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Promoting Healthy Communities through Land Use Initiatives: Federal Limits on Physical Taking of Property for Public Use

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The Fifth Amendment to the U.S. Constitution states: "[N]or shall private property be taken for public use without just compensation."[1] In this paper, we examine the extent to which the "public use" portion of that prohibition constrains attempts by state and local governments to use their powers of eminent domain to institute land use initiatives to combat childhood obesity. More specifically, some of these land use initiatives may rely on that government's authority to condemn private property on payment of just compensation.[2] Creating more public parks to encourage active play, for example, may require a city to use its eminent domain authority to force unwilling landowners to sell their private property to the city.[3] The public use limitation provides a constraint on the power of state and local governments to compel such sales—landowners cannot be forced to sell their private property to the government unless the condemned property will be put to "public use."[4] This paper evaluates the scope of the public use constraint in the U.S. Constitution, with particular reference to land use initiatives designed to reduce the prevalence of childhood obesity.[5]

While the requirement that condemned property be put to public use seems straightforward, it has, nonetheless, vexed scholars and judges for some time. The easy cases of public use entail the condemnation of private property for government ownership of public infrastructure such as roads, schools, government buildings, and parks.[6] Neither the case law nor the scholarly literature has ever introduced any doubt that these uses constitute valid public uses within the meaning of that phrase in the Fifth Amendment. Thus, any land use initiative that sought to transfer ownership of private property to the government (on payment of just compensation) and to open that property up to use by the public at large would constitute a valid exercise of the government's eminent domain authority. Assuming they have the power under state law to do so, state and local governments are free, under the U.S. Constitution, to compel landowners to sell their property to the government for use as a public park, a hike and bike trail, or any other form of publicly used infrastructure.

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[1] U.S. CONST. amend. V.

[2] Throughout this paper we assume that the relevant local governmental entity has the power of eminent domain under state law. In reality, state laws vary widely among the political subdivisions of the various states, and any program designed to promote the implementation of land use initiatives that rely on the exercise of the power of eminent domain must first ensure that the relevant local government does, in fact, have such authority under applicable state laws.

[3] Of course, the government may also create more public parks by converting land already owned by the government or by seeking donations of land for this charitable purpose.

[4] It is not self-evident that the public use clause was actually intended to impose a constraint on the purposes to which condemned property can be put. It has been suggested that the public use phrase merely provides a description of the particular type of eminent domain for which compensation is required. *See, e.g.*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (outlining this reading of the public use clause). Most scholars, however, assume it is a limiting clause, and the U.S. Supreme Court has consistently treated it as such.

[5] Many state constitutions also contain public use constraints, and these state-level constraints often impose further limitations on the eminent domain powers of state and local governments than are imposed by the federal public use constraint. In addition, most states have adopted statutory restrictions on the use of eminent domain, most particularly in the context of economic development takings (i.e., taking private property from one landowner to transfer it to another to promote economic development). Those state-level limitations are discussed in NPLAN's Land Use Initiatives to Prevent Childhood Obesity and Potential Obstacles from State Takings Laws, *available at* http://www.nplanonline.org.

[6] *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 861.

The inquiry is made more difficult, however, when the use to which the government wishes to put the property entails private ownership of the condemned property. Some such cases are still rather obviously valid public uses. For example, the provision of essential public infrastructure by highly regulated private entities, such as railroads and utility companies, has long been recognized as satisfying the public use requirement. Because such uses are highly regulated and the new private owners may not pick and choose which members of the public to serve, they are essentially "open to the public," and most theories of public use readily encompass them. In contrast, using government compulsion to require the transfer from one private landowner to another, to be put to whatever use the second private landowner wishes, is clearly not for a public use.[7]

In between these two extremes—the condemnation of private property for the private provision of a traditional aspect of public infrastructure (almost always permitted) and the condemnation of private property solely for the benefit of another private landowner (almost never permitted except in extreme cases of market failure)—lies the public use dilemma. Several of the land use initiatives to reduce the prevalence of childhood obesity may fall into this grey area. For example, a city may wish to ensure that residents of certain communities have access to the healthy food available at a full-service supermarket. While the city does not wish to operate a supermarket, it might be able to identify a local developer/retailer who would do so, if land were available at a subsidized price. The city might wish to make land available by condemning property owned by a private landowner and transferring ownership at a below-market rate to the developer who promises to operate a supermarket. This transaction occupies the indeterminate middle ground of public use jurisprudence.

