eminent domain.¹⁷⁸ Occasionally, however, government would use the power to acquire the resource from an unwilling seller. For example, the State of Kansas, pursuant to a state statute, used the power of eminent domain in 1927 to acquire the Shawnee Mission, an Indian mission founded by the Methodist Church in

¹⁷⁶Memorandum from Paul Edmondson, Vice President & General Counsel, National Trust for Historic Preservation, *Some Thoughts about the Kelo Decision For Members of the Historic Preservation Community* [hereinafter Edmondson] (Aug. 2, 2005).

¹⁷⁷ Judy Mattivi Morley, *Making History*, in *GIVING PRESERVATION A HISTORY* 283, 284 (Max Page & Randall Mason, eds., 2004).

¹⁷⁸Duerkson, *supra* note 175, at 2. This strategy was used to save the old state capital in Philadelphia in 1816 and the Hasbrouck House in New York in 1850.

1829.¹⁷⁹ Where authorized,¹⁸⁰ local governments have also used the power of eminent domain to acquire endangered historic resources through eminent domain.¹⁸¹

At the federal level, Congress first entered the preservation field in the late nineteenth century by purchasing Civil War battlefield sites for memorials.¹⁸² In 1898, Congress authorized the use of eminent domain to acquire land associated with the Battle of Gettysburg.¹⁸³ Congress used this strategy as late as 1988 when it authorized¹⁸⁴ the condemnation of land in Virginia to prevent development adjacent to Manassas Battlefield National Park.¹⁸⁵

The Supreme Court early on recognized the public use in the condemnation of historic resources. For example, in *United States v. Gettysburg Electric Railway Company*,¹⁸⁶ the Court upheld the Congressional use of eminent domain to purchase Gettysburg battlefield land for preservation. Likewise, in a Supreme Court case arising out of the condemnation of Shawnee

¹⁷⁹*State ex rel. Smith v. Kemp*, 261 P. 556, 556, 558 (Kan. 1927), *aff'd*, *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929).

¹⁸⁰States determine which agency of the local government may condemn historic property. For example, Idaho permits the historic preservation to acquire historic properties by purchase, bequest, or donation, but prohibits acquisition by condemnation. IDAHO CODE ANN. § 67-4606(b).

¹⁸¹*Edmondson*, *supra* note 176.

¹⁸²*Duerkson*, *supra*, note 175, at 2.

¹⁸³*See United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1869).

¹⁸⁴Manassas National Battlefield Park Amendments of 1988, 16 U.S.C. § 429b (2000).

¹⁸⁵*See Brooke A. Masters, U.S. to Pay \$ 81 Million in Battlefield Settlement*, WASH. POST, Dec. 21, 1990, at C1.

¹⁸⁶*United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1869).

Mission, *Roe v. Kansas ex rel. Smith*,¹⁸⁷ the Court upheld the state's use of eminent domain against a public use challenge.

Initially, state and local governments would turn acquired resources into house museums or government facilities. More recently, however, localities have used eminent domain to acquire threatened resources in order to transfer them to owners who will preserve, rehabilitate, or reuse the properties.¹⁸⁸ Ideal candidates for this technique are abandoned buildings or those with clouded title, though it is also used for buildings suffering major demolition by neglect. This might be done on an individual building basis, or it might be done as part of a larger redevelopment plan.

Redevelopment projects that are centered on adaptive use of historic resources or that take account of historic resources have become more common because of a greater awareness of preservation's value¹⁸⁹ as well as the reality of a highly regulated development environment.¹⁹⁰

¹⁸⁷*Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929).

¹⁸⁸Adrian Scott Fine, *Eminent Domain: A Double-Edged Sword for Historic Preservation*, 19 FORUM JOURNAL, Spring 2005, at 22, 23.

¹⁸⁹Paul Edmondson writes:

Economic development authorities whose predecessors once condemned older neighborhoods to make way for "modern" development projects are far more likely today to use their condemnation powers (or, more typically, the power to negotiate purchases backed by condemnation as a last resort) to assist local developers to rehabilitate abandoned buildings or vacant warehouses as loft apartments, artists' studios, or mixed-use commercial centers.

Edmondson, *supra* note 176, at 2.

¹⁹⁰*See* STEPHEN L. KASS, ET AL., REHABILITATING OLDER AND HISTORIC BUILDINGS § 9.2.4 (describing extensive statutory procedural requirements met in Forty-Second Street Development Project in New York City).

