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GRADUAL AND SILENT ENCROACHMENTS:

HOW THE MISSOURI SUPREME COURT EXPANDED THE POWER OF EMINENT DOMAIN

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EXECUTIVE SUMMARY

The Constitution of Missouri includes more provisions addressing the property rights of citizens than that of any other state. The careful restrictions it places on the use of eminent domain show that, in ratifying the Constitution, the people of the Show-Me State intended to prevent the abuse of eminent domain to benefit private parties. Despite these protections, however, few states today have so dismal a record of eminent domain abuse as Missouri.[1] And, in 2008, despite the constitutional and statutory restrictions on the government's ability to take one person's home, business, or house of worship and give it to another private owner, the Missouri Supreme Court chose to expand the power even further, placing the property rights of all Missourians in even greater jeopardy.

This study will examine the case of *City of Arnold v. Tourkakis*,[2] to describe the protections to which Missourians should be entitled and how Missouri's courts have eroded the legal barriers that once protected citizens from governmental efforts to transfer property from one private owner to another. Part I, therefore, details the constitutional provisions governing eminent domain in Missouri. Part II discusses the Missouri Real Property Tax Increment Allocation Redevelopment Act[3] — the "TIF Act" — which was at the center of the *Tourkakis* case.[4] Part III will detail the *Tourkakis* litigation, and Part IV will describe the court's decision and its shortcomings.

HOMER TOURKAKIS AND THE CITY OF ARNOLD

In 1988, dentist Homer Tourkakis and his wife purchased property in

Well over a century before the U.S. Supreme Court's decision in* Kelo v. New London *brought the subject to its current national prominence, the taking of property from one private party for the benefit of another had been a highly controversial practice.

the city of Arnold, Mo., a city 20 miles south of Saint Louis with a population of some 20,000 people. The Tourkakises' property overlooked Interstate 55, making it a prime location, and the business flourished, enabling Homer Tourkakis to employ five office workers and assistants, including his wife, Julie. Almost 20 years later, city officials began the process of condemning Tourkakis' property as part of an economic development project called the Arnold Triangle. The project called for the construction of a 325,000-square-foot shopping center that would include a Lowe's Hardware Store, an Office Depot supply store, and other retailers — all constructed by THF Realty, a powerful developer behind many development projects in Missouri suburbs.[5] In 2005, the city enacted an agreement with THF Realty promising to condemn land for transfer to THF to construct the project, and declared a region of the city to be blighted.

On June 16, 2006, the city filed a petition in eminent domain against Homer and Julie Tourkakis, asserting that it had authority under the TIF Act to take ownership of the dentist's office.[6] The city's petition also cited two other state laws governing condemnation. However, these were not applicable because they referred to public works projects rather than redevelopment projects,[7] and, in any event, the city never pled the relevance of or followed the procedures established under either of these other statutes. It was thus clear from the outset that the city's eminent domain action could be based only on powers that it claimed to derive from the TIF Act.

The Tourkakises responded to the petition by denying that the city of Arnold had either constitutional or statutory authority to condemn their property, and arguing that their property was not blighted. They asked the court to dismiss the city's petition, arguing that the TIF Act did not permit the city to condemn their land for redevelopment and that the TIF Act violated constitutional restrictions on eminent domain.

I. MISSOURI'S CONSTITUTIONAL PROVISIONS RESTRICTING EMINENT DOMAIN

The Tourkakises' first argument in defense of their land was based on the unusual protections for property rights long ago incorporated into Missouri's Constitution as a result of citizens' concerns about abuses of the eminent domain power. Well over a century before the U.S. Supreme Court's decision in *Kelo v. New London*[8] brought the subject to its current national prominence, the taking of property from one private party for the benefit of another had been a highly controversial practice. During the 19th century, governments often used eminent domain to take land from farmers, homeowners, and business owners and give it to railroads, even though those railroads were privately owned, for-profit enterprises rather than government entities. Those takings were generally permitted on the grounds that railroads, despite their private character, were in some sense still public institutions, because they were "common carriers" — that is, they were prohibited from refusing

service to anyone who wanted to use the railroad — and because their prices were limited and controlled by government agencies.[9] Thus, the argument went, they were not really private users of the property taken through eminent domain. Although this rationale satisfied most courts, there was still widespread concern about the real danger of abuse among legal scholars like Michigan Supreme Court Justice Thomas Cooley,[10] as well as landowners whose property had been targeted by politically well-connected (and sometimes corrupt) railroads.

A. The 1875 Constitution

Populist resentment against the abuse of eminent domain led many states to adopt new constitutional restrictions on its use during the years following the Civil War.[11] Nowhere was this more evident than in Missouri, which called a constitutional convention in 1875.[12] That convention added new provisions to the state's bill of rights that prohibited the use of eminent domain for private benefit. The 1820 Constitution had declared that private property could be taken only "for public use,"[13] but the 1875 delegates added a new clause forbidding government from *damaging* property except for public use, as well as a separate provision, found today in Article I, section 28, declaring that "no private property can be taken for private use, with or without compensation."[14] The Missouri Constitution thus became one of only two state constitutions to include two separate sections in its bill of rights, in order to make the public use requirement as clear as possible.[15] This "no private use" clause, like similar language added to other state constitutions in the same era,[16] was devised to clarify that even if private development would benefit the public in some way by increasing commerce, that alone could not justify the use of eminent domain. One delegate to the convention explained that reiterating the ban on private condemnations would mean "that it shall not be competent for the General Assembly if some one covets the vineyard of his neighbor[17] to declare that that vineyard may be taken and used as the vineyard of the trespasser and 'that it is hereby devoted to public use.'"[18] The double prohibition on private takings would shut "the door to all schemes of spoliation."[19]

The convention also reinforced the new Constitution's prohibition on condemnations for private benefit by requiring courts to act independently in eminent domain cases — adding what later generations would call "heightened scrutiny" whenever a property owner argued that a taking was not for "public use." The new clause declared that "when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."[20] This prohibition against courts deferring to legislatures would restrict the power of the state or of cities to grant economic benefits to politically influential private parties. "Now that has been the difficulty heretofore," explained delegate Francis Black. "[P]roperty has been taken for purposes which many times was not really public."[21]

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As these provisions — and as the lengthy convention debate about the assessment of damages in eminent domain cases — demonstrate, the 1875 convention saw it as a top priority to limit the ability of powerful railroad corporations to exploit the eminent domain power by using the excuse that their economic prosperity provided benefits to the general public.[23] Given all these new constitutional declarations against the abuse of eminent domain, it is not surprising that Missouri's courts provided strong protections against such abuses shortly after the 1875 Constitution was ratified.

In 1881, the state Supreme Court rejected an attempt to take land through eminent domain for a private road, observing that "the wisdom of [the] framers is nowhere so conspicuously displayed as in the careful manner in which they have sedulously guarded private property and the rights incident thereto against ruthless invasion, and virtual confiscation under the thin disguise of legal process."[24] Three years later, the same court noted that the new prohibition on private takings "in so many words, was not in the [prior] constitution," but was added in response to "adjudications by the courts of this State, as well as the current history of the times developing so many devices and schemes by individuals, legislatures and municipalities to obtain private property against the owner's consent for purely private purposes."[25] The new bar against private takings was really a way of emphasizing what was "always the common law of the land that private property could not be taken for private use against the owner's consent." This principle "springs from the inviolability of individual right, the encouragement to the acquisition of property by the citizen, the aim and office of every just government."[26]

In 1906, the court explained why judges should not defer to elected officials when they try to use eminent domain for economic development. "[S]uppose an influential individual, to whom a slice of his neighbor's property would be very convenient, should ask the city council to condemn that property for his use," wrote Justice Leroy Valliant. If the city enacted an ordinance taking land for such private uses, that ordinance would obviously be "void on its face." But if, "in order to give it validity," the city were to claim "that the property was to be condemned for a public street, would such a false recital in the ordinance be conclusive, would it put the man whose property was to be taken … beyond the protection of the constitutional guarantee that their property should not be taken for private use?" The answer was clearly no. The Constitution required courts to review such takings independently, so that they would not become "a mere tool to do the will of the council, with no power to inquire into the truth of the matter."

Valliant continued:

What protection has a citizen for his constitutional rights, if the courts cannot look through a sham and see the truth, and how can the courts learn the truth

if they must take the recitals in the ordinance as conclusive, and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless! But our law is not so lame, and our courts are not so impotent.[27]

Yet other populist ideas were also strongly felt at the 1875 convention — in particular, the demand for "home rule" for large cities.[28] Up to that point, cities derived authority for most municipal functions from the state legislature, which caused city officials to complain that they were often hampered or delayed by state bureaucracy when they tried to act on local problems. The home-rule movement sought to renovate state-municipal relations by granting autonomy over certain city functions directly to city officials, so that they could act with more or less the full authority of state government. This grant took the form of a charter, issued to the city by the state legislature. The 1875 convention was the first in the nation to implement municipal home rule.[29] At first, only cities of at least 100,000 people — only Saint Louis and Kansas City qualified — were allowed to become charter cities,[30] but as people came to believe that local problems could be dealt with more effectively and with more citizen oversight if they were handled by local officials, that minimum was reduced. Today, cities with as few as 5,000 people can petition for a charter granting them home rule powers.[31] However, while smaller cities now qualify for charters, the constitutional distinction between charter cities and non-charter cities remains, and is routinely enforced by courts.[32] Only 37 cities in Missouri have received charters from the General Assembly, while more than 800 non-charter communities continue to rely on the state as the source of their powers.[33]

B. The 1943–44 Constitution

In 1943–44, the state held another constitutional convention, at which the delegates reenacted all of the previous restrictions on eminent domain that had been adopted in the 1875 Constitution. But it went on to add a new section, Article VI, section 21, which would mark the most significant change in eminent domain law in Missouri history.

