The US perspective on economic takings

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For the last part of the Chapter, I consider US law, where economic development takings are already considered as an important special category. I track the development of the case law on the public use restriction in the Fifth Amendment and in various state constitutions, from the early 19th Century up to the present day.[1] Many writers assert that the 19th and early 20th Century was characterized by a "narrow" approach to public use which eventually gave way to a broader conception.[2] Against this, I argue that it is more appropriate to think of this period as one when courts adopted a *broad* approach to judicial scrutiny of the takings purpose at state level. Importantly, I also argue that while different state courts expressed different theoretical views on the meaning of "public use", there was a growing consensus that the approach to judicial scrutiny should be contextual, focused on weighing the rationale of the taking against the concrete social, political and economic circumstances of the local area.[3] In particular, I argue that early state courts did not focus as much on the exact wording of the constitutional property clause as many later commentators have suggested.

I go on to show that the doctrine of deference that was developed by the Supreme Court early in the 20th Century was directed primarily at state courts, not state legislatures and administrative bodies.[4] I then present the case of *Berman*, arguing that it was a significant departure from previous case law.[5] After *Berman*, deference was suddenly taken to mean deference to the

[1]The public use clause in the US constitution was not held to apply to state takings until the late 19th Century, see *Chicago, Burlington & Quincy RR Co v City of Chicago* 166 US 226 (1897).

[2]See, e.g., AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 483; Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 203-204. For a more in-depth argument asserting the same, see Philip Nichols, "The Meaning of Public Use in the Law of Eminent Domain" (1940) 20 Boston University Law Review 615.

[3]A summary of state case law that supports this view is given in the little discussed Supreme Court case of *Hairston v Danville & W R Co* 208 US 598 (1908).

[4]See *City of Cincinnati v Vester* 281 US 439 (1930) (echoing and citing *Hairston v Danville & W R Co* (n 3)).

[5]*Berman v Parker* 348 US 26.

(state) legislature, so there would be little or no room for judicial review of the takings purpose. I go on to present the subsequent developments at state level, characterized by increasing worry that the eminent domain power could be abused by powerful commercial actors. I discuss the case of *Poletown*, where a neighborhood of about 1000 homes was razed to provide General Motors with land to assemble a car factory.[6] I link this to the subsequent controversy that arose over *Kelo*, suggesting that it should be seen as the eventual backlash of *Berman*, a consequence of abandoning the contextual approach to public use in favor of an almost absolute rule of deference.

After the historical overview, I go on to briefly present the vast amount of research that has targeted economic takings in the US after *Kelo*. I give special attention to writers that propose new legitimacy-enhancing institutions for facilitating economic development of jointly owned land. I focus on two proposals in particular, targeting compensation and participation respectively.[7] These proposals will serve as important reference points later on, when I consider the Norwegian appraisal and land consolidation courts in Chapters 4 and 5.

1 From broad judicial review to strict deference: An historical overview

Going back to the time when the Fifth Amendment was introduced, there is not much historical evidence explaining why the takings clause was included in the bill of rights, and little in the way of guidance as to how it was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial to Congress.[8] Hence, it is natural to regard it as a codification of an existing principle, rather than a novel proposal. Indeed, several State constitutions pre-dating the Bill of Rights also included takings clauses, and they all seem to be largely based on a codification of principles from English Common law.[9]

[6] *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981).

[7] Amnon Lehavi and Amir N Licht, "Eminent Domain, Inc." (2007) 107(7) Columbia Law Review 1704; Michael Heller and Rick Hills, "Land Assembly Districts" (2008) 121(6) Harvard Law Review 1465.

[8] See letters from Madison to Edmund Randolph dated 15 June 1789 and from Madison to Thomas Jefferson dated 20 June 1789, both included in James Madison, *The papers of James Madison, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789* (Charles F Hobson and Robert A Rutland eds, University Press of Virginia 1979).

[9] See Emily A Johnson, "Reconciling Originalism and the History of the Public Use Clause" (2011) 79 Fordham Law Review 265, 299.

As we discussed in subsection **??** above, the typical English attitude from this time, which was also reflected in the law, held private property in very high regard. On this background it is not surprising that Madison regarded the property clause as an uncontroversial amendment.[10] Its importance may in fact have been greater as a legitimizing force, increasing confidence in the regulatory power of the newly established state by setting up clear parameters for the exercise of that power. However, while the principle itself was regarded as self-evident, it was never clear what it would mean in practice, particularly in cases when takings where challenged on the basis that they were not for a "public use"'.[11]

There are two points that I would like to record about the early common law in the US in this regard. First, the distinction between public use and public purpose does not appear to have been considered sharp. In his *Commentaries*, James Kent first makes clear that the power of eminent domain is for "public use, and public use only", but then goes on to qualify this by stating that a taking which served a "purpose not of a public nature" would be unconstitutional.[12] He does not address this limitation in any detail, however, suggesting that it was not the subject of much debate at this time. To the founders, it seems that the right to compensation was considered the more important principle, something that is also reflected in the *Commentaries*.[13] The public use limitation was probably taken for granted as a matter of principle, while it had not yet proved problematic as a matter of practical adjudication. Moreover, it appears to have been accepted that takings which clearly benefited the public would be legitimate regardless of whether or not the property was physically put to use by the public.[14]

An interesting early illustration of how courts approached takings controversies at this time can be found in *Stowell v Flagg*, a Massachusetts case from 1814. In this case, a landowner complained that his land had been flooded by a mill and sought a remedy in common law. The mill owner protested, however, since he was entitled to flood the land according to a special mill act, which allowed him to exercise the power of eminent domain to gain the right to flood his neighbor (provided statutory compensation was

[10]Indeed, early American scholars also emphasized the importance of private property. For instance, in his famous *Commentaries*, James Kent described the sense of property as "graciously implanted in the human breast" and declared that the right of acquisition "ought to be sacredly protected", see James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827) 257.

[11]See Johnson (n 9) 317.

[12]See Kent (n 10) 275-276.

[13]James Kent held it to be "founded in natural equity" and described it as an "acknowledged principle of universal law", see ibid, 276.

[14]Johnson (n 9).

paid). The focus in the case was on whether a common law claim for damages could still be made, irrespectively of the act's clear intention to deprive the affected neighbors of this opportunity. Hence, the court implicitly dealt with the legitimacy of the mill act itself, and they actively engaged with the public use requirement in the state constitution when making their assessment.[15] In the end, they found that the act was legitimate, and they highlighted the purpose of the interference, commenting that "these mills, early in the settlement of this country, were of great public necessity and utility".[16]

At the same time, however, the court had misgivings about how the act had come to be applied and expressed concern that "the legislature, as well as the courts of law in this state, seem to have been disposed rather to enlarge, than to curtail, the power of mill owners".[17] Still, after noting that affected land owners were entitled to compensation under the act, the court concluded that the act had to be observed and that it precluded any claims for damages under common law. Hence, the case is an early example of judicial deference to the legislature in takings cases, while also illustrating that the public use requirement was beginning to emerge as a potentially problematic issue in its own right. The presiding judge stated that he could not help thinking that the statute was "incautiously copied from the ancient colonial and provincial acts", but still held in favor of the mill owner, concluding that "as the law is, so must we declare it".[18]

While judicial deference was recognized as a guiding principle early on in US takings law, it is important to note in this regard that eminent domain was seldom used in a way that would raise serious controversy. English common law, while lacking clearly defined constitutional safeguards, was, as we have already mentioned, based on a fundamentally cautious attitude, ensuring that the power would typically only be used as a last resort. As Professor Meidinger notes, the British were never really charged with abuse of eminent domain, and private property tended to be respected, also in the colonies.[19] This undoubtedly influenced early US law. Indeed, the importance of constitutional limits on the taking power was made clear by the Supreme Court early on, as a matter of principle.[20] Hence, the relative lack of judicial inter-

[15] *Stowell v Flagg* 11 Mass 364 (1814).

[16] ibid, 366.

[17] ibid, 366.

[18] ibid, 368.