These projects, while undoubtedly benefitting the particular property, can also be integral parts of historic downtown revitalization plans.¹⁹¹

3. *Values and interests.* Preservation as a regulatory institution necessarily distrusts complete free market control of land use. Purely private controls have proven to be inadequate in protecting historic resources,¹⁹² therefore some government regulation is necessary. This basic premise is easily extended, as *Berman* made clear, to see eminent domain as an appropriate means for carrying out valid public purposes. Many preservationists, therefore, do not recoil out of fundamental principles at the theoretical use of this tool.¹⁹³

Finally, some preservationist supporters of *Kelo* might be concerned about the anti-development label often affixed to preservation efforts. Preservationists are sensitive to accusations that they want to stop time and all development. Most preservationists do not see themselves this way, and would like to think themselves as favoring development as a tool for progressive land use policies.

¹⁹¹Kennedy Smith, The Community Land Use & Economics Group, *Kelo v. The City of New London: What the Supreme Court's Ruling on Eminent Domain Means for America's Downtowns*, at 4, http://www.cluegroup.com/Downloads/What_Kelo_means_for_downtowns.pdf [hereinafter Smith, *America's Downtowns*] (noting that eminent domain has been used to strengthen downtowns by “assembling property for a rehabilitation project to keep a growing business or industry downtown . . . rather than losing it to new facilities on otherwise undeveloped land outside the district . . . [o]r converting abandoned industrial buildings into much-needed downtown housing”).

¹⁹²Though a property rights advocate might quip that private controls have been inadequate in protecting resources from *government* action; a command and control regime is self-fulfilling, necessitating further, different controls.

¹⁹³A related aspect is the professionalization of preservation. Many local governments have preservation planners who are nestled in the planning department. With the establishment of preservation controls and programs, the preservation movement has integrated to a large degree with government.

C. USES OF EMINENT DOMAIN ANTITHETICAL TO PRESERVATION OBJECTIVES

While eminent domain can clearly be a powerful—if often unwieldy—tool for preservation, many preservationists are wary of its misuse. Due to the misuse of eminent domain in the past and the current general atmosphere of suspicion and caution towards its use, it is natural for preservationists to feel conflicted about the *Kelo* decision and current debate about eminent domain used for economic development.

1. *Historical backdrop.* As noted above, a tension between eminent domain and historic preservation arises from the roots of the modern preservation movement. Urban Renewal and the highway program were immensely destructive to cities and towns across the country. Entire neighborhoods were wiped out for projects that never came to fruition.¹⁹⁴ This destruction was made possible, in part, by the *Berman* decision permitting the use of eminent domain for urban renewal projects.

2. *Practical applications. Blight Removal.* A lingering legacy of *Berman* and Urban Renewal is the use of eminent domain as a means of blight removal. This justification of the use of eminent domain has been questioned since its inception and continues to be a major source of controversy.¹⁹⁵ Both property rights advocates and preservationists have criticized blight removal programs. Preservation's reasons for being suspicious of blight remedy statutes and programs are related to but vary slightly from property rights advocate's reasons. Property rights

¹⁹⁴See generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (describing failure of Urban Renewal) (1964).

¹⁹⁵See generally, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L. & Pol'y Rev.* 1 (2003) (tracing development of blight concept and its ramifications on American cities).

advocates' main complaint against blight removal is that statutes defining what constitutes blight are vague and give local governments entirely too much leeway in making a blight determination, leading to takings in which a determination of blight is merely a pretext for a private taking.

Preservationists, while not disputing such unjust takings can occur, have a broader concern; even if there is no indication of pretext or due process violations, the very notion of blight has disproportionate adverse effects on historic resources. This is so because one of the primary factors for establishing blight in many statutes authorizing expropriation for blight removal is the age of the building. The blight calculus uses age as an objective measurement closely correlated with blight: the older the building, the likelier the finding of blight.¹⁹⁶ In the significance calculus of historic preservation, age is often closely correlated with significance; the older the building, the more likely a finding of historic significance.¹⁹⁷ It is not difficult to see, at least from a theoretical perspective, how blight determinations could be contrary to the goals of preservation.¹⁹⁸

The Big Project, Public and Private. Preservationists are naturally suspicious of large public projects such as civic centers or stadia. On a theoretical level, while preservationists might be as awed as anyone over Haussmann's Paris, they are also keenly aware of Mussolini's

¹⁹⁶Of course, the other factors that are likely to be included, such as "obsolete layout," also correlate to some degree with age, and therefore historic significance.

¹⁹⁷This is a generalized statement. In the earlier days of the preservation movement, the correlation was much closer. The history of historic preservation shows that other values used to determine significance, such as architectural quality, might yield a result that shows little correlation between age and significance. However, as a general principle, the longer a building has survived, the more likely it will be found to have preservation significance.

¹⁹⁸Like much of the debate about eminent domain abuse, this is based on anecdotal evidence and received wisdom.

Rome. Contemporary, at-home examples arise out of Urban Renewal projects where entire blocks were acquired and demolished for a project that never materialized as well as from out-of-scale civic projects that destroyed the character of surrounding neighborhoods.

