

2012

Property: Eminent Domain and Restoring Access
to Parcels Isolated by Highway Reconstruction:
Finding the Public Use—State Ex. Rel.
Commissioner of Transportation v. Kettleson

Alex C. Sellke

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Sellke, Alex C. (2012) "Property: Eminent Domain and Restoring Access to Parcels Isolated by Highway Reconstruction: Finding the Public Use—State Ex. Rel. Commissioner of Transportation v. Kettleson," *William Mitchell Law Review*: Vol. 39: Iss. 1, Article 14.
Available at: <http://open.mitchellhamline.edu/wmlr/vol39/iss1/14>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**PROPERTY: EMINENT DOMAIN AND RESTORING
ACCESS TO PARCELS ISOLATED BY HIGHWAY
RECONSTRUCTION: FINDING THE PUBLIC USE—
STATE EX. REL. COMMISSIONER OF TRANSPORTATION
V. KETTLESON**

Alex C. Sellke[†]

I. INTRODUCTION	337
II. HISTORICAL BACKGROUND	338
A. <i>Eminent Domain: Nature, Definition, and Origin</i>	338
B. <i>“Public Use” and the Takings Clause</i>	340
1. <i>Early U.S., Berman & Midkiff</i>	341
2. <i>The Kelo Decision</i>	343
3. <i>The Legislative Response to Kelo</i>	344
C. <i>Eminent Domain in Minnesota</i>	345
1. <i>Public Use</i>	345
2. <i>2006 Legislative Revision</i>	346
3. <i>MnDOT’s Eminent Domain Authority</i>	347
III. THE KETTLESON DECISION	349
A. <i>Facts of the Case</i>	349
B. <i>Lepak’s and MnDOT’s Arguments</i>	350
C. <i>District Court and Court of Appeals Decisions</i>	352
D. <i>Minnesota Supreme Court Decision</i>	353
IV. ANALYSIS	355
A. <i>Starting Off Right: Legislative Intent and the Arbitrary and Capricious Standard</i>	356
B. <i>Finding the Public Use: The Power of Persuasive Precedent</i> .	358
1. <i>How to Distinguish Between a “Private” and “Public” Road</i>	358
2. <i>Looking at the “Project as a Whole” and “Economy to the State” to Locate a Public Use</i>	361
a. <i>Kelmar: A Homegrown Example</i>	362

[†] J.D. Candidate 2014, William Mitchell College of Law; B.S., University of Minnesota-Twin Cities, 2006.

b. <i>Not a New Problem: Highway Construction and Isolated Properties in Other Jurisdictions</i>	363
C. <i>A Different Perspective: Economic Theory and Eminent Domain</i>	367
1. <i>Holdouts, Bilateral Monopoly, and Rent Seeking</i>	367
2. <i>Merrill's Economics of Public Use</i>	369
3. <i>Application to Kettleson</i>	370
V. CONCLUSION	371

I. INTRODUCTION

In *State ex rel. Commissioner of Transportation v. Kettleson*,¹ the Minnesota Supreme Court once again faced the eminent domain doctrine and its ever pliable public use provision. The government's use of eminent domain to acquire property for a typical highway project is generally uncontroversial² and involves the easiest cases of public use.³ However, *Kettleson* involved a unique set of facts that distinguished it from the many unremarkable right-of-way acquisitions, by condemnation or otherwise, that the state and county highway departments initiate every Minnesota road construction season.⁴

In *Kettleson*, a road reconstruction project effectively landlocked an improved parcel of land when the project eliminated that parcel's driveway to the adjacent highway. To remedy the problem, the Minnesota Department of Transportation (MnDOT) exercised its eminent domain authority, taking a portion of a neighboring parcel to create a new access road to the isolated parcel. This led to another eminent domain challenge alleging that the taking of private property was without a valid public use. By upholding the taking, the Minnesota Supreme

1. 801 N.W.2d 160 (Minn. 2011).

2. 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.06[3][a] (rev. 3d. ed. 2009).

3. LARRY W. THOMAS, TRANSP. RESEARCH BD., NAT'L COOP. HIGHWAY RESEARCH PROGRAM, LEGAL DIGEST 56: THE RAMIFICATIONS OF POST-KELO LEGISLATION ON STATE TRANSPORTATION PROJECTS 8 (2012) (citing Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 661 (2007)), available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_lrd_56.pdf.

4. See MINN. DEP'T TRANSP., GUIDE FOR PROPERTY OWNERS (2007), available at http://www.dot.state.mn.us/row/pdfs/Guide_for_Property_Owners_wo_graphics.pdf (providing a very general overview of MnDOT's right-of-way acquisition procedure).

Court reached the correct decision. However, the court's public use analysis leaves something to be desired. This note will attempt to fill that void.

In order to put this case in its proper context, Part II of this note will provide a brief introduction of eminent domain, the public use requirement, and how the public use requirement has been interpreted at the federal level and in Minnesota. Part III will outline the facts, arguments, and holding of *Kettleson*. The analysis in Part IV is intended as an attempt to contextualize the case among other landlocked property cases and demonstrate that the court made the correct public use decision by analyzing persuasive authorities from Minnesota and other jurisdictions, and economic theory. There is no conclusive principle of public use. Instead, the courts are left to balance the facts of each case to locate a legitimate public benefit and to restrain condemning authorities from acting arbitrarily and capriciously, if necessary. Without a firm test to apply, no one fact is controlling. By reviewing persuasive precedent, similar cases, and an applicable economic theory, this analysis seeks to provide points of reference within the larger body of public use analysis in an effort to bring further support to the court's decision.

II. HISTORICAL BACKGROUND

A. *Eminent Domain: Nature, Definition, and Origin*

The power of eminent domain,⁵ which results in condemnation when exercised, is at its very essence “the state-compelled transfer of property.”⁶ It is further defined, with inclusion of the public use limitation, as “the power of the sovereign to take property for public use without the owner's consent.”⁷ It is said that the power is an inherent sovereign right

5. The term eminent domain is derivative of the Latin phrase *dominium eminens*, which translates to “supreme lordship” and was first used by Dutch jurist Hugo Grotius “to emphasize that ‘the property of subjects is under the eminent domain of the state’ so that the state may use, alienate, or destroy such property ‘not only in the case of extreme necessity . . . but for end of public utility.’” Daniel B. Kelly, *Acquiring Land Through Eminent Domain: Justifications, Limitations, and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 345 (Kenneth Ayotte & Henry E. Smith eds., 2011).

6. Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 7 (1980).

7. See SACKMAN, *supra* note 2, § 1.11.

that exists in absolute and unlimited form,⁸ not constitutionally granted to the government, but constitutionally limited.⁹ The concept of eminent domain has an expansive history spanning centuries and cultures,¹⁰ though its precise origin is lost in obscurity.¹¹ In early England, property was taken by the king and parliament under various circumstances, but there appeared to be a lack of any discrete body of law that could be categorized as eminent domain and neatly linked to our contemporary concept of the power.¹²

Early colonial America also lacks a neat narrative to cleanly track the modern development of the concept.¹³ There were many instances of nonconsensual land transfers, including the building of dams, the building of mills, and the draining of private land.¹⁴ And, it is interesting to note, especially in the context of the *Kettleston* case, that the earliest record of eminent domain in the United States was for building roads.¹⁵

8. *Id.* § 1.14[2] (“[T]he power comes into being *eo instante* with the establishment of the government and continues as long as the government endures. It does not require recognition by constitutional provision, but exists in absolute and unlimited form.”).

9. *Kohl v. U.S.*, 91 U.S. 367, 371 (1875) (“The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.”); *Barmel v. Minneapolis-St. Paul Sanitary Dist.*, 201 Minn. 622, 624, 277 N.W. 208, 209 (1938) (“[T]he power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the constitution.” (quoting *Fairchild v. St. Paul*, 46 Minn. 540, 542, 49 N.W. 325, 325 (1891))).

10. See SACKMAN, *supra* note 2, §§ 1.2–1.23 (providing a perspective on the origin and history of eminent domain, reaching as far back as biblical antiquity, and including Roman times).

11. Meidinger, *supra* note 6, at 4. Scholars debate whether the concept of eminent domain existed in any recognizable form as far back as ancient Rome. *Id.* at 6. Some commentators point to Rome’s relatively advanced road and aqueduct infrastructure as evidence of its early use in some form. *Id.* at 7.

12. *Id.* at 8.

13. *Id.* at 13.

14. Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 500 (2006).

15. Meidinger, *supra* note 6, at 13 (noting a 1639 Massachusetts statute which “authorized county courts, upon a complaint stating that a highway was needed, to appoint local citizens to lay one out” and provided compensation for affected landowners).

B. “Public Use” and the Takings Clause

The limitations on eminent domain power in colonial America were fairly vague.¹⁶ The familiar “public use” limitation first emerged in 1776 when it was inserted into Pennsylvania’s and Virginia’s constitutions.¹⁷ In 1789 the United States Constitution was amended by the Bill of Rights, and the “public use” language was inserted in the Fifth Amendment.¹⁸ The language of the amendment’s familiar Takings Clause is, “[N]or shall private property be taken for public use, without just compensation.”¹⁹ Pursuant to the Takings Clause, the valid exercise of the power of eminent domain in the United States is subject to only two prerequisites: public use and compensation.²⁰

Unfortunately, public use has been an ambiguous concept from the beginning and defining it can often be the most elusive task in condemnation cases.²¹ Throughout the nineteenth century the country’s soaring demand for new infrastructure fueled an expansion of the use of eminent domain by both public and private entities.²² During this time two different schools of thought

16. Cohen, *supra* note 14, at 504. After the Revolutionary War the original thirteen states gradually added the public use provision to their constitutions, but these provisions “often did not specify the actual permitted uses and limitations of the eminent domain power.” *Id.*

17. *Id.*

18. Meidinger, *supra* note 6, at 17.

19. U.S. CONST. amend. V.

20. *Id.* This note will not discuss the meaning or purpose of “just compensation” in any substantive manner. This is not to trivialize this component of the takings clause, but simply it was not put into controversy in *Kettleson*. This note will also not cover in any depth the necessity component of eminent domain. While *Kettleson* involved pleadings and a holding on this element, the thrust of the case was a public use challenge. As *Kettleson* noted, the requisite necessity is reasonable necessity to further a proper purpose, not absolute necessity. *State ex rel. Commissioner of Transportation v. Kettleson*, 801 N.W.2d 160, 167 (Minn. 2011). A finding of necessity will only be overruled if the taking was arbitrary and capricious. *Id.* For a thorough treatment of the origin and meaning of the necessity requirement, see generally Robert C. Bird & Lynda J. Oswald, *Necessity as a Check on State Eminent Domain Power*, 12 U. PA. J. CONST. L. 99 (2009).

