What's Yours Can be Mine: Are There Any Private Takings After *Kelo v. City of New London*?

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The Supreme Court's decision in *Kelo v. City of New London*,[1] upholding the use of eminent domain to take private property from one owner and give it to another in order to promote economic development, angered many.[2] Some felt that this decision meant the "public use" stipulation for the use of eminent domain no longer had any meaning and that the Court was now prepared to endorse any taking for any reason, so long as compensation

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1. 125 S. Ct. 2655 (2005).

2. *See, e.g.,* Timothy Egan, *Ruling sets off tug of war over private property,* N.Y. TIMES, July 30, 2005, at A1 (noting the efforts in Congress and the states after the *Kelo* opinion to condemn it or limit it with legislation); Michael Corkery and Ryan Chittum, *Eminent-domain uproar imperils projects*, WALL ST. J., August 3, 2005, at B1 (discussing how the *Kelo* opinion is causing a backlash against many projects involving the use of eminent domain); Nick Timiraos, *States may raze Court's domain ruling*, Stateline.org Politics & Policy News, *at* http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=43135 (Jul. 15, 2005) (noting the adverse reaction many states had to the *Kelo* opinion and efforts being taken at the state level to place limits on the use of eminent domain for economic development purposes). *See also* Charley Shaw, *Lawmakers respond to eminent domain ruling*, ST. PAUL LEGAL-LEDGER, July 18, 2005, at 1 (discussing how three lawmakers in Minnesota had already introduced legislation to limit eminent domain takings for economic development purposes); Joi Preciphs, *Eminent-domain ruling knits rivals*, WALL ST. J., July 8, 2005, at A4; Jason Hoppin, *High court's eminent domain ruling touches a nerve*, ST. PAUL PIONEER PRESS, July 24, 2005, at B1 (noting the backlash and reaction to the *Kelo* opinion); Adam Karlin, *Property Seizure Backlash*, CHRISTIAN SCIENCE MONITOR, July 6, 2006, at 1 (noting the concern among many that the *Kelo* decision has produced homeowner backlash and outrage); Editorial, *They Paved Paradise,* WALL ST. J., June 30, 2005, at A12 (criticizing the *Kelo* decision as rendering homes less safe from condemnation); David Kirkpatrick, *Ruling on Property Seizure Rallies Christian Groups*, N.Y. TIMES, July 11, 2005, at A13 (noting how some conservative Christian groups are concerned about the condemnation of church property in prime real estate areas because local communities may wish to replace their tax-exempt property with commercial developments).

was paid. Did *Kelo* in fact signal the death knell for the "public use" doctrine? If yes, this is not the first time that property rights advocates would have made this claim. Following decisions such as *Hawaii Housing Authority v. Midkiff*[3] and *Poletown Neighborhood Council v. City of Detroit*[4] similar laments were heard.[5]

This Article will argue that *Kelo* did not render toothless the public use stipulation on eminent domain. Moreover, it will also argue that the decision did not really represent any major change in the law as it had evolved in the last 20, if not 100, or so years. The real importance of the *Kelo* decision lies in its effort to articulate a new test already emerging in state law regarding what separates a private from a public taking. This distinction centers in on the role of the comprehensive plan as a tool for demarcating the boundary between a purely private taking and one promoting a public use.

The article first presents a jurisprudential history of the public use doctrine at the federal and state level. The reason for this discussion is twofold: first, to show that economic development

3. 467 U.S. 229 (1984). *See infra* notes 18, 94, 142, 154 and accompanying text.

4. 304 N.W.2d 455 (Mich. 1981). *See infra* notes 100, 106-08 and accompanying text.

5. For a general discussion of the presently broad interpretation the judiciary has given to the "public use" stipulation on both the federal and state level, *see* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2001-02); Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-NW. J. ENV. L. & POL'Y 179 (2003); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543 (2002); Rachel A. Lewis, *Strike That, Reverse It:* County of Wayne v. Hathcock*: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341 (2005); Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901 (2001); Jennifer M. Klemetsrud, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783 (1999); 2A NICHOLS ON EMINENT DOMAIN § 7.02 (Julius Sackman, ed., 3d. ed. rev. 2003); Suzanne LaBerge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine*, 14 STETSON L. REV. 649 (1985); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 814 (1985); Martin J. King, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266 (1972); Thomas J. Coyne, *Hawaii Hous. Auth. v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME L. REV. 388 (1985); Mark C. Landry, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 TUL. L. REV. 419 (1985); Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987); Jonathan Neal Portner, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542 (1988).

was already an accepted goal of eminent domain even prior to *Kelo* and, second, to show how previous efforts to draw a bright-line rule distinguishing a valid public use from a private taking had failed. The second part of the Article examines the Supreme Court's *Kelo* opinion, concentrating on how it discussed the role of comprehensive plans as a possible means of distinguishing public from private takings. Finally, the third part of the article draws upon three pre-*Kelo* state court opinions to demonstrate two points. One point is that comprehensive plans had already been used in an effort to clarify when a taking is for a public as opposed to a private use. The other point is that even in jurisdictions that recognize a broad authority to use eminent domain for economic development purposes, it is still possible to find that some takings are not valid in that they serve private interests. This is the case even when a comprehensive plan is in place.

Overall, this article argues that while the Court in *Kelo* hinted at a new test to distinguish valid public from invalid private uses of eminent domain, and even though the presence of a comprehensive plan may not ultimately be a satisfactory means to distinguish the two types of takings, nonetheless, the decision does not mean that the public use doctrine is dead.

I.
DISTINGUISHING PUBLIC FROM PRIVATE TAKINGS

The jurisprudential road to *City of New London v. Kelo* is punctuated by three characteristics when it comes to the public use doctrine. First, the term "public use" is ambiguous, yielding many competing definitions. Second, previous efforts to forge a precise distinction or fashion a bright-line rule between a taking that is for a valid public use versus one that is for a private benefit have failed. Third, "public use" is an elastic concept, yielding over time to an ever broader array of activities which may be undertaken or facilitated by eminent domain. Due to these three characteristics, a brief history of the public use doctrine reveals that, even prior to *Kelo*, the use of eminent domain for economic development purposes was already well accepted and permitted.

A. *Competing Visions of Public Use*

1. The Broad and Narrow Public Use Doctrines

The "public use" doctrine can be described as an "essentially contested concept" whereby its meaning has been subject to de-

bate over time.[6] A history of this doctrine shows that various courts and legislatures have defined "public use" to mean "used by the public," "public advantage," "promoting the public welfare," the "public good," and "public necessity," among other similar conceptualizations.[7] In efforts to try to distinguish between a public use and a private benefit, courts have employed a variety of tests. They range from insisting that the public have a right to use the property taken, or that everyone must benefit from the project for the condemnation to be considered valid, to a private acquisition being one where the private benefits are primary and not secondary to the public benefits. Yet despite these tests, clear demarcation between a public and a private use has been difficult for at least two reasons.

First, local customs and conditions have significantly influenced the meaning of public use in both the United States and individual state constitutions.[8] For example, though irrigation of private property in a dry climate, given local weather conditions, the state of the economy, and patterns of land ownership, may be considered a valid public use in one community,[9] such irrigation in a wet climate may not be considered a valid public use but may be seen as simply favoring a private interest. Legislatures are clearly influenced by local conditions when determining eminent domain policy and local courts pay great respect to local determinations of public use.[10] In effect, the law on what constituted a valid "public use" was constructed from the bottom up, with local jurisdictions basing determinations upon local conditions and needs, resulting in a lack of a unified or uniform definition of a valid "public use."

The federal courts reinforced this process by giving great deference to local determinations of public use. For example, the

6. WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 10 (2d ed. 1993). *See also* TERENCE BALL ET AL., POLITICAL INNOVATION AND CONCEPTUAL CHANGE (1989); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 276-279 (1984) (discussing how words, including legal concepts, hold and lose their meanings).

7. *See* 2A SACKMAN, *supra* note 5, § 7.02.

8. *See Id.* § 7.03[1] -[2].

9. *See* Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112 (1896) (upholding the use of public funds to pay for the irrigation of private land).

10. *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906). *See also* Lake Koen Navigation, Reservoir & Irr. Co. v. Klein, 63 Kan. 484 (Kan. 1901); *In re* Tuthill, 163 NY. 133 (N.Y. 1900); Dalles Lumbering Co. v. Urquhart, 16 Or. 67 (Ore. 1888) (all discussing the importance of local conditions as affecting the meaning of what constitutes a valid public use).