By the mid-1940s, the Progressive movement and the New Deal had dramatically changed the status of property rights in American law. Whereas earlier generations of Americans had believed that the purpose of government was to "restrain men from injuring one another, [and] leave them otherwise free,"[34] the Progressive revolution in political philosophy promulgated the notion that government should also take an active role in controlling the growth and direction of American society. Progressives held that government should have power to dictate the physical, psychological, social, moral, intellectual, and economic lives of all citizens, as part of a program to radically transform persons and society into an allegedly more scientific, centrally planned machine of progressive improvement.[35] Property rights and eminent domain were, naturally enough, a focal point of this ideological shift.[36]

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Although the Progressive agenda initially met some resistance in state and federal courts, that resistance had melted by the 1930s, when Franklin Delano Roosevelt's New Deal programs put into practice the government controls and restrictions on individual freedom that the Progressives espoused. State and federal courts followed suit by adopting the Progressive interpretation of the U.S. Constitution, primarily through the creation of "rational basis scrutiny," and the related notion that property rights were to be treated as secondary rights, of lesser constitutional importance than speech or other democratic-participatory rights.[42] As historian Arthur Ekirch explained, by the time Missouri's new state Constitution was written, the principles of classical liberalism had been all but erased from the nation's political debates, replaced with "a general demand for some form of economic planning and government action."[43] The Roosevelt era's aggressive economic control took many forms, including expansive use of eminent domain for economic development.

The road had been paved by the Progressives, who not only broadened the definition of "public use," but also invented the concept of "blight." Originally a word linked to plant disease, the term was first applied to communities by Progressives who saw government as something like a gardener, whose job it was to cut, bend, and manipulate the behavior of citizens so as to cultivate a society that conformed to the vision of those in power.[44] Beginning in the 1920s, Progressive reformers began using eminent domain to "clean up" neighborhoods.[45] This trend increased during the next decades, prevailing in the U.S. Supreme Court in 1954[46] as the fad of "urban renewal" began to reach its climax.[47]

Thus, when the Missouri constitutional convention of 1944–45 convened, the consensus among political and legal elites was that property rights had a lower constitutional status and that a legitimate — indeed, essential — task of government was to manage, control, and redistribute wealth so as to eliminate perceived social ills. Unsurprisingly, some delegates at

the convention were eager to expand the power of charter cities to employ eminent domain to eliminate slums and blighted areas. Yet the record shows that little time was spent on the issue.

On May 9, 1944, the convention's "Committee on Local Government (City of St. Louis, St. Louis County, and Jackson County)"[48] put forward a proposal to expand the eminent domain powers of the state and of charter cities for purposes of blight eradication. The proposal read:

> *The General Assembly shall have power to provide by law and any city or county operating under a special charter may provide by ordinance, for the clearance, replanning, reconstruction, redevelopment, and rehabilitation of blighted, substandard, and insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and they may condemn or permit the condemnation of property for such purposes and when so acquired, the owner of such property shall be invested with the fee simple title thereto, and may sell or otherwise dispose of such property subject to such restrictions as may be deemed in the public interest.*[49]

The proposal was advanced by delegate Edward Stayton, who explained that it had been drafted by officials in Kansas City who sent it to the convention because they wanted the authority to eliminate "blighted areas."[50] The "[p]opulation has moved out — other inhabitants move in, and we now find great areas in some cities that are blighted, and the problem comes to that city of how to restore it — what to do about it."[51] Stayton's words make it clear that the provision was intended almost solely to meet the demands of Kansas City and other large urban centers.[52] He noted that everyone in the committee, after evaluating the proposal, "agreed that it was all right in the form in which it came to us from the City Counselor's office in Kansas City," and that the slum and blight that the proposal sought to remedy were "essentially the problems of the city concerned, and those cities should have the responsibility to restore those areas."[53] Smaller communities did not suffer from the same problems and did not need the same power:

> *It is not so serious with us as with many larger cities, nowhere near so serious with us as with many larger cities, nowhere near so serious to us as I understand it is in St. Louis. But in all conscience, it's serious enough, terribly serious. And the city administration and the Chamber of Commerce in Kansas City are asking that this provision be adopted as it is and give them the power and the authority to proceed to do those things which they think will restore that area. They are perfectly willing to accept the responsibility as being theirs. They ask only that we give them definite authority to perform that function.*[54]

When asked to clarify what this clause would mean, Stayton explained that it would "giv[e] the City Council of Kansas City or St. Louis the authority to condemn by ordinance entire areas if they see fit, small areas or large areas, whatever are deemed necessary for the purpose of cleaning up that blighted area."[55] He was quite explicit about how his proposal would allow government to condemn land and transfer it to private developers: "I can

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visualize the Metropolitan Life Insurance Company, for instance, or anybody else coming into Kansas City or St. Louis and saying to the City Council, 'Either you condemn fifty blocks … give it to us for the price that we want it condemned, or give us that authority and we will clean up this situation and restore and rebuild it.'"[56] Later, delegate E. McDonald Stevens agreed, noting that Article VI, section 21, was "put in the Constitution for the purpose of giving a city or a county operating under a special charter the power to condemn property in blighted areas and the power to give the right to private individuals to condemn property for blighted areas and to rehabilitate that property ..."[57]

This appears to be the convention's only discussion of what eventually became Article VI, section 21, of the 1945 Constitution. That provision, as finally enacted, declares:

> *Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.*

This provision sets out the only exception to the Missouri Constitution's otherwise severe restrictions on the use of eminent domain. But the phrase "laws may be enacted" creates an ambiguity. Under one interpretation, charter cities may use eminent domain to eliminate blighted areas, and the legislature may establish procedures by which they may do so. But non-charter cities may not condemn property for transfer to private owners, and the General Assembly may not authorize them to do so. This interpretation would respect the intentions of the authors of the 1945 Constitution, because it would allow government to use eminent domain to eliminate blight in large charter cities, while otherwise restricting the use of eminent domain to cases involving "public use." What's more, this interpretation complies with Missouri's longstanding rule that courts should adopt the strictest plausible construction of laws involving eminent domain.[58]

Under a second interpretation, however, charter cities and charter counties may independently enact their own ordinances for eliminating blight, and the General Assembly may also grant non-charter cities the power to do the same thing. This interpretation is deeply flawed. To begin with, the eminent domain provisions appear in Article VI, the section of the Constitution devoted to the powers of charter cities. The convention's delegates intended to grant autonomy only to large cities with respect to whether and when to use eminent domain to eliminate dangers to the community caused by run-down, crime-ridden parts of town. Moreover, interpreting this clause as allowing the General Assembly to authorize non-charter cities to use eminent domain for redevelopment would render as surplusage the phrase

"and any city or county operating under a constitutional charter may enact ordinances." If the legislature may delegate the eminent domain power to non-charter cities without constitutional limitation, then Article VI, section 21, ought to read simply, "Laws may be enacted providing for the clearance, replanning, reconstruction ..."

Homer and Julie Tourkakis argued, therefore, that while large charter cities like Saint Louis might be able to use eminent domain to take land and transfer it to private developers, that power was not enjoyed by the city of Arnold, a third-class non-charter city. That power was specifically withheld from non-charter cities by the framers of the state Constitution, and the General Assembly had no constitutional authority to give that power to non-charter cities. But even if the Constitution did allow the legislature to give this power to non-charter cities, they argued, it had not yet done so.

This second argument required the court to look into the meaning of the Missouri Real Property Tax Increment Allocation Redevelopment Act, or the "TIF Act," a statute adopted in 1982 to facilitate the use of eminent domain for redevelopment throughout Missouri.

II. THE TIF ACT AND NON-CHARTER CITIES

The second prong of Homer Tourkakis' defense challenged the city's use of the TIF Act to justify taking his business. The TIF Act is only one of the state's many laws governing the use of eminent domain for redevelopment. Others include the Urban Redevelopment Corporations Law,[59] the Planned Industrial Expansion Law,[60] and the Land Clearance for Redevelopment Authority Law.[61] But unlike these other statutes, the TIF Act is concerned primarily with the *funding* of redevelopment projects. Tax Increment Financing is a tool by which local governments can finance development by borrowing against the anticipated tax income that will flow from the completed project.[62] TIF is highly controversial. It is subject to widespread abuse,[63] and its effectiveness is doubtful.[64] Nevertheless, many states use TIF, and Missouri cities are particularly enthusiastic about it.[65]

The TIF Act includes elaborate financing provisions but only one passing reference to eminent domain. That reference comes in section 99.820(3) of the act, which declares that a "municipality" — defined elsewhere as including not only charter cities, but any "city, village, or incorporated town"[66] — may, "pursuant to a redevelopment plan, subject to any constitutional limitations, acquire by purchase, lease, or, as part of a redevelopment project, eminent domain … land and other property … [as] reasonably necessary to achieve the objectives of the redevelopment plan."[67] Meanwhile, the state's other redevelopment laws allow only charter cities to use the power of eminent domain for redevelopment. Because Arnold is a non-charter city, and could not look to these other laws, it claimed that section 99.820(3) gave it the power to take the Tourkakises' property for redevelopment. Yet the act did not grant Arnold that power.

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A. The TIF Act Did Not Grant Non-Charter Cities the Authority to Condemn Property for Redevelopment

Because eminent domain can impose such serious injuries on innocent citizens, Missouri law has long required courts to construe eminent domain statutes strictly. Courts also apply strict construction to statutes granting powers to non-charter cities. Thus, even setting aside the constitutional question, Missouri courts should only construe the TIF Act to permit non-charter cities to use eminent domain for redevelopment if the language did so in "specific and express" terms.[68] But, in fact, the act's language is decidedly ambiguous because of its highly unusual and undefined reference to "constitutional limitations," a phrase that occurs in no other state law. The act also conspicuously lacks any procedure to govern condemnation, strongly suggesting that the General Assembly did not intend to grant that power to non-charter cities. Given these ambiguities, a Missouri court faithfully applying strict construction should have concluded that the TIF Act did not give non-charter cities the power to use eminent domain for redevelopment.[69]

Aside from the act's ambiguous language, there is also no extrinsic evidence to suggest that the General Assembly intended the TIF Act to expand the eminent domain power. The Missouri legislature did not record its deliberations over the TIF Act, so the only available insight into the Assembly's motives comes from the report on the bill prepared by the legislature's research analyst.[70] That report contains no reference to eminent domain, and neither do articles published in legal periodicals or newspapers at the time the act was passed.[71] Instead, all of these sources focus on the subject referred to in the title of the act itself: *financing*. The TIF Act was written to govern the funding of redevelopment projects, not to grant independent power of eminent domain. There is certainly no evidence that the General Assembly intended to give non-charter cities any *new* eminent domain powers. To the contrary, the act's unique reference to "constitutional limitations" suggests that it was meant only to refine redevelopment powers that already existed. While those cities already allowed to use eminent domain would also be able to finance projects by using tax increment financing, the TIF Act itself did not create any new condemnation authority.