21. See, e.g., *State v. Houghton*, 144 Minn. 1, 16, 176 N.W. 159, 161 (1920) (“The term ‘public use’ is flexible . . .”). See generally SACKMAN, *supra* note 2, § 7.02[1] (“[P]ublic use’ . . . does not have a precise and fixed meaning.”).

22. Though eminent domain is a government power, during this period the power was delegated to private turnpike, canal, and railroad companies. See Meidinger, *supra* note 6, at 26–27. Illustrative of the rapid increase in infrastructure is the fact that between 1840 and 1860 U.S. railroads expanded from 3000 miles of track to 30,000 miles. *Id.* “As the [railroad] industry hit its stride in the next several decades, so did its use of eminent domain.” *Id.*

emerged as to the nature of the power: the narrow interpretation and the broad interpretation.²³ The narrow definition emphasizes actual, physical use or employment of the property by the public.²⁴ The broader definition takes into account the wider public benefit or advantage. Under this view, it has been said:

Any exercise of eminent domain which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and prosperity of the whole community and thus constitutes a valid public use.²⁵

1. *Early U.S., Berman & Midkiff*

By the early twentieth century the United States Supreme Court had written off the narrow view of public use.²⁶ The contemporary view of public use, specifically characterized by judicial deference to legislative determinations of public use, began to take shape in 1954 when the Supreme Court decided the influential case *Berman v. Parker*.²⁷ The appellants in *Berman* sought to enjoin the condemnation of their property, which the District of Columbia Redevelopment Land Agency sought under the District of Columbia Redevelopment Act of 1945.²⁸ The taking of a non-blighted department store within an otherwise largely blighted redevelopment area was challenged on the basis that it was not for a public use as required by the Takings Clause.²⁹ The court articulated the prevailing view of judicial deference to legislative determinations of public use when it stated:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the

23. SACKMAN, *supra* note 2, § 7.02[1].

24. *Id.* § 7.02[2].

25. *Id.* § 7.02[3].

26. *Rindge Co. v. L.A. Cnty.*, 262 U.S. 700, 707 (1923) (“[It is] not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.”); *Cohen*, *supra* note 14, at 509 (“The inadequacy of the use by the general public as a universal test is established.” (citing *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916))).

27. 348 U.S. 26 (1954).

28. *Id.* at 28–29.

29. *Id.*

public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for public purpose is an extremely narrow one.³⁰

Thirty years later in *Hawaii Housing Authority v. Midkiff*, the next major public use challenge reached the Supreme Court.³¹ The Court took much the same approach, heavily citing the *Berman* decision. In *Midkiff*, the Hawaii Land Reform Act of 1967, “which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership,”³² was challenged on the basis of not having a public purpose to sustain a valid exercise of eminent domain. Once again, the Court deferred to the legislative body’s public use determination. The Court stated:

In short, the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use “unless the use be palpably without reasonable foundation.” . . .

. . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.³³

The seminal decisions of *Berman* and *Midkiff* paved the way for *Kelo v. City of New London*,³⁴ the famous Supreme Court public use decision that was wildly unpopular,³⁵ yet arguably consistent.³⁶

30. *Id.* at 32 (citations omitted).

31. 467 U.S. 229 (1984).

32. *Id.* at 229. The Hawaii Legislature concluded that this concentration of ownership “was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.” *Id.* at 232.

33. *Id.* at 241 (citation omitted).

34. 545 U.S. 469 (2005).

35. In 2005, Zogby and Saint Index conducted a national survey on *Kelo* in which 95% and 81% of respondents, respectively, opposed the decision. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108–11 (2009) (summarizing the survey results).

36. Compare John M. Zuck, *Kelo v. City of New London: Despite the Outcry, the Decision is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 192 (2007) (“[U]ltimately the Supreme Court has remained consistent in its decisions.”), with James W. Ely, Jr., *Post-Kelo*

2. *The Kelo Decision*

Kelo involved a public use challenge by owners of non-blighted property located within a larger area targeted by the state and the city in a comprehensive redevelopment plan.³⁷ The City of New London had been identified by the State of Connecticut as an economically distressed area and the redevelopment plan was intended to spur economic development.³⁸ The appellant's land was taken through the power of eminent domain simply because it happened to be located within the boundaries of the redevelopment area.³⁹

A divided Supreme Court, citing *Berman* and *Midkiff*, reaffirmed the precedential, judicial deference, stating, “[For] more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”⁴⁰ Citing the “comprehensive character” of the redevelopment plan, the “thorough deliberation that preceded its adoption, and [the Court’s] limited scope of . . . review,” the majority held that “[b]ecause that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”⁴¹ Perhaps the most influential words of the decision were contained in the final paragraph where Justice Stevens reminded state legislatures that “nothing in [the Court’s] opinion precludes any State from placing further restrictions on its exercise of the takings power.”⁴²

Reform: Is the Glass Half Full or Half Empty?, 17 SUP. CT. ECON. REV. 127, 128 (2009) (“Such a myopic assessment is sadly wide of the mark. It rests largely upon sweeping language in previous Supreme Court opinions rather than a careful look at the factual circumstances at issue in particular cases.”).

37. *Kelo*, 545 U.S. at 474–75. The ninety-acre redevelopment plan included the creation of Fort Trumbull State Park and a \$300 million research facility to be built by pharmaceutical company Pfizer Inc. *Id.* at 473. The Pfizer facility was seen as the catalyst for the revitalization of the redevelopment area and the New London downtown. *Id.* at 474.

38. *Id.* at 473.

39. *Id.* at 475.

40. *Id.* at 483.

41. *Id.* at 484.

42. *Id.* at 489.

3. *The Legislative Response to Kelo*

Following *Kelo*, the perceived threat to private property rights led to a public and media firestorm, and ignited a national debate on the proper limitation of eminent domain.⁴³ State legislatures across the country took Justice Stevens' words to heart, as approximately forty-three states, including Minnesota, ultimately amended their eminent domain statutes.⁴⁴ Many of these legislative amendments were specifically targeted at limiting eminent domain powers in the economic development context, especially where there was a transfer to "private" entities.⁴⁵ However, commentators have found that, with certain exceptions, these statutory changes have neither been effective in curbing states' abilities to take property for economic development purposes, nor in providing citizens with increased protection of their property.⁴⁶

In light of the *Kettleson* decision it is especially relevant to note the cumulative effect, if any, this wave of new legislation has had on road projects and the ability of highway departments to use eminent domain in the execution of their work. The National Cooperative Highway Research Program (the "NCHRP") published a fairly comprehensive report addressing this question.⁴⁷ The report concluded that "most state DOTs [Departments of Transportation] have not been affected by the states' constitutional and legislative changes in response to the *Kelo* decision."⁴⁸ In fact, at least thirteen states explicitly provided "that the post-*Kelo* restrictions do not apply to takings for the purpose of constructing, maintaining, or operating streets and highways."⁴⁹ However, some

43. See generally Michael Allan Wolf, *Hysteria Versus History: Public Use in the Public Eye*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 15 (Robin Paul Malloy ed., 2008) (dissecting the media coverage and subsequent public reaction after the *Kelo* decision was announced).

44. Somin, *supra* note 35, at 2102.

45. Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Year Later*, 38 ECOLOGY L.Q. 703, 707 (2011).

46. Somin, *supra* note 35, at 2171 ("Despite broad and strongly felt public opposition to *Kelo* and economic development takings . . . the majority of states failed to enact effective reform legislation banning them."); see also Mihaly & Smith, *supra* note 45, at 708 ("[M]uch of the legislation 'passed in the wake of *Kelo* was substantially cosmetic and will likely have little or no effect on economic development takings.'" (quoting EDWARD J. ERLER, IN *KELO'S WAKE* 12–13 (2008), available at http://www.hillsdale.edu/images/userImages/rvanopstal/Page_6542/Erler_2_Final.doc)).

47. THOMAS, *supra* note 3.

48. *Id.* at 8.

49. *Id.* at 9.

state DOTs reported that eminent domain reforms have increased right-of-way acquisition costs⁵⁰ and imposed new procedural time constraints that make the use of eminent domain less attractive as a property acquisition tool.⁵¹ Another common element of eminent domain reforms identified by the NCHRP is the requirement that condemned property be retained for public ownership and prohibited from being transferred to a private entity.⁵²

C. *Eminent Domain in Minnesota*

1. *Public Use*

The constitutional restraint in Minnesota mirrors that of the Fifth Amendment's Takings Clause, providing, "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor[e], first paid or secured."⁵³ *City of Duluth v. State* is a foundational and widely cited Minnesota case that illustrates the state's adoption of the broad definition of public use.⁵⁴ In *City of Duluth*, the court upheld the condemnation of private, commercial property in order to develop a new, privately operated papermill.⁵⁵ The court reasoned that, despite the fact that the condemnation would benefit private interests, the taking was not unconstitutional because it would further the broader public purposes of providing employment, increasing the city tax base, and revitalizing a deteriorating urban area.⁵⁶ The court endorsed the broad view of public use when stating, "What constitutes a public use . . . is, of course, a judicial decision; however, in light of the deferential scope of review, this court has construed the words 'public use' broadly."⁵⁷ Historically, the court

50. *Id.* at 24.

51. *Id.* at 25.