1896 decision in *Missouri Pacific Railway Company v. Nebraska*[11] was the first and last time the United States Supreme Court overruled a state court determination of what constituted a valid public use. Justice Holmes, in *Strickley v. Highland Boy Mining Company*,[12] underscored this point, indicating that if eminent domain statues of a state are constitutional, the Supreme Court would "follow the construction of the state court."[13]

A second reason for the vagueness of the public use doctrine is that throughout American history, it has carried two distinct meanings. One, the narrow meaning, defines public use as "used by the public."[14] A project must be used by many people for it to be considered public.[15] The second definition, the broad construction, equates public use with public advantage, public utility, or public purpose.[16] This meaning suggests that almost any project can be construed as a public use as long as it is shown that it furthers economic development, public welfare, or a better use of local resources.[17]

Throughout American history courts have wavered between applying the broad versus the narrow constructions of public use, but during the twentieth century, and most certainly at present, the broad construction of public use has triumphed.[18] This has resulted in legislatures being given wide deference in local determinations of what constitutes a valid public use, with public use eventually given a scope equal to that of the police power in *Hawaii Housing Authority v. Midkiff*.[19]

Colonial and early American uses of eminent domain were confined mainly to the building of roads, schools, and other public buildings.[20] In some cases eminent domain furthered economic development, but generally, while the eminent domain

11. 164 U.S. 403 (1896).

12. 200 U.S. 527 (1906).

13. *Id.* at 529.

14. *See* 2A SACKMAN, *supra* note 5, § 7.02[2].

15. West River Bridge Co. v. Dix, 47 U.S. 507 (1848).

16. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923); Clark v. Nash, 198 U.S. 361 (1905).

17. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); *Strickley*, 200 U.S. at 531.

18. Phillip Nichols Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 616-20 (1940) [hereinafter *The Meaning of Public Use*]; *Cf.* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 588-92 (1972).

19. *Midkiff*, 467 U.S. at 229.

20. Meidinger, *supra* note 5, at 2, 18.

power was established and accepted, little discussion about the meaning of public use occurred.[21] Moreover, the Fifth Amendment Takings Clause did not apply to the states until 1897.[22] Thus, unless local state constitutions had a public use stipulation, they were not limited by federal "public use" constitutional standards. In 1776 only two state constitutions had a public use clauses, and it was not until about the 1830s that most states had such a stipulation attached to the exercise of eminent domain power.[23] Overall, federal courts did not become involved with public use and eminent domain questions until the last quarter of the nineteenth century,[24] leaving local state courts as the mainstay in constructing the public use meaning, subject to local conditions. The result was a plethora of different uses upheld as valid condemnations, subject to competing broad and narrow constructions of the term.

Two events are particularly important in early state history of public use and eminent domain. First, state judges articulated both a broad construction of public use to justify state support of economic development, and a narrow meaning of just compensation as a way to make traditional property owners subsidize new commercial interests.[25] Eminent domain was an important nineteenth-century economic development tool, used to redistribute economic and political power and wealth.[26] Until the 1830s public use was not a judicial question, but generally a legislative one, giving state representatives wide latitude to further economic development goals. After this time the courts, especially in New York, became more conservative and made public use determinations judicial questions.[27]

One early example of this change is *Bloodgood v. The Mohawk and Hudson Railroad Company*.[28] At issue was a New York state law granting railroads the right to enter onto and take

21. *Id.* at 2.

22. Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (holding that the Fifth Amendment "just compensation" requirement for eminent domain applied to states through the Fourteenth Amendment Due Process clause).

23. Meidinger, *supra* note 5, at 16; Stoebuck, *supra* note 18, at 591-93.

24. *See* Cole v. La Grange, 113 U.S. 1 (1884).

25. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 63-71 (1977); *see also* WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 159-163 (1975).

26. HORWITZ, *supra* note 25, at 63, 260-61.

27. *Id.* at 63-65.

28. 18 Wend. 9 (N.Y. 1837).

private land, and compensate the owner to build rail lines. Nowhere did the statute refer to a public use justification for this action. But according to the opinions of Kent and Tracy, the public use doctrine must apply to this type of taking. What does it mean to say a taking is for "public use"? While dicta mention public utility, interest, and expediency, the New York court settled on the narrow definition of public use as "used by the public."[29] Since the railroads were used by the public, it was proper for the state to delegate to them that right to appropriate land.

Bloodgood is important to the development of the public use doctrine for three reasons. First, it affirmed the right of a state to transfer the ability to condemn land to a private party, and thus made it harder to say that the private use of property taken by eminent domain did not constitute a valid public use. Second, the court stated that the judiciary, not the legislature, was to be the arbiter of the meaning of public use. Finally, *Bloodgood* was the first and perhaps clearest articulation of the narrow construction of public use in the nineteenth century.[30]

A second important influence on the meaning of public use was the Mills Acts. These acts delegated eminent domain power to millers and gave them the right to build dams and raise water levels for grain mills.[31] As a result of the damming, adjacent lands were flooded and property was *de facto* taken. In most cases the Mills Acts authorized the private flooding, stating that a legitimate public use was being furthered.[32] Building dams for grain mills either furthered a private economic good (for the mill owner) that served general economic development needs, and thus was justified under a broad construction of public use; or else the grain mills were open to public use and thus justified under a narrow construction. Either way, the Mills Acts gave new meaning to "public use" by allowing states to use eminent domain as an economic development tool,[33] even when the property taken was not transferred to the public.[34]

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29. *Id.*

30. James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L.REV. 583, 589 (1981).

31. HORWITZ, *supra* note 25, at 47.

32. HORWITZ, *supra* note 25, at 49-53; NELSON, *supra* note 25, at 47.

33. In *Kelo v. City of New London*, 843 A.2d 500, 522 (2004), the Connecticut Supreme Court cites the Mills Acts and one of its cases, *Olmstead v. Camp*, 33 Conn. 532 (1866), as support for the condemnation in the case before it.

34. In fact, along with the Mills Acts, eminent domain was widely used for a variety of measures to facilitate economic development or aid private enterprise. *See*

From the 1840s on, the broad public benefit construction of public use seemed to be eclipsed by the narrow "use by the public" standard.[35] This shift in meaning led to two problems. The first was how to accommodate the Mills Acts into the new, narrow doctrine. How could a narrow interpretation of public use support the private flooding and construction of mills that were not really used by the public? Justice Shaw in Massachusetts pointed the way by denying that the Mills Acts were a species of eminent domain.[36] The acts were positioned as a special part of riparian law, such that neither the public use nor just compensation requirements for eminent domain applied.[37] The acts did not invoke eminent domain, but rather the police power regulating uses of property along river ways. In addition, a second potential problem was how to reconcile the private benefits that accrued to a beneficiary of eminent domain with the "use by the public" doctrine. Would not the receipt of such private benefits mean that the taking itself was "for" private benefit? The courts dealt with this issue by ruling that the private benefit was "incidental" to the public benefit.[38] Private interests could profit from eminent domain, but only as long as their profit was not the primary purpose of the taking.[39]

Despite the fact that the narrow doctrine was influential in the latter half of the nineteenth century, its use did not go unquestioned. One author writes that the narrow construction was mostly given lip service during the nineteenth century, and by the beginning of the twentieth century it was all but dead.[40] The narrow doctrine, declaring void any transfer of land from one private party to another regardless of the ultimate public purpose, did not really halt many state eminent domain projects; and state and federal courts generally upheld legislative determinations of public use.[41]

2A SACKMAN, *supra* note 5, § 7.07 (reviewing the many ways the public use doctrine was interpreted to facilitate economic development).

35. Nichols, *supra* note 18, at 617.

36. *Id.* at 620; HORWITZ, *supra* note 25, at 53.

37. Nichols, *supra* note 18, at 620.

38. HORWITZ, *supra* note 25, at 53.

39. *Id.*

40. Nichols, *supra* note 18, at 624.

41. *See, e.g.*, Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923); Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co., 243 U.S. 563 (1917) (upholding condemnation of private properties despite the incidental benefit to private individuals).

Legal commentaries on eminent domain indicate the conflicting meanings of public use in the nineteenth century. The first is a 1856 piece by J. P. Thayer, in which he states that legislatures may generally determine when to use eminent domain to serve a "public exigency."[42] However, courts do reserve some right to review these legislative determinations to protect private property. For Thayer, public use meant "use by the public;" therefore he did not believe that eminent domain permitted private transfers of land.[43]

A second discussion is found in John Lewis's *A Treatise on the Law of Eminent Domain in the United States.*[44] This treatise, with editions in 1888, 1900, and 1909, claimed to survey almost 24,000 eminent domain cases,[45] and concluded that both narrow and broad constructions of public use were used, and neither had complete sway over the judiciary. Lewis made four other interesting points regarding the narrow versus broad debate: 1) Many cases indicated that actual use by the public was not essential to sustain an eminent domain project. This meant that the broad meaning of public use was employed to sustain many takings. 2) If the narrow construction of public use was meant to exclude private transfers, then only a few state constitutions explicitly precluded private takings.[46] This was a sign that the broad meaning had legislative and state constitutional support. 3) Even the federal constitution did not clearly preclude private takings. According to Lewis, the wording of the Fifth Amendment—"nor shall private property be taken for public use"—did not really preclude takings for private use. A wording "nor shall private property be taken *except* for public use" would be more definitive of a prohibition of a private taking.[47] Finally, like Thayer, Lewis claimed that the courts generally gave great deference to legislative determinations of public use unless their action was "without reasonable foundation."[48]

In sum, throughout the nineteenth century the scope of legislative power to take property was tied to its authority to define

42. J.B. Thayer, *The Right to Eminent Domain*, 9 MONTHLY L. REP., 241, 249 (1856).

43. *Id.* at 256.

44. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (3d ed., Callaghan & Co., 1909).

45. *Id.* at iii-vi.

46. *Id.* at 494.

47. *Id.* at vi.

48. *Id.* at 499.

"public use," but that authority was not always clear or consistent. There was debate over which branch of government had the right to make public use decisions and authorize the taking of private property. It was not until after World War II that the debate over the construction of this term was resolved in favor of legislatures.

2. Emergence of the Broad Public Use Doctrine

Cole v. LaGrange[49] was the first Supreme Court case to deal with the public use question. *Cole* involved a LaGrange, Missouri, issuance of 25 bonds to the LaGrange Iron and Steel Company to operate a rolling mill. The challenge to the issuance was that the bonds were for private, not public, use, and were not sanctioned by the state constitution of Missouri. Justice Gray, writing for the majority overturning the bonding, stated that:

> [T]he general grant of legislative power in the Constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object.[50]

The Missouri Constitution, in declaring that takings are only permitted for public use, "clearly presupposes" that private property cannot be taken for private use.[51] In this case, the bonds were to the benefit of a private enterprise and therefore the state court was correct in its judgment that this was an unconstitutional private taking.

Cole stood for the proposition that no private takings for private benefit would be permitted. This decision implied that the Supreme Court had given sanction to the narrow reading of public use. It also seemed to pave the way for the Court to be the branch to protect property by deciding what a valid public use was. It should come as no surprise that *Cole* was decided around the time the Court was deciding cases such as *Muglar v.Kansas,*[52] ushering in the doctrine of substantive due process.[53] Here in *Muglar* the Court stated:

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49. 113 U.S. 1 (1885).

50. *Id.* at 6.

51. *Id.* at 7.

52. 123 U.S. 623 (1887).

53. EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT (1948).

> The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[54]

Transforming public use decisions into judicial questions was the product of a jurisprudential and constitutional philosophy that was part of the *Lochner v. New York*[55] era, whereby the courts took it upon themselves to second-guess the wisdom of economic regulation and legislation.[56]

For example, in *Hairston v. Danville and Western Railway*[57] the Court was confronted with the question whether a spur off a main railroad line took land for a private or public purpose. Justice Moody's decision affirmed the taking, yet still reserved for the Court the authority to be the final arbiter of what constituted a valid public use.

> The one and only principle in which all the courts seem to agree is that the nature of uses, whether public or private, is primarily a judicial question. The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, and the relative importance of industries to the general public welfare, and the long established methods and habits of the people.[58]

The decision also raised two significant points. Firstly, local conditions influence determinations of public use, but, secondly, it is up to the courts ultimately to decide the meaning of this term. Twenty-two years later, *Cincinnati v. Vester*[59] reaffirmed this

54. 123 U.S. at 661.

55. 198 U.S. 45 (1905) (striking down a state law regulating the working hours of individuals employed in bakeries).

56. DAVID A. SCHULTZ AND CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 2 (1996) (discussing the assumptions of Lochner era jurisprudence).

57. 208 U.S. 598 (1908).

58. *Id.* at 606.

59. 281 U.S. 439 (1930).

point regarding judicial determinations of public use. In the early part of the twentieth century, it thus appeared that the federal courts had taken control of public use determinations, giving eminent domain power a narrow construction. However, that was not completely the case.

In *Shoemaker v. United States,*[60] which raised the question of taking land for a park, the Supreme Court appeared to contradict its earlier rulings. The Court held that a taking for a recreational purpose was a legitimate public use.[61] The Court also said that the amount of land taken for public use is wholly a legislative question.[62] Following *Shoemaker,* in 1896, the Court was asked to review an 1857 California statute providing for irrigation of thousands of acres of dry, arid, private land. In *Fallbrook Irrigation District v. Bradley,*[63] several individuals claimed that public funds spent on the project were for a private use and thus their taxes were being taken and given to another private person. In upholding the California law the Supreme Court noted that the California Supreme Court found the irrigation of the land to be a public use contributing to the general prosperity of the area.[64] Next, the Supreme Court stated that what a valid public use is depends on local facts and circumstances[65] and that if local courts sustained the action, and the local law did not violate the federal Constitution, then the Supreme Court would follow state rulings.[66]

In what appeared to be a partial rejection of the narrow reading of public use the Court reasoned thus:

> The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. . . . The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. . . . . The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community or even a considerable portion thereof should

60. 147 U.S. 282 (1893).
61. *Id.* at 390.
62. *Id.* at 299-300.
63. 164 U.S. 112 (1896).
64. *Id.* at 153.
65. 164 U.S. at 167-68.
66. *Id.*

directly enjoy or participate in an improvement in order to considered a public use.[67]

A legitimate public use did not require use by the public but only that a project serve the general prosperity of a community. even if only the interests of a few people. Additionally, in *Clark v. Nash*[68] and *Strickley v. Highland Boy Mining Company,*[69] condemnations of land for aerial tramways for mining companies was contested as a private use. In upholding the state court determination of public use, the Supreme Court stated again that it would follow local rulings of public use unless the local laws were unconstitutional.[70]

From the 1920s through World War II the state and federal courts continued to expand the list of permissible projects under the public use doctrine while at the same time laying the narrow reading of the doctrine to rest. This was a consequence of takings that occurred for military and war-related purposes, or to respond to the economic crisis of the Depression. For example, in *Block v. Hirsh,*[71] the Court found that a Washington, D.C., rent control/security of occupation law, enacted as an emergency war time measure,[72] secured a valid public use. In *Old Dominion v. United States,*[73] the Court held that the taking of private land for military purposes was also a legitimate public use.[74] Finally, in *International Paper Company v. United States,*[75] the Court upheld as a valid public use a federal act taking electrical power

67. *Id.* at 161-2. At 158 the Court states: "[t]he question, what constitutes a public use, has been before the courts of many of the states and their decisions have not been harmonious, the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others."

68. 198 U.S. 361 (1905).

69. 200 U.S. 527 (1906).

70. 198 U.S. at 368 (stating in *Clark* that "we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private."). 200 U.S. at 530 (stating in *Strickley* that "[i]n view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws, as construed, are consistent with the 14th Amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court.").

71. 256 U.S. 135 (1921).

72. *Id.* at 154.

73. 269 U.S. 55 (1925).

74. *Id.* at 63.

75. 282 U.S. 399 (1931).

from the Niagara Falls Power Company and diverting it for war purposes to other private companies. In these three cases the Court did not relinquish its role to review the public use question but instead rejected the narrow reading of public use. For example, in *Old Dominion* the Court stated:

> We shall not inquire whether this purpose was or was not so reasonably incidental to the necessarily hurried transactions during the war as to warrant the taking, upon the principle illustrated by *Brown v. United States*, 263 U. S. 78, 44 S. Ct. 92, 68 L. Ed. 171. Congress has declared the purpose to be a public use, by implication if not by express words. If we disregard the heading quoted from the latest Act, 'Sites for Military Purposes,' which we see no reason for doing, and treat 'For quartermaster warehouses' as descriptive rather than prospective, still there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use.[76]

The 1936 *New York City Housing Authority v. Muller*[77] involved a city statue authorizing the clearing of slums to build low-income housing. The challenge here—which would become important in future slum-clearance and federal low-income housing acts—was that private property was being taken to provide housing for other private individuals. Even though in many cases the housing to be built would be public, it was still occupied by private individuals and thus the challenge was that the taking was for a private use. In *Muller* the New York Court of Appeals rejected this challenge and agreed with the state that slum clearance was a valid public use because it reduced juvenile delinquency, crime, and disease in the area.[78] The Court explained: "It is true that the legislative findings and the determination of public use are not conclusive on the courts. But they are entitled at least to great respect, since they relate to public conditions concerning which the Legislature both by necessity and duty must have known."[79]

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76. 269 U.S. at 66.

77. 270 N.Y. 333 (1936).

78. *Id.* at 338.

79. *Id.* at 339 (citing *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249).