B. "Subject to Constitutional Limitations"

The city of Arnold argued that because the act referred to the use of eminent domain by "municipalities," the court should find that the act gave all cities, with or without a charter, the power to use eminent domain for redevelopment. This argument failed to address the phrase "subject to constitutional limitations." That phrase is given no further definition in either the statute or the case law, and does not appear in *any* other Missouri statute. Its very uniqueness calls for explanation.

The Missouri Constitution itself grants only to charter cities the power to use eminent domain for blight clearance. The statutory reference to "constitutional limitations," in a statute that implicates the use of eminent domain in areas designated

as "blighted," appears to be an attempt to acknowledge the limits of the power granted by Article VI, section 21. The words "subject to" indicate that the legislature understood the boundaries of eminent domain, and intended to work within those boundaries instead of unconstitutionally granting eminent domain powers to non-charter cities or expanding legislative authority. Furthermore, similar statutory language in other states has been interpreted as indicating a legislative intent to avoid pushing constitutional boundaries.[72] Courts usually apply limiting constructions in such cases, concluding that where a legislature expressly invokes "constitutional limitations," it does not intend to push the boundaries of its constitutional authority.[73]

The only apparent alternative to this interpretation would be to read the phrase "subject to constitutional limitations" as referring to broad constitutional protections like due process and just compensation. But this reading would make the language superfluous, because *all* statutes are automatically "subject to constitutional limitations" in that sense. Given the age-old rule that statutes should not be interpreted in ways that render any words ineffective, such an interpretation seems unreliable.[74] Instead, the constitutional limitations clause should be read as imposing a meaningful limit on the TIF Act's grant of powers. Be that as it may, this undefined phrase introduces an ambiguity into the statute, and the ambiguity means that the TIF Act does not clearly and explicitly grant non-charter cities the power to condemn property for redevelopment. Under the strict-construction requirement, therefore, that interpretation is barred.

C. Lack of Procedure

Whenever it has passed a law providing for the use of eminent domain, the General Assembly has always included either a set of procedures to be followed[75] or a cross reference to procedures established in some other statute.[76] But the TIF Act contains no such language; it creates no procedure for condemnation, and does not instruct city officials to use the procedures of any other condemnation law. This is not surprising, because the TIF Act is a financing mechanism, not a condemnation law.

As Missouri's Western District Court of Appeals noted in one 2004 decision, the absence of "a means of enforcing" an alleged power is good reason to believe that "the General Assembly never intended" to grant such power.[77] This basic idea has been reflected in the courts of other states, as well. In one Washington case, the state Supreme Court was asked to determine whether a park district had the authority to condemn property for park purposes under a statute that conferred on park districts "'the right of eminent domain,'" and the power to "'purchase, acquire and condemn lands,'" but which contained "no method of procedure ... for the exercise of the power of eminent domain by park districts."[78] The court noted that the statute stated "no method of procedure ... either directly or by implication or by reference to other acts having a similar purpose."[79] The law did not provide "for the filing of any petition, [or a] description of the contents thereof … nor … any designation of the court in which the property owner shall appear."[80]

As Missouri's Western District Court of Appeals noted in one 2004 decision, the absence of "a means of enforcing" an alleged power is good reason to believe that "the General Assembly never intended" to grant such power.

The lack of a condemnation procedure in Missouri's TIF Act strongly indicates that it was not designed to convey eminent domain powers to cities that did not already have such powers under other statutes.

Many other important procedural elements were also missing, provisions which the court found were "not merely matters of form; they are essential to due process before private property may be taken for public use."[81] This silence as to procedure contrasted with the detailed procedures provided by other state statutes authorizing the use of eminent domain. Because the court was required to construe statutes granting eminent domain power strictly, the absence of a condemnation mechanism meant that even in instances where the legislature clearly intended to grant the power of eminent domain, its effort could not be effective.[82]

Likewise, the lack of a condemnation procedure in Missouri's TIF Act strongly indicates that it was not designed to convey eminent domain powers to cities that did not already have such powers under other statutes. Those other statutes *do* point to procedures to be followed, and thus it was unnecessary for the TIF Act's drafters to include either a procedure or a cross-reference to such a procedure. Because charter cities in Missouri are permitted to establish their own condemnation procedures, and other redevelopment statutes either provide procedures or require condemning authorities to use the state's general condemnation statute, the TIF Act's lack of a procedure is all the more noticeable. Although the city argued in the *Tourkakis* case that the state's general condemnation rules provided the necessary procedural guidelines, those rules apply only to condemnations for public utilities like "road[s], railroad[s], street railway[s], telephone[s]," and others, laid out in a long and specific list.[83] But that list does not include redevelopment condemnations, and Missouri courts have never declared that this section is the default rule for all condemnation actions.[84]

The legislature's failure to provide a procedure for condemnations in the TIF Act is a strong indication that that law was not meant to convey condemnation authority to entities that did not previously enjoy that authority.

D. Strict Construction

Missouri law specifies that the powers of non-charter cities are to be construed strictly.[85] In part, this is a function of the charter/non-charter distinction: Charter cities enjoy a good deal of autonomy, but non-charter cities are "creatures of statute and only have the powers granted to them by the legislature."[86] Under the rule of strict construction, courts do not presume that a non-charter city has a power unless a statute or constitutional provision clearly grants that power in express terms.

In one 1902 decision, the court of appeals held that a statute that granted non-charter cities the power to establish gasworks for the lighting of city streets did not also allow them to establish electrical companies for that purpose. Although the statute allowed non-charter cities to set up streetlights, or to contract with private companies to do so, the court found that they had no power to establish electrical companies.[87] The court recognized that its interpretation might be "considered too narrow," but it noted that "[t]he grant of legislative powers to municipalities is to be strictly construed, and, if there be a reasonable doubt of the

existence of a power, it will be held not to have been granted."[88]

Missouri law also requires strict construction of statutes purporting to grant the power of eminent domain.[89] That power "should not be gathered from doubtful inferences, or from vague or ambiguous language, and every reasonable doubt should be resolved adversely to the existence of the right."[90] Thus, statutes purporting to grant the eminent domain power to non-charter cities are subject to a doubly strict construction.[91] Courts have in the past been highly skeptical of such claims of power. In *State ex rel. Missouri Cities Water Co. v. Hodge*,[92] a third-class city tried to condemn a waterworks company and to maintain it as a municipally-owned waterworks, claiming authority under a law that allowed third-class cities to "acquire ... maintain and operate, waterworks."[93] Although this seems liked a reasonable interpretation of the law, the state Supreme Court employed a strict construction, concluding that it did not allow such an "extraordinary exercise of the power of eminent domain."[94] Likewise, in *City of Smithville v. St. Luke's Northland Hospital*,[95] the judges found that a non-charter city lacked authority to condemn a private hospital and operate it as a government-run hospital. A Missouri law[96] did authorize the use of eminent domain to take "lands" for the establishment of hospitals, and the city claimed that this implied the authority to condemn existing hospitals.[97] However, again employing strict construction, the court rejected this argument: "Smithville's proposed interpretation of the statute is strained and involves a liberal construction rather than an appropriate strict construction of the statutory language. This court finds that a proper construction of the statute reveals no specific and express statutory authority for Smithville's proposed condemnation of an existing hospital."[98]

Perhaps the most important recent case invoking the rule of strict construction is *Missouri Highway & Transportation Commission v. Eilers*,[99] in which the court of appeals prohibited the state highway department from entering private land to conduct a "soil survey," even though the department had explicit statutory power to "survey" land that it was considering condemning for the construction of highways.[100] A soil survey evaluates the surface strength of land to determine whether it can support a highway; it is quite different from the standard "survey," which measures the metes and bounds of property. The court rejected the department's attempt to use its power to "survey" land as an authorization for conducting a "soil survey" against the owner's will. It came to this conclusion because purported grants of eminent domain power must be strictly construed, and if the statute were construed as authorizing pre-condemnation soil surveys, the statute would have "violate[d] constitutional restrictions on the taking and damaging of private property without just compensation."[101]

III. THE TRIAL COURT SIDES WITH THE DENTIST

After extensive hearings, Circuit Judge M. Edward Williams ruled against the city and allowed Dr. Tourkakis to keep

Missouri law requires strict construction of statutes purporting to grant the power of eminent domain. That power "should not be gathered from doubtful inferences, or from vague or ambiguous language, and every reasonable doubt should be resolved adversely to the existence of the right."

his property.[102] But the grounds of the ruling were unclear. Addressing Homer's constitutional argument, Judge Williams noted that although government "has the inherent power to take private property by eminent domain for *true* public uses," including "roads, sewer systems, [or] water lines," it "most emphatically" did not have any power to take land for "the construction of a shopping center by a private developer."[103] Judge Williams reasoned that even though "projects that increase property and sales taxes" would doubtless lead to "economic benefit[s]," those benefits were not a constitutional public use. Moreover, the language of the Constitution barred non-charter cities from using eminent domain for redevelopment: "If it was intended that *all* cities and counties have authority to take property for this purpose by eminent domain, what do the words 'operating under a constitutional charter' mean?" That phrase, the judge reasoned, "can only mean that the delegates who wrote the Constitution of 1945 and the voters who approved it intended to limit the awesome power of eminent domain in such cases to charter counties and cities."[104] Thus, Judge Williams concluded, "to the extent [that the TIF Act] is inconsistent with Article 6, section 21 of the Constitution of 1945, it is declared unconstitutional."[105]

Yet a closer reading revealed that Judge Williams' decision actually was *not* based on the Constitution, but on the TIF Act itself. The decision began with the observation that while there was "much room for philosophical debate about what takings of private property *ought* to be permitted by law," the court would "limit its discussion to what the law appears to authorize."[106] And the TIF Act, wrote Williams, did not give the city of Arnold the power to use eminent domain for redevelopment. The act, he wrote:

> *provides that the acquisition of property is "subject to any constitutional limitations." It cannot be assumed that the legislature intended that this language be meaningless. The Court would question whether the legislature could have conferred the power of eminent domain on all cities in light of Article 6, section 21, but that question need not be answered as the reference to "constitutional limitations" is a clear indication that there was no such intent.*[107]

The overlapping constitutional and statutory discussions in Judge Williams' decision gave rise to serious confusion in later stages of the case. The city claimed that the judge had based his opinion on constitutional interpretation, while the Tourkakises argued that the decision was really based on the TIF Act. But lawyers employ certain rules of interpretation that help resolve confusions like this, and those tools made it clear that the decision was a statutory decision and not a constitutional one. First, courts will usually try to avoid discussing constitutional issues, and will instead resolve cases on statutory grounds when possible.[108] This rule of "constitutional avoidance" was probably what Judge Williams was referring to when he observed that the constitutional "question need not be answered," and when he explained that the phrase "subject to constitutional limitations" in the TIF Act indicated that the statute did not expand the eminent domain power beyond what the state Constitution already

