Contents

3 Possible Approaches to the Legitimacy Question

3.1 Introduction

In the previous chapter, I argued that economic development takings are a separate category of interference with private property. I also placed such takings in the theoretical landscape, by relating them to the social function theory of property. In particular, I argued that economic development takings raise questions that require us to depart from the individualistic, entitlements-based narrative that otherwise dominates in property theory.

This chapter develops this idea further, by considering how economic development cases are dealt with in England, where such takings have yet to be widely recognised as a separate category, and the US, where they first began to attract special attention. In addition, the chapter considers case law from the ECtHR and asks what it tells us about how to approach economic development takings under European human rights law.[1] Finally, the chapter considers recent proposals for reform that focus on how to increase legitimacy by developing new institutions for self-governance to replace the traditional takings procedure in economic development cases.

I begin in Section **??** by commenting briefly on the importance of economic development takings

[1] So far, the issue of economic development takings have been brought into focus at the Court in Strasbourg.

on the global stage. Specifically, I note that the core issues raised by such takings appear relevant also in the context of developing economies, even when property rights as such are an unstable basis on which to reason about the rights and obligations of individuals and communities. Specifically, I propose that the social function theory might offer a conceptual bridge between the study of economic development takings and the study of *land grabbings*, large-scale land acquisitions in the developing world. In both cases, the worry is often that local communities, who might lack formal title to the land, suffer as a result of a dramatic change in property's social function.

In Section 3.2, I move on to consider the status of economic development takings in English law. This also serves to introduce the topic of my thesis from the point of view of an important jurisdiction in Europe, where the issue of economic development takings has attracted far less attention than in the US. It appears to be gaining importance, however, as public-private partnerships and a market-oriented approach to public services has become influential in many jurisdictions, including in England.

In Section 3.4, I elaborate on a practically significant pan-European property clause, namely Article 1 of Protocol 1 (P1(1)) of the European Convention of Human Rights (ECHR). I argue that this clause provides an interesting perspective on the legitimacy issue, asking us to focus on the proportionality of the interference, judged relatively to its social and political context. I also consider some possible objections against the human rights approach, including the worry that the court in Strasbourg is not well-placed to be the arbiter of social and individual justice throughout Europe. At the same time, I point to some recent decisions at the Court that I believe signal hope that the case law on property is moving away from ill-conceived "micro-management", towards a more open-ended jurisprudence that seeks to force member states to address systemic problems that they might otherwise be reluctant or incapable of raising to the national agenda. Here the involvement of a (hopefully) politically neutral institution like the ECtHR can serve an important purpose, particularly if it manages to tailor its own case law in such a way as to leave room for

local institutions of the member states to work out for themselves how to concretely resolve human rights issues flagged by the Court in Strasbourg.

In Section 3.3, I return to the US setting, by presenting in detail how the perspective on economic development takings, mediated through case law on the public use restriction, has evolved since the 19th century until today. I structure the presentation as a story in two parts, describing the situation before and after the *Kelo* case. For the pre-*Kelo* presentation, I begin by pointing out that the case law on the public use restriction was initially developed by state courts, who would adjudicate legitimacy cases against the respective state constitutions (which typically also contain some sort of public use restriction on the takings power).

The Supreme Court adopted deference to state *courts* initially, before changing their perspective by adopting a policy of deference directed rather at the state *legislature* (in practice also the administrative branch). I argue that this shift in Supreme Court jurisprudence can be pin-pointed to the case of *Berman*.[2]

I go on to argue that this shift in case law at the federal level had the effect of destabilizing the established state approach to economic development takings, resulting in increased tension and controversy, paving the way to *Kelo*. In essence, my argument is that the Supreme Court was right in taking a deferential stance with respect to local institutions, but wrong in stripping the public use restriction of content, a move that threatened to undermine the authority of state courts. In effect, the federal takings jurisprudence threatened to weaken a very sensible *local* judicial constraint on executive power, a constraint that was also important to the proper division of power at the state level.

In Section 3.3.2, I follow this up by a discussion of developments after *Kelo*, which has seen a resurgence in state court scrutiny of the public use requirement, often backed up by state legislation that explicitly seeks to limit the scope of takings for economic development. According to some,

[2] See *Berman v Parker* 348 US 26.

such state reforms have been largely ineffective. In principle, the US public is almost unanimously on the side of the local communities in cases like *Kelo*, but in practice, the great distance between political cause and effect makes effective reform policies hard to formulate. The danger is that reform proposals come to rely on oversimplified narratives tailored to centralised processes of decision-making.

In Section **??**, I consider a proposal due to Heller and Hills that serves as a possible answer to this concern.[3] This proposal focuses on the need for new frameworks for collective action, institutions that can replace the top-down dynamics of eminent domain in cases of economic development. The goal is to ensure a greater level of self-governance for the communities directly affected by the development, the individual members of which have a rational incentive to invest time and effort in reaching sophisticated compromises that can replace the use of black-white solutions (be it in the form of an economic development taking or a politically sanctioned top-down *ban* on such takings).

I argue that this idea embodies both a natural and necessary counterpart to increased judicial scrutiny of the public use restriction. In particular, I argue that the two ideas are mutually conducive to each other, when properly conceived. This argument will set the stage for the case study in the second part of the thesis, where I explore the tension between takings and self-governance in the context of hydropower development in Norway.

In response to that worry, this chapter aims to bring into focus the key question of how to ensure meaningful participation for owners and their local communities in decision-making pertaining to economic development on their land. The tentative answers provided in Section **??** will set the stage for the remainder of the thesis, where these answers will be assessed in depth against the case study of Norwegian hydropower.

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[3] See Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

3.2 England and Wales: Legitimacy through Parliamentary Soveregnity and Administrative Law

In England and Wales, the principle of parliamentary sovereignty and the lack of a written constitutional property clause has led to expropriation being discussed mostly as a matter of administrative law and property law, not as a constitutional issue.[4] Moreover, the use of compulsory purchase – the term used to denote takings in the UK – has not been restricted to particular purposes as a matter of principle.[5] The uses that can justify taking property by compulsion are those uses that parliament regard as worthy of such consideration.[6] However, as private property has typically been held in high regard, the power of compulsory purchase has usually been exercised with caution.[7]

In his *Commentaries*, William Blackstone famously described property as the "third absolute right" that was "inherent in every Englishman".[8] Moreover, Blackstone expressed a very restrictive view on the possibility of expropriation, arguing that it was only the legislature that could legitimately interfere with property rights. He warned against the dangers of allowing private individuals, or even public tribunals, to be the judge of whether or not the common good could justify takings. Blackstone went as far as to say that the public good was "in nothing more invested" than the protection of private property.[9]

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4 See generally Michael Taggart, 'Expropriation, Public Purpose and the Constitution: Essays on public law in honour of Sir William Wade' in *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998).

5 See, e.g., Emma J L Waring, 'Aspects of Property: The Impact of Private Takings' (PhD Thesis, 2009) 48-49.

6 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48-49.

7 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 47-48.

8 See William Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press 1979) 134-135. The first right, according to Blackstone, is security, while the second is liberty.

9 Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 8) 134-135.

3.2. ENGLAND AND WALES: LEGITIMACY THROUGH PARLIAMENTARY SOVEREGNITY AND ADMINISTRATIVE LAW

Historically, Blackstone's description arguably conveys an idealised impression of takings practice in England, shaped not so much by practical reality as by political values gaining ground among the bourgeoisie after the decline of the feudal system.[10] However, the fact remains that compulsory purchase powers appear to have been granted relatively infrequently during his time, with no great increase in prevalence until the industrial revolution.[11] Moreover, the conferral of such powers would typically require parliamentary involvement on a case-by-case basis, a practice reflecting that takings of private property, although far from unheard of, were indeed considered rather draconian.[12]

Interestingly, the procedure followed by parliament in takings cases often resembled a judicial procedure; the interested parties were given an opportunity to present their case to parliament committees that would then effectively decide whether or not compulsion was warranted.[13] On the one hand, the direct involvement of parliament in the decision-making is suggestive of a fundamental respect for property rights. But at the same time, parliamentary sovereignty meant that the question of legitimacy was rendered mute as soon as compulsory purchase powers had been granted. The courts were not in a position to scrutinize takings at all, much less second-guess parliament as to whether or not a taking was for a legitimate purpose.[14]

During the 19th Century, as an industrial economy developed, so-called *private* acts granting compulsory purchase powers to private companies grew massively in scope and importance.[15]

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10 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 34-35 (describing Blackstone's account as a "myth").

11 See Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 15. That said, recent scholarship has pointed out that expropriation appears to have taken place more frequently than previously thought, particularly following the glorious revolution, see Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688–1833' (2011) 210(1) Past & Present 93.

12 See William D McNulty, 'The Power of "Compulsory Purchase" under the Law of England' (1912) 21(8) The Yale Law Journal 639, 43-46.

13 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 13-16.

14 See, e.g., McNulty (n 12) 643.

15 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

Railway companies, in particular, regularly benefited from such acts.[16] During this time, the expanding scope of private-to-private transfers for economic development led to high-level political debate and controversy.[17] Usually, it would attract particular opposition from the House of Lords. Interestingly, this opposition was not only based on a desire to protect individual property owners. It also often reflected concerns about the cultural and social consequences of changed patterns of land use.[18]

Hence, the early *political* debate on economic development takings in the UK shows some reflection of a social function approach to property protection. At the same time, as society changed following increasing industrialisation, a more expansive approach to compulsory purchase would eventually emerge as the norm.[19] The idea that economic development could justify takings gradually became less controversial.

