

NECESSITY AS A CHECK ON STATE EMINENT DOMAIN POWER

Robert C. Bird^{*} & Lynda J. Oswald^{**}

ABSTRACT

The Supreme Court decision of Kelo v. City of New London has provoked rigorous debate over the proper discretion given to government entities exercising powers of eminent domain. Rarely discussed is the equally important requirement of necessity. The necessity doctrine requires that a condemnor justify that the proposed taking is reasonably necessary for the stated purpose. Few attorneys and even fewer scholars have discussed the role of necessity doctrine in modern eminent domain practice. This manuscript traces the history and development of necessity, discusses cases where courts have prevented takings for lack of sufficient necessity, and suggests opportunities for practitioners to better challenge eminent domain proceedings. This manuscript concludes that necessity should be revived from its largely dormant state and can play a meaningful role in curbing the worst excesses of eminent domain.

This Article examines a largely ignored aspect of eminent domain: “necessity.” The necessity doctrine requires that a condemnor justify a proposed taking as necessary for furthering a proposed public use.¹ In some states, the doctrine is created explicitly through constitutional or statutory provisions; in others, the courts have found it to be an implicit constraint on condemnation arising from the state’s constitutional or statutory structure.² Necessity determinations implicate

* Assistant Professor of Business Law, Ackerman Scholar, University of Connecticut School of Business. Our thanks for comments and support go to attendees at the Academy of Legal Studies in Business 2005 annual conference, San Francisco, CA. We also appreciate feedback from attendees of the 2008 University of Florida Huber Hurst Research Seminar. My thanks go to Jeannine DePhillips for diligent research assistance. Support from the University of Connecticut’s Center for Real Estate and Urban Economic Studies is gratefully acknowledged.

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1 See *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 15 (Nev. 2003) (“In an eminent domain proceeding, necessity is usually raised in the context of challenging whether a project furthers a public purpose and therefore constitutes a public use. It involves whether the property to be taken is necessary to accomplish the public purpose and it encompasses the selection of the location of the condemned land.” (footnote omitted)).

2 See 71 AM. JUR. 3D *Proof of Facts* § 2 (2008) (noting that to constitute a valid exercise of eminent domain power, “private property can only be taken out of ‘necessity’ to accomplish an identified ‘public purpose’”).

not only narrow considerations, such as the selection of the specific land to be condemned for the public use, but also the much broader and often contentious question of whether the exercise of the eminent domain power is actually needed to further the public purpose at stake.³

While necessity is a counterpart to the more analyzed and well-known public use doctrine, it is analytically distinct and raises different concerns. Those differences are significant. Public use has been thoroughly explored in both court opinions and the legal literature, particularly in the context of the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*.⁴ By contrast, although courts often refer

³ *Id.* § 1 (discussing necessity as “involv[ing] whether the property to be taken is necessary to accomplish the public purpose and encompasses the selection of the location of the condemned land”).

⁴ 545 U.S. 469 (2005). In *Kelo*, the Supreme Court ruled that the city's use of eminent domain to condemn private property for the purpose of economic redevelopment through private enterprise ownership constituted a valid “public use” within the meaning of the Fifth Amendment's Takings Clause. *Id.* at 488–90. *Kelo* examined the breadth of what constitutes a permissible public use that suffices for takings under eminent domain. The public use doctrine has already been, and in the future will likely continue to be, the subject of extensive scholarly commentary. See, e.g., Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007); Richard O. Brooks, *Kelo and the “Whaling City”: The Failure of the Supreme Court’s Opportunity to Articulate a Public Purpose of Sustainability*, in THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 5 (2006), available at http://www.vjcl.org/takings/Brooks_article.pdf; Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799 (2008); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005); Scott Griswold, *Property Rights vs. Public Use: Analyzing Tennessee’s Response to Kelo Eminent Domain Ruling*, 43 TENN. B.J. 14 (2007); George Lefcoe, *Redevelopment Takings After Kelo: What’s Blight Got to Do With It?*, 17 S. CAL. REV. L. & SOC. JUST. 803 (2008); Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43 (2006); David Schultz, *Economic Development and Eminent Domain after Kelo: Property Rights and “Public Use” Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41 (2006); 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 (2006); Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to Kelo*, 23 J. LAND USE & ENVTL. L. 305 (2008); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007); Viola Vetter, *Kelo: Midkiff’s Latest Victim*, 16 TEMP. POL. & CIV. RTS. L. REV. 257 (2006); Lucas J. Asper, Comment, *The Fair Market Value Method of Property Valuation in Eminent Domain: “Just Compensation” or Just Barely Compensating?*, 58 S.C. L. REV. 489 (2007); Justin Morgan Crane, Note & Comment, *The Privatization of Public Use: Why Rational Basis Review of a Private Property Condemnation is a Violation of a Fundamental Civil Right*, 28 WHITTIER L. REV. 511 (2006); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171 (2005); Scott P. Ledet, Comment, *The Kelo Effect: Eminent Domain and Property Rights in Louisiana*, 67 LA. L. REV. 171 (2006); James J. Ferrelli, *Eminent Domain in New Jersey After Kelo: What’s Next?*, N.J. LAW., Dec. 2005, at 44.

Interestingly, the *Kelo* trial court found that part of the parcels at issue in the case could not be taken because there was no necessity for the taking. See *Kelo v. City of New*

to necessity in the context of evaluating takings, they seldom discuss it extensively and only the occasional court has refused to allow a taking to proceed because of lack of necessity. However, with the public use limitation on the takings power diminished by *Kelo*, necessity is one of the few remaining potential checks on the eminent domain power. The doctrine warrants further analysis and heightened attention by courts and scholars.

Part I of this Article outlines the history and development of eminent domain necessity jurisprudence. This Part reviews the comments of treatise writers as well as examines the historical origins of modern necessity doctrine. We find that necessity questions have traditionally been left to the judgment of the legislature and that necessity and public use rules are sometimes conflated.

Part II examines successful necessity challenges to takings on the grounds that the proposed plan was too remote or speculative.⁵ This Part discusses cases in which courts have concluded that planners have failed to show necessity to condemn because of a vague plan, uncertain timing of the execution of that plan, and other considerations. Part III examines successful challenges on the basis that procedural or regulatory hurdles impeding development make the government's plan not viable on necessity grounds. We conclude that this long dormant cousin of "public use" has significant potential for landowners as a defense to eminent domain takings.

I. THE ORIGINS AND DEVELOPMENT OF THE NECESSITY DOCTRINE

Early eminent domain cases arose primarily in the state courts, under either state statutory or constitutional law. Because of these state law origins, the legal rules pertaining to eminent domain displayed considerable variety in their early stages. By the early nine-

London, No. 557299, 2002 WL 500238 (Conn. Super. Ct. Mar. 13, 2002). The Connecticut Supreme Court reversed, finding that the legislature's determination was entitled to deference. 843 A.2d 500, 572 (Conn. 2004). The U.S. Supreme Court, of course, framed the case as raising an issue of public use. 545 U.S. at 472.

⁵ A natural progression would be to focus first on the role of necessity in federal eminent domain proceedings. However, federal courts have long deemed necessity review of federal proceedings beyond the purview of the judicial function and the sole provenance of the legislature. *See, e.g.,* *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349 (1900) ("The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government . . ."); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) ("When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance."). Instead, we focus our efforts in this article on the diverse interpretations of necessity in state courts.

teenth century, however, the basic principles underlying the modern framework of eminent domain law had begun to emerge and coalesce.⁶ As part of this natural evolution and development in legal doctrine, courts clarified the role of “necessity” in the takings decision-making process.

From the outset, American legal doctrine recognized that the sovereign has an inherent power of eminent domain; i.e., the power “of taking or of authorizing the taking of any property within its jurisdiction for the public good.”⁸ This historical view of eminent domain as an inherent power necessarily colors the law’s perception of the outer limits of the power. Thus, the constitutional provisions that address eminent domain are couched in terms of limitations on this sovereign power (i.e., that the taking be for a public “use” or “purpose” and that just compensation be paid), and not in terms of an express

⁶ See generally Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by the Government, 1789–1910*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 132, 133 (L. Friedman & H. Scheiber eds., 1978) (describing the history of eminent domain law); J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931) (discussing how courts dealt with the question of whether “higher law” guaranteed compensation for takings throughout history); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972) (developing a framework for analyzing eminent domain principles). It was only in 1875 that the U.S. Supreme Court definitively ruled that the federal government had an eminent domain power of its own. See *Kohl v. United States*, 91 U.S. 367, 372 (1875) (holding that the postal power includes power to obtain sites for post offices by eminent domain); see also 1 NICHOLS ON EMINENT DOMAIN § 1.24 (Julius L. Sackman ed., rev. 3d ed. 2007) [hereinafter NICHOLS 3d] (discussing history and development of federal government’s eminent domain power). In addition, before the Fifth Amendment’s limitation on federal takings was extended to the states under the Due Process Clause of the Fourteenth Amendment in 1896, state takings were seldom reviewed in federal court. See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 207 (1978) (noting that “the use of condemnation to open private roads from one person’s land across the property of others to the public roads was a necessity if the country was to be developed” and consequently, a fully developed system of condemnation evolved which federal courts rarely reviewed); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 599–600 n.4 (1949) (noting that the Fifth Amendment Eminent Domain Clause is “not directly applicable to the states”).

⁷ According to the U.S. Supreme Court’s classic statement, the taking power is a “political necessity” because “[s]uch an authority is essential to [the sovereign’s] independent existence and perpetuity.” *Kohl*, 91 U.S. at 371; see also 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 672 (3d ed. 1909) (“The power of eminent domain, being an incident of sovereignty, is inherent in the federal government and in the several States, by virtue of their sovereignty.”); *id.* at 7 (“[T]he power of eminent domain is not a reversed [sic] [power], but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute.” (footnotes omitted)).

⁸ 1 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN: A TREATISE ON THE PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR THE PUBLIC USE 1 (2d ed. 1917) [hereinafter NICHOLS 2d].

grant of the power to take in the first place.⁹ Because of the predominance of this early view of the eminent domain power as being inherent within the sovereign,¹⁰ it is not surprising that necessity determinations were also deemed to lie within the discretion of the legislature, and that the courts' role in making such determinations was historically constrained.

A. *Historical Development of the Role of Necessity Within Eminent Domain Doctrine*

Modern notions of eminent domain did not arise until after the decline of the feudal system in Europe.¹¹ The timing was logical and natural, as eminent domain was unnecessary in feudal societies, where the sovereign was the ultimate owner of all land such that the confiscation of land for a public improvement “would not . . . involve the taking of property in its modern sense.”¹² Although the decline of feudalism and the concomitant rise of individual property ownership and recognition of private property rights ultimately gave rise to

⁹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). None of the early state constitutions explicitly granted the power of eminent domain to the states. See 1 NICHOLS 2d, *supra* note 8, at 58 (“The provisions found in most of the state constitutions relating to the taking of property for the public use therefore do not by implication grant the power of eminent domain to the government of the state, but they limit a power already existing which would otherwise be unlimited.”). Even the Fifth Amendment is phrased in terms of a restraint upon a power that is nowhere explicitly granted to the federal government. See ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 73–77 (1987) (discussing the adoption of the Fifth Amendment); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) (discussing the adoption and ratification of the Fifth Amendment).

¹⁰ Early proponents of the natural law theory, such as Grotius, Pufendorf, Vattel, Bynkershoek, and Montesquieu, discussed eminent domain in terms of an inherent power. See generally 1 LEWIS, *supra* note 7, at 503 (“This power [of eminent domain] was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power.”); PAUL, *supra* note 9, at 74–77; Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 596–601 (1942); Stoebuck, *supra* note 6, at 559–600.

¹¹ Nichols notes that the extent to which eminent domain was recognized and used under Roman law is unclear, but that any such power used by the Romans disappeared after the fall of the Roman Empire, and did not re-emerge until post-feudalism days. 1 NICHOLS 2d, *supra* note 8, at 5. Nichols noted:

The origin of the power of eminent domain is lost in obscurity, since before the title of the individual property owner as against the state was recognized and protected by law, the right to take land for public use was merged in the general power of the government over all persons and property within its jurisdiction.

Id. at 4.

¹² *Id.* at 5.

modern notions of eminent domain,¹³ the transition did not occur overnight. For example, even as private property rights evolved and gained heightened legal stature and protection, the English king retained significant rights under common law to take private land for constructing structures for defense against the public enemy or the sea (such as lighthouses) without compensation, or to take provisions for the royal household with compensation.¹⁴

Modern notions of eminent domain seemed to have developed from an English procedure known as “inquest of office,” which allowed the taking of private property for purposes such as the construction of new roads through the issuance of a writ of *ad quod damnum* and a proceeding in which a jury determined damages.¹⁵ However, this proceeding was *ex parte* and the property owner had no right to be notified of the proceeding, to object to the location of the new road, or to challenge the amount of damages awarded.¹⁶ Thus, the sovereign was not required to answer to the courts in any way in terms of the “necessity” of the taking.