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authorized — that is, only to charter cities. Second, the context makes clear that Judge Williams' brief discussion of the Constitution was intended only to help interpret the statute's reference to "constitutional limitations." Third, courts will regard any discussion of unnecessary issues in a judicial opinion as non-binding "dicta." Yet it was not necessary for Judge Williams to discuss the constitutional issues in order to resolve the case, since an interpretation of the TIF Act sufficed. Discussion of the meaning of Article VI, section 21, could not constitute the basis of the opinion — a fact made clear by Judge Williams' conclusion that the city lacked the power "to take the property of defendants under [the TIF Act]."[109]

Nevertheless, confusion about whether Judge Williams had declared the TIF Act unconstitutional or simply ruled that the act did not give Arnold the power to condemn for redevelopment began almost immediately. The city of Arnold appealed the case directly to the Missouri Supreme Court, rather than to the Court of Appeals, on the basis of a law that gives the Supreme Court jurisdiction over "all cases involving the [constitutional] validity of a … statute."[110] Although they acknowledged that the case "involved" the validity of the TIF Act, the Tourkakises emphasized in their response[111] that the real question was the extent of the city's power under the act, and they addressed their arguments primarily to that issue. They pointed out that the act contained no procedure for eminent domain, included references to undefined "constitutional limitations," and failed to provide a clear and unambiguous grant of power as required by the rule of strict construction. And, although they viewed the case as involving only statutory construction, and not a constitutional issue, they also argued that the act allowed the legislature to grant powers to condemn for redevelopment only to charter cities. Thus, they contended, the TIF Act would be unconstitutional if it did indeed extend the eminent domain power to non-charter cities like Arnold.

IV. THE MISSOURI SUPREME COURT EXPANDS THE TIF ACT

A. The Court's Statutory and Constitutional Construction

The Missouri Supreme Court reversed the trial court in a short 5-1 decision, with one justice not participating.[112] The decision was deeply influenced by the court's confusion over whether the case was one of statutory or constitutional interpretation. Although the Tourkakises argued at length that the TIF Act did not give Arnold the power to use eminent domain for redevelopment, and despite the trial court's declaration that it need not address the constitutionality of the TIF Act, the Supreme Court confined its opinion almost exclusively to the act's constitutionality. It did not discuss any of the Tourkakises' arguments about statutory construction.

The court began by employing the "standard of review for constitutional challenges to a statute,"[113] which is a deferential standard, instead of the non-deferential standard of review

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appropriate to statutory interpretation. It went on to declare that the legislature may grant eminent domain powers for redevelopment to non-charter cities, because the Constitution provides that "laws may be enacted" that facilitate the condemnation of blighted areas in non-charter cities.[114] As we have seen, this is a possible but unconvincing interpretation of the constitution's language, and appears to contradict the intention of the framers.

The court's decision included only three sentences addressing whether the TIF Act grants eminent domain powers to non-charter cities. "The City is authorized under several statutes, including the TIF Act, to exercise eminent domain," it asserted.[115] "Arnold, as a non-charter city, derives its authority to utilize eminent domain from statutes, including the TIF Act."[116] Inexplicably, the court made no reference at all to the Tourkakises' statutory construction arguments — arguments that took up more than 16 pages of their brief and virtually the entire oral argument.[117] The only explanation the court gave to justify its conclusion that the act gives such powers to non-charter cities was that it "allows urban renewal of blighted areas by permitting tax abatements to be used for the redevelopment of these areas. It is codified within chapter 99 and authorizes 'municipalities' to utilize eminent domain to take private property to facilitate redevelopment."[118] The word "municipality," the court noted, was "statutorily defined as a city, village, incorporated town, or any county."[119] Yet, as explained above, this broad reading of the act ignores the requirement that eminent domain statutes and statutes granting powers to non-charter cities be strictly construed. It also fails to explain the lack of any condemnation procedures in the act. Although asked to do so in a motion for rehearing, the court never addressed these complications.

The arbitrary nature of this expansion of the eminent domain power was suggested during proceedings before the court issued its ruling. In their brief, the Tourkakises objected that reading the act broadly so as to grant redevelopment powers to non-charter cities would seriously disrupt the constitutional distinction between the charter and non-charter cities.[120] To this argument, the city of Arnold replied that there was "no reason why these important powers should be restricted to constitutional charter cities. … Charter cities do not, by definition, possess any unique attributes that predispose them to blight."[121] Yet regardless of whether or not the Constitution and laws *ought to* distinguish between charter and non-charter cities, the fact is that they *do* so, and the former are granted powers that are withheld from the latter. The city provided no legal reason for departing from the long-established constitutional structure, an error compounded during an exchange in oral argument:

> *[Attorney for the city of Arnold]: Why would the Constitution, adopted by the people of this state, say that we are going to distinguish charter cities and counties from other cities and counties throughout the state, and say "we're just going to let you do it [i.e., use eminent domain for redevelopment], rather than you"? The suggestion that only charter cities and counties have the*

competence and have the people and have the wherewithal to take care of their own communities is preposterous.

[Justice Teitelman]: But the Constitution ... does distinguish between different categories of cities for different purposes.

[Attorney]: Without question, Judge, but they distinguish between those entities without regard to a substantive issue like this. "Okay, you get to do this, charter city, and you don't, third class city." Tell the city of Chesterfield, a non-charter city, of 47,000 people, that when it was sitting 20 feet under water, after the 1993 flood ... that "too bad, city of Chesterfield, you are a non-charter city, so you have to sit there and watch the guts of your city continue to decay and rot, because of the fact that that's what the Constitution says" ... It would be an absolutely ridiculous reading of the Constitution to suggest that.[122]

It is difficult to see why this suggestion is so ridiculous. The whole reason the Constitution distinguishes between charter and non-charter cities is so that the former may do "substantive" things that the latter may not do. There is no other justification for creating different categories of cities *if not* to tell charter cities that they may do things that non-charter cities may not do. While an emergency situation like a flood might prove to be an inconvenient time for such a distinction, inconvenience is not a good reason for ignoring the state's fundamental law. Moreover, while an emergency like a flood might call for extraordinary government powers, it is not analogous to a redevelopment project that takes place over the course of years and involves intricate planning on the part of a wide variety of business and government officials.

Finally, while the people of non-charter cities are no doubt just as capable as citizens of charter cities of "taking care of their own communities," the mechanisms by which they may do so are established by the Constitution, which grants different government powers to different types of city governments. Missouri law allows any city of more than 5,000 residents to apply for a legislative charter and obtain the powers and privileges of charter cities. Yet Arnold and other large non-charter cities have chosen not to do so. Arnold's argument — supported by no law or precedent — rested on nothing more than a desire to set aside constitutional distinctions between charter and non-charter cities when it found those distinctions inconvenient. The city demanded that the court ignore the differences that the Missouri Constitution makes between charter cities and non-charter cities, and ignore the choice of Arnold residents to decline to become a charter city. The court silently acquiesced in this demand, adopting without meaningful analysis a new, loose construction of the TIF Act that vastly expands the reach of eminent domain in Missouri.

In doing so, the *Tourkakis* decision ignored the constitutional avoidance rule, under which a court "will avoid the decision of a constitutional question if the case can be fully determined without reaching it,"[123] as well as the requirement of strict construction. Even when a strict construction of a law is strained, a court will adopt it (so long as it is not absurd) in order to avoid addressing constitutional

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Even if the TIF Act could be construed as broadly as the other justices thought, Justice Teitelman had reservations about the act's constitutionality.

questions unnecessarily.[124] We have seen that in *Eilers*, the court of appeals adopted a restricted reading of the term "survey" in order to avoid conflict with the Constitution's protections for property rights. In that case, the judges observed that "if [the statutes at issue in that case were] read to authorize soil surveys," then the statute would authorize government officials to "violate constitutional restrictions on the taking and damaging of private property without just compensation."[125] This consequence was sufficient to justify a narrow construction because "statutes should be construed to avoid constitutional problems."[126] Likewise, in *State ex rel. Taylor v. Land Clearance for Redevelopment Authority of Kansas City*,[127] the Missouri Supreme Court adopted a narrow construction of the Land Clearance for Redevelopment Act when it concluded that a redevelopment agency lacked statutory power to issue bonds to finance a project. The court found no express or implied authority to issue the bonds,[128] despite the fact that the act (unlike eminent domain laws) was to be "liberally construed,"[129] and it adopted this narrow construction so that it would not have to address a constitutional question.[130] Yet the *Tourkakis* Court failed to abide by these restrictions, and, ignoring important rules of statutory construction, reached out to decide an unnecessary constitutional issue.

Justice Teitelman pointed out these problems in a short dissent. "A strict construction of the TIF act reveals no express delegation of the power of eminent domain to third-class cities," he observed.[131] It provides "absolutely no procedures" for the use of eminent domain, and "the most logical conclusion" would be that lawmakers presumed that cities "would proceed under the eminent domain powers already granted by applicable eminent domain statutes."[132] Because non-charter cities lacked these powers, the TIF Act should not be read as giving them such powers.

Even if the TIF Act could be construed as broadly as the other justices thought, Teitelman had reservations about the act's constitutionality. In his view, the Constitution "does not expressly authorize the wholesale delegation" of eminent domain. "Instead, it provides only that the legislature may enact a law allowing the use of eminent domain for a redevelopment project."[133] In his view, Article VI, section 21, would allow the General Assembly to give redevelopment powers to non-charter cities only on a project-by-project basis. This interpretation (which was not argued by either party) respects the constitutional distinction between charter and non-charter cities, and preserves the state legislative oversight that has long been the rule for eminent domain powers. Article VI, section 21, was designed as a limited exception to this general rule, giving charter cities greater autonomy but retaining legislative authority in all other cases. Moreover, legislative oversight does sometimes serve as a check against the abuse of eminent domain by local officials.[134] Yet this interpretation is hard to reconcile with the Constitution's language, which refers to "laws … providing for the clearance … of blighted, substandard or insanitary *areas*" — in the plural.[135] This language suggests that the legislature retains discretion to enact routine

procedures in non-charter cities, not on a case-by-case basis, but whenever those areas fall below standards set out in general laws.