Slum removal, and the subsequent construction of new housing, would be beneficial to the public. Other slum clearance cases followed *Muller*,[80] capped off by *Berman v. Parker.*

B. Berman v. Parker

The 1954 United States Supreme Court decision in *Berman v. Parker*[81] unanimously upheld the constitutionality of the District of Columbia's use of eminent domain, pursuant to statutory authorization[82] for the public use of acquiring commercial property. In *Berman*, the justification for the taking of property was slum clearance, or the removal of urban blight. The expansion in the definition of public use resulted from the Court's comment that "[t]he concept of public welfare is broad and inclusive . . . the power of eminent domain is merely the means to the end."[83] Notably, the Court found that the means used to exercise eminent domain could include utilizing an entity of private enterprise or the authorization to take private property for its resale or lease to the same or other parties.[84] In this regard, and especially important here, the Court said that:

> [T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[85]

Berman illustrates the use of eminent domain to benefit society as a whole, yet other uses of this power may[86] affirm its deployment to benefit narrower interests in the hope that they will eventually serve the broader, public interest. This concept is im-

80. *See, e.g.,* Neufeld v. O'Dwyer, 79 N.Y.S.2d 53 (N.Y. 1948); Opinion of the Justices, 120 N.E.2d 198 (Mass. 1954); Davis v. City of Lubbock, 326 S.W.2d 699 (Tex. 1959) (all affirming the use of eminent domain for slum clearance).

81. Berman v. Parker, 348 U.S. 26 (1956).

82. District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701 to -719.

83. 348 U.S. at 33.

84. *Id.* at 34.

85. *Id.* at 33-34.

86. *See* 8A PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 22.02 (Rev. 3d ed., Matthew Bender & Co., 2005). (describing alternative ways cities have used eminent domain to protect their communities from the adverse economic consequences that accompany the real or potential closing of a business facility).

portant because it arguably supports using eminent domain to prevent a business closing even though it would appear to only benefit the employees of the business. In fact, given the ripple effect of unemployment in the economy, preventing closings can benefit the entire public.

C. Hawaii Housing Authority v. Midkiff

The Supreme Court further broadened the public use definition even more in *Hawaii Housing Authority v. Midkiff*.[87] In *Midkiff*, the issues revolved around the constitutionality of a Land Reform Act[88] enacted by the Hawaii Legislature in 1967. The purpose of the Act was to reduce the perceived social and economic evils inherent in large land estates, whose origins were traceable to the feudal chiefs of the pre-statehood Hawaiian Islands.[89] The Act created the Hawaii Housing Authority (the "Authority"), whose mission was, by use of a land condemnation scheme, to take title to the real property from the lessors, condemn it, compensate the lessors for the taking, and then sell the property to the lessees inhabiting the land at the time it was condemned.[90] The process was instituted only after the Authority had determined that the acquisition of the particular tract would promote the public purposes of the Act.

In regards to the tract at issue before the Supreme Court, the Authority determined that taking the land held by the lessors would serve the Act's purposes, and thus directed the lessors to negotiate the sale of the land to its lessees. When these negotiations failed, the Authority ordered the lessors to submit to the compulsory arbitration required by the Act. Rather than comply with the order, the lessors filed suit in federal district court asking that the Act be declared unconstitutional. The federal district court held the compulsory arbitration and compensation formulas of the Act unconstitutional, but found the remainder of the Act constitutional under the Fifth Amendment's public use requirement.[91] The Ninth Circuit Court of Appeals reversed, holding that the Act violated the public use requirement of the Fifth Amendment.[92]

87. 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).
88. HAW. REV. STAT. §§ 516-1 to -182.
89. *Id.*
90. *Id.*
91. Midkiff v. Tom, 483 F. Supp. 62 (D. Haw. 1979).
92. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

On appeal, the Supreme Court unanimously reversed the Court of Appeals.[93] The Supreme Court noted and dispelled the Court of Appeal's concern that "[s]ince Hawaiian lessees retain possession of the property for private use throughout the condemnation process, . . . the Act exacted takings for private use."[94] In response to this concern the Court stated that:

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use. . . . [W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair."[95]

Justice O'Connor, writing for a unanimous Court, reinforced the principles of a broad public use doctrine surrounding legislative authorizations of eminent domain and indicated the role of the judiciary in these types of proceedings:

> The "public use" requirement is thus coterminous with the scope of the sovereign's power. There is, of course, a role for the courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made it clear that it is "an extremely narrow" one.[96]

The *Midkiff* ruling thus endorses the use of eminent domain as a tool to redistribute private resources within society in order to accomplish certain widely drawn public purposes. *Midkiff*, *Berman*, and other federal court decisions[97] also exemplify the expansive interpretation now given the public use requirement on the federal level.[98]

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

94. 467 U.S. at 243.

95. 467 U.S. at 243-244 (citations omitted).

96. *Midkiff*, 467 U.S. at 240.

97. *See, e.g.*, People of Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316 (1st Cir. 1946), where a federal court of appeals upheld an agrarian reform measure that broke up large tracts of land and redistributed it in smaller parcels to private individuals.

98. For sources discussing the presently broad interpretation the judiciary has given to the "public use" stipulation on both the federal and state level, *see supra* note 5; 8A ROHAN & RESKIN, *supra* note 86, § 22.02[2].

D. Poletown Neighborhood Council v. City of Detroit

Poletown Neighborhood Council v. City of Detroit[99] is perhaps the most famous recent case involving the use of eminent domain for economic development purposes. In *Poletown* the Michigan Supreme Court upheld the City of Detroit's use of eminent domain to level a city neighborhood, relocate 1,362 households,, and acquire over 150 private businesses in order to accommodate the desire of General Motors Corporation to build a new assembly plant on 465 acres of land.[100] The city's eminent domain authority was exercised pursuant to the Michigan Economic Development Corporations Act,[101] a statute similar to that at issue in *Berman*. The Act declared:

> There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises, including employee-owned corporations, to strengthen and revitalize the economy of this state and its municipalities. Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.[102]

While most of the residents and property owners in the Poletown areas did not fight the taking, several did, including the owners of ten non-blighted businesses. These businesses challenged the taking as not constituting a valid public use under the Michigan Constitution;[103] and instead as primarily benefitting a private party (GM).[104] They also contended that there was a difference between what constituted a valid "public use" under the Michigan Constitution, versus what constituted a public benefit, arguing that Article 10, section 2 prescribed a more narrow test than simply a public benefit or utility.[105] The City of Detroit responded by arguing that the proposed condemnation was for the primary benefit of the public and therefore the taking did in fact

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99. 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (2004).

100. DAVID SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 83 (1992).

101. MICH. COMP. LAWS ANN. §§ 125.1601-.1636 (1974).

102. MICH. COMP. LAWS ANN. § 125.1602 (1974).

103. MICH. CONST. art. X, § 2 (stating in part that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law").

104. JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED, 74-9 (1989).

105. *Poletown*, 304 N.W.2d at 457.

constitute a valid public use.[106] In effect, the constitutional dispute was over whether the Michigan Constitution recognized a narrow or broad conception of what constituted a public use.[107]

The Michigan Supreme Court upheld the taking as a valid public use under the state constitution, finding that the public would be the primary beneficiary, since "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and the law does not so much regard the means as the need."[108] In *Poletown* the court recognized that the needs that would be served by upholding this use of eminent domain included the alleviation of "the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, [and] the economic boost the proposed project would provide."[109]

The *Poletown* decision offered an expansive definition of public use and demonstrated how a state court envisioned its role in public use determinations under its own Constitution. In addressing the meaning of the public use clause in the state constitution, the court indicated that "public use changes with changing economic conditions of society and that 'the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.'"[110]

In order to promote the general economic welfare of the people, the *Poletown* court approved the municipal taking of private property of some, in order to provide land for the future development and expansion of a General Motor's manufacturing facility. The court followed its understanding of *Berman v. Parker*, as well as state precedents, in equating public use with public benefit, and in indicating that "the determination of what constitutes a public purpose is primarily a legislative function."[111]

Poletown is an important precedent in several respects. First, the Michigan court held that state's constitutional "public use" stipulation was to be interpreted quite broadly and that the judiciary should assume a minimal role in questioning legislative de-

106. Brief for Appellees, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (No. 66294).

107. *Poletown*, 304 N.W.2d at 457.

108. *Id.* at 459.

109. *Id.*

110. *Id.* at 457.