The American colonies adopted the notion of eminent domain from English law, and initially used the power of eminent domain primarily for the establishment of roads.¹⁷ Because land in colonial America was, for the most part, undeveloped and plentiful and, in fact, often had not even been assigned to private ownership,¹⁸ the application of eminent domain in the American colonies was rather informal. Compensation, particularly where the land was unimproved, was often not required by law as such land was viewed as having little, if any, value.¹⁹ Nonetheless, the English system of *ad quod damnum* had a clear influence upon early colonial practices, and juries were often used to determine the course of roads and the damages due to land owners whose property was taken.²⁰ However, as in England, this procedure was apparently more administrative than judicial in na-

¹³ *Id.*

¹⁴ *Id.* at 5–6.

¹⁵ *Id.* at 6–7.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 13–14; *see also* Stoeckel, *supra* note 6, at 563–66. Other early uses of eminent domain were uses that had a clear public use or public purpose, such as to foster improvements such as the development of mills or the drainage of land. *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940) (“Only a few situations existed, in the primitive America of that day, where eminent domain was felt to be needed. These included rights of way for roads and flowage easements for mills.”).

¹⁸ 1 NICHOLS 2d, *supra* note 8, at 14.

¹⁹ *Id.*

²⁰ *Id.* at 14–15.

ture, and proceedings were often *ex parte*, affording the landowner no right of notification or opportunity to be heard.²¹

There are hints in colonial law of “necessity” playing a limited role in these early exercises of the eminent domain power. For example, when lands were initially granted in colonial Pennsylvania, it was with the understanding that six percent of the land was reserved for highways; as a result, the sovereign did not need to exercise eminent domain to construct such roads. Nonetheless, a 1700 Pennsylvania colonial law provided “that no such road shall be carried through any man’s improved lands, but where there is a necessity for same” and required the empanelment of a six-man jury to determine the value of the improvements so taken and the compensation due the owner.²²

However, in these early takings, the judiciary, to the extent it was involved at all, was concerned primarily with the issues of damages and adequate compensation; the question of the necessity of the taking itself got short, if any, shrift from the courts. Rather, the courts viewed the issue of necessity as one to be decided by the legislature or its delegates, not by the courts. Christopher Teideman, in his influential late nineteenth century treatise on the police power, summarized the status of early eminent domain law as follows:

Except so far as the exercise of the power may be limited and controlled by provisions of the constitution, the necessity for its exercise is left to the legislative discretion. The courts cannot question the necessity for the taking, provided the land is taken for a public purpose. The legislative determination of the necessity is final, and is not subject to review by the courts.²³

B. The Historical Role of the Judiciary in Determinations of Necessity

Modern necessity doctrine has been shaped largely by historical notions of the proper relationship between the legislature and the judiciary. Philip Nichols, the author of a leading turn-of-the-twentieth-century treatise on eminent domain law, extensively discussed the balance between judicial and legislative power, stating: “The exercise by a court of the power to nullify the wishes of the representatives of the people, enacted into law in solemn form, is indeed full of grave responsibility and not to be called into play indiscrimi-

²¹ 2 NICHOLS 2d, *supra* note 8, at 900.

²² Act of 1700, *quoted in* *Feree v. Meily*, 3 Yeates 153, 1801 WL 743, at *2 (Pa. 1801); *see also* 1 NICHOLS, 2d, *supra* note 8, at 19 (discussing the statute in *Feree* and other such laws).

²³ CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 372–73 (The Lawbook Exchange, Ltd. 2001) (1886).

nately.”²⁴ Nichols further stated that there were three canons by which the court’s power to overturn a legislative decision was constrained in the early years of the republic. The first of these dealt with the presumption of validity that was to be afforded legislative decision making:

Every presumption should be made in favor of the validity of a statute. It is not to be held a violation of the fundamental charter established by the people in their constitution unless so clearly outside the power conferred upon the legislature as to be free from reasonable doubt in that regard. It must be assumed that the legislature intended to act within its lawful bounds, and this assumption cannot be overthrown unless the statute unmistakably oversteps these bounds by manifest and plain terms.²⁵

Nichols thus described a sharp philosophical difference in how the courts defined their role vis-à-vis the legislature: “[T]he courts have nothing to do with the wisdom or expediency of a statute, and . . . questions of public or governmental policy are not judicial.”²⁶

However, Nichols also ruefully noted that over time, as the power of the judiciary to set aside legislative acts became more recognized, “it became a common thing for courts to declare statutes to be unconstitutional upon strained and technical reasoning, whenever they seemed to the courts to be unfair or even merely unwise.”²⁷ Nichols, by contrast, embraced the notion of judicial deference to legislative decision making, stating:

When a court is asked to pass upon the constitutionality of an act of the legislature, a co-ordinate branch of the government, the court should not decide whether in its own opinion the act is constitutional or not, but whether the members of the legislature, as reasonable men, might have fairly considered it constitutional. Every presumption is in favor of the validity of the law, and it is only when it seems clearly a violation of the constitution “at first blush” that the court will hold it invalid.²⁸

Nichols viewed public use challenges to takings in these terms as well, stating that “the question, as it presents itself to the courts, is not whether the use for which the property is taken is public, but whether the legislature might reasonably consider it public.”²⁹ However, Nichols also recognized an outer limit on the deference due the legislature by the judiciary, concluding that:

24 1 NICHOLS 2d, *supra* note 8, at 34.

25 *Id.* at 35. The other two canons dealt with constitutional limitations on the legislature (which were to be measured in general terms of liberty and justice), and in the interpretation of the Constitution by an independent judiciary. *Id.*

26 *Id.* at 37.

27 *Id.*

28 *Id.* at 88.

29 *Id.* at 154.

[I]f the court, after giving due weight to [sic] the declaration of the legislature, considers that the purpose for which the taking of property has been authorized has no real and substantial relation to the public use, it is its duty to declare the act authorizing the taking to be unconstitutional.³⁰

In practice, however, the erosion of judicial deference to legislative decision making that Nichols lamented did not seem to extend to determinations of necessity, which remained largely within the realm of the legislature.³¹ While the court might, in rare instances, determine that there was *no* necessity present such that the taking was invalid, if any necessity was present, no matter how slight, the court generally viewed the exercise of the eminent domain power as a legislative question beyond its purview.³² Moreover, this deference was not diminished just because the legislature might have chosen to delegate all or part of its condemning authority to a specific agency or entity (such as a public or private corporation) as state legislatures were (and still are) empowered to do.³³ As stated by the U.S. Supreme Court: “[T]he necessity and expediency of the taking of property for public use ‘are legislative questions, no matter who may

³⁰ *Id.* at 155.

³¹ See 1A NICHOLS 3d, *supra* note 6, § 4.11[1] (describing necessity determination as a legislative power). As Nichols remarks:

When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary or expedient that his land be taken for such improvement, unless the public use alleged for the taking is a mere pretense.

Id. See also *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349 (1900) (“The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government . . .”).

³² 2 NICHOLS 2d, *supra* note 8, at 910–11 (“In every case therefore it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. But while the courts have frequently declared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen.” (footnote omitted)).

³³ See *id.* at 920 (“The legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work.”); see also *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.”); *People ex rel. Herrick v. Smith*, 21 N.Y. 595, 598 (N.Y. 1860) (stating that the eminent domain power “may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested”).

be charged with their decision.”³⁴ Thus, the non-legislative recipient of the eminent domain power was typically afforded much the same judicial deference with regard to the necessity of the taking as was the legislature, provided the recipient acted “reasonably and in good faith” in making the necessity determination.³⁵

Nichols and the author of another early treatise on eminent domain, John Lewis, both discussed extensively the meaning of “necessity” and the role of the courts in evaluating this issue in early takings cases. Both asserted that the element of necessity raises three questions: (1) whether a particular public improvement should be constructed; (2) where such an improvement should be located; and (3) whether the eminent domain power should be employed to acquire the property needed for the improvement.³⁶ However, Nichols and Lewis placed all of these questions squarely within the exclusive domain and jurisdiction of the legislature, as did early courts.³⁷ Nichols explained the basis for this rule in historical terms, stating:

³⁴ N. Laramie Land Co. v. Hoffman, 268 U.S. 276, 284 (1925) (citations omitted).

³⁵ 2 NICHOLS 2d, *supra* note 8, at 920; *see* TIEDEMAN, *supra* note 23, at 376 (collecting cases and noting it is “constitutionally unobjectionable to delegate to the corporation or individual, along with the exercise of the right of eminent domain, the power to determine finally upon the necessity for the taking, without any judicial investigation”).

However, Nichols stated where the legislature had delegated the eminent domain authority to a non-legislative body, such as a public agency or private corporation, the courts were less reluctant to evaluate the necessity of the underlying taking than they would have been if the legislature had made the determination itself. *See* 2 NICHOLS 2d, *supra* note 8, at 921 (“[T]he courts may hold [determinations of necessity made by delegated parties] to be unlawful without the reluctance they feel in declaring acts of the legislature unconstitutional.”). While the courts would not interfere where some necessity was present, a complete lack of necessity for the taking was a judicial question to which a positive answer would render the taking unauthorized and would warrant judicial intervention. *Id.*

³⁶ *See* 2 LEWIS, *supra* note 7, at 1053; 2 NICHOLS 2d, *supra* note 8, at 908.

³⁷ For Nichols, *see* 2 NICHOLS 2d, *supra* note 8, at 908 (“When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary and expedient that his land be taken for such improvement, unless the public use alleged for the taking is mere pretense.”). For Lewis, *see* 1 LEWIS, *supra* note 7, at 503 (“The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government.”). *See also id.* at 674 (“Whether the power of eminent domain shall be put in motion for any particular public purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature.”). For the early court decisions, *see Richland School Twp. v. Overmeyer*, 73 N.E. 811, 813 (Ind. 1905) (“The authority to determine in any case whether it is necessary or expedient to permit the exercise of the power of eminent domain, when not prohibited by the Constitution, rests with the legislative department of

[T]he courts have no power to revise any enactment of the legislature unless it violates some clause of the constitution. The constitutions of the great majority of the states contain no provision prohibiting the taking of land for public use except for necessary or economically expedient undertakings, or unless the work can be done in no other way, nor was it the practice when the state constitutions were adopted to require a judicial hearing upon the question of necessity in eminent domain cases, so that it can be plausibly argued that such a hearing is essential to due process of law.³⁸

Lewis and Nichols made clear their understandings that the answer to the first question—whether a particular public improvement should be constructed—in particular lay solely within the legislature’s decision-making authority.³⁹ This result, Nichols found, followed directly from the independent power of the legislature to make determinations of the need for specific public improvements. As Nichols succinctly put it:

If the legislature should determine that it was unwise to establish a public improvement for which there was a considerable demand, no one would suppose that such a determination could be reviewed by the courts, and the principle is the same if the determination of the legislature is the other way.⁴⁰

The second question—whether a particular piece of property is needed for the improvement—was also a matter left solely to the legislature.⁴¹ The theme of judicial deference to legislative determina-

the state; and the propriety of taking private property for public use is not a judicial question, but one of political sovereignty, and a hearing upon the facts as to such propriety or necessity is not required.”), *overruled in part by* Cemetery Co. v. Warren Sch. Tp., 139 N.E.2d 538 (Ind. 1957); *In re Niagara Falls & Whirlpool Ry. Co.*, 15 N.E. 429, 431 (N.Y. 1888) (“[T]he necessity or expediency of taking private property for [public] uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government . . .”).

³⁸ 2 NICHOLS 2d, *supra* note 8, at 909.

³⁹ *See id.* at 908 (noting “as there is no fixed principle which decides what public improvements shall be undertaken and where they shall be located, these questions must be settled by some department of the government”; that body, Nichols concluded, is the legislature); *see also* 1 LEWIS, *supra* note 7, at 678 (“The courts cannot inquire into the motives which actuate the authorities or enter into the propriety of making the particular improvements.”); 2 LEWIS, *supra* note 7, at 1056 (“The necessity of making any proposed work or improvement is also a [sic] purely a legislative question, unless otherwise provided by the constitution or statute.”).

⁴⁰ 2 NICHOLS 2d, *supra* note 8, at 908–09.

