Contents

3 Taking Property for Profit

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 3.2 by commenting briefly on the importance of economic development takings 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

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

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 3.3, 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 3.5, 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 3.5.4, 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, 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

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

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 3.6, I consider two recent suggestions that I regard as possible answers to this concern.[3] These suggestions focus 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.

3.2 The "Underscrutinised" Language of Economic Development

Economic development takings can be seen as a form of public-private partnership, whereby the state seeks to rely on for-profit takers and the market to fulfil some public purpose. Public-private partnerships are becoming increasingly important to the world economic order.[4] To some, they

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

[4] See generally Stéphane Saussier, 'Public–private partnerships' (2013) 89 Journal of Economic Behavior & Organization 143.

are the illegitimate children of privatisation and deregulation, while others see them as efforts to make the public sector more efficient and accountable. Either way, public-private partnerships are becoming more important, and they appear to be here to stay.[5] In this situation, it is inevitable that when eminent domain is used to acquire property for economic development, those who directly benefit will often be commercial companies rather than public bodies. In the previous chapter, I pointed out how indirect public benefits are typically used to justify such takings. Standard legitimizing reasons include the prospect of new jobs, increased tax revenues, and various other economic and social ripple effects.

Despite more or less convincing evidence of such benefits, economic development takings have a tendency to result in controversy. After *Kelo*, economic development takings have also been at the forefront of the constitutional property debate in the US. In the rest of the world, a similar shift in academic outlook has yet to take place, but expropriation-for-profit situations are increasingly coming into focus also on the global stage.[6] If we broaden our perspective slightly, to consider commercially motivated interference in property more generally, it even seems appropriate to speak of a crisis of confidence in property law, particularly in relation to land rights. This is most clearly felt in the developing world, where egalitarian systems of property use and ownership are coming under increasing pressure. It has been noted, in particular, that large-scale commercial actors are assuming control over an increasing share of the world's land rights, a phenomenon known as *land grabbing*.[7]

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5 Although their potentially pernicious effects on stability and accountability has also been noted. See, e.g., CRichard Baker, 'Investigating Enron as a public private partnership' (2003) 16(3) Accounting, Auditing & Accountability Journal 446 (arguing that "the Enron scandal can be better understood as an American form of public private partnership rather than just another example of capitalism run amok").

6 See, e.g., Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011); Emma JL Waring, 'The prevalence of private takings' in Nicholas Hopkins (ed), *Modern studies in property law: Volume 7* (Hart Publishing 2013); LCA Verstappen, 'Reconceptualisation of Expropriation' in H Mostert and LCA Verstappen (eds), *Rethinking Public Interest in Expropriation Law* (Forthcoming, 2014).

7 See generally Saturnino M Borras and others, 'Towards a better understanding of global land grabbing: an editorial introduction' (2011) 38(2) Journal of Peasant Studies 209.

3.2. THE "UNDERSCRUTINISED" LANGUAGE OF ECONOMIC DEVELOPMENT

So far, most research on land grabbing has looked at how commercial interests, often cooperating with nation states, exploit weaknesses of local property institutions, to acquire land voluntarily, or from those who lack formal title. However, the similarity between economic development takings and state-aided land grabbings in favour of large commercial companies is striking. In particular, it has been noted how the purported public interest in economic development can be used to justify land grabs that would otherwise appear unjustifiable. In a recent article, Smita Narula cites *Kelo* directly and warns that procedural safeguards alone might not provide sufficient protection against abuse. She writes:

> Procedural safeguards, however, can all too easily be co-opted by a state because its claims about what constitutes a public purpose may not be easy to contest. Particularly within the context of land investments, states could use the very general and under-scrutinized language of "economic development" to justify takings in the public interest.[8]

This quote underscores the broader relevance of the study of economic development takings. In addition, it reminds us that the question of what can be justified in the name of "economic development" is a general one, not confined to particular systems for organizing property rights. To address this, and to restore confidence in the institution of property more generally, many academics and policy makers turn towards *human rights*.[9] It has been argued, in particular, that a human right to land should be recognised on the international stage, a right that would apply even when those affected by a land grab lack formal title. If successful, this approach promises to deliver basic protection against interference in established patterns of property use independently

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8 Smita Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' [2013] (1) Stanford Journal of International Law 140, 157.

9 See generally Olivier De Schutter, 'The Emerging Human Right to Land' 12(3) International Community Law Review; Olivier De Schutter, 'The Green Rush: the Global Race for Farmland and the Rights of Land Users' (2011) 52(2) Harvard International Law Journal 503; Rolf K'unnemann and Sofía Monsalve Suárez, 'International Human Rights and Governing Land Grabbing: A View from Global Civil Society' (2013) 10(1) Globalizations 123.

of how particular jurisdictions approach property.

In Europe, the human right to property is still usually understood in more conventional terms, as pertaining primarily to the rights of formally titled owners. However, a broad, social-function perspective on this right is influential due to the ECHR and the court in Strasbourg.[10] The issue of land grabbing highlights the importance of maintaining such a perspective, particularly when attempting to use western legal categories when analysing the developing world. In the context of land grabbing, protecting land rights is not primarily a question of protecting the civil law ideal of individual dominion. Rather, it is a question of providing protection against large-scale transactions that destabilise or destroy established patterns of land use, to the detriment of local communities.

In human rights discourse, particularly relating to the developing world, the focus is often on pressing problems related to food and water security as well as the protection of basic livelihoods, issues that can arise with urgency in the context of land grabbing. However, to achieve effective protection we need firm categories and enforcible legal principles to back up our benchmarks and our good intentions. In this regard, I think Narula is right to stress that the lack of a convincing approach to the notion of "economic development" is a crucial challenge.

As an overarching goal, economic development is no doubt sound, particularly for poor nations. The problem is that the risk of abuse is great when such a vague term is used to justify dramatic interferences in property. Such interferences typically cause severe disturbances in people's lives. This, moreover, is true for a middle-class US homeowner in much the same way as it is true for members of self-sustaining agrarian communities in Africa, although the stakes might be very different. Hence, there seems to be great potential for exchange of ideas and insight between those working on economic development takings and those studying land grabs in the developing world.

In this thesis, I focus on legal systems where private property is well-established and relatively

[10] As discussed in Chapter 2, Section 6.3.2.

stable as a legal category. Moreover, my case study will look to Norway, a prosperous European country with a long tradition of an egalitarian distribution of land rights among the rural population. Hence, I will focus on situations when those affected by takings of land for economic development have a *prima facie* cause for objecting on the basis of recognised property rights. Therefore, the complications that occur when those most severely affected do not have formally recognised property rights will not be considered in any depth. However, I believe this a very interesting avenue for future work.

In the following, I will present a comparative background for my case study. I will begin by considering English law, where courts have generally been reluctant to broadly scrutinize the use of economic development as a justification for state interference in property. After this, I turn to the ECHR and the proportionality test that is now at the core of property adjudication at the ECtHR. I note that while states are considered to have a wide margin of appreciation with regards to the legitimacy of the purpose underlying interference, the balancing required under the proportionality test can still become a powerful basis on which to scrutinize the broader negative effects of economic development takings.

Following this, I move on to consider the US in greater depth, both the historical debate that led to *Kelo* and the suggestions for reform that have emerged following its backlash. There has been much written about this issue in the US. Moreover, while much of it is repetitive and coloured by the tense political climate, I believe some historical points, as well as some recent suggestions for reform, are highly relevant also to the international setting. To single out and analyse those aspects is the main aim of this part of the chapter. Indeed, the current debating climate in the US might be an indication of what is to come also in Europe, if concerns about the legitimacy of economic development takings are not taken seriously.

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 3.6 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.

3.3 Economic Development Takings in England

Economic development takings have not become as controversial in Europe as they are in the US, but there have been cases where the issue has come up, in several different jurisdictions.[11]

In this section, I address economic development takings from the point of view of English law. In England, the principle of parliamentary supremacy 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.[12] Moreover, the use of compulsory purchase – the term most often used to denote takings in the UK – has not been restricted to particular purposes as a matter of principle. The uses that can warrant compulsory alienation of property are those that parliament regard as worthy of such consideration. However, as private property itself has long been recognised as a fundamental right, the power of compulsory purchase has typically been exercised with caution.

In his *Commentaries on English Law*, William Blackstone famously described property as the "third absolute right" that was "inherent in every Englishman".[13] 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

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11 For instance, in the UK, Ireland and Germany, as well as in Norway and Sweden. See AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 466-483; Geir Stenseth, 'Noen internasjonale utviklingstrekk i ekspropriasjonsretten' (2010) 123(04-05) Tidsskrift for Rettsvitenskap 774.