111. *Id.* at 459 (quoting Gregory Marina, Inc. v. Detroit, 378 Mich. 364, 396 (1966)).

terminations of public use. *Poletown* seems also to allow for municipalities to use their economic development and urban renewal authority to undertake significant redistribution of private resources, including the acquisition of other private businesses[112] and property for broadly defined economic development purposes.[113] Such purposes might properly include the acquisition of business facilities and sports franchises to prevent their relocating or closing, to serve the larger public goal of general economic welfare. *Poletown* became a notorious decision, criticized in numerous books and articles for how it represented an unprecedented expansion of eminent domain power and government control over private property.[114] Eventually, when the Michigan Supreme Court later overturned the *Poletown* decision in 2004,[115] its demise was heralded as an important victory by many.[116]

E. City of Oakland v. Oakland Raiders

City of Oakland v. Oakland Raiders[117] is the only existing precedent upholding the right of a municipality to use eminent domain power to acquire a business sports franchise contemplating relocation. In this case, the City of Oakland was allowed to use its eminent domain power to seize all real and personal business assets of the Raiders' football franchise. The coliseum in which the team played was leased by the team owners from a public, non-profit city/county corporation. Upon failure to reach a settlement on an option to renew the lease the team announced its intention to remove itself to Los Angeles. To prevent this, the City of Oakland commenced an eminent domain action to acquire all the property rights associated with the team, including players' contracts, team equipment, and television and radio contracts. The franchise owner argued against the City's action on

112. E. Lewis, *Corporate Perogative, "Public Use" and A People's Plight: Poletown Neighborhood Council v. City of Detroit*, 1982 DET. C.L. REV 907, 909-910 (1982) (indicating that 1176 buildings were acquired through this eminent domain action including the property of 150 commercial business establishments).

113. Susan Crabtree, Note, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown?*, 20 CAL. W. L. REV. 82, 93-98 (1983).

114. *See, e.g.*, RICHARD A, EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 32-37 (1988); Crabtree, *supra* note 113.

115. County of Wayne v. Hathcock, 684 N.W.2d 765 (2004).

116. *See, e.g.*, Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J. L. & PUB. POL'Y 651 (2005).

117. 646 P.2d 835 (Cal. 1982).

two grounds: (1) that the law of eminent domain did not permit the taking of intangible property not associated with realty (here, the team's network of intangible contractual rights), and (2) that the taking contemplated by the City could not, as a matter of law, be for any public use within the City's authority.

The core of the California Supreme Court's decision in *Oakland Raiders* addressed whether the state constitutional requirement that eminent domain acquisitions must serve a "public use" was met. First, the court drew upon state precedents and noted that the power of eminent domain was an "inherent attribute of general government" and that "constitutional provisions merely place limits upon its exercise."[118] Among these limiting provisions is a public use stipulation. The court rejected a narrow reading of this stipulation, holding that a "public use is a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[119] Noting that public use has an evolving nature and that the acquisition contemplated here was an unusual application of eminent domain, the court nonetheless held that "acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function."[120]

Having established a broad constitutional understanding of the state's public use stipulation in eminent domain acquisitions, the court next addressed whether a city has the power to acquire business property to serve municipal uses. First the court noted that "in contrast to the broad powers of general government . . . a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law."[121] Explicit statutory provisions would be necessary to support state delegation of eminent domain authority to municipal corporations if the latter wished to act. Such a delegation had occurred here via the California Government Code, which provides that "a city may acquire by eminent domain any property necessary to carry out any of its powers and functions."[122] The City of Oakland thus had authority to acquire the Oakland Raiders' property, including all its intangible property and assets.

118. *Id.* at 837-838 (citing County of Mareo v. Coburn, 63 P. 78, 79 (Cal. 1900), and People v. Chevalier, 340 P.2d 598, 601 (Cal. 1959)).

119. *Id.* at 841.

120. *Id.* at 843.

121. *Id.* at 838, citing City of Menlo Park v. Artino, 151 Cal. App. 2d. 261, 266 (Cal. Ct. App. 1957).

122. *Id.*

In reversing the trial court's grant of summary judgment in the team's favor, the California Supreme Court rejected both of the team's arguments, concluding that "the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function."[123] The court held that "intangible assets are subject to condemnation,"[124] and that the subject acquisition could meet the public use test when it is defined as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[125] Perhaps in recognition of the City's argument that "the factual circumstances surrounding the construction of the Oakland Coliseum and the integration of the past use of the stadium with the life of the City of Oakland in general will readily demonstrate the 'public' nature of the use contemplated here,"[126] the court noted that "[i]t is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use."[127] Hence, the court accepted the City of Oakland's argument that "the one crucial factor and sole test of public use . . . [is that] the use must be for the general benefit of the *public* and not be primarily for private individual gain."[128] Although it may appear that by retaining the team only the fans and those deriving direct economic gain (for example, vendors) benefit from this use of eminent domain, in reality the community as a whole benefits economically and culturally, and in this manner the public use requirement is served.[129]

The *Oakland Raiders* decision provides powerful precedent from a prominent court in its endorsement of a municipality's authority to acquire a business facility or a relocating sports franchise.[130] It serves as yet another example of how, prior to

123. *Id.* at 843 (stating that court remanded case to trial court for full trial on merits and subsequent history of case includes three dismissals, the last at City of Oakland v. Oakland Raiders, No. 76044, slip. op. (Cal. Super. Ct., Monterey County, June 16, 1984)).

124. *Id.* at 840.

125. *Id.* at 841 (citing Bauer v. County of Ventura, 289 P.2d 1, 6 (Cal. 1955)).

126. *Id.* at 844.

127. *Id.* at 841 (citing Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 161-62 (1896), and citing *accord* Univ. of So. Cal. v. Robbins, 37 P.2d 163, 165 (1934)).

128. Brief and Petition for Hearing for Appellant at 28, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

129. *Id.* at 29-30.

130. *Id.* (The City of Oakland citing City of Los Angeles v. Superior Court, 51 Cal. 2d 423 (1959); City of Anaheim v. Michel, 259 Cal. App. 2d 835 (1968); and New Jersey Sports and Exposition Auth. v. McCrane, 292 A.2d 580 (N.J. Super. Ct.

Kelo, eminent domain had been used for a variety of economic development purposes.

F. *Summary*

This brief review of the history of the public use doctrine leading up to *Kelo v. City of New London* suggests several conclusions. First, since the early to mid-nineteenth century, numerous efforts to define and specify a single meaning for the public use doctrine have failed. This has occurred because state legislatures and courts have been content to let local conditions and customs dictate what constitutes valid grounds for a taking, and reviewing courts have generally deferred to those judgments. In the process, determinations of what constitutes a valid public use have changed with the times and circumstances, and the Supreme Court has permitted exigencies – such as war or the Depression – to influence eminent domain considerations.

In addition, this brief history also shows how the various tests, formulated over time to define the term "public use," have failed or fallen by the wayside. Tests that insisted that the public retain control of the property, that they be permitted access or use, that the condemnor be the government, that a certain number of individuals benefit, or that no private parties benefit, were all at one time offered and rejected as ways to distinguish public from private uses. Yet the needs of economic expansion—to build mills and railroads, to defend the country, or to abate slums and nuisances—gradually demonstrated the impracticality of the narrow public use doctrine. Finally, the process of rendering the courts the final arbiter of public use decisions—a theory born of the substantive due process era—essentially died with the advent of the New Deal and the demise of economic due process. As Justice O'Connor noted in *Lingle v. Chevron, U.S.A.*:[131]

> We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. . . . The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by

Law Div. 1971), *aff'd* 292 A.2d 545 (N.J. 1971), as authority for the proposition that providing facilities for professional sports is "a proper public purpose for a city to engage in").

131. 125 S. Ct. 2074 (2005).

> now well established, and we think they are no less applicable here.[132]

Given the fact that many of the tests used to distinguish public from private uses were somewhat subjective (for example, tests required a determination of how much incidental private benefit is too much, or how many people must actually benefit for a taking to be considered public) judicial determinations of what is to be considered a valid public use may seem to be nothing more than judges substituting their judgment for that of legislators or members of Congress regarding when a taking is appropriate. The significance of the *Lingle* opinion is, in pertinent part, that it effectively reaffirms early claims made in *Berman* and *Midkiff* that gave legislatures significant discretion to interpret "public use" broadly, including for economic development purposes.

The final point that should be clear from this abbreviated history is that, prior to *Kelo*, both federal and state court rulings had moved significantly towards expanding the public use doctrine so as to permit the taking of private property and transferring it to another party for a variety of purposes, including promoting economic development. The *Midkiff* decision equating the scope of the public use clause with the police power, along with *Poletown*'s clear endorsement of a broad reading of the doctrine, together already seemed to endorse the use of eminent domain for economic development purposes.

II.

KELO V. CITY OF NEW LONDON

In the 2004 term, the Supreme Court unambiguously stated in *Kelo v. City of New London* that promoting economic development is a valid public use.[133] In the process, it fashioned yet another new test to distinguish a valid public use from a private taking.

A. *Kelo and Economic Development*

In *Kelo*, the United States Supreme Court affirmed a decision of the Connecticut Supreme Court, which held that the taking of unblighted private property for economic development purposes

132. *Id.* at 2085. (citations omitted).

