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Can Public Trust Rights Re-Emerge?: The Takings Clause Implications of *United States v. 32.42 Acres of Land*

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CAN PUBLIC TRUST RIGHTS RE-EMERGE? THE TAKINGS CLAUSE IMPLICATIONS OF *UNITED STATES v. 32.42 ACRES OF LAND*

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Abstract: In 2005, the United States took by eminent domain about 32.42 acres of prime San Diego coastland that had been subject to California's public tidelands trust. In the Ninth Circuit Court of Appeals, the California State Lands Commission argued that although the state public trust may not apply to the land while in federal hands post-taking, the trust should re-emerge to burden the property if the federal government later transfers it to a private party. In 2012, the Ninth Circuit rejected this argument, holding in *United States v. 32.42 Acres of Land* that the federal taking *permanently* extinguished the state public tidelands trust applicable to the property. This Comment argues that in terminating the state public trust on the San Diego property, the Ninth Circuit failed to consider the degree to which its decision enables unconstitutional evasion of the public use requirement of the Takings Clause by facilitating economic development takings that eliminate a vast amount of public benefit but create relatively little in return.

Introduction

The City of San Diego, visited by millions every year, is home to seventy miles of beaches.[1] The city is also home to several large installations of the United States Navy, including Naval Base San Diego, the principal homeport of the Pacific Fleet, and Naval Base Point Loma, containing seven submarines and numerous support installations.[2] The Navy is the city's largest employer, with fifty-four thousand active duty

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[1] San Diego Convention & Visitors Bureau, San Diego 2012 Fast Facts 4 (2012), *available at* http://www.sandiego.org/~/media/a4c266bc10254b58b5049c408c26c9fe/2012%20fast%20facts.pdf; *Important Facts and Figures*, The City of San Diego, http://www.sandiego.gov/economic-development/sandiego/facts.shtml (last updated Mar. 1, 2011). In 2011, over 31.1 million people visited San Diego. San Diego Convention & Visitors Bureau, *supra*.

[2] *Naval Base Point Loma History*, Commander, Navy Installations Command, http://www.cnic.navy.mil/PointLoma/About/History/index.htm (last visited July 12, 2013); *Welcome to Naval Base San Diego*, Commander, Navy Installations Command, https://www.cnic.navy.mil/sandiego/index.htm (last visited July 12, 2013).

and reserve employees, accounting for nearly eight percent of the city's total employment.[3]

In May 2005, the United States used its eminent domain power to acquire about 32.42 acres of filled and unfilled tide and submerged lands (the "Property") in San Diego on behalf of the Navy, which had leased the parcel continuously since 1949.[4] The taking itself was not out of the ordinary; the federal government filed a declaration of taking and a complaint in condemnation in the United States District Court for the Southern District of California.[5] The court denied objections to the taking by both the San Diego Unified Port District (the "Port") and the California State Lands Commission (the "Lands Commission").[6] A jury trial subsequently determined the amount of just compensation owed to the landowner, the Port.[7]

What was out of the ordinary was the Property itself. At the time California joined the Union in 1850, this parcel was entirely underwater and subject to California's public tidelands trust.[8] The Lands Commission, on appeal to the U.S. Circuit Court of Appeals for the Ninth Circuit, argued that although the public trust does not apply to the land while it is in federal hands, the trust should re-emerge to burden the Property if the federal government later transfers it to a private party.[9] Ultimately, the Court of Appeals rejected this argument, ruling in *United States v. 32.42 Acres of Land* that the federal taking permanently extinguished the state public tidelands trust applicable to the land.[10]

Whether the federal government, when exercising its eminent domain power, had the authority under the Constitution to perma-

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[3] City of San Diego, Cal., Comprehensive Annual Financial Report 307 (2012), *available at* http://www.sandiego.gov/comptroller/reports/pdf/120131cafr2011.pdf.

[4] United States v. 32.42 Acres of Land, 683 F.3d 1030, 1033 (9th Cir. 2012).

[5] Complaint in Condemnation at 1–3, United States v. 32.42 Acres of Land, No. 3:05-CV-01137-DMS-WMC, 2009 WL 2424303 (S.D. Cal. Aug. 6, 2009), ECF No. 1; Declaration of Taking at 1–2, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 2.

[6] Order: (1) Overruling Defendant San Diego Port District's Objections to the United States' Taking of Property by Eminent Domain; and (2) Denying Defendant California State Lands Commission's Motion for Summary Judgment at 12, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 24.