⁴¹ *See* 2 LEWIS, *supra* note 7, at 1068 (“[T]hose invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts.”); 2 NICHOLS 2d, *supra* note 8, at 899 (“[T]he laying out or establishment of a specific public improvement and consequently the determination that a certain definite tract of private land shall be taken by eminent domain for such improvement is a purely legislative act, and

tions of location was established early on, led in part by pragmatic considerations. A landowner could not argue that the taking of his land was not “necessary” because a neighbor’s land was just as (or perhaps more) suitable for the legislature’s purpose.⁴² The condemnor often had to choose between two equally useful or similarly-situated parcels of property. Neither could be considered “uniquely necessary” because of the existence of the other as a suitable option, yet nonetheless one or the other had to be chosen if the project was to go forward.

By the early twentieth century, this notion of judicial deference to legislative determinations regarding siting was firmly entrenched in both the courts’ opinions and in the scholarly commentary. For example, the U.S. Supreme Court stated in 1900: “The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government.”⁴³ Similarly, Nichols noted: “When it is decided to take land by eminent domain, what land shall be taken and how much, are matters in the discretion of the legislature,” although he qualified that statement by adding that “land that manifestly cannot be used cannot be taken.”⁴⁴ Thus, when there was no necessity to justify the taking, Nichols found that the taking would be unlawful, but where the land could be put to some use for the public good at stake, the “degree of necessity” was not a judicial matter.⁴⁵

This qualification (that “land that manifestly cannot be used cannot be taken”) merges into Nichols’s and Lewis’s third question—whether the eminent domain power should be exercised to acquire the property needed for the improvement—which is similarly re-

can be effected without the intervention of the courts at any stage of the proceedings . . .”).

⁴² See *Kansas & Tex. Coal Ry. Co. v. N.W. Coal & Mining Co.*, 61 S.W. 684, 690 (Mo. 1901) (noting that if the rule were otherwise, “the plaintiff could not condemn any land; for every other landowner would likewise have the same right to object to his land being condemned”).

⁴³ *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349 (1900). The Court went on to state: “The State possesses the [takings] power as a sovereign and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done?” *Id.*; see also *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.”).

⁴⁴ 2 NICHOLS 2d, *supra* note 8, at 918–19. As Nichols explained, “The owner of the land which it has been decided to take is not entitled to be heard upon the question whether an equally available site was not already in possession of the public, or could be bought elsewhere for less than the fair value of his land.” *Id.* at 917.

⁴⁵ *Id.* at 921.

solved by the separation of powers between the judiciary and legislature, and in state constitutional provisions. According to Lewis, in the absence of a state constitutional provision to the contrary, “[t]he question of exercising the power of eminent domain for any particular public use is solely for the legislature.”⁴⁶ And as Nichols explained, “[t]he constitutions of the great majority of the states contain no provision prohibiting the taking of land for public use except for necessary or economically expedient undertakings.”⁴⁷

However, Nichols noted “a theoretical limit beyond which the legislature cannot go.”⁴⁸ Takings ostensibly made in furtherance of a public improvement which the condemnation “can never by any possibility serve” or takings for uses that are not public would deprive the landowner of property without due process, and so would call for judicial intervention.⁴⁹ In short, Nichols concluded, the judiciary could intervene only where the legislature “had acted with total lack of judgment or in bad faith.”⁵⁰ Although this rule would seem to leave the landowner with little protection from ill-conceived acts of the legislature, Lewis dismissed such concerns, stating:

The owner is assumed to be sufficiently protected from an abuse of the power by the fact that the condemnor is not likely to take and pay for property which it does not need and which it cannot sell and cannot lawfully use for any other purpose than that for which it was condemned⁵¹

Despite the overwhelmingly strong notion that determinations of necessity were legislative questions, the judiciary nonetheless retained a role in necessity determinations. The judiciary typically intervened in one of two instances. The first involved abuses of discretion; the second was where a statute specifically granted the court a role in these decision-making processes.

Nichols addressed the first instance—abuses of discretion—in his treatise. His analysis was based on the fundamental notion that a per-

46 2 LEWIS, *supra* note 7, at 1056. The exception is where the state constitution does provide for judicial review of the necessity for the taking. Lewis, for example, describes in detail a decision by the Supreme Court of Vermont, which, faced with a state constitution providing that private property can be taken for public use only when it is necessary for such use, ruled that necessity was thus a judicial question. *See id.* at 1053–55 (discussing *Stearns v. Barre*, 50 A. 1086 (Vt. 1901)).

47 2 NICHOLS 2d, *supra* note 8, at 909.

48 *Id.*

49 *Id.*; *see also id.* at 910 (stating that the Due Process Clause “would protect an individual who was deprived of his property under pretense of eminent domain in ostensible behalf of a public enterprise for which it could not be used”).

50 *Id.*

51 2 LEWIS, *supra* note 7, at 1055.

son whose property is taken by eminent domain is protected by the Fourteenth Amendment to the extent that an arbitrary, unfair, or unjust taking is not allowed, even if the taking is for the public use and the property owner is compensated.⁵²

The second instance where the judiciary could make evaluations of necessity involved situations in which a specific law gave the court the power to do so. For example, Michigan passed a constitutional provision in 1851 that made the determination of necessity a decision for a jury or commissioners appointed by a court. This body considered both the necessity of the improvement and the necessity of taking the land at issue for the improvement.⁵³ In discussing legislative delegations of necessity determinations to the judiciary, Nichols explained:

Such a duty [determining the necessity of a proposed taking], although primarily legislative, is not so essentially unjudicial that to impose it upon a court is a violation of the principle of the separation of powers, and in several states it has been enacted with respect to particular classes of public improvements that land shall not be taken unless the taking is found to be necessary by the court.⁵⁴

This suggests that traditional judicial deference to the legislature's determinations of necessity was premised on respect for legislative sovereignty and for the distinct roles of the judiciary and legislature, as opposed to any inherent limitation on judicial power. In general, however, the courts traditionally have taken a hands-off approach to issues of necessity. As summarized by the Illinois Supreme Court in a 1951 case:

[W]here the right to condemn exists, and the property is subject to the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, courts cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine.⁵⁵

The court went on to define the role of the judiciary narrowly:

[C]ourts may only rightfully determine whether a petitioner has the power to exercise the right of eminent domain, whether the property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused, as by the taking of an excessive amount of property, and other kindred questions which do not involve a

⁵² See 2 NICHOLS 2d, *supra* note 8, at 897–98 (noting the Fourteenth Amendment prohibits arbitrary takings).

⁵³ See *id.* at 922 (discussing the Michigan constitutional provision).

⁵⁴ *Id.* at 923.

⁵⁵ *City of Chicago v. Vaccarro*, 97 N.E.2d 766, 771 (Ill. 1951).

determination of the necessity or expediency of the taking of the lands sought to be condemned.⁵⁶

In short, questions of the necessity of taking have historically fallen to the legislature, not the judiciary, to decide. Even today, the courts profess to have little role in reviewing these legislative actions, in the absence of legislative bad faith and abuse of discretion.⁵⁷

C. *The Overlap Between Necessity and Public Use*

There is a significant overlap between “necessity” and “public use,” and this overlap has colored the way in which the courts have historically analyzed these issues. “Public use” is a term fraught with controversy and subject to considerable interpretative nuances under modern law.⁵⁸ Historically, the state courts, in particular, have diverged on how they treat the term. Courts adopting the narrower view of the concept of “public use” require that the condemned property be employed only for projects where the public can actually directly use the property acquired (e.g., for a road, school, park, or other public good).⁵⁹ By contrast, courts adopting the broad view treat “public use” as coterminous with “public advantage” or “public benefit.”⁶⁰ Under this view, “public use” is broadly defined as “conducive to community prosperity,”⁶¹ which would include “[a]ny exercise of eminent domain which tends to enlarge resources, increase

⁵⁶ *Id.*

⁵⁷ *See* *City of Phoenix v. McCullough*, 536 P.2d 230, 235 (Ariz. Ct. App. 1975) (“[A] condemnor’s determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct.”); *City of Atlanta v. Heirs of Champion*, 261 S.E.2d 343, 344 (Ga. 1979) (“The question of whether there is a necessity for taking the fee is a matter of legislative discretion, which will not be interfered with or controlled unless the authority acts in bad faith or beyond the powers conferred upon it by law.”); *Westrick v. Approval of Bond of Peoples Natural Gas Co.*, 520 A.2d 963, 965 (Pa. Commw. Ct. 1987) (“Administrative decisions of a condemnor concerning the amount, location, or type of estate condemned are not subject to judicial review unless such decisions are in bad faith, arbitrary, capricious, or an abuse of power.”); *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth. (In re Seattle Monorail Popular Auth.)*, 121 P.3d 1166, 1175 (Wash. 2005) (“A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.”).

⁵⁸ *See generally* 2A NICHOLS 3d, *supra* note 6, §§ 7.01[1], 7.02[3] (discussing meaning of “public use”); Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 52–57 (2008) (discussing the same).

⁵⁹ *See* 2A NICHOLS 3d, *supra* note 6, § 7.02[2] (discussing the narrow view of public use).

⁶⁰ *See id.* § 7.01[2].

⁶¹ *Id.* § 7.02[4] (quoting *People of Puerto Rico v. E. Sugar Assoc.*, 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772 (1946)).

industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community.”⁶²

The U.S. Supreme Court reaffirmed its historical adoption⁶³ of the broad view of public use in *Kelo v. City of New London*. Justice Stevens, writing for the majority, stated that “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’”⁶⁴ Instead, the *Kelo* majority turned to what it deemed the “broader and more natural interpretation of public use as ‘public purpose.’”⁶⁵ The Court also emphasized the “great respect” that the federal courts should pay the state courts and legislatures in identifying local public needs,⁶⁶ stating that: “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”⁶⁷ Rather, “if a legislature . . . determines there are substantial reasons for an exer-

62 *Id.* § 7.02[3].

63 *See* *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (pointing out the “inadequacy of use by the general public as a universal test” for public use); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896) (finding that “public use” means furthering a public interest).

64 545 U.S. 469, 479 (2005) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

65 *Id.* at 480. The *Kelo* majority had a long line of precedent to look to, in which the Court had repeatedly held that the judicial role in the public use inquiry was extremely limited. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“The role of the judiciary in determining whether that [eminent domain] power is being exercised for a public purpose is an extremely narrow one.”). The *Kelo* Court in particular turned to *Berman*, where it had found that “[t]he concept of the public welfare is broad and inclusive” enough to allow the use of eminent domain to achieve any legislatively permissible end, *Kelo*, 545 U.S. at 481 (quoting *Berman*, 348 U.S. at 33), and its 1984 decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), where the Court stated that the eminent domain power is “coterminous with the scope of a sovereign’s police powers,” *id.* at 240, and that a taking must be upheld if it is “rationally related to a conceivable public purpose.” *Id.* at 241.

66 *Kelo*, 545 U.S. at 482 (citing *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606–07 (1908)).

67 *Id.* at 488 (quoting *Midkiff*, 467 U.S. at 242–43). As explained in the leading treatise in the area of eminent domain law:

When the legislature has authorized the exercise of eminent domain in a particular case, it has necessarily adjudicated that the land to be taken is needed for the public use, and no other or further adjudication is necessary. When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary or expedient that his land be taken for such improvement, unless the public use alleged for the taking is a mere pretense.

See 1A NICHOLS 3d, *supra* note 7, § 4.11[1].

cise of the taking power, courts must defer to its determination that the taking will serve a public use.”⁶⁸

Treating “public use” as coterminous with “public purpose,” however, does little to resolve the question of what types of takings are permissible, as the term “public purpose” itself is subject to considerable variations in interpretation.⁶⁹ Moreover, the high degree of deference afforded by both state and federal courts to legislative determinations to condemn property means that property owners can expect little relief from takings by falling back on arguments relating to public use.

Theoretically, “public use” and “necessity” are completely distinct inquiries.⁷⁰ Necessity usually arises in the context of determining whether the proposed project furthers a public purpose and thus is a public use.⁷¹ Whether “public use” is present is clearly a question for the judiciary,⁷² while determination of “necessity” (i.e., whether the proposed project furthers the stated public use) is for the legislature.⁷³ As the U.S. Supreme Court stated in *Shoemaker v. United States*:

[W]hile the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.⁷⁴

Thus, the courts may not “substitute their own judgment” for that of the legislature or reject a taking simply because the legislature could

68 *Midkiff*, 467 U.S. at 244.

69 In the words of an Illinois Appellate Court, “[w]hat constitutes a ‘public purpose’ . . . has plagued the American judiciary ever since it arrogated to itself the prerogative of interpreting constitutions.” *Lake Louise Improvement Ass’n v. Multimedia Cablevision*, 510 N.E.2d 982, 984 (Ill. App. Ct. 1987).