12 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).

13 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 is security while the second is liberty.

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.[14]

Historically, Blackstone's description conveys a largely accurate impression of takings practice in England. Indeed, Parliament itself would usually be the granting authority in expropriation cases, through so-called *private Acts*. Hence, compulsory purchase would not take place unless it had been discussed at the highest level of government. Moreover, the procedure followed by parliament in such cases strongly resembled a judicial procedure; the interested parties were given an opportunity to present their case to parliament committees that would then decide whether or not compulsion was warranted.[15]

On the one hand, the direct involvement of parliament in the decision-making process reflected a fundamental respect for property rights. But at the same time, parliamentary supremacy also 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.

During the 19th Century, as an industrial economy developed, private acts granting compulsory purchase powers to commercial companies grew massively in scope and importance.[16] Private railway companies, in particular, regularly benefited from such acts.[17] During this time, the expanding scope of private-to-private transfers for economic development led to high-level political

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[14] Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 13) 134-135.

[15] See Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 13-16. While this procedure reflected a protective attitude towards private property, recent scholarship has also pointed out that expropriation was in fact used very actively in Britain, particularly following the glorious revolution, see Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688–1833' (2011) 210(1) Past & Present 93.

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

[17] Allen, *The Right to Property in Commonwealth Constitutions* (n 15) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

debate and controversy. 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, an 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 and the role of courts is to a large extent limited to the application and interpretation of statutory rules. 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.[20] With respect to the question of legitimacy, however, the starting

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

19 Arguably, the social function perspective is the key to understanding 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 **waring09**

20 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 notoriously hard to apply in practice. For a recent attempt at clarifying 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 of particularly relevance in the context of economic development takings. I will not address this particular issue in any depth here – I choose instead to focus on legitimacy of takings in a broader, non-compensatory sense. However, the compensation aspect of economic development takings is also very interesting (and challenging). For further details, I refer to 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).

point for English courts is that this is a matter of ordinary administrative law.[21]

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.[22] 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 warrant a taking under the Town and Country Planning Act 1990, it is enough that it will "facilitate the carrying out of development, redevelopment or improvement on or in relation to the land".[23]

While various governmental bodies are authorised to issue compulsory purchase orders (CPOs), a CPO typically has to be confirmed by a government minister.[24] 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 will usually only be scrutinized on the basis of whether or not it lies within the scope of the statute authorising it, not on the basis of whether or not the purpose of the taking appears to be legitimate as such.[25]

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,

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21 See Taggart (n 12).

22 See **waring09** 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.

23 Town and Country Planning Act 1990 s 226.

24 See **waring09**

25 See, e.g., **waring09**

for instance by Lord Denning in *Prest v Secretary of State for Wales*.[26] He said:

> It is clear that no minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomsoever it is made – should come down against compulsory acquisition. 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. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen.[27]

Lord Denning also supported the doctrine of necessity, as expressed by Forbes J in *Brown v Secretary for the Environment*:[28]

> It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary, in order to exercise the powers for the purposes of the Act under which the compulsory purchase order is made, that the acquiring authority should have authorisation to acquire the land in question.[29]

In practice, these principles are mostly implicit in legal reasoning, as a factor that influences the courts when they interpret statutory rules and carry out judicial review of administrative decisions. As Watkins LJ stated in *Prest*:

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[26] *Prest v Secretary of State for Wales* (1982) 81 LGR 193.

[27] *Prest v Secretary of State for Wales* (n 26) 198.

[28] *Brown v Secretary for the Environment* (1978) 40 P & CR 285.

[29] *Brown v Secretary for the Environment* (n 28) 291.

> The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.[30]

In *R v Secretary of State for Transport, ex p de Rothschild*, Slade LJ referred to *Prest* and made clear that he did not regard it as expressing a rule concerning the burden of proof in compulsory purchase cases. Rather, he took it as more general observation on the severity of property interference and the importance of vigilance in such cases.[31] He pointed to "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".[32]

3.3.1 *Sainsbury's Supermarkets Ltd v Wolverhampton City Council*

An illustration of how English courts approach objections to the legitimacy of takings is found in the recent case of *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*.[33] Here a CPO was granted to allow the company Tesco to acquire land from its competitor Sainsbury, in a situation when they were both competing for licenses to undertake commercial development on the same land, owned partly by both. The decisive factor that had led the local authorities to grant the CPO was that Tesco had offered to develop a different property in the same local area,

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30 *Prest v Secretary of State for Wales* (n 26) 211-212.

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

32 *R v Secretary of State for Transport, ex p de Rothschild* (n 31) 938.

33 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, (2010) 1 AC 437.

which was currently in need of regeneration.

Sainsbury protested, arguing that the local council could not strike such a deal on the use of its compulsory purchase power. It was argued, moreover, that taking the land for incidental benefits resulting from development in a different part of town was not legitimate under the Town and Country Planning Act 1990. The UK Supreme Court agreed 4-3, with Lord Walker in particular emphasising the need for heightened judicial scrutiny in cases of private-to-private takings for economic development.[34] Lord Walker even cited *Kelo*, to further substantiate the need for a stricter standard in such cases.[35]

However, the main line of reasoning adopted by the majority was based on an interpretation of the Town and Country Planning Act itself. In particular, the majority held that it was improper for the local council to take into consideration the development that Tesco had committed itself to carry out on a different site.[36] This, in particular, was not "improvement on or in relation to the land", as required by the Act.[37] In addition, Lord Collins, who led the majority, said that "the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision maker".[38] These comments reflect the traditional approach to judicial review of CPOs under English law, demonstrating how the underlying statutory authority tends to be at the center of attention.

However, it is interesting to see how the purpose of the interference featured in the background of the Supreme Court's interpretation and application of the statutory rule. The opinion of Lord Walker is particularly interesting, since he stresses that "the land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes,

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34 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 80-84.

35 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 81.

36 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 73-79.

37 Town and Country Planning Act 1990, s 336.

38 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 70.

mainly retail and residential."[39] He goes on to state 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."[40]

Lord Walker then makes clear that he does not think it is impermissible, as such, for the local council to take into account positive effects on the local area, even when these do not directly result from the planned use of the land that is being acquired. Instead, he relies explicitly on the for-profit character of the taking, by arguing that "the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for."[41]

Lord Walker's opinion might indicate that the narrative of economic development takings is about to find its way into English case law. Moreover, a more critical approach might be adopted in the future, when compulsory purchase powers are made available to commercial companies wishing to undertake for-profit schemes. However, for schemes where the commercial aspect appears less dominant, English courts still appear very reluctant to quash CPOs, also when the purpose is economic development. This is so even in situations when the owners have requested a stricter standard of review on the basis of human rights law.

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39 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 81.

40 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 81.

41 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 33) 84.

3.3.2 *Smith & Others v Secretary of Stare for Trade and Industry*

In the case of *Smith & Others v Secretary of State for Trade and Industry*, a caravan site was compulsorily acquired for development in connection with the London Olympic Games.[42] Some of the owners protested, including Romany Gypsies who used the caravans as their primary residence. A public inquiry was held, after which the inspector recommended that the CPO should not be confirmed until adequate relocation sites had been identified. However, due to the "urgency, timing and importance" of the project, the Secretary of State decided to go ahead before a relocation scheme was put in place (although he expressed commitment to ensuring satisfactory relocation).[43] The owners argued that without satisfactory relocation plans, the interference in the property rights was not proportional and had to be struck down on the basis of human rights law, in particular Article 8 in the ECHR regarding respect for the home and private life.[44]

The Court of Appeal considered the matter in great depth, applying the doctrine of proportionality developed at the ECtHR. Importantly, this doctrine was understood to go beyond the standard form of judicial review required under English law. However, the Court still concluded that the taking was proportional. This was largely based on the finding that "the issue of proportionality has to be judged against the background that everyone accepts that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified."[45]

Justice Williams arrived at this conclusion after noting that the owners' *only* substantial objection against the CPO was that it was confirmed before adequate relocation measures had been

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42 *Smith and Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), (2008) 1 WLR 394.

43 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 10.

44 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 27-51.