[7] *32.42 Acres of Land*, 683 F.3d at 1033; Verdict, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 113. The total amount of compensation was $2,910,000. *Id.*

[8] *See 32.42 Acres of Land*, 683 F.3d at 1033.

[9] Brief of Appellant California State Lands Commission at 6, 7–8, *32.42 Acres of Land*, 683 F.3d 1030 (No. 10–56568), ECF No. 11.

[10] *32.42 Acres of Land*, 683 F.3d at 1039.

nently extinguish a state's public trust rights in its tidelands was a matter of first impression in U.S. appellate courts.[11] This Comment argues that although the concept of quiescent public trust rights was rejected by the Ninth Circuit, the court failed to recognize the degree to which its decision may enable dangerous circumvention of the public use requirement of the Takings Clause by opening the door to economic development takings that eliminate a vast amount of public benefit—in the form of a permanently extinguished public trust—but create relatively little in return.[12]

I. Facts and Procedural History

When California was admitted to the Union in 1850, the state acquired title to the 32.42 acres of filled and unfilled tide and submerged lands in dispute.[13] In 1911, the California legislature conveyed the Property, subject to the state's public tidelands trust, to the City of San Diego.[14] In 1949, the United States Navy leased the Property for an initial period of fifty years, retaining an option to renew for an additional fifty years.[15] In 1963, San Diego transferred the Property to the Port, subject to the public trust and the lease to the Navy.[16] Over time, the Navy's expansion of its facilities filled much of the originally submerged lands, leaving only 4.88 acres of the parcel submerged.[17]

In 2005, the Navy decided that—rather than lease the Property—it preferred to own the land in fee simple.[18] Therefore, in May of that year, the United States filed a declaration of taking and complaint in condemnation in the U.S. District Court for the Southern District of

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[11] *See* United States v. 11.037 Acres of Land, 685 F. Supp. 214, 217 (N.D. Cal. 1988) (ruling that condemnation of California tidelands by the United States extinguished the state's public trust easement in the land); United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124–25 (D. Mass. 1981) (ruling that condemnation of Massachusetts' tidelands did not extinguish the state's public trust easement in the land).

[12] *32.42 Acres of Land*, 683 F.3d at 1039; *see infra* notes 72–85 and accompanying text.

[13] *32.42 Acres of Land*, 683 F.3d at 1033. Before a state joins the Union, title to its navigable waters and tidelands are held in trust by the United States for the benefit of the future state. Shively v. Bowlby, 152 U.S. 1, 50 (1894). Under the equal-footing doctrine, when a state does enter the Union, it receives sovereignty and jurisdiction over the submerged lands within its borders from its trustee, the United States. *See* Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845).

[14] Act of May 1, 1911, 1911 Cal. Stat. 1357.

[15] Complaint in Condemnation, *supra* note 5, at Schedule E.

[16] *32.42 Acres of Land*, 683 F.3d at 1033.

[17] *Id.*

[18] *Id.*

California.[19] In addition to taking the Property in fee simple, the complaint explicitly declared the government's condemnation of the California tidelands trust rights applicable to the Property.[20]

The Lands Commission moved for summary judgment, arguing that the federal government did not have the authority to permanently extinguish California's public trust rights.[21] The district court denied the motion in April 2006 and a jury trial was held to determine the amount of just compensation.[22] The Lands Commission appealed the final judgment of the district court, entered in August 2010, to the Ninth Circuit.[23]

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[19] Complaint in Condemnation, *supra* note 5; Declaration of Taking, *supra* note 5. The Navy's decision to file the condemnation action may have been an attempt to prevent lease disputes with the Port and Lands Commission. *See 32.42 Acres of Land*, 683 F.3d at 1033. In 1996, the Navy had exercised its option to renew its lease of the Property, but the Port and Lands Commission opposed the extension on the grounds that the lease was invalid. *Id.* In response, the United States brought a condemnation action to enforce its leasehold interests in the Property. Complaint in Condemnation, United States v. 32.38 Acres of Land, No. 3:99-CV-01662-W-RBB (S.D. Cal. Aug. 13, 2002), ECF No. 1. The district court granted summary judgment in favor of the United States, but that order was later withdrawn as part of a settlement agreement giving the Navy a leasehold interest in the property through August 8, 2049. Order Granting Plaintiff's Motion for Partial Summary Judgment; Denying Defendants' Motions for Summary Judgment, 32.38 Acres of Land, No. 3:99-CV-01662-W-RBB, ECF No. 39; Consent Order Entering Final Judgment, 32.38 Acres of Land, No. 3:99-CV-01662-W-RBB, ECF No. 65.