[19] Errol Meidinger, "The 'Public Uses' of Eminent Domain: History and Policy" (1980) 11 Environmental Law 1, 17.

[20] As reflected in *de dicta* comments from *Calder v Bull* and *Vanhorne's Lessee v Dorrance*, see *Calder v Bull* 3 US 386, 388 (1798); *Vanhorne's Lessee v Dorrance* 2 US 304, 310 (1795).

est in the question of legitimacy does not appear to have been due to a broad view on the scope of eminent domain, but an established practice of narrow use of that power, inherited from the English. The traditional attitude to eminent domain would eventually give way to a more expansive approach, however. This development became particularly marked during the period of great economic expansion and industrialization in the mid to late 19th century, when eminent domain was increasingly used to benefit (privately operated) railroads, hydroelectric projects, and the mining industry.[21] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence of the fact that eminent domain was now used more widely, for new kinds of projects.[22] Controversy arose particularly often with respect to mill acts.[23] Such acts were found throughout the US, and many of them dated from pre-industrial times when mills were primarily used to serve the needs of self-sufficient agrarian communities.[24] However, following economic and technological advances, acts that were once used to facilitate the construction of grist mills would increasingly also be relied on by developers wishing to harness hydropower for manufacturing, and eventually, for hydroelectric projects.[25]

The mill acts typically contained provisions that enabled the mill developer to condemn both property needed for the construction itself as well as the right to damage surrounding land by flooding or deprivation of water. Such takings became increasingly controversial, however, and many legitimacy cases came before state courts in the late 19th and early 20th century. In the next subsection I present some of these cases, to shed light on how states courts developed their own approach to the question of legitimacy of takings.

[21]Meidinger (n 19) 23-33.

[22]ibid, 24.

[23]ibid, 24. See also Johnson (n 9) 306-313 and Morton J Horwitz, "The Transformation in the Conception of Property in American Law, 1780-1860" (1973) 40 University of Chicago Law Review 248, 251-252.

[24]A total of 29 states had passed mill acts, with 27 still in force, when a list of such acts was compiled in *Head v Amoskeag Mfg Co* 113 US 9, 17 (1885). According to Justice Gray, at pages 18-19 in the same, the "principal objects" for early mill acts had been grist mills typically serving local agrarian needs at tolls fixed by law, a purpose which was generally accepted to ensure that they were for public use.

[25]See, e.g., ibid, 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

1.1 Legitimacy in state courts

In the mil cases, we find the first clear evidence of how the public use requirement was put to use to enable state courts to scrutinize the legitimacy of takings. Generally speaking, when a court upheld an interference in private property, it would place decisive weight on the broader purpose of interference, typically by arguing that economic ripple effects ensured that the mill was in the public interest even if the public would not literally make use of it.[26] By contrast, when a court decided that an interference was unconstitutional (with respect to state constitutions), it would often focus on the use made of the mill, arguing that it did not directly benefit the public in the sense required by the public use restriction.[27] For a time, a doctrine which sought to distinguish between takings for public use and takings for a public purpose, played quite a significant role in many states. Under this doctrine, only those takings that were deemed to qualify as public use takings under a narrow view of that term would be upheld.[28]

It is tempting to associate the narrow view on public use with a more restrictive attitude towards the use of eminent domain. Similarly, it is natural to assume that a broad view on public use suggests a more relaxed attitude. To some extent, the primary sources warrant this; unsurprisingly, those who endorsed a broad view on the public use question also often spoke in favor of judicial deference in legitimacy cases, while those endorsing a narrow view tended to emphasize the importance of constitutional safeguards against abuse of eminent domain. However, it seems that both groups were quite heterogeneous and that differences of opinion about the public use requirement did not necessarily reflect any deep ideological divisions.

It is clear, for instance, that many of the courts which favored a broad interpretation of public use still viewed the constitutional limitation on the takings power as an important safeguard, not only as a guarantee for compensation but also as a restriction on the purpose of takings. Indeed, it seems

[26]See, e.g., *Hazen v Essex Co* 66 Mass 475 (1853); *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832); *Boston & Roxbury Mill Corp v Newman* 29 Mass 467 (1832). A more comprehensive list of cases adopting a broad view can be found in Nichols (n 2) 617.

[27]See, e.g., *Sadler v Langham* 34 Ala 311 (1859); *Ryerson v Brown* 35 Mich 333 (1877); *Gaylord v Sanitary Dist of Chicago* 68 NE 522 (1903); *Minnesota Canal & Power Co v Koochiching Co* (n 25). A more comprehensive list can be found in *Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain* 54 ALR 7 (American Law Reports, 1928).

[28]Professor Nichols goes as far as to conclude that this emerged as the "majority" opinion on public use, see (Nichols [n 2] 617-618). But contrast this with Lawrence Berger, "The Public Use Requirement in Eminent Domain" (1978) 57 Oregon Law Review 203 and Meidinger (n 19) 24, who argue that the narrow view was only dominant in a handful of states, led by New York.

that most late 19th Century Courts, including those that upheld economic takings, were influenced by the growing body of case law across the US that actively scrutinized takings, sometimes striking them down. In particular, it seems that the strict deferential view was largely abandoned in economic takings cases during this period. Deference to the legislature still played an important role and was typically called on as an important argument in takings cases. However, it became much more common to discuss legitimacy also in terms of substantive arguments, by directly addressing the context and circumstances of the taking complained of. I believe this is an important insight to record about the case law from this period; despite differences of opinion about the meaning of public use, a consensus appears to have emerged that judicial review of legitimacy was appropriate and important in economic takings cases.

A good example is the case of *Dayton Gold & Silver Mining Co. v. Seawell*, concerning a Nevada Act which stipulated that mining was a public use for which the power of eminent domain could be exercised to acquire additional rights needed to facilitate extraction.[29] The Supreme Court of Nevada decided that the Act was constitutional and adopted a broad understanding of the property clause in the Nevada constitution.[30] Interestingly, it argued for this interpretation partly on the basis that it would provide *better* protection for landowners:

> If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. [...] Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor.[31]

[29] *Dayton Gold & Silver Mining Co v Seawell* 11 Nev 394 (1876).
[30] Nev Const Art 8 § 1.
[31] *Dayton Gold & Silver Mining Co v Seawell* (n 29) 410-411.

The quote shows that a broad understanding of "public use" need not be synonymous with a less cautious attitude to abuse of the takings power. Indeed, while the Court decided to uphold the Act, it did so only after a very careful assessment of both legal arguments and factual circumstances. In particular, the Court considered the importance of mining, concluding that it was the "greatest of the industrial pursuits" in the state, and that all other interests were "subservient" to it.[32] Moreover, the Court commented that the benefits of the mining industry was "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".[33]

This shows that the Court actively engaged with the purpose of the Act, thoughtfully assessing it against the constitution. Importantly, it did not do so in isolation, as a linguistic exercise or by attempting to recreate its "original intent". Rather, the court approached the constitutional safeguard by making detailed references to the prevailing social and economic conditions in the state of Nevada. The Court noted the importance of deference to the legislature on matters of policy, but it did so only after it had satisfied itself that the Act could be "enforced by the courts so as to prevent its being used as an instrument of oppression to any one".[34] More generally, the court commented as follows on the public purpose test that had to be performed in takings cases, elucidating on the principles on which it should be founded:

> Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent.[35]

In light of this, *Dayton Gold & Silver Mining Co. v. Seawell* must be regarded as an early example of a *contextual* approach to legitimacy, characterized by the willingness of the Court to engage in a fairly detailed analysis of the concrete circumstances and consequences of takings. A formalistic approach based on the phrase "public use" was abandoned, but not in favor of general deference. Rather, a more nuanced view was adopted, to respect the idea that the legislature should have the final say on policy while also recognizing that courts should play a crucial role in protecting citizens from abuse of the takings power.

[32] *Dayton Gold & Silver Mining Co v Seawell* (n 29) 409.
[33] ibid, 409.
[34] ibid, 412.
[35] ibid, 398.