Preservationists are also suspicious of large, primarily private projects. One of the primary rationales given by local governments for the necessity of eminent domain is for the assembly of the large parcel. They argue that large parcels are needed in order to attract developers who demand large commercial or office footprints in order to attract and give confidence to investors that their development will succeed.¹⁹⁹ Large footprints and increased density are “factors that favor clearance of many old buildings and that encourage the assembly of sites encompassing several blocks.”²⁰⁰ Not only are historic buildings often destroyed by such projects, but some argue that cities and communities fare better by “having many small projects, reflecting many minds, and many individual commitments.”²⁰¹

Likewise, even large, supposedly preservation-centric projects can be detrimental to historic resources. After the Century Building debacle in St. Louis, preservationists have every reason to be suspicious of claims of surgical uses of eminent domain for redevelopment projects. In that case, after repeatedly denying the owner’s demolition requests, the city attempted to condemn the over-a-century-old Century Building, but the assessed value was more than it was

¹⁹⁹Matthew J. Kiefer, *Reactions to Supreme Court Eminent Domain Decision Misguided*, BANKER & TRADESMAN, Aug. 22, 2005, at 2.

²⁰⁰Philip Langdon, *New Urbanists Divided on Use of Eminent Domain*, NEW URB. NEWS (Cong. for New Urb., Ithaca, N.Y.), Sept. 2005, at 1, 5.

²⁰¹*Id.* See also Smith, *America’s Downtowns*, at 3 (noting “myth that big development is better than small development and that, in order to attract a developer, local government must assemble smaller parcels of land into one monolithic chunk of land”).

willing to pay at the time.²⁰² After further acrimony, the city ended up purchasing the building for the owner's asking price.²⁰³ When the developers of the adjacent Old Post Office adaptive use project insisted on building a parking garage on the Century Building site, the city demolished the building²⁰⁴ and turned it over to the developers. There are many lessons to be learned from the Century Building fiasco, not least of which is that even in redevelopment projects focused on adaptive use of historic buildings, terrible sacrifices of other historic buildings might be made.

Rural Preservation Concerns. Some local governments have used eminent domain to condemn rural land for big box retail or manufacturing operations. This is an attractive option to many counties because condemning greenfields appears to be a cost-effective way to generate jobs and tax revenue. This potentially has two impacts, one immediate and one protracted, on historic preservation that should give preservationists pause. First, the immediate impact on farmland in counties can be extremely damaging to rural preservation efforts; once the

²⁰²Tim Bryant, *Syndicate Trust Building is Sold to Developer; Pyramid Construction is Active Downtown*, ST. LOUIS POST-DISPATCH, Aug. 22, 2000, at C7.

²⁰³Charlene Prost, *City Will Purchase Disputed Downtown Building*, ST. LOUIS POST-DISPATCH, July 25, 2001, at C8.

²⁰⁴The demolition occurred with the blessing of the National Trust for Historic Preservation. See John E. Czarnecki, *Critics Say National Trust Helped Doom Renowned St. Louis Building*, ARCHITECTURAL RECORD, May 11, 2005, <http://archrecord.construction.com/news/daily/archives/050511critics.asp> (discussing Trust's support for demolition of Century Building); Robert W. Duffy, *Century Building Dies Senseless Death Downtown*, ST. LOUIS POST-DISPATCH, Oct. 31, 2004, at B1 (noting ironic role of National Trust and \$6.9 million in New Market tax credits handed over by National Trust). See also Press Release, Richard Moe, National Trust for Historic Preservation Stands by Decision to Support Rehabilitation of Old Post Office in St. Louis, MO, http://www.nationaltrust.org/news/docs/20040628_StLouis.html (responding to criticism of Trust's position). St. Louis tried to use eminent domain to acquire the Century Building and would have had the price been right. Why should preservationists trust that eminent domain will be used surgically when they cannot even trust the National Trust to make the right preservation decisions? This is the preservationist's fear of the overzealous big project.

leapfrogging begins, it is difficult to control. Preservationists should also consider longer impacts as well. The process of retail sprawl out to greenfields has negative effects on historic downtowns.²⁰⁵

3. *Values and interests.* Preservationists' ambivalence toward the decision stems in part from their employment and the multiple preservation-related interests they hold. Whether they are employees in planning departments, affordable housing advocates, or New Urbanist theorists, many preservationists are tugged in different directions regarding the proper role of government coerced sale of property for economic development. They may think that sometimes eminent domain must be used for purposes other than preservation, however they balk if the result is the destruction of historic resources.