[20] Complaint in Condemnation, *supra* note 5, at 2.

[21] Notice of Motion and Motion of Defendant California State Lands Commission for Summary Judgment, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 15; Memorandum of Points and Authorities of Defendant California State Lands Commission in Support of its Motion for Summary Judgment at 7–12, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 16. In the motion, the Lands Commission argued that (1) the principles outlined in Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), are unlawfully violated if the United States permanently divests the citizens of California of their absolute public trust rights in the Property, and (2) the equal-footing doctrine forbids the United States from eliminating California's title in the tide and submerged lands that the state acquired when it joined the Union. Memorandum of Points and Authorities of Defendant California State Lands Commission in Support of its Motion for Summary Judgment, *supra*, at 5, 6.

[22] Order, *supra* note 6; *see* Verdict, *supra* note 7, at 1 (holding that the proper amount of compensation was $2,910,000).

[23] *32.42 Acres of Land*, 2009 WL 2424303, at *1–*3; Notice of Appeal at 1–2, *32.42 Acres of Land*, 2009 WL 2424303 (No. 3:05-CV-01137-DMS-WMC), ECF No. 122.

II. Legal Background

A. *Eminent Domain*

The federal eminent domain power is not derived from the Constitution, but is an inherent attribute of governmental sovereignty.[24] The Takings Clause of the Fifth Amendment, which prohibits the federal government from taking private property unless it is done so for public use and in exchange for just compensation, functions as a limitation on this inherent authority.[25] In addition to private property, the Supreme Court has ruled that state land can also be lawfully condemned.[26] The Takings Clause applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment.[27]

The eminent domain power lies exclusively in the legislative branch of the government and may not be exercised unless the legislature has authorized its use through statute.[28] A taking of land by the federal government extinguishes all previous rights and gives the United States title to the property "against all the world."[29] When the government takes property in fee simple by eminent domain, it acquires all interests in the land, even those it does not specify.[30]

The Supreme Court interprets the public use requirement of the Takings Clause liberally.[31] For example, in *Hawaii Housing Authority v. Midkiff*, the Court upheld the constitutionality of a Hawaii statute creating a land condemnation scheme whereby the state took fee simple title was taken from private lessors and transferred title directly to private lessees in order to reduce the concentration of land ownership in the

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[24] United States v. Jones, 109 U.S. 513, 518 (1883).

[25] U.S. Const. amend. V, cl. 4; *Jones*, 109 U.S. at 518.

[26] Okla. *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941).

[27] *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

[28] *See* Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678 (1923) ("That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion.").

[29] *See* A.W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924).

[30] *Id.*

[31] *See* Kelo v. City of New London, 545 U.S. 469, 483–84 (2005) (upholding the constitutionality of the condemnation of private land for economic redevelopment purposes, subject to a comprehensive plan); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (permitting land to be taken from one private party and given directly to another private party so long as the transfer is rationally related to a conceivable public purpose and compensation is paid); Berman v. Parker, 348 U.S. 26, 30, 36 (1954) (upholding the constitutionality of an act allowing the use of the eminent domain power to redevelop slum areas and to sell or lease the condemned land to private interests).

state.[32] The Hawaii legislature had found that the oligopolistic land ownership scheme skewed the residential real estate market, inflated the price of land, and injured the public welfare.[33] In evaluating the constitutionality of the statute, the Court conceded that the Takings Clause does not permit the condemnation of private property for the benefit of another private person without a justifying public purpose, even if compensated.[34] Nevertheless, the Takings Clause allows the government to directly transfer land from one compensated private party to another if such a transfer is rationally related to a conceivable public purpose.[35] Courts evaluate the *purpose* of the condemnation—in *Midkiff*, to eliminate the deleterious effects of oligopolistic land ownership—not its *mechanics* in deciding whether the acquisition violates the Takings Clause.[36]

In *Kelo v. City of New London*, the Supreme Court reiterated that legislative determinations of what constitutes a public use are entitled to strong judicial deference.[37] In *Kelo*, the Court ruled that New London's condemnation of private land pursuant to a comprehensive economic development plan fulfilled the public use requirement of the Takings Clause.[38] The plan, developed by the New London Development Corporation, was designed to create jobs, generate tax revenue, and help rejuvenate downtown New London.[39] The *Kelo* majority reiterated much of the Court's analysis from *Midkiff*, stating that although the "sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*," the Takings Clause does not require the sovereign to open the condemned land to use by the general public.[40] Thus, the public use requirement is best understood as a public purpose requirement.[41] Concluding that the promotion of economic development was a long-accepted public purpose, the Court ruled that the takings under review in *Kelo* were constitutional.[42] Never-

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[32] 467 U.S. at 233, 245.