The case is not unique, but rather exemplifies the type of reasoning that was used in economic takings cases at this time. Interestingly, many common elements exist between courts that upheld and struck down such takings, irrespectively of whether or not they subscribed to a narrow or broad view on the public use test. One example is *Ryerson v. Brown*, a case often cited as an authority in favor of a narrow view.[36] Here the Supreme Court of Michigan explicitly qualifies its decision by stating that it is "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain", hardly a clear endorsement of the narrow rule. The case concerned the constitutionality of a mill act, and while the court argues that public use should be taken to mean "use in fact", it is clear that "use" is understood rather loosely, not literally as physical use of the property that is taken.[37] Moreover, when clarifying its starting point for judicial scrutiny of mill acts, the court explains that "in considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties". Following up on this with regards to the act in question, the court finds that " the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it". After considering this and other possible consequences of mill development under the act, the court eventually declares it to be unconstitutional, summing up its assessment as follows: "What seems conclusive to our minds is the fact that the questions involved are questions not of necessity, but of profit and relative convenience".[38]

Hence, far from nitpicking on the basis of the public use phrase, the court adopts a contextual approach to takings that is in fact rather similar to the approach of *Dayton Gold & Silver Mining Co. v. Seawell*. The outcome it different, but it is also based on a different assessment of the context and the consequences of the takings complained of. Importantly, the case does not

[36] *Ryerson v Brown* (n 27).

[37] The court explains its stance on the public use restriction by stating (emphasis added) "it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to *accommodations*." The court continues with an illustrative example: "A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed the two last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade". See ibid 336.

[38] ibid, 336.

rest on any *a priori* assumption that economic takings of the kind in question could not meet a public use test – no general rule is relied on at all. Hence, it is somewhat strange that later commentators have focused on the case for its comments on public use rather than its broad, albeit perhaps somewhat conservative, assessment of legitimacy.

Many of the important cases from the late 19th Century, on both sides of the public use debate, shares many crucial features with the two cases discussed above.[39] In my opinion, this points to an interesting alternative perspective on legitimacy adjudication from this time. Some commentators describe the case law as chaotic, with competing conceptions of constitutional limits competing for dominance.[40]. I think this is more accurate than saying that a narrow interpretation of public use developed as a general rule. However, I also find evidence that there was in fact a broad consensus in this period regarding the need for special judicial scrutiny of economic development cases. State courts widely engaged in contextual assessment of legitimacy, and they were conscious of the special challenges that arose in a time when eminent domain was being used to facilitate economic expansion that would benefit specific commercial actors. Differences of opinion about public use terminology was an important aspect of this, but it was rarely considered in isolation from other aspects. On a deeper lever, the fact that the public use debate was regarded as important in the first place clearly suggests that deference to the legislature was not held to be an exhaustive answer to the question of legitimacy. This, in my opinion, is an important observation which appears to have been somewhat overlooked in the literature.

It is an observation that I think is relevant not only in relation to state law, but also when considering the takings doctrine that was later developed by the Supreme Court. While the narrow view of public use was indeed losing ground at the beginning of the 20th Century, the doctrine of extreme deference that was about to be adopted at the federal level represents a

[39]See, e.g., *Scudder v Trenton Delaware Falls Co* (n 26) (Eminent domain power upheld, but said: "The great principle remains that there must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule. What may be considered a public use may depend somewhat on the situation and wants of the community for the time being."), *Fallsburg Power & Mfg Co v Alexander* (1903) 101 Va 98 (Eminent domain struck down, on holding that "the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain"), *Board of Health of Portage Tp v Van Hoesen* 87 Mich 533, 538 (1891) (Eminent domain struck down, qualified by "not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use").

[40]Berger (n 28); Meidinger (n 19).

largely new development. The new deference was not originally directed at the legislature, in particular, but primarily towards the judiciary at the state level. Hence, it represent a development that is in some sense incomparable to the earlier case law from the states. The balance of power between states and the federal government also played an important role, which should not be overlooked.

1.2 Legitimacy as discussed in the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[41] Federal takings, on the other hand, were of limited practical significance since the common practice was that the federal government would rely on the states to condemn property on their behalf.[42]. This changed towards the end of the 19th Century, particularly following the decision in *Trombley v. Humphrey*, where the Supreme Court of Michigan struck down a taking that would benefit the federal government.Trombley v Humphery 1871 Not long after, in 1875, the first Supreme Court adjudication of a federal taking case occurred, marking the start of the development of the Supreme Court's own doctrine on public use and legitimacy.[43] Eventually, in 1897, the Court would also hold that state takings could be scrutinized under the takings clause of the constitution.[44] This was a development that can be traced to the passage of the Fourteenth Amendment to the Constitution after the civil war, concerning due process.[45]. Indeed, some early Supreme Court cases dealing with state takings were adjudicated against the due process clause directly.[46]

After the Supreme Court started developing its own case law on the legitimacy issue, the deferential stance soon became entrenched. As argued by Professor Horwitz, the mid to late 19th Century was the period in US history when control over property was transferred on a massive scale from agrarian communities to various agents of industrial expansion.[47] Moreover, it was a period of great optimism about the ability of *laissez faire* capitalism to ensure progress and economic growth. This was also reflected in the case law on eminent domain, particularly as developed by the Supreme Court. A particularly clear expression of this can be found in *Mt. Vernon-Woodberry*

[41] *Barron v City of Baltimore* 32 US 243 (1833).
[42] Meidinger (n 19) 30.
[43] *Kohl v United States* 91 US 367 (1875).
[44] *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 1).
[45] Johnson (n 9).
[46] See, e.g., *Head* (n 24).
[47] Horwitz (n 23).

Cotton Duck Co v Alabama Interstate Power Co.[48] This case dealt with the legitimacy of a condemnation arising from the construction of a hydropower plant, which the Alabama Supreme Court had upheld against claims that it was unconstitutional under the constitution of Alabama. The presiding judge held that it was valid using quite brisk language:

> The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.[49]

The quote serves as an indication of how deference was fast gaining ground, without yet being established doctrine. On the one hand, the Court stresses that deference to the *state* judgment (rather than the judgment of the legislature) should be given great weight in legitimacy cases. On the other hand, it prefers to conclude on the basis of its own assessment of the purpose of the taking. This assessment, however, is not particularly grounded in the circumstances on the ground in Alabama, being based rather on sweeping assertions about the "organic relations of modern society" and the desire to "save mankind from toil that it can be spared".

This judgment, from 1916, was given during the so-called *Lochner* era of jurisprudence in the US, when the Supreme Court would famously engage in active censorship of regulation that was meant to promote greater social and economic equality.[50] In particular, much case law from this period witnesses

[48] *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co* 240 US 30 (1916).

[49] ibid.

[50] Charles E Cohen, "The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate" (2008) 46 Duquesne Law Review 375.

to a general lack of deference. Hence, it is not unexpected to find that public use cases decided on the basis of substantive arguments. However, it is rather more surprising to find that deference actually played an increasingly important role in takings cases.[51] As early as *United States v. Gettysburg Electric Railway Co.*, a case from 1896, deference was described as a fundamental guiding principle, which should be adhered to except in very special circumstances.[52] In particular, Justice Peckham lended his support to the following deferential stance on the public use test:

> It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th Ed. § 600) that, when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.[53]

The case did not turn on the public use issue, however, as the condemned land would be used for battlefield memorials at Gettysburg, Pennsylvania, clearly a public use. In addition, the case concerned a federal takings, authorized by Congress. In later cases, the deferential stance was not adopted in cases originating from the states. As late as in 1930, in *Cincinatti v Vester*, the Supreme Court commented that the "'It is well established that,

[51]The *Lochner* era in general was characterized by courts engaging in censorship of state regulation, but this general tendency is not well reflected in how eminent domain law developed over the same period. This is interesting, as it points to the shortcoming of another commonly held view on property protection, namely that it largely serves the interests of property-owning elites, to the detriment of regulatory efforts to promote social equality. The cases through which *Lochner* era courts developed the deferential stance suggest a different interpretation; those who benefited most directly from takings in these cases were commercial interests, not vulnerable groups of society. Moreover, they benefited from acquiring land rights from members of agrarian communities, not from the elites. Hence allowing such takings to go ahead was no affront to the ideology of progress through *laissez faire* capitalism, quite the contrary. In particular, if it is true as many have argued, that the *Lochner* courts were ideologically committed to the promotion of unrestrained capitalism, there was little reason for them to oppose expansion of eminent domain into the commercial arena: those who would be likely to benefit were market actors who were proposing large scale commercial development projects. Indeed, the case law from this period makes it natural to argue that the deferential stance developed primarily to cater to the needs of the capitalists, under the perceived view that they represented the class which would bring progress and prosperity to the nation as a whole.