70 1 LEWIS, *supra* note 7, at 502–03 (“Nearly all the cases, however, hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature.”).

71 *See City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 15 (Nev. 2003) (“In an eminent domain proceeding, necessity is usually raised in the context of challenging whether a project furthers a public purpose and therefore constitutes a public use.”).

72 1 LEWIS, *supra* note 7, at 499 (“[P]rivate property can be taken only for public use, and . . . what is a public use is a question for the courts.”).

73 *Id.* at 503 (“[T]he question of necessity is distinct from the question of public use, and . . . the former question is exclusively for the legislature”); *see also* TIEDEMAN, *supra* note 23, at 378 (“It is a legislative question whether the public exigencies require the appropriation, but it is a clearly a judicial question, whether a particular confiscation of land has been made for a public purpose.”).

74 147 U.S. 282, 298 (1893); *see also In re Niagara Falls & Whirlpool Ry. Co.*, 15 N.E. 429, 431 (N.Y. 1888) (stating that when a use is public, the necessity of the taking is not a matter for the judiciary, but for the “political and legislative branches”).

have achieved the public purpose through a different mechanism or method.⁷⁵

In practice, however, the distinction between the “public use” and “necessity” was, and still is, murky.⁷⁶ “Public use” historically was (and still is) often defined in terms of “necessity.”⁷⁷ For example, the Massachusetts Supreme Court stated in 1911 that: “The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein.”⁷⁸ In the middle of the nineteenth century, the California Supreme Court defined necessity in terms of public use, providing that eminent domain is “the right of the sovereignty to use the property of its members for the public good or public necessity.”⁷⁹ Similarly, Lewis stated that even though a state’s constitution and statutes might be silent on the issue of necessity, “the power to take is, in every case, limited to such and so much property as is necessary for the public use in question.”⁸⁰ Necessity, in this context, means only a reasonable, but not an absolute, necessity,⁸¹ and the requirement is deemed met

⁷⁵ See *City of Las Vegas Downtown Redev. Agency*, 76 P.3d at 15.

⁷⁶ See *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076 (D. Colo. 1986) (“[T]he issues of necessity and public purpose are closely related and, to some extent, interconnected.”).

⁷⁷ For example, Nichols defines “public use” serving:

(1) to enable the United States or a state or one of its subdivisions to carry on its governmental functions, and to preserve the safety, health and comfort of the public, whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body; [or] (2) to serve the public with some *necessity or convenience of life* which is required by the public as such and which cannot be readily furnished without the aid of some governmental power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right.

1 NICHOLS 2d, *supra* note 8, at 140 (emphasis added).

⁷⁸ *In re Winnisimmet Co.*, 95 N.E. 293, 294 (Mass. 1911).

⁷⁹ *Gilmer v. Lime Point*, 18 Cal. 229, 250 (1861). Moreover, the court went on to state: “The word *necessity*, in this connection, is not to be used in too limited a sense; it means a want, an exigency, an expediency, for the interest or safety of the State.” *Id.* It also discussed public use specifically, stating:

If the use for which the property is taken be to satisfy a great public want or public exigency, it is a *public use* in the meaning of the Constitution, and the State is not limited to any given mode of applying that property to satisfy the want, or to meet the exigency.

Id. at 251. Interestingly, the Massachusetts State Constitution also provides for compensation “whenever the public exigencies require that the property of any individual should be appropriated to public uses.” MASS. CONST. pt. I, art. X. The Massachusetts Supreme Court has determined that “public exigenc[ies]” encompass “public convenience and necessity.” *Boston Water Power Co. v. Boston & Worcester R.R. Corp.*, 40 Mass. (23 Pick.) 360, 392 (1839).

⁸⁰ 2 LEWIS, *supra* note 7, at 1060.

⁸¹ *Id.* at 1062.

if “the property sought to be condemned would conduce to some extent to the accomplishment of the public object to which it was to be devoted.”⁸²

Thus, while necessity may be reserved for the legislature and public use may be reserved for the judiciary, the two are inextricably connected. While early courts and commentators agreed that necessity is a critical element of eminent domain—that taking property unnecessarily is unconstitutional—they also clearly viewed the determination of necessity as being a legislative or political one. And even though the early courts and commentators often distinguished between different necessity issues, the majority of authorities resolved the issues in the same manner—broad deference to legislative will. Thus, while early courts might have intervened to prevent a taking, they typically did so on necessity grounds only where it was apparent that the legislature had abused its power or acted in bad faith.⁸³

The Washington Supreme Court recently addressed this issue, in its decision in *HTK Management, L.L.C. v. Seattle Popular Monorail Authority (In re Seattle Popular Monorail Authority)*.⁸⁴ The court noted that “even though the two terms do overlap to some extent,” there is a difference between stating that condemnation is for a “public use” and that it is a “public necessity.”⁸⁵ Although the legislature’s declaration that the specific use of property is a public use “is entitled to great weight,” the declaration “is not dispositive,” as the question of public use fundamentally is “a judicial question.”⁸⁶ A declaration of the necessity to condemn certain land, by contrast, is “conclusive” absent “actual fraud or arbitrary and capricious conduct” tantamount to constructive fraud.⁸⁷

In summary, although some states have statutory or constitutional provisions requiring a finding of necessity to support a taking,⁸⁸ in

82 *Id.*; see also *Vittetoe v. Iowa S. Utils. Co.*, 123 N.W.2d 878, 881 (Iowa 1963) (stating that Lewis’ view of necessity is applicable to an eminent domain dispute).

83 2 LEWIS, *supra* note 7, at 1063.

84 121 P.3d 1166 (Wash. 2005).

85 *Id.* at 1175.

86 *Id.* (quoting WASH. CONST. art. I, § 16).

87 *Id.*

88 The language of the North Dakota statute is typical of such provisions:

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

N.D. CENT. CODE § 32-15-05 (2008). For similar statutes, see ALASKA STAT. § 09.55.270 (2008); ARIZ. REV. STAT. ANN. § 12-1112 (2008); IDAHO CODE ANN. § 7-704 (2008); MONT. CODE ANN. § 70-30-111 (2008).

most states the requirement arises through judicial application of constitutional principles pertaining to eminent domain and due process. Regardless of whether the requirement of necessity arises statutorily or through judicial doctrine, the courts are generally reluctant to review necessity determinations, generally imposing a very narrow standard of review based on abuse of discretion, arbitrary and capricious decisionmaking, or bad faith.⁸⁹ Moreover, the courts make clear that the standard is one of reasonable, not absolute, necessity.⁹⁰

Nonetheless, necessity review provides some hope for targets of an eminent domain action, especially if the proceeding is disputed in state court. Although courts are deferential to the condemnor's findings regarding necessity, state courts do occasionally overturn takings on necessity grounds. The next three Parts of this Article will examine these possibilities. First, the court may view the municipal plan as too speculative or remote to be justified. Second, the municipality may not have surmounted all procedural or regulatory requirements. Third, the land sought by the municipality may exceed what is necessary to fulfill the stated public purpose. The next Part examines the decisions in these three categories where landowners have successfully challenged taking efforts on necessity grounds.⁹¹

II. THE EMINENT DOMAIN PLAN IS TOO REMOTE OR SPECULATIVE

Eminent domain doctrine has long cast a skeptical eye upon takings that appear speculative in nature. Nichols asserted in his treatise, for example, that "if [a] proposed taking savored at all of a municipal law speculation, no court would hesitate to hold it

⁸⁹ See *Swenson v. County of Milwaukee*, 63 N.W.2d 103, 105 (Wis. 1954) ("[C]ourts will not disturb . . . [a determination of necessity] in the absence of fraud, bad faith, or gross abuse of discretion." (quoting 18 AM. JUR. *Eminent Domain* § 108)). See also *King v. City of McCaysville*, 33 S.E.2d 99, 100 (Ga. 1945) ("In the absence of bad faith, the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity, and what and how much land shall be taken."); *Seba v. Indep. Sch. Dist. No. 3*, 253 P.2d 559, 561 (Okla. 1953) ("The ordinary rule in condemnation cases is that while the particular property sought to be condemned must be necessary for the proposed project, the condemnor's decision as to the necessity for taking particular property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.").

⁹⁰ See *Falkner v. N. States Power Co.*, 248 N.W.2d 885, 894 (Wis. 1977) ("In determining necessity neither the legislature nor its delegate is limited to takings that are absolutely or indispensably necessary. Necessary in this context has been construed to mean reasonably necessary, reasonably requisite and proper for the accomplishment of the public purpose for which the property is sought; necessary does not mean absolutely imperative.").

⁹¹ For a categorization of necessity cases, see 71 AM. JUR. 3D *Proof of Facts* § 97 (2008).

unconstitutional.”⁹² Challengers to takings (i.e., landowners) can thus weaken the strong presumption that necessity exists by showing that the future use is somehow uncertain, unplanned, or indeterminate.

A. *The Plan Is Uncertain*

The courts have long held that condemners may take property not only for current public needs, but also for future needs that may be reasonably anticipated.⁹³ A basic requirement of condemning for future uses is that the condemnor must at the very least have plans for using the land in the future.⁹⁴ Those plans can be quite vague, provided the condemnor is acting in good faith. In *Port of Umatilla v. Richmond*,⁹⁵ for example, the Oregon Supreme Court found that a port authority could consider probable future needs, as well as known present needs, in determining the extent of land to be taken, provided its estimation of future needs was made in good faith.⁹⁶

The “good faith” requirement implies that the condemnor must have some reasonable basis for anticipating a need for the property

⁹² 1 NICHOLS 2d, *supra* note 8, at 178.

⁹³ *See, e.g.*, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923) (“In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered.”); *see also* *Pac. Gas & Elec. Co. v. Parachini*, 29 Cal. App. 3d 159, 164 (Cal. Ct. App. 1972) (stating that in determining whether condemnation is necessary for a public use, “the court is entitled to consider not only present needs, but those which can be fairly anticipated on account of future growth”); *City of Chicago v. Vaccarro*, 97 N.E.2d 766, 772 (Ill. 1951) (condemnor should consider “not only the present needs of the public, but those which may be fairly anticipated in the future”); *White Mountain Power Co. v. Whitaker*, 213 A.2d 800, 804 (N.H. 1965) (“[P]roperty may be taken for uses which may be reasonably anticipated in the future.”); *Rueb v. Oklahoma City*, 435 P.2d 139, 141 (Okla. 1967) (“A future hope based on speculation is not sufficient to justify the taking of private property in a condemnation proceeding. But a condemning authority may consider those demands which may be fairly anticipated in the future.”).

⁹⁴ *E.g.*, *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App. 2d 472, 480–81 (Cal. Dist. Ct. App. 1961) (taking of easements for phone lines with “no present intention to install any such lines” and uncertainty as to whether “the public [will ever] receive any benefit from the acquisition of the[] easements” lacks necessity and cannot be taken by eminent domain).

⁹⁵ 321 P.2d 338 (Or. 1958).

⁹⁶ *Id.* at 350–51 (“A condemning corporation may condemn lands sufficient to provide for not only its present but also its prospective necessities, if it is not more than may in good faith be presumed necessary for future use within a reasonable time.” (internal quotations and citation omitted)); *see also* *City of Waukegan v. Stanczak*, 129 N.E.2d 751, 756 (Ill. 1955) (“As to amount, condemning authorities have substantial discretion to take land sufficient not only for present needs but future requirements . . . which they can and should anticipate. . . . Unless the discretion is abused or any area grossly excessive is taken . . . the taking will not be disturbed.” (citations omitted)).

in the future. Where such a basis is lacking, the taking is likely to fail. In *Connecticut Light and Power Co. v. Huschke*,⁹⁷ for example, a utility company sought an easement over private property through eminent domain.⁹⁸ The dominant reason put forth by the utility for the taking was that the utility needed to accommodate a second transmission line sometime in the future.⁹⁹ The utility never specified when in the future the line might be constructed, nor did it specify a concrete plan that needed to be accommodated.¹⁰⁰ The utility also failed to obtain necessary governmental approvals for a second transmission line that would have utilized the land at issue.¹⁰¹ The trial court found, without detailed discussion, that the taking for this easement was an abuse of the utility's powers of eminent domain.¹⁰²

Similarly, in *State v. 0.62033 Acres of Land in Christiana Hundred*,¹⁰³ the Delaware State Highway Department sought to condemn land for a future four-lane highway.¹⁰⁴ The Department admitted it had no present plans for a highway and could only anticipate that at "some time in the future" a highway might be required.¹⁰⁵ The Department had not yet taken any official action in furtherance of construction of the highway and could not state with any certainty that plans for a highway would eventually be drafted.¹⁰⁶ Indeed, the only reason the Department gave for the condemnation was that taking the land was a money-saving measure in what was apparently a rising real estate market.¹⁰⁷ While the Delaware Supreme Court concluded that saving taxpayer dollars by buying land early was a "very commendable purpose," this reasoning, combined with the lack of any specifics regarding time and plans, did not constitute sufficient necessity to take the land at issue.¹⁰⁸

97 409 A.2d 153 (Conn. Super. Ct. 1979).