The brevity of the court's discussion of the TIF Act concealed from some observers the degree to which the *Tourkakis* case expanded the power of eminent domain in Missouri. The decision makes clear that every town and village in the state, no matter how small, now has the power to condemn private property and transfer it to private developers for the construction of projects designed to alleviate "blight." The decision accomplished this in spite of the absence of procedural mechanisms, and in spite of traditional legal rules of interpretation that require courts to avoid constitutional questions and to strictly construe both the powers of non-charter cities and laws that address the power of eminent domain.

In her *Kelo* dissent, Justice Sandra Day O'Connor warned that with the expansion of the eminent domain power, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[136] Likewise, although the power to condemn "blighted" and "substandard" areas was originally restricted to Missouri cities and counties that had gone through the process of adopting a charter, the *Tourkakis* decision extends that power to every local government entity in the state. This means that even residents of the state's small communities, such as Sugar Creek,[137] must now fear that their homes, businesses, and houses of worship could be next to be bulldozed for the private benefit of a commercial developer.

B. The Consequences of the *Tourkakis* Decision

It is unfortunate enough that the Missouri Supreme Court chose to expand the power of eminent domain beyond what legislators intended, ignoring long-standing rules of legal interpretation. But there are other reasons why the *Tourkakis* decision is particularly dangerous for the rights of Missouri's home and business owners. Residents of charter cities are allowed the power of referendum,[138] which would allow them to act directly to prevent abuses of eminent domain. But residents of non-charter cities have no such guarantee. And, although residents of third-class cities like Arnold have a limited power to recall[139] or impeach[140] city officials, they may recall officials only for "misconduct in office, incompetence, or failure to perform duties as prescribed by law," which bars recalls motivated by disagreement with official policies.[141] There are also other significant restrictions on this recall power,[142] which has caused confusion in the past.[143] The grounds for impeachment are unclear as well.[144] Residents of fourth-class cities and villages have no power of recall.

The reason for this difference is that non-charter cities may exercise authority only by legislative grant, which means that the legislature can monitor the use of such power. If the legislature believes that non-charter cities are abusing their powers, it can revoke or restrict those powers. Charter cities, by contrast, exercise autonomous authority, but are checked by citizens armed with the referendum power. This issue can be particularly important in the context of redevelopment, where

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Although Missouri courts gradually broadened the category of purposes for which eminent domain may be employed during the years since the Constitution's ratification — allowing condemnations not only to eliminate slums but also to remedy "economic underutilization" — even these expansive cases were confined to "urban redevelopment" on the grounds that "[c]entrally located urban land is scarce."

citizens can use a referendum to stop abuses of eminent domain.[145] Residents of non-charter cities lack this power, and are therefore at greater risk of eminent domain abuse.

This concern is amplified still further when reflecting on the fact that residents of small communities are at greater risk of what America's founders called "the mischiefs of faction"[146] than are residents of large cities. James Madison argued that in small communities, it is more likely that a "common passion or interest" will lead the majority to violate the rights of unpopular individuals.[147] As recent controversies over eminent domain indicate, the power to condemn land for redevelopment is a power especially susceptible to the problem of faction,[148] and this appears to be particularly true in smaller communities.[149] As George Vaubel observed with respect to the autonomy of charter cities, "the dangers of majority abuse of government by factions, particularly by smaller units of government (as presented by James Madison with respect to federal/state relations) is of significant importance. The need to protect against possible abuse suggests that limits be placed upon local power."[150]

What's more, smaller communities appear to be more likely to use eminent domain for purposes of *development* as opposed to the *redevelopment* of slums or blighted areas. The original purpose of Article VI, section 21, was to enable city officials to eliminate deteriorating neighborhoods thought to be a source of crime and disease.[151] The authors of the 1945 Constitution believed that these problems were far more likely to be found in urban slums than in rural communities or small towns. Although Missouri courts gradually broadened the category of purposes for which eminent domain may be employed during the years since the Constitution's ratification — allowing condemnations not only to eliminate slums but also to remedy "economic underutilization"[152] — even these expansive cases were confined to "*urban* redevelopment" on the grounds that "*[c]entrally located urban land* is scarce."[153] In *Annbar Associates v. West Side Redevelopment Corporation*,[154] probably the most important redevelopment case in Missouri law, the court observed that "the growth like 'Topsy'[155] of our great cities" had "awakened [the state] to the realization that a result of that growth has been the creation of slums and blighted areas ... [which are] a breeding ground for juvenile delinquency, infant mortality, crime and disease. ... The people of the two great metropolitan areas of this state, Kansas City and St. Louis, have authorized their respective cities" to clear and redevelop "their blighted areas."[156]

Rural communities, by contrast, seem more likely to employ eminent domain to attract businesses to otherwise unused or vacant land that is not dilapidated or depressed, but which local government would like to see transformed into tax-producing commercial land.[157] In one recent California case, for example, the desert community of California City — a sparsely populated city in Kern County — adopted a redevelopment plan designating vacant desert land for the construction of a test track for the Hyundai corporation.[158] A 1998 report found 25 redevelopment projects in California that consisted of more than 50 percent

vacant land, and concluded that such projects "appear to have development, rather than redevelopment, as their prime purpose."[159] The circumstances were similar in *Tourkakis*: The property at issue was a commercially successful enclave of stores and businesses, none of which was substandard or a threat to public health or safety. Instead, city officials sought to replace the existing middle-class small businesses with a multimillion dollar shopping center. The use of eminent domain for slum clearance or the elimination of substandard areas as contemplated by the Missouri Constitution of 1945 was predicated on the belief that such areas are a threat to public health and safety and to the welfare of the body politic — a proposition that does not warrant the use of eminent domain for the development of vacant land or land that, although perhaps suboptimal in its usage, is still tidy and economically productive. Smaller communities, however, eager for economic development and advancement, seem to be more likely to abuse eminent domain powers for this reason.[160] And, while recent legislation bars officials from declaring agricultural land to be "blighted," it does not protect residents of small communities who do not own farms, but who do own land that local bureaucrats think would make a good spot for a shopping center.

Finally, granting non-charter cities full redevelopment powers might lead to significant conflict with redevelopment plans designed at the state level. In contrast to the autonomy given to charter cities, the 1945 Constitution gives the General Assembly the power to pass laws regulating development in non-charter cities. Accordingly, it has established a number of statewide redevelopment mechanisms, such as the recently enacted "DREAM Initiative," which facilitates redevelopment of downtown areas in cities across the state, including non-charter cities.[161] But, in the wake of the *Tourkakis* decision, *all* city governments in Missouri are now free to implement redevelopment plans, with little oversight at the state level.[162] This makes it likely that cities, competing to attract potential developers, will adopt conflicting development plans.[163] This concern is not farfetched; cities and states already come into frequent conflict over the use of tax incentives and land-use regulations designed to attract businesses. In 2004, the American Planning Association adopted resolutions calling for greater "intergovernmental and agency cooperation" so as to "reduce conflict in redevelopment planning and implementation efforts."[164] The rationale offered by proponents of government-maintained land-use planning is to ensure uniformity in development schemes,[165] and some of these proponents have complained that "excessive reliance upon local governments to regulate land use has … created problems such as … conflicting land uses at municipal borders … [and] local governments are often unable to resolve intra-local land use disputes fairly and rationally."[166] Autonomous, competing redevelopment plans would seem to entail the same problems. Expanded local control without expanded state oversight — and without the power of referendum to allow citizens to supervise city officials — is likely to increase conflict and make redevelopment planning more complicated.

The use of eminent domain for slum clearance or the elimination of substandard areas as contemplated by the Missouri Constitution of 1945 was predicated on the belief that such areas are a threat to public health and safety and to the welfare of the body politic — a proposition that does not warrant the use of eminent domain for the development of vacant land or land that, although perhaps suboptimal in its usage, is still tidy and economically productive.

At bottom, the *Tourkakis* Court's decision to allow non-charter cities to use eminent domain for redevelopment undoes one of the crucial constitutional distinctions between charter and non-charter cities, and without any sound legal basis for doing so. The Missouri Constitution makes that distinction quite clear, and courts have long respected it. The *Tourkakis* decision eliminates that distinction in cases involving eminent domain, endangering citizens in non-charter cities and even undermining the efforts of redevelopment proponents.

Given the prolific abuse of eminent domain in Missouri, it is particularly distressing to see the state's highest court expand the power of eminent domain even further than the state legislature evidently intended.

CONCLUSION

After the United States Supreme Court's decision in *Kelo v. New London*, citizens across the nation demanded stronger protections against the use of eminent domain by redevelopment agencies that often condemn private property for the benefit of politically well-connected private entities.[167] Although residents in some states gained substantive new protections of their property rights, most states failed to enact strong new protections. This is particularly true in Missouri, where a 2006 law allegedly reforming eminent domain in reality did little to bolster property rights.[168] Given the prolific abuse of eminent domain in Missouri, it is particularly distressing to see the state's highest court expand the power of eminent domain even further than the state legislature evidently intended.

NOTES

[1] See: Berliner, Dana, *Public Power, Private Gain*, Institute for Justice, 2004, p. 117. "Missouri has one of the worst records on eminent domain abuse in the country."

[2] 249 S.W.3d 202 (Mo. banc 2008).

[3] Mo. Stat. § 99.800 *et seq.*

[4] Thus, this article will not discuss Missouri's several other statutes providing for the use of eminent domain for redevelopment.

[5] See: THF Realty, Arnold Commons. Online here: www.thfrealty.com/properties/missouri/arnold_final.pdf

[6] See: Plaintiff's Petition in Eminent Domain, *City of Arnold v. Tourkakis, et al.,* No. 06JE-CC00142 (Cir. Court, 23d Judicial Dist., June 16, 2006) at 3. Online here: tinyurl.com/7eaqgv. The city cited chapters 79 and 88 of the Missouri statutes. The reference to chapter 79 appears to be a typographical error — that section refers to fourth-class cities. Chapter 77 refers to third-class cities, including Arnold.

[7] See: Mo. Stat. §88.010 (allowing condemnation only for public works and benefit districts); Mo. Stat. §77.150 (allowing condemnation for dams, lake and flood protection systems, therapeutic bathhouses, and other purposes).

[8] 545 U.S. 469 (2005).