Additionally, a sense of unease felt by preservationists might arise in part from the economics of eminent domain. When a government expropriates property using its eminent domain power it pays "just compensation," which is typically fair market value. The need for eminent domain arises in the first place because some owners are unwilling to part with their property for its objective worth. It follows that there is therefore a subjective value involved in the calculus; otherwise, the sale need not be coerced. This subjective value could simply be the value of not wanting government to take one's property, even if one finds the compensation offered a legitimate objective valuation of the property. Or, it could be because the property itself has subjective value to the owner that is not counted in the fair market value, either because it not measurable, or because it exacerbates the hold-out problem, making the use of eminent

²⁰⁵See Smith, *America's Downtowns*, at 3 (describing negative externalities of big-box developments).

domain prohibitively and erratically expensive and judicially unmanageable.²⁰⁶ Historic significance is such a subjective value of which the market is often unaware.

Finally, the impulse behind the desire to preserve is often tightly intertwined with a sense of justice, of protecting the underdog in the face of imminent, unjust demolition. This aspect is especially heightened when blight removal is equated historically with “Negro Removal,” and contemporaneously with the issue of gentrification.²⁰⁷

4. *What’s the proper simile?* Some commentators have likened eminent domain to a hammer: it is a useful tool that should not be outlawed even though it is occasionally misused to commit crime.²⁰⁸ A more appropriate simile, at least historically, might be that eminent domain is like dynamite. Yes, it is a useful tool, but it is also inherently dangerous and can be misused with ease to highly destructive effect if not properly regulated. While we still want the use of this tool, we should be willing to put controls on its use that lessen its likelihood of being destructively misused.

While there are numerous reasons from a preservation perspective to be wary of eminent domain, there are compelling reasons to keep the power as a tool with proper safeguards. Ideally, legislatures should examine the issue with some clarity and balk at passing kneejerk legislation. The following section will examine what a few legislatures have enacted in reaction to the *Kelo* case and will analyze how these statutes could impact preservation.

²⁰⁶See Stoebeck, note 12, at 597 (noting special problem of selectivity of exercise of eminent domain and stating that “we must assume owners attach a unique, non-monetary satisfaction to the holding of specific property interests”).

²⁰⁷See *Kelo v. City of New London*, 125 S. Ct. 2655, 2683 (2005) (Thomas, J., dissenting) (noting that: “Urban renewal projects have long been associated with the displacement of blacks”).

²⁰⁸Kiefer, *supra* note 199, at 2.

IV. THE RESPONSE IS REAL: WHAT LEGISLATURES ARE DOING TO ASSUAGE THE PEOPLE

“In no other country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property.”²⁰⁹

One of the reasons routinely given by courts for their exercise of deference to the legislature is the superior position of the legislature to make complex policy decisions.²¹⁰ Legislatures have greater numbers and resources and more time than courts to make these decisions. Ideally, legislatures would take that responsibility seriously. However, a legislature is also a political body that must react to its constituents. So, while there is an opportunity to take stock and perform proper empirical studies locally of what has worked and to examine all the different positions and needs, intense political pressure has created a climate where that work cannot be adequately undertaken. Legislation inevitably has unintended consequences, but when legislation is rushed and is primarily drafted to appease sudden, intense political factions, those unintended consequences are likely to be numerous and significant.

The floodgates have indeed been open: not for municipal land grabs, but for *Kelo*-remedial legislation. The legislatures have responded to the outrage of the people in the wake of *Kelo* with a flurry of proposed legislation. Trying to get a handle on this mercurial legislation is

²⁰⁹ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Bradley ed., Bowen trans., Alfred A. Knopf 1994) (1835, 1840).

²¹⁰*See, e.g.,* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (“Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”).

not an easy task. As of the end of March 2006, forty-seven states had introduced legislation purporting to curb or alter eminent domain.²¹¹ A simple search in LexisNexis of pending legislation from the past six months with eminent domain in the synopsis yielded over 700 results. As of the writing of this chapter, fourteen states have enacted legislation in response to the political furor over *Kelo*. Of these enacted statutes, three are analyzed below. They were chosen because they raise issues explored in this thesis regarding the relationship between eminent domain and historic preservation, and because they illustrate principles, such as deference to the legislature and local control of land use, raised in the discussion of public use law.

The statutes also can be seen as a continuum of comprehensiveness. On one end is Ohio, which passed an eminent domain for economic development moratorium and set up a task force to study the issue, thereby deferring the issue until further study. On the other end is Georgia, which passed a comprehensive act covering all the hot-button eminent domain issues of the day. Roughly in the middle is Alabama, which passed a fairly rigid act but left some wiggle room, especially in the act's blight exception.