[52]*US v Gettysburg Electric R Co* 160 US 668 (1896).

[53]ibid, 680.

in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one".[54] In this judgment, Chief Justice Hughes also describes in more depth how the judicial assessment of the public use question should be carried out, echoing the contextual approach that had been developed in case law from the states.

> In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[55]

In *Hairston v. Danville & W. R. Co.*, the same idea was expressed even more clearly by Justice Moody, who surveyed the state case law and declared that "The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[56] He continued by describing in more depth the typical approach of the state courts in determining public use cases:

> 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, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected.[57]

Justice Moody goes on to give a long list of cases illustrating this aspect of state case law, showing how assessments of the public use issue is inherently contextual and varies from state to state.[58] He then cites three further Supreme Court cases, pointing out that all of them express similar sentiments of support for state case law on this issue.[59] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned

[54] *City of Cincinnati v Vester* (n 4) 447.
[55] ibid, 447.
[56] *Hairston v Danville & W R Co* (n 3) 606.
[57] ibid, 606.
[58] ibid, 607.
[59] *Falbrook, Clark* and *Strickley*

"a taking upheld by the state *court* as a taking for public uses in conformity with its laws" (my emphasis). After making clear that situations might still arise where the Supreme Court would not follow state courts on the public use issue, Justice Moody goes on to conclude that the cases cited " show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[60]

I believe *Hairston* is an important case for two reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was largely directed at the state courts rather than the state legislature. Second, it demonstrates federal recognition of the fact that a consensus had emerged in the states, whereby scrutiny of the public use determination was consistently regarded as a judicial task.[61] Moreover, the Court clearly looked favorably on the contextual approach adopted in such cases, whereby state courts would look to the concrete circumstances of the individual takings and acts complained of. The Court's approval of this tradition, in particular, is explicitly given as the reason for adopting a deferential stance. Put simply, the judicial test provided at state level was held to be of such high quality that there was little use for further scrutiny; a deferential stance was assumed, but made contingent on the fact that state courts would provide the required judicial scrutiny.

Despite this, *Hairston* would later be cited as an early authority in favor of almost unconditional deference in *US ex rel Tenn Valley Authority v Welch*.[62] This case concerned a federal taking and it cited *US v Gettysburg Electric R Co* as an authority in favor of strong deference with regards to the public use limitation.[63] However, the Court also paused to note that the later case of *City of Cincinnati v Vester* expressed the opposite view, that the public use test was a judicial responsibility.[64] In a very selective citation, the Court then purports to resolve this tension by quoting *Hairston* and the observation made there that the Supreme Court had never overruled the state courts in takings cases. Effectively, the importance of judicial scrutiny is thereby downplayed, although as we saw, the rationale behind *Hairston* was that state courts already offered high-quality judicial scrutiny of the public purpose.

Welch is particularly important because it is used as an authority in the later case of *Berman v Parker*, which endorses almost complete deference to

[60] *Hairston v Danville & W R Co* (n 3) 606.

[61] Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 4) 606.

[62] *U S ex rel Tenn Valley Authority v Welch* 327 US 546, 552 (1946).

[63] *US v Gettysburg Electric R Co* (n 52).

[64] *City of Cincinnati v Vester* (n 4).

the legislature regarding the public use issue.[65] This case concerned condemnation for redevelopment of a partly blighted residential area in the District of Colombia, which would also condemn a non-blighted department store. In a key passage, the Court states that the role of the judiciary in scrutinizing the public purpose of a taking is "extremely narrow".[66] The Court provides only two citations for this claim, one of them being *Welch*. The other case, *Old Dominion Land Co v US*, concerned a federal taking of land on which the military had already invested large sums in buildings.[67] In my view, both cases are weak authorities for prescribing general deference regarding public use. Moreover, both cases are concerned with federal takings only, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[68] It is possible to see this as a *dictum*, since the District of Columbia is governed directly by Congress, but it is a passage that has had a great impact on future cases. In effect, *Berman* caused departure from a significant and consistent body of case law which recognized the important role of the judiciary, at state level, in assessing the purported public purpose of takings. It did so, moreover, without engaging with any of these cases at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principles of *Berman*, in a case where the state of Hawaii had made used of the takings power to break up an oligopoly in the housing sector.[69] However, the fact that the case made it to the Supreme Court is perhaps suggestive of an increase in the level of worry and tension associated with eminent domain in the 1980s. Indeed, Justice Sandra Day O'Connor, joined by a unanimous Supreme Court, expressed general disapproval of private takings and she appears to have felt the need to provide further qualification

[65] *Berman v Parker* (n 5) 32.

[66] ibid, 32.

[67] The Court commented on the public use test by saying that "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". See Old Dominion Land Co v US 1925, 66 Hence, the Court took the view that courts should be cautious in second-guessing the intentions of Congress on the basis of what its subordinates had subsequently done and said. This is far from a general deferential stance on public use, and no cases are cited at all, suggesting further that the Court did not think its remarks would be of general significance. Still, a partial quote, used to substantiate broad deference to the legislature (not only Congress, but also the states) except when it involves an "impossibility", has become commonplace. In particular, such a quote was used in the much discussed *Hawaii Housing Authority v Midkiff* 467 US 229, 240 (1984).

[68] *Berman v Parker* (n 5) 32.

[69] *Midkiff* (n 67).

for the deferential view, which she did in part by observing that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of eminent domain". Hence, judicial deference was not regarded as an absolute and systemic imperative, as in Berman, but made contingent on the fact that legislatures are "better able" than courts at conducting public purpose tests. Hence, some of the contextual ideas from earlier case law is echoed in the decision, but now with respect to the legislature. It should be noted that *Midkiff* follows *Berman* also in the authorities consulted, and does not consider the cases which had focused on the importance of judicial scrutiny at state level.

The purpose of interference in *Midkiff* was to break up an oligopoly to the benefit of tenants, not to further economic development by allowing commercial interests to take land. Hence, the rationale behind the interference is likely to have struck the Supreme Court as sound and just. Moreover, it seems that such an interference would be easy to uphold also under the doctrine of contextual judicial scrutiny of the public use determination. Indeed, Justice O'Connor partly relies on an assessment of the merits of the taking, pointing out that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers". In conclusion, the "extremely narrow" room for judicial review set up by *Berman* seems to have been replaced by a slightly more nuanced formulation, which nevertheless made clear that a legal precedent of deference had now become entrenched. Fine readings aside, *Midkiff* reaffirms the main principle: the meaning of public use can be broad, and the room for judicial review of governmental assessments in this regard is narrow.

So far we have only commented on how the Supreme Court developed its own doctrine on the public use restriction in the early 20th Century. Given that its role in takings jurisprudence was limited up to this point, it is important to consider also the effect on state case law. In particular, what was the fallout of *Berman*, which failed to recognize the importance of the tradition for judicial scrutiny that had developed at the state level? A detailed assessment of this against primary sources will have to be left for future work. However, it seems clear that *Berman* had a significant effect, both conceptually and in practice. A clear indication of this can be found in the secondary literature. Indeed, most academics following WW2 seemed to converge towards the view that the public use requirement was of little or no judicial importance. Professor Merrill, in an influential paper from 1986, goes as far as to describe it as a "dead letter".[70]. At the same time, eminent

[70]Thomas W Merrill, "The Economics of Public Use" (1986) 72 Cornell Law Review 61.

domain became more controversial in this period, as it was also put to use more aggressively by some states.