[9] In his dissent in *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), Justice Stephen Field observed that the government could grant "franchises of a public character appertaining to the government," whose "use usually requires the exercise of the sovereign right of eminent domain." When government grants such authority, it may "determine … the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty … upon particular … corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others." *Id.* at 88. He repeated this point in his dissent in *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 146–47 (1876): "It is only where some right or privilege is conferred by the government … upon the owner, which he can use in connection with his property … or he thereby enjoys an advantage over others, that the [price] to be [charged] by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant [of, e.g., the eminent domain power], and the State … only determines the conditions upon which its concession shall be enjoyed."

[10] See, e.g.: *Swan v. Williams*, 2 Mich. 427 (1852); Cooley, Thomas, A., *Treatise on Constitutional Limitations*, Little, Brown & Co.,1868, pp. 530–538.

[11] See Sandefur, Timothy, "Don't Mess with Property Rights in Texas: How the State Constitution Protects Property Owners in the Wake of *Kelo*," *Real Property, Probate and Trust Journal*, vol. 41, 2006, pp. 227, 228–230.

[12] Missouri has held seven constitutional conventions, far fewer than New Hampshire's 17, but more than most other states. See; Dinan, John J., *The American State Constitutional Tradition*, University Press of Kansas, 2006, pp. 8–9.

[13] Missouri Constitution, Article XIII, section 7 (1820).

[14] Missouri Constitution, Article I, section 20 (1875), reprinted in *id.*

[15] The Oklahoma Constitution of 1907 also has separate "public use" and "no private use" provisions. Compare Oklahoma Constitution, Article II, section 23, with *id.* Article II, section 24.

[16] Colorado Constitution, Article II, section 14 (1876); Wyoming Constitution, Article I, section 32 (1889); Washington Constitution, Article I, section 16 (1889); Oklahoma Constitution, Article II, section 23 (1907); Arizona Constitution, Article II, section 17 (1912).

[17] This was a reference to 1 Kings 21, which depicts how Ahab covets Naboth's vineyard so much that his wife Jezebel corruptly arranges to take Naboth's vineyard away.

[18] Loeb, Isidor, and Floyd Shoemaker, eds., *Debates of the Missouri Constitutional Convention of 1875*, 1930, at 440 (speech of Mr. Gantt). Online here: tinyurl.com/9t6mu8

[19] *Id.* at 441.

[20] Missouri Constitution, Article I, section 28.

[21] 4 Debates of the Missouri Constitutional Convention of 1875*, supra* note 18 at 194.

[22] Missouri Constitution, Article II, section 2.

[23] Unfortunately, one of the most essential elements of the convention's barrier against private condemnations — the non-deferential standard of review called for in the 1875 Constitution and incorporated without change in the 1945 Constitution — has been disregarded by subsequent courts. See: *State ex rel. Dalton v. Land Clearance* for Redevelopment Authority of Kansas City, 270 S.W.2d 44, 52 (Mo. banc 1954). "[T]he question whether the contemplated use of any property sought to be taken … is public rests upon the courts, but … a legislative finding under said law that a blighted or insanitary area exists … *will be accepted by the courts as conclusive evidence* that the contemplated use thereof is public" (emphasis added). There is some indication that Missouri courts are shying away from this extreme degree of deference. In *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007), the state Supreme Court was unusually

skeptical toward a designation of "blight," observing that "the Missouri Constitution prohibits the taking of private property for uses that are not public and ensures judicial review of whether the use is public without regard to any legislative declaration that such use is public. These requirements prevent a condemning authority from forcing the transfer of private property from its owner primarily for benefit of another private party." *Id.* at 435 n. 3. See also: Leasure, Stanley A., and Carol J. Miller, "Eminent Domain: Missouri's Response to *Kelo*," *Journal of the Missouri Bar*, vol. 63, no. 4, 2007, pp. 178, 185. "Query whether future courts will be less apt to defer to legislative determinations of what constitutes blight in light of the addition of a substantial evidence requirement."

[24] *Colville v. Judy*, 73 Mo. 651, 654 (1881).

[25] *Humes v. Missouri Pacific Railway Co.*, 82 Mo. 221, 226 (1884). See also: *In re Twenty-First St.*, 96 S.W. 201, 205–06 (Mo. 1906) (taking to give land to private railroad would violate the public use clause).

[26] *Id.* at 227.

[27] *Kansas City v. Hyde*, 96 S.W. 201, 205 (Mo. 1906).

[28] Schmandt, Henry J., "Municipal Home Rule in Missouri," *Washington University Law Quarterly*, 1953, pp. 385, 385. The charter city concept was pioneered by legal scholar Howard Lee McBain; see his book *The Law and the Practice of Municipal Home Rule*, 1916. McBain was a Progressive who would become one of the first writers to use the phrase "living constitution" ; see McBain, Howard Lee, *The Living Constitution*, 1927.

[29] Vanlandingham, Kenneth E., "Municipal Home Rule in the United States," *William and Mary Law Review*, vol. 10, 1969, pp. 269, 270.

[30] Schmandt, *supra* note 28 at 385.

[31] See: Missouri Constitution, Article VI, section 19.

[32] Cf*. Waisblum v. City of St. Joseph*, 928 S.W.2d 414, 417 (Mo. App. W.D. 1996). "[T]he fact that the General Assembly, in all those years, never removed the population requirement [for obtaining a charter] denotes an intent by the legislature that it remain a part of the statute."

[33] "Forms of Government for Missouri Municipalities," Missouri Municipal League, Dec. 2004.

[34] Jefferson, Thomas, First Inaugural Address (1800), in: Peterson, M., ed., *Jefferson: Writings*, 1984, p. 494. See also: Madison, James, "Property" (1792), reprinted in: Rakove, J., ed., *Madison: Writings*, 1999, p. 515. "Government is instituted to protect property of every sort ….This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*."

[35] See, e.g.: Dewey, John, "The Future of Liberalism," *Journal of Philosophy*, vol. 32, 1935, p.225. "[Progressive] [l]iberalism … takes an active interest in the working of social institutions that have a bearing, positive or negative, upon the growth of individuals who shall be rugged in fact and not merely in abstract theory. It is as much interested in positive construction of favorable institutions, legal, political, and economic, as it is in the work of removing abuses and overt oppressions." See further: West, Thomas G., "Progressivism and the Transformation of American Government," in: Marini, John, and Ken Masugi, eds., *The Progressive Revolution in Politics and Political Science: Transforming the American Regime*, 2005, p. 13.

[36] The expansion of the eminent domain power in the United States can be divided into several stages. After the late 19th century witnessed the initial shift to allowing eminent domain by privately operated utilities, the Progressive era took the next step when courts declared, "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment." *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923). The next steps were taken by Progressives who decided that eradicating slum neighborhoods was justified as a public health and safety measure. See: Pritchett, Wendell E., "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," *Yale Law & Policy Review*, vol. 21, 2003, pp. 1, 3. The promotion of economic vitality was subsequently used as a means to this purpose. Thus, government could take property that was not as commercially productive as political leaders wished, and transfer it to other private owners whose use of the property would satisfy bureaucratic forecasts of economic performance. See, e.g.: *Berman v. Parker*, 348 U.S. 26 (1954). The latest step was taken when the Supreme Court determined that "[p]romoting economic development" — as opposed to eradicating slum neighborhoods or eliminating dangerous structures — "is a traditional and long-accepted function of government," which government can serve by taking property through eminent domain. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

[37] See, generally: Epstein, Richard A., *How Progressives Rewrote the Constitution*, Cato Institute, 2006; Marini and Masugi, *supra* note 35.

[38] *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).

[39] *Egan v. City of San Francisco*, 165 Cal. 576, 582 (1913).

[40] *In re Kansas City Ordinance No. 39946*, 252 S.W. 404, 407–08 (Mo. banc 1923).

[41] *Id*. at 409.

[42] White, G. Edward, *The Constitution and the New Deal*, Harvard University Press, 2000, pp.

128–63.

[43] Ekhirch, Arthur A., Jr., *Ideologies and Utopias: The Impact of the New Deal on American Thought*, Quadrangle Books,1969, p. 37. See also *id.* at 101. "The emphasis of the New Deal was on a type of liberty that minimized individual freedom in favor of a greater social security and economic equality of the whole."

[44] See: Sandefur, Timothy, "Mine and Thine Distinct": What *Kelo* Says About Our Path," *Chapman Law Review*, vol. 10, 2006, pp. 1, 25. Missouri courts first used the word "blight" to describe neighborhoods in 1949. See: *Bader Realty & Inv. Co. v. St. Louis Housing Authority*, 217 S.W.2d 489, 493 (Mo. banc 1949) (quoting: *New York City Housing Authority v. Muller*, 270 N.Y. 333, 339 [N.Y. 1936]).

[45] See: Pritchett, *supra* note 36 at 22–37; Claeys, Eric R., "Don't Waste a Teaching Moment: *Kelo*, Urban Renewal, and Blight," *Journal of Affordable Housing and Community Development Law*, vol. 15, no. 1, 2005, pp. 14, 15; Sandefur, "Mine and Thine Distinct," *supra* note 44 at 19–29.

[46] Oddly, it appears that 1954 was a seminal year in the history of eminent domain. Along with the famous U.S. Supreme Court decision *Berman v. Parker*, 348 U.S. 26 (1954), courts in many other states adopted expansive readings of the eminent domain power that year. See further: Sandefur, Timothy, "A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of 'Public Use,'" *Southwestern University Law Review*, vol. 32, 2003, pp. 569, 659–667. This includes Missouri. See *Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. banc 1954).

[47] See: Anderson, Martin, *The Federal Bulldozer*, McGraw-Hill, 1967, pp. 39–51.

[48] The convention had two committees on local governmental matters: one for counties under 100,000 population, called the "Committee on Local Government," the other for large municipalities, called the "Committee on Local Government (St. Louis, St. Louis County, and Jackson County)." *Constitutional Convention of 1943–44 Verbatim Stenotype Debates*, on file with the Missouri Secretary of State, at 2171, 2175–76.

[49] *Id.* at 2090.

[50] *Id.*

[51] *Id.*

[52] Stayton also suggested that this expanded power would be enjoyed by Springfield and Saint Joseph, which were not at that time charter cities. No other delegate agreed with this statement, however, and the text of the final provision makes clear that only charter cities were directly granted this power.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 2091.

[56] *Id.*

[57] *Id.* at 2181.

[58] *Burks v. City of Licking*, 980 S.W.2d 109, 111 (Mo. App. S.D. 1998); *City of Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416, 424 (Mo. App. W.D. 1998); *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. banc 1994); *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281, 288 (Mo. banc 1977); *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. banc 1977); *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975).