45 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 42.

agreed on.[46] Hence, the question, as he saw it, did not concern the validity of using compulsory purchase powers, but merely the timing with which it had been ordered. On this basis, he framed the question of legitimacy as one relating to the "necessity" standard, according to which an infringement of Convention rights is only permissible when the public interest cannot be served in some other way.[47] A strict reading of this standard holds that an interference must be the *least intrusive means* of achieving the stated aim.[48]

Justice Williams argued against such a strict reading, subscribing instead to a view expressed as an *obiter* in the case of *Pascoe v The First Secretary of State*. According to this view, an interference need not be the least intrusive means. Rather, it is sufficient that the measure is "reasonably necessary" to achieve that aim.[49] However, while noting his agreement with this approach, Justice Williams went on to also apply the stronger necessity test, and found that even if this was applied the CPO in question would still be a proportional interference.[50]

It seems clear that while the taking in question was for economic and recreational development purposes, the case was marked by a preliminary finding to the effect that the legitimacy of the aim of interference – to facilitate the London Olympics – was beyond reproach. Hence, there was no need for, or even room for, more detailed purposive reasoning of the kind that would later be applied by Lord Walker in *Sainsbury*. The fact that the taking was for economic development and recreation, not for a pressing public need, was not considered relevant. Moreover, since the case was construed to be solely about the extent to which the CPO was "necessary" to further its stated

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46 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 42.

47 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 43.

48 Such a standard has been adopted in some Convention cases, for instance in *Samaroo v Secretary Of State For Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150.

49 See *Pascoe v The First Secretary of State* [2006] EWHC 2356, [2007] 1 EWHC 885, 74-75 (quoting *Clays Lane Housing Co-Operative Ltd, R (on the application of) v Housing Corporation* [2004] EWCA Civ 1658, (2005) 1 WLR 2229, 25).

50 *Smith and Others v Secretary of State for Trade and Industry* (n 42) 41-50.

aim, the proportionality test that was carried out, despite being detailed, was very narrow in scope. It concerned only proportionality of the means, not of the aim itself. The question of how to weigh the public interest in a multi-billion dollar sporting event against the security of someone's home was not considered.

In later cases, a dismissive attitude towards substantive review has been adopted even in situations when the owners have argued against takings by explicitly questioning the proportionality of the interference against the importance of the aim.

3.3.3 *Alliance Spring Co Ltd v The First Secretary of State*

In the case of *Alliance Spring Co Ltd v The First Secretary of State*, a large number of properties were expropriated to build a new football stadium for the football club Arsenal.[51] Some owners who stood to lose their business premises protested, pointing to the fact that the inspector in charge of the public inquiry had recommended against the takings.[52] According to Justice Collins, the main argument that the owners relied on when protesting the taking was that it did not serve a "proper purpose".[53] This argument was not held to be valid, however, with Justice Collins concluding as follows:

> There is nothing in the material put before and accepted by the Inspector which persuades me that that decision was ill founded or was one which the Secretary of State was not entitled to reach. Developments which result in regeneration of an area are often led by private enterprise. Mr Horton perforce accepts that that is so, but submits that this is not the sort of situation where, for example, a private development is the

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

[52] *Alliance Spring Co Ltd v The First Secretary of State* (n 51) 6-7.

[53] *Alliance Spring Co Ltd v The First Secretary of State* (n 51) 19.

anchor for a particular scheme. I disagree.[54]

Hence, unlike the case of *Smith*, where the Court did in fact carry out its own assessment of proportionality, the *Alliance* Court was content with deferring to the assessment carried out by the executive branch.[55] As such, the case appears to follow the pattern of judicial review of CPOs established before the Human Rights Act 1998. This means that the decision also contrasts with how English courts have approach the Convention in relation to other rights, such as those of Article 8 addressed in *Smith*.

Whether the approach taken in *Alliance* is good law after *Sainsbury* is unclear; judging from Lord Walker's opinion, it seems that a more substantive assessment might be required for similar cases in the future. While this might not imply a different outcome for a case like *Alliance*, it would mean that courts would have to engage in independent review of the purpose and merits of contested CPOs that benefit commercial actors. In particular, English courts would have to change the way they approach such cases, by being better prepared to assess for themselves whether a fair balance is struck between the interests of the developer and the property owners. Hence, it is not unlikely that the category of economic development takings will become an important point of reference in the future, both for the law and those who study it.

3.4 The Property Clause in the European Convention of Human Rights

The standard account of the protection against interference inherent in P1(1) describes it as consisting of three rules.[56] First, there is the rule of *legality*, asserting that an interference needs to be

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54 *Alliance Spring Co Ltd v The First Secretary of State* (n 51) 19.

55 This has been criticized, e.g., by Kevin Grey who describes the reference to Convention Rights in Alliance as "worryingly brief". See Gray, 'Recreational Property' (n 6).

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

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.[57]

The starting point for property adjudication at the ECtHR is that States have a "wide margin of appreciation" with regard to the legitimacy question.[58] 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 argued by Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[59]

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.[60]

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.

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57 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.

58 See *James* (n 57) para 54.

59 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, 1055.

60 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.

Less obviously, a similar sentiment appears to be behind the Court's reasoning in recent cases involving rent control schemes and housing regulation.[61] 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".[62] The 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.[63] 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.[64] 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.[65]

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,

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

62 *Hutten-Czapska* (n 61) para 239.

63 *Hutten-Czapska* (n 61) paras 20-31.

64 *Hutten-Czapska* (n 61) paras 31-53.

65 *Hutten-Czapska* (n 61) paras 20-53.

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.[66] 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.[67] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[68]

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.[69]

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.[70] The result, therefore, was not premised on a narrow

66 *Hutten-Czapska* (n 61) paras 60-61.

67 *Hutten-Czapska* (n 61) para 224.

68 *Hutten-Czapska* (n 61) para 224.

69 *Hutten-Czapska* (n 61) paras 224-225.

70 *Hutten-Czapska* (n 61) para 225.

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.[71] Moreover, the Court did not censor the political reasoning that motivated 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.

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71 *Hutten-Czapska* (n 61) para 224.

Instead, the aim should always be to get at the systemic features that cause perceived imbalances. As in *Hutten-Czapska v Poland Hutten-Czapska*,[72] 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 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).[73] 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,

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72 *Hutten-Czapska* (n 61).

73 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.

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.[74]

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

[74] 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.

on pre-existing conditions.[75] 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*.[76] 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".[77] 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 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

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75 *Lindheim and others v Norway* (n 61) para 119.

76 *Hutten-Czapska* (n 61).

77 *Lindheim and others v Norway* (n 61) para 135.

O'Connor engaged in when considering *Kelo*.[78] 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*,[79] 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.[80] This conclusion was backed up 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

78 See *Kelo v City of New London* 545 US 469 (2005).

79 *Hutten-Czapska* (n 61).

80 *Hutten-Czapska* (n 61) para 225.

regulate private-public partnerships might be higher in Europe.[81] 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 US Perspective on Economic Development Takings

In this section, I consider US law in more depth. First, I track the development of the case law on the public use restriction found in the Fifth Amendment and in various state constitutions. I consider the jurisprudential development from the early 19th century up to the present day.[82] Many writers assert that case law from the 19th and early 20th century was characterised by a tension between 'narrow' and 'broad' readings of the notion of public use.[83] Adding to this, I argue that while different state courts expressed different theoretical views on the meaning of "public use", there was a growing consensus that the approach to judicial scrutiny should be contextual, focused on weighing the rationale of the taking against the social, political and economic circumstances.[84] In particular, early state courts did not focus unduly on the exact wording of constitutional property clauses.

Following up on this, I argue that the doctrine of deference that was developed by the Supreme Court early in the 20th century was directed primarily at state courts, not state legislatures and

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81 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 .

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

83 See, e.g., Walt (n 11) 483; Allen, *The Right to Property in Commonwealth Constitutions* (n 15) 203-204. For a more in-depth argument asserting the same, see Philip Nichols, 'The Meaning of Public Use in the Law of Eminent Domain' (1940) 20 Boston University Law Review 615.

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

administrative bodies.[85] I then present the case of *Berman*, arguing that it was a significant departure from previous case law.[86] After *Berman*, deference was now taken to mean deference to the (state) legislature, meaning that there would be little or no room for judicial review of the takings purpose.

This paved the way for the infamous case of *Poletown*, where a neighbourhood of about 1000 homes was razed in order to provide General Motors with land to build a car factory.[87] I note how *Berman* provided a key authority used by the state court to uphold this taking. *Poletown* in turn links up with the even greater controversy surrounding *Kelo*, the eventual backlash of the deferential stance introduced in *Berman*.

After the historical overview, I go on to briefly present the vast amount of research that has targeted economic takings in the US after *Kelo*. I devote special attention to proposals for new legitimacy-enhancing institutions for facilitating economic development of jointly owned land. I focus on two suggestions in particular: targeting compensation and participation.[88] These proposals will serve as important reference points later on, when I consider the Norwegian land consolidation courts in Chapters 6.