Some concrete cases proved particularly controversial, and they were taken to illustrate the dangers of eminent domain, particularly in relation to economic development projects. While the takings power had traditionally been used mostly to condemn agrarian land rights, it was now regularly used to condemn middle class homes. The controversy surrounding the case of Poletown Neighborhood Council v. City of Detroit illustrates this, and the case marks a watershed moment in the history of economic development takings in the US.[71] In *Poletown*, the Michigan Supreme Court held that it was not in violation of the public use requirement to allow General Motors to displace some 3500 people for the construction of a car assembly factory. The majority 5-2 cites *Berman*, commenting that its own room for review of the public use requirement is limited.[72]

The *Poletown* decision was controversial, and the minority, especially Justice Ryan, was highly critical of it. He objects both to the deferential stance in general and to the majority reading of *Berman* in particular, pointing out that the Supreme Court's doctrine of deference was in large part directed at the state courts.[73] Hence, he concludes, the majority's reliance on *Berman* is "particularly disingenuous".[74]

Justice Ryan was not alone in his disapproval of *Poletown* and the case is widely regarded as the prelude to an era of increased tensions over economic development takings in the US. This would culminate with *Kelo* which, despite upholding an economic development taking, also signaled a move towards more active judicial review of the public use requirement. This effect of *Kelo* has become more clear over time, primarily due to state responses caused by widespread disapproval with the outcome. However, it has also been remarked that both the majority and minority opinions in *Kelo* indicate that the Supreme Court itself may not be entirely at ease with the doctrine of strict deference that developed after *Berman*. In the next subsection, I will give an overview of recent developments, particularly from the secondary literature.

[71] See Timothy Sandefur, "A gleeful obituary for Poletown Neighborhood Council v. Detroit" (2005) 28(2) Harvard Journal of Law and Public Policy 651, 380-381.

[72] *Poletown Neighborhood Council v City of Detroit* (n 6) 632-633.

[73] ibid, 668.

[74] ibid, 668.

2 Economic development takings after Kelo

The fact that *Kelo* was decided against the homeowner met with wide disapproval by the US public. In addition, many scholars expressed concern at what they saw as an ill advised "abdication" of the judiciary in takings cases. The minority opinions given in *Kelo*, particularly the opinion of Justice O'Connor, also proved influential, causing further attention to be directed at the perceived dangers of eminent domain abuse. A massive amount of literature has since appeared devoted to studying the "problem" of economic takings. Moreover, many states have seen reforms aimed to curb the use of eminent domain for economic development.[75]

As of 2014, 44 states have passed post-*Kelo* legislation to curb the use of eminent domain for economic development.[76] Various legislative techniques have been adopted by the states to achieve this. Some states, including Alabama, Colorado, Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[77] In South Dakota, the legislature went even further, banning the use of eminent domain "(1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue".[78]

In other states, more indirect measures were also taken, such as in Florida, where the legislature enacted a rule whereby property taken by the government could not be transferred to a private party until 10 years after the date it was condemned.[79] Many states also offer inclusive, often lengthy, lists of uses that should count as public, allowing the states to restrict the eminent domain power while also allowing condemnations that are regarded as particularly important to the state.[80] However, as argued by Somin, many of these legislative reforms are largely ineffective in preventing economic development takings.[81] Somin also points to another interesting trend, namely that state

[75]For an overview and critical examination of the myriad of state reforms that have followed *Kelo*, I point to Steven J Eagle and Lauren A Perotti, "Coping with Kelo: A potpourri of legislative and judicial responses" (2008) 42(4) Real Property, Probate and Trust Journal 799. See also Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo" (2009) 93 Minn. L. Rev. 2100.

[76]According to the Castle Coalition, a property activist project associated with the Institute of Justice. See http://www.castlecoalition.org/ for an up-to-date survey of state legislation on eminent domain.

[77]See Eagle and Perotti (n 75) 107-108.

[78]South Dakota Codified Laws § 11-7-22-1, amended by House Bill 1080, 2006 Leg, Reg Ses (2006).

[79]Eagle and Perotti (n 75) 809.

[80]ibid, 804.

[81]Somin (n 75) 2120.

reforms enacted by the public through referendums tend to be far more restrictive and effective in preventing economic and private-to-private takings than reforms passed through the state legislature.[82]

This is a further reflection of the extent to which the US public opposed the decision in *Kelo*. Surveys show that as many as 80-90 % believe that it was wrongly decided, an opinion widely shared also among the political elite.[83] Indeed, *Kelo* has had a great effect on the discourse of eminent domain in the US, and this effect is perhaps of greater importance than the various state reforms that have been enacted. According to Somin, most of the reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[84]

Somin is not alone in feeling that eminent domain reform has offered more than it could deliver, this is a sentiment that is expressed both by supporters and critics of *Kelo*. On the other hand, while practitioners have noted that it is largely business-as-usual in eminent domain law, they also report a greater feeling of unease regarding the public use requirement, expressing hope that the Supreme Court will soon revisit the issue.[85] In this way, the public backlash against *Kelo* has served as an influential reminder that the rationale behind eminent domain for economic development is largely out of sync with the sense of fairness and justice endorsed by most non-experts.

The underlying cause of this, according to Somin, can be traced to the fact that people are "rationally ignorant" about the economic takings issue. For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on principles that, in fact, are opposed by a large majority of citizens.[86] Indeed, Somin argues that surveys show how people tend to overestimate the effectiveness of eminent domain reform, possibly due to the fact that symbolic legislative measures are mistaken for materially significant changes in the law.[87]

I think Somin's analysis is on an interesting track, although it seems

[82]Somin (n 75) 2143.

[83]ibid, 2109.

[84]ibid, 2170-2171.

[85]See MM Murakami, BCK Ace, and RH Thomas, "Recent developments in eminent domain: Public use" (2013) 45(3) Urban Lawyer 809 ("Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities").

[86]Somin (n 75) 2163-2171.

[87]ibid.

wrong to assume *a priori* that people's critical stance on economic development takings would necessarily remain in place if they educated themselves more on the issue. Rational ignorance, in particular, should be seen as a double-edged sword in disputes of this kind. But this does nothing to detract from the main message, which is that the *Kelo* backlash seems to have caused greater insecurity about what the law is, without being able to significantly curb those uses of eminent domain that have been deemed problematic. In my opinion, this shows that the static legislative approach to eminent domain reform, which has dominated the scene in the US so far, needs to be supplemented by more dynamic proposals. In particular, it seems important to target the decision-making processes surrounding planning and eminent domain, to look for principles by which this process can be imbued with legitimacy.

In a country where the population expresses antagonism towards eminent domain for economic development, a more inclusive process will likely cause such takings to become more uncommon. On the other hand, if principles of good governance are put in place, it might also restore confidence in eminent domain as a procedure by which to implement democratically legitimate decisions about how to weigh the interests of landowners against the interests of the public. In the next subsection, I will consider two proposals for principles of this kind. The first targets specifically the question of how compensation is determined in economic development cases, a crucial aspect of legitimacy. The second proposal targets the decision-making process more broadly, by proposing a framework for land assembly that is meant to replace the use of eminent domain in certain circumstances.

3 Institutional proposals for increased legitimacy

In this subsection, I first present the Special Purpose Development Companies proposed by Lehavi and Licht.[88] I relate this proposals to theoretical approaches to the issue of compensation, before I go on to note some shortcomings and open questions that I will later address in my case study. I then go on to consider the Land Assembly Districts proposed by Heller and Hills.[89] I consider this proposal in light of the stated motivation, which is to design an effective mechanism of self-governance that can replace eminent domain in economic development cases. I present some unresolved questions

[88]Lehavi and Licht (n 7).
[89]Heller and Hills (n 7).

and argue that there is a tension in the proposal between its narrow scope, imposed to prevent majority tyranny and other forms of abuse, and its broad goal of empowering local communities.