[59] Mo. Stat. § 353.010, *et seq*.

[60] Mo. Ann. Stat. § 100.300, *et seq*.

[61] Mo. Stat. § 99.300-99.660.

[62] Dudley, Christina G., "Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast," *UMKC Law Review*, vol. 54, 1985, pp. 77, 77–80; Reinert, Josh, "Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?," *St. Louis University Law Journal*, vol. 45, 2001, pp. 1019, 1020; White, Michael T., "Tax Increment Financing in Missouri," *Journal of the Missouri Bar*, vol. 46, 1990, pp. 453, 453–44.

[63] Reinert, *supra* note 62 at 1019 (describing incident in which a multimillion dollar shopping mall was adjudged to be "blighted" to qualify for government grants under the TIF Act); Dardia, Michael, *Subsidizing Redevelopment in California*, Public Policy Institute of California, 1998 (describing abuses of TIF in California).

[64] See, e.g.: McGraw, Daniel, "Giving Away the Store to Get a Store," *Reason*, January 2006. Online here: tinyurl.com/7arbc5

[65] Dudley, *supra* note 62 at 77–80; Reinert, *supra* note 62 at 1023–26.

[66] Mo. Stat. 99.805(8).

[67] Mo. Stat. 99.820(3).

[68] See *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531, 534 (Mo. Ct. App. 1993)

[69] The strictness of construction applied to non-charter cities is exemplified by *City of Raytown v. Danforth*, 560 S.W.2d 846 (Mo. banc 1977), in which the state Supreme Court found that non-charter cities were required to obtain licenses to operate ambulances, and were not immunized from that requirement by a state law granting them the power to operate ambulances. The enabling act, the court noted, made "no provision for licensing, minimum equipment requirements, personnel qualifications, training requirements or related operational standards." *Id.* at 848. Because the legislature had not provided these means, the court would not presume that non-charter cities had the authority to act on such matters independently; instead, those cities were required to abide by other statutes establishing licensing procedures.

[70] 1982 Missouri House Perfection Calendar, 81st General Assembly, 2d Sess. at 37–39 (May, 1982).

[71] See, e.g.: Lindecke, Fred W., "Senate Passes

Bill to Aid Urban Renovation Projects," *St. Louis Post-Dispatch*, Apr. 21, 1982; White, "Tax Increment Financing in Missouri,"46 J. Mo. Bar 453(1990); Dudley, "Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast," 54 UMKC L. Rev. 77 at 96–98 (1985).

[72] Cf. *Appeal of HCA Parkland Medical Center.*, 719 A.2d 619, 621–22 (N.H. 1998) ("[T]he phrase 'subject to this chapter' ... plainly evinces an intent by the legislature to limit the [applicability of the statute].... [It is] limiting language."); *Mills v. Fletcher*, 229 S.W.3d 765, 768 (Tex. App. 2007) (noting that "the phrase '[i]n addition to any other limitation under law,' shows an intent by the Legislature to limit expenses simply 'incurred.'").

[73] See, e.g.: *Kirschbaum v. Walling*, 316 U.S. 517, 522–23 (1942) (In enacting the Fair Labor Standards Act, Congress did not intend to exercise its full power of regulating interstate commerce).

[74] See, e.g.: *State ex rel. Union Elec. Co. v. Pub. Svc. Comm'n of Missouri*, 765 S.W.2d 626, 628 (Mo. App. W.D. 1988) ("[I]t will not be presumed that the legislature inserted idle verbiage or superfluous language in a statute"); *Wilson v. Traders Ins. Co.*, 98 S.W.3d 608, 618 (Mo. App. S.D. 2003) (same).

[75] For example, non-charter cities are empowered to condemn property for streets, water courses, and similar uses by Mo. Stat. § 88.497, which establishes a procedure for condemnation and valuation. See: *Id.* §§ 88.010-88.077.

[76] See: Mo. Stat. § 353.130(3) ("An urban redevelopment corporation operating pursuant to a redevelopment agreement ... may exercise the power of eminent domain ... in the manner provided ... in chapter 523."); *Id.* § 100.420(1) ("An authority ... may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523 ..."); *Id.* § 99.460(1) ("An authority may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523 ..."). Mo. Stat. § 523, *et seq.* is Missouri's general condemnation law. Mo. Stat. § 88.497 also allows non-charter cities to use eminent domain for certain specified purposes (but not for redevelopment).

[77] *In re Foreclosure of Liens for Delinquent Land Taxes by Action in rem v. Hous. Auth. of Kansas City, Mo.*, 150 S.W.3d 364, 370 (Mo. App. W.D. 2004). *Accord*, *Thogmartin v. Nevada Sch. Dist.*, 176 S.W. 473, 474 (Mo. App. K.C. 1915). ("[A]s the Legislature has provided no effective remedy ... whereby such judgment may be enforced, it may be taken as quite evident that the law-making power did not intend the statute to apply ...")

[78] *State ex rel. Mower v. Superior Court for Pierce County*, 43 Wash.2d 123, 127 (1953).

[79] *Id.* at 131.

[80] *Id.*

[81] *Id.*

[82] See also *Bechen v. Moody County Bd. of Comm'rs*, 703 N.W.2d 662, 667 (S.D. 2005) ("The legislature has not established a procedure to allow a decision made by a board of adjustment to be subject to referendum. We do not believe that this was an oversight, given the carefully crafted procedure established by the legislature. ... Thus we must conclude that the legislature did not intend that the actions of boards of adjustment be subject to referendum."); *Millay v. Cam*, 84 Wash. App. 369, 374 (Wash. Ct. App. 1996), *rev'd on other grounds*, 135 Wash.2d 193 (1998) ("[The Legislature] has not established a procedure for resolving disputes about the 'sum required.' ... This omission indicates that the Legislature did not intend to provide any preredemption procedure for disputing the 'sum required.'"); *Miller v. Baldwin*, 176 Or. App. 500, 509–510 (Or. Ct. App. 2001) (where legislature has not provided a procedure for exercising an alleged power, it is strong evidence that such power does not exist); *City of South Haven v. Van Buren County Bd. of Comm'rs*, 478 Mich. 518, 527–29 (2007) (same).

[83] Mo. Stat. 523.010(1). The statute does refer to condemnations for transfer to "corporation[s] created under the laws of this state for public use," but this does not seem to apply to redevelopment projects, either. The term "public use" in this section modifies "corporation," and a corporation created for public use is a public works project such as a public utility, not a redevelopment project; at least, it is not a redevelopment project under the principle of *ejusdem generis*.

[84] When challenged on this point, the city also argued that the procedures whereby third-class cities could use eminent domain for redevelopment were also established in Rule 86 of the Missouri Supreme Court Rules — a provision it had never cited before in the case. See: Reply Brief of Appellant, *City of Arnold v. Tourkakis*, No. SC88647, at 15. Online here: tinyurl.com/8x8oez. Yet this rule only applies when the condemning party "has authority to bring a condemnation proceeding." Missouri Supreme Court Rule 86.03. The city's argument therefore begged the question.

[85] See: *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. 1994); *City of Smithville v. St. Luke's Northland Hospital Corp.*, 972 S.W.2d 416, 424 (Mo. Ct. App. 1998).

[86] *Burks*, 980 S.W.2d at 111.

[87] *City of Carthage v. Carthage Light Co.*, 70 S.W. 936, 937 (Mo.App. K.C. 1902).

[88] *Id.*

[89] See, e.g.: *State ex rel. State Highway Comm'n v. Curtis*, 222 S.W.2d 64, 68 (Mo. banc 1949) (Missouri courts "compel strict compliance

with the [enabling] statutes and … prevent the taking of private property for a private or non-public use.")

[90] *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531, 534 (Mo. App. W.D. 1993); *accord*, *City of Springfield ex rel. Bd. of Pub. Utilities of Springfield, Mo. v. Brechbuhler*, 895 S.W.2d 583, 584 (Mo. banc 1995) ("The power of eminent domain is one of the most intrusive powers of government. ... Therefore in determining the power to condemn in a governmental body, statutes must be strictly construed.").

[91] See, e.g.: *Mehan*, 854 S.W.2d at 533–36.

[92] 878 S.W.2d 819 (Mo. 1994).

[93] *Id.* at 821 (citing Mo. Stat. § 91.450).

[94] *Id.* at 825.

[95] 972 S.W.2d 416 (Mo. App. W.D. 1998).

[96] Mo. Stat. § 79.380.

[97] *Smithville*, 972 S.W.2d at 423.

[98] *Id.* at 424.

[99] 729 S.W.2d 471 (Mo. App. W.D. 1987).

[100] *Id.* at 472.

[101] *Id.* at 473.

[102] *City of Arnold v. Tourkakis*, No. 06JE-CC00142 (Cir. Ct. 23d Jud. Dist. Jefferson County, May 21, 2007). Online here: tinyurl.com/a8qr7q

[103] *Id.* at 2.

[104] *Id.* at 2–3.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 3.

[108] See, e.g.: *Eilers*, 729 S.W.2d 471; *State ex rel. Taylor v. Land Clearance for Redevelopment Auth.*, 586 S.W.2d 331, 335 (Mo. banc 1979). See also: *State v. Thompson*, 294 Or. 528, 531–32 (1983) ("to the extent that statutory law disposes of a case a court has no occasion to reach a constitutional issue").

[109] *City of Arniold v. Tourkakis,* No. 06JE-CC00142, *supra* note 102 at 3.

[110] Missouri Constitution, Article V, section 3.

[111] The Tourkakises pointed out this fact in their brief to the Missouri Supreme Court but did not dispute the court's jurisdiction, because, if the court had reversed Judge Williams' statutory construction, it would then have been required to address the constitutionality of the TIF Act. See: Brief of Respondents, *City of Arnold v. Tourkakis*, No. SC88647 at 3–4. Online here: tinyurl.com/8m25el

[112] 249 S.W.3d 202 (Mo. banc 2008).

[113] *Id.* at 204.

[114] *Id.* at 205 ("The phrase 'Laws may be enacted' indicates that the legislature has the authority to pass statutes to allow non-charter cities to utilize eminent domain to eliminate blighted areas.")

[115] *Id.* at 206.

[116] *Id.*

[117] Brief of Respondents, *City of Arnold v. Tourkakis,* No. SC88647, at 9–24. Online here: tinyurl.com/8m25el

[118] *Id.* at 205.

[119] *Id.* at 205 n. 4.