Today, the law on compulsory purchase in England is regulated in statute. Hence, parliament rarely gets involved on a case-by-case basis, and the role of the courts is largely limited to the application and interpretation of statutory rules.[20] Some common law rules still play an important role, such as the *Pointe Gourde* rule, which stipulates that changes in value due to the compensation scheme itself should be disregarded when calculating compensation to the owner.[21] With respect

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16 Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

17 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

18 Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

19 Arguably, the social function perspective helps explain why this happened. Indeed, the expanded use of private takings in England during the 19th century, particularly in connection with the railways, might have served a more easily justifiable social function than that commonly associated with economic development takings today. Waring, in particular, notes how railway takings tended to affect aristocratic landowners rather than marginalised groups ("unlike private takings today, the railway legislation was most likely to affect those who could best defend their property rights from attack"), see Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 111.

20 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 116-121.

21 The rule takes it name the case of *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71. The underlying principle, including also statutory regulations with a similar effect, is referred to as the "no scheme" principle, see Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001). The principle is found in many jurisdictions, see Jacques Sluysmans, Stijn Verbist and Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property.' (2014) 2014(1) European Property Law Journal 3. The principle is often quite contentious, and

to the question of legitimacy, however, the starting point for English courts is that this is a matter of ordinary administrative law.[22]

More recently, the Human Rights Act 1998 adds to this picture, since it incorporates the property clause in P1(1) into English law. Even so, the usual approach in England is to judge objections against compulsory purchase orders on the basis of the statutes that warrant them, rather than constitutional principles or human rights provisions that protect property.[23] It is typical for statutory authorities to include standard reservations to the effect that some public benefit must be identified in order to justify a compulsory purchase order, but the scope of what constitutes a legitimate purpose can be very wide. For instance, to justify a taking under the Town and Country Planning Act 1990, it is enough to argue that it will "facilitate the carrying out of development, redevelopment or improvement on or in relation to the land".[24]

While various governmental bodies are authorised to issue compulsory purchase orders (CPOs), a CPO typically has to be confirmed by a government minister.[25] The affected owners are given a chance to comment, and if there are objections, a public inquiry is typically held. The inspector responsible for the inquiry then reports to the relevant government minister, who makes the final decision about whether or not it should be granted, and on what terms. The CPO may then be challenged in court, but then on the basis of the statute authorising it, not on the basis of whether

notoriously hard to apply in practice. For a recent clarification of (some aspects of) the principle, see *Waters and other v Welsh National Assembly* [2004] UKHL 19. I note that a strict interpretation of the no-scheme principle effectively precludes benefit sharing between takers and owners, a phenomenon that is also relevant in the context of economic development takings. See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

22 See Taggart (n 4).

23 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 121-132. The important statutes are the Acquisition of Land Act 1981, the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004.

24 Town and Country Planning Act 1990, s 226.

25 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48.

or not the purpose appears legitimate as such.[26]

That said, the idea that property may only be compulsorily acquired when the public stands to benefit permeates the system. Indeed, this has also been regarded as a constitutional principle, for instance by Lord Denning in *Prest v Secretary of State for Wales*.[27] Moreover, in *R v Secretary of State for Transport, ex p de Rothschild*, Slade LJ spoke of "a warning that, in cases where a compulsory purchase order is under challenge, the draconian nature of the order will itself render it more vulnerable to successful challenge".[28]

In keeping with the principle of parliamentary sovereignty, this warning targets judicial review of administrative decision-making, not legislation. Despite this limitation, it has been argued that the English approach to legitimacy has traditionally proved quite effective in preventing controversy from arising with respect to the use of eminent domain.[29] Much of this effect, moreover, appears to be achieved through legislation and administrative practice, not judicial scrutiny.

However, England has also seen controversial cases, and they appear to become more frequent.[30] For instance, in the case of *Alliance*, many properties were taken in order to facilitate the construction of a new stadium for the football club Arsenal.[31] Some owners who stood to lose their business premises protested on the basis that the purpose was dubious, pointing also to the fact

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26 See, e.g., Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48-49. The typical way to launch an attack on a taking would be to argue that it serves a purpose that falls outside the scope of the statute authorising it, or, more subtly, that the administrative decision-maker took irrelevant purposes into account when granting the power. See, e.g., *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, (2010) 1 AC 437.

27 See *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 ("I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands.").

28 *R v Secretary of State for Transport, ex p de Rothschild* (1989) 1 All ER 933 (CA) 938.

29 See generally Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59(04) International & Comparative Law Quarterly 1055.

30 See generally Emma JL Waring, 'The prevalence of private takings' in Nicholas Hopkins (ed), *Modern studies in property law: Volume 7* (Hart Publishing 2013).

31 *Alliance Spring Co Ltd v The First Secretary of State* [2005] EWHC 18 (Admin).

that the inspector in charge of the public inquiry had recommended against the takings.[32] Their arguments also invoked P1(1) of the ECHR, to overcome the limitations of traditional judicial review in England and Wales. However, these argument were all quite summarily rejected by the Court.[33]

Arguably, the *Alliance* case reflects a weakness of the English approach to legitimacy, going beyond whatever doubts one might have about the principle of parliamentary supremacy applied to property as a constitutional and/or human right. Specifically, if the framework laid down by parliament greatly empowers the administrative branch, while failing to appropriately regulate administrative practices, the deference due to parliament might soon translate into undue deference to the administrative branch. If the *practice* of using compulsory purchase continues to expand in relation to for-profit undertakings, there appears to be a significant risk of abuse associated with the broad powers granted to the executive to take property for economic development.[34]

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32 *Alliance Spring Co Ltd v The First Secretary of State* (n 31) 6-7.

33 See (*Alliance Spring Co Ltd v The First Secretary of State* [n 31] 6-7). For a critical discussion, describing the Court's assessment against P1(1) as "worryingly brief", see Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011).

34 The Supreme Court might have begun a movement towards stricter scrutiny to counter this, at least with respect to the Town and Country Planning Act 1990 s 226. Specifically, in the case of *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*, Lord Walker cited *Kelo* explicitly and commented that "economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive". See *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 26) 82. However, the outcome of *Sainsbury* arguably underscores the weaknesses of an indirect approach to legitimacy through administrative law. Instead of giving a purposive argument that the taking in question was illegitimate, the Supreme Court quashed the CPO in question on the basis that the local government had taken into account the taker's promised regeneration project in a different part of town, in contravention of the authorising statute. In fact, on a purposive assessment, the taking should arguably have been upheld: the owner and the taker were both large commercial companies, they each owned a share in a plot of land suitable for joint development, they both wanted to develop at the expense of the other party, and the taker appeared to have the best overall plan for the community. Ironically, the English approach resulted in *this* taking being struck down, while the taking in *Alliance*, involving the displacement of local people in favour of a football stadium, was hardly scrutinised at all.

3.3 The US: Legitimacy through Public Use

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.[35] Moreover, there is little in the way of guidance as to how the takings clause was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial.[36] Hence, it is natural to regard the property clause as a codification of an existing principle, not a novel proposal. Indeed, several state constitutions pre-dating the Bill of Rights also included takings clauses, seemingly based on codifying principles from English common law.[37] As Meidinger notes, the Americans had never really charged the British with abuse of eminent domain, and private property had tended to be respected, also in the colonies.[38] This undoubtedly influenced early US law.

Just like English scholars at the time, early American scholars emphasised 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".[39] Indeed, the Supreme Court itself expressed similar sentiments early on, when it spoke of the impossibility of passing a law that "takes property from A and gives it to B".[40]

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35 See Fifth Amendment to the US Constitution 1791.

36 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).

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

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

39 See see James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827) 257.

40 This was a *de dicta* in *Calder v Bull* 3 US 386, 388 (1798). See also *Vanhorne's Lessee v Dorrance* 2 US 304, 310 (1795).

However, just as would happen in England, this early US attitude would soon change in response to industrial advances and a desire for economic development. As the 19th century progressed, eminent domain was used more frequently, now also to benefit (privately operated) railroad operations, hydroelectric projects, and the mining industry.[41] 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 used more widely, for new kinds of projects.[42] Controversy arose particularly often with respect to the so-called mill acts.[43] Such acts were found throughout the US, many of them dating from pre-industrial times when mills were primarily used to serve the farming needs of agrarian communities.[44] Following economic and technological advances, provisions originally enacted to serve local farming purposes were now being used by developers wishing to harness hydropower for manufacturing and hydroelectric plants.[45]

It is important to note, however, that mill acts could not be used to authorise large-scale compulsory transfer of natural resources from owners to non-owners. Rather, mill acts provided management tools that could be used to ensure that owners of water resources could make better use of their rights. This would sometimes involve allowing riparian owners to interfere with, or take a necessary part of, the property of their neighbours, e.g., by constructing dams that would flood neighbouring land.[46] However, the primary purpose of most mill acts was to facilitate rational coordination among owners, to the benefit of their community as a whole. This point was frequently

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41 Meidinger (n 38) 23-33.

42 Meidinger (n 38) 24.

43 Meidinger (n 38) 24. See also Johnson (n 37) 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.

44 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.

45 See, e.g., *Head* (n 44) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

46 See *Head* (n 44) (a mill case adjudicated by the Supreme Court, including a summary of mill acts and case law from various states). See also Abram P Staples, 'The Mill Acts' (1903) 9(4) The Virginia Law Register 265, 265.

made by the courts to justify upholding takings on the basis of mill acts, including takings that would benefit the manufacturing industry.[47]

As the industrial use of mill acts increased in scope, the original aim of these acts gradually became overshadowed by the strength of the commercial interests involved, leading to public use controversy relating to provisions that had not previously raised any such doubts.[48] This mechanism, deeply dependant on the social and economic context, underscores the appropriateness of adopting a social function perspective on the relevant body of case law. More generally, it seems that most of the early case law on the public use test from US state courts is characterised by a contextual understanding of property protection.

In fact, this legacy from the states was also recognised by the early Supreme Court jurisprudence on economic development takings, as discussed in the next section.