52. *Id.* at 10. The language of these public use definitions that require public ownership, are extremely similar to Minnesota's definition of public use. *See infra* note 66. For example, Iowa's definition of public use provides in part, "The possession, occupation, and enjoyment of property by the general public or governmental entities." THOMAS, *supra* note 3, at 10.

53. MINN. CONST. art. I, § 13. It should also be noted that the Takings Clause of the Fifth Amendment is applicable to the states by the Fourteenth Amendment. *See Chi., B. & Q.R. Co. v. City of Chi.*, 166 U.S. 226 (1897).

54. 390 N.W.2d 757 (Minn. 1986).

55. *Id.* at 760.

56. *Id.* at 763 (citing *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980)).

57. *Id.*

has used the words “public use” interchangeably with the words “public purpose.”⁵⁸ Subsequent high profile Minnesota economic development cases affirmed this broad definition of public use,⁵⁹ but resistance to this liberal application of eminent domain began to build.⁶⁰ Like it had in so many other states, the *Kelo* decision provided the final impetus for the Legislature to act.

2. 2006 Legislative Revision

In April 2006, shortly after *Kelo*, the Minnesota Legislature took up the task of scrutinizing the eminent domain statute⁶¹ and analyzing the definition of public use, particularly in the economic development context.⁶² By May of the same year, a significant revision to the statute was enacted (the “2006 Amendments”).⁶³ Of particular interest to this case are the preemption clause⁶⁴ and the new definition of public use and public purpose.⁶⁵ Minnesota Statutes section 117.025, subdivision 11(a) provides the critical

58. *Id.*

59. See Hous. & Redevelopment Auth. *ex rel. City of Richfield v. Walser Auto Sales, Inc.* 641 N.W.2d 885 (Minn. 2002) (3-3 decision) (affirming that condemnation of land containing operating auto dealerships, in connection with a redevelopment plan, mainly involving the construction of the Best Buy corporate headquarters, is a public use and is authorized under the Minnesota economic development statute, section 469 (2000)).

60. Paul B. Zisla, *How Recent Case Law and Legislative Developments in Eminent Domain Will Impact You*, in NAT'L BUS. INST., EMINENT DOMAIN: LEGAL UPDATE 1, 4 (2006) (describing the Minnesota Auto Dealers' post-*Walser* effort to lobby the legislature for changes to the eminent domain statute).

61. MINN. STAT. §§ 117.012–.57 (2010).

62. See MINN. S. COMM. ON TRANSP., S. 84-2006 TRP, Reg. Sess. (2006), *reprinted in* MN S. Comm. Up., 2006 TRP (Mar. 31, 2006) (Westlaw). During this committee hearing, Senator Thomas Bakk, lead author of the revisions to the eminent domain statute, stated his “goal with the bill is to stop the use of eminent domain for economic development purposes.” *Id.* In addition, he said that “[t]he heart of the bill is in provisions defining public uses or public purposes.” *Id.*

63. Act of May 19, 2006, ch. 214, 2006 Minn. Laws 195, 195 (“An act relating to eminent domain; making changes to and regulating the exercise of eminent domain; providing for public use or purpose and providing other definitions; providing for notice, hearing, and other procedural requirements; providing for attorney fees and additional forms of compensation . . .”).

64. MINN. STAT. § 117.012 (2010). Subdivision 1 added the following preemption language: “Notwithstanding any other provision of law, including any . . . statute, . . . all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter.” *Id.* Subdivision 2 echoes the U.S. and Minnesota Constitutions by again expressly stating that “[e]minent domain may only be used for a public use or a public purpose.” *Id.*

65. *Id.* § 117.025, subdiv. 11.

thrust of the amendment by providing, “[P]ublic use’ or ‘public purpose’ means, exclusively: (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies.”⁶⁶ In comparison to other jurisdictions’ eminent domain statute revisions, the 2006 Amendments are seen as establishing intermediate limitations on the use of eminent domain for economic development purposes.⁶⁷

3. MnDOT’s Eminent Domain Authority

Though not directly at issue in this case,⁶⁸ it is relevant to understand the MnDOT constitutional mandate and eminent domain powers. The Minnesota Constitution provides that “a trunk highway system . . . shall be constructed, improved, and maintained as public highways by the state.”⁶⁹ Pursuant to this constitutional provision, the Minnesota Supreme Court has held that condemnation of land for the purpose of the trunk highway system is an established public use.⁷⁰ The Legislature has delegated to the Commissioner of Transportation (the “commissioner”) the responsibility of carrying out this constitutional provision.⁷¹ Under this legislative grant, MnDOT has “broad authority in highway matters.”⁷² This authority includes selecting “the particular course

66. *Id.* The balance of the definition of public use or public purpose includes: “the creation or functioning of a public service corporation; or mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.” *Id.* Subdivision 11 concludes by stating, “The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.” *Id.*

67. Mihaly & Smith, *supra* note 45, at 713–14. The authors note that the 2006 Amendments are less strict than other states with “strong limitations” primarily because Minnesota does not prohibit economic development benefits from being a reason to use eminent domain, though they cannot be the only reason. *Id.*

68. *State ex rel. Comm’r of Transp. v. Kettleson*, 801 N.W.2d 160, 162 n.1 (Minn. 2011) (noting that the taking of land to be used exclusively for the highway was not challenged).

69. MINN. CONST. art. XIV, § 2.

70. *See, e.g., State ex rel. Hilton v. Voll*, 155 Minn. 72, 72, 192 N.W. 188, 188 (1923) (“[T]he Constitution determines that the taking of the right of way necessary for the trunk highway system is for public use.”).

71. MINN. STAT. § 161.20, subdiv. 1 (“The commissioner shall carry out the provisions of article 14, section 2, of the Constitution . . .”).

72. *State ex rel. Head v. Christopher*, 284 Minn. 233, 233, 170 N.W.2d 95, 96 (1969).

and necessary land for the trunk highways.”⁷³

By statute, MnDOT is authorized “to acquire . . . by eminent domain proceedings as provided by law, in fee or such lesser estate as the commissioner deems necessary, all lands and properties necessary . . . in laying out, constructing, maintaining, and improving the trunk highway system.”⁷⁴ Much like the legislative decisions of public use in *City of Duluth*, *Berman*, *Midkiff*, and *Kelo*, MnDOT’s decisions regarding locating the highway right-of-way are given substantial deference by the courts.⁷⁵ Drawing on decades of precedent, *State ex rel. Mondale v. Ohman* provided a succinct statement of the broad judicial deference given to MnDOT by stating “the courts may not interfere with the determination of the commissioner of highways, acting for the state in its sovereign capacity, if his determinations have a reasonable basis and are not arbitrary, capricious, or discriminatory.”⁷⁶

MnDOT also has been granted statutory authority to use eminent domain to address the issue of access to property isolated as a result of highway construction.⁷⁷ Minnesota Statutes section 161.24, subdivision 4, entitled “Access to isolated property,” provides:

When the . . . reconstruction of a trunk highway closes off any other . . . private road, or entrance at the boundary of the trunk highway, the commissioner may, in mitigation of damages . . . construct a road either within or outside the limits of the trunk highway, connecting the closed-off . . . private road . . . with another public highway. In determining whether to build the road within or outside the limits of the trunk highway, the commissioner may take into consideration economy to the state and local traffic needs.⁷⁸

The statute goes on to state that “[a]ll lands necessary for connecting a . . . private road . . . to another public highway . . . may be acquired by . . . condemnation.”⁷⁹ The phrases “in mitigation of damages” and “economy to the state” are indicative of

73. *Voll*, 155 Minn. at 73, 192 N.W. at 189.

74. MINN. STAT. § 161.20, subdiv. 2(a)(1).

75. *See, e.g., Voll*, 155 Minn. at 76, 192 N.W. at 190.

76. 263 Minn. 115, 119–20, 116 N.W.2d 101, 104 (1962) (citing *State ex rel. Peterson v. Severson*, 194 Minn. 644, 261 N.W. 469 (1935)).

77. MINN. STAT. § 161.24, subdiv. 4.

78. *Id.*

79. *Id.*

the need for state highway departments to take into account the financial consequences of their planning decisions. And the problem of isolated property—as contemplated in this statute and as encountered in *Kettleson*—makes salient this point.

III. THE *KETTLESON* DECISION

A. *Facts of the Case*

In 2008, 3½ miles of Trunk Highway 61 (TH 61) overlooking Lake Superior between Tofte and Lutsen was due for reconstruction (the Project).⁸⁰ MnDOT's plan for the Project included adding wider shoulders, passing lanes, and turning lanes in order to improve highway safety.⁸¹ To achieve the Project's objectives, MnDOT determined it must acquire additional right-of-way property from landowners adjacent to the Project area.⁸² Exercising its statutory authority, on August 29, 2008, MnDOT filed a condemnation petition in Cook County District Court seeking transfer of title and possession of certain portions of twenty-three parcels along the Project area.⁸³ One property affected by this petition, and the subject of this discussion, was appellant Richard Lepak's unimproved property (Parcel 15) north of and adjacent to TH 61.⁸⁴ In its petition, MnDOT sought to take a 110-foot-deep strip of Lepak's Parcel 15—the full length of his property adjacent to and parallel with TH 61.⁸⁵ The 75-foot-deep strip of Parcel 15 closest to the road was to be used exclusively for the planned improvements of TH 61 and was not challenged by Lepak.⁸⁶

80. MINN. DEP'T OF TRANSP., ANNUAL REPORT ON MAJOR HIGHWAY PROJECTS A12 (2011), available at <http://archive.leg.state.mn.us/docs/2011/mandated/110142.pdf> (summarizing the Project's history, objectives, schedule, and cost estimate).

81. *Id.*

82. Respondent's Brief at 3, State *ex rel.* Comm'r of Transp. v. *Kettleson*, 801 N.W.2d 160 (Minn. 2011) (No. A09-1894), 2010 WL 7367170, at *3.

83. Appellant's Brief & Addendum at 5, *Kettleson*, 801 N.W.2d 160 (No. A09-1894), 2010 WL 7367169 at *5.

84. *Id.* at 6.