A. OHIO

1. The Act. Ohio enacted a moratorium on the use of eminent domain to take non-blighted property for economic development in November of 2005, lasting until December 31, 2006.²¹² The law also provided for the establishment of a legislative task force to study eminent

²¹¹Press Release, Castle Coalition, Ohio Eminent Domain Task Force Releases Initial Recommendations (April 3, 2006), http://castlecoalition.org/media/releases/4_3_06pr.html.

²¹²2005 Ohio Laws File 44 (S. B. 167) (2005).

domain during the moratorium. The task force is comprised of twenty five members, representing a full spectrum of interests. One position in the task force is reserved for a member “representing a statewide historic preservation organization that works with commercial districts.”²¹³ The task force study areas were statutorily defined and included the general subject of “[t]he use of eminent domain and its impact on the state,” the impact of the *Kelo* decision on state law, and “[t]he overall impact of state laws governing the use of eminent domain on economic development, residents and local governments.”²¹⁴ The task force was to provide a report of findings and recommendations regarding the first subject area by April 1, 2006 and a report of finding and recommendations for “the updating of state law governing eminent domain” by August 1, 2006, at which point the task force would dissolve.²¹⁵

2. *Impact on preservation.* Overall, Ohio’s approach is a sensible one that balances the political need for an immediate response to the perception of eminent domain “abuse” with the awareness that the issue should be carefully considered before enacting substantive legislation. In so doing, it represents the principle that while the legislature is a political body that must react to the will of its constituents, it is also the branch of government in the best position of having the resources and time to develop appropriate policy, taking into consideration a variety of viewpoints.

The inclusion of a representative of a statewide historic preservation organization on the task force is at least a sign that the legislature realizes it should include the views of preservation when reforming eminent domain law. It remains to be seen what influence the preservation

²¹³*Id.* § 3(A)(11).

²¹⁴*Id.* § 3(C)(1).

²¹⁵*Id.*

member will have. One can hope with the passage of time and cooling of tempers the task force and legislature will be able to fully assess the issues and strike the right balance between property rights and the needs of society.

The task force's first report recommended the state consider adopting a statewide definition of blight, but was divided on this issue.²¹⁶ Those who favored such a definition disagreed as to what it should include. Some members favored a definition limited to health and safety concerns while others favored a definition that includes features such as obsolete layout of streets.²¹⁷ The latter definition could potentially be adverse to preservation because it assumes that there are some older plans and sites that are fundamentally flawed. Historic streets and layouts often deviate from such a norm and would be more likely to meet this definition than more recent developments. While a building that is in disrepair can usually be repaired, the solution for "obsolete layout" is demolition of the resource or its immediate surroundings. So while the obsolete layout definition might increase the flexibility of the blight determination to include more areas, such a definition would be of little use to a preservation-centric adaptive use project (assuming such projects would still be permissible at all) because it more often than not calls for demolition rather than reuse.

²¹⁶Thomas Ott, *Ohio Task Force Favors Restrictions on Grabbing Private Land to Develop*, PLAIN DEALER (Cleveland), Apr. 4, 2006, at B5. The article quotes a member: "All that we concluded is that it's an issue that needs to be discussed further," said Cannon, who favors leaving the judgment up to local officials."

²¹⁷*Id.*

B. ALABAMA

1. *The Act.* The Alabama legislature enacted eminent domain reform legislation that purports to focus on the prohibition of takings for private use. Public Act 313, enacted in August of 2005, includes a legislative purpose stating that it was enacted “in light of the decision and certain opinions recently announced by the United States Supreme Court,” in order to prohibit, “the aforesaid recent interpretation of the Fifth Amendment to the contrary notwithstanding,” the use of eminent domain “to take the private property of any person for the private use of another.”²¹⁸

The act reads in part: “a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”²¹⁹

The act lists three types of exceptions to the above prohibitions including: an authorized public entity’s “finding of blight in an area covered by a redevelopment plan or urban renewal plan pursuant” to redevelopment and urban renewal projects code sections; for the benefit of broadly defined public utilities; and for the construction, maintenance, or operation of streets, government buildings, or park and recreation facilities.²²⁰

The act also provides for a right of first refusal to the condemnee. If his or her property is not used as was originally planned, nor for any other public use, and the condemnor intends on

²¹⁸2005 Ala. Acts 313, § 1.

²¹⁹*Id.*, § 2(b), (codified at ALA. CODE § 11-47-170).