3.3.1 Legitimacy as Discussed by the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[49] 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 its behalf.[50]

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.[51] Not long after, in 1875, the first Supreme Court adjudication of a federal taking occurred, marking the start of the development of the federal doctrine on public use and

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47 See *Fiske v Framingham Mfg Co* 12 Pick 68 (1831). See also the discussion (including references to other cases) in *Head* (n 44).

48 See **head86**

49 *Barron v City of Baltimore* 32 US 243 (1833).

50 Meidinger (n 38) 30.

51 *Trombley v Humphery* 23 Mich 471 (1871).

legitimacy.[52]

At the same time, the Supreme Court began to hear takings cases originating from the states, first on the basis of the due process clause of the fourteenth amendment, introduced after the civil war.[53] Later, in 1897, the Supreme Court held that state takings could be scrutinized also against the takings clause of the fifth amendment.[54]

In federal takings cases, the Supreme Court showed little willingness to carry out public use scrutiny. In *United States v Gettysburg Electric Railway Co*, a case from 1896, deference to the legislature in federal takings cases was referred to as a principle that should be observed unless the judgement of the legislature was "palpably without reasonable foundation".[55]

Importantly, however, such a deferential stance was not adopted in cases originating from the states. In *Cincinatti v Vester*, a case from 1930, the Supreme Court commented that "it is well established that, 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".[56]

In the earlier case of *Hairston v Danville & W R Co*, from 1908, the same was expressed 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."[57] Justice Moody 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

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52 *Kohl v United States* 91 US 367 (1875).

53 See, e.g, *Head* (n 44).

54 See *Chicago, Burlington & Quincy RR Co v City of Chicago* 166 US 226 (1897).

55 *US v Gettysburg Electric R Co* 160 US 668, 680 (1896).

56 *City of Cincinnati v Vester* 281 US 439, 447 (1930).

57 *Hairston v Danville & W R Co* 208 US 598, 606 (1908).

> 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.[58]

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.[59] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned "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]

Hairston is important for three reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was primarily directed at state courts rather than legislatures and administrative bodies. 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] Third, it provides a valuable summary of the contextual approach to the public use test that had developed at the state level.

The *Hairston* Court clearly looked favourably on the case law from state courts. Indeed, the judicial scrutiny provided by state courts was held to be of such high quality that there was in general little need for federal intervention. Hence, when a deferential stance was adopted in *Hairston*, this was contingent on the fact that state courts would continue to administer the

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58 *Hairston v Danville & W R Co* (n 57) 606.

59 *Hairston v Danville & W R Co* (n 57) 607.

60 *Hairston v Danville & W R Co* (n 57) 606.

61 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 56) 606.

required public use test.

Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference.[62] This happened in *US ex rel Tenn Valley Authority v Welch*, concerning a federal taking.[63] The Court first cited *US v Gettysburg Electric R Co* as an authority in favour of deference with regards to the public use limitation.[64] The Court then paused to note that *Vester* later relied on the opposite view, namely that the public use test was a judicial responsibility.[65] The Court then attempts to undercut this by setting up a contrast between *Vester* and *Hairston*, by selectively quoting the observation made in the latter case that the Supreme Court had never overruled the state courts on the public use issue.[66] Hence, *Hairston* is effectively used to argue against judicial scrutiny, in a manner that is quite incommensurate with the full rationale behind the Court's decision in that case.

Later, *Welch* was used as an authority in the case of *Berman v Parker*.[67] 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".[68] The Court provides only two references to previous cases to back up this claim, one of them being *Welch*.[69]

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62 In fact, it was cited in this way also by the majority in *Kelo*, see *Kelo v City of New London* 545 US 469, 482-483 (2005).

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

64 *US v Gettysburg Electric R Co* (n 55).

65 *City of Cincinnati v Vester* (n 56).

66 See *U S ex rel Tenn Valley Authority v Welch* (n 63) 552.

67 *Berman v Parker* (n 2).

68 *Berman v Parker* (n 2) 32.

69 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. 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*

Moreover, both of the cases cited were concerned with federal takings, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[70] It is possible to regard this merely as a *dictum*, since the District of Columbia is governed directly by Congress. However, *Berman* was to have a great impact on future cases. In effect, it undermined a large body of case law on judicial scrutiny of taking purposes without engaging with it at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principle expressed in *Berman*.[71] Here the state of Hawaii had made use of eminent domain to break up an oligopoly in the housing sector. Given the circumstances of the case, it would have been natural to argue in favour of this taking on the basis that it served a proper public purpose.

However, the Court instead decided to rely on the doctrine of deference, shunning away from scrutinizing the takings purpose. Justice O'Connor, in particular, observed 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".[72]

Effectively, what had been a doctrine of deference towards state courts had now transformed into a doctrine of deference towards state legislatures (and, in practice, the executive branch). In light of this, it is easy to understand why *Kelo* was decided in favour of the taker. It would have been a clear break with earlier precedent on the public use restriction if the Supreme Court had chosen to decide otherwise.

Dominion Land Co v US 269 US 55, 66 (1925) A misleading and partial quote, to the effect that deference to the legislature is in order except when it involves an "impossibility", has since become commonplace. In particular, such a quote was repeated by the Supreme Court itself in the later case of *Hawaii Housing Authority v Midkiff* 467 US 229, 240 (1984).

70 *Berman v Parker* (n 2) 32.

71 *Midkiff* (n 69).

72 **hawaii84**.

3.3.2 Economic Development Takings after *Kelo*

Following *Kelo*, much attention was directed at the perceived dangers of eminent domain abuse in the US.[73] Many states responded by introducing reforms aimed at limiting the use of eminent domain for economic development.[74] Within two years, 44 states had passed post-*Kelo* legislation in an attempt to achieve this.[75] Various legislative techniques were adopted. Some states, including Alabama, Colorado and Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[76] 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".[77]

In other states, more indirect measures were 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.[78] Many states also offered lengthy lists of uses that were to count as public, designed to restrict the room for administrative discretion while allowing condemnations for purposes that were regarded as particularly important.[79]

Somin points to an interesting trend, namely that state reforms enacted by the public through referendums tend to be more restrictive than reforms passed through the state legislature.[80] Many

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73 See generally Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100.

74 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 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73).

75 See '50 State Report Card' (*Castle Coalition*) ⟨http://castlecoalition.org/50-state-report-card⟩ accessed 17th July 2015.

76 See Eagle and Perotti (n 74) 107-108.

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

78 Eagle and Perotti (n 74) 809.

79 Eagle and Perotti (n 74) 804.

80 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2143.

of the more radical reform proposals, moreover, did not emerge from the state government, but were initiated by activist groups as ballot measures. In some US states, initiative processes make it possible for activist groups to put measures on the ballot without prior approval by the state legislature.[81] As Somin observes, the reforms taking place via this route would be comparatively strict, testifying to the power of direct democracy.[82]

Indeed, the successes of popular anti-takings movements underscores how strongly 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]

Kelo has clearly had a great effect on the discourse of eminent domain in the US. However, the effects of the many state reforms that have been enacted are less clear. According to Somin, most of these reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[84] At the same time, property lawyers report a greater feeling of unease regarding the correct way to approach the public use requirement, expressing hope that the Supreme Court will soon revisit the issue.[85]

Why have legislative reforms proved inadequate and ineffective? Part of the reason, according to Somin, is that people are "rationally ignorant" about the economic takings issue.[86] 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

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81 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2148.

82 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2143-2149.

83 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2109.

84 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 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 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2170.

a system based on practices that a majority of citizens actually oppose.[87] 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.[88]

I think Somin's analysis is on an interesting track. However, it should be noted that the notion of rational ignorance is a double-edged sword with regards to his main argument. In particular, it seems possible, in theory, that the prevailing critical attitude towards economic development takings is itself an instance of such ignorance. Perhaps people would change their opinion on economic development takings if they were better educated on the issue?

However, this possibility does nothing to detract from the main message, which is that the *Kelo* backlash have in fact caused greater insecurity about what the law is and what it delivers, often without significantly curbing those uses of eminent domain that are regarded as most problematic. Arguably, this shows that the legislative approach so far, which has focused on introducing more elaborate and detailed versions of the public use restriction, need to be supplemented by different kinds of proposals.

In this regard, it seems important to also target governmental decision-making processes regarding the use of private land for economic development. These processes, it seems, need to be imbued with greater legitimacy. In particular, it seems crucial that owners themselves should be granted a better chance to participate in the management of their own land, even when this involves deliberating on, and possibly taking part in, large-scale development projects. After all, it is the owners' and their communities' feeling that they are being treated unfairly that tend to lie at the root of controversies surrounding takings for economic development.[89]

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87 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2163-2171.

88 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 73) 2155-2157.

89 For a similar perspective, see Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377.

If improved principles of governance are put in place, this alone might be enough to restore some confidence in eminent domain as a procedure by which to implement democratically accountable decisions about land use. However, it seems that eminent domain as such might often be an unduly blunt instrument when society desires commercial development on private land. Instead, it might be possible to devise mechanisms for collective action that replaces the use of eminent domain altogether.

3.4 Recent Developments at the ECtHR: Legitimacy as Institutional Fairness

The standard account of the protection against interference inherent in P1(1) describes it as consisting of three rules.[90] First, there is the rule of *legality*, asserting that an interference needs to be authorized by statute. Second, there is the rule of *legitimacy*, making clear that interference should only take place in pursuance of a legitimate public purpose. The third rule is the "fair balance" principle, requiring proportionality between the means and the aims in cases involving property interference.[91]

The starting point for property adjudication at the ECtHR is that States have a "wide margin of appreciation" with regard to the legitimacy question.[92] This question is thought to depend on democratically determined policies to such an extent that it is rarely appropriate for the Court to censor the assessments made by member states. At the same time, the Court has gradually adopted a more active role in assessing whether or not particular instances of interference are proportional and able to strike a fair balance between the interests of the public and the property owners. As

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90 For a more detailed description of P1(1) generally, I refer to Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005).