I. Theoretical Perspectives on the Public Use Requirement

Condemnations of private property raise vexing issues under the public use clause only when the condemned property is transferred to private ownership. We refer to these condemnations as private ownership condemnations. The question of whether a particular private ownership condemnation constitutes a permissible public use or a prohibited private benefit is both theoretically indeterminate and inextricably intertwined with the traditional police powers of legislative bodies to act for the public health, safety, and welfare. As a consequence, scholars addressing the public use dilemma have taken two general approaches.

Some, such as Professor Richard Epstein, advance theoretical substantive limitations on the reach of governmental eminent domain powers. Epstein argues that the exercise of eminent domain should be limited, essentially, to cases in which the government is providing a "public good."[8] This requirement would preclude most private ownership condemnations. Epstein's

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[7] Kelo v. City of New London, 545 U.S. 469, 477-78 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'").

[8] RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166-69 (1985). A public good is a good that is impossible to exclude people from consuming once it is produced and that is not diminished by consumption. Public goods are a classic example of market failure, and national defense is the classic example of a public good.

narrow view of the legitimacy of private ownership condemnations is premised on the assumption that the public use limitation serves as a greater principled deterrent to governmental overreaching than the obligation to pay just compensation.[9] However, this categorical approach would empower judges to strike down legislative determinations on a finding that the use did not provide a "public good." Many scholars view this reallocation of authority to the judiciary as unworkable and undemocratic.

As a consequence of the problematic empowerment of the judiciary under substantive public use theories, some scholars attempt to solve the public use dilemma by shifting the focus of the inquiry from the question of what counts as a public use to proxy questions designed to provide judicially manageable standards for limiting impermissible takings without treading on traditional legislative prerogatives. Professors Thomas Merrill and Nicole Stelle Garnett have offered solutions along these lines.[10]

Professor Merrill argues that courts are unwilling or ill equipped to resolve the central question of what constitutes a valid public use, and therefore should focus their inquiry on the means by which government entities should acquire private property rather than evaluate the ends to which the property will be put.[11] Under this approach, courts would focus on "where and how the government should get property, not [on] what it may do with it."[12] In essence, Merrill takes Epstein's challenge to achieve conceptual clarity seriously.[13] In doing so, Merrill draws a distinction between "thin markets" and "thick markets" for private property.[14] Thick markets are markets in which there is sufficiently competitive supply and demand that the owner of private property cannot extract "economic rents" from a potential government buyer.[15] In other words, the private owner cannot secure a price higher than his opportunity costs of forgoing the sale. Thin markets, by contrast, exist whenever the supply of suitable real property for a government project is so limited that the potential seller(s) can extract economic rents. Professor Merrill argues that private ownership condemnations are permissible only in thin markets, never in thick markets.

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[9] *Id.* at 165.

[10] *See, e.g.*, Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61-64 (1986); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936-37 (2003).

[11] Merrill, *supra* note 10, at 63-65.

[12] *Id.* at 66-67 ("The ends question asks what the government plans to do once the property is obtained. This inquiry, in turn, requires a clear conception of the legitimate functions or purposes of the state. May the state promote employment by subsidizing the construction of a privately owned factory? May it own a professional football team or undertake land reform? The answers to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake.").

[13] *Id.* at 73-74 ("A second economic model of public use, recently advocated by Richard Epstein, involves the public goods concept. Public goods, in their pure form, possess two properties: jointness in supply and impossibility of exclusion. In particular, because of the latter attribute, the market generates fewer public goods than generally thought desirable. Hence, theorists have long viewed public goods as an appropriate object of governmental action. Under the public goods model, a court would ask whether an exercise of eminent domain is designed to procure a public good. If so, the court would deem the taking to serve a public use; if not, the court would deem the exercise an unconstitutional taking for a private use. . . . Again, however, the main failing of the public goods model, at least for present purposes, is that it directs attention to ends rather than means. It asks whether government will use acquired property to provide a public good, not whether nonconsensual means are necessary to acquire the property.").

[14] *Id.* at 89.

[15] This behavior is generally referred to as rent seeking.