[33] *Id.* at 232.

[34] *Id.* at 241 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)).

[35] *Id.*

[36] *Id.* at 244.

[37] 545 U.S. at 483.

[38] *Id.* at 483–84.

[39] *Id.* at 473, 474–75.

[40] *Id.* at 477, 479 (quoting *Midkiff*, 467 U.S. at 244); *see Midkiff*, 467 U.S. at 241 (quoting *Thompson*, 300 U.S. at 80) (noting that the Takings Clause does not permit the condemnation of private property for the benefit of a private person without a justifying public purpose).

[41] *Kelo*, 545 U.S. at 479–80.

[42] *Id.* at 484–85, 489–90.

theless, Justice Kennedy noted in his concurrence that the Court's decision may allow for a more stringent standard of review where "the purported benefits [of a taking] are so trivial or implausible, that courts should presume an impermissible private purpose."[43]

B. *Public Trust*

The concept of the public trust, under which the sovereign holds "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people,'" originated in Roman law and was further developed through English common law.[44] States acquired title in these lands as trustee upon their admission to the Union.[45] Thus, California received title, as trustee, to its tidelands when it was admitted to the Union in 1850.[46]

In *Marks v. Whitney*, the California Supreme Court considered the right of a private landowner to fill and develop the tidelands on his property as he saw fit.[47] The court ruled unequivocally that the tidelands under review were burdened by the public trust.[48] The court made clear that the public trust had traditionally been interpreted as enabling a triad of public uses: navigation, commerce, and fishing.[49] Over time, far broader acceptable public uses of trust lands have been recognized, including hunting, bathing, and swimming.[50] The court here acknowledged that one of the most important public uses of the public tidelands is the preservation of them in their natural state.[51] Therefore, Marks did not have the right to fill and develop the tidelands on his property however he saw fit.[52]

In *National Audubon Society v. Superior Court of Alpine County (Mono Lake)*, the California Supreme Court again examined the contours of the California public trust doctrine, though it did so in a different con-

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[43] *Id.* at 493 (Kennedy, J., concurring).

[44] Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty. *(Mono Lake)*, 658 P.2d 709, 718 (Cal. 1983) (quoting Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 432 P.2d 3, 8 (Cal. 1967). The public trust doctrine was first articulated in the laws of Emperor Justinian: "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." *Id.* (quoting J. INST. 2.1.1).

[45] Shively v. Bowlby, 152 U.S. 1, 57–58 (1894).

[46] City of Berkeley v. Superior Court of Alameda Cnty., 606 P.2d. 362, 365 (Cal. 1980). Tidelands are lands between the mean high and mean low tide marks. *Id.* at 363 n.1.

[47] 491 P.2d 374, 377 (Cal. 1971).

[48] *Id.* at 378, 380.

[49] *Id.* at 380.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 381.

text than in *Marks*.[53] In *Mono Lake*, the plaintiffs argued that the shores, bed, and waters of Mono Lake—which because of municipal water diversions was decreasing in volume and increasing in salinity, thus adversely affecting the local food chain—were protected by the public trust.[54] The plaintiffs sought to protect the recreational and ecological values that the diversions compromised.[55] The court agreed that the public trust safeguards these values, and extended public trust protections beyond navigable waters to the nonnavigable tributaries of Mono Lake.[56]

III. Analysis

In *United States v. 32.42 Acres of Land*, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court, holding that federal eminent domain taking creates an entirely new chain of title, permanently extinguishing all other interests in the land, including California's public trust rights.[57] The court rejected the California Lands Commission's (the "Lands Commission") arguments for a quiescent trust, holding that the federal government was free to convey the property in dispute to a private party in the future free and clear of the state tidelands trust.[58]

The Ninth Circuit denied the Lands Commission's claim that the equal-footing doctrine requires the federal government to have a compelling reason for taking submerged lands—like those on the property in dispute—by eminent domain.[59] The court also rejected the Lands Commission's argument that the public trust doctrine prohibits the extinguishment of the tidelands trust because such a reading of the

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[53] 658 P.2d at 719–21 (examining the nature of the public trust as applied to an alpine lake); *see Marks*, 491 P.2d at 380 (examining the nature of the public trust as applied to tidelands).