91 See *Sporrong and Lónnroth v Sweden* Series A no 52, para 69 and *James and others v United Kingdom* (1986) Series A no 98, para 120.

92 See *James* (n 91) para 54.

argued by Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[93]

In the early case law behind this development, the focus was predominantly on the issue of compensation, with the Court gradually developing the principle that while P1(1) does not entitle owners to full compensation in all cases of interference, the fair balance will likely be upset unless at least some compensation is paid, based on the market value of the property in question.[94]

As mentioned in Section **??** of Chapter 2, it has now become clear that the fair balance test encompasses more than this. In particular, the hunting cases show that the Court in Strasbourg is willing to reflect broadly on the context and purpose of interference, to critically assess the social function of the taking.

Less obviously, a similar sentiment appears to be behind the Court's reasoning in recent cases involving rent control schemes and housing regulation.[95] There are obvious financial interests at stake in such cases, for both landlords and tenants. However, the Court has addressed these cases by looking to the fairness of the underlying regulation more generally, by critically evaluating the social, economic and political context. Moreover, the Court has not shied away from using concrete cases as a starting point for providing an assessment of the sustainability of national provisions as such.

3.4.1 *Hutten-Czapska v Poland*

The striking conclusion in *Hutten-Czapska v Poland*, which makes it interesting for the questions studied in this thesis, was that it demonstrated "systemic violation of the right of property".[96] The

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93 Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 29) 1055.

94 See *Scordino v Italy* ECHR 2006–V 276, para 103. The case also illustrates that the Court has adopted a fairly strict approach to the question of when it is legitimate to award less than full market value.

95 See *Hutten-Czapska v Poland* ECHR 2006–VIII 628; *Lindheim and others v Norway* ECHR 2012 985.

96 *Hutten-Czapska* (n 95) para 239.

case concerned a house that had been confiscated during the Second World War. After the war, the property was transferred back to the owners, but in the meantime, the ground floor had been assigned to an employee of the local city council. The state implemented strict housing regulations during this time, which eventually led to the applicant's house being placed under direct state management.[97] Following the end of communist rule in 1990, the owners were given back the right to manage their property, but it was still subject to strict regulation that protected the rights of the tenants.[98] In addition to rent control, rules were in place that made it hard to terminate the rental contracts. Hence, it became impossible for the owners to make use of the house themselves.[99]

After an in-depth assessment of the relevant parts of Polish law and administrative practice, the Grand Chamber of the ECtHR concluded that there had been a violation of P1(1). Importantly, they did not reach this conclusion by focusing on the owners and the interference that had taken place with respect to their individual entitlements. Rather, they focused on the overall character of the Polish system for rent control and housing regulation, as it manifested in the concrete circumstances of the applicant's case.

The financial consequences for the owners were considered to shed light on a broader question of sustainability, as was the financial situation of the tenants.[100] The Court was particularly concerned with the fact that the total rent that could be charged for the house in question was not sufficient to cover the running maintenance costs.[101] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[102]

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97 *Hutten-Czapska* (n 95) paras 20-31.

98 *Hutten-Czapska* (n 95) paras 31-53.

99 *Hutten-Czapska* (n 95) paras 20-53.

100 *Hutten-Czapska* (n 95) paras 60-61.

101 *Hutten-Czapska* (n 95) para 224.

102 *Hutten-Czapska* (n 95) para 224.

In the end, the Court highlighted how three factors combined to bring both owners and their properties to a precarious position. First, the rigid rent control system made it hard to sustainably manage rental property. Second, tenancy regulation made it hard for owners to terminate tenancy agreements. Third, the Court noted that the state itself had set up these tenancy agreements during the days of direct state management, shedding doubt on the legitimacy of the commitments that these contracts imposed on owners. In combination, these factors led the Court to conclude that a fair balance had not been struck.[103]

The contextual nature of the Court's reasoning in *Hutten-Czapska* is evidenced not only by the extent to which the concrete circumstances were assessed against the goal of fairness. It is also illustrated by how the Court explicitly places the "social rights" of the tenants on equal footing with the property rights of the owners.[104] The result, therefore, was not premised on a narrow understanding of property protection as an individual entitlement, but on a broader vision of property as a social institution.

It is also of interest to note how the Court concludes that the root of the problem is with the Polish legal order as such. In this regard, great weight is placed on the observation that the regulatory system suffers from a lack of adequate safeguards to protect owners against imbalances such as those identified in *Hutten-Czapska*. In particular, the Court reflects on the position of owners and comments on "the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsidised by the State in justified cases". Hence, the rent control scheme alone was not the whole problem, the Court also criticised what it saw as a defective way of implementing it.[105] Moreover, the Court did not censor the political reasoning that motivated

[103] *Hutten-Czapska* (n 95) paras 224-225.

[104] *Hutten-Czapska* (n 95) para 225.

[105] *Hutten-Czapska* (n 95) para 224.

Polish housing legislation, but concluded instead that the "burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole".

I think the structural argument at work here is key to understanding the case, pointing also to the core function that the ECtHR should embrace more generally. It seems to me, in particular, that objections may well be raised against the appropriateness of having the Court in Strasbourg assess concretely what is fair regarding the relationship between owners and tenants in a specific house in Gdynia. The Court's remoteness to the local conditions, as well as its lack of accountability to local democratic institutions suggests that the Court is not ideally placed to carry out the kind of contextual assessment that it itself prescribes for such cases. In addition, the amount of resources and time needed to independently scrutinize these aspects concretely risks undermining the Court's ability to deal expediently with its case load. The ECtHR will hardly be able to protect human rights in Europe on a case-by-case basis.

Instead, the aim should always be to get at the systemic features that cause perceived imbalances. As in *Hutten-Czapska v Poland Hutten-Czapska*,[106] the Court serves its function best when it is able to use concrete information about a suspect case to identify a sense in which the domestic legal order needs to be improved to better comply with human rights standards. This is particularly true when, as in that case, the Court notes that the applicants have insufficient options available for achieving a fair balance by appealing to institutions within the domestic legal order. By demanding *institutional* changes, the Court effectively delegates responsibility for ensuring the kind of fair balance that is required under the ECHR. Moreover, by scrutinizing the procedures and principles that the states apply when fulfilling this duty, it is likely that the Court will still be able to steer and unify the development of the case law.

Importantly, they would then be able to do so without having to engage extensively in concrete

106 *Hutten-Czapska* (n 95).

assessments of fairness. Against this, one may argue that the judicial or administrative bodies of the signatory states can easily circumvent their obligations by giving a superficial or biased assessment of the facts in human rights cases, to avoid embarrassment for the state's political or bureaucratic elite. However, this might then be raised as a procedural complaint before the ECtHR, resulting in cases revolving around Articles 6 (fair trial) and 13 (effective remedy).[107] In this way, the Court can streamline its functions, by always aiming to direct attention at issues that arise at a higher level of abstraction. This, in my view, is desirable. The ECtHR should not aim to micromanage the signatory states, particularly not in relation to a norm such a P1(1), which the Court itself regards as highly dependent on context.

However, the question arises as to what kind of institutions the Court should focus on in its effort to ensure fairness in relation to Convention rights such as property. It is not given, in particular, that directing attention towards domestic judicial bodies is the most appropriate approach. Rather, it is logical to assume that those institutions most in need of reform will be exactly those that are most often responsible for violations. A possible lack of an effective complaints procedure would be worrying, but not as problematic as systemic weaknesses of those institutions that act in ways that give rise to complaints in the first place.

By shifting attention towards the institutional context of the primary decision-maker, the Court can also avoid getting stuck in deference to domestic judicial bodies. This can then be accomplished alongside a shift of attention away from concrete assessment of alleged violations. The Court can achieve this by concretely and critically assessing those rules and procedures that are identified as causally significant to individual complaints, at the administrative rather than the judicial level.[108]

Indeed, the case of *Hutten-Czapska* appears to be suggestive of a move towards such a per-

[107] I note that this also fits with recent developments at the ECtHR, toward somewhat broader scrutiny under Article 6, see *Khamidov v Russia* ECHR 2007 928.

[108] In the future, one might even encounter cases when the Court prefers to remain agnostic about whether a substantive violation occurred, focusing instead on the possible violation inherent in excessive systemic risks and a shortage of adequate safeguards.

spective. While the Court went into great detail about the facts of the case, it *also* looked at the case from an alternative perspective, more in line with the suggestion sketched above. In fact, I think it is likely that the Court will eventually veer even more towards such an approach, while deferring to national judicial bodies when it comes to concrete factual assessments. If not as a result of policy, I imagine this will happen from necessity, due to the limited capacity of the Court to hear the merits of individual cases.

The proportionality doctrine could still be applied, but approached in more abstract terms as the question of what kinds of rules, and what kinds of institutions, member states need to put in place to ensure fairness. This perspective appears to have been adopted in the case of *Lindheim and others v Norway*. Here the applicants complained that their rights had been violated by a recent Norwegian act that gave lessees the right to demand indefinite extensions of ground leases on pre-existing conditions.[109] In the end, the Court concluded that there had indeed been a breach of P1(1). They engaged in the same form of assessment that they had adopted in *Hutten-Czapska v Poland Hutten-Czapska*.[110] Moreover, they concluded that the Ground Lease Act 1996 as such was the underlying source of the violation – the problem was not merely that this act had been applied in a way that offended the rights of the applicants. In light of this, the Court did not only award compensation, it also ordered that general measures had to be taken by the Norwegian state to address the structural shortcomings that had been identified.

The Court also commented that its decision should be regarded in light of "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1".[111] However, in light of the change in perspective that accompanies this development, it is interesting to ask in what sense the protection is stronger. In particular, it is not *prima facie* clear that

[109] *Lindheim and others v Norway* (n 95) para 119.

[110] *Hutten-Czapska* (n 95).