Professor Garnett extends Professor Merrill's argument, proposing that courts apply an essential nexus and rough proportionality test similar to that used to evaluate conditions on permits to determine the validity of a particular private ownership condemnation.[16] The essential nexus and rough proportionality tests, first developed in *Nollan v. California Coastal Commission*[17] and *Dolan v. City of Tigard*,[18] assesses the validity of a condition imposed on a land use permit by asking whether the condition bears an essential nexus to the legitimate concerns that would justify denying the land use permit and whether the burdens imposed by the condition are roughly proportional to the burdens that are likely to be created by the proposed land use. In the context of private ownership condemnations, Garnett proposes that the courts require similar justifications for the use of eminent domain rather than a private market transaction. In particular, she argues that the courts should require the government to "show that the exercise of eminent domain was reasonably necessary to advance, or related in nature and extent to, the public purpose for which the condemnation power was invoked."[19] This extension of the means/end fit analysis would, in her view, preclude the overuse of eminent domain in those cases in which the obligation to pay just compensation would not be a sufficient deterrent to government action. It would also give courts a way to assess when condemnation was required. In many ways, Professor Garnett is also concerned with the question of who gets to capture the surplus value that is generated by forced sales. According to Professor Garnett, when this value is not incorporated into the market price, but rather is subjective to the owner, it is especially important that government be held to its proof that condemnation is the only way to achieve its goals.

While scholars have been struggling for theoretical clarity in the context of private ownership condemnations, courts have been busy resolving public use challenges. Unfortunately, there is little correlation between the two exercises.

II. The Public Use Clause in the Courts

Perhaps because of the seemingly intractable nature of the public use dilemma, the U.S. Supreme Court has remained largely above the fray, consistently declining to adopt a substantive theory of the public use limitation in the U.S. Constitution. Instead, for most of its history, the Court has relied on a jurisprudence of significant deference to legislative determinations of public purpose. In 2005, in *Kelo v. City of New London*,[20] however, the Court upheld a private ownership condemnation in an opinion that revealed hints of a theory of process-based limitations on the power of eminent domain.

As Professor John F. Hart's extensive chronicle of colonial era land use regulation makes clear, land ownership in this country has long been subject to extensive governmental control.[21] Town leaders, tasked with facilitating the development of entirely new, productive settlements,

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[16] Garnett, *supra* note 10, at 936-37.
[17] 483 U.S. 825 (1987).
[18] 512 U.S. 374 (1994).
[19] Garnett, *supra* note 10, at 964.
[20] 545 U.S. 469 (2005).
[21] John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-81 (1996).

aggressively managed the type and intensity of land use permitted on private parcels.[22] Regulations authorizing condemnation of private property for the economic benefit of the community were extensive, and private property was regularly transferred from one private owner to another owner to facilitate construction of necessary infrastructure that the town leaders believed would be better run by private enterprise, such as mills and roads.[23] Many of these land use decisions were challenged as impermissible condemnations of private property for the private benefit of another citizen.[24]

In response to these challenges, the Supreme Court has consistently embraced a broad interpretation of the public use requirement, holding that the Fifth Amendment authorizes the use of eminent domain in any project that is undertaken for the benefit of the public, whether its actual use is open freely to the public or not.[25] Moreover, the Court has consistently deferred to legislative determinations of what counts as a public benefit.[26] This posture, developed over the course of 150 years, was solidified in two cases decided in the mid- to late twentieth century—*Berman v. Parker*[27] and *Hawaii Housing Authority v. Midkiff*.[28]

The plaintiffs in *Berman* challenged the condemnation of their profitable retail establishment for transfer to another private owner.[29] This condemnation was part of the first phase of the District of Columbia's comprehensive urban renewal program, which targeted Project Area B in the "Southwest Survey Area" for complete revitalization.[30] Although the District's surveys indicated that the area covered by Project Area B was significantly blighted, some of the property, including the plaintiff's, was being profitably used in a productive manner.[31] Nonetheless, the plan called for complete revitalization, requiring the acquisition by purchase, gift, or eminent domain of every parcel.[32] Under the plan, some of the property would be kept in public ownership and used for roads, schools, parks, and similar infrastructure, and the rest would be allocated according to the comprehensive plan to various forms of privately owned residential and commercial use.[33] The reserved land would be resold to private owners and