98 *Id.* at 154.

99 *Id.* at 157. The utility justified the taking by stating that it required access to install the power line, flexibility to determine power line location, and a need for a buffer zone. *Id.* at 156–57. The court concluded that these justifications did not apply to the defendant. *Id.* at 157.

100 *See id.* (suggesting the plan was indeterminate).

101 *Id.*

102 *Id.*

103 112 A.2d 857 (Del. 1955).

104 *See id.* at 858, 860 (detailing the highway improvements that caused the Delaware State Highway Department to seek to acquire the defendants' land).

105 *Id.* at 860.

106 *See id.* ("[T]he Department had taken no official action whatsoever for the construction of a four-lane highway.")

107 *See id.* ("[T]he Department acknowledged . . . that the taking of a 100 foot right-of-way at this time was largely in order to save money for the state . . .").

108 *Id.*

Likewise, in *Regents of the University of Minnesota v. Chicago & North Western Transportation Co.*,¹⁰⁹ the Minnesota Court of Appeals upheld the lower court's dismissal of an eminent domain petition on the grounds that the condemnor had failed to show "necessity."¹¹⁰ The regents of the University had negotiated to purchase property from a railroad, but the negotiations failed and the railroad accepted an offer from another purchaser instead. The regents then sought to condemn the property.¹¹¹ The University had no concrete plans for the property but had considered several types of potential but mutually exclusive uses.¹¹²

The trial court was statutorily charged with the task of determining whether the taking "appear[ed] to be necessary."¹¹³ "Necessity in this context" required a showing by the condemnor that the property was being taken for an identifiable public purpose for use "now or in the near future."¹¹⁴ The appellate court found that the University was unlawfully attempting to "stockpil[e]" the land for speculative future use.¹¹⁵ Not only had the University not included the property on its master plan, but the Regents had not approved any project for the land and environmental contamination present on the property meant that a multi-year remediation process would be required before it could be used for any of the proposed purposes.¹¹⁶

However, the Minnesota Court of Appeals restricted the scope of this ruling in subsequent cases, stating first that "necessity cannot be thwarted by alleging that . . . the purpose for condemning the property is too speculative if in fact the project is officially supported by the governmental entity and ordinary agreements are in place to realize the project,"¹¹⁷ and second, that "[t]he rule established in *Re-*

109 552 N.W.2d 578 (Minn. Ct. App. 1996).

110 *Id.* at 578, 580.

111 *Id.* at 580.

112 *See id.* ("[A]lthough the University claims to have at least three potential uses for the land, the uses are mutually exclusive, and the Board of Regents has not yet approved a single project for the property.")

113 *Id.* (quoting MINN. STAT. § 117.075 (1994)).

114 *Id.* (internal quotation marks omitted) (quoting *State ex. rel. City of Duluth v. Duluth St. Ry.*, 229 N.W. 883, 884 (Minn. 1930)).

115 *See Regents*, 552 N.W.2d at 580 ("The University may well have the right to purchase this property, but it cannot acquire it for speculative future use (stockpiling) by condemnation.")

116 *See id.* ("[B]ecause of soil contamination problems . . . the University could not currently use the property for any of its proposed uses. The parties have not yet agreed on a remediation plan . . . [which will require] approximately two to seven years . . .").

117 *Minneapolis Cmty. Dev. Agency v. Opus N.W., L.L.C. (In re Condemnation by Minneapolis Cmty. Dev. Agency)*, 582 N.W.2d 596, 597 (Minn. Ct. App. 1998).

gents . . . is limited by the extreme facts present in that controversy.”¹¹⁸ The appellate court has also emphasized the deference accorded the trial court’s finding in necessity determinations. In an unpublished 2006 decision, *Economic Development Authority v. Hmong-American Shopping Center, L.L.C.*, for example, the court of appeals rejected the argument by a landowner that the taking of its land for blight-clearing purposes failed the necessity test simply because the condemnor admitted “that there was no definite use, plan, or design concept for the land beyond the acquisition, demolition, and remediation of the property to prepare it for redevelopment.”¹¹⁹ Rather, the appellate court found that the trial court had not clearly erred in finding that the condemnor’s determination of necessity was not manifestly arbitrary or unreasonable.¹²⁰ Unlike the nebulous actions by the condemnor in *Regents*, the condemnor in *Hmong-American Shopping Center* had included the disputed parcel within its plans and had adopted resolutions finding it was in the public interest and necessary for the condemnor to acquire the property, through negotiation or condemnation, in order to eliminate blight, increase the tax base, and bolster the public health and welfare.¹²¹ The condemnor had provided both a plan and a timeline (of less than one year) for clearing the property and remediating any environmental problems.¹²² Moreover, both the condemnor and the condemnee agreed that redevelopment could not occur unless the condemnor acquired the condemnee’s parcel.¹²³ The court found that the only similarity between the instant case and *Regents* was the “lack of a finalized and specific use for the land after the removal of blight and environmental contamination,” but also held that “*Regents* does not require that a final design concept be in place” prior to the taking.¹²⁴

118 *Itasca County v. Carpenter*, 602 N.W.2d 887, 890 (Minn. Ct. App. 1999).

119 No. A05–1239, 2006 Minn. App. Unpub. LEXIS 438, at *9 (Minn. Ct. App. May 9, 2006).

120 *See id.* at *13 (“Here, we must give deference to the district court’s findings and ultimate conclusion that the [Economic Development Authority (“EDA”)] sufficiently demonstrated necessity.”).

121 *See id.* at *4–5 (discussing the EDA board’s resolutions).

122 *See id.* at *14 (“[T]he EDA had both a plan and timeline—of less than a year—for razing the buildings and remediation of the environmental damage . . .”).

123 *See id.* at *13 (“[T]he board of commissioners of the EDA *had* adopted a resolution finding that it was in the public interest and was necessary for the EDA to proceed with the proposed redevelopment and to acquire the property through negotiation or by eminent domain . . .”).

124 *Id.* at *14.

B. The Timing of the Plan's Execution Is Too Vague

Condemnation actions can also fail for lack of necessity where the timing of the proposed public use is uncertain or so far in the future as to make the use itself speculative. While condemnors may find it fiscally advantageous to condemn early and to accumulate land for anticipated future uses,¹²⁵ courts have struck down such plans on necessity grounds. For example, in *Board of Education v. Baczewski*, the Michigan Supreme Court struck down a school board's attempt to take property for a high school site that would not be needed for thirty years or more.¹²⁶ The school board made clear that its actions were motivated by economic planning and a desire to save future taxpayers money by acquiring the land far in advance of anticipated need, while the land was still undeveloped and hence less valuable.¹²⁷ The court held that the state constitution's requirement that there be "necessity for using such property"¹²⁸ meant that the condemnor had to show that the property would be either used immediately or within "the near future" or a "reasonably immediate" time.¹²⁹

Similarly, the California Appellate Court found that while the condemnor was permitted to condemn an easement for electric lines, its efforts to take gas and telephone line easements across the same land failed for lack of necessity because the condemnor had made no showing that it contemplated future installation of such lines; rather, it was only trying "to cover the possibility of a need" for an easement

125 As explained in Donald M. Zupanec, *Eminent Domain: Validity of Appropriation of Property for Anticipated Future Use*, 80 A.L.R. 3D 1085 (1977):

The motives behind the desire for present condemnation of property to be used in the future are both obvious and understandable. The rule that any taking of private property for a public use requires the payment of just compensation, coupled with the fact that the value of real property follows an ever-increasing spiral, makes it manifestly more economical for a condemnor to acquire property at present, when its value is less, than to delay condemnation until the point in the future when immediate use is planned, by which time the value of the property inevitably will have risen, as will the amount of compensation which will have to be paid. Moreover, land-use planning may be made more effective and less disruptive where future needs can be anticipated and property acquired ahead of time to provide therefor.

Id. § 2(a) (footnote omitted).

126 65 N.W.2d 810, 811 (Mich. 1954).

127 *See id.* ("Appellee instituted this proceeding long before there was need for a new high school site, in order to save money.")

128 MICH. CONST. of 1908, art. 13, § 2 ("When private property is taken for the use or benefit of the public, the necessity for using such property . . . shall be ascertained by a jury . . ."). This language does not appear in the current Michigan State Constitution.

129 *Baczewski*, 65 N.W.2d at 813 (internal quotations omitted).

for such purposes at some unspecified time in the future.¹³⁰ Likewise, the Commonwealth Court of Pennsylvania held that a taking of farmland to satisfy a projected need for new school buildings within the next five-to-twelve years was an abuse of discretion, albeit made in good faith, because the “probable need” for the land was based on “assumptions and possibilities that [had] been challenged by contrary evidence.”¹³¹ While the court acknowledged that a school district needs to engage in long-term planning for future needs and that purchase of land to meet those needs was “proper and commendable,” the court found that condemnation of land to support such needs would require “more” support than mere “projections based on possible housing development.”¹³² Yet, it is unclear what that something “more” would be, as the court also acknowledged that the projections used to calculate future needs were “based on the best available information” and that the school board relied upon those figures in good faith in calculating its future needs.¹³³ Presumably, it was the five-to twelve-year time horizon that gave the court pause.

Certainly, condemners can take property somewhat in advance of the anticipated public use. For example, the California Appellate Court upheld a condemnation for a school to be built within four years of the taking¹³⁴ and the Kansas Supreme Court upheld the taking of land for utility purposes where the land was needed to satisfy present and future demands for power reasonably anticipated within the next five years.¹³⁵ Likewise, the Arkansas Supreme Court permitted the taking of extra land to enable a planned two-lane highway to be expanded into a four-lane divided highway at an unspecified time in the future when funds permitted its construction.¹³⁶ The court’s holding may have been influenced by the fact that traffic counts already justified the wider road, and it apparently was only a lack of funding that resulted in the narrower road being first built.

Similarly, the Kentucky Appellate Court saw no lack of necessity or excess condemnation when a municipality condemned land for

130 *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App. 2d 472, 480 (Cal. Dist. Ct. App. 1961).

131 *In re Condemnation by Octorara Area Sch. Dist.*, 556 A.2d 527, 527, 531 (Pa. Commw. Ct. 1989).

132 *Id.* at 531.

133 *Id.*

134 *Anaheim Union High Sch. Dist. v. Vieira*, 241 Cal. App. 2d 169, 172–73 (Cal. Dist. Ct. App. 1966).

135 *Shelor v. W. Power & Gas Co.*, 449 P.2d 591, 593 (Kan. 1969).

136 *Woollard v. State Highway Comm’n*, 249 S.W.2d 564, 566 (Ark. 1952).

planned construction of a reservoir thirty years hence.¹³⁷ The court noted that customary planning practice was to project water needs thirty years out,¹³⁸ and noted that “a municipality may also procure land in contemplation of such reasonable necessity as may arise in the future.”¹³⁹ The Florida Appellate Court went even further, upholding a condemnation for park purposes, even though the exact nature of the park was not known at the time of condemnation, and even though it was uncertain where the park would be constructed (although it was acknowledged that the city had no immediate intention of pursuing the park use).¹⁴⁰

The difficulty lies in determining just how far in the future the public purpose may lie without running afoul of necessity determinations. This issue was addressed in *City of Phoenix v. McCullough*.¹⁴¹ The Phoenix city council passed an ordinance authorizing city officials to acquire two parcels of land by eminent domain to expand a local airport.¹⁴² In August 1969, the city commenced an action to condemn five lots owned by the McCulloughs.¹⁴³ According to the airport master development plan, twenty percent of the McCulloughs’ property would be used between 1984 and 1992 and the remaining eighty percent would be used by 2015.¹⁴⁴ According to the city, these specific

137 See *McGee v. City of Williamstown*, 308 S.W.2d 795 (Ky. Ct. App. 1957).

138 See *id.* at 797 (“The thirty-year [water use] projection into the future is . . . a customary procedure in planning water reservoirs.”).

139 *Id.* at 796.