²²⁰*Id.*

selling the property, the condemnee may purchase it for the original condemnation price minus any taxes the condemnee paid related to the condemnation.²²¹

2. *Potential impact on preservation.* While the Alabama act seems to be staunchly opposed to any transfers for private uses, the blighted area exception could actually be a large exception that could work, like most blight statutes, to the benefit or detriment of preservation. As noted above, an exception to the prohibition on transfers for private uses is the determination that the property to be condemned is in a blighted area within a redevelopment or urban renewal project. The Alabama Code chapters dealing with redevelopment projects²²² and urban renewal projects²²³ describe blighted property broadly and include project areas, rather than individual properties in isolation.²²⁴ The determination of necessity of the projects for the public interest remains a matter for the legislature.²²⁵

Significantly, the code also permits the acquisition of “property for the purpose of removing, preventing or reducing blight, blighting factors or the causes of blight.”²²⁶ It is possible that Alabama courts will find this provision in conflict with the new statute in some

²²¹*Id.*

²²²ALA. CODE § 24-2-1 to -10 (LexisNexis 2005).

²²³*Id.* § 24-3-1 to -9.

²²⁴*Id.* § 24-2-2. Blighted areas are defined as: areas, including slum areas, with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community.

²²⁵*Id.* § 24-2-1(b).

²²⁶*Id.* § 24-2-2(2).

cases because the prevention of blight or blighting factors, while in a project area, might not be construed as a finding of blight pursuant to the new act.

This statute could have some harsh consequences for preservation in Alabama. It severely hampers the ability of local governments to condemn threatened historic resources, to the extent that they use this technique. Local and state governments can use the power of eminent domain to acquire endangered buildings for preservation only if they are in a designated blighted area, or if the government intends to occupy the building or run it as a house museum open to the public. Condemnation and transfer of individually blighted buildings not in renewal or development areas to private parties willing to rehabilitate or reuse the buildings would not be permitted. Nor would larger scale preservation-centric economic development projects having a necessary private component be permitted if not in a blighted project area.

One might argue, however, that the statute should be read narrowly and that it is only aimed at takings for economic development purposes. Under this reading, the language “may not condemn . . . for the *purposes*” of private development, and “*primarily* for enhancement of tax revenue”²²⁷ is aimed squarely at takings for an economic development purpose and does not necessarily foreclose takings for other purposes using private development as their means or that incidentally enhance tax revenue. The troubling exclusion to this interpretation, “or for transfer to [anyone who is not exclusively governmental],”²²⁸ can be explained as implying purpose as well. The subsection is poorly drafted; while the most natural reading of the sentence seems to indicate that “purposes” only modifies the first clause about development, the choice of the

²²⁷2005 Ala. Acts 313, § 2(b). *See supra* note 219 and accompanying text.

²²⁸*Id.*

plural for a disjunctive list in the first clause²²⁹ and lack of colon after “may not condemn property” makes this reading far from definitive. The stronger, if only marginally so, argument is that “may not condemn . . . *for* transfer to [a private party]” prohibits the use of eminent domain *for the purpose of* transferring private property to a private party, because this would violate the basic principle that a naked private transfer from A to B is unconstitutional.

It could be argued that the purpose of historic preservation, especially in an emergency situation like the preservation of a threatened resource, is an independent purpose. While the means of effectuating this purpose might include subsequent private transfer and development, and might incidentally enhance tax revenue, the argument would be that those were not the purposes for which the government condemned. The likelihood of prevailing with such a claim is not great. It has the best likelihood of success for individual endangered properties where it does not appear that historic preservation is being used as a pretext for economic development. This type of situation is infrequent, and, because of scarce resources and political reasons, this solution is likely used very infrequently. Furthermore, it depends on judicial recognition of historic preservation as an independent and important government purpose. While this is more probable since *Berman* and *Penn Central*, it is not certain. What is fairly certain is that, to the extent Alabama uses rehabilitation and reuse projects for economic development outside of designated blighted areas, preservation will be negatively impacted by the new act. However, because Alabama continues to define blight broadly and includes the prevention of blight, this might not be a significant hindrance.

²²⁹Of course, if the plural is less than desirable if applied to the disjunctive list in the first clause, there is little reason why it would fare better if applied to the disjunctive clauses. One possible reason, however, is that in the first clause the disjunctive separates types of private development, a single purpose, while the disjunctive clauses are clearly different purposes.

In terms of protection afforded preservation through the act, there is the theoretical possibility that the right of first refusal could encourage preservation in some small number of cases. If an authority acquires a historic building from a condemnee for less than full subjective value, does not immediately demolish it, and then offers it some time in the future back to the condemnee (who wants to and is able to buy it), there is a chance the building will be preserved. It should be apparent that these conditions are so attenuated that protection for historic resources in this manner is largely theoretical. Another way in which this provision could be beneficial to preservation is inherent in the way the provision discourages overreaching and pie in the sky plans. Ill-conceived plans cannot be hedged with the possibility of turning a profit on land acquired but not used. Regardless, this provision is a fair one that potentially favors preservation.

C. GEORGIA

1. The Act. Georgia enacted a comprehensive eminent domain reform statute entitled “The Landowner’s Bill of Rights and Private Property Protection Act.”²³⁰ The act amends four titles, amending and appending many code sections covering most of the recently contentious areas of eminent domain law.