133. 125 S. Ct. 2655, 2665-69 (2005).

constituted a valid public use under both the state and federal constitutions.[134]

At issue in this case was an attempt by the City of New London, a municipal corporation, and the New London Development Corporation, to use a state law (Chapter 132 of the Connecticut General Statutes) to take non-blighted land to build and support economic revitalization of the city's downtown.[135] In its plan, New London divided the development into seven parcels, with some of these parcels including public waterways or museums. One parcel, known as Lot 3, was to be a 90,000 square feet research and development office space and parking facility for the Pfizer Pharmaceutical Company. Several plaintiffs located within Lot 3 challenged the taking of their property, claiming that the condemnation of unblighted land for economic development purposes violated both the state and federal constitutions. More specifically, they argued that the taking of private property under Chapter 132 and the handing it over to another private party did not constitute a valid public use, or at least that the public benefit was incidental to the private benefits generated.

The Connecticut Supreme Court rejected the plaintiffs' claims, and the United States Supreme Court granted *certiorari* to the federal question of whether the taking of private property for economic development purposes, when it involves the transferring of the land from one private owner to another, constitutes a valid public use under the Fifth and Fourteenth Amendments of the United States Constitution.

Writing for a divided Court, Justice Stevens ruled that the taking did not violate the public use requirement of the Fifth Amendment.[136] In reaching this holding, Stevens first noted how the case pitted two propositions against one another:

> [T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condem-

134. 843 A.2d 500 (Conn. 2004), *aff'd,* 125 S. Ct. 2655 (2005).

135. *See* 125 S. Ct. at 2660 (noting that "[t]here is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area").

136. *Id.* at 2665-66. *See also id.* at 2659 (noting that the purpose of the economic redevelopment plan was to revitalize the waterfront, bring new businesses to the area, generate tax revenue, and increase employment).

nation of land for a railroad with common-carrier duties is a familiar example.[137]

However, Stevens contended that neither of these rules resolved the case.[138] Instead, drawing upon *Midkiff*, he first reaffirmed the proposition that a taking for a purely private benefit would be unconstitutional. But this case did not constitute a private taking, because the decision to acquire the property was part of a "'carefully considered' development plan" for which neither the real nor the hidden motive was to convey a private benefit.[139]

Second, the Court rejected arguments that the taking failed the public use requirement because the property would eventually be used and transferred to a private party, rather than be used by the public.[140] Here, Stevens stated that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public"[141] and that this narrow reading had been rejected in favor of a broader public purpose reading of the public use doctrine.[142] The case therefore turned on whether the taking served a valid public purpose, and Stevens wrote that the Court should adhere to the long-established judicial tradition of deferring to legislative determinations on this matter.[143] In short, given the broad and flexible meaning attached to the public use stipulation, and past judicial deference to legislative determinations of what is considered a public purpose, Stevens declined to establish a bright-line rule,[144] and concluded that the taking of private property for economic development purposes was a valid public use.[145]

Finally, Stevens rejected arguments for the Court to carve out an economic development exception to the broad public use doctrine.[146] He rejected such a rule as unworkable, stating that it would be impossible to distinguish economic development from other valid public purposes.[147] He also rejected assertions that the taking for economic development purposes blurred the dis-

137. *Id.* at 2661.
138. *Id.*
139. *Id.*
140. *Id.* at 2661-62.
141. *Id.* at 2662 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
142. *Id.*
143. *Id.* at 2663, 2664.
144. *Id.* at 2663-64.
145. *Id.* at 2665.
146. *Id.* at 2668.
147. *Id.* at 2665.

tinction between a public and a private taking.[148] Instead, Stevens responded:

> It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.[149]

Stevens here offers an example of what the Court might consider to be evidence of a taking for private use, in other words, a taking not backed up by a comprehensive plan. Absent such a plan, it might appear that the taking was primarily intended to convey a private benefit. The presence of such a plan, especially one replete with legislative findings, would provide evidence that the taking was part of a broader public purpose, and therefore not primarily aimed at conveying a private benefit.

In many ways *Kelo* did not make new law in terms of taking private property for economic development purposes. As Stevens pointed out, the City could not take private property to primarily benefit a private party.[150] He also noted that the narrower conception of public use had long since been abandoned,[151] and governments have long had the power to take for a variety of public welfare purposes, including economic development.[152] *Kelo* simply reaffirmed a trend that already existed in the law. Overall, *Kelo* seemed to cap a recent line of jurisprudence giving governments broad authority to take private property.

However, two additional points in *Kelo* are worth underscoring. First, the one area where new law was created was perhaps in the appeal to a comprehensive plan as a means of distinguishing public versus private takings. In several locations in the *Kelo* opinion, Justice Stevens references the existence of a comprehensive plan as critical to upholding a taking. For example, in comparing the taking here to that in *Midkiff*, Stevens states, "Therefore, as was true of the statute challenged in *Midkiff* . . . the City's development plan was not adopted 'to benefit a partic-

148. *Id.* at 2666.
149. *Id.* at 2666-67.
150. *Id.* at 2661.
151. *Id.* at 2662.
152. *Id.* at 2662-63.

ular class of identifiable individuals.'"[153] Furthermore, "In *Berman v. Parker*. . . this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair."[154] Finally, Stevens concludes:

> The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including — but by no means limited to — new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the *Fifth Amendment*.[155]

Second, the majority in *Kelo* made it clear that their holding did not preclude states from imposing greater restrictions on the taking of property for economic development purposes. Specifically, the Court stated:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.[156]

Thus, while the Fifth and Fourteenth Amendments permit the taking of unblighted private property for purely economic development purposes, states, under their own constitutions or by statute, may impose more restrictive conditions upon what constitutes a valid public use. In fact, the Court cited to the re-

153. *Id.* at 2661-62 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)) (citation omitted).

154. *Id.* at 2663 (citing Berman v. Parker, 348 U.S. 26 (1954)) (citation omitted).

155. *Id.* at 2665.

156. *Id.* at 2668.

cently decided *County of Wayne v. Hathcock* as such an example.[157] This means that *Kelo* did not overrule state decisions that had already placed more restrictions on takings for a public use, if decided on their own constitutional or statutory grounds.

B. *Summary*

The decision in *Kelo* surely disappointed property rights advocates who expected that the Rehnquist Court would limit the use of eminent domain and prevent takings premised upon economic development purposes. While a loss on one score, *Kelo* also left open the potential for those who oppose such takings to bring their battles at the state level. Here, at Justice Stevens' apparent encouragement, states are free to impose stricter limits upon eminent domain, and to offer property owners more protection than that found under the United States Constitution. The opinion also emphasized the importance of comprehensive development plans, thus hinting at a new test for distinguishing public versus private takings.

III.

PUBLIC VERSUS PRIVATE TAKINGS AFTER *KELO*

Prior to the *Kelo* decision, several state courts had independently interpreted their own state constitutions and public use provisions. In some cases, state court decisions have evolved to expand the public use concept.[158] Conversely, some state courts declined to follow the direction of the Supreme Court and in-

157. *Id.* at 2668 n.22.

158. *See* Meidinger, *supra* note 6, at 13 (indicating that the first recorded uses of eminent domain in America can be traced to a 1639 Massachusetts statute authorizing the taking of private land to build roads). *See also* John F. Beggs, *The Theoretical Foundations of the Takings Clause and the Utilization of Historical Conceptions of Property in the Ecological Age,* 6 FORDHAM ENVTL. L.J. 867 (1995); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine,* 109 HARV. L. REV. 1252 (1996); William M. Treanor, *The Original Understanding of the Takings Clause and The Political Process,* 95 COLUM. L. REV. 782 (1995); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding,* 37 AM. J. LEGAL HIST. 464 (1993); HORWITZ, *supra* note 26; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1988); Stoebuck, *supra* note 19, at 588-90; *The Meaning of Public Use, supra* note 19, at 615, 617-20; NELSON, *supra* note 26; D. FLEMING & B. BAILYN, LAW AND AMERICAN HISTORY (1971) (discussing how eminent domain was used since colonial times to further some social welfare functions, such as building hospitals and poor houses, or how eminent domain was used for numerous purposes to regulate the economy or acquire private property for numerous uses that furthered the public good, welfare, etc.)

stead interpreted their constitutions to offer stronger protections for property rights than found at the federal level.

What doctrinal developments might we anticipate at the state level in response to the *Kelo* opinion? Is the public use doctrine really dead, such that it will be impossible ever to find a taking to be for a private use or benefit? What role might comprehensive plans have in distinguishing valid public uses from invalid private takings? Several state court cases decided prior to *Kelo* offer indications regarding how state courts might examine comprehensive plans and the public use doctrine in the context of takings for economic development purposes.

A. *Nevada:* City of Las Vegas Downtown Redevelopment Agency v. Pappas

In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*[159] the Nevada Supreme Court upheld the taking of non-blighted commercial property to provide parking facilities for a downtown redevelopment project under both the federal and Nevada constitutions.