[111] *Lindheim and others v Norway* (n 95) para 135.

the Court's remark should be read as a statement expressing a change in its understanding of the content of individual rights under P1(1). Rather, it may be read as a statement to the effect that the Court now assumes it has greater authority to address structural problems under that provision. In effect, this allows the Court to conclude that a violation has occurred due to structural unfairness, even when it is not possible to trace this back to any flawed decision that specifically targets the applicants.

3.4.2 How Would the ECtHR Approach an Economic Development Taking?

Is the jurisprudential developments illustrated by the rent control cases relevant to the issue of economic development takings? I believe so. Indeed, I am struck by how the reasoning of the ECtHR in recent cases on hunting and rent control mirrors the kind of reasoning that Justice O'Connor engaged in when considering *Kelo*.[112] The emphasis is on structural aspects and fairness, grounded on the facts of the concrete case, but mainly interested in what these facts reveal about the rules and procedures involved.

This is a contextual approach that can maintain a broad focus without loosing its bite. The crux of arguments used to conclude violation is the observation that the system currently in place can offend against the role that owners *should* occupy in order to be able to meet those obligations and exercise those freedoms that are attached to the properties they posses.

On this narrative, interference becomes illegitimate when it demonstrates a failure of governance. In the case of *Hutten-Czapska v Poland Hutten-Czapska*,[113] this boiled down to the observation that it was illegitimate to address problems in the Polish housing sector by placing the burden "on one particular social group", namely the owners.[114] This conclusion was backed up

[112] See *Kelo* (n 62).

[113] *Hutten-Czapska* (n 95).

[114] *Hutten-Czapska* (n 95) para 225.

by the concrete observation that the rules and procedures in place meant that owners who were obliged to maintain their properties in good condition for their tenants were in fact prevented from doing so because they were not permitted to charge rents that would cover the costs.

In the case of *Kelo*, Justice O'Connor argued in a similar fashion when she concluded that the system which had led to the decision to condemn Suzanne Kelo's house was likely to function so as to systematically "transfer property from those with fewer resources to those with more". To Justice O'Connor, there was little doubt that this could become a general pattern, if safeguards were not put in place.

To conclude, I think the ECtHR would have been likely to approach a case like *Kelo* in a manner consistent with Justice O'Connor's approach. Whether they would reach the same conclusion seems more uncertain, particularly since confidence in the nation states' ability and willingness to regulate private-public partnerships might be higher in Europe.[115] However, it seems unlikely that the ECtHR would follow the majority in *Kelo*, by simply deferring to the determinations made by the granting authority. Moreover, with the recent change in perspective towards structural assessment of property institutions, Justice O'Connor's predictions about the "fallout" of the *Kelo* decision would likely have been of significant interest to the justices at the Court in Strasbourg.

3.5 The Gray Test

Pointing to early US case law on public use as a "laboratory of elementary proprietary ideas", Kevin Gray builds on the evidence found there to provide a set of conditions for recognising what he calls "predatory takings". [116] His conditions capture key aspects of eminent domain abuse that I believe should be recognised by a theory of economic development takings inspired by the notion

[115] For a discussion from the point of view of English law, arguing that the prevailing regulatory regime limits the risk of eminent domain abuse largely through regulation of the takings power rather than strict property protection, see in .

[116] See Gray, 'Recreational Property' (n 33) 28-30.

of human flourishing. Below, I briefly present the criteria proposed by Gray, as well as three riders that I believe suggest themselves on the basis of the discussions presented earlier in this chapter. I will refer to the resulting set of conditions as the *Grey test*, to be understood as a proposed general heuristic for assessing the legitimacy of takings, especially in situations when there are strong commercial interests present on the taker side.

Several combinations of conditions might be sufficient to justify designating a taking as eminent domain abuse. The purpose of the Gray test is not to produce a definite set of such conditions that provide a final answer in any case. Rather, the aim is to provide an abstract heuristic to facilitate concrete assessment against the social, economic and political circumstances surrounding the taking in question. In general, if a commercial or private-to-private taking represent an abuse of power, one would expect it to run afoul with regard to some, and probably several, of the criteria set out in the following points.

Balance of Power among the Parties

In a typical case of eminent domain abuse, the parties that stand to benefit will be more economically and politically powerful than those from whom property is taken.[117] This can be reflected in the takers' ability to solicit legal assistance and other services to defend the taking, as well as in the owners' inability to launch a coordinated defence.[118] If there is an imbalance of power, this is particularly likely to be noticeable early on, during the planning stages, before the decision to condemn has actually been made.

After the decision has been made, the position of the owners might improve, for instance because they are entitled to have their costs covered during the proceedings used to award compensation. However, this might not serve to restore any meaningful balance between the parties; when special

[117] See Gray, 'Recreational Property' (n 33) 30-31. Gray himself omits any explicit mention of political power, but it is present in Justice O'Connor's dissent in *Kelo*, and in my view clearly belongs here.

[118] See Gray, 'Recreational Property' (n 33) 30-31.

procedural protections kick in, it will often be too late for the owners to launch an effective defence against the taking. Indeed, strict rules concerning cost reimbursement for costs incurred *after* the decision to take has already been made, is not a sufficient response to imbalance of power in legal systems that do not offer extensive judicial scrutiny of takings purposes.

More generally, a possible imbalance of power should be assessed against the decision-making process as a whole, going back to the first initiative made for taking the property in question. A critical assessment of what role the owners have played throughout the process is a good way to ascertain whether imbalances of power between the parties may have unduly influenced the final outcome.

The Net Effect on the Parties

As Gray notes, a hallmark of eminent domain abuse is that the net effect of the taking is a "significant transfer of valued resource from one set of owners to another"[119] In itself, this is not a conclusive sign of abuse, but it directs us to ask two important questions. First, we should inquire critically into the main purpose of the taking. Is the transfer of resources as a mere side-effect, arising from the realisation of a distinct public purpose? In many cases of eminent domain abuse, this claim will be entirely unconvincing, as the main motivation appears to be the transfer of resources as such. If this is not acknowledged and discussed by the decision-maker authorising the taking, it clearly points towards predation.

In some cases, however, it might be that the redistribution of (control over) resources is openly acknowledged as part of the rationale justifying eminent domain. In such cases, it is pertinent to ask questions about the economic and social status of the parties, particularly the extent to which it is permissible to embark on a redistributive campaign to benefit one at the expense of the other. If there is eminent domain abuse, one would except the taking to fail to stand up to scrutiny in this

[119] See Gray, 'Recreational Property' (n 33) 31.

regard. It seems clear that failure in this regard is particularly likely when commercial companies benefit at the expense of local populations.

In some cases, it might be debatable whether the taking passes the net effect test. However, the importance of scrutiny is still significant, since it helps bring the crucial questions into the open, thereby ensuring higher quality of the decision-making regarding the taking. Indeed, if legitimacy tests such as the Gray test are applied at an early stage of the proceedings, this in itself might help increase legitimacy. Indeed, making room for more extensive legitimacy tests in takings law might well end up bolstering the government's power to take land, provided the power is used responsibly. If this is achieved, courts may choose to rely more often on the value of deference, not as a systemic imperative, but as a reasonable approach to judicial review of takings.

Initiative

In many suspicious economic development takings, the party benefiting commercially from the taking is the party that initially made the suggestion for using eminent domain.[120] In uncontroversial cases, on the other hand, the initiative tend to come from some government body that seeks to pursue a specific policy goal, e.g., to provide a public service or bestow a benefit on a particular group that is found to be in need of support. The contrast between this and cases when the initiative lies with the commercial beneficiaries themselves point to a disturbance of the decision-making underlying the decision to use eminent domain. As such, it is an important hallmark of abuse.

The assessment to make in this regard should take into account the wider social and political context of the taking, particularly the relative status of the parties involved. If the beneficiary is both more powerful and privileged than the owners *and* takes the initiative for the taking, this is clearly a sign pointing towards predation. On the other hand, if the beneficiaries are marginalised groups who could not expect to be given any consideration at all unless they take the initiate

[120] See Gray, 'Recreational Property' (n 33) 32.

themselves, the situation might have to be viewed differently.

Location

The location, in a broad sense of the word, of the property that is taken, can be a strong indicator that eminent domain is inappropriate.[121] For instance, cases involving the taking of dwellings are naturally more suspect than cases involving the taking of barren or unused plots of land. Similarly, the taking of property that is important to the subsistence of the current owner should raise the bar for when a taking may be considered legitimate. The location of the property can also attain relevance independently of the current owner. For instance, if the taker's choice of property appears to be one of convenience rather than necessity, this points towards predation. It is particularly telling if alternative locations would be less intrusive, or obviate the need for using eminent domain altogether.

On the other hand, the location of the property can sometimes point towards *increased* legitimacy of a taking that would otherwise appear suspect. This would be the case, for instance, if the property that is taken has special value to the taker specifically because of its strategic location with respect to the taker's own property. For instance, if riparian owners cannot make rational use of the water flowing over their land without intruding on the land of their neighbours, using eminent domain to resolve this might be considerably less suspect than other kinds of economic development takings.[122] The same can also be said for cases when property rights frustrate efforts to secure other rights of non-owners, such as rights to drinking water in cases when riparian owners prevent non-owners access to water for their basic needs.

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[121] See Gray, 'Recreational Property' (n 33) 33-34.

[122] I mention that this particular scenario was much discussed in the US during the 19th century, as the result of the fact that many states had passed so-called mill acts which authorised neighbour-to-neighbour takings of limited property rights needed for development projects involving water, c.f., the discussion of this in Chapter 2, Section **??**.

Social Merit

If the taking is hard to justify on the basis of its social merits, this is a sign that it is inappropriate.[123] This condition asks for closer scrutiny of the type of public interest that is used to justify the taking.