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[22] *Id.* at 1278-79 (explaining that private landowners were often obligated to put their property to a particular use or have it taken from them to be put to that same use by another private citizen).
[23] Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339 (1999) (chronicling the forced transfer of private property from one citizen to another for the purpose of building mills and private roads).
[24] *See, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530-32 (1906); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).
[25] *See, e.g.*, *Strickley*, 200 U.S. at 531-32 (upholding that condemnation of a right-of-way by a mining company for an aerial bucket line across a placer mining claim as a valid public purpose); Clark v. Nash, 198 U.S. 361 (1905) (holding that a state statute permitting private landowners to condemn the land of their neighbor to create an irrigation ditch to benefit the condemnors' agricultural land served a valid public purpose); *Fallbrook Irrigation Dist.*, 164 U.S. at 160-63 (holding that the condemnation for the construction of an irrigation project to benefit privately owned land constitutes a public purpose).
[26] *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").
[27] 348 U.S. 26 (1954).
[28] 467 U.S. 229 (1984).
[29] *Berman*, 348 U.S. at 31.
[30] *Id.* at 30.
[31] *Id.* at 31.
[32] *Id.* at 30-31.
[33] *Id.*

developers to accomplish the purposes of the renewal plan.[34] Berman objected to being forced to sell his profitable businesses to the District merely to have the District transfer it to another private landowner.[35] The Supreme Court upheld the District's authority to use its power of eminent domain for this purpose, however, stating grandly:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[36]

Moreover, the Court made it clear that legislative determinations of public purpose were entitled to extraordinary deference:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved.[37]

Hawaii Housing Authority v. Midkiff involved an even more dramatic use of eminent domain, consisting entirely of the forced transfer of private property from existing owners to other private owners.[38] The Hawaii Land Reform Act of 1967 authorized the use of eminent domain to force landowners to sell their land in fee simple to their lessees.[39] According to the Hawaii legislature, the forced sales were necessary to break up the oligopolistic landownership patterns that had evolved in Hawaii since Polynesian settlers had established feudal tenurial systems built around ownership by High Chiefs.[40] Midkiff objected to being forced to sell his real property to his lessee, and again the Supreme Court rejected the public use challenge.[41] It held that

> [t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. . . . The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only

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[34] *Id.*
[35] *Id.* at 31.
[36] *Id.* at 33 (citations omitted).
[37] *Id.* at 32 (citations omitted).
[38] 467 U.S. 229, 233 (1984).
[39] *Id.*
[40] *Id.* at 231-33.
[41] *Id.* at 233.

> the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.[42]

In addition, the Court reaffirmed the degree of deference owed to legislative determinations of public benefit, pointing out that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[43]

The *Midkiff* decision was the Court's determinative statement of both the breadth of the public use clause and the degree of deference to be accorded legislative determinations of public purpose for more than twenty years.[44] In light of its expansive holding, federal courts consistently rejected public use challenges to the exercise of eminent domain between 1984 and 2004, until the Court granted certiorari in *Kelo*. In fact, as David Mathues states in his Note, "[a]ll reported federal appellate decisions between 1954 and 1986 in which the definition of 'public use' was contested upheld the challenged use of eminent domain, as did thirteen out of the fourteen reported appellate decisions on point between 1986 and 2003."[45]

In contrast to the deferential posture of the federal courts interpreting the public use clause of the U.S. Constitution, state courts have generally been more willing to strike down private ownership condemnations based on the public use clauses of the relevant state constitutions. Professor Thomas Merrill first observed this phenomenon in 1986 after surveying state and federal cases in which an exercise of eminent domain was challenged on public use grounds.[46] While his survey revealed that federal courts were faithfully adhering to the deferential standard of review articulated in *Berman*, he was surprised to discover that state courts were significantly less deferential in applying their own constitutions' public use requirements.[47] Indeed, his survey revealed a trend of increasingly close scrutiny of public use claims in successive five-year periods between 1954 and 1984.[48]

Intensive state court scrutiny of the public use requirement has continued to rise since Merrill conducted his survey. In some states, this heightened scrutiny is essentially distinct from the limitations imposed by the federal public use clause because the constitutions of these states make clear that whether a proposed use of condemned property constitutes a public use is a matter for judicial, not legislative, determination.[49] For example, the Washington Constitution