The act struck the paltry definitions section of the eminent domain title and replaced it with a lengthy list of substantive definitions defining public use, blight, condemnor, and public utility among other terms. Blight is now rigorously defined. Blighted property “means any urbanized or developed property” that meets at least two conditions out of a list of six, each of

²³⁰H.B. 1313 (Ga. 2006).

which would be sufficient for a finding of public nuisance, and “is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.”²³¹ The definition also contains the caveat that “property shall not be deemed blighted because of aesthetic conditions.”²³² This is not the blight of *Berman*, this is the “blight” of slums. While this is the language of slums, it should be noted that, by definition, blight applies to individual properties, not whole areas. If a property is surrounded by blighted properties, but does not meet the definition of blight, it cannot be taken as part of a blighted area. *Berman* has been completely eviscerated.

Public uses are specifically enumerated in the definition of the term. The uses include:

- (I) the possession, occupation, or use of the land by the general public or state or local governmental entities;
- (II) the use of land for the creation or functioning of public utilities;
- (III) the opening of roads, the construction of defenses, or the providing of channels of trade or travel;
- (IV) the acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;
- (V) the acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or
- (VI) the remedy of blight.²³³

Section four of the act amends a code section describing the nature of the right²³⁴ of eminent domain to include the statement that “neither this state nor any political subdivision

²³¹*Id.*, § 3.

²³²*Id.*

²³³*Id.*

²³⁴Georgia follows the conception that eminent domain is the right of the state to reassert dominion over land of the state.

thereof nor any condemning authority shall use eminent domain unless it is for a public use,” and that “[p]ublic use is a matter of law to be determined by the court and the condemnor bears the burden of proof.”²³⁵ This one sentence effects a fairly radical shift. Deference to government determinations of public is turned on its head: with the shift in the burden of proof, government determinations are now presumptively invalid.²³⁶

Within the same section, the act appends a provision permitting the condemnee to purchase back the condemned property after five years if it has not been put to a public use. The condemnee also has the option of recouping any increase in valuation of the property since condemnation. If the condemnee opts for repurchase, the price cannot exceed the original condemnation price. This provision eliminates incentive to condemn property for questionable projects and prevents government from profiting on a condemnation that resulted in real estate speculation rather than a public use.

The act also appends a policies and practices section to the eminent domain title.²³⁷ Nearly all of the sections’ provisions are individually qualified. For example, the section calls for “reasonable effort” to acquire property through negotiation. The development of a project shall be scheduled so that, “to the greatest extent practicable” occupiers will have ninety days written notice before being forced to move.²³⁸ The entire section is qualified as well. It requires that condemnations and potential condemnations “shall, to the *greatest extent practicable*, be

²³⁵H.B. 1313, § 4 (Ga. 2006) .

²³⁶The statute is silent about standard of proof.

²³⁷H.B. 1313, § 5 (Ga. 2006) (to be codified at O.C.G.A. § 22-1-9).

²³⁸*Id.*

guided by the following policies and practices.”²³⁹ The legislature has attempted to compromise and build into the section flexibility, but perhaps has done so to the point that the section is almost rudderless and invites litigation and extensive fact finding by courts.

In addition to the greatest-extent-practicable policies and practices section, the act contains mandatory procedural and substantive sections. One important section requires that before title vests in the condemnor, the court “shall determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain.”²⁴⁰ Again, the condemnor bears the burden of proof.

The subsequent section provides for an award to the owner of the property, “such sum as will in the opinion of the court reimburse such owner for [actually incurred] . . . costs and expenses, including reasonable attorney, appraisal, and engineering fees” if the court’s final judgment is that the condemnor “cannot acquire the real property by condemnation” or the condemnor abandons the proceeding.²⁴¹ Finally, condemnees are entitled to reasonable relocation expenses and “direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation.”²⁴²

2. *Impact on preservation.* The Landowner’s Bill of Rights and Private Property Act leaves little room for creative uses of eminent domain for historic preservation purposes. It

²³⁹*Id.*

²⁴⁰H.B. 1313, § 5 (Ga. 2006) (to be codified at O.C.G.A. § 22-1-11) .

²⁴¹*Id.* (Ga. 2006) (to be codified at O.C.G.A. § 22-1-12).

²⁴²*Id.* (Ga. 2006) (to be codified at O.C.G.A. § 22-1-13).

provides an exclusive list of permissible public uses, and it will be interesting to see in future litigation, what, if any, wiggle room is available.