3.5.1 The History of the Public Use Restriction

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.[89] 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

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85 See *City of Cincinnati v Vester* 281 US 439 (1930) (echoing and citing *Hairston v Danville & W R Co* (n 84)).

86 *Berman v Parker* (n 2).

87 See *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981).

88 Lehavi and Licht (n 3); Heller and Hills (n 3).

89 See Fifth Amendment to the US Constitution 1791.

uncontroversial.[90] 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.[91] 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.[92] 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".[93] 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".[94]

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.[95] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence

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90 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).

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

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

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

94 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).

95 Meidinger (n 92) 23-33.

of the fact that eminent domain was used more widely, for new kinds of projects.[96] Controversy arose particularly often with respect to the so-called mill acts.[97] 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.[98] 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.[99]

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.[100] 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 made by the courts to justify upholding takings on the basis of mill acts, including takings that would benefit the manufacturing industry.[101]

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

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96 Meidinger (n 92) 24.

97 Meidinger (n 92) 24. See also Johnson (n 91) 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.

98 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.

99 See, e.g., *Head* (n 98) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

100 See *Head* (n 98) (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.

101 See *Fiske v Framingham Mfg Co* 12 Pick 68 (1831). See also the discussion (including references to other cases) in *Head* (n 98).

controversy relating to provisions that had not previously raised any such doubts.[102] 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 the following, I explore this in some further detail.

3.5.2 Legitimacy in State Courts

When considering objections to the legitimacy of takings, state courts would not look to the federal Takings Clause directly, but rather base their decisions on corresponding property clauses from their own respective state constitutions.[103] Indeed, it was not until the late 19th century that state takings came to be regularly scrutinized at the federal level.[104]

When a state court upheld an interference that would benefit commercial interests, it would typically emphasise the broader purpose, often focusing on economic ripple effects.[105] By contrast, when a court decided that an interference was unconstitutional, it would often focus on the concrete use made of the property that was taken, pointing out that it did not directly benefit the public in the sense required by the public use restriction.[106] Sometimes, the question of legitimacy would turn on how widely the notion of 'use' was understood. Should this notion be interpreted narrowly,

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102 See **head86**

103 Not all states had such property clauses, and exact formulations varied, but a public use requirement was typically observed, see Johnson (n 91) 293-296.

104 At first, the federal scrutiny took place on the basis of the due process clause in the Fourteenth Amendment, see **head75** The federal takings clause itself was only applied to state takings after 1897, see *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 82).

105 See, e.g., *Hazen v Essex Co* 66 Mass 475 (1853); *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832); *Boston & Roxbury Mill Corp v Newman* 29 Mass 467 (1832). A more comprehensive list of cases adopting a broad view can be found in Nichols (n 83) 617.

106 See, e.g., *Sadler v Langham* 34 Ala 311 (1859); *Ryerson v Brown* 35 Mich 333 (1877); *Gaylord v Sanitary Dist of Chicago* 68 NE 522 (1903); *Minnesota Canal & Power Co v Koochiching Co* (n 99). A more comprehensive list can be found in Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 'American Law Reports' (1928).

as requiring that the property had to be literally used by the public, or could it be understood broadly, as pointing to a public purpose or benefit of some sort?[107]

This tension between broad and narrow readings of the public use clause have received much attention from legal scholarship.[108] However, when studying the case law in more depth, a complementary picture emerges, testifying to some cohesion in the states' jurisprudence. Regardless of their reading of the public use requirement, state courts seem to have agreed that the question of what counted as a public use was a judicial question that should be assessed concretely, not abstractly.

A good example is the case of *Dayton Gold & Silver Mining Co v Seawell*, concerning an act that gave mineral owners a right to acquire additional rights needed to facilitate extraction.[109] The Supreme Court of Nevada decided that the act was constitutional on the basis of a highly contextual reading of the public use requirement in the property clause of the Constitution of Nevada. Interestingly, the Court argued against a literal (narrow) reading on the basis that such a reading would ultimately provide *weaker* protection of property:

> If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. [...] Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to

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107 According to Nichols, the narrow view emerged as the "majority" opinion on public use, see (Nichols [n 83] 617-618). But contrast this with Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203 and Meidinger (n 92) 24, who argue that the narrow view was only dominant in a handful of states, led by New York.

108 See Nichols (n 83); Berger (n 107); Meidinger (n 92); Johnson (n 91).

109 *Dayton Gold & Silver Mining Co v Seawell* 11 Nev 394 (1876).

> very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor.[110]

The quote presents an argument in favour of a broad understanding of the public use requirement. However, it also prescribes broad judicial review of takings purposes, including purposes that would appear to pass a 'narrow' public use test. In this way, it asks us to resist the temptation to think that a broad understanding of public use necessarily entails a public use test that can be passed more easily.

The Court follows up on its reading of the public use requirement by giving a highly contextual assessment of the takings purpose. Specifically, it considers the social and economic importance of mining, concluding that it is the "greatest of the industrial pursuits" and that all other interests are "subservient" to it.[111] Indeed, the Court goes as far as to conclude that the benefits of the mining industry are "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".[112] On this basis, the Court upholds the taking.

I am agnostic as to whether or not this decision was based on an accurate description of the mining industry in Nevada in the late 19th century. The importance of the decision and the remarks above does not turn on this factual question. Rather, the importance arises from the fact that the Court felt the need to scrutinize the takings purpose very broadly. The issue of legitimacy was not approached as a linguistic exercise or an attempt at recreating the original intent of the relevant property clause. Instead, the court proceeded on the basis of their assessment of the prevailing social and economic conditions in the state of Nevada.

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110 *Dayton Gold & Silver Mining Co v Seawell* (n 109) 410-411.

111 *Dayton Gold & Silver Mining Co v Seawell* (n 109) 409.

112 *Dayton Gold & Silver Mining Co v Seawell* (n 109) 409.

The Court noted the importance of deference to the legislature on matters of policy, but qualified this by remarking that any authority to take property had to be "enforced by the courts so as to prevent its being used as an instrument of oppression to any one".[113] Furthermore, the Court was convinced that its contextual approach in this regard would generally offer *increased* protection of private property compared to more formalistic approaches. The Court summarised its view on this as follows:

> Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent.[114]

The *Seawell* case is not unique. For another example, I mention *Ryerson v Brown*, a case often cited as an authority for a narrow view of public use.[115] Here the taking in question was held to be unconstitutional. However, the Supreme Court of Michigan qualified also made clear that it was "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain".[116]

The case concerned the constitutionality of a taking under a mill act, and while the court argues that public use should be taken to mean "use in fact", it is clear that "use" is understood rather loosely, not literally as physical use of the property that is taken.[117] Moreover, when clarifying its

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113 *Dayton Gold & Silver Mining Co v Seawell* (n 109) 412.

114 *Dayton Gold & Silver Mining Co v Seawell* (n 109) 398.

115 *Ryerson v Brown* (n 106).

116 *Ryerson v Brown* (n 106) 337.

117 The court explains its stance on the public use restriction by stating (emphasis added) "it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to *accommodations*." The court continues with an illustrative example: "A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbour to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed the two

starting point for judicial scrutiny, the court explains that "in considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties". Following up on this, the court finds, with respect to the case in question, that "the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it". On thi basis, the Court strikes down the taking, summing up its factual assessment as follows: "what seems conclusive to our minds is the fact that the questions involved are questions not of necessity, but of profit and relative convenience".[118]

Hence, far from nitpicking on the basis of the public use phrase, the court adopts a contextual approach to takings that is rather similar to the approach of *Dayton Gold & Silver Mining Co. v. Seawell*. The outcome is different, but it is also based on a different assessment of the context and the consequences of the takings complained about. Importantly, the case does not rest on any *a priori* assumption that economic development takings of the kind in question could not meet a public use test – no general rule is relied on at all. Hence, it is somewhat strange that later commentators have focused on the case for its ambiguous comments on public use as "public in fact" rather than its broad and well-reasoned assessment of actual legitimacy.[119]

Many of the important cases from the late 19th century, on both sides of the public use debate, share crucial features with the two cases discussed above.[120] Hence, a shared trait appears to

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last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade". See *Ryerson v Brown* (n 106) 336.

118 *Ryerson v Brown* (n 106) 336.

119 See, for instance, Justice Thomas' dissent in *Kelo*, *Kelo* (n 78) 513 (using *Ryerson* as a reference to support an 'actual use' interpretation of the public use requirement in the fifth amendment).