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[42] *Id.* at 243-44.
[43] *Id.* at 241.
[44] G. David Mathues, Note, *Shadow of a Bulldozer? RLUIPA and Eminent Domain After* Kelo, 81 NOTRE DAME L. REV. 1653, 1662 (2006).
[45] *Id.*
[46] *See* Merrill, *supra* note 10, at 95.
[47] *Id.* at 96.
[48] *See id.* at 97 ("When we divide the survey cases into five-year periods, we find that the total number of public use cases is fairly constant, ranging from 42-61 cases in each period. But the percentage of [state court] cases holding that a taking does not serve a public use generally increases throughout the 31-year period. The percentages are as follows: 1954-1960, 11.8%; 1961-1965, 12.5%; 1966-1970, 13.1%; 1971-1975, 13.7%; 1976-1980, 21.4%; and 1980-1985, 20.4%.").
[49] Arizona, Colorado, Missouri, and Washington have such provisions in their constitutions. ARIZ. CONST. art. II, § 17 ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the

states that "[p]rivate property shall not be taken for private use. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."[50] Notwithstanding this constitutional directive, the Washington Supreme Court has held that "a legislative declaration [of public use] will be accorded great weight."[51] Ultimately, though, the scrutiny is significantly less deferential than that articulated under *Berman*, *Midkiff*, and *Kelo*.[52]

But in cases in states with public use clauses similar to the federal clause and constitutional silence on the role of the judiciary in reviewing public use questions, courts are nonetheless departing from the *Berman* and *Midkiff* standard with what appears to be increasing frequency.[53] Perhaps the most noteworthy case is *County of Wayne v. Hathcock*,[54] in which the Michigan Supreme Court overruled its notorious *Poletown*[55] decision. In *Poletown*, the Michigan Supreme Court upheld Detroit's plan to condemn large parcels of private property and convey them to General Motors to build an assembly plant.[56] *Poletown* is widely thought to be the most extreme judicial accommodation of a legislative determination of public benefit.[57] In *County of Wayne*, the plaintiffs challenged the condemnation of their residential property for the construction of a privately owned 1,300 acre business and technology park that had the dual purpose of removing residential property from the over-flight path of the expanded Wayne County airport and "[reinvigorating] the struggling economy of southeastern Michigan."[58] The Michigan Supreme Court recognized that the proposed condemnations were within the statutory authority of the County,[59] but held that those statutory provisions were unconstitutional as applied in this case.[60] Specifically, the court overruled *Poletown* and expressly held that the desire to create jobs and increase tax revenue does not constitute a public use for purposes of the state constitution.[61] The Michigan Supreme Court in *County of Wayne* followed the lead of other state courts in rejecting proposed private ownership condemnations when the stated "public purpose" appeared to be

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contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."); COLO. CONST. art. II, § 15 ("[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."); MO. CONST. art. I, § 28 ([W]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."); WASH. CONST. art. I, § 16.

[50] WASH. CONST. art. I, § 16.

[51] Des Moines v. Hemenway, 437 P.2d 171, 174 (Wash. 1968).

[52] *See, e.g.*, *In re* Petition of the City of Seattle, 638 P.2d 549, 554-55 (Wash. 1981) (holding that a proposed downtown revitalization project, while clearly in the public interest, did not afford sufficient "public use" to satisfy the constitutional limitation).

[53] For a discussion of this phenomenon, see Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1849-53 (2005) (citing state court cases that have applied more heightened scrutiny to the public use inquiry).

[54] 684 N.W.2d 765 (Mich. 2004).

[55] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

[56] *Id.* at 459-60.

[57] *See* Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651, 665 (2006).

[58] *County of Wayne*, 684 N.W.2d at 769-70.

[59] *Id.* at 776.

[60] *Id.* at 788.

[61] *Id.* at 787.

pretextual, and the condemnation seemed intended solely or primarily to benefit an identified private entity.[62] This concern reappears as a central component of Justice Kennedy's concurrence in *Kelo*.[63]

When the Supreme Court granted certiorari in *Kelo*, proponents of a more restrictive public use jurisprudence expressed guarded hope that the Supreme Court was reconsidering its expansive *Berman* and *Midkiff* pronouncements, and contemplating following the lead of the state courts in restricting the use of eminent domain for economic redevelopment, in part because *Kelo* presented the Court with virtually the same public use challenge as did *Berman*.[64] In *Kelo*, the City of New London, an "economically distressed city" with a high unemployment rate, sought to revitalize an area of town left substantially underused when the federal government closed the Naval Undersea Warfare Center in the Fort Trumball area.[65] The comprehensive revitalization plan called for the integrated redevelopment of 90 acres, which required the New London Development Corp. to acquire all of the privately owned property within the plan's boundaries.[66] Kelo and several of her neighbors owned residential property in this area. The properties were neither blighted nor in poor condition, but were subject to condemnation simply because they were located within the area covered by the redevelopment plan.[67] The plan called for the transfer of their land to another private landowner for redevelopment purposes, and the landowners objected.[68]