140 See *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So. 2d 149, 152 (Fla. Dist. Ct. App. 1977) (“[I]t is not necessary that a condemnor, representing the state or a political subdivision of the state, have funds on hand, plans and specifications prepared and all other preparations necessary for immediate construction before it can determine the necessity for taking property for a public use. In point of fact, it is the duty of public officials to look to the future and plan for the future . . .” (quoting *Cent. & S. Fla. Flood Control Dist. v. Wye River Farms, Inc.*, 297 So. 2d 323 (Fla. Dist. Ct. App. 1974)) (emphasis omitted)).

141 536 P.2d 230 (Ariz. Ct. App. 1975).

142 See *id.* at 231 (“On August 12, 1969, the City Council of the City of Phoenix passed Ordinance No. S-4878 authorizing various city officials to acquire title to two parcels of land ‘for the purpose of expanding, improving and developing Sky Harbor Municipal Airport.’”).

143 See *id.* (“Pursuant to this ordinance, the City on August 28, 1969 instituted this action seeking to condemn the lots owned by the McCulloughs.”).

144 See *id.* at 232 (“According to this Master Plan, approximately 20% of the McCullough property would be used between 1984 and 1992 and the remaining 80% would be used in the year 2015.”).

parcels were being taken to permit the expansion of air freight facilities and ancillary services, as well as to provide off-street parking.¹⁴⁵

An Arizona state statute provided: “[b]efore property may be taken, it shall appear that . . . [t]he taking is necessary to such use.”¹⁴⁶ The appellate court noted that the phrase “necessary to such use” unavoidably introduces a time element into the evaluations of the validity of the taking.¹⁴⁷ Although the court acknowledged that a condemnor could “legitimately consider future needs in determining what property and the amount of property is necessary for use,”¹⁴⁸ the court also questioned “how far in the future . . . the condemnor [may] crystal gaze before the taking loses the essence of necessity.”¹⁴⁹ The court appeared to view the consideration of necessity through the lens of a balancing test.¹⁵⁰ On the one hand, a city has legitimate fiscal interests in taking as much land as possible as early as possible in a rising land market.¹⁵¹ Takings for future uses also enable systematic long-term planning for public use.¹⁵² On the other hand, landowners have a strong interest in retaining possession of their land, not only to reap the benefits of rising land values but also to reap the benefits of ownership of real property.¹⁵³ Moreover, private ownership benefits the city because it keeps land available for public taxa-

145 *See id.* (“[T]he McCullough Properties ‘were required at the time this said action was filed to provide for the expansion of the airfreight [sic] facilities and to provide ancillary services necessary thereof.’”).

146 *Id.* at 235 (quoting ARIZ. REV. STAT. ANN § 12-1112 (1956)).

147 *Id.* at 234.

148 *Id.* at 235.

149 *Id.* at 236. The court rejected the city’s initial argument that a legislative determination of necessity per se removes the decision from judicial scrutiny, although the court also stated that “a condemnor’s determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct.” *Id.* at 235.

150 *See id.* at 236 (stating that necessity review “requires a balancing of competing interests”).

151 *See id.* (“Obviously, a condemnor considering future needs is interested in the legitimate pursuit of saving taxpayers’ money . . .”).

152 *See id.* (“[A] systematic planning for future public use should be encouraged.”).

153 *See id.* (“Equally as obvious is the interest of the private landowner in holding and using his property as long as possible, not only to take advantage of rising real estate values, but also to enjoy the advantages that land ownership affords.”); *see also* Zupanec, *supra* note 125, § 2(a):

As the condemnor gains economically by present acquisition, so does the landowner lose. If condemnation occurs at any point in time substantially prior to the point at which the property is actually used, the owner will have received less in compensation than would have been the case had condemnation been delayed and the property permitted to appreciate. Additionally, the owner generally has an interest, whether tangible or intangible, in retaining possession of his property for as long as possible. Whether the property is used for residential or business purposes, its owner normally is reluctant, for personal or economic reasons, to part with it before absolutely necessary.

tion as long as possible.¹⁵⁴ The challenge, from the *McCullough* Court's perspective, was to "keep within bounds government planners whose schemes require an ever-increasing diet of private land to satisfy their planning appetites [while] encourag[ing] systematic planning of acquisition of land for public use."¹⁵⁵

Interestingly, after articulating this balancing inquiry, the court then interpreted the necessity requirement as a simple reasonableness test, stating that a condemning authority can acquire additional property for future use as long as the proposed public use will occur within "a reasonably foreseeable future."¹⁵⁶ A reasonable time, the court stated, would be determined by the "surrounding circumstances."¹⁵⁷ Here, the city's proposed use for the property would not occur until fifteen to forty-six years in the future.¹⁵⁸ Moreover, the city attorney admitted to the trial court that the city knew the plan was going to change over time and there was no way to know today how the lots would actually be used in 2015.¹⁵⁹ The appellate court concluded that where the condemnor does not know when or how a future use of condemned property will occur, the future use is "unreasonable, speculative and remote as a matter of law."¹⁶⁰

The court hinted that it might have accepted a fifteen-year or even longer future timetable as reasonable.¹⁶¹ However, the decades-long delay in property use, combined with the possibility that even the fifteen-year use might change, compelled the court to override the city's decision to condemn. The court seemed to reach this outcome reluctantly, remarking that it had "no other choice" but to reach this conclusion.¹⁶² Thus, although the *McCullough* court recognized in general terms that municipalities may condemn property for future use, it found that the condemnation at issue was for a purpose so remote and speculative, it could not be upheld.

154 See *McCullough*, 536 P.2d at 236 ("[T]here is something to be said for keeping private real property on the tax rolls as long as that property is not needed for public use.").

155 *Id.*

156 *Id.* (quoting *City of Phoenix v. Donofrio*, 407 P.2d 91, 95 (Ariz. 1965)).

157 *Id.*

158 *See id.* (questioning the reasonableness of a time fifteen to forty-six years in the future).

159 *See id.* ("[T]here is question of whether the City will even use the property in 1984 or 2015.").

160 *Id.* at 237; *see also id.* ("[E]ven this 15-year use might change . . .").

161 *See id.* (stating that in the absence of uncertainty as to future use, the court "might hesitate to hold that 15 years in the future was not a reasonable time for future planning").

162 *Id.* at 236. The court cited the attorney's trial court remarks and the reference to the city's master plan as a "general concept and guide." *Id.* at 236. The court cited no other evidence beyond the length of time to support its no-necessity determination. *Id.* at 236-37.

Other courts have found a lack of necessity with even shorter time horizons than those found in *McCullough*. In *Meyer v. Northern Indiana Public Service Co.*,¹⁶³ for example, a utility sought to take two rights-of-way by eminent domain—one for a 345 kilovolt (kV) power line and one for a 138 kV power line.¹⁶⁴ While the utility offered specific evidence about the need for the 345 kV line, it lacked the same evidence for the 138 kV line.¹⁶⁵ An engineer testified that the 138 kV line was to service an “anticipated load” in the future, but the utility had no documentation regarding the planning of the 138 kV line and no specific plans for its development.¹⁶⁶ The engineer could not state whether the 138 kV line would be constructed more than six years from the date of the trial court hearing. Furthermore, one of the landowners testified that he was told that at least ten years would pass before the 138 kV line would be constructed.¹⁶⁷ The Court reasoned that the need for the 138 kV line was purely speculative and ruled in favor of the landowner on the grounds of lack of necessity.

Meyer appears similar to *McCullough*—in both, the court struck down the condemnation as lacking necessity, except that the *Meyer* court seemed to be less tolerant of a delay much shorter than that found in *McCullough*. The explanation may lie in the degree of planning engaged in by the two condemners. In *McCullough*, the city had a specific, written plan for future use of the condemned property, albeit with very long time horizons. In *Meyer*, by contrast, the utility had no such written plan and could not even hazard a guess as to when the land would be used. This suggests that an additional factor that can influence how a court views a condemnation for future use is the degree of planning engaged in by the condemner. The less defined the time horizon for use, and the less defined the plan, the more likely it may be that the condemnee can successfully challenge the taking for future use on necessity grounds.

In *Salt Lake County v. Ramoselli*, for example, the Utah Supreme Court struck down a proposed taking for park and recreation pur-

163 258 N.E.2d 57 (Ind. 1970).

164 *See id.* at 58 (“[T]he present plans and need call for a 345 KV transmission line and . . . the appellee would need 150 feet right-of-way width for the construction and maintenance of such a line.”).

165 *See id.* (“[T]here were no memoranda concerning the planning of the 138 KV line . . .”).

166 *Id.* The engineer testified, “we really haven’t started planning. This is ahead of any planning that I would get into. Planning of the line has not actually begun except that we have an anticipated load that’s the reason that we are doing what we are.” *Id.* (internal quotations omitted).

167 *See id.* (“Mr. Etzler had represented to the property owners that it would be ten years or more before the 138 KV line would be constructed . . .”).

poses on the basis of lack of necessity.¹⁶⁸ In support of its holding, the Supreme Court noted that:

[N]o defined plan[] ha[s] been adopted or approved, . . . no time frame of use within the reasonably foreseeable future ha[s] been determined, . . . a voluntary acquisition of nearby property for public use some six years prior ha[s] not as yet been placed to its intended purpose, and . . . no funds ha[ve] been requested, budgeted, appropriated or were presently in existence to place the property in question to use.¹⁶⁹

These cases suggest that unless the condemnor's future plans are outrageously distant in the future, challengers to takings (i.e., landowners) must weaken the strong necessity presumption by showing that the future taking is somehow uncertain, unplanned, or indeterminate.¹⁷⁰ Ultimately, the indeterminacy and time issues might be evaluated together in a kind of linked continuum. The more distant the proffered time of the use of the property, the less indeterminacy might be required to destroy any necessity presumption.

C. Other Considerations Prevent a Justification of Necessity

Although courts have rejected municipal actions without any plan to develop the property as lacking necessity, even when a municipality presents specific plans and goals to justify a taking, it may not survive a judicial review of necessity. In *Hodges v. Jacksonville Transportation Authority*,¹⁷¹ for example, the Florida court of appeals found that a municipal transit authority had failed to make its requisite showing that its condemnation of the petitioner's land was reasonably necessary where at least four, and possibly five, other routes were available to it, and where the city already owned a substantial portion of the right of way for the road were it to be built in the original proposed alignment.¹⁷²

In *City of Helena v. DeWolf*, municipal planners sought to redevelop a blighted commercial area.¹⁷³ The plan sought to consolidate land

¹⁶⁸ 567 P.2d 182, 184 (Utah 1977).

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g.*, *Regents of the Univ. of Minn. v. Chi. & Nw. Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (holding that although condemning for future use is permissible, the university's taking failed for lack of necessity because it had not included the condemned property in its master plan; had articulated three mutually exclusive uses for the property, none of which had been approved by the Board of Regents; and soil contamination would prevent use of the unremediated land for any of the three purposes, yet no remediation plan had been devised).

¹⁷¹ 353 So. 2d 1211 (Fla. Dist. Ct. App. 1977).

¹⁷² *Id.* at 1215.

¹⁷³ 508 P.2d 122, 124 (Mont. 1973).

ownership, demolish unsuitable structures, and install public improvements, such as sewers, curbs, and accessible streets in order to attract private development.¹⁷⁴ Some buildings were kept in spite of their poor state because of their historical significance.¹⁷⁵ Other buildings were rehabilitated or destroyed altogether.¹⁷⁶ City planners picked and chose which tracts to take in a broad area.¹⁷⁷ Planners selected the defendant's property for taking, although the court found the defendant's property was not substandard or blighted, despite being in a blighted area.¹⁷⁸

The defendants claimed that the city lacked necessity to take their property, a 9000 square foot tract with a supermarket and commercial stores.¹⁷⁹ The property was located on the extreme edge of the urban renewal project.¹⁸⁰ Further, although defendants admitted to the necessity of urban renewal, they challenged the necessity of the particular use associated with their property, an outer parking area for more centralized businesses in the urban redevelopment area.¹⁸¹

At trial, planners introduced, according to the court, "considerable evidence" about the plan and the specific uses of defendants' property, including traffic and parking requirements.¹⁸² In spite of these efforts, the court determined that the city failed to present sufficient proof of necessity.¹⁸³

The court's reasoning is instructive. First, the court took into account the geographic location of the parcel within the entire project, stating that because the "[d]efendants' property stands at the extreme edge of the project[, i]t can be eliminated from the project

174 *See id.* ("[The Urban Renewal Agency] consolidat[es] land ownership, install[s] public improvements such as streets, sewers and curbs, and demolish[es] existing structures on an area basis.").

175 *See id.* ("Some dilapidated properties were being kept for historical purposes.").

176 *See id.* ("Some properties were shown as to rehabilitation projects.").

177 *See id.* ("The properties taken are on a selective basis . . .").