85. *Id.* In addition, MnDOT sought a temporary easement taking of a twenty-foot section of land immediately north of and adjacent to the fee taking. Respondent's Brief, *supra* note 82, at 4–5. The temporary easement taking was not challenged by Lepak. *Id.* at 3.

86. Appellant's Brief & Addendum, *supra* note 83, at 6–7.

B. *Lepak's and MnDOT's Arguments*

At the November 18, 2008, hearing on MnDOT's petition, Lepak objected to the taking of the remaining 35-foot-wide strip of the 110-foot-deep fee taking.⁸⁷ Lepak objected on the basis that the 35-foot strip was to be used to construct a new road to provide the neighboring, improved Parcel 14, directly to the west of Parcel 15, with access to the reconstructed TH 61.⁸⁸ Parcel 14 previously had direct access to TH 61 by a driveway on its own property, but that access would be eliminated by the reconstruction project, rendering it landlocked.⁸⁹ Lepak characterized this new road to be built across the entirety of his as a "private access" used to restore Parcel 14's connection to TH 61.⁹⁰ He contended that, as a private access, it was an improper taking because it was "not for a public use or public purpose and, therefore, is prohibited by Minnesota law."⁹¹

Further, Lepak argued that the judicial deference and broad construction of public use and public purpose articulated in *City of Duluth* was overruled by the 2006 Amendments.⁹² Lepak contended that the new narrow, exclusive definition of public use and public purpose "repudiated the broad interpretation" of these terms.⁹³ Finally, Lepak asserted that MnDOT's statutory authority in section 161.24 to provide access to isolated properties requires the broad interpretation of public use that was "preempted by the 2006 Amendments to Minnesota's eminent domain laws to the extent it purports to authorize such a taking."⁹⁴

In support of the taking, MnDOT asserted a series of arguments, all of which paralleled common arguments expressed in similar cases.⁹⁵ MnDOT characterized the road, not as a "private road," but as a "public access road" that will serve three parcels, not just Parcel 14,⁹⁶ and will be open to the traveling public.⁹⁷ MnDOT

87. *Id.* at 5–6.

88. *Id.* at 6.

89. Respondent's Brief, *supra* note 82, at 6–7.

90. Appellant's Brief and Addendum, *supra* note 83, at 6.

91. *Id.* at 5.

92. *Id.* at 11–12.

93. *Id.* at 11.

94. *Id.* at 12.

95. *See infra* Part IV.B.2.b.

96. Respondent's Brief, *supra* note 82, at 6. A third parcel, Parcel 16, which is also unimproved and directly east of Parcel 15, was involved in this condemnation but was not at issue in the case. *Id.*

sought to distinguish a public road from a private road by reasoning:

It is the right of travel by public, and not the exercise of the right, that constitutes a public roadway. The actual amount of travel should not be material—if it is open to all who desire to use it, [it] is a public roadway even though it may be used by only a limited portion of the traveling public⁹⁸

MnDOT also contended that access road falls within the new statutory definition of public use, specifically the “possession, occupation, ownership, and enjoyment” clause.⁹⁹ By retaining title and possession of the access road and not transferring an interest to a private party, MnDOT would satisfy this requirement.

In addition, MnDOT argued that Minnesota’s public purpose analysis only requires that a public purpose be established for the whole of a project, not for each individual aspect, such as the access road.¹⁰⁰ MnDOT pointed out that past Minnesota eminent domain cases were analyzed under a two-step framework of public use and reasonable necessity, and that the 2006 Amendments have no language demonstrating legislative intent to change that framework by adding additional steps of analyzing separate components of the challenged taking.¹⁰¹

MnDOT offered additional statutory authority to condemn a portion of Lepak’s land.¹⁰² MnDOT asserted the authority found in both Minnesota Statutes section 160.18 and section 161.24.¹⁰³ Section 160.18 provides that “road authorities . . . in relocating or reconstructing an old highway shall construct suitable approaches thereto within the limits of the right-of-way . . . so as to provide abutting owners a reasonable means of access to such highway.”¹⁰⁴ Section 161.24 is an express provision for restoring access to property isolated by a highway project.¹⁰⁵

Lastly, both Lepak and MnDOT recognized that this dispute

97. *Id.* at 15.

98. *Id.* at 14.

99. *Id.* at 19.

100. *Id.* at 10–13.

101. *Id.* at 10–12.

102. *Id.* at 20–21.

103. *Id.*

104. MINN. STAT. § 160.18, subdiv. 2 (2010).

105. *Id.* § 161.24.

was one of economics and the efficient use of resources.¹⁰⁶ MnDOT pointed out that if the court held in Lepak's favor, denying the condemnation, the court would "invalidate a taking that affects just a small portion of his unimproved property, which in turn would result in the economic destruction of his neighbor's improved property. Such a result would hardly be fair or just."¹⁰⁷ Lepak countered that while MnDOT had a "substantial financial incentive" to avoid compensating the owner of the landlocked parcel for the "economic destruction" of that property, the new narrow definition of public use made no mention of such an exercise of eminent domain.¹⁰⁸ Therefore, the taking was without legal basis.

C. *District Court and Court of Appeals Decisions*

On November 25, 2008, one week after the original hearing, the district court granted MnDOT's condemnation petition.¹⁰⁹ Lepak appealed to the Minnesota Court of Appeals.¹¹⁰ The court of appeals remanded the case back to the district court for a specific finding on Lepak's objection that the private-access road was not a public use or public purpose.¹¹¹ In an August 12, 2009, order, the district court held that the project as a whole provided a proper public purpose, and MnDOT did not need to show a public purpose for every aspect of the project, including the disputed road.¹¹² The district court reached this conclusion by reasoning that "once MnDOT establishes a broad public purpose, it need only prove that a challenged aspect of the project is reasonably necessary to further that purpose."¹¹³ The district court found the widening of TH 61 had a legitimate public purpose and the disputed access road to be reasonably necessary to serve the

106. See Appellant's Brief & Addendum, *supra* note 83, at 8 (discussing the State's duty to compensate the owner of Parcel 14 for the lost access); Respondent's Brief, *supra* note 82, at 18.

107. Respondent's Brief, *supra* note 82, at 18.

108. Appellant's Reply Brief at 2-4, State *ex rel.* Comm'r of Transp. v. Kettleon, 801 N.W.2d 160 (Minn. 2011) (No. A09-1894), 2010 WL 7367171.

109. Respondent's Brief, *supra* note 82, at 3.

110. *Id.*

111. *Id.*

112. State *ex rel.* Comm'r of Transp. v. Kettleon, No. A09-1894, 2010 WL 2813456, at *2 (Minn. Ct. App. July 20, 2012); Respondent's Brief, *supra* note 82, at 2.

113. *Kettleon*, 2010 WL 2813456, at *2.

legitimate highway expansion.¹¹⁴

A divided court of appeals affirmed the district court's ruling in an unpublished decision dated July 20, 2010.¹¹⁵ First, the court of appeals found that the 2006 Amendments did not disturb the long-standing judicial deference to a condemning authority's public use determination.¹¹⁶ The court pointed out that the deferential "clearly erroneous" standard of review for public use evaluations discussed in *City of Duluth* was still valid and cited with approval subsequent to the statutory amendment.¹¹⁷ Next, the court concluded that the appellant's assertion that the access road was to be a private driveway was without support.¹¹⁸ Instead, citing the subdivision of Minnesota Statutes section 117.025 defining public purpose as "the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies," the court determined that MnDOT was seeking to possess and occupy a "public-highway access road for use and enjoyment by the owners of three adjacent parcels of land."¹¹⁹ Therefore, a valid public purpose was established.¹²⁰ The Minnesota Supreme Court granted Lepak's petition for further review to evaluate the validity of the challenged taking in light of the new statutory definition.¹²¹

D. Minnesota Supreme Court Decision

The supreme court reached the same decision as the lower courts, holding that the proposed taking fell "squarely within" the new statutory definition of public use.¹²² To reach this conclusion, the court first found that the 2006 Amendments had not disturbed the broad deference the courts give to condemning authorities.¹²³

114. *Id.*

115. *Id.* at *4.

116. *Id.* at *1.

117. *Id.* The court of appeals cited *City of Willmar v. Kvam*, 769 N.W.2d 775, 780 (Minn. Ct. App. 2009), and *City of Granite Falls v. Soo Line Railroad Co.*, 742 N.W.2d 690, 697 (Minn. Ct. App. 2007), to show that the previous standard had been cited with approval. *Kettleson*, 2010 WL 2813456, at *1.

118. *Id.* at *2.

119. *Id.*

120. *Id.* The court also discussed reasonable necessity and found that "the state provided a valid public purpose for the highway project and showed that the taking was reasonably necessary to further that purpose." *Id.* at *4.

121. *State ex. rel. Comm'r of Transp. v. Kettleson*, 801 N.W.2d 160, 163 (Minn. 2011).

122. *Id.* at 166.

123. *Id.* at 165. The supreme court agreed with the court of appeals in finding

Specifically, the 2006 Amendments did not change the legislative nature of the government's eminent domain power.¹²⁴ The court pointed out that "MnDOT has been specifically authorized by the Legislature to condemn property directly on its behalf" and that "[n]othing in [section 117.02 of the 2006 Amendments] disturbs the long-standing principle of deference by the courts to the Commissioner's legislative decision-making in condemning private property to build highways."¹²⁵ The court's role is to ensure that takings "are within such discretionary power rather than an arbitrary or discriminatory exercise of the legislative prerogatives."¹²⁶

The court then enumerated three reasons why it found this taking to fit squarely within the statutory definition of public use and public purpose. First, it cited MnDOT's broad authority to administer the state's transportation policies and plans and held that the Highway 61 Project was "without question a transportation plan with the over-arching purpose of providing a public benefit."¹²⁷ The court then reasoned that, because MnDOT would hold title and possession to the access road, the statutory requirement of "possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies" was met.¹²⁸ Third, because the road would lie within the public right-of-way and there was no evidence offered that the public would be excluded, the court maintained that the "enjoyment of the access road is established to be for the general public."¹²⁹ After asserting these three points, the court concluded that "[w]hile no single fact is controlling, we conclude, on the record before us, that MnDOT has demonstrated a proper public purpose for the taking."¹³⁰

the case law precedent for this deferential standard was still cited with approval subsequent to the 2006 Amendments. *Id.*; see also *supra* note 117 and accompanying text.