120 See, e.g., *Scudder v Trenton Delaware Falls Co* (n 105) (Eminent domain power upheld, but said: "The great principle remains that there must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule. What may be considered a public use may depend somewhat on the situation and wants of the community for the time being."), *Fallsburg Power & Mfg Co v Alexander* (1903) 101 Va 98 (Eminent domain struck down, on holding that "the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain"), *Board of Health of Portage Tp v Van Hoesen* 87 Mich 533, 538 (1891)

have emerged among state courts during this period, namely a willingness to engage in broad judicial scrutiny of the legitimacy of economic development takings. Indeed, state courts appear to have been conscious of the special legitimacy questions that arise when eminent domain is used to facilitate economic development through commercial enterprise. The question of how to understand public use terminology was an important part of this, but it was not considered in isolation from other aspects.

This observation is relevant when considering the takings doctrine that later developed at the federal level. In particular, the broad scrutiny offered by state courts suggests that the doctrine of extreme deference that was about to be adopted by the Supreme Court resulted from a completely new development, not a continuous broadening of the public use requirement.[121]

3.5.3 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.[122] 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.[123]

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.[124] 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

(Eminent domain struck down, qualified by "not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use").

121 This contrasts with the argument given by the majority in *Kelo*, see *Kelo* (n 78) 479-480 (placing the doctrine of deference in a tradition emerging from how the narrow view of some early state courts "steadily eroded" because of the "diverse and always evolving needs of society").

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

123 Meidinger (n 92) 30.

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

legitimacy.[125]

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.[126] Later, in 1897, the Supreme Court held that state takings could be scrutinized also against the takings clause of the fifth amendment.[127]

The early 20th century was a period of great optimism about the ability of *laissez faire* capitalism to ensure progress and economic growth, a sentiment that was reflected in the federal case law on eminent domain. A particularly clear expression of this can be found in *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co.*[128] This case dealt with the legitimacy of condemnation arising from the construction of a hydropower plant. The Supreme Court held that it was legitimate, with the presiding judge arguing briskly as follows:

> The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The

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

126 See, e.g, *Head* (n 98).

127 See *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 82).

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

> inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.[129]

On the one hand, the Court notes the importance of deference to the *state* judgement (not specifically the judgement of the state legislature). On the other hand, it prefers to conclude on the basis of its own assessment of the purpose of the taking. This assessment, however, is not grounded in the facts of the case or the circumstances in Alabama. Rather, it is based on sweeping assertions about "all our welfare" and the desire to "save mankind from toil that it can be spared". This marks a contrast with the approach of state courts, as discussed in the previous subsection.

The contrast was even greater in cases when the takings in question had been authorised by the federal government itself. In such cases, the Supreme Court showed little willingness to subject takings purposes to 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".[130]

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".[131] In this judgement, Chief Justice Hughes also describes how the judicial assessment of the public use question should be carried out:

> In deciding such a question, the Court has appropriate regard to the diversity of local

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129 *Mt Vernon-Woodberry Cotton Duck Co* (n 128) 32.

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

131 *City of Cincinnati v Vester* (n 85) 447.

> conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[132]

Notice how this echoes the contextual approach developed at the state level, while explicitly prescribing deference to state *courts*. In the earlier case of *Hairston v Danville & W R Co*, from 1908, the same idea 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."[133] 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 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.[134]

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.[135] 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

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132 *City of Cincinnati v Vester* (n 85) 447.

133 *Hairston v Danville & W R Co* (n 84) 606.

134 *Hairston v Danville & W R Co* (n 84) 606.

135 *Hairston v Danville & W R Co* (n 84) 607.

we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[136]

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.[137] Thirdly, 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 required public use test.

Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference.[138] This happened in *US ex rel Tenn Valley Authority v Welch*, concerning a federal taking.[139] The Court first cited *US v Gettysburg Electric R Co* as an authority in favour of deference with regards to the public use limitation.[140] The Court then paused to note that *Vester* later relied on the opposite view, namely that the public use test was a judicial responsibility.[141] 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

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136 *Hairston v Danville & W R Co* (n 84) 606.

137 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 85) 606.

138 In fact, it was cited in this way also by the majority in *Kelo*, see *Kelo* (n 78) 482-483.

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

140 *US v Gettysburg Electric R Co* (n 130).

141 *City of Cincinnati v Vester* (n 85).

overruled the state courts on the public use issue.[142] 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*.[143] 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".[144] The Court provides only two references to previous cases to back up this claim, one of them being *Welch*.[145]

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.[146] 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*.[147] 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

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142 See *U S ex rel Tenn Valley Authority v Welch* (n 139) 552.

143 *Berman v Parker* (n 2).

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

145 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 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).

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

147 *Midkiff* (n 145).

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".[148]

The formulation here is slightly less absolute than that given in *Berman*. In particular, the deferential stance is not presented as a system imperative, but rather made contingent on the fact that legislatures are "better able" to assess what counts as a public purpose. Moreover, Justice O'Connor also actively refers to the merits of the taking, especially when she points out that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers".[149]

Despite these nuances, *Midkiff* reaffirmed the main principle expressed in *Berman*, namely that the meaning of public use is a matter for legislatures and that the room for judicial review is narrow. 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.

Formally, the case law on the federal takings clause is not binding on state courts when they assess cases against their own constitutions.[150] Moreover, as Merrill notes, state courts have not uniformly responded by embracing deference towards their own legislatures.[151] Rather, many state courts continued to offer scrutiny of taking purposes, despite the signals coming from the federal level.[152]

It should be noted, however, that the time after *Berman* was also a time when many government

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148 **hawaii84**.

149 **hawaii84**.

150 See Thomas W Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61, 95.

151 Merrill (n 150) 65.

152 Merrill (n 150) 65.

bodies throughout the US would actively seek to condemn homes for redevelopment projects, to combat "blight", but often also to the benefit of commercial enterprises.[153] Hence, continued public use scrutiny at state courts might also reflect an increased threat of eminent domain abuse. Sometimes, moreover, state courts seems to have failed in their duty to offer appropriate protection.

The case of *Poletown Neighborhood Council v City of Detroit* is a classic example.[154] In this case, the Michigan Supreme Court held that it was not in violation of the public use requirement in the Michigan Constitution to allow General Motors to displace some 3500 people for the construction of a car assembly factory. The majority 5-2 cites *Berman*, commenting that the state court's room for review of the public use requirement is similarly limited.[155]

The *Poletown* decision was controversial, and the minority, especially Justice Ryan, was highly critical of it. He objects both to the deferential stance in general and to the majority reading of *Berman* in particular, pointing out that the Supreme Court's doctrine of deference outside the context of federal takings was directed at the state courts, not state legislatures.[156] Hence, as he concludes, the majority's reliance on *Berman* was "particularly disingenuous".[157]

Justice Ryan was not alone in his disapproval of *Poletown*.[158] Moreover, the case is widely regarded as the prelude to an era of increased tensions over economic development takings in the US.[159] This would culminate with *Kelo* which, despite upholding and strengthening the deferential doctrine, also inadvertently caused a shift towards stricter public use scrutiny at the state level,

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153 See generally Wendell E Pritchett, 'The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain' (2003) 21(1) Yale Law & Policy Review 1.

154 *Poletown Neighborhood Council v City of Detroit* (n 87).

155 *Poletown Neighborhood Council v City of Detroit* (n 87) 632-633.

156 *Poletown Neighborhood Council v City of Detroit* (n 87) 668.

157 *Poletown Neighborhood Council v City of Detroit* (n 87) 668.

158 Indeed, the decision would later be overturned by the Supreme Court of Michigan itself, see generally Timothy Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (2005) 28(2) Harvard Journal of Law and Public Policy 651.

159 See Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 158) 664-668.

as discussed in the following subsection.

3.5.4 Economic Development Takings after *Kelo*

The fact that *Kelo* was decided against the homeowner met with wide disapproval among the public.[160] In addition, many scholars expressed concern that the deferential approach had been taken too far, and that economic development takings such as *Kelo* were in need of more substantive public use scrutiny by courts.[161] Moreover, following *Kelo*, much attention was directed at the perceived dangers of eminent domain abuse in the US.[162]

Many states responded by introducing reforms aimed at limiting the use of eminent domain for economic development.[163] Within two years, 44 states had passed post-*Kelo* legislation in an attempt to achieve this.[164] 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.[165] 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".[166]

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160 See Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100, 2109.

161 For a small sample, see Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377; Timothy Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (2006) 10 Chapman Law Review 1; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183; Nicholas M Gieseler and Steven Geoffrey Gieseler, 'Strict Scrutiny and Eminent Domain After Kelo' English (2010) 25(2) Journal of Land Use & Environmental Law 191.