[120] See: Brief of Respondents, *City of Arnold v. Tourkakis*, No. SC88647, at 35–38. Online here: tinyurl.com/8m25el

[121] Appellant's Opening Brief, *City of Arnold v. Tourkakis*, No. SC88647, at 24–25. Online here: tinyurl.com/9yyefx

[122] Oral argument audio recording, *City of Arnold v. Tourkakis*, No. SC88647, at 28:31–30:06. Online here: tinyurl.com/9jv4x9

[123] *State ex rel. Union Elec. Co. v. Public Service Com'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). Citing more than 50 cases involving the constitutional avoidance canon, Judge Juan R. Torruella of the First Circuit observed that it "is as old as the Rocky Mountains and embedded in our legal culture for about as long." *United States v. Vilches-Navarrete*, 523 F.3d 1, 9 n. 6 (1st Cir. 2008) (Torruella, J., dissenting).

[124] See, e.g.: *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991) ("It is a well accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended.")

[125] *Eilers*, 729 S.W.2d at 473.

[126] *Id.*

[127] 586 S.W.2d 331 (Mo. banc 1979).

[128] *Id.* at 335.

[129] *Id.*

[130] *Id.*

[131] *Tourkakis*, 249 S.W.3d at 207 (Teitelman, J., dissenting).

[132] *Id.*

[133] *Id.* at 206 (Teitelman, J., dissenting).

[134] For example, recent eminent domain reform legislation in Kansas specifies that redevelopment projects must be expressly approved by the legislature. See: Sandefur, Timothy, "The 'Backlash' So Far: Will Americans Get Meaningful Eminent Domain Reform?" *Michigan State Law Review*, 2006, pp. 709, 744.

[135] Missouri Constitution, Article VI, section 21 (emphasis added).

[136] *Kelo*, 545 U.S. at 503.

[137] See, e.g.: Burnes, Brian, "Sugar Creek Development Angers Some Longtime Residents," *Kansas City Star*, Oct. 3, 2007, at B2 (2007 WL 19307098); Kelly, Robert, "Missouri's High Court Hears Eminent Domain Case Today," *St. Louis Post-Dispatch*, Jan. 17, 2008. Online here: tinyurl.com/8tlf4r

[138] See, e.g.: *Pitman v. Drabelle*, 183 S.W. 1055, 1056 (Mo. 1916).

[139] Mo. Stat. §77.650.

[140] Mo. Stat. §77.340.

[141] Mo. Stat. §77.650(2). See also: *State ex rel. City Council of City of Gladstone v. Yeaman* 768 S.W.2d 103, 106–07 (Mo.App. W.D. 1988).

[142] Mo. Stat. §77.650. An official may be recalled

only after serving in office for six months, and there are limits on the number of recall petitions that may be filed.

[143] Callier, Charles E., and Lorna L. Frahm, "Removal of Local Government Elected Officials by Impeachment and Recall," *Journal of the Missouri Bar*, vol. 49, 1993, pp. 111, 117. See also: *Gladstone*, 768 S.W.2d at 107–08.

[144] Callier and Frahm, *supra* note 143 at 112–13.

[145] See, e.g.: *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457 (Mo.App. E.D. 2000) (citizens trying to use referendum powers to stop redevelopment project); *State ex rel. Wright v. Campbell* 938 S.W.2d 640, 641 (Mo.App. E.D. 1997) (same); *Friends of the City Market v. Old Town Redevelopment Corp.* 714 S.W.2d 569, 571–572 (Mo.App. W.D. 1986) (same); *Anderson v. Smith*, 377 S.W.2d 554, 557 (Mo.App. 1964) (same).

[146] *The Federalist* No. 10 at 81 (James Madison) (Clinton Rossiter, ed., 1961).

[147] *The Federalist* No. 10, *supra* note 146 at 78.

[148] See: *Norwood v. Horney*, 853 N.E.2d 1115, 1140 (Ohio 2006) ("[D]ue to the mutuality of public and private interests in such cases, a danger exists that the state's decision to take may be influenced by the financial gains that would flow to it or to the private entity because of the taking."). See also: Somin, Ilya, "Controlling the Grasping Hand: Economic Development Takings After *Kelo*," *Supreme Court Economic Review*., vol. 15, 2007, pp. 183, 201. "[T]here are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the economic development rationale; severe limits on electoral accountability caused by low transparency; and time horizon problems."); Sandefur, "Mine and Thine Distinct," *supra* note 44 at 34–39.

[149] One dramatic example of this fact in the context of eminent domain is the case of Freeport, Texas, described in: Main, Carla T., *Bulldozed:"Kelo," Eminent Domain, and the American Lust for Land*, Encounter Books, 2007. But similar problems were present in the notorious 1981 *Poletown* case. See: Wylie, Jean, *Poletown: Community Betrayed*, University of Illinois Press, 1989, pp. 219–20.

[150] Vaubel, George D., "Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule: Part II," *Stetson Law Review*, vol. 24, 1995, pp. 417, 486.

[151] See: Pritchett, *supra* note 36 at 22–37; Claeys, *supra* note 45 at 15 (2005). "Blight or slum clearance was made popular during the 1920s and 1930s by progressive urban planners who sought to establish new idealistic programs for comprehensively planned urban development."

[152] *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146, 151 (Mo. 1987).

[153] *Id.* (emphasis added).

[154] 397 S.W.2d 635, 646 (Mo. 1966).

[155] This is a reference to the character Topsy in Harriet Beecher Stowe's *Uncle Tom's Cabin*, a young slave girl who, when asked if she knew about the God who made her, replied, "Never was born. … I spect I grow'd. Don't think nobody never made me." Stowe, Harriet Beecher, *Uncle Tom's Cabin*, Barnes and Noble, 1995, 1852, pp. 239–40. Given the racial disparities that were always present in "urban renewal" programs like the one at issue in *Annbar*, this was an impolitic choice of words.

[156] *Annbar,* 397 S.W.2d at 639.

[157] It is notable that in nearly all the major eminent domain cases of what we might call the *Kelo* era, smaller communities have used the power for the sake of economic development instead of blight or slum removal. See: *Kelo*, *supra* note 36 (involving the small town of New London, Conn.); *Norwood, supra* note 148 (involving the small town of Norwood, Ohio); *Western Seafood v. City of Freeport*, 202 Fed. Appx. 670 (5th Cir. 2006) (the first federal eminent domain case to follow *Kelo*, involving the small community of Freeport, Texas). The exception is *Wayne County v. Hathcock*, 471 Mich. 445 (2004), a case decided immediately before *Kelo*, which involved the city of Detroit.

[158] *Neilson v. City of California City*, 146 Cal. App.4th 633 (2007).

[159] Dardia, Michael, *Subsidizing Redevelopment in California*, Public Policy Institute of California, 1998, p. xii. Online here: tinyurl.com/8mxqa6

[160] The distinction between the use of eminent domain for redeveloping blighted areas and the use of eminent domain for developing underperforming but not blighted areas has played an important part in discussions about property rights in the wake of *Kelo*. See, e.g.: *Board of County Com'rs of Muskogee County v. Lowery*, 136 P.3d 639, 650–51 (Okla. 2006). But that distinction seems more illusory than real. See, e.g.: Eagle, Steven J., and Lauren A. Perotti, "Coping with *Kelo*: A Potpourri of Legislative and Judicial Responses," *Real Property, Probate & Trust Journal*, vol. 42, 2008, pp. 799, 815.

[161] Office of Missouri Governor Matt Blunt, press release, "Blunt's DREAM Initiative Helps Hermann Preserve Historic Heritage," August 10, 2007. Online here: tinyurl.com/77q8wo

[162] It is remarkable that third-class cities like Arnold are required to have explicit statutory authority to even change the names of streets (see, e.g.: Mo. Stat. 77.220) but are now free to condemn private property and transfer it to private developers pursuant to their own self-created redevelopment plans.

[163] See, e.g.: McFarlane, Audrey G., "The New Inner City: Class Transformation, Concentrated Affluence, and the Obligations of the Police Power," *University of*

Pennsylvania Journal of Constitutional Law, vol. 8, 2006, pp. 1, 15–17 (describing cities' use of redevelopment powers to attract businesses).

[164] Taub, Theodore C., "Post-*Kelo*: Emerging Impacts and Issues in Eminent Domain," SM004 ALI-ABA 1721 (2006).

[165] See: Arnold, Craig Anthony (Tony), "Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development," *Stanford Environmental Law Journal*, vol. 10, 1991, pp. 1, 2–3. "Centralization of land use regulatory powers is an ongoing, or at least recurring, process that has seen considerable progress among state governments as a necessary response to local inabilities to adequately address regional land use planning issues (e.g., transportation, affordable and integrated housing, spatially uniform economic development, and location of unwanted land uses)." It is doubtful, however, that this motive explains government regulation of land use better than the rent-seeking effects of such planning. After the better part of a century, the Progressive mechanisms of land use planning — zoning and its many cousins — have not produced uniform land uses or uniform development. Instead, redevelopment and other schemes for government control over land use generate profits for lobbyists and protect the professional positions of an elite class of professional government planners at the expense of taxpayers. It is this, and not any success on the part of allegedly objective land use control mechanisms, that accounts for the perpetuation of those mechanisms. See also: Vaubel, George D., "Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule, Part II," *Stetson Law Review*, vol. 20, 845, 878 (1991) ("courts [have] found subjects to be under ultimate state control as matters of statewide concern because their regulation had extraterritorial impact or … needed uniformity of regulation").

[166] Cf.: Ostrow, Ashira Pelman, "Judicial Review of Local Land Use Decisions: Lessons from RLUIPA," *Harvard Journal of Law and Public Policy*, vol. 31, 2008, pp. 717, 719–20.

[167] See, generally: Sandefur, "Backlash," *supra* note 134; Somin, Ilya, "Controlling the Grasping Hand: Economic Development Takings After *Kelo*," *Supreme Court Economic Review*, vol. 15, 2007, p. 183.

[168] See: Sandefur, "Backlash," *supra* note 134 at 746–48; see also: Whitman, Dale A., "Eminent Domain Reform in Missouri: A Legislative Memoir," *Missouri Law Review*, vol. 71, 2006, pp. 721, 765–66 (noting that the eminent domain reform bill "fail[ed] to deal effectively with the definition of 'blight' … [or with] the want of serious judicial review of blight determinations by local governments," but concluding that dissatisfaction with these and other failures is "[g]rumbling by eminent domain's 'victims.'")

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