124. *Kettleson*, 801 N.W.2d at 165.

125. *Id.*

126. *Id.* at 165–66 (quoting *Pearce v. Vill. of Edina*, 263 Minn. 553, 571, 118 N.W.2d 659, 671 (1962)).

127. *Id.* at 166.

128. *Id.*

129. *Id.*

130. *Id.* at 167.

IV. ANALYSIS

The court's holding that "no single fact is controlling" is indicative of the ongoing difficulty, or perhaps impossibility,¹³¹ of conclusively defining public use, even when the legislature speaks. As the leading commentary on eminent domain states: "In any given case, a use clearly conducive to the welfare of the community, or which more closely conforms with the local practices and conditions of the people of a state, governs the judiciary's construction of the meaning of 'public use' for that community."¹³² Add this expansive notion of judicial construction to the standard that MnDOT decisions will not be interfered with as long they have "a reasonable basis and are not arbitrary, capricious, or discriminatory,"¹³³ and one would understand why some say that challenging public purpose in a road case "is likely a waste of time and money."¹³⁴

The court set the stage for its public use analysis by correctly refuting Lepak's contention that the 2006 Amendments overruled decades of broad judicial deference to condemning authorities' decisions. And it correctly reaffirmed the only if arbitrary, capricious, or discriminatory standard of review. However, with no Minnesota case directly on point and by confining its decision strictly to the new statutory definition of public use, the court offered a thin analysis of public use. The court omitted a large volume of persuasive precedent that would have been helpful in showing this decision's place within the panoply of similar public use challenges. Defining public use "has never been accomplished."¹³⁵ So instead of trying to do the impossible in defense of this decision, this analysis will draw on this array of persuasive authority from Minnesota, other jurisdictions, and economic theory, in an attempt to add color and clarity to the *Kettleson* court's public use holding.

These persuasive authorities suggest that the court properly discerned the nature of a public road as it has been historically recognized in Minnesota. Namely, public roads are defined by

131. 26 AM. JUR. 2D *Eminent Domain* § 44 (2004) ("A 'public use' defies absolute definition for it changes with varying conditions of society . . .").

132. SACKMAN, *supra* note 2, § 7.02[1].

133. See MINN. DEP'T OF TRANSP., *supra* note 80 and accompanying text.

134. Robert Lindall & Howard A. Roston, *Litigation of Public Purpose, in* EMINENT DOMAIN LAW § 3, at 8 (Minn. CLE, 2006).

135. SACKMAN, *supra* note 2, § 7.02[1].

open public access, not by a specific number of public users. The court did not expressly rule on the continuing validity of section 161.24 and its “economy of state” rationale or whether the project “taken as a whole” is controlling.¹³⁶ However, the court indirectly, yet properly, recognized the validity of these arguments, which is demonstrated by their wide application in a variety of similar cases.¹³⁷ Finally, while not discussed by the court, the fundamental economic theory of eminent domain provides additional support to the decision, even if this rationale falls outside of a traditional legal analysis.

A. *Starting Off Right: Legislative Intent and the Arbitrary and Capricious Standard*

Before proceeding to discuss public use, it is necessary to briefly address two critical points the court got right. First, the court clearly rejected the argument that the 2006 Amendments overruled the precedent of broad judicial deference to public use.¹³⁸ The court stated that all of its use of statutory interpretation is to determine the intent of the Legislature.¹³⁹ Part of this analysis may include looking at the “circumstances surrounding the law’s enactment.”¹⁴⁰ The 2006 Amendments were a direct consequence of rulings, such as *Kelo* and *Walser*, where people’s homes and businesses were being taken for economic development that appeared to be for the benefit of large corporations like Best Buy and Pfizer.¹⁴¹ One of the lead drafters of the 2006 Amendments stated that the amendments were to “stop the use of eminent domain for economic development purposes.”¹⁴² Considering these circumstances surrounding the 2006 Amendments, it hardly seems valid to say that the Legislature intended to create a regime in Minnesota with a strict, narrow definition of public use rules in all situations, including highway construction. By maintaining the possibility that the benefits of economic development could still be

136. See State *ex. rel.* Comm’r of Transp. v. Kettleson, 801 N.W.2d 160, 166–67 (Minn. 2011).

137. See *infra* Part IV.B.2.

138. *Kettleson*, 801 N.W.2d at 165–66.

139. *Id.* at 166.

140. *Id.*

141. See *Kelo v. City of New London*, 545 U.S. 469, 474–75 (2005); Hous. & Redevelopment Auth. *ex rel.* City of Richfield v. Walser Auto Sales, Inc. 641 N.W.2d 885, 891 (Minn. 2002); *supra* notes 36 & 58 and accompanying text.

142. See MINN. S. COMM. ON TRANSP., *supra* note 62; text accompanying note 62.

reasons for using eminent domain, the Legislature demonstrated it was not endorsing the strict view of public use that Lepak suggests.¹⁴³ Constricting MnDOT's "essential legislative function"¹⁴⁴ was not the Legislature's intent and the supreme court correctly recognized that.

Second, it is important to point out that the "not arbitrary, capricious, or discriminatory" standard correctly applied by the court is a high hurdle.¹⁴⁵ It is difficult to find a published appellate court decision where a MnDOT decision was overruled under this standard.¹⁴⁶ One 2001 case was reversed because the eminent domain statute permitted the condemnee to appeal the damage award, but not the public use or necessity.¹⁴⁷ The statute was deemed unconstitutional because condemnees are entitled to a judicial review of these elements.¹⁴⁸ Looking at the *Kettleson* facts, it is hard to argue that MnDOT's decision was arbitrary, capricious, or discriminatory. The access road was placed so three adjoining parcels would have opportunity to utilize it.¹⁴⁹ The testimony of MnDOT's engineer showed at least some level of forethought and planning.¹⁵⁰ There were no allegations that Lepak was singled out or given prejudicial treatment in any way. On balance, there is a void of evidence of any arbitrary, capricious, or discriminatory actions by MnDOT that would make this a judicially reversible legislative decision.

143. See MINN. STAT. §§ 117.012, 117.025, subdiv. 11; *supra* notes 64, 66 and accompanying text.

144. *Kettleson*, 801 N.W.2d at 163.

145. *Id.* at 165.

146. Searches in Westlaw under ("eminent domain" & "department of transportation"), ("eminent domain" & "commissioner of highways"), and ("eminent domain" & "county highway") did not yield any decisions where the court overturned a MnDOT decision about planning of highways. This is not conclusive, but it at the very least shows the infrequency of such an occurrence. One non-highway exercise of eminent domain that failed to meet this generous benchmark is a case in which the University of Minnesota sought to condemn land for which it had no specific purpose; the court found that a speculative stockpiling of land for some unknown future use was an inadequate justification for a condemnation action. *Regents of Univ. of Minn. v. Chi. & N.W. Transp. Co.*, 552 N.W.2d 578 (Minn. Ct. App. 1996).

147. *In re Damages to Rapp*, 621 N.W.2d 781 (Minn. Ct. App. 2001).

148. *Id.* at 785.

149. Respondent's Brief, *supra* note 82, at 6.

150. *Id.* at 5.

B. *Finding the Public Use: The Power of Persuasive Precedent*

1. *How to Distinguish Between a “Private” and “Public” Road*

The court reached its public use conclusion in part by finding that the access road is public because there was no evidence that members of the public would be excluded from using it.¹⁵¹ However, the court did not elaborate on why this made it a “public road.” In Minnesota, distinguishing between a “private” and a “public” road is not intuitively measured strictly by the quantity of people directly using or benefiting from any given road. That a public road is defined by open access to it by the public, not by volume of use by the public is a proposition with strong precedent in Minnesota, specifically under the Minnesota cartway statute.¹⁵² This statute and its related case law are helpful for lending persuasive support to the court’s holding.

A cartway “is merely a classification of a type of public road, unique in character because it principally benefits an individual instead of the general public.”¹⁵³ Minnesota’s cartway statute reads in part:

Upon petition presented to the town board by the owner of a tract of land . . . who has no access thereto except over a navigable waterway or over the lands of others, or whose access thereto is less than two rods in width, the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner’s land with a public road.¹⁵⁴

The cartway statute does not apply to *Kettleison*,¹⁵⁵ but it offers strong

151. State *ex. rel.* Comm’r of Transp. v. *Kettleison*, 801 N.W.2d 160, 166 (Minn. 2011).

152. MINN. STAT. § 164.08 (2010). Many states have similar acts, sometimes referring to them as private road acts that allow a landlocked property owner to petition the local government to establish a road over the property of a neighbor in order for the landlocked owner to have access to a public way. See Kristin Kanski, Note, *Property Law—Minnesota’s Lakeshore Property Owners Without Road Access Find Themselves Up a Creek Without a Paddle—In Re Daniel for the Establishment of Cartway*, 30 WM. MITCHELL L. REV. 725, 729 n.34 (2003) (providing a list of similar state statutes).

153. Kanski, *supra* note 152, at 726 n.4 (citing 39 AM. JUR. 2D *Cartways* § 6 (2002)).

154. MINN. STAT. § 164.08, subdiv. 2 (including different provisions depending on the size of the parcel for which the petitioner is seeking relief).