162 See generally Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160).

163 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 160).

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

165 See Eagle and Perotti (n 163) 107-108.

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

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.[167] 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.[168]

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.[169] Many 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.[170] As Somin observes, the reforms taking place via this route would be comparatively strict, testifying to the power of direct democracy.[171]

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.[172]

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.[173] At the same time, property lawyers report

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167 Eagle and Perotti (n 163) 809.

168 Eagle and Perotti (n 163) 804.

169 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2143.

170 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2148.

171 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2143-2149.

172 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2109.

173 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2170-2171.

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.[174]

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.[175] For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on practices that a majority of citizens actually oppose.[176] 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.[177]

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

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174 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").

175 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2170.

176 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2163-2171.

177 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 160) 2155-2157.

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.[178]

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. At least, it should be possible to devise mechanisms for benefit sharing in these cases, to make the imposition of a development project appear less unfair to local owners.

In the next subsection, I will consider two proposals for reforms of this kind, both of which rely on proposing new institutions for collective action. The first specifically targets the question of benefit sharing by proposing a special negotiation mechanism for determining the level of compensation after an economic development taking. The second proposal targets the decision-making process leading to economic development through condemnation by proposing a framework for land assembly that is meant to replace the use of eminent domain in many circumstances.

[178] For a similar perspective, see Underkuffler, 'Kelo's moral failure' (n 161).

3.6 Institutional Proposals for Increased Legitimacy

In this subsection, I first present the Special Purpose Development Companies (SPDCs) proposed by Lehavi and Licht.[179] I relate this proposals to theoretical approaches to the issue of compensation, before I go on to note some shortcomings and open questions that I will later address in my case study. I then go on to consider the Land Assembly Districts (LADs) proposed by Heller and Hills.[180] I consider this proposal in light of the stated motivation, which is to design an effective mechanism of self-governance that can replace eminent domain in economic development cases. I present some unresolved questions and argue that there is a tension in the proposal between its narrow scope, imposed to prevent majority tyranny and other forms of abuse, and its broad goal of empowering local communities.

3.6.1 Special Purpose Development Companies

An important distinguishing feature of economic development takings is that they give the taker an opportunity to profit commercially from the development. This may even be the primary aim of the project, with the public benefiting only indirectly through potential economic and social ripple effects. Property owners facing condemnation in such circumstances might expect to take a share in the profit resulting from the use of their land. However, in many jurisdictions, including the US, the rules used to calculate compensation prevents owners from getting any share in the commercial surplus resulting from development.[181] In particular, various *elimination rules* are typically in place to ensure that compensation is based entirely on the pre-project value of the land that is being

[179] Lehavi and Licht (n 3).

[180] Heller and Hills (n 3).

[181] See, e.g., Lee Anne Fennell, 'Taking Eminent Domain Apart' (2004) 2004 Michigan State Law Review 957, 965-966.

taken.[182] That is, the value of the development potential itself is not to influence the compensation payment (at least not to a greater extent than it was already reflected in the value of the property prior to the development plans). The policy reasons for such rules is that they ensure that the public does not have to pay extra due to their own special want of the property. After all, this is one of the main purposes of using eminent domain in the first place: to ensure that the public does not have to pay extortionate prices for land needed for important projects. However, when the purpose of the project is itself commercial in nature, there appears to be a shortage of good policy reasons for excluding this value from consideration when compensation is calculated. This is especially true when, as in the US, compensation tends to be based on the market value of the land taken. Why should a commercial condemner's prospect of carrying out economic development with a profit be disregarded when assessing the market value? In any fair and friendly transaction among rational agents, one would expect benefit sharing in a case like this. Yet for economic development backed up by eminent domain, the application of elimination rules ensures that all the profit goes to the developer.

Some authors have argued that failures of compensation is at the heart of the economic takings issue and that worry over the public use restriction is in large part only a response to concerns about the "uncompensated increment" of such takings.[183] In addition to the lack of benefit sharing, previous work has identified two further problems of compensation that also tend to become exasperated in economic development cases. First, the problem of "subjective premium" has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.[184] For instance, if a home is condemned, the homeowner will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate

[182] See Robert H Freilich, 'Condemnation Blight: Analysis and Suggested Solutions' in *Current Condemnation Law: Takings, Compensation and Benefits* (American Bar Association 2006) 81.

[183] See Fennell (n 181) 962.

[184] Fennell (n 181) 963.

"objective" logistic costs as well as more subtle costs, such as having to familiarize oneself with a new local community. Second, the problem of "autonomy" has been discussed, arising from the fact that an exercise of eminent domain deprives the landowner of their right to decide how to manage their property.[185]

In[186], the authors propose a novel approach for addressing the "uncompensated increment" in economic takings cases. Their proposal is based on a new kind of structure that they dub a *Special Purpose Development Corporation* (SPDC). The idea is that owners affected by eminent domain will be given a choice between standard pre-project market value and shares in a special company. This company will exist only to implement a specific step in the implementation of the development project: the transaction of the land-rights. The SPDC may choose either to offer their rights on an auction or else negotiate a deal with a designated developer.[187] Hence, the idea is to ensure that the owners are paid a value that reflects the post-project value of the land, but in such a way that the holdout problem is avoided. In particular, the SPDC will have a single task: to sell the land for the highest possible price within a given time frame.[188] After the sale is completed, the SPDC will divide the proceeds as dividends and be wound up.[189]

Other suggestions have taken a more static approach to compensation reform, such as proposing to give owners a fixed premium in cases of economic development, or developing mechanisms of self-assessment to ensure that compensation is based on the true value the owner attributes to his own land.[190] Compared to such proposals, the idea of SPDCs is more sophisticated and should be

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185 Discussed in Fennell (n 181) 966-967. For a general personhood building theory of property law, see Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press 1993). For a general economic theory of the subjective value of independence, see Matthias Benz and Bruno S Frey, 'Being Independent Is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy' (2008) 75(298) Economica 362.

186 Lehavi and Licht (n 3).

187 Lehavi and Licht (n 3) 1735.

188 Lehavi and Licht (n 3) 1741.

189 Lehavi and Licht (n 3) 1741.

190 A range of static proposals have been proposed in the literature: Merrill proposes 150 % of market value for takings

looked at in more depth.

The conceptual premise for the proposal is that takings for economic development can be seen as compulsory incorporation, a pooling of resources useful in overcoming market failures.[191] Just as the corporation is formed to consolidate assets in order to facilitate effective management, so is eminent domain used to assemble property rights in order to facilitate efficient organization of development. According to Lehavi and Licht, this also provides a viable approach to problems of "opportunistic behavior"; hierarchical governance after assembly ensures that order and unity can be regained even if interests in the land are distributed among a large and heterogeneous group of potentially mischievous shareholders.[192] In the words of Lehavi and Licht:

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

As soon as we look at the rationale behind economic development takings in this way, any remnant of good policy reasons for ensuring that the developer gets all the profit seems to disappear. Rather, we are led to consider compensation as an issue entirely separate from the exercise of the takings power. After the land has been reorganised by eminent domain and an SPDC has been

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that are deemed to be "suspect", including takings for which the nature of the public use is unclear, see Merrill (n 150) 90-93. Krier and Serkin propose a system that provide compensation for a property's special suitability to its owner, or a system where compensation is based on the court's assessment of post-project value, see James E Krier and Christopher Serkin, 'Public Ruses' (2004) 2004 Michigan State Law Review 859, 865-873. Fennell proposes a system of self-evaluation of property for taking purposes with tax-breaks given to those who value their property close to market value (to avoid overestimation), see Fennell (n 181) 995-996. Bell and Parchomovsky also propose self-evaluation, but rely on a different mechanism to prevent overestimation; tax liability is based on the self-reported value and no property can be sold by its owner for less than his reported value, see Abraham Bell and Gideon Parchomovsky, 'Taking Compensation Private' (2007) 59(4) Stanford Law Review 871, 890-900.