The expectations of property rights advocates, however, were not fulfilled by the Court's decision in *Kelo v. City of New London*.[69] In fact, the Court rejected Kelo's challenge to the condemnation of her property for a privately owned revitalization project, relying heavily on *Berman* and *Midkiff* in the process.[70] Indeed, the Court reaffirmed the principle that "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the

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[62] *See, e.g.*, S.W. Ill. Dev. Auth. (SWIDA) v. Nat'l City Envtl., 768 N.E.2d 1, 10-11 (Ill. 2002) (invalidating a "quick-take" condemnation of private land for the purpose of expanding the parking lot of an adjacent business, upon concluding that "[w]e do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose"); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (rejecting proposed condemnation of private land for transfer to casino developer to hold for future development upon concluding that "the primary interest served here is a private rather than a public one," since the developer was unconstrained in his future uses of the property).

[63] *See* 545 U.S. at 490. Indeed, in the years leading up to *Kelo*, at least one lower federal court rejected attempts to condemn private property for economic development on the grounds that the public benefit was a pretext and that the purely private benefit was the primary motive for the condemnation. *See* 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (noting that "[i]n this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another," and invalidating the proposed condemnation).

[64] *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1419 (2006) ("[A]t the time of the decision many takings scholars and public figures expected (or hoped) that the Supreme Court would narrow down the definition of public use.").

[65] Kelo v. City of New London, 545 U.S. 469, 473 (2005).

[66] *Id.* at 474-76.

[67] *Id.* at 475.

[68] *Id.*

[69] *See* Bell & Parchomovsky, *supra* note 64, at 1423-25 (detailing the disappointment of commentators after *Kelo*).

[70] *Kelo*, 545 U.S. at 480-87.

takings power."[71] Property rights proponents were outraged, and the public seemed to take notice of the broad power of eminent domain almost for the first time.[72]

Contrary to what has emerged as the conventional wisdom about *Kelo*, however, the decision in fact significantly retreated from the broad holdings in *Berman* and *Midkiff*. As Justice O'Connor observed in her *Kelo* dissent, the "errant language" of deference in *Berman* is so sweeping as to admit of virtually no judicial oversight of legislative determinations of public purpose.[73] The *Kelo* decision, in contrast, offers meaningful oversight of both the substance and procedure of eminent domain.[74]

The procedural constraints articulated by the *Kelo* decision are widely recognized.[75] In upholding the City of New London's determination that the condemnations were for the public benefit, the Court relied on its observation that the planning process had been comprehensive, transparent, and specifically authorized by state statute.[76] These procedural safeguards presumably set the standard for when the Court's extraordinary deference to legislative determinations is appropriate. Thus, private ownership condemnations used to combat childhood obesity are likely to be upheld in the face of Fifth Amendment challenges if they result from careful, deliberate, and transparent planning, and are authorized by state statute.

In addition to these procedural requirements, *Kelo* imposes a substantive limitation on the use of eminent domain that may have been dormant under *Berman* and *Midkiff*.[77] According to the *Kelo* Court, the public use clause not only prohibits a government actor from taking the private property of one citizen for the personal benefit of another, but also prohibits the taking of private property under the pretext of public purposes when the actual purpose is to bestow a private benefit.[78] In his concurrence in *Kelo*, Justice Kennedy emphasized this substantive limitation, making clear that all the process in the world will not insulate from judicial scrutiny

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[71] *Id.* at 483.

[72] *See, e.g.*, Bell & Parchomovsky, *supra* note 64, at 1418-19 (describing the "instant and near universal condemnation" that *Kelo* engendered). The *Kelo* case drew public attention largely because Kelo represented, in essence, any landowner, giving weight to the property rights activists' rallying cry that all homeowners were now vulnerable to development-motivated condemnations. In contrast, *Berman* involved commercial property in a blighted neighborhood, and *Midkiff* was essentially sui generis, involving the remnants of a tribal tenurial system and state-sponsored land reform. Neither of those earlier cases gave average homeowners cause for concern about the security of their own landownership.