155. If MnDOT had left Parcel 14 without a driveway, perhaps the owner could have proceeded under the cartway statute. Respondent’s Brief, *supra* note 82, at 5. However, Parcel 14 was likely not strictly landlocked as this concept is understood

guidance as to how Minnesota courts have analyzed this difficult private versus public distinction. In *Rask v. Town Board*, the appellant made a similar argument to Lepak when it contended that a certain cartway was a “private road” because H. J. Rask, the petitioner, would be the person “principally benefited.”¹⁵⁶ However, the court held:

[T]he public, without doubt, has an interest in having access to the farm in question. A determination of whether a way be public or private does not depend upon the number of people who use it, but upon the fact that everyone desiring to do so may lawfully use it. The right to use, and not the extent of the use, controls.¹⁵⁷

This concept was rationalized by equating public use with “any use . . . which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities.”¹⁵⁸ This holding is in accordance with the *Kettleson* court’s holding that “the access road is established to be for the general public.”¹⁵⁹

One could offer the counterargument that these cases are outdated, outmoded, and no longer needed in a modern and developed landscape.¹⁶⁰ In fact, some states have deemed similar

under the cartway statute. *Id.* The boundary of Parcel 14 is contiguous to the public right-of-way of TH 61 for more than two rods, but the steep grade change allegedly made construction of a driveway for vehicular traffic unreasonable. *Id.* Under the cartway statute, arguably ineffective access may not qualify a landowner to seek relief. *See Horton v. Twp. of Helen*, 624 N.W.2d 591, 593 (Minn. Ct. App. 2001). *But see Mueller v. Supervisors of Courtland*, 117 Minn. 290, 297, 135 N.W. 996, 998 (1921) (refusing to overturn a jury verdict granting a petitioner a cartway even though the petitioner already had inconvenient access to a public way over his own property).

156. 173 Minn. 572, 573–74, 218 N.W. 115, 115 (1928) (citing *Mueller*, 117 Minn. at 296, 135 N.W. at 998).

157. *Id.* at 574, 218 N.W. at 115 (citing *Mueller*, 117 Minn. at 296, 135 N.W. at 998).

158. *Mueller*, 117 Minn. at 295, 135 N.W. at 998 (quoting *Stewart v. Great N.R.R. Co.*, 65 Minn. 515, 517, 68 N.W. 208, 209 (1896)).

159. *State ex. rel. Comm’r of Transp. v. Kettleson*, 801 N.W.2d 160, 166 (Minn. 2011).

160. Cartway statutes, known as private road acts in some jurisdictions, emanate from colonial times when the country was largely undeveloped. Meidinger, *supra* note 6, at 25 (“[S]ince the country consisted largely of wilderness and since the government could not hope to furnish all the roads needed, ‘the use of condemnation to open private roads . . . was a necessity if the country was to be developed at all.’” (quoting Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 207 (1978))).

statutes unconstitutional.¹⁶¹ Or, as Lepak did, one could also make the argument that these cases and their interpretation of public use were overruled by the 2006 Amendments' definition of public use.¹⁶² After all, proceedings under the cartway statute are closely connected to eminent domain proceedings.¹⁶³ *Silver v. Ridgeway* helps to refute these counterarguments.¹⁶⁴ *Silver* was decided after the 2006 Amendments and continued to favorably cite these foundational cases, holding that "establishment of a cartway creates a public road and therefore does not violate the constitutional prohibition against taking private property for a private use."¹⁶⁵

This concept of a public road being defined by access has support in jurisdictions outside of Minnesota and in contexts beyond cartway statutes. There are a number of cases from other states that involve a factual scenario similar to *Kettleson* and rely on a similar formulation of a public road. In *Sturgill v. Kentucky, Department of Highways*, the appellant challenged the use of eminent domain to provide an access road to a hotel incidentally landlocked by the construction of a highway ramp.¹⁶⁶ The court resolved the issue by asking "Have the public the right to [the road's] use upon the same terms as the person at whose instance the way was established? If they have, it is a public use; if they have not, it is a

161. See *Tolksdorf v. Griffith*, 626 N.W.2d 163, 165 (Mich. 2001). The *Tolksdorf* court found that the public was not the "predominant interest served by the private roads act" and the public benefit was "purely incidental and far too attenuated to support a constitutional taking of private property." *Id.* at 168–69 (quoting *McKeigan v. Grass Lake Twp. Supervisor*, 587 N.W.2d 505, 509 (Mich. Ct. App. 1998), *superseded by* 593 N.W.2d 605 (Mich. Ct. App. 1999), *overruled by Tolksdorf*, 626 N.W.2d 163). However, the facts may have affected the decision. In *Tolksdorf*, the owners surrounding the landlocked parcel had long allowed access to it for recreational purposes, but the petitioner was a real estate developer who acquired the property with knowledge that it was landlocked, hoping to subdivide the property and sell lots. *Id.* at 165–66. Compare *Tolksdorf* with *In re Opening Private Rd. for Benefit of O'Reilly*, in which the Supreme Court of Pennsylvania seemed poised to also find its state's private roads act unconstitutional. 5 A.3d 246, 258 (Pa. 2010). Instead, the court remanded the case to allow further findings of fact as to whether the proposed "private road" taking "might be regarded as an interconnected course of events" with a highway taking, which caused the petitioner to become landlocked. *Id.*

162. See MINN. STAT. § 117.025, subdiv. 11 (2010).

163. *Id.* § 164.07, subdiv. 8 ("[The appeal] shall be tried in the same manner as an appeal in eminent domain proceedings under chapter 117.").

164. 733 N.W.2d 165 (Minn. Ct. App. 2007).

165. *Id.* at 169 (citing *Mueller v. Supervisors of Courtland*, 117 Minn. 290, 296, 135 N.W. 996, 998 (1921)).

166. 384 S.W.2d 89, 90 (Ky. 1964).

private one.”¹⁶⁷ In a similar situation in Ohio, the court held that a condemnation for a disputed access road was valid because it would be “open to the public and used by the public as a means of ingress and egress to and from the business conducted on these premises.”¹⁶⁸ Further, the Washington high court explained, “Any public way naturally confers a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead end streets or highways inevitably and particularly subserve the private interests of the last property owner on the line.”¹⁶⁹ There is no shortage of jurisdictions that have ascribed to this principle.¹⁷⁰

Admittedly, defining a public road by access, not by use, may not be inherently intuitive.¹⁷¹ However, the weight of authority in Minnesota subscribes to this theory. And even though this authority is cartway precedent, it is difficult to see how the underlying facts of these cases are different enough to warrant separate treatment. There seems to be no reason why cartway petitions should be treated under this broad “public access is public use” rule, while lands incidentally landlocked by highway construction should be evaluated under a different, stricter framework. The problems are sufficiently analogous to merit extension of this long-held cartway precedent to the *Kettleston* access road. For these reasons, the court made the correct decision as to the nature of the road.

2. *Looking at the “Project as a Whole” and “Economy to the State” to Locate a Public Use*

The court supported its public use decision by stating that the

167. *Id.* at 92 (citing *Chesapeake Stone Co. v. Moreland*, 104 S.W. 762, 765 (1907)).

168. *May v. Ohio Tpk. Comm’n*, 178 N.E.2d 920, 922 (Ohio 1962).

169. *State v. Belmont Improvement Co.*, 495 P.2d 635, 639 (Wash. 1972).

170. *See, e.g., Andrews v. State*, 229 N.E.2d 806, 810 (Ind. 1967) (“[T]he Legislature properly intended such service roads would constitute a public use whether such road served one property owner or many.”); *State v. Totowa Lumber & Supply Co.*, 232 A.2d 655, 659 (N.J. Super. Ct. App. Div. 1967) (“The number of people who will participate in or benefit by the use for which the property is condemned is not the determinant of whether the use is or is not a public one.”).

171. Similar to Lepak’s argument, in this author’s opinion the *Kettleston* access road does have the appearance of a driveway leading directly to the Parcel’s garage. Even the local fire authority appears to recognize the road as a driveway as it has placed the fire number for Parcel 14 on the north side of the approach from TH 61 (closest to Parcel 16) adding to its appearance as such. *See* Photograph: *Kettleston* access road with accompanying fire number (Aug. 2012) (on file with author).

highway improvement was “without question a transportation plan with the *over-arching purpose* of providing a public benefit,”¹⁷² but also stating that it “need not decide whether the project must be viewed as a whole or whether each individual aspect . . . must be examined for a public purpose.”¹⁷³ In addition, the court quoted Minnesota Statutes section 161.24, expressly stating that “MnDOT also may acquire land by eminent domain” for “connecting the closed-off highway, street, private road, or entrance with another public highway.”¹⁷⁴ Yet, the court went on to state, in reference to section 161.24, that “[w]e do not decide whether the new definition of public purpose has invalidated the statutory provisions that allow the Commissioner to condemn land ‘necessary for connecting’ a private road that is closed off by the highway project.”¹⁷⁵ It is difficult to know how to interpret these apparently conflicting and contradictory statements.

That a given project should be “taken as a whole” and section 161.24’s stated rationale of “economy to the state” are arguments that have been used in past Minnesota cases and in many other jurisdictions facing situations similar to *Kettleson* to help identify a proper public purpose. Perhaps the court’s opposing statements on these points may be best interpreted as implied endorsements of these propositions as useful tools in locating the limit of proper public use, yet a manifest desire to limit the scope of its decision.

a. Kelmar: A Homegrown Example

A sufficiently analogous example of the Minnesota Supreme Court using “economy to the state” and “taken as a whole” arguments to support a challenged condemnation can be found in *Kelmar Corp. v. District Court*.¹⁷⁶ The factual scenario of *Kelmar* is different than *Kettleson*, yet the decision is instructive. In *Kelmar*, MnDOT sought to condemn a portion of the Kelmar Corporation’s land in conjunction with the construction of the Interstate Trunk Highway No. 494 bridge over the Minnesota River.¹⁷⁷ However, Kelmar’s condemned land was not to be used directly by MnDOT.

172. State *ex rel.* Comm’r of Transp. v. Kettleson, 801 N.W.2d 160, 166 (Minn. 2011) (emphasis added).

173. *Id.*

174. *Id.* at 164 (quoting MINN. STAT. § 161.24, subdiv. 4 (2010)).

175. *Id.* at 167 (quoting § 161.24, subdiv. 2).