191 Lehavi and Licht (n 3) 1732-1733.

192 Lehavi and Licht (n 3) 1733.

formed, the land rights might as well be sold *freely* to a developer. In this way, the land will be sold for a price that is closer to an actual market value, on the market where the land is destined for development.[193] More generally, the SPDC becomes an aid that the government can use to create more favourable market conditions for transferring land that has commercial potential in its public use. Due to the compulsory pooling of resources, no owner can exercise monopoly power by holding out, but due to decoupling of compensation from assembly, the owners can now negotiate with potential developers for a share of the resulting profit. Moreover, the fact that the SPDC offers its rights on an actual market can also help ensure that more information becomes available regarding the true economic value of the development, something that may in turn help ensure that only the good projects will be successful in acquiring land. Hence, according to Lehavi and Licht, an additional positive effect of SPDCs is that developers and governments will shy away from using the eminent domain power to benefit projects that are not truly welfare-enhancing.[194]

In addition to these substantive consequences, the SPDC-proposal also stands out because it has a significant institutional component, pointing to its potential for restoring procedural legitimacy as well as substantive fairness. Lehavi and Licht discuss corporate governance issues at some length, but without committing themselves to definite answers about how the operations of the SPDC should be organised.[195] Indeed, while their proposal is perhaps most interesting because of its procedural aspects, it also appears to be rather preliminary in this regard. The main idea is to let the SPDC structure piggyback on existing corporative structures, particularly those developed for securitisation of assets.[196] The basic idea is that the corporate structure should be insulated

193 Lehavi and Licht (n 3) 1735-1736.

194 Lehavi and Licht (n 3) 1735-1736.

195 Lehavi and Licht (n 3) 1040-1048.

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

from the original landowners to the greatest possible extent; it should have a narrow scope, it should be managed by neutral administrators, and it should entrust a third party with its voting rights.[197] This is meant to prevent failures of governance within the SPDC itself, making it harder for majority shareholders and self-interested managers to co-opt the process. For instance, if a possible developer already holds a majority of the shares in an SPDC, this structure would prevent him from using this position to acquire the remaining land on favourable terms.

Lehavi and Licht observe that under US law, the government would often be required to make shares in an SPDC available to the landowners as a public offering.[198] Lehavi and Licht deem this to be desirable, arguing that full disclosure will provide owners with a better basis on which to decide whether or not to accept SPDC shares in place of pre-project market value. It will also facilitate trading in such shares, so that they will become more liquid and therefore, presumably, more valuable.[199]

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

It seems that from the owners' point of view, Lehavi and Licht's proposals for governance reduces the SPDC to a mechanism whereby they can acquire certain financial entitlements. These may exceed those that would follow from standard compensation rules, but they do not directly empower owners vis-á-vis developers and the government. Instead, a largely independent structure will be introduced. It is this new organisational structure, rather than the owners, that will now

197 Lehavi and Licht (n 3) 1742.

198 Lehavi and Licht (n 3) 1745.

199 Lehavi and Licht (n 3) 1746.

become an important actor in the eminent domain process. In principle, it is meant to represent owners, but to what extent can it do so effectively? After all, it is specifically intended to operate as neutral player, charged with maximising the price, nothing more. Hence, it appears that the SPDC will not be able to give owners an arena to negotiate on the basis of property's social functions. Indeed, the institutional component of the SPDC proposal specifically targets a narrow, entitlements-oriented, perspective on what it means to be an owner and why property should be protected.

With regards to individual aspects of property's social function, such as the personal attachments it engenders, or the sense of autonomy it provides, the idea that money can compensate for the owners' loss is not entirely implausible. Some standard examples include compensation for relocation costs and compensation for the cost of juridical assistance. And, indeed, in many jurisdictions, the law already provides for such compensation.[200]

In general, however, may would no doubt object that financial compensation is beside the point with regards to subjective values pertaining to the individual's own unique relationship with their property. The aftermath of *Kelo* itself can serve as an illustration of this.

After the case, Suzanne Kelo remained defiant at first, but eventually decided to settle in 2006, for an offer of USD 442 155, more than USD 319 000 above the appraised value.[201] Despite this, there is no indication that Suzanne Kelo changed her view of the taking. Indeed, after the long struggle she had taken part in, it is easy to imagine that financial compensation, if it was to be an effective remedy at all, would have to be very high. Even after she had settled, Kelo apparently toured the country speaking out against economic takings.

Hence, the significant overcompensation she received, compared to standard market value, did

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200 See, e.g., Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006) 105(1) Michigan Law Review 101, 121-126.

201 Lehavi and Licht (n 3) 1709.

not restore legitimacy, not even to her personally. Moreover, to the community as a whole, it apparently did more harm than good. Indeed, the other owners affected by the same development plan were not pleased, arguing that recalcitrant owners had been unjustly rewarded for holding out.[202]

This is indicative of the fact that when we move to consider the role of the community, including property dependants that have no formal claims as owners, the compensatory perspective falls short of providing a meaningful approach. Indeed, as laid down by Lehavi and Licht, it does not seem like SPDC will do much good for the community. It will not better enable its members to fulfil their obligations and responsibilities with regards to each other, their land, and society's desire for economic development. Rather, it will render them just as passive as under traditional eminent domain proceedings, the only difference being that they might benefit financially if the SPDC administrators do their job well.

The problems addressed here both seem to point to the fact that the SPDCs, while more flexible than other suggestions, are still too static to achieve many of their objectives. In particular, to arrive at genuine market conditions for assessing post-project value, there is still a need for changes in the dynamics of the planning process underlying the taking. Moreover,

This only adds to the number of external authorities on whose judgement and discretion the faith of the community will depend. If the SPDC proposal is thought of as representing as a layer *between* the owners, the government and interested developers, the result can also be a further marginalisation of individual owners, for whom it is now even harder to gain access to primary decision-makers.

To better fulfil the goal of ensuring increased legitimacy, there is a need for a mechanism that goes beyond expert bargaining and provides owners with better access to the decision-making process. In the next subsection, I will consider a proposal that aims to address this, by proposing

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202 Lehavi and Licht (n 3) 1709.

a framework for self-governance.

3.6.2 Land Assembly Districts

In a recent article, Heller and Hills propose a new institutional framework for carrying out land assembly for economic development. Interestingly, it is meant to replace eminent domain altogether. The goal is to ensure democratic legitimacy while also creating a template for collective decision-making that will prevent inefficient gridlock and holdouts.

The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[203] 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 must consent before it is formed.[204] 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.[205] 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.[206] 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.[207]

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 ap-

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[203] Heller and Hills (n 3) 1469-1470.

[204] Heller and Hills (n 3) 1488-1489.

[205] 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.

[206] 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.

[207] Heller and Hills (n 3) 1496.

proving and spelling out the parameters within which the LAD is called to function.[208] Hence, it appears to be assumed that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue. A possible challenge that arises, not discussed by Heller and Hills at any length, is that the scope of the LAD needs to be broad enough to allow for meaningful competition and negotiation after LAD formation. But there will probably be a push, both by governments and initiating developers, to ensure that the scope is defined narrowly enough to give confidence that zoning permissions will not be denied at a later stage. Hence, the LAD proposal needs to ensure a balanced approach to the issue of how the initial development plan should be defined, and to what extent it should limit the authority of the LAD.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, the government will be precluded from using eminent domain against them to assemble the land.[209] This is the crucial novel idea that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. LADs will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead. 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. This makes the proposal stand out in the recent literature on economic takings. It is the first concrete suggestion that addresses the democratic deficit in a dynamic, procedural manner, without failing to 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, observe 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

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

209 Heller and Hills (n 3) 1491.

Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[210]

After the formation of the LAD, the government will not be able to use eminent domain against it, but the planning authorities will still occupy an important role. Heller and Hills envision a system of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[211] In this process, it is assumed that other interests will also be represented, such as owners of adjoining land, who might want to raise objections against the project. However, their role in the process is not clarified in any detail, raising worries about the extent to which the LAD will 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 local community.

The LAD proposal also raises issues pertaining to the proposed mechanism of collective decision-making among owners. As Kelly points out, the basic mechanism of majority voting is imperfect.[212] He argues, in particular, that 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 alternative development, conflicting with the LAD proposal, they might simply be ignored. Indeed, they might have to be ignored, since the formation of the LAD itself precludes the kind of development they wish to pursue. This could become particularly inefficient in cases when this development would also be more socially desirable

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210 Heller and Hills (n 3) 1490.

211 See Heller and Hills (n 3) 1490-1491.

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

than the development that will benefit from assembly. The role of the LAD in such cases will not improve the quality of the decision to develop, since it pushes the decision-making process into a track where those interests that *should* prevail are voiced only by a marginalised minority inside the new institution.[213]

More generally, the lack of clarity regarding the role of LADs in the planning process is a problem. As it stands, the proposal leaves it uncertain how LADs will affect the decision-making process regarding development.

However, the ideal is clearly stated. LADs should help to establish self-governance for land assembly. 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".[214] 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".[215] Unfortunately, these ideals are somewhat at odds with the concrete rules that Heller and Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills echo many of the "corporate governance"-ideas that also feature heavily in Lehavi and Licht's proposal. Indeed, in direct contrast to their comments about "broad discretion" and "self-governance", Hiller and Hills also state that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[216] This is a good thing, according to Heller and Hills, since it provides a safe-guard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt

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213 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.