To address the problems of economic development and blight in the city's urban core, Las Vegas created a redevelopment agency pursuant to state community development law.[160] The Agency, composed solely of Las Vegas City Council members, was entrusted to determine if redevelopment was needed to address physical, social, or economic blight in the downtown area and, if so, to develop a comprehensive plan to remedy such blight.[161] The Agency concluded that blight existed and that redevelopment was needed; several years later the "Fremont Street Experience" plan was proposed for a portion of the downtown.[162] The plan called for creation of a pedestrian plaza along Fremont Street and building a five story parking complex, including retail and office space.[163] To finance this proposal, a consortium of casinos were to provide the capital and then run the garage and share in its revenues.[164] The Pappas owned three of the thirty-two properties set to be acquired for the parking lot. When approached about selling their property, the Pappas re-

159. 76 P.3d 1, 17 (Nev. 2003).
160. *Id.* at 6.
161. *Id.*
162. *Id.* at 7.
163. *Id.*
164. *Id.*

fused, setting into motion Agency condemnation of their land.[165] The Pappas raised several challenges to the taking in district court, including claims that the Agency acted in bad faith, and that it lacked the authority to take their property.[166] The district court concluded that the Pappas' property could properly be acquired for the parking facility, because the taking promoted a valid public use under the federal and state constitutions.[167]

In reviewing the decision, Nevada's Supreme Court first noted that the United States and Nevada constitutions have parallel eminent domain stipulations.[168] Additionally, Nevada courts had given similarly broad construction to the term "public use," concluding that the term could be read to include public advantage, benefit, and utility.[169] The Court also noted that other states with public use clauses similar to that found in the Nevada Constitution had reached the same conclusion.[170]

Second, the Nevada Supreme Court rejected the notion that "public use" required that the public own the condemned property, arguing instead that the rights of owners are protected when they receive just compensation for any interests taken. Thus, the narrower conception of public use—requiring use or ownership by the public—was not mandated by Nevada's Constitution.[171]

Finally, the Court observed that the state legislature had defined the eradication of blight to be an important public purpose in enacting its Community Redevelopment law. Thus the question in determining whether the exercise of eminent domain furthers a valid public use is how the specific development plan serves that purpose, not whether the condemned land is publicly owned.[172] The Nevada Court was unwilling to second guess Agency determinations of blight or necessity for the taking.[173] The Court described how federal law since *Berman v. Parker* had

165. *Id. at 8.*

166. *Id.* at 8-9. The details of the claims and counterclaims by the Pappas and the Agency are skipped over as they are not germane to the public use constitutional issues.

167. *Id.*

168. *Id.* at 10 (quoting NEV. CONST. art. 1, § 8, cl. 6, which reads that "[p]rivate property shall not be taken for public use without just compensation having been made first").

169. *Id.* at 10 n.20 (citing Dayton Mining v. Seawell, 11 Nev. 394 (1876), and Milchem, Inc. v. Dist. Ct., 445 P. 2d 148 (1968)).

170. *Id.* at 10.

171. *Id.*

172. *Id.* at 12.

173. *Id.* at 12-14.

afforded broad discretion to legislatures to define blight,[174] and stated that, like other states, it would defer to the Agency's decision and judgment regarding whether the blight had been abated.[175] Second, the Court refused to question the necessity of the property taken, stating that "it is up to the legislative body [. . .] to determine how to accomplish the public purpose" and the "courts may not substitute their own judgment" regarding what should be condemned to secure the public purpose.[176]

Overall, in seeking to clarify the meaning of "public use" in its own constitution, the Nevada Supreme Court took many of its legal cues from United States Supreme Court and from decisions in other states. It equated public use with public utility or advantage, rejected claims that pubic ownership was a necessary component of this doctrine, and ruled that it would give broad deference to Agency determinations of what constituted a valid public purpose, whether blight existed, and what property should be acquired.

B. *Illinois:* Southwestern Illinois Development Authority v. National City Environmental, L.L.C.,

The Illinois Supreme Court ruled in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*[177] that transferring private property from one business in order to allow another to expand was not a valid public use. The Court did not categorically rule out the use of eminent domain for economic development purposes; instead it narrowly held that this particular taking did not secure a public purpose.

The Southwestern Illinois Development Authority (SWIDA) was created in 1987 with the legislative mandate to "promote development within the geographic confines of Madison and St. Clair counties."[178] Among the powers that the legislature conveyed to SWIDA was the authority to use eminent domain to acquire properties located in those counties in order to promote economic development and expansion.[179]

In 1996, SWIDA issued bonds to assist Gateway International Motorsports Corporation (Gateway) develop racetrack facili-

174. *Id.*
175. *Id.* at 14-15.
176. *Id.* at 15.
177. 768 N.E.2d 1 (Ill. 2002).
178. *Id.* at 3.
179. *Id.*

ties.[180] In 1998, Gateway sought additional land, then occupied by National City Environmental and the St. Louis Auto Shredding Company (collectively "NCE") in order to expand its parking facilities. When negotiations to purchase the property from NCE failed,[181] Gateway requested that SWIDA use its quick-take eminent domain authority to acquire the land and transfer it to them.[182] Before SWIDA could use its quick-take powers, Gateway was required to complete an application stating the reasons for why it wanted the land. In its application, Gateway indicated that it would pay for all of the expenses SWIDA encountered.[183] Additionally, County Board approval was required before SWIDA could use its quick-take powers. The St. Clair County Board adopted a resolution in support of the condemnation, indicating that the acquisition would increase racetrack attendance, address parking needs, and enhance the public health, welfare, safety, and tax revenue of the southwestern Illinois area.[184] Subsequently, SWIDA also adopted a resolution to use its quick-take powers, citing to many of the same factors as the county.[185]

NCE challenged the condemnation at a quick-take hearing in Circuit Court, claiming that the taking was for a private use and that the land sought was excessive given the need.[186] Specifically, the plaintiffs alleged that the taking violated both the Fifth Amendment to the United States Constitution, and Article I, section 15 of the Illinois Constitution, both of which mandated that private property may only be taken for a public use.[187]

The Circuit Court upheld the taking, relying on testimony by St. Clair County and SWIDA that the condemnation was needed to relieve blight, promote economic development, and abate a traffic public safety problem in the area, the result of the construction and expansion of the Gateway facility.[188] The judge also relied upon testimony from Gateway officials, who stated that the taking would be cheaper than building a parking ramp and that the new land would help their company expand. The

180. *Id.*
181. *Id.* at 4.
182. *Id.*
183. *Id.*
184. *Id.* at 5.
185. *Id.* .
186. *Id.*
187. *Id.* at 6.
188. *Id.*

state appellate court reversed, holding that SWIDA had exceeded its constitutional authority.[189] The case was appealed to the Illinois Supreme Court, which upheld the appellate court.[190]

The Illinois Supreme Court framed the issue in terms of whether this specific taking served a valid public use.[191] The court first stated that the Illinois Constitution[192] limited the use of eminent domain to situations which served a valid public use,[193] but noted that the taking of private property and the eventual transfer to another private party did not necessarily contravene the public use mandate.[194] The court also acknowledged that the United States Supreme Court had appeared to equate public purpose with public use in *Midkiff*, but that the two were not necessarily the same under the Illinois Constitution.[195] The court observed that the term "public use" had been applied flexibly, but stated that "this flexibility does not equate to unfettered ability to exercise takings beyond constitutional boundaries. 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.'"[196] For a taking to be for a valid public use, the "public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."[197] Yet the Court noted that it was not easy to draw the line between what was a public purpose, versus a private benefit lacking a "legitimate public purpose to support it."[198]

The court acknowledged that the taking of the NCE property would serve an important public purpose in mitigating blight or public safety problems.[199] It also recognized how, in previous case law, it had found economic development to be a valid public purpose.[200] However, the court characterized this condemnation as "private venture designed to result not in a public use, but in

189. *Id.*
190. *Id.* at 7.
191. *Id.* .
192. ILL. CONST. art. I, § 15.
193. *Southwestern Illinois Dev. Auth.*, 768 N.E.2d at 7 (citing Gaylord v. Sanitary District, 204 Ill. 576 (1903)).
194. *Id.*
195. *Id.* at 9.
196. *Id.*
197. *Id.* .
198. *Id.* at 8.
199. *Id.* at 9.
200. *Id.*

private profits."[201] Critical to this conclusion was the absence of a study, commission, or plan to assess the parking problem.[202] Additionally, SWIDA seemed simply willing to acquire whatever land Gateway requested.[203] Finally, the court noted that despite its public purpose claims to the contrary, SWIDA simply acted as the "default broker of land for Gateway's proposed parking plan" when Gateway's efforts to purchase the NCE property failed.[204] Overall, the Court stated that these factors pointed to the conclusion that no independent public use or purpose had been found for the project,[205] thus it constituted a taking for a private benefit that violated both the United States and Illinois constitutions.