176. 269 Minn. 137, 130 N.W.2d 228 (1964).

177. *Id.* at 138, 130 N.W.2d at 229.

Instead, Kelmar's land would be utilized by the U.S. Corps of Engineers (the "Corps") in an independent project of straightening the Minnesota River.¹⁷⁸ By condemning Kelmar's property for use by the Corps, the Corps could modify their project and allow MnDOT to build a bridge 1500 feet shorter, equating to a savings of \$1,646,362 for the state.¹⁷⁹

Kelmar objected, contending that the purpose of the condemnation "is not for highway purposes, that the taking is not necessary but is arbitrary and capricious, and is beyond the authority of the Commissioner of Highways to acquire."¹⁸⁰ The court held:

We are convinced, however, from an examination of the record and authorities, that the taking of the property in question is for a public purpose. Although the direct physical use of the property in question will not be for highway purposes, its use is nevertheless incidental to and related to that purpose. The acquisition of the property in question will make it possible to relocate the main channel of the river so that a bridge may be constructed which will more conveniently and economically serve as a public facility.¹⁸¹

The court looked at the project as a whole and found that since the taking was "incidental" to highway purposes it was valid.¹⁸² This is the essence of the "project as a whole" argument. Identifying the "economy to the state" argument needs no explanation. One major difference between *Kelmar* and *Kettleston* is the proposed "non-highway" use for the MnDOT-condemned land. Use by the Corps for the purpose of maintaining a navigable river is a more apparent "public use" than the *Kettleston* access road. Nevertheless, *Kelmar* illustrates the principle that the "economy to the state" and the nature of a taking as incidental to a highway purpose is something the court will consider.

b. *Not a New Problem: Highway Construction and Isolated Properties in Other Jurisdictions*

Not surprisingly, the landlocked issue presented in *Kettleston* is

178. *Id.*

179. *Id.* at 139, 130 N.W.2d at 230.

180. *Id.* at 140, 130 N.W.2d at 230.

181. *Id.* at 141, 130 N.W.2d at 231.

182. *Id.*

not a unique situation. There is a relatively sizeable sample of cases from jurisdictions across the country in which similar situations have sparked public use challenges. Where the public use is validated, courts typically rely on the same list of justifications, particularly the familiar “project as a whole” and “economy to the state” propositions.

*Luke v. Massachusetts Turnpike Authority*¹⁸³ appears to be one of the early and influential cases addressing the issue of restoring access to land parcels rendered landlocked by highway construction. In *Luke*, the Massachusetts Turnpike Authority sought a permanent easement across two parcels for the purpose of providing ingress and egress to a third parcel, which was deprived access to a public right-of-way due to no-access provisions in the construction of a tollway.¹⁸⁴ Following a public use challenge by one of the neighboring parcels burdened by the easement, the court concluded:

If the easement or the private way should be viewed in the abstract, no public purpose would appear. Such an approach, however, would be closing the eyes to reality. The laying out of the turnpike . . . and the acquisition of numerous sites essential to that object are attributes of one huge undertaking. Procuring an easement and creating a right of way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way are but a *by-product* of that undertaking. The authority was not engaged in a “roving commission.”¹⁸⁵

The fact that the taking was a by-product of a highway project has proved persuasive in the series of cases that followed *Luke*'s lead.¹⁸⁶ Two cases from North Carolina show that if the lost access and taking is a by-product of a highway project, it can be the

183. 149 N.E.2d 225 (Mass. 1958).

184. *Id.* at 226.

185. *Id.* at 228 (emphasis added) (citation omitted).

186. See *Miss. State Highway Comm'n v. Morgan*, 175 So.2d 606, 609 (Miss. 1965) (“[A] mere by-product of laying out the highway”); *State v. Totowa Lumber & Supply Co.*, 232 A.2d 655, 660 (N.J. Super. Ct. App. Div. 1967) (“The reasoning used by the Massachusetts court is applicable to this case.”); *May v. Ohio Tpk. Comm'n*, 178 N.E.2d 920, 922 (Ohio 1962) (“The reasoning used by the Massachusetts court is applicable to this case. In the construction of a turnpike, which is for ‘the public welfare’ and ‘the public use,’ it is often necessary that certain parcels of land be left without access.”); see also 29A C.J.S. *Eminent Domain* § 31 (2012); SACKMAN, *supra* note 2, § 7.06[5] (identifying *Luke* as a leading case, which many legal commentaries have expounded upon).

controlling fact. Independent from a larger project, in 1965 the North Carolina Supreme Court overruled a highway department's condemnation to establish a certain cul-de-sac, holding that it would be "for the substantial and dominant use and benefit of [one family] . . . and that the use by, or any benefit for, the general public will be only incidental."¹⁸⁷ However, four years later, the state appellate court reached a different conclusion when the facts were closer to the facts of *Kettleson*.¹⁸⁸ After a parcel was landlocked due to the construction of a controlled access highway, the court, citing *Luke*, found the highway commission had "ample authority for the taking here in question as this taking was necessary in order for it to 'properly prosecute the work' involved with [the] project."¹⁸⁹ This language strongly suggests that the nature of the taking was seen as incidental to a highway project, a fact that helped nudge the court over the line to find a valid public use.

"Economy to the state" is an equally compelling rationale for many states. Even the United States Supreme Court has recognized that financial considerations are a valid part of the public use equation.¹⁹⁰ The Kentucky court noted that a taking to create a new access road to serve a landlocked motel would alleviate the motel's access issue and "incidentally . . . save a substantial amount of money (to which [the motel owner] would be entitled as condemnation damages)."¹⁹¹ The Mississippi court recognized that destruction of access was unavoidable in limited access highway projects and, therefore, highway departments need a wide measure of discretion in laying out these roads in order to keep "with their duty not to expend public moneys needlessly."¹⁹² Perhaps it was the Indiana Supreme Court that most forcefully relied on this "economy to the state" rationale.¹⁹³ The court stated, "If the State

187. *State Highway Comm'n v. Batts*, 144 S.E.2d 126, 136 (N.C. 1965).

188. *See N.C. Highway Comm'n v. Ashville Sch. Inc.*, 169 S.E.2d 193 (N.C. Ct. App. 1969).

189. *Id.* at 198 (citation omitted).

190. *U.S. ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 554 (1946) ("[T]he fact that the authority wanted to prevent a waste of government funds . . . [did not detract] from its power to condemn The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public.")

191. *Sturgill v. Ky., Dep't of Highways*, 384 S.W.2d 89, 90 (Ky. 1964).

192. *Miss. State Highway Comm'n v. Morgan*, 175 So.2d 606, 609 (Miss. 1965).

193. *See Andrews v. State*, 229 N.E.2d 806 (Ind. 1967).

of Indiana is not in a position to minimize the damages paid to land owners, then the cost of Interstate Highways would soar astronomically and Indiana would be dotted abnormally with landlocked real estate.”¹⁹⁴ There are other examples of states that find saving money a useful element in justifying similar takings, though there are detractors.¹⁹⁵

The preceding litany of cases is offered to merely add some context and background to the court’s decision. There is plenty of persuasive precedent to support the court’s decision. These cases offer more evidence that there is no easily definable public use in these situations; just a judicial weighing of what is “clearly conducive to the welfare of the community,”¹⁹⁶ with “no single fact . . . controlling.”¹⁹⁷ Thomas Merrill showed his frustration with this amorphous public use analysis when after *Midkiff* he observed, “[C]ourts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate” and that “cases are filled with clichés regarding the ‘breadth’ and ‘elasticity’ of the ‘evolving’ concept of public use”¹⁹⁸ Merrill offered economic theory as an alternative, which offers a unique perspective to analyze cases like *Kettleson*.¹⁹⁹

194. *Id.* at 810. Also citing an Indiana statute allowing condemnation for service roads, the court found that “the Legislature properly intended such service roads would constitute a public use whether such road served one property owner or many.” *Id.*

195. *See, e.g.*, *State v. Totowa Lumber & Supply Co.*, 232 A.2d 655, 660 (N.J. Super. Ct. App. Div. 1967) (“[T]he proposed plan [to build an access road to a 5.3-acre plot of another party which otherwise would be landlocked] was the most economical of all the other legally possible solutions to the problem here present.”); *State v. Davis*, 209 A.2d 633, 635 (N.J. Super. Ct. App. Div. 1965) (“[T]aking only the land needed for the freeway and then unlocking the resulting large landlocked areas by condemnation of land for this access road . . . was a seemingly more economical solution of the problem”). *But see, e.g.*, *Ark. State Highway Comm’n v. Alcott*, 539 S.W.2d 432, 433 (Ark. 1976) (holding that an access road that would “substantially reduce right-of-way costs and, therefore, would be in the best interest of the state” was a “private driveway” and not for a public use, and therefore outside the powers of the state); *Saunders v. Titus Cnty. Fresh Water Supply Dist. No. 1*, 847 S.W.2d 424, 429 (Tex. Ct. App. 1993) (holding that these types of takings are “based on economic grounds rather than public use and [are] justified on the grounds that it will save the public money because there will be no necessity for condemning the entire tract because there is no access”).

196. *See* SACKMAN, *supra* note 2, § 7.02[1].

197. *State ex rel. Comm’r of Transp. v. Kettleson*, 801 N.W.2d 160, 167 (Minn. 2011).

198. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 63–64 (1986) (citation omitted).

199. *Id.* at 72–94.

C. *A Different Perspective: Economic Theory and Eminent Domain*

Kettleson and other landlocked property cases are emblematic of a fundamental theoretical economic justification for eminent domain: a market failure.²⁰⁰ Not surprisingly, the court did not engage in this non-legal reasoning. However, it is worth noting certain economic arguments which provide an alternative perspective as to how a road that principally benefits one private party can be a valid exercise of eminent domain.