[73] *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting).

[74] *See id.* at 483-84 (emphasizing the careful planning process that produced the revitalization plan at issue in *Kelo*), *id.* at 486-87 (recognizing that "one-to-one transfers" outside of a careful planning context would call for more intense judicial scrutiny of public purpose).

[75] *See* David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After* Kelo v. City of New London?, 24 UCLA J. ENVTL. L. & POL'Y 195, 221-22 (2006) (recognizing *Kelo*'s emphasis on the comprehensive planning process).

[76] *Kelo*, 545 U.S. at 483-84 ("To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review . . . the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

[77] *Id.* at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

[78] *Id.* (emphasizing the lack of evidence of improper purpose); *see also id.* at 491(Kennedy, J., concurring).

"transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits."[79] Under this doctrine, a plausible allegation of private benefit would warrant much more rigorous scrutiny of the legislative determination than that articulated in *Berman* and *Midkiff*. Thus, notwithstanding public outcry to the contrary, *Kelo* significantly reined in the expansive approach to the public use inquiry that characterized *Berman* and *Midkiff*.

*III. Post-*Kelo *Public Use Challenges in Lower Courts*

As Nicole Stelle Garnett has observed, "most post-*Kelo* public use litigation will take place in state courts, not federal ones."[80] And most of this state court review will occur under state law. This is true in part because the *Kelo* Court emphasized that the role for federal courts in reviewing public use challenges was "extremely narrow."[81] It is mostly true, however, because most states responded to *Kelo* by enacting statutory or constitutional constraints on the exercise of eminent domain for economic development purposes.[82] Still, *Kelo* leaves open the possibility of future public use challenges under the U.S. Constitution under two theories.[83] First, by emphasizing that the Fifth Amendment prohibits the use of eminent domain to advance a purely private purpose, *Kelo* has left open the opportunity to challenge condemnations that are merely "pretexts" for a desire to confer a private benefit on a particular entity. Second, by emphasizing the importance of planning as a mechanism for avoiding a finding of pretext, *Kelo* invites constitutional scrutiny of condemnations that do not arise out of a comprehensive rational land use plan. As Professor Garnett observes, "[i]t is here that *Kelo* carves out a role for planning: government officials will view planning as a constitutional safe harbor and private litigants will consider a lack of planning a constitutional red flag."[84]

As Professor Garnett predicted, the issues of planning and pretext have played central roles in public use challenges since *Kelo*. In *Rhode Island Economic Development Corp. v. The Parking Co.*,[85] for example, the Rhode Island Supreme Court rejected the "quick-take" condemnation of

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[79] *Id.* at 491 (Kennedy, J., concurring).
[80] Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOL. L.Q. 443, 454 (2007).
[81] *Kelo*, 545 U.S. at 500.
[82] These state constitutional and statutory responses are discussed in NPLAN's Land Use Initiatives to Prevent Childhood Obesity and Potential Obstacles from State Takings Laws, *available at* http://www.nplanonline.org.
[83] Even this review under the U.S. Constitution is most likely to occur in state courts because recent Supreme Court decisions make it increasingly difficult to obtain federal judicial review of federal takings claims. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (holding that federal takings claims are not ripe until the state fails to provide adequate compensation for the takings, including in state court proceedings); and San Remo Hotel v. City & Cnty. of San Fran., 545 U.S. 323 (2005) (applying ordinary issue preclusion rules to takings claims litigated in state court under state law, if state law is essentially co-terminous with federal law).
[84] Garnett, *supra* note 80, at 454. In fact, lower courts had begun to examine private ownership condemnations for precisely these infirmities in the years leading up to *Kelo*. *See, e.g.,* 99 Cents Only Stores v. Lancaster Redev. Auth., 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (rejecting a local government's effort to condemn property leased by the plaintiff to accommodate the expansion demands of the discount retailer, Costco Wholesale Corp., on the grounds that the condemnation conferred a purely private benefit); *see also* S.W. Ill. Dev. Auth. (SWIDA) v. Nat'l City Envtl., 768 N.E.2d 1 (Ill. 2002) (rejecting an attempt to use eminent domain to allow a race track to build a parking garage, finding any claim of public benefit to be pretextual).
[85] 892 A.2d 87 (R.I. 2006).