Importantly, if the justification narrative surrounding the taking revolves solely around 'trickle-down' effects and the successful business ventures that the takings will facilitate, there is reason to be suspicious. If the taking cannot sustain a social merit narrative, whereby attention is shifted away from purely economic considerations, this becomes a further indication that the taking might count as predation.

The point here is not that the language of social merit should replace the language of public use or public interest as some kind of conclusive test of legitimacy. Rather, the point is that one should always be encouraged to analyse takings specifically in terms of non-economic, social, effects. This is particularly important in difficult cases, because it can help us arrive at a better understanding of where exactly the taking sits on the gray scale between admissible governance and predatory exploitation.

Environmental Impact

According to Gray, a typical feature of eminent domain abuse is that it has an adverse environmental impact. Moreover, a typical feature of eminent domain abusers is that they show disregard for such adverse affects.[124] This is an additional element that pertains specifically to the status of the taker, asking us to consider whether it is appropriate to grant their activities public interest

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[123] See Gray, 'Recreational Property' (n 33) 34. Gray writes of lap-dancing clubs and cigarette factories as examples of purposes that are suspect. Importantly, such purposes might well fulfil a public interest requirement via the economic development narrative, yet still fail a social merit test that focuses rather on the social dimensions of the use to which the property will be put.

[124] See Gray, 'Recreational Property' (n 33) 34 ("predatory takers tend to be relatively unperturbed if they lay waste to the earth").

status.

This is not primarily a question of how the development stands with regard to environmental regulation. That is a question for administrative decision-makers, possibly a basis for separate judicial review on the basis of environmental law. What is at stake in relation to the taking question is something else, namely whether or not the characteristics of the taker and their plans are such that it is permissible to make the power of eminent domain available on their behalf.

The relevant environmental standard in this regard should arguably be drawn up more strictly than what which follows from general environmental law. Presumably, one is entitled to expect *more* in terms of environmental awareness and concern from a developer and a development plan that benefit from the power of eminent domain. Indeed, the mere fact that takers are actively lobbying for leniency in relation to environmental standards can shed doubt on the proposition that they act in the public interest. What might otherwise be considered natural and admissible behaviour from a commercial company can be improper or inadmissible behaviour for one that benefits from eminent domain powers.

Rider 1: Regulatory Effects

As discussed in Section **??**, property has an important regulatory effect, also outside the realm of positive law. This effect typically changes following a taking, sometimes quite dramatically. For instance, if locally owned property is taken by external commercial actors for high-intensity commercial use, the post-taking regulatory status of the property will most likely be completely different to its status prior to the interference. Importantly, the changed status might have as much to do with informal social functions as it has to do with positive regulation.

It might be, for instance, that the property in question is found in a jurisdiction that emphasises the freedom of owners to do as they please without state interference. In this case, the fallout of allowing external commercial actors to take locally owned property can be particularly severe, as

the the new owner is likely to be unconstrained by locally grounded systems of sustainable resource management. In these cases, there is a risk that there will be a 'tragedy of the taken', arising from how the taking undermines locally grounded frameworks for sustainable resource management. As a result, a society emphasising egalitarianism and limited state interference might find itself incapable of appropriately restraining the actions of commercial actors who accumulate property for high-intensity use.[125] If this is resolved by increasing the state's power to interfere with private property, the effect can be a further undermining of local management frameworks, increased subsequent use of eminent domain, and a general spreading and amplification of the democratic deficit already inherent in the original act of taking.

A different regulatory concern is that an economic development taking has the effect of changing the regulatory status of the property in positive law, for instance because the development in question brings it under the scope of different rules. It is possible that these new rules offer weaker protection for the local community, the environment, or even the general public interest, in which case it reflects badly on the initial decision to use eminent domain.[126]

Rider 2: Impact on Non-Owners

Following up on the theoretical arguments made previously in this chapter, it is appropriate to direct special attention at the status of non-owners affected by economic development takings. It is of particular interest to ascertain whether or not the interests of non-owners were given due consideration prior to the decision to use eminent domain. If their interests appear to have been neglected, or have not been considered at all, there is additional reason to be sceptical of the purported public interest of the taking. Indeed, just as disregard for the environment is a typical

[125] This problem can of course arise independently of the use of eminent domain, e.g., in the context of land grabs arising from voluntary or semi-voluntary transactions. However, the situation appears particularly problematic if the state itself is complicit in bringing about the problem, by undermining property's social function through the use of the takings power.

[126] The case study of Norwegian waterfall expropriation will offer an example of this mechanism, c.f., Chapter 5, Section **??**.

sign of predation, a general disregard for non-owners is also a clear sign of abuse.

To shed further light on the status of directly affected non-owners, one may first ask what role they played in the decision-making process. If the non-owners directly affected by the taking were allowed to express their opinion, and enjoyed some measure of influence, this can enhance legitimacy. If, on the other hand, the most strongly affected non-owners were not consulted, or not given a proper voice in the proceedings, it indicates abuse. However, there is also an important substantive aspect to consider: how is the taking going to affect property dependants without recognised ownership rights? If it is clear that they will suffer severely, for instance by being displaced from their homes or by loosing their livelihoods, this must be counted as an indication of predation irrespective of procedural aspects.

Importantly, it follows from the social function perspective that financial compensation can not by itself excuse shortcomings in this regard. If people are displaced, for instance, the fact that new dwellings are provided somewhere else does not detract from the fact that a community has been destroyed. It is possible that the needs of the public necessitate such a drastic interference with property's proper function, but this should give rise to a more in-depth scrutiny of legitimacy. Indeed, the bar to pass the legitimacy test should be raised considerably compared to less intrusive exercises of the eminent domain power.

Rider 3: Democratic Merit

Perhaps the most important characteristic to consider when assessing the legitimacy of a taking is its democratic merit. In an important sense, putting a taking to the test against this measure of legitimacy serves to encapsulate all the other points raised above, as we are asked to consider the totality of factors in order to judge whether the taking decision conforms to good governance standards within a system based on democratic decision-making. The inquiry made in this regard should not be focused on second-guessing government policies, but should compel us to take seriously the

idea that a commitment to democracy places real constraints on the exercise of government power. As such, an overarching focus on democratic merit can hopefully render the principles of scrutiny expressed by the Gray test as a suitable template for courts in many different jurisdictions. By emphasising how deference depends on substantive standards of democratic decision-making, on might succeed in justifying more extensive judicial review of takings on the basis of both human rights and constitutional property law.

The overarching question that arises with respect to democratic merit is whether the taking in question can be said to arise from a legitimate process of decision-making, in the pursuit of a fair and equitable outcome. It bears emphasising that in line with a more modern appreciation of the meaning of democracy and human rights, the relevant assessment under this point involves both procedural and substantive elements. Fairness in itself is a constraint on the democratic process, particularly when fundamental economic and social rights are involved. However, the notion of democratic merit rightly brings procedural questions to the foreground. Indeed, it might be a weakness of Gray's own points that they do not single out procedural issues for special consideration.

On the one hand, it is inappropriate to reduce the takings question to a matter of administrative law. But on the other hand, the way in which the taking decision was made can often tell us much about its legitimacy, including how it stands with regard to broader notions of fairness. It is particularly important, in this regard, to inquire into the position of local owners and communities during the planning process leading up to the decision to use eminent domain. In the context of property as a human right, moreover, a stricter standard might be appropriate here, compared to that which otherwise would follow from administrative law.

Importantly, our commitment to property as a social institution requires us to take into account that the owners generally make up the group of people who will be most directly affected by any decision involving the future of their property. As such, they should normally be granted a decisive

voice in decision-making processes leading up to economic development. At the same time, the social function account leaves room for recognising that this presumption in favour of emphasising owners does not apply equally to all merely as a result of formal rights. It is clear, for instance, that the substantive interests of absentee landlords might be limited compared to the substantive interests of local non-owners who depend more directly on the relevant property for their livelihoods. In these cases, the social function approach allows us to recognise that a taking might have significant democratic merit, even if it is based on a form of decision-making that prioritises the interests and participation rights of non-owners.

Nevertheless, within a system based on private property rights it will always be appropriate to show caution in this regard. The presumption should always be, within such a system, that the owners are the primary stakeholders in decision-making processes involving their property. Moreover, if this presumption is not found to be correct with respect to a substantive assessment of the interests at stake, it points to a structural weakness of property's function within society, a weakness that should normally be addressed by general property reforms, not by adopting a more permissive attitude towards takings.

Indeed, if imbalances in the distribution of property is used to justify giving the state increased powers to interfere on a case-by-case basis, it does *more* than implement redistribution (which might well have considerable democratic merit). Importantly, granting such power to the government, particularly if the power is vested in the executive branch, risks undermining property as an institution. Hence, property might become a less secure basis on which to support local communities in the future, including those marginalised groups that are most in need of protection from external forces.[127]

[127] A concrete discussion of the point at stake here, in the context of Indian law, is given in **...** ("....").

3.6 Alternatives to Takings for Economic Development

As mentioned briefly in Section **??** of Chapter 2, the work of Ostrom and others on common pool resources suggests that sustainable resource management can often be better achieved through local self-governance than through markets or states.[128] The connection between this work and property theory is highly interesting, and has been explored in some recent work, particularly by US legal scholars.[129] As these scholars have observed, the connection can be made at a very high level of generality. Indeed, in a democracy, property as such has a kind of (partial) commons structure, since property as an institution depends on the collective choices we make regarding the legal order.[130] In cases when property is made subject to eminent domain, this perspective becomes particularly salient, since then the collective explicitly withdraws its backing for the rights of the owner, in favour of collective decision-making about the future of the property in question.[131] Finally, in case of an economic development taking, the property in question typically pertains to a resource such as land or water, which can typically be seen as part of a larger resource system with clear common pool characteristics of its own.[132]The social function theory in particular, compels

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[128] See generally Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge University Press). For a recent exposition of the main ideas, placing the work in a broader academic context, see the revised version of Ostrom's Nobel Lecture, Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100(3) The American Economic Review 641.