1. *Holdouts, Bilateral Monopoly, and Rent Seeking*

The market failure illustrated in these cases is essentially a form of the “holdout problem,” a basic and widely discussed economic argument for eminent domain.²⁰¹ The holdout problem occurs when a landowner is unwilling to voluntarily sell his or her land to the government when the government seeks the land for a project that will have certain socially desirable benefits and an overall economic surplus.²⁰² This problem is particularly applicable to right-of-way-acquiring entities like a highway department.²⁰³ In right-of-way acquisitions, the holdout problem can lead to increased transaction costs when, after the route for a highway is selected and changing that route becomes very costly, property

200. Thomas Miceli provides a helpful explanation of market failures and their relation to eminent domain that is best conveyed by quotation:

[E]minent domain is a forced sale of property from the current owner to another owner . . . in an effort to achieve some public objective. The question is, why does the sale have to be forced? According to economic theory, the purpose of exchange, whether voluntary or involuntary, is to transfer resources to higher-valued uses; in other words, to realize some gains from trade. Under ideal conditions, that goal is best achieved through ordinary market exchange, with the government’s role being limited to the protection of property rights and the enforcement of contracts. Any departure from this paradigm is therefore justifiable only if there is some reason to believe that the market will fail to operate efficiently.

THOMAS J. MICELI, *THE ECONOMIC THEORY OF EMINENT DOMAIN* 151 (2011).

201. *See id.* at 27–31; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 71 (8th ed. 2011).

202. *See MICELI, supra* note 200, at 27–31. Economic surplus refers to the increased value of the land after the transfer or transactions. Cohen, *supra* note 14, at 539. One critique of eminent domain is that the condemnor reaps all the benefits of the economic surplus because the condemnee is only compensated for the “market value of the property at the time of the taking” and not “any element resulting subsequently to or because of the taking.” *Id.* at 539 n.330.

203. POSNER, *supra* note 201, at 71.

owners “in the path of the advancing line [are] tempted to hold out for a very high price.”²⁰⁴ The economic issue with this situation is one of efficient allocation of resources.²⁰⁵ Land is held by owners seeking inflated compensation for their land, leading to increased cost of highway construction, delay, and possibly abandonment of publicly beneficial projects.²⁰⁶ When projects are abandoned for this reason, land is left “in its existing, less valuable uses, and this is inefficient.”²⁰⁷

Holdouts seeking inflated compensation may have different motivations, and this is an important distinction to note. There are strategic owners that are simply looking to extract as large a portion as possible of the economic surplus created by the transaction.²⁰⁸ Alternatively, there are idiosyncratic owners for which “no mutually agreeable price may exist for a number of reasons: a person might hold a sentimental attachment to his land, have sufficient wealth to meet his needs, and be unwilling to sell the land for any price the state is willing to offer.”²⁰⁹ Idiosyncratic owners often embody the principle that all land is unique, so there is a subjective value often difficult to ascertain and properly account for in the just compensation calculation.²¹⁰

The access roads in *Kettleston* and the other cases are not strict holdout problems, but are “bilateral monopoly” problems, a subcategory of the holdout phenomenon.²¹¹ A bilateral monopoly is a transaction including only one buyer and one seller where neither party has an alternative but to negotiate with the other.²¹² As one author notes:

A single buyer and single seller may not be able to reach a mutually agreeable price, even though one exists, because neither the buyer nor the seller has any alternative party with whom to bargain. The result is excessive haggling over the surplus, and this haggling may entail transaction costs that are high and, in some instances, prohibitive if they exceed the gains-from-trade.²¹³

204. *Id.*

205. *Id.*

206. MICELI, *supra* note 200, at 28.

207. POSNER, *supra* note 201, at 71.

208. *See* Kelly, *supra* note 5.

209. *Id.* at 348 (citation omitted) (internal quotation marks omitted).

210. *Id.*

211. MICELI, *supra* note 200, at 34–35.

212. *Id.* at 35.

213. Kelly, *supra* note 5, at 349.

Landlocked parcels are a quintessential bilateral monopoly situation.²¹⁴ The bilateral monopoly of the landlocked parcel problem has prompted courts and legislatures to allow a private party to compel a transfer of land from an existing owner, as in the case of the above discussed private road acts.²¹⁵

2. *Merrill's Economics of Public Use*

In 1986, Thomas Merrill offered a theory to refashion the public use analysis from an economic perspective in his influential article, *The Economics of Public Use*.²¹⁶ *Kettleson* provides an opportunity to revisit Merrill's argument and determine if his suggested framework provides helpful insight into the economics of the court's decision. Merrill starts with the same premises discussed above: that eminent domain can be justified by market failures and the holdout problem.²¹⁷ This is what Merrill calls a "thin market setting," which is what induces the strategic owner's behavior and excessive haggling that leads to "monopoly pricing by the seller, to unacceptably high transaction costs, or to both."²¹⁸

Merrill goes on to theorize that thin markets and their potential to produce rent seeking behavior "make it economically efficient to confer the power of eminent domain on a buyer."²¹⁹ After factoring in the extra "'due process' costs of eminent domain,"²²⁰ Merrill hypothesizes that in a truly "thin market setting," the use of eminent domain is "self-regulating."²²¹ That is, if there is not a thin market and the related market exchange failures discussed above, then the government is unlikely to use

214. *Id.*

215. *See supra* Part IV.B.1. However, Miceli cautions that there "is the risk that any two-party transaction could potentially be labeled as a bilateral monopoly, given the unobservability of transaction costs." MICELI, *supra* note 200, at 35. In a holdout situation, contrary to a bilateral monopoly, the presence of many sellers "is evidence that bargaining is likely to fail." *Id.* Miceli suggest that courts should more closely scrutinize takings in such two-party transactions. *Id.*

216. Merrill, *supra* note 198.

217. *Id.* at 65 ("I argue that eminent domain's purpose is to overcome barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer.").

218. *Id.*

219. *Id.* at 76.

220. *Id.* at 77 (explaining that the eminent domain procedure is expensive and requires drafting and filing a complaint, serving process, securing a formal appraisal, the possibility of trial, and appeal, etc.).

221. *Id.* at 80.

eminent domain because it will be more expensive than transacting in the open market. Consequently, Merrill concludes that in this setting, “courts need do nothing to limit the use of eminent domain,” reinforcing the judicial deference announced in *Berman*, *Midkiff*, and *Kelo*.²²² The alternative public use inquiry is then to identify market failures, which gives the judiciary a different role in reviewing the exercise of eminent domain, that is, “a more narrowly focused and judicially manageable inquiry.”²²³

3. *Application to Kettleston*

Kettleston appears to acutely illustrate the bilateral monopoly issue. The buyer (MnDOT) and the seller (Lepak) had no other option but to negotiate with each other. By holding out, Lepak could gain a much more favorable bargaining position because the state’s only alternative was to compensate Parcel 14 for the loss of access.²²⁴ Negotiations failed as each party sought to secure for themselves the largest share of the surplus profit.²²⁵ In a very rudimentary sense, the surplus profit could be represented by the likely gross difference in value between the complete loss of access to a \$371,200 parcel (Parcel 15),²²⁶ and a 35 foot strip of a \$69,600 parcel (Parcel 14).²²⁷ This apparent disparity in relative values seems to provide strong evidence of a holdout or bilateral monopoly problem. Together, MnDOT, the general public, and Parcel 15 appear to be the higher-value users of the property, which, if in their possession, would result in certain socially desirable benefits and an overall economic surplus. Thus, Merrill’s basic premise lends support to the conclusion that the court’s decision is further supported by the presence of a market failure, and with that market failure, the state’s exercise of eminent

222. *Id.* at 81; *see also* *Kelo v. City of New London*, 545 U.S. 469 (2005).

223. Merrill, *supra* note 198, at 67.

224. *See, e.g.*, *Hendrickson v. State*, 267 Minn. 436, 440, 127 N.W.2d 165, 169 (1964) (“The weight of authority, including Minnesota, treats access to a public highway from abutting property as a right which may not be denied without compensation.”).

225. *See* MICELI, *supra* note 200, at 35 (describing how transaction costs increase in bilateral monopolies).

226. *Tax Statement for Wendell L. & Linda E. Herron, Trustees, Property ID: 25-047-0020*, COOK CNTY. (Dec. 4, 2012), <http://www.co.cook.mn.us/property/detail.php?pid=25-047-0020>.

227. *Tax Statement for Richard Stanley Lepak, Property ID: 25-047-0010*, COOK CNTY. (Dec. 4, 2012), <http://www.co.cook.mn.us/property/detail.php?pid=25-047-0010>.

domain would seem self-regulating and appropriate to receive judicial deference on economic grounds alone.

V. CONCLUSION

Public use is a notoriously indefinable requisite to a valid, constitutional exercise of the government's eminent domain power. There is well-established precedent in both the United States as a whole and Minnesota specifically, that the courts will defer to legislative determinations of public use. These legislative choices are reversed by the judiciary only when clearly erroneous, arbitrary, or capricious.²²⁸ This extensive discretion granted to highway departments like MnDOT, and other legislative-empowered condemning authorities, means eminent domain petitions are rarely overruled by the court.

When a taking is challenged in isolated property cases like *Kettleson*, courts have long been challenged to clearly articulate why using eminent domain to establish an access road is a valid public use. After all, the isolated parcel owner appears to be the dominant beneficiary, not the public. The *Kettleson* court was similarly unable to identify any single governing principle as to why the taking was valid. To find a public use in these cases, courts have consistently offered a series of similar justifications. They define a public road as simply any road accessible by the public.²²⁹ In highway cases like *Kettleson*, they find the challenged taking is incidental to the larger, indisputably public use. They reason that the public finances must be protected. Or, in an attempt to bring some logical framework to the fluid, fact-specific judicial analysis of public use, theorists leave the legal realm altogether in search of economic answers. This note shows that perhaps the best that can be done in challenging public use cases is to look at a range of analogous cases, theories, and persuasive precedent to determine whether the facts fall within the generally accepted range of "public use." After all, no fact is controlling.

228. State *ex rel.* Comm'r of Transp. v. Kettleson, 801 N.W.2d 160, 165 (Minn. 2011).

229. *Id.* at 167.