The act not only defines what constitutes blight, but limits determination of blight to specific parcels rather than whole areas. This section of the statute will likely have a large impact on the use of eminent domain because it limits the ability of government to use eminent domain to assemble large tracts for redevelopment based on the determination that the majority of buildings or lots in the area are blighted. This would prohibit the type of takings of non-blighted property contested in *Berman* and *Kelo*, forcing governments either to abandon larger redevelopment projects as impracticable, or to devise more creative and nuanced developments that are compatible with properties within the area that could not be condemned or otherwise acquired. This has the potential to be beneficial to preservation because it puts limits on the ability of government to completely demolish large swaths of property, increasing the chances that a reasonably maintained historic resource would survive.

At the same time, this provision stifles to some degree the ability of local governments to acquire property for part of preservation-centric reuse projects. Redevelopment projects aimed at revitalizing downtowns or reconnecting disconnected areas of cities, which could have substantial secondary benefits to historic resources and districts, would also be negatively impacted. The success of such projects would depend, of course, upon the quality and sensitivity of the design. Under the new statute, however, such projects, no matter how important and well designed, could be blocked by a single holdout owner of a building so long as his building did not meet the rigorous definition of blight. Of course, to the extent a preservationist distrusts local governments, planners, and designers to make the right choices, this provision might not seem so bad.

While the likelihood of large redevelopment projects being undertaken is diminished, the ability of government to use eminent domain to clear title and save threatened resources remains intact. Often, historic resources have clouded title that hinders their purchase and rehabilitation. Local governments could condemn such resources and give clean title to an owner willing to undertake rehabilitation. Theoretically, a building suffering demolition by neglect to the extent it meets the definition of blight could be condemned and sold to a buyer willing to rehabilitate it. In practice, if it meets the new definition of blight, the most likely result will be the building's demolition.

It remains to be seen what sort of impact the change in the blighted property conception will have on preservation on a broad, theoretical level. The removal of aesthetics as a consideration and focus on individual properties refutes the most revolutionary features of *Berman*. However, one could argue that the removal of aesthetics and requirement of meat and potatoes health, safety, and morals justifications for use of the police power reinforces the notion that eminent domain is really a means to a traditional police power end. The question to ponder, if this is the case, is whether the reduction in scope of use of eminent domain is concomitant with a reduction in the conception of the proper scope of the police power. To the extent this is true, historic preservation and aesthetic regulations have been devalued as proper regulatory concerns.

V. CONCLUSION

The public outrage directed at the *Kelo* decision was clouded by misinformation and misconceptions about the history and the development of eminent domain law. An examination of Supreme Court public use decisions reveals that the *Kelo* decision fits squarely with Supreme Court precedent. However, even if the public was mistaken about the facts and holding of the case, the reaction was real, and legislators took heed. In less than a year since the decision, forty-seven states are considering or have enacted a variety of eminent domain reform statutes.

These statutes will affect the relationship between eminent domain and historic preservation. Preservation has an understandably ambivalent relationship with eminent domain. While eminent domain has been misused in the past, the opportunities for preservation-centric developments and the tool of saving particularly threatened buildings counsels that we should keep the tool, but with reasonable procedural controls. From a preservation perspective, some substantive controls might not be all bad. For example, it might not be ideal to assemble massive parcels. The Georgia statute prohibits the designation of blighted areas that include non-blighted properties, thereby restricting the use of eminent domain to assemble large parcels. It will be interesting to see if contending with smaller parcels will encourage more creative design solutions that are sensitive to preservation objectives, or will result in stagnation.

While preservationists might be ambivalent, they cannot afford to be paralyzed or indifferent. They must help bring some clarity to the topic, and, as people in the middle of the libertarian/local government eminent domain spectrum, could have valuable insight leading to rational compromises. As it is, the debate has been rather lopsided towards property rights, and

the legislation reflects that. There is therefore a need for further research and the collection of objective data on positive examples of the use of eminent domain generally and for preservation specifically to counter the negative examples collected by the property rights side, raise awareness of the larger context, and highlight what is at stake.

In the meantime, preservationists need to take stock of the resources around them. Are there resources still in need of designation? Are there other strategies that would encourage private development that is sensitive to preservation without the use of eminent domain? For example, can incentive programs be expanded or targeted to encourage rehabilitation and reuse without the need for eminent domain?

Finally, the variety of pending and enacted legislation, if anything, vindicates the Supreme Court's decision in *Kelo*. Local conditions require local solutions in the realm of land use. In classic laboratory of democracy fashion the nation will be able to reap the benefits of knowledge coming out of the different solutions to the problem in a way that would be impossible under a rigid interpretation at the federal constitutional level.²⁴³ Preservationists need to understand and adapt to the new and varied definitions and exceptions found in the post-*Kelo* statutes in order to use the powerful tool of eminent domain to preservation's advantage.

²⁴³Smith, *Hamstring*, *supra* note 166, at 19.