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**Colorado River Commission of Nevada**
**Water Division**

**26th Annual Governor's Water Conference**

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# Governmental Power

- Power of Eminent Domain
  - “Condemnation” (“express takings”)
- Police Power
  - Public Health and Safety
  - Regulation (“regulatory takings”)
- Proprietary Power
- Particularly enumerated powers granted to Congress, the President and the Courts by the U.S. Constitution
- Particularly delegated powers granted to federal or state administrative entities by Congress or State legislatures

# Kelo v. City of New London

- U.S. Supreme Court, June 23, 2005
- 545 U.S. _____ (2005)
- Majority: Justices Stevens, Kennedy, Souter, Ginsburg, Breyer
- Minority: O'Connor, Rehnquist, Scalia, Thomas
- Is economic development a public purpose justifying exercise of the power of eminent domain?

# Kelo v. City of New London

- Private, non-profit redevelopment corporation
- City condemned property to be transferred to redevelopment company
- Purpose:
  - Create jobs
  - Generate tax revenue
  - Build momentum for revitalization of downtown
  - Make city more attractive
  - Create leisure and recreational opportunities

# Kelo v. City of New London

- City's action pursuant to an express state legislative determination that the taking of land as part of an economic development project is a "public use" and in the "public interest."

# Kelo v. City of New London

- May the sovereign take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation?

- Where *B*'s use provides a public benefit?

# Kelo v. City of New London

- "The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."
- Deference to legislative determinations of public purpose.

# Kelo v. City of New London

- Berman v. Parker, 384 U.S. 26 (1954)
  - Deference to legislative determination that planning must be effectuated as a whole
- Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)
  - Purpose: eliminating the "social and economic evils of land oligopoly"—redistribution of wealth
- Ruckelshaus v. Monsanto, Co., 467 U.S. 986 (1984)
  - Deference to congressional determination that first applicant's research data could be expropriated for evaluation of second applicant's FIFRA application, provided compensation is paid to the first applicant

# Kelo v. City of New London

- "Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."

# Kelo v. City of New London

- “Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.”

- “. . . There is no basis for exempting economic development from our traditionally broad understanding of public purpose.”

- “Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.”

# Kelo v. City of New London
## O'Connor, J., dissenting.

- "We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private [purpose] distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on governmental power is to retain any meaning."
- Recommended standard: identification of a public harm which the exercise of eminent domain remedies

# *Active Liberty—Interpreting Our Democratic Constitution*

- Justice Stephen Breyer
- Alfred A. Knopf, New York, 2005
- “judicial restraint” with respect to the legislative fiat
- Ensures that the public’s participation through representative democracy is encouraged.
- Premised on one’s historical perspective of the objectives of the writers of the Constitution.

# Oklahoma Constitution

- “Private property shall not be taken or damaged for public use without just compensation.”
- “. . . determination of the character of the use shall be a judicial question.”
- Art. III, Section 24.

# Pertinent Questions

- Does Supreme Court's decision in Kelo v. Town of New London affect Oklahoma's Constitution?
- In Oklahoma, who may determine whether exercise of the power of eminent domain is needed?
- Is determination of "public use" under the Oklahoma Constitution a legislative or judicial question?

# Does the Supreme Court's decision in Kelo v. Town of New London affect Oklahoma's Constitution or its "public use" standard?

- No
- "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline." Kelo v. City of New London.

In Oklahoma, who may determine whether exercise of the eminent domain power is needed?

- The public entity exercising the power may determine its necessity.
- Public Service Co. of Oklahoma v. B. Willis CPA, Inc., 941 P. 2d 995 (1997).
- Arthur v. Board of Commissioners of Choctaw County, 43 Ok. 174, 141 P. 1 (1914)

# Oklahoma Statutory Delegation of Power of Eminent Domain

- Railroads—66 Oklahoma Statutes Annotated §§ 51, et seq.
- Private persons—27 OSA § 6 (private ways of necessity for agriculture, mining and sanitary purposes)
- Private persons—82 OSA § 105.3 (rights of way for storage or conveyance of water for beneficial use)
- Light, Heat or Power Companies—27 OSA § 7
- Coal Pipelines—27 OSA § 7.1, 7.2
- Water Power Companies—27 OSA § 4
- Municipalities generally for “water works”—11 OSA §§ 37-103, 37-105.
- Municipalities for “urban renewal projects”—38 OSA §§ 38-101 et seq.

# Is the determination of “public use” under the Oklahoma Constitution a legislative or judicial question?

- Judicial
- Questions becomes whether:
  - Oklahoma Legislature has delegated eminent domain power consistent with the “public use” limitation (i.e., Constitutional review of legislative enactment), or
  - Whether delegated parties have exercised delegated eminent domain power consistent with the “public use” limitation.
- It is more than likely that there is some form of deference for legislatively-defined delegations, just as there is deference for “necessity” determinations.

# Does any “private benefit” destroy the “public use”?

- No
- Kelo v. Town of New London: “Quite simply, the government’s pursuit of a pubic purpose will often benefit individual private parties.”
- Arthur v. Board of Commissioners of Choctaw County, 43 Ok. 174, 141 P. 1 (1914): Placement of a public highway to reach a private ferry is a public use, even though ferryman benefits.

# Does any “private benefit” destroy the “public use”?

- Nevertheless—a question of degree
- Graham v. City of Tulsa, 261 P. 2d 893 (1953)
- If there is too much private benefit, a factual determination, a judicial determination of no public use is appropriate.

# Is water “property” subject to eminent domain?

- “the use of land for collecting, storing and distributing electricity for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs—a use that is so manifestly public ‘that it has seldom been questioned and never denied.’” Tuttle v. Jefferson Power & Improvement Co., 31 Ok. 710, 112 P. 1102 (1912) (quoting Lewis on Eminent Domain, 3rd ed.)

# Is water “property” subject to eminent domain?

- “legally defensible interest”
- attributes of the right to water
  - diffused surface water
    - rule of capture—personalty
  - stream water
    - riparian rights
    - appropriative rights
  - ground water
    - ownership
    - permission to use