214 See Heller and Hills (n 3) 1496.

215 See Heller and Hills (n 3) 1498.

216 See Heller and Hills (n 3) 1500.

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?".[217]

But this means that there is an internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority tyranny on the other. Moreover, 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 meaningful "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 choose among development proposals. Effectively, it will render LADs as little more than a variant of SPDCs, where the owners are awarded an extra bargaining-chip, namely the option to refuse all offers.

In my view, such a restriction on the operations of LADs is not desirable. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will emerge in response to the formation of a LAD. Such proposals may involve novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commer-

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

cially attractive, even if the price offered is not competitive. In particular, the formation of a LAD and the competition for development that ensues creates an opportunity for tapping into a greater pool of ideas for redevelopment, ideas which may then also be rooted more firmly in the local community. Surely, getting such proposals to the table would be desirable. Moreover, it would take us to the heart of self-governance. At the same time, it is easy to acknowledge that problematic situations may arise, for instance if a majority forms in favour of a scheme that involves razing only the homes of the minority, maybe on the rationale that these are the most blighted properties. That would likely give rise to accusations of unfair play, which may or may not be warranted. But irrespective of this, an alternative project of this kind might well be a better use of the land in question, also from the point of view of the public. Hence, it would seem that the planning authorities would be obliged to give it some serious consideration. Then, however, the LAD has truly become an arena for a new kind of power play among different interests, and a potential vehicle of force for whomever secures support from a majority of owners within the district.

In their proposal, Heller and Hills are aware of this potential problem, which they propose to resolve by strict regulation. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[218] But this raises further questions. For one, what is meant by "affiliation" here? Say that a landowner happens to own shares in some of the companies proposing development. Should he then be barred from voting? If so, should he be barred from voting on all proposals, or just those involving companies in which he is a shareholder? If the answer is yes, how would this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that his vote is biased against assembly that would benefit a competing

[218] Heller and Hills (n 3).

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, especially if a low-level employment relationship has such a dramatic effect. But in some cases even low-level ties could play a decisive factor. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees.

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

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

3.7 Conclusion

In this chapter, I have given a more in-depth presentation of economic development takings. I began by noting that the issue is particularly pressing for land users that are not regarded as bringing about economic growth. Hence, I argued that the issue is closely related to that of land grabbing, which is currently receiving much attention, both academic and political. Under the social function understanding of property there is in principle no difference between protecting property rights arising from formal title and property rights arising from use. That said, special issues arise in the latter case, not least because it is unclear how the law should deal with rights resulting from cultural practices that western property regimes are not designed to handle. In addition, I noted that special issues related to poverty and basic necessities such as food and water arise with particular urgency in relation to land grabbing.

The nature of my case study makes it natural for me to focus on traditional western systems of property law. Hence, I went on to discuss how economic development takings are dealt with in such legal systems, focusing on Europe and the US respectively. For the case of Europe, this assessment was made more difficult by the fact that the category is not an established part of legal discourse. However, by looking to England for concrete examples, I noted that such cases do arise and that they are increasingly seen as controversial.

I then went on to consider the property protection offered by P1(1) of the ECHR, and how it is applied by the Court in Strasbourg. I zoomed in on those aspects that I believe to be the most relevant for economic development takings. While I noted that this category has yet to be discussed by the ECtHR, I argued that a recent shift in the Court's property adjudication is suggestive of the fact that it would likely approach such cases similarly to how Justice O'Connor approached *Kelo*. In particular, I noted how the Court has recently adopted a stricter standard of assessment. This standard, I argued, is characterised primarily by increased sensitivity to systemic

imbalances causing alleged P1(1) violations. Hence, to regard economic development takings as a special category appears to fit well with recent jurisprudential developments at the Court in Strasbourg.

I went on to consider US sources on economic development takings, noting that the issue has receive an extraordinary amount of attention in recent years. I adopted an historical approach to the material, by tracing the case law surrounding the public use restriction in the fifth amendment to the US constitution, which was much debated even before the specific issue of economic development takings rose to prominence. I focused particularly on case law developed by state courts, and I argued that it shows great sensitivity to the need for contextual assessment. Indeed, it seems that many state courts originally adopted an implicit social function view of property when assessing such cases.

I then looked at the history of Supreme Court adjudication of public use cases. I noted that the doctrine of deference was developed early on, but that it was initially directed mainly at state courts. In fact, I showed that the Supreme Court itself explicitly approved the contextual and in-depth approach these courts relied on when dealing with the legitimacy issue.

The shift, I argued, came with *Berman*, in which the Supreme Court adopted a deferential doctrine that was directed specifically at the state legislature.[219] This was quite a dramatic departure from the Court's previous attitude towards state takings. Moreover, it was almost entirely backed up by precedent set in cases when *federal* takings had been ordered by Congress.

I went on to consider the fallout of *Berman* at state level, which culminated with the infamous *Poletown* case. This case prompted wide-spread accusations of eminent domain abuse and thus set the stage for *Kelo*.

After completing the historical overview, I went on to consider the literature after *Kelo*. I expressed particular support for those responses that focus on the need for *institutional* reform, to

[219] *Berman v Parker* (n 2).

address dangers that Justice O'Connor pointed to in her minority opinion. As a shorthand, I proposed referring to the mechanisms she identified as the *democratic deficit* of economic development takings.

I then gave a thorough presentation of two recent reform suggestions that might help address this deficit. Both are institutional in nature, based on setting up formally recognised coalitions of land owners that can act as a counterweight to the disproportional power of commercial beneficiaries. The first suggestion, by Lehavi and Licht, is limited to dealing with the issue of compensation, recognising the need for a system whereby the land owners are compensated based on post-project value. However, this idea alone represents a fairly dramatic break with the currently dominant doctrine in takings law, where compensation is almost always based on the pre-project value of the land *to the owner*.[220]

In Chapter 5, I will briefly discuss how this principle was abandoned in Norway, for some case types involving hydropower development. However, the broader point that will interest me in thesis concerns the conceptual premise of Lehavi and Licht's proposal. By suggesting that economic development takings can be viewed as a form of compulsory incorporation of private rights, they effectively undermine the justification for disallowing the original owners to take up a corresponding share in the resulting enterprise. This, in my view, is a powerful idea that has implications that go well beyond the issue of compensation. In particular, it points to the possibility of avoiding eminent domain altogether, by proposing a suitable framework for collective action regarding economic development.

The second suggestion I looked at in depth, proposed by Heller and Hills, is based on a similar idea. However, it does not go as far as to explicitly suggest that owners themselves should be granted shares in the development enterprise. Instead, the focus is on organising a process for

[220] This is a reflection of the no-scheme principle, mentioned briefly in Section **??** above. For further details, I refer to Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 20).

selling the properties required, without the use of compulsion. According to this proposal, local communities should be entitled to greater self-governance in economic development scenarios. At the same time, the proposal recognises the need for a mechanism to avoid inefficient and socially harmful gridlock due to holdouts among unwilling owners. Instead of eminent domain, however, a different mechanism is proposed, namely that of a majority decision made by a land assembly district.

This is also a new type of institution, and I pointed out some problems and seeming inconsistencies in the proposal. I highlighted the lack of clarity regarding the exact role LADs are supposed to play during the planning process. I argued that while the risk of abuse and failure increases with the level of participation, so does the overall potential for achieving a positive effect on legitimacy. I concluded that to reduce the democratic deficit in economic development cases, a wide power of participation must be granted to the land owners and their communities. This is needed, in particular, to restore balance in the relationship between owners and others directly connected with the land, the planning authorities, and the commercial actors interested in development for profit. The question that is as of yet unresolved is how to organise such participation in a way that avoids obvious pitfalls, such as administrative inefficiency and tyranny by majorities or elites that gain control of the local agenda.

In Chapter 6, I will shed light on this question by considering the Norwegian institution of land consolidation, which has a very long tradition behind it. It is a flexible framework which includes, among other things, a template for establishing institutions that can function as a LAD. I will focus on how land consolidation functions in cases of economic development that would otherwise likely be pursued by eminent domain. The case study is based on considering hydropower development, but I will also discuss planning law and development more generally, as the Norwegian government is now considering making consolidation, traditionally a rural institution, a primary mechanism for land development even in urban areas.

Before I delve into this, I will present an overview of Norwegian hydropower and the role of waterfalls as private property. This will serve as an introduction to the second part of this thesis, to which I now turn.