[129] See generally Carol Rose, 'Ostrom and the lawyers: The impact of Governing the Commons on the American legal academy' (2011) 5(1) International Journal of the Commons; LA Fennel, 'Ostrom's Law: Property Rights in the Commons' (2011) 5(1) International journal of the commons 9.

[130] For similar observations, see Carol M Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2(1) Yale Journal of Law & the Humanities 37, 51; **heller00**

[131] A common pool resource is typically identified by the fact that exclusion is difficult or costly, while use can cause depletion (and hence should be limited), see, e.g., Elinor Ostrom and Charlotte Hess, 'Private and Common Property' in Boudewijn Bouckaert (ed), *Property Law and Economics* (Edward Elgar 2010) 57. Hence, the mere fact that some property is apt to be regulated, or taken, by the collective, demonstrates that property has common pool characteristics (although these might be imposed by the polity, rather than arising from the nature of the underlying good).

[132] See, e.g., Fennel (n 17) 16 ("we are *always* operating at least partially within a commons of some sort"). I also mention Smith's notion of a "semicommons", used to describe settings where common pool arrangements for resource management interact with individual property rights, see generally Henry E Smith, 'Semicommon Property Rights and Scattering in the Open Fields' (2000) 29(1) The Journal of Legal Studies 131; Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) The Journal of Legal Studies S453.

us to consider the place of private property in such contexts.

To complement these observations, it is crucial to note that designating something as a common pool resource does not in any way imply that the resource in question is open-access or that it is held as a form of common property, as a public trust, or under some other legal construction moving beyond the basic notion of private property.[133] Perhaps more controversially, designating something as a common pool resource does not in any way imply that the resource *should* be removed from the sphere of private property.[134] According to Ostrom and Hess, the appropriate property regime for a given common pool resource is a pragmatic question that depends on the concrete circumstances.[135] It should be noted, however, that this neutral position on the relationship between property and common pool resources is premised on a bundle of rights understanding of the nature of property.[136] Potentially, a different understanding of property could suggest a different perspective. Specifically, the question arises as to how theories of common pool resource management relates to the social function theory of property. This is a particularly interesting avenue for future work. Specifically, it would promise to shed further light on the appropriateness of a normative stance that explicitly favours private property as a basis for sustainable self-governance, backed up by a human flourishing account of what private property is, and should be.

In this thesis, I will limit myself to noting how the link between property and theories of commons governance provides an alternative route towards an institutional perspective on the takings question. Intuitively, such a perspective already suggests itself by the work done in this and the previous chapter, which has emphasised the position of the local community and the function of property as an anchor for democracy. It remains to work out in further detail what

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133 See, e.g., Ostrom and Hess (n 20) 58.

134 See Ostrom and Hess (n 20) 58 ("there is no automatic association of common-pool resources with common-property regimes – or, with any other particular type of property regime").

135 See Ostrom and Hess (n 20) 58.

136 See Ostrom and Hess (n 20) 59.

exactly such a perspective has to offer in relation to the issue of economic development takings.

To make progress in this regard, it will be useful to first briefly consider one of the most important theoretical legacies of Ostrom's work, namely a list of eight design principles that she formulated on the basis of empirical studies.[137] These principles were formulated because they seemed to be particularly crucial in ensuring good governance at the local level, and have since been supported by a growing body of empirical evidence.[138] In brief, the so-called CPR principles are the following:

1. **Well-defined boundaries:** There should be a clearly defined boundary around the resource in question, and a clear distinction should exist between members of the user community, who are entitled to access the resource, and non-members, who may be excluded. This will internalise the costs of resource exploitation and other externalities, ensuring that proper incentives for sustainable management arise within the community of resource users.[139]

2. **Congruence between appropriation and provision rules and local conditions:** Management principles should be flexible and responsive to changing local conditions. Moreover, management practices should be anchored in the economic, social, and cultural practices prevalent at the local level. In addition, the individual benefits should generally exceed the individual costs associated with membership in the community of users, and collectively managed benefits should be distributed fairly among community members.[140]

3. **Collective-choice arrangements:** The individual members of the user community should

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[137] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 90.

[138] See M Cox, G Arnold and SV Tomas, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15(4) Ecology And Society 38 (the authors also suggest splitting some of the original principles in two parts, resulting in a slightly more fine-grained list, not needed in this thesis).

[139] Importantly, the possibility of excluding non-members marks a distinction between open-access resources and common pool resources, where the latter appears much less susceptible to a commons tragedy than the former, because externalities are internalised to a clearly defined community. See **ostrom99**

[140] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 92.

have an opportunity to participate in decision-making processes regarding the rules that govern the user community and the resource management. In addition to securing fairness and legitimacy, this will enhance the quality of the decision-making, as the users themselves have first-hand knowledge and low-cost access to information about their situation and the state of the resource in question.[141]

4. **Monitoring:** There should be mechanisms in place to ensure that the behaviour of users is monitored for violations of management rules. To increase efficiency, monitoring should be locally organised. Moreover, to ensure local responsiveness and legitimacy, individuals acting as monitors should themselves be members of the user community or in some way answerable to this community.[142]

5. **Graduated sanctions:** There should be an effective system in place for penalising violations of user community rules. These penalties should be graduated so that more severe or repeated violations are sanctioned more severely than minor or one-time transgressions.[143]

6. **Conflict-resolution mechanisms:** The user community should be endowed with low-cost procedures for conflict resolution. These procedures should be sensitive to local conditions, to ensure local legitimacy.[144]

7. **Minimum recognition of rights:** The user community should be protected from interference by external actors, including government agencies. As a minimum, the existence of local institutions and the right to self-governance should be recognised and respected by external government authorities.[145]

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[141] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 93.

[142] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 94-100.

[143] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 94-100.

[144] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 100-101.

[145] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 101.

8. **Nested enterprises:** There should be vertical integration between local, small-scale, management institutions and larger institutions aimed at protecting and furthering non-local interests. This integration should be based on the minimum recognition of rights mentioned in the previous point. Furthermore, it should provide a template for integrated decision-making about larger scale issues, where local competences are employed incrementally in more general settings, involving also institutions working on behalf of municipalities, regions, states and the international community. Local institutions for resource management should not only be respected by such larger scale structures, they should also feed into larger scale decision-making and be called to respond to greater community needs.[146]

There are at least two interesting connections between self-governance principles such as these and the issue of economic development takings, especially as that issue is approached in this thesis, on the basis of the social function theory of property. First, one may observe that when economic development takings appear to lack legitimacy with respect to social functions, this is typically also an indication that the surrounding framework for resource management is not well-designed. In particular, it appears that the Gray test presented at the end of Chapter 2 closely tracks many of the design principles proposed by Ostrom.

For instance, consider the balance of power between the owners and beneficiaries of a taking, the first point to consider according to the Gray test. When a taking fails on this point, doubts naturally arise also with regard to the underlying framework for resource management, particularly aspects pertaining to the recognition of local rights, the adequacy of collective-choice arrangements, and the congruence between appropriation, provision and local conditions. If property is taken by powerful actors, chances are that these actors are not representative of local community interests. Moreover, takings characterised by an imbalance of power typically indicate that the government

146 See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 16) 101-102.

is in fact quite unwilling to recognise the rights of local people, even when these rights are formally recognised as property rights.

By contrast, the situation might be quite different if it involves a taking that is not suspect according to the Gray test. For instance, if property is taken from absentee landlords and given to local land users in order to facilitate development, this might be an honest attempt at setting up a management framework that complies with CPR principles. In such a case, moreover, one would not expect the balance of power between owners and takers to point towards abuse.

The second link between CPR design and economic development takings is arguably even more interesting. This link becomes apparent as soon as we shift attention away from diagnosing a lack of legitimacy towards coming up with alternative management principles that can restore it. Specifically, work done on local governance of common pool resources point to an *alternative* way of approaching the goal of economic development in cases that might otherwise result in the use of eminent domain.

The search for viable alternatives to eminent domain as a means to ensure economic development on private property has not received much attention in the literature so far. One notable exception, discussed in depth in the following subsection, is the work of Heller, Dagan and Hills.[147] Looking at their work will serve to make the abstract discussion above more concrete, and will set the stage for a comparison between their proposal and solutions that can be facilitated by the system of land consolidation presented in Chapter 5.

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147 The work of Lehavi and Licht also deserves a brief mention, even though it focuses on compensation rather than alternatives to eminent domain. The reason is that this work relies on proposing a novel institution that also touches on issues related to self-governance. In particular, Lehavi and Licht propose that post-taking, collective, price bargaining should be carried out on behalf of owners by a Special Purpose Development Company, in an effort to give them a chance to get their share of the commercial benefit arising from development. See Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704. For a more in-depth discussion of this proposal, and the compensatory approach to economic development takings more generally, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 21).

3.6.1 Land Assembly Districts

In an article from 2001, Heller and Dagan considered the connection between CPR design and overarching (liberal) property values.[148] From this, they arrived at a proposal for what they call a "liberal commons", which adds some design constraints rooted in a desire to protect individual autonomy and minority rights. In particular, they emphasise the value of exit, the opportunity for members of the governance structure to alienate their share in the commons resource (conceived of as a property right).[149] The right of owners to leave the collective is thought of as a safety mechanism, to prevent failing institutions from trapping its members in a state of oppression. This, it is argued, is an important overarching design constraint, described as a "liberal" idea, that should complement the other design principles for local management of common pool resources.[150]

In a later article, responding to the *Kelo* controversy, Heller and Hills build on the idea of the liberal commons by proposing a novel approach to the takings issue, consisting of a proposal for a new institutional framework that can facilitate land assembly for economic development. Importantly, it is meant to replace eminent domain altogether, in certain kinds of cases. The goal is to ensure democratic legitimacy while also setting up 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.[151] The idea is that while anyone will be able to propose and promote the formation of a LAD, the official planning authorities and the owners themselves

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148 See Hanoch Dagan and Michael A Heller, 'The Liberal Commons' (2001) 110(4) Yale Law Journal 549.