Southwestern Illinois Development Authority is a limited holding. It does not necessarily stand for the proposition that a taking to promote economic development would not constitute a public use. Nor does the case stand for the rule that a taking of land from one private party and transferring it to another is invalid under the state public use doctrine. Instead, it holds that there must be an independent public use, primary and distinct from any private use. Critical to the decision in *Southwestern Illinois Development Authority* was the court's observation that SWIDA did not undertake an independent study of the Gateway parking problem at any point or otherwise consider alternatives beyond the acquisition proposed by Gateway.[206] Had it done so, presumably, the court might have come to a different conclusion.

C. *Arizona:* Bailey v. Myers

In *Bailey v. Myers*,[207] the Arizona Court of Appeals ruled that the taking of private property for retail redevelopment was not a valid public use under the state constitution.

The Baileys had operated a business on their property in Mesa, Arizona since 1946.[208] In 1996, the Mesa City Council adopted a resolution calling for the creation of the Mesa Town Center Redevelopment Area, which originally did not include the Bailey

201. *Id.*
202. *Id.* at 10.
203. *Id.*
204. *Id.* at 9.
205. *Id.* at 10.
206. *Id.* .
207. 76 P.3d 898, 904-05 (Ariz. Ct. App. 2003).
208. *Id.* at 899.

property.[209] Subsequently, another private business owner approached the Mesa City Council with a plan to expand his hardware store to include the property owned by the Baileys. The Council then amended its redevelopment plan to include the Bailey property.[210] A condemnation order was issued for the Bailey property.[211] The Baileys objected, claiming that the taking violated Article II, section 17 of the Arizona Constitution. The trial court upheld the taking, and granted an order for immediate possession, but stayed the order while the case was appealed to the Arizona Court of Appeals.[212] The Court of Appeals ruled that the taking was for a private and not a public use, thereby overturning the trial court order.[213]

Critical to the Court of Appeals' holding was the specific wording of the Arizona Constitution and its eminent domain-public use clause. Article 2, Section 17 states:

> *Private property shall not be taken for private use,* except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. . . . *Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*[214]

In particular, the Court noted that Article 2, Section 17 explicitly states that determinations of what constitutes a valid use are judicial questions, not requiring deference to any legislative determinations.[215] Unlike the United States Constitution, which is silent on the issue of who has authority to determine public use decisions—thereby enabling the Court to rule that this was a legislative determination in cases such as *Kelo* and *Midkiff*—the Arizona Constitution explicitly assigns the task of making this determination to its judiciary.[216]

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209. *Id.*
210. *Id.* at 899-900.
211. *Id.* at 900.
212. *Id.*
213. *Id.* at 904-05.
214. *Id.* at 900 (quoting ARIZ. CONST. art. II, § 17) (emphasis in original).
215. *Id.* at 901.
216. This constitutional language rendering of public use decisions ultimately a judicial matter in Arizona also contrasts to the constitutions in Minnesota, Nevada, and Connecticut where there was no textual support for the courts second guessing the legislature regarding public nature of the taking. *See also* David Schultz, *The Public Use, in* 2A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 7.02

The Appellate Court criticized the trial court for failing to undertake an independent and serious review of the taking under the Constitution to determine if the condemnation was "really public."[217] In undertaking this review on its own, the Court of Appeals relied upon past precedent to make several distinctions. First, citing *City of Phoenix v. Superior Court*,[218] the court noted that the determination of what constituted a valid public use was distinct from the question of the necessity of the taking. In *City of Phoenix*, the Arizona Supreme Court stated that, while determinations of the necessity of a taking demanded a "deferential standard of review" as to legislative determinations, a lesser standard of deference was to be afforded under Article II, Section 17.[219] Second, again relying upon *City of Phoenix*, the Appeals Court rejected claims that the mere taking of private property and transferring it to another private party made the the taking one for private benefit.[220] Instead, it noted how in *City of Phoenix* the Arizona Supreme Court had permitted the taking and transferring of private property from a private person to a business if the property was a slum or blighted.[221]

The Court of Appeals next reasoned that the *City of Phoenix* case did not stand for the proposition that "any property within a designated slum or blighted area is automatically subject to being taken for redevelopment without the constitutionally required judicial determination that the property is being taken for a use that is 'really public.'"[222] In fact, the Court noted how, in the case of Bailey's property, there were no specific findings that the property was blighted.[223] Fourth, the Court declined to consider precedent such as *Midkiff* and *Berman* to guide their reading of the Arizona state constitution, explaining that those opinions were not controlling in the construction of Article II, Section 17.[224] Finally, noting the parallel between its constitution and that of the State of Washington, the court cited precedent from

(discussing the changing meanings of public use and the role of the courts in adjudicating its meaning).

217. *Bailey*, 76 P.3d at 901-02.

218. 671 P.2d 387, 389-90 (1983) (cited at 76 P. 3d at 902 n.1).

219. 76 P. 3d at 901.

220. *Id.*

221. *Id.*

222. *Id.* at 902.

223. *Id.* at 902 n.2.

224. *Id.* at 903.

the Washington Supreme Court contending that a "beneficial use is not necessarily a public use."[225]

The Court of Appeals made the above distinctions in an effort to construct what it felt the Arizona Constitution demanded of the state judiciary in making its own independent determinations of what constituted a valid public use, concluding:

> [W]e hold that when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is "really public." The constitutional requirement of "public use" is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.[226]

To undertake this weighing process, the Court noted that many factors would have to be considered, including but not limited to questions about who would own the property, how it would be used, paid for, or financed, who would benefit from the project, and whether there are any public health issues implicated.[227] Noting that the taking was not for a traditional use such as a street or sidewalk, nor was it necessary for health or safety reasons, the Court held that the City of Mesa had not proved its burden of showing that the taking was for a public use.[228] Instead, since the taking was for the creation of a privately-owned commercial project, this condemnation furthered a private interest and did not constitute a valid public use.

D. *Summary*

Public use decisions under the state constitutions of Nevada, Illinois, and Arizona reveal an interesting pattern suggesting how other jurisdictions might address the taking of private property for economic development in light of the United States Supreme Court's *Kelo* opinion.

First of all, the importance attached to findings of fact and the development of comprehensive plans can be used to determine whether the taking was for public or private purposes. In cases

225. *Id.* at 903-04 (citing Manufactured Hous. Cmtys. of Wash. v. Wash., 13 P.3d 183, 189 (Wash. 2000)).

226. *Bailey*, 76 P. 3d at 904.

227. *Id.*

228. *Id.*

upholding the taking for a public use, a comprehensive plan was in place and the taking was considered in light of how it advanced the plan, or how its findings supported the condemnation. In cases where the taking was found to be for private benefit, either there was no comprehensive plan to support the taking (such as in Illinois), or the plan was deficient on several grounds (such as in Arizona). Only in Nevada did the courts uphold the taking, and here the comprehensive plan was critical to the ruling that the taking was for public benefit. Taken together, these cases anticipated one of the major distinctions made by Justice Stevens in *Kelo*, when he indicated that the presence or absence of a comprehensive plan would be critical to determining whether the taking was for private or public benefit.[229]

Second, it is still possible to invalidate a taking in jurisdictions with broad public use doctrines, even if comprehensive plans are in place. In Arizona, the existence of the plan did not salvage the taking. In part this was because of the constitutional provision giving the court independent authority to make public use decisions. But the facts of the case were also important: the original comprehensive plan did not include the property in dispute. Instead, the plan was amended, seemingly at the request of the another private business that wanted the property. The facts here looked suspicious to the court. Had the property been included as part of the original plan, the court might have looked upon the condemnation differently, since the defendants could have argued that its inclusion and taking was part of a broader design to further a public good. Instead, the late addition of the property to the plan appeared to be an opportunistic move on the part of a specific business that wished to expand.

The Illinois case shows what happens when no real plan is in place. While findings of fact had been made, no real comprehensive plan had been developed, and no real finding to support a public purpose existed. Only in Nevada, where a plan existed, and where the property to be acquired was originally part of it, was the condemnation upheld. The facts here suggest that this was not a private taking, and the existence of the comprehensive plan was crucial in reaching this determination.

As demonstrated by these three cases, the specifics of the comprehensive plan or its absence, along with the specific facts of the condemnation, were critical factors affecting whether a public

229. *Kelo*, 125 S. Ct. at 2666.

use existed. None of these cases revealed a categorical or bright-line rule regarding takings for economic development purposes; instead the determination will depend on the specific circumstances surrounding each taking.

CONCLUSION

City of New London v. Kelo was deemed a major loss to property rights advocates who viewed this decision as the final demise of the public use limitation on the use of eminent domain. *Kelo* did not sound the demise of the public use provision. Instead, it suggested a new test for distinguishing valid public uses from private takings, emphasizing the role that comprehensive plans could have in clarifying the differences between the two. Drawing upon pre-*Kelo* state cases, it is clear that even with the presence of a development plan, not all takings will be upheld, indicating that there is still some life to the public use doctrine. However, whether the new test hinted at in *Kelo* is viable, or whether it will fail as previous tests have, remains to be seen.