3.1 Special Purpose Development Companies

The primary distinguishing feature of economic development takings is that they give the taker an opportunity to profit commercially from the development. This may even be the primary aim of the project, with the public benefiting only indirectly through potential economic and social ripple effects. Property owners facing condemnation in such circumstances might expect to take a share in the profit resulting from the use of their land. However, in many jurisdictions, including the US, the rules used to calculate compensation prevents owners from getting any share in the commercial surplus resulting from development.[90] In particular, various *elimination rules* are typically in place to ensure that compensation is based entirely on the pre-project value of the land that is being taken.[91] The policy reasons for such rules is that they ensure that the public does not have to pay extra due to its own special want of the property. After all, this is one of the main purposes of using eminent domain in the first place; to ensure that the public does not have to pay extortionate prices for land needed for important projects. However, when the purpose of the project is itself commercial in nature, there appears to be a shortage of good policy reasons for excluding this value from consideration when compensation is calculated. This is especially true when, as in the US, compensation tends to be based on the market value of the land taken. Why should a commercial condemner's prospect of carrying out economic development with a profit be disregarded from the assessment of market value? In any fair and friendly transaction among rational agents, one would expect benefit sharing in a case like this. Yet for economic development backed up by eminent domain, the application of elimination rules ensures that all the profit goes to the developer.

Some authors have argued that failures of compensation is at the heart of the economic takings issue and that worry over the public use restriction is in large part only a response to deeper concerns about the "uncompensated increment" of such takings.[92] In addition to the lack of benefit sharing, previous work has identified two further problems of compensation that also tend

[90]See, e.g., Lee Anne Fennell, "Taking Eminent Domain Apart" (2004) 2004 Mich. St. L. Rev. 957, 965-966.

[91]See *Current Condemnation Law: Takings, Compensation and Benefits* (American Bar Association 2006) 81.

[92]See Fennell (n 90) 962.

to become exasperated in economic development cases. First, the problem of "subjective premium" has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.[93] For instance, if a home is condemned, the homeowner will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate "objective" logistic costs as well as more subtle costs, such as having to familiarize oneself with a new local community. Second, the problem of "autonomy" has been discussed, arising from the fact that an exercise of eminent domain deprives the landowner of her right to decide how to manage her property.[94]

In[95], the authors propose a novel approach for addressing the "uncompensated increment" in economic takings cases. Their proposal is based on a new kind of structure that they dub a *Special Purpose Development Corporation* (SPDC). The idea is that owners affected by eminent domain will be given a choice between standard pre-project market value and shares in a special company. This company will exist only to implement a specific step in the implementation of the development project: the transaction of the land-rights. The SPDC may choose either to offer their rights on an auction or else negotiate a deal with a designated developer.[96] Hence, the idea is to ensure that the owners are paid a value that reflects the post-project value of the land, but in such a way that the holdout problem is avoided. In particular, the SPDC will have a single task: to sell the land for the highest possible price within a given time frame.[97] After the sale is completed, the SPDC will divide the proceeds as dividends and be wound up.[98]

Other suggestions have taken a more static approach to compensation reform, such as proposing to give owners a fixed premium in cases of economic development, or developing mechanisms of self-assessment to ensure that compensation is based on the true value the owner attributes to his own land.[99] Compared to such proposals, the idea of SPDCs is more sophisticated

[93]Fennell (n 90) 963.

[94]Discussed in ibid, 966-967. For a general personhood building theory of property law, see Margaret Jane Radin, *Reinterpreting property* (University of Chicago Press 1993). For a general economic theory of the subjective value of independence, see Matthias Benz and Bruno S Frey, "Being Independent Is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy" (2008) 75(298) Economica 362.

[95]Lehavi and Licht (n 7).

[96]ibid 1735.

[97]ibid, 1741.

[98]ibid, 1741.

[99]A range of static proposals have been proposed in the literature: Merrill proposes 150 % of market value for takings that are deemed to be "suspect", including takings for which the nature of the public use is unclear, see Merrill (n 70) 90-93. Krier and Serkin propose

and should be looked at in more depth.

The conceptual premise for the proposal is that takings for economic development can be seen as compulsory incorporation, a pooling of resources useful in overcoming market failures.[100] Just as the corporation is formed to consolidate assets in order to facilitate effective management, so is eminent domain used to assemble property rights in order to facilitate efficient organization of development. According to Lehavi and Licht, this also provides a viable approach to problems of "opportunistic behavior"; hierarchical governance after assembly ensures that order and unity can be regained even if interests in the land are distributed among a large and heterogeneous group of potentially mischievous shareholders.[101] In the words of Lehavi and Licht:

> The exercise of eminent domain powers thus resembles an incorporation by the government of all landowners with a view to brining all the critical assets under hierarchical governance. Establishing a corporation for this purpose and transferring land parcels to it thus would be merely a procedural manifestation of the substantive economic reality that already takes place in eminent domain cases.

As soon as we look at the rationale behind economic development takings in this way, any remnant of good policy reasons for ensuring that the developer gets all the profit seems to disappear. Rather, we are led to consider compensation as an issue entirely separate from the exercise of the takings power. After the land has been reorganized by eminent domain and an SPDC has been formed, the land rights might as well be sold *freely* to a developer. In this way, the land will be sold for a price that is closer to an actual market value, on the market where the land is destined for development.[102] More generally, the SPDC becomes an aid that the government can use to create more favorable market conditions for transferring land that has commercial

a system that provide compensation for a property's special suitability to its owner, or a system where compensation is based on the court's assessment of post-project value, see James E Krier and Christopher Serkin, "Public Ruses" 2004 Mich. St. L. Rev. 859, 865-873. Fennell proposes a system of self-evaluation of property for takings purposes with tax-breaks given to those who value their property close to market value (to avoid overestimation), see Fennell (n 90) 995-996. Bell and Parchomovsky also propose self-evaluation, but rely on a different mechanism to prevent overestimation; tax liability is based on the self-reported value and no property can be sold by its owner for less than his reported value, see Abraham Bell and Gideon Parchomovsky, "Taking Compensation Private" (2007) 59(4) Stanford Law Review 871, 890-900.

[100]Lehavi and Licht (n 7) 1732-1733.

[101]ibid, 1733.

[102]ibid, 1735-1736.

potential in its public use. Due to the compulsory pooling of resources, no owner can exercise monopoly power by holding out, but due to decoupling of compensation from assembly, the owners can now negotiate with potential developers for a share of the resulting profit. Moreover, the fact that the SPDC offers its rights on an actual market can also help ensure that more information become available regarding the true economic value of the development, something that may in turn help ensure that only the good projects will be successful in acquiring land. Hence, according to Lehavi and Licht, an additional positive effect of SPDCs is that developers and governments will shun away from using the eminent domain power to benefit projects that are not truly welfare-enhancing.[103]

In addition to these substantive consequences, the SPDC-proposal also stands out because it has a significant institutional component, pointing to its potential for restoring procedural legitimacy as well as substantive fairness. Lehavi and Licht discuss corporate governance issues at some length, but without committing themselves to definite answers about how the operations of the SPDC should be organized.[104] Indeed, while their proposal is perhaps most interesting because of its procedural aspects, it also appears to be rather preliminary in this regard. The main idea is to let the SPDC structure piggyback on existing corporative structures, particularly those developed for securitization of assets.[105] The basic idea is that the corporate structure should be insulated from the original landowners to the greatest possible extent; it should have a narrow scope, it should be managed by neutral administrators, and it should entrust a third party with its voting rights.[106] This is meant to prevent failures of governance within the SPDC itself, making it harder for majority shareholders and self-interested managers to co-opt the process. For instance, if a possible developer already holds a majority of the shares in an SPDC, this structure would prevent him from using this position to acquire the remaining land on favorable terms.

Lehavi and Licht observe that under US law, the government would often be required to make shares in an SPDC available to the landowners as a public offering.[107] Lehavi and Licht deem this to be desirable, arguing that

[103]Lehavi and Licht (n 7) 1735-1736.

[104]ibid, 1040-1048.

[105]See generally Steven L Schwarcz, "The Alchemy of Asset Securitization" (1994) 1(1) Stanford Journal of Law, Business & Finance 133. For an up-to-date overview, targeting special challenges that became apparent during the 2008 financial crisis, see Steven L Schwarcz, "Securitization, Structured Finance, and Covered Bonds" (2013) 39(1) Journal of Corporation Law 129.

