A. THE TAKINGS CLAUSE

1. Introduction

The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. This guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

2. The “Public Use” Requirement

The scope of the “public use” requirement of the Takings Clause is “coterminal with the scope of a sovereign’s police powers,” defined as the authority to provide for the health, safety, morals, and general welfare of the citizenry. “The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.”

There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, but it is an extremely narrow one. The Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use “unless the use be palpably without reasonable foundation.” Hence, “the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking is ‘rationally related to a conceivable public pur-
pose.” 10 “Judicial deference is required because, in [the American] system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.” 11

[J4] “[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.” 12 But “[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court [has] rejected the notion that a use is a public use only if the property taken is put to use for the general public.” 13 Indeed, “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” 14 “So long as the taking has a conceivable public character, ‘the means by which it will be attained is . . . for the legislature to determine.’” 15 In light of these considerations, Midkiff upheld land reform legislation that authorized condemnations for the specific purpose of transferring ownership to another private party, in order to eliminate a land oligopoly and the socioeconomic evils associated with it. 16 Boston & Maine Corporation held that the Interstate Commerce Commission was not irrational in determining that the condemnation of property owned by freight railroads would serve a public purpose, by facilitating Amtrak’s rail passenger service. 17 In Berman, the Court permitted land condemnations that contemplated reselling the land to redevelopers as part of a plan to restore dilapidated sections of the District of Columbia. 18 Moreover Kelo held that,


11 Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240, 244 (1984). See also United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946), which emphasized that “any 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.”

If the condemnation of property serves legitimate public interests, it is constitutionally irrelevant that other purposes also may be advanced. See United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).


14 Id. at 244.


16 Hawaii Hous. Authority v. Midkiff, 467 U.S. 229, 239–44 (1984). As the Court noted, “[t]he land oligopoly ha[d,] according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State’s residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. . . . Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly was found to be a rational exercise of the eminent domain power.” Id. at 242–43.


18 Berman v. Parker, 348 U.S. 26, 28–36 (1954). The Court emphasized that “[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cat-