149 See Dagan and Heller (n 40) 567-572.

150 Despite their commitment to protect the right of exit, Heller and Dagan are also aware of the destabilising effect exit can have on an otherwise well-functioning institution. To address this, they discuss additional mechanisms, such as rights of first refusal, that can ensure that exit does not prove too disruptive to the local collective, as long as a sufficient number of members chose to remain. See Dagan and Heller (n 40) 596-702.

151 Heller and Hills (n 3) 1469-1470.

must consent before it is formed.[152] Clearly, some kind 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.[153] How to allocate voting rights in the LAD is given careful consideration, with Heller and Hills opting for the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[154] 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.[155]

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.[156] While it is not discussed at any length, the assumption appears to be that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue in quite some depth. Hence, despite the overarching goal of self-governance, the power of the planning authority still appears significant under the LAD proposal as it currently stands.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, Heller and Hills suggest that the government should be precluded from using eminent domain to assemble the land.[157] This is a crucial aspect of their proposal that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. A LAD will not only ensure

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152 Heller and Hills (n 3) 1488-1489.

153 See Heller and Hills (n 3) 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 procedures, for instance by requiring separate majorities from different groups of owners. See Heller and Hills (n 3) 1523-1524.

154 See Heller and Hills (n 3) 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favour of the property-based proposal, see Heller and Hills (n 3) 1503-1507.

155 Heller and Hills (n 3) 1496.

156 Heller and Hills (n 3) 1489-1491.

157 Heller and Hills (n 3) 1491.

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. 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. Hence, the LAD proposal promises to address the democratic deficit of economic development takings, without failing to recognise that the danger of holdouts is real and that institutions are needed to avoid it.

There are some problems with the model, however. First, it seems that planning authorities might have an incentive to refuse granting approval for LAD formation. After all, doing so 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.[158] However, the question then arises as to how deferential courts should be in this regard, echoing the conundrum that engulfs the safeguard intended by the public use restriction. Presumably, one would want the courts to strictly scrutinise LAD rejections, to instil that LADs should normally be promoted. However, would the courts be comfortable providing such scrutiny, also against a government body claiming that the "public interest" speaks against LAD formation? This would likely depend on the exact formulation and spirit of the LAD-enabling legislation. To work as intended, some sort of presumption in favour of LAD approval appears to be in order, but this in turn can have the effect of making it easier for powerful landowners to abuse the LAD system, e.g., by pushing through LADs that enable them to impose their will on other community members.

This worry is related to a second possible objection against the LAD proposal, concerning the practicalities of the process leading up to the LAD's decision on whether or not to accept a given offer. Is it possible to organise such a process in a manner that is at once efficient, inclusive and informative, without making it too costly and time consuming? Here Heller and Hills envision a sys-

[158] Heller and Hills (n 3) 1490.

tem of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[159] The process envisioned here would resemble existing planning procedures to such an extent that additional costs could hopefully be kept at a minimum.

The significant difference would concern the relative influence of the different actors, with the owners as a group receiving a considerable boost as a result of the LAD. Rather than being sidelined by a narrative that sees the use of eminent domain as the culmination of planning, the owners are now likely to occupy center stage throughout, as they now will have the final say on whether or not the development will go ahead.

From this, however, arises the question of how the interests of other locals, without property rights, will be protected. Heller and Hills assumes that local non-owners will also be represented during the stages leading up to the LAD's final decision, but their role in the process is not clarified in any detail.[160] This raises the worry that LADs might undermine local democracy by giving property owners a privileged position with respect to policy questions that should be decided jointly by all members of the community. The severity of this risk depends heavily on the circumstances. In a context of egalitarian property ownership and sensible government regulation of land uses and LAD operations, the risk should be minimal. In principle, the local anchoring that LADs provide should also benefit non-owners, by bringing the decision-making process closer and making it more easily accessible for the people most directly affected, including non-owners. Moreover, if some members of the local community remain marginalised, this should possibly be regarded as a regulatory failure or a reflection of underlying inequality in society, not a shortcoming of the LAD proposal as such. In these cases, a reasonable approach might even be to *expand* the

[159] See Heller and Hills (n 3) 1490-1491. It might also be necessary for the planning authorities or other government agencies to take on some responsibilities with respect to providing guidance and assistance to less resourceful members among the owners.

[160] Heller and Hills (n 3) 1490-1491.

function of LADs, by granting voting rights to a larger class of local property dependants, not only formally titled owners.[161]

However, the LAD proposal raises some highly problematic issues pertaining to the proposed mechanism of collective decision-making. As Kelly points out in a commentary, the basic mechanism of majority voting is deeply flawed.[162] For instance, if different owners value their property differently, majority voting will tend to disfavour those with the most extreme viewpoints, either in favour 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 short, the problem is that a majority can often be found that does not take due account of minority interests.

For instance, if a minority of owners are planning development on their own land, and this conflicts with some LAD proposal targeting a larger area, the minority might find it difficult to defend themselves against the force of the LAD. Indeed, such a minority might effectively loose the battle for their property as soon as a LAD is formed, if the development description underlying LAD formation is incompatible with the kind of development they wish to pursue. For such owners, a presumption in favour of LAD formation might prove highly disadvantageous.[163]

Indeed, developers might come to rely on LADs to push through *de facto* condemnations of property, through a procedure that leaves minorities less protected than the traditional takings process. Indeed, it would be theoretically possible for any landowner to use a LAD to condemn any neighbouring property smaller than their own. Eventually, a whole community might be taken

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161 The important invariant to maintain, I believe, is that the locally anchored institution should be the active, invested, agent, while more centralised and/or expert-dominated government bodies should act as passive, impartial, regulators. In the processes leading to economic development takings, this equation is typically reversed, with government bodies and commercial companies being the active agents, while the owners and the local community are the passive agents whose property rights and dependencies place some nominal limits on the authority of other parties (limits which, due to the weakness of owners as a group, tend to be easily disregarded).

162 Daniel B Kelly, 'The Limitations of Majoritarian Land Assembly' (2009) 122 Harvard Law Review Forum 7.

163 Of course, one might imagine 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 marginalised, since the existence of the LAD, acting 'on behalf of the owners', might detract from any dissenting voices on the owner-side.

over by one or a few powerful landowners, through a sequence of appropriately designed LADs and development projects.

Despite these worries, the ideal of the LAD proposal is clearly stated and highly attractive. LADs should help to establish self-governance for land assembly and economic development. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighbourhood – or reject all such proposals".[164] 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".[165] The problem is that these ideals turn out to be at odds with some of 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 emphasise, in direct contrast to their comments about "broad discretion" and "self-governance", that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[166] This is a good thing, according to Heller and Hills, since it provides a safeguard 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?".[167]

This means that there is a significant internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority

[164] See Heller and Hills (n 3) 1496.

[165] See Heller and Hills (n 3) 1498.

[166] See Heller and Hills (n 3) 1500.

[167] Heller and Hills (n 3) 1500.

tyranny on the other. Indeed, it is hard to see how LADs can at once have both a "narrow purpose" as well as enjoy "broad discretion" to choose between competing proposals for development. If such discretion is granted to LADs, what prevents special interest groups among the landowners from promoting development projects that will be particularly favourable to them, rather than to the landowners as a group? What is to prevent landowners from making behind-the-scene deals with favoured developers at the expense of their neighbours? It might be difficult to come up with rules that prevent mechanisms of this kind, without also making substantive self-governance 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 consider the social functions of property when choosing among development proposals. In my view, it is undesirable to restrict the operations of LADs in this way. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will be made 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 proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commercially attractive, or because the developer interested in pursuing such a proposal cannot offer the highest payment to the owners. In the end, the decision that the LAD makes concerns the future of the community as a whole. This is not an exercise in profit-maximization, and there are good reasons to believe that LAD regulation should encourage a broad perspective, not enforce a narrow one.

However, when it comes to the details, Heller and Hills seem quire adamant that the degree of self-governance needs to be limited in favour of strict regulation to reduce the risk of LAD abuse. 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".[168] Here, the notion of self-governance is made even thinner, as owners will effectively be barred from using LADs as a template for gaining the right to participate in development projects themselves.

Moreover, new questions arise. For one, what is meant by "affiliation"? Say that a landowner happens to own shares in some of the companies proposing development. Should they then be barred from voting? If so, should they be barred from voting on all proposals, or just those involving companies in which they are a shareholder? If the answer is yes, how can 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 their vote is biased against assembly that would benefit a competing company? Or what about the case when some of the landowners 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. But in some cases, employment relations could play a decisive factor in determining the outcome of a vote. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees. Heller and Hills give no clear answer to the questions arising in this regard, and at this point, the circle has in some sense closed in on their proposal. Indeed, just as courts today struggle with the "public use" requirement, it seems that the proposed "affiliation" criterion for depriving someone of their voting rights would provide a very shaky basis for judicial review.

More generally, it seems that how to best organise a LAD remains an open problem. The challenge is to ensure that LADs deliver a real possibility of self-determination, while also ensuring good governance and protection against abuse. That it remains unclear how to do this is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only

[168] Heller and Hills (n 3).

a limited assessment of their proposal can be made in the absence of empirical data.[169] Later in the thesis, I will shed light on this challenge when I consider the Norwegian framework for land consolidation. This framework can be looked at as a sophisticated institutional embedding of many of the central ideas of LADs. In particular, I will discuss how Norwegian land consolidation can be employed in cases of economic development, and how it is increasingly used as an alternative to expropriation in cases of hydropower development. This will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

[169] See Heller and Hills (n 3).