[106]Lehavi and Licht (n 7) 1742.

[107]ibid, 1745.

full disclosure will provide owners with a better basis on which to decide whether or not to accept SPDC shares in place of pre-project market value. It will also facilitate trading in such shares, so that they will become more liquid and therefore, presumably, more valuable.[108]

Lehavi and Licht's proposal is interesting, but I think a fundamental objection can be raised against it. In particular, it seems that their governance model more or less completely alienate property owners from the decision-making process after SPDC formation. Limiting the participation of owners is to a large extent an explicit aim, since governance by experts is held to increase the chances of ensuring good governance. But is expert rule really the answer?

It seems that from the owners' point of view, Lehavi and Licht's proposals for governance reduces the SPDC to a mechanism whereby they can acquire certain financial entitlements. These may exceed those that would follow from standard compensation rules, but they do not directly empower owners vis-á-vis developers and the government. Instead, a largely independent structure will be introduced. It is this new organizational structure, rather than the owners, that will now become an important actor in the eminent domain process. In principle, it is meant to represent owners, but to what extent can it do so effectively? After all, it is specifically intended to operate as neutral player, charged with maximizing the price, nothing more. Hence, it appears that the SPDC will not be able to give owners an arena to negotiate on the basis of the personal and social importance they attribute to their land rights. How the problem of "autonomy" is addressed by the proposal is therefore hard to see and the "subjective premium" also appears to be in danger, unless it can be objectively quantified and covered by the surplus from a voluntary sale. But if such quantification is possible, then why not simply tell the appraiser to award some premium under standard compensation rules?

More generally, it seems to me that while all three categories of "uncompensated increments" are interesting to study from a financial viewpoint, severe doubts can be raised regarding the feasibility of addressing the subjective aspects of this as a question of compensation. It may be that issues related to "subjective premium" and "autonomy" are seen as public use issues for good reason; they are hard to quantify otherwise. Moreover, attempting to do so might do more harm than good. On the one hand, it might skew the political process, since owners that have been "bought off" don't object to ill-advised development projects, as long as they generate financial revenue. But what about projects that are undesirable for other reasons, for instance

[108]Lehavi and Licht (n 7) 1746.

because they completely change the character of a neighborhood, or because they are harmful to the environment? On the other hand, the very idea that money can compensate for the subjective importance of property and autonomy can itself prove offensive. At least it seems likely that it would often come to be seen as inadequate and inefficient.[109] Moreover, an owner that is compelled to give up his home after an inclusive process where the public interest has been debated and clearly communicated is likely to feel like he incurs less costs related both to his subjective premium and his autonomy. Hence, the lack of participation in the decision-making process can in itself increase the uncompensated loss. Clearly, no externally managed "bargain-oriented" SPDC will be able to resolve this problem. Of course, some "objective" elements of, such as relocation costs or cost for juridical assistance, can still be addressed under the banner of compensation. But in most jurisdictions, they already are.[110] For more subtle aspects, the aftermath of *Kelo* itself can serve as an illustration of how a compensatory approach is unsatisfactory:

After the case, Suzanne Kelo remained defiant, until she eventually decided to settle in 2006, for an offer of $ 442 155, more than $ 319 000 above the appraised value.[111] Apparently, the other owners affected by the same taking were not particularly pleased, arguing that recalcitrant owners were actually rewarded for holding out.[112] On the other hand, there is no indication that Suzanne Kelo was not genuine in her opposition to the taking. Indeed, after the long struggle she had taken part in, it is easy to imagine that financial compensation, if it was to be an effective remedy at all, would have to be very high. Even after she had settled, Kelo apparently toured the country speaking out against economic takings. This, too, is a statement to the inadequacy of a purely financial approach to legitimacy.

I conclude that SPDCs have serious shortcoming with regards to the subjective aspects of undercompensation, aspects that can only be addressed if the focus turns towards participation. However, SPDCs do seem promising when it comes to profit-sharing. This, after all, is what the structure is specifically aiming to achieve. In addition, I agree that SPDCs will likely have a positive effect on the other actors in the eminent domain process. In particular, I agree with Lehavi and Licht that greater openness is likely to result, revealing the true merits of development projects, at least in so far

[109]For more detailed criticism of the compensation approach to the public use issue, see Nicole Stelle Garnett, "The Neglected Political Economy of Eminent Domain" (2006) 105(1) Michigan Law Review 101.
[110]See, e.g., ibid, 121-126.
[111]Lehavi and Licht (n 7) 1709.
[112]ibid, 1709.

as these are translatable into financial terms. The fact that developers must negotiate with an SPDC who can threaten to make the land available an an open auction will likely deter developers and government from pursuing fiscally inefficient projects. Hence, the risk that governments will subsidized such projects by giving them cheap access to land will also be reduced. In addition, the presence of a third voice, speaking on behalf of owners, is likely to help achieve a better balance of power in development takings.

Even if the individual landowners do not have a voice in this process, the fact that the landowners are better represented as a group is then still likely to have a positive effect on legitimacy. On the other hand, as long as the power of the SPDC is limited to choosing the best offer and negotiating over price, it seems that SPDCs will easily end up being dominated by developers and government. This is a particular concern in cases when competition fails to arise after SPDC formation. To ensure that there are other interested parties, in particular, sems like an important precondition for the proposal to work in practice. In this regard, it is important to realize that a lack of interest from other developers may not be due to the superiority of the original developer's plans. It might rather be due to the fact that the scope of the assembly giving rise to the SPDC is so defined as to make alternatives unfeasible. The danger of abuse in this regard seems significant, particularly when developers themselves participate in coming up with the plans that give rise to SPDC formation.

Moreover, as long as owners remain marginalized in the planning phase, it is easy to imagine situations where the plan itself will be formulated in such a way that only one developer is in a position to successfully implement it. A simple example would be if a prospective developer already owns some of the land that is critical to the plan, and is able to ensure that this land is kept out of the scope of the SPDC. Clearly, if SPDCs are to operate effectively, such instances of manipulation need to be avoided, suggesting that the proposal as it stands needs to be fleshed out in greater detail.

The problems addressed here both seem to point to the fact that the SPDCs, while more flexible than other suggestions, are still too static to achieve many of their objectives. In particular, to arrive at genuine market conditions for assessing post-project value, there is still a need for changes in the dynamics of the planning process underlying the taking. Moreover, to ensure legitimacy, there is a need for a mechanism that goes beyond expert bargaining and provides owners with better access to the decisionmaking process. In the next subsection, I will consider a proposal that aims to address this, by proposing a framework for self-governance.

3.2 Land assembly districts

In a recent article, Heller and Hills propose a new institutional framework for carrying out land assembly for economic development. Interestingly, it is meant to replace eminent domain altogether. The goal is to ensure democratic legitimacy while also creating a template for collective decision-making that will prevent inefficient gridlock and holdouts. The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[113] Anyone can propose and promote the formation of a LAD, but both the official planning authorities and the owners themselves must consent before it is formed.[114] Clearly, some form of collective action mechanism is required to allow the owners to make such a decision. Hiller and Hill suggest that voting under the majority rule will be adequate in this regard, at least in most cases.[115] How to allocate voting rights in the LAD is another issue that require careful consideration, but Heller and Hills land on the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[116] Owners can opt out of the LAD, but in this case eminent domain can be used to transfer the land to the LAD using a conventional eminent domain procedure.[117]

Heller and Hills envision an important role for governmental planning agencies in approving, overseeing and facilitating the LAD process. Their role will be most important early on, in approving and spelling out the parameters within which the LAD is called to function.[118] Hence, it appears to be assumed that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue. A possible challenge that arises, and which Heller and Hills do not address at any length, is that the scope of the LAD needs to be broad enough to allow for meaningful competition and negotiation after LAD formation. At the same time, however, there will probably be a push, both by governments and initiating developers, to ensure that the scope is defined narrowly enough to give confidence that

[113]Heller and Hills (n 7) 1469-1470.