an easement for the use of a parking garage owned by The Parking Co.[86] The condemnation was intended to permit the Rhode Island Airport Corp. to secure the profits of the parking garage before the lease to The Parking Co. expired. The Rhode Island Supreme Court rejected the assertion of a public benefit, noting *Kelo*'s focus on the careful and deliberate planning underlying the City of New London redevelopment plans and the contrasting "hasty maneuvering" in this case.[87] The lack of careful and transparent planning in *The Parking Co.* served to confirm the Court's suspicion that the claims of public use were merely pretextual and that the real purpose of the condemnation was to secure increased revenues for the airport.[88] Conversely, in *Western Seafood v. United States*, the Fifth Circuit rejected a landowner's challenge to a private ownership condemnation, concluding that the degree of planning and deliberation undertaken by the City of Freeport, Texas, in developing its revitalization plan insulated it from challenge under *Kelo*.[89]

In *Franco v. National Capital Revitalization Corp.*,[90] the District of Columbia Court of Appeals declined to strike Franco's claim of pretext in a condemnation action by the NCRC. In that case, the NCRC sought to condemn Franco's discount store as part of a revitalization plan for the shopping center in which the store was located. The revitalization plan called for transferring ownership of the entire shopping center site and five adjoining acres to a private developer. Franco challenged the condemnation action by claiming that the actual purpose of the private ownership condemnation was to confer a private benefit on a private party (the developer who would purchase the site from the NCRC). The court of appeals relied heavily on *Kelo*'s statements about pretext and concluded that "there may be situations where a court should not take at face value what the legislature has said" about public benefit.[91] Finding that Franco had provided sufficient allegations of pretext to warrant a determination on the merits, the court denied NCRC's motion to strike the challenge.[92]

IV. **Kelo***, Public Use, and Land Use Initiatives to Combat Childhood Obesity*

As noted above, any land use initiative that relies on the power of eminent domain to condemn private property for publicly owned infrastructure—such as parks, walking trails, or recreation areas—will readily satisfy the public use requirement of the Fifth Amendment to the U.S. Constitution. However, land use initiatives that seek to address childhood obesity concerns by transferring ownership to other private landowners—such as a decision to condemn a land use initiative and transfer ownership to a developer who agrees to operate a full-service grocery store—may raise public use concerns. Ultimately, however, even these land use initiatives are likely to survive constitutional challenge, for several reasons.

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[86] "Quick-take" condemnation statutes permit government entities to condemn private property using summary procedures. Litigation concerning the appropriateness of the condemnation or the sufficiency of the compensation generally occurs after title has changed hands. *See id.* at 99-100 (describing Rhode Island's "quick-take" statute).
[87] *Id.* at 104.
[88] *Id.* at 105-06.
[89] 202 Fed. Appx. 670 (5th Cir. 2007).
[90] 930 A.2d 160 (D.C. 2007).
[91] *Id.* at 169.
[92] *Id.* at 169-71.

First, all of the cases in which private ownership condemnations have been invalidated involve projects justified solely on "economic development" grounds, and courts have long been wary of the potential for such broad and seemingly limitless assertions of public use to mask impermissible pretextual private benefit transfers. In contrast, an initiative to combat childhood obesity is not justified by the mere assertion that one use will be more profitable than another, but by an independent substantive goal of reducing childhood obesity. Public health, especially the health of children, has long been recognized as a core function of the state's police power.[93] As the Second Circuit has recently stated, "regulations directed at the safety and welfare of children lie at the heart of the states' police power."[94] Thus, as long as the relationship between the condemnation and the goal of reducing childhood obesity can be established to some reasonable degree, that independent public purpose is likely to dispel any judicial concerns of overreaching.

Second, governments seeking to engage in private ownership condemnations can avoid *Kelo*-based invalidation of their actions by engaging in comprehensive planning and transparent deliberation. Once these steps are taken, *Kelo* demands that courts defer to nonpretextual legislative determinations of public use. By engaging in careful and transparent planning, local governments that seek to use private ownership condemnations to combat childhood obesity should be able to withstand any challenge to those condemnations under the public use clause of the U.S. Constitution.

[93] *See, e.g.,* Price v. Johnson, 711 F.2d 582, 588 (5th Cir. 1983) (removal of junked vehicles permissible under city's general police power in part because they constitute a potential hazard to children).
[94] Greater N.Y. Metro. Food Council v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999).