178 *See id.* ("Defendants' property was inspected and found to be lacking in meeting what were called 'code standards' in some respects; but the record is clear, and the trial court found, that the necessary improvements could and would [have been] made except for this litigation.").

179 *Id.* at 123-24.

180 *Id.* at 128.

181 *See id.* at 126 (noting that defendant's brief described the plan to be "a 'planner's dream expressed in architectural drawings"). The plan consisted of a 'shopping center' model whereby the commercial zone would be surrounded by streets and parking, thereby separating vehicle and pedestrian traffic. *Id.* at 124.

182 *Id.* at 127.

183 *See id.* ("[W]e do not find sufficient credible testimony to uphold the district court's findings.").

without harming the balance of the project.”¹⁸⁴ The court cited testimony by city officials admitting that the renewal plan could be amended to eliminate the defendants’ land for the project without interfering with parking or traffic flows.¹⁸⁵

The court thus appears to distinguish between core and peripheral properties. Properties at the geographical edge might demand a greater showing of necessity from city planners. Perhaps this reasoning was implicit in the *McCullogh* Court’s decision to dismiss a taking of property for the airport. Recall that the land at issue was not for a central terminal or airstrip, but for the expansion of freight facilities and ancillary services. The difference between core and peripheral might not just be a geographical distinction, it might also apply to the plan itself. If the core purpose of the plan is to build a highway, for example, ancillary needs such as commuter parking lots and rest stops might receive more judicial scrutiny under a necessity challenge.

More fundamentally, the *DeWolf* court reviewed the necessity determination by examining the “particular property” at issue and not simply the entire project.¹⁸⁶ This reasoning creates particular advantages for the landowner because it weakens or severs the necessity review from the overall context of the overall plan, neighborhood, or goals. For example, many states have statutes promoting condemnation in blighted areas.¹⁸⁷ Interpreted most broadly, if a necessity review demands a focus on the particular property, does that mean that taking a non-blighted property should be examined absent from the blighted area surrounding it? If so, then takings of broad urban areas for redevelopment might be particularly difficult because an individual non-blighted property could thwart the development of a large scale public project such as a highway, stadium, or shopping center. The court recognized the widely-held rule that taking broad areas is

184 *Id.* at 128.

185 *See id.* (using testimony from engineers to show that the project “would not alter the effectiveness of the street in serving the area”).

186 *Id.* at 129 (quoting *State Highway Comm’n v. Crossen-Nissen Co.*, 400 P.2d 283, 284 (Mont. 1965)). In *State Highway Commission v. Crossen-Nissen Co.*, the court stated:

The requirement that the condemnor must show necessity for the property taken does not mean that it must be indispensable to the proposed project. Rather the word ‘necessary’ as used in section 93–9905 means that the particular property taken be reasonably requisite and proper for the accomplishment of the purpose for which it is sought under the peculiar circumstances of each case.

400 P.2d at 284.

187 While some statutes define blight broadly, others, especially those passed after *Kelo* was decided, are quite restrictive. *See* Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 195–99 (2007) (discussing legislation that prohibits the use of eminent domain for development).

necessary to clear blighted areas and prevent their return, but also stated that if the specific property is not necessary for the blighted area's clearance, then the "area concept" does not apply.¹⁸⁸

This pinpoint-style review is not universally accepted. For example, in *City of Jacksonville v. Griffin*, the Florida Supreme Court ruled that the District Court of Appeals had misinterpreted precedent in denying a city's condemnation of land for redevelopment purposes.¹⁸⁹ The Court of Appeals had relied upon *Ball v. City of Tallahassee*, which held that "[t]he city must present evidence pinpointing the need for the particular property . . . sought to be condemned."¹⁹⁰ The Court of Appeals found that the taking failed because of the lack of "some specific plan for development of the property in the reasonably foreseeable future, including plans for financing such a vast undertaking."¹⁹¹ The Florida Supreme Court, however, noted that the primary principle articulated in *Ball* is that a condemnor must show some "reasonable necessity" for its taking; once it has done so, the condemnee "must then either concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense."¹⁹² The Florida Supreme Court thus found that *Ball* "placed an unreasonable gloss" on earlier Florida eminent domain decisions insofar as it required pinpointing the need for the particular property at issue.¹⁹³ The court reasoned that otherwise each landowner would be able to argue, "Why not my neighbor?" and thus harm the prospects for eminent domain projects.¹⁹⁴

188 *DeWolf*, 508 P.2d at 127–28.

189 346 So. 2d 988, 990 (Fla. 1977) [hereinafter *Griffin II*].

190 281 So. 2d 333, 337 (Fla. 1973).

191 *Griffin v. City of Jacksonville*, 314 So. 2d 605, 607 (Fla. Dist. Ct. App. 1975) [hereinafter, *Griffin I*].

192 *Griffin II*, 346 So. 2d at 990.

193 *Id.* at 991.

194 *See id.* ("Were the City not permitted to exercise its discretion in good faith as to the sequence of the parcels to be condemned, then each landowner would be able to raise the question, 'Why not my neighbor?' and thereby effectively frustrate commencement or continuation of the project. Such is not and cannot be the law."); *see also* *City of Hollywood Cmty. Redev. Agency v. 1843, LLC*, 980 So. 2d 1138, 1142 (Fla. Dist. Ct. App. 2008) ("The condemning authority need not present evidence pinpointing the need for the particular property sought to be condemned."). By analogy, courts have ruled that a non-blighted property in a blighted area may be subject to eminent domain as the condition of the total area determines its blight status and not individual parcels of land. *See generally* Jonathan M. Purver, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R. 3d 1096, § 2(b) (1972) (noting that courts are generally concerned with the blighted status of an entire area rather than that of individual properties).

Returning to *DeWolf*, the final point worth mentioning is the grounds upon which the *DeWolf* Court reached its no-necessity determination. Even though the city proffered considerable evidence on its plans and goals, the court found no present necessity because the commercial businesses upon which the demand for parking would be based had not been established.¹⁹⁵ The structures for the planned business had not yet been built. No assurances were given that private enterprise would take root. Even with robust private enterprise present, the city could not ensure that the defendants' land was necessary for parking. The court viewed the city's motivation in taking the property as simply "to await money, motivation, and hopes of the planners."¹⁹⁶ The Court defined necessity as "a reasonable need with foreseeable ability to complete."¹⁹⁷ The city was required to show necessity, according to the Court, for both the amount of parking needed and the probability that the buildings that required the parking would also be constructed.¹⁹⁸ Failing that, the Court stated, takings would only be limited by "the architect's imagination."¹⁹⁹

In essence, *DeWolf* instructs that city planners cannot "bootstrap" necessity by taking some land for public use and then using that taking as proof of necessity for additional condemnations. Florida and Montana are in agreement. In the similar case of *Baycol, Inc. v. Downtown Development Authority*,²⁰⁰ the city sought to take land for a shopping mall, and argued that the businesses there would create the necessity of parking and further takings.²⁰¹ The Court refused to permit the taking, reasoning that the city was placing "the cart before the horse" by attempting to create necessity by taking other property and applying it to a private interest.²⁰² As *Baycol* affirmed, allowing such a taking for this reason would create a "dangerous precedent" and allow municipalities to circumvent necessity or public use inquiries for any property considered ancillary to the main redevelopment plan.²⁰³

195 See *City of Helena v. DeWolf*, 508 P.2d 122, 128 (Mont. 1973) ("It is clear . . . that need for the parking . . . is not a present need nor a need in the reasonably foreseeable future. . . . Thus, the concept of necessity for a public use is a possible future necessity.").

196 *Id.*

197 *Id.* at 129–30.

198 *Id.*

199 *Id.* at 129.

200 315 So. 2d 451 (Fla. 1975).

201 See *id.* at 458 ("It was also shown . . . that the creation of the shopping mall was to create the need for the public parking proposed.").

202 *Id.* at 457–58.

203 *Id.* at 458.

The lesson from these cases is that the failure to cite any specific time frames whatsoever for use of the land will place the necessity of the taking in doubt. Furthermore, taking land for the sole purpose of purchasing early in a rising real estate market will not constitute sufficient necessity to take a private owner's land. In addition, the failure to obtain specific approvals will also weigh against necessity. It is questionable whether any municipality today, especially in light of the *Kelo*-fueled backlash against eminent domain, would condemn land with so little planning of its intended future use.

III. PROCEDURAL OR REGULATORY HURDLES EXIST TO SUCCESSFUL DEVELOPMENT

As a general matter, statutory grants of condemnation power are strictly construed, and condemnation actions in violation of the statutory grant are invalid.²⁰⁴ The most obvious bureaucratic requirement that municipalities fail to follow, thereby showing lack of necessity, is their own written development plan. In *State v. Pacific Shore Land Co.*, the State of Oregon sought land for the development of a highway "right of way," as stated by a resolution of the Highway Commission.²⁰⁵ The court ruled that a portion of the land sought by the State fell outside the specific right of way specified in the State's plan and was thus not necessary for development; as a result, the court blocked the State's efforts to take the land.²⁰⁶

In *Monarch Chemical Works, Inc. v. City of Omaha*, the City of Omaha, Nebraska devised a "Master Plan" designed to redevelop a large area of blighted East Omaha for commercial and industrial sites.²⁰⁷ The plaintiff owned vacant land in the area, and planned to use the land for development of storage tanks to store production materials,

204 See, e.g., *Village of Skokie v. Gianoulis*, 632 N.E.2d 106, 111–12 (Ill. App. Ct. 1994) ("It is well established in Illinois that laws conferring the authority to take private property by exercising the power of eminent domain must be strictly construed A statutory grant of eminent domain power can only be exercised in the manner authorized by statute." (citations omitted)); see also *McCabe Petroleum Corp. v. Easement & Right-of-Way Across Twp. 12 N.*, 87 P.3d 479, 481 (Mont. 2004) ("[F]undamental real property rights require that 'public uses' for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and cannot be implied.").

205 269 P.2d 512, 520 (Or. 1954) (discussing the Oregon Highway Commission's resolution).

206 See *id.* ("Plaintiff ha[s] no authority under its resolution . . . to proceed by condemnation action . . .").

207 277 N.W.2d 423, 426 (Neb. 1979).

such as asphalt.²⁰⁸ The plaintiff stated that although it was not currently using the land, the vacant land was so important to its operations that “if we don’t have [the vacant land], we have to . . . move the remaining plant to another location.”²⁰⁹

After the plan’s approval, the city “selected plaintiff’s property as the site for . . . [a prison] complex . . . [desired by] the State of Nebraska.”²¹⁰ The city amended the plan to specifically target the plaintiff’s property, but did not amend the plan’s stated purpose to include a penal complex nor did it amend the provision of the plan stating that property owned by existing industries for future expansion purposes would not be purchased.²¹¹

The plaintiff challenged the condemnation of its land.²¹² The Nebraska Supreme Court held that the taking of blighted or substandard property for redevelopment and resale in accordance with an approved redevelopment plan as provided for by the state development statute was a proper public use.²¹³ However, here the city had failed to carry out its redevelopment plan in accordance with its own plan document.²¹⁴ The court concluded that the plaintiff’s land was taken not to further the redevelopment purposes of the plan, but to simply accommodate the State’s need for a site for a penal complex.²¹⁵ Because the condemnation of the plaintiff’s land was not a part of the redevelopment plan, the taking was not for a public purpose, and the Nebraska Supreme Court affirmed the lower court’s issuance of an injunction.²¹⁶

208 *See id.* (“Presently there are plans to build two . . . storage tanks on the particular [vacant] property to take care of off-season purchase of construction-type asphalt.”).

209 *Id.* (internal quotations omitted).

210 *Id.*

211 *Id.* at 426–27.

212 The Nebraska Supreme Court rejected the plaintiff’s public use and constitutional challenges to the taking, finding commercial development a public use and concluding that economic redevelopment is a sufficiently different purpose than development of manufacturing and industrial sites by eminent domain, which is prohibited by the Nebraska Constitution. *Id.* at 427.

213 *See id.* at 428 (“The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole . . . is a proper public use for a municipality.”).

214 *See id.* (“The authority to acquire plaintiff’s land [here] was not provided for in the redevelopment plan in order to carry out the purposes of the plan . . .”).

215 *See id.* (noting the land was acquired “solely as an accommodation to the state to acquire a site for a penal complex which had nothing to do with the redevelopment plan”).

216 *See id.* (“[T]he trial court was correct in issuing an injunction against the proceedings, and its judgment is affirmed.”).