[114]ibid, 1488-1489.

[115]See ibid, 1496. However, when many of the owners are non-residents who only see their land as an investment, Heller and Hills note that it might be necessary to consider more complicated voting procedure, for instance by requiring separate majorities from different groups of owners. See ibid, 1523-1524.

[116]See ibid, 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favor of the property-based proposal, see ibid, 1503-1507.

[117]ibid, 1496.

[118]ibid, 1489-1491.

rezoning permissions will not be denied at a later stage. Another potential challenge is that the planning authorities might have an incentive to refuse granting approval for LAD formation, since it effectively entails that they give up the power of eminent domain for the land in question. For this reason, Heller and Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[119]

After the formation of the LAD, the government will have a less important position, but the planning authorities will still occupy an important facilitating role. Heller and Hills envision a system of public hearings, possibly organized by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[120] In this process, it is assumed that also other voices will be represented, such as owners of adjoining land, who can use this opportunity to express objections against the project. Their role in the process is not clarified, but presumably the planning authorities would be able to offer this group some protection, if not in relation to the LADs own operations, then later in relation to the decision whether or not to grant the licenses needed for the development project.

Importantly, if the owners do not agree to forming a LAD, or if they refuse to sell to any developer, the government will be precluded from using eminent domain against them to assemble the land.[121] This is the crucial novel idea that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. LADs will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead, if they should so decide. Hence, the proposal shifts the balance of power in economic development cases, giving owners a greater role also in preparing the decision whether or not to develop, and on what terms. In my opinion, this makes the proposal stand out as particularly interesting in the recent literature on economic takings. It is the first concrete suggestion that addresses the democratic deficit in a dynamic, procedural manner, without failing to recognize that the danger of holdouts is real and that institutions are needed to avoid it, also in economic development cases.

There are some problems with the model, however. Kelly points out that the basic mechanism of majority voting is itself imperfect, and can lead both to overassembly and underassembly, depending on the circumstances.[122]

[119]Heller and Hills (n 7) 1490.
[120]See ibid, 1490-1491.
[121]ibid, 1491.
[122]Daniel B Kelly, "The Limitations of Majoritarian Land Assembly" (2009) 122 Harvard Law Review Forum 7.

He points out, in particular, that if different owners value their property differently, majority voting will tend to disfavor those with the most extreme viewpoints, either in favor of, or against, assembly. If these viewpoints are assumed to be non-strategic and genuine reflections of the welfare associated with the land, the result can be inefficiency. In a nutshell, the problem is that a majority can often be found that does not take due account of minority interests. For instance, if some owners are planning alternative development, leading them to attribute a high *hope*-value to their land, they can safely be ignored as long as the majority have no such plans. This could become particularly bad in cases when the alternative development itself is more socially desirable than the development that will benefit from assembly. The role of the LAD in such cases will not improve the quality of the decision to develop, since it pushes the decision-making process into a track where those interests that *should* prevail are voiced only by a marginalized minority inside the new institution.[123]

More generally, the lack of clarity regarding the role of LADs in the planning process is a problem. As it stands, the proposal leaves it uncertain how LADs will affect the decision-making process regarding development. But the ideal is clearly stated: LADs should help to establish self-governance in land assembly cases. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighborhood – or reject all such proposals".[124] As they put it, two of the main goals of LAD formation is to ensure " preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government".[125] Unfortunately, these ideals are somewhat at odds with the concrete rules that Heller and Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills echo many of the "corporate governance"-ideas that also feature heavily in Lehavi and Licht's proposal. Indeed, in direct contrast to their comments about "broad discretion" and "self-governance", Hiller and Hills also state that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[126] This is a good thing, according to Heller and Hills, since it provides a safe-

[123]Of course, one might imaging these landowners opting out of the LAD, or pursuing their own interests independently of it. However, they are then unlikely to be better off than they would be in a no-LAD regime. In fact, it is easy to imagine that they could come to be further marginalized, since the existence of the LAD, acting "on behalf of the owners", might detract from any dissenting voices on the owner-side.

[124]See Heller and Hills (n 7) 1496.

[125]See ibid, 1498.

[126]See ibid, 1500.

guard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt the community voice to further their own interests. As Heller and Hills puts it, the narrow scope of LADs will ensure that "all differences of interest based on the constituents' different activities and investments, therefore, merge into the single question: is the price offered by the assembler sufficient to induce the constituents to sell?".[127]

But this means that there is an internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighborhood bickering and majority tyranny on the other. It is hard to see, in particular, how the idea of LADs with a "narrow purpose" is compatible with a scenario where the LAD has "broad discretion" to choose between competing proposals for development. If such discretion may indeed be exercised, what is to prevent special interest groups among the landowners from promoting development projects that will be particularly favorable to them, rather than to the landowners as a group? And what is to prevent landowners from making behind-the-scene deals with favored developers at the expense of their neighbors? It seems like a great challenge to come up with rules that prevent mechanisms of this kind, without also constraining the landowners so much that meaningful "self-governance' becomes an impossibility. If a LAD is obliged to only look at the price, this might prevent abuse. But it will not give owners broad discretion to choose among development proposal. Effectively, it will render LADs as little more than a variant of SPDCs, where the owners are awarded an extra bargaining-chip: the option to refuse all offers.

In my view, such a restriction on the operations of LADs is not desirable. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will emerge in response to the formation of a LAD. Such proposals may involve novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are less commercially attractive. In particular, the formation of a LAD and the competition for development that ensues creates an opportunity for tapping into a greater pool of ideas for redevelopment, ideas which may then also be rooted more firmly in the local community. Surely, getting such proposals to the table would be desirable and it would take us to the heart of self-governance. At the same time, it is easy to acknowledge that problematic situations may arise, for instance if a majority forms in favor of a scheme that involves razing only the homes of the minority, maybe on the rationale that these are "more blighted". That would likely give rise to accusations

[127]Heller and Hills (n 7) 1500.

of unfair play, which may or may not be warranted. But irrespectively of this, an alternative project of this kind might well be a better use of the land in question, also from the point of view of the public. Hence, it would seem that the planning authorities would be obliged to give it some serious consideration. Then, however, the LAD has truly become an arena for a new kind of power play among different interest, and a potential vehicle of force for whomever secures support from a majority of owners within the district.

In their proposal, Heller and Hills are aware of this potential problem, which they propose to resolve by strict regulation. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[128] But this raises further questions. For one, what is meant by "affiliation" here? Say that a land owner happens to own shares in some of the companies proposing development. Should he then be barred from voting? If so, should he be barred from voting on all proposals, or just those involving companies in which he is a shareholder? If the answer is yes, how would this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that his vote is biased against assembly that would benefit a competing company? Or what about the case when some of the land owners are employed by some of the development companies? Should such owners be barred from voting on proposals that could benefit their employers? This seems quite unfair as a general rule, especially if a low-level employment relationship has such a dramatic effect. But in some cases even low-level ties could play a decisive factor. This might happen, for instance, if an important local employer proposes development in a neighborhood where it has a large number of employees.

Of course, the most pressing issue that arises is the following: who exactly should be empowered to make the determination of when an affiliation is such that an owner should be deprived of his voting rights? Heller and Hills give no answer, but it is easy to imagine that whoever is given this task in the first instance, the courts would soon enough be asked to consider the question. At this point, the circle has in some sense closed in on the proposal. In particular, one might ask: why is it easier to determine if someone can be deprived of his voting rights due to an "affiliation", than it is to determine if someone can be deprived of his land due to some planned "public use"?

In any event, to come up with a set of rules ensuring that LADs can

[128]Heller and Hills (n 7).

deliver both self-governance and good governance largely remains an open problem. This is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only a limited assessment of their proposal can be made in the absence of empirical data. Later in the thesis, I will shed light on this challenge when I consider the Norwegian rules relating to land consolidation, showing how these can be looked at as a highly developed institutional embedding of many of the central ideas of LADs. The assessment of how they function in cases of economic development, and how they are increasingly used as an alternative to expropriation in cases of hydro-power development, will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

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