The court's ruling literally rested on public use grounds, but interpreted through a different lens, this could have easily been a necessity case. Instead of stating that acquisition for redevelopment and penal purposes were a necessary purpose of the plan, the plan simply created its own procedural hurdle by limiting its scope to development and blight removal and by specifically disavowing any intent to condemn property held by existing industry for expansion purposes. Had the plan not contained the latter limitation, city planners might have been able to simply declare the penal complex a necessity, which under Nebraska law is a legislative question,²¹⁷ and might have been able to take the land with minimal, if any, judicial scrutiny. This case instructs that city planners can trigger no-necessity findings by taking actions that do not conform to the goals of the written plan, and a challenging landowner should thus scour the plan for such inconsistencies.

A municipal agency may also lose at the condemnation proceeding when it fails to adhere to its own statutory limitations of authority. In *Wilmington Parking Authority v. Land With Improvements*, the Wilmington Parking Authority ("WPA") was authorized by statute to take certain land by eminent domain for public parking purposes.²¹⁸ The WPA orchestrated a plan for condemnation of property that would result in a significant percentage of the parking spaces being reserved for a local newspaper company, which would also receive the right to purchase land not available to the general public.²¹⁹ The court found that sufficient evidence existed that the primary purpose of taking the land at issue was to retain the newspaper company as a corporate citizen, rather than to provide the public with parking facilities,²²⁰ and that the "paramount benefit" from the taking would go to the newspaper company, not the public.²²¹ As a result, the Delaware Supreme Court upheld the trial court's refusal to grant the WPA's immediate possession of the private property sought.²²²

217 See *id.* at 427 (suggesting that, under Nebraska law, the defendants clearly had the power to declare the penal complex a necessity).

218 521 A.2d 227, 228–29 (Del. 1986).

219 See *id.* at 233–34 ("The court also noted that approximately ten percent of the 950 new spaces would be reserved for News-Journal employees. In light of this evidence, the trial judge estimated that the net benefit to the public would be less than 350 spaces.").

220 See *id.* at 234 ("There is sufficient evidence to support the ultimate finding that the primary purpose of the project was to retain the News-Journal as a corporate citizen rather than to provide the public with parking facilities.").

221 *Id.* at 230–31.

222 See *id.* at 234 ("Therefore, the WPA's attempted exercise of its limited power of eminent domain was beyond its statutory authority[] . . . [and] the ruling of the Superior Court [i]s affirmed.").

Although *Wilmington* discusses the taking in terms of public use and purpose, the case fundamentally rests upon a determination of necessity. The dispositive issue in the case was not whether taking land and transferring it to a private entity was a proper public use. Delaware law at the time had well settled the notion that a public use that has a substantial benefit to private interests suffices for a proper taking.²²³ Rather, the case addressed whether the WPA's taking of the defendant's land was necessary for the purposes authorized for the WPA to pursue by statute.²²⁴ Again, the city might have avoided this legal wrangling if it had just sought eminent domain through another agency with broader statutory authority. In cases such as these, where the public use prong is interpreted so broadly, often the most viable opportunity a landowner can hope for is that the municipality bungles its effort to take through poor decision making or its own internal mismanagement.

A municipality may also suffer a no-necessity finding when the trial court to which it presents its condemnation question fails to grant the landowner even the most basic procedural rights. For example, in *Public Service Co. of Oklahoma v. B. Willis, C.P.A, Inc.*, the plaintiff commenced a condemnation proceeding against the defendant to acquire an easement for the purpose of building a railroad spur.²²⁵ Pursuant to an Oklahoma statute, the commissioners filed a report with the court, which the landowner-defendant challenged.²²⁶ The defendant argued that the plaintiff did not establish a prima facie case of necessity.²²⁷ When the defendant sought discovery to obtain evidence for trial, the trial court rejected the defendant's motion and concluded that the defendant had neither a right to pursue discovery nor to contest the taking of his land.²²⁸ According to the trial court, the government agency merely needed to allege necessity in its petition.²²⁹ The trial court entered judgment in favor of the plaintiff,²³⁰

223 *See id.* at 231 (“This Court has addressed on at least two occasions the question of whether a taking which results in a substantial benefit to private interests may nevertheless be for ‘public use’ as required by the State and Federal constitutions.” (citing *Wilmington Parking v. Ranken*, 105 A.2d 614 (Del. 1954), and *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476 (Del. 1958))).

224 *Wilmington Parking Auth.*, 521 A.2d at 228–29.

225 941 P.2d 995, 997 (Okla. 1997).

226 *See id.* at 998 (“[Public Services Company (“PSO”)] has put on no proof whatsoever in support of its petition and none will be required at the hearing on remand before the trial court, as the Court of Civil Appeals has placed the burden of proof on him rather than the condemning authority where it should be, all in violation of [Oklahoma law].”).

227 *Id.*

228 *Id.* at 997–98.

229 *Id.*

and—as the court of civil appeals subsequently did—rejected the landowner’s allegation that the absence of a resolution of necessity by the condemnor meant that the condemnor lacked a prima facie case.²³¹

The Oklahoma Supreme Court disagreed, however, holding that the condemnor must meet its initial burden of proof in a condemnation case by making a prima facie case of necessity by introducing into evidence a resolution of necessity, at which point the burden of proof shifts to the condemnor to show the taking is not necessary.²³² The court remarked that the plaintiff never attempted to submit its necessity resolution as evidence to the trial court, but merely attached the resolution to its supplemental brief.²³³ Because this fact precluded the defendant from challenging the resolution’s introduction into evidence and forced objections to it to be raised for the first time on appeal, the court concluded that the defendant had a right to a hearing on “all aspects of plaintiff’s condemnation” and to challenge the report that articulates the necessity of the government agency to take land by eminent domain.²³⁴ The court thus remanded the case back to the trial court for further proceedings based on the trial court’s improper denial of the defendant’s right to challenge the plaintiff’s “asserted but unproven right” to take the property.²³⁵

It is difficult to say where the mishap lay in the plaintiff’s efforts to take. The trial court’s highly deferential stance towards necessity was apparently not utterly unreasonable as it was affirmed by the intermediate appellate court.²³⁶ The intermediate appellate court concluded that filing a necessity resolution was not necessary but the mere act of filing a petition that alleges necessity creates a rebuttable presumption of the necessity of the taking.²³⁷ Perhaps the most useful lesson from *Willis* is that landowners should expect, at a minimum, an opportunity to be heard at trial, and that courts may not let a mu-

230 *Id.* at 998–99.

231 *See id.* at 998 (“The Court of Civil Appeals agreed with the trial court that PSO was not required to file a copy of a resolution of necessity with its petition . . . and held that a resolution declaring the necessity of the taking was unnecessary . . .”).

232 *Id.*

233 *See id.* at 999 (“PSO never attempted to have its resolution admitted into evidence by the trial court. It simply attached the resolution to a supplemental brief. *Willis*, therefore, had no opportunity to challenge its authenticity . . . or present any other objections to the trial court regarding the purported resolution.”).

234 *Id.*

235 *Id.* at 1000. The Oklahoma Supreme Court also held the defendant was improperly denied the right to conduct discovery. *Id.*

236 *Id.* at 998.

237 *Id.*

nicipality completely bypass the judicial system based upon its own determination of necessity. The fact that such a basic right had to be litigated to a state's supreme court, however, is an unnerving hint of how deferential courts can be in eminent domain cases.

Resolution of environmental contamination issues was a leading cause of a no-necessity finding in *Regents of the University of Minnesota v. Chicago & North Western Transportation Co.*, where the University of Minnesota sought to take by eminent domain a neighboring rail yard owned by the defendant for the purpose of placing potentially several types of facilities on the land.²³⁸ As noted earlier, the Minnesota Court of Appeals concluded that the University's proposed condemnation was not necessary in part because the University had no specific plan for the land and a University official testified the time before the property would be used was potentially indefinite.²³⁹ Calling the University's efforts "stockpiling," the court found for the landowner on grounds already examined in this article—the plan was too speculative and the timeline for development simply too long to prove necessity.²⁴⁰

The court cited additional issues, however, that help further illuminate the necessity inquiry. In addition to never receiving permission from its Board of Regents, the University sought to take land that was currently unusable because it was contaminated with oil during the years that the then-current landowner used the property as a railroad facility.²⁴¹ In addition, the University had not yet reached an agreement on a remediation plan with the landowner even after significant negotiations.²⁴² Furthermore, even if a remediation agreement were reached, it would have taken two to seven years beyond that to decontaminate the land.²⁴³ The lesson from *Regents* is that the presence of bureaucratic or other hurdles will be relevant for determining the necessity of a taking.

The University's dilatory conduct before the attempted taking probably did not help its case. For years, the University apparently knew that the property owner wanted to sell but took little concrete

238 552 N.W.2d 578, 579 (Minn. Ct. App. 1996).

239 See *id.* at 580 ("[T]he trial court did not clearly err in finding that the University had failed to demonstrate the required level of necessity for condemnation.").

240 *Id.*; see also *supra* notes 115–16 and accompanying text.

241 See *Regents*, 552 N.W.2d at 579 ("The Regents have not yet approved a single project for the property, allegedly due in part to the uncertainty arising out of the parties' disagreement over how to address the environmental contamination problems on the property.").

242 *Id.*

243 *Id.*

action to purchase the land.²⁴⁴ Other than obtaining two appraisals, the University did not act.²⁴⁵ Only after the railroad received an offer from a private interest did the University place an offer of its own.²⁴⁶ When the railroad rejected its offer in favor of another, the University then chose to proceed by eminent domain.²⁴⁷

It is impossible to know whether the University's pre-take conduct influenced the judge's decision. The written opinion does not cite this behavior as a factor for finding lack of necessity. Yet, it poses the potential for a public relations nightmare simply by characterizing the University as imposing heavy-handed tactics because it failed to play by the rules of the commercial marketplace and submit a sufficiently competitive offer. A savvy landowner could also contend that it was the University's own sluggishness in failing to act promptly when it first learned of the intent to sell that caused its failure to obtain the property through ordinary means. Using eminent domain as an escape hatch for failure in the open market does not create a sympathetic government entity.

IV. CONCLUSION

For far too long, necessity doctrine has remained the dormant doctrine of eminent domain. While the necessity requirement has been largely ignored, the public use requirement has received significant attention. In the wake of the *Kelo* decision and the broad discretion of eminent domain power that case brings, the public use requirement has been largely neutered as a meaningful check on condemnation power.

Necessity remains one of the few tools available. In spite of the opportunities that necessity doctrine brings, there has been virtually no attention paid to this aspect of eminent domain law. Few attorneys representing landowners appear to raise a necessity challenge. Even fewer scholars discuss the requirement in depth. The doctrine is in need of revival.

²⁴⁴ *See id.* ("The University of Minnesota claims to have been interested in acquiring the property since 1992 On several occasions in the subsequent two or three years, representatives from the University and the Railroad discussed the property.").

²⁴⁵ *See id.* at 579–80 ("In October 1994, after the University had obtained two appraisals of the Railroad's property, the University became aware that the Railroad had received a purchase offer from another party.").

²⁴⁶ *Id.* at 580.

²⁴⁷ *See id.* ("In early 1995, the University learned that the Railroad had rejected its offer and had accepted an offer from CSM Investments, Inc. (CSM) to purchase the property. . . . The University filed a petition to acquire the property by eminent domain in April 1995.").

The first step towards a meaningful discussion must be an understanding of its interpretation. Currently, most necessity challenges are unsuccessful. This does not necessarily mean, however, that necessity must remain dormant. Courts have been willing to stop takings on the grounds that the condemning agency lacked sufficient necessity. Ranging from a lack of plan specificity to the presence of regulatory barriers, there are a number of grounds upon which takings may be challenged for lack of necessity. The problem has been that these cases are few and far between, are scattered across time and jurisdiction, and have been left out of the larger discussion of the appropriate limits of eminent domain.

This Article takes a modest first step toward reviving necessity as a meaningful check on eminent domain power. The cases in this Article and inferences arising from them go some way toward understanding what courts will and will not accept as sufficient necessity. It also shows examples of condemning agencies proceeding with takings, perhaps overconfidently, with little evidence or support for its need. Necessity doctrine will not, and should not, grind all but the most essential of eminent domain proceedings to a halt. Rather, what a revived doctrine could do at the very least is cause condemning agencies to pause at least briefly and consider possible options before initiating condemnation of a parcel. Justice Brandeis once wrote that sunshine was the best disinfectant.²⁴⁸ The glare of greater transparency in eminent domain proceedings can improve objective municipal decision making and subject proceedings to public scrutiny and debate. If necessity doctrine can serve this purpose, and perhaps a more aggressive role under certain circumstances, it will play an important role in curbing the excesses of an extraordinary government power.

248 See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914) ("Sunlight is said to be the best of disinfectants . . ."). The book also discusses the hoarding of wealth by a corporate elite.