[54] *Mono Lake*, 658 P.2d at 712, 715.

[55] *Id.* at 719; *see Marks*, 491 P.2d at 380 (noting the public trust's importance in protecting ecological values).

[56] *Mono Lake*, 658 P.2d at 712, 719.

[57] *See* United States v. 32.42 Acres of Land, 683 F.3d 1030, 1039 (9th Cir. 2012).

[58] *Id.* at 1034, 1039.

[59] *Id.* at 1034, 1035; *see supra* note 13. The court stated that this argument merely reflected the fact that as a policy matter, the federal government has been reluctant to take and grant away submerged state land absent exceptional circumstances. *32.42 Acres of Land*, 683 F.3d at 1039. As such, this policy does not legally bind the government and is not a limitation on the federal taking power. *Id.*

doctrine would unconstitutionally subjugate the federal government's eminent domain power to state public trust law.[60]

After *Hawaii Housing Authority v. Midkiff* and *Kelo v. City of New London*, the hurdle over which the government must jump to satisfy the public use requirement of the Takings Clause is very low, especially for economic development takings.[61] If the government prepares a rational plan that calls for the condemnation of land to fulfill the plan, the courts will strongly defer to such legislative determinations.[62] Courts considering public use challenges need not worry that takings pursuant to an economic development plan may significantly benefit private parties.[63] Courts need not police the size of the taking or question the legislative determination of the size or character of the public benefit that will accrue, so long as the justification for the taking is rational and it serves a conceivable public purpose.[64] Courts need not even ensure that the benefits of an economic development program for which land is condemned actually accrue.[65] Therefore, municipalities are largely free to craft economic development condemnation schemes that may yield very little public benefit or in some cases, as it turns out, none at all.[66]

Unlike the relatively slight public benefit that will satisfy the public use requirement of the Takings Clause after *Midkiff* and *Kelo*, the public trust doctrine exists for the very purpose of ensuring and preserving

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[60] *32.42 Acres of Land*, 683 F.3d at 1038. The court concluded that because California's public trust is an expression of state law, if the state's public trust interest in the property survived the federal government's explicit attempt to take it, the federal government's powers would be subservient to those of the state in violation of the Supremacy Clause. *Id.*

[61] *See* Kelo v. City of New London, 545 U.S. 469, 482–83 (2005) (giving "broad latitude" to a municipality's determination that a comprehensive economic redevelopment of the city justified its use of the takings power); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233, 245 (1984) (permitting land to be taken from one private party and given directly to another private party so long as the transfer is rationally related to a conceivable public purpose and compensation is paid); Berman v. Parker, 348 U.S. 26, 33 (1954) (deferring to a municipality's determination that the use of its eminent domain power to redevelop slum areas and to sell or lease the condemned land to private interests served a public purpose).

[62] *Kelo*, 545 U.S. at 482–83; *Midkiff*, 467 U.S. at 240–41.

[63] *See Kelo*, 545 U.S. at 485.

[64] *See id.* at 483, 488–89; *Midkiff*, 467 U.S. at 241, 242.

[65] *Kelo*, 545 U.S. at 487–88; *see Midkiff*, 467 U.S. at 242–43.

[66] *See Kelo*, 545 U.S. at 487–88. For example, in 2009, Pfizer, the anchor of the redevelopment plan under review in *Kelo*, abandoned its plans to open a large facility in New London, leaving the project in shambles. *Id.* at 473; Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. Times, Nov. 13, 2009, at A1.

perpetual public use.[67] While the public trust was originally intended to protect limited public uses like commerce, navigation, and fishing, it has come to protect a more robust set of public activities, like hunting, bathing, swimming, and even the preservation of trust lands in their natural state.[68] The public trust is not merely an indication of the power of states to protect certain lands for public uses, but is an affirmation of the duty of states to "protect the people's common heritage" and to only compromise that duty in "rare cases."[69] *Marks v. Whitney* and *National Audubon Society v. Superior Court of Alpine County (Mono Lake)* indicate the degree to which the public trust doctrine, in California at least, serves as a public use preservation tool.[70] As such, the public trust protects public use values inherent in the trust lands and courts will probingly evaluate actions that may damage these values.[71]

In *32.42 Acres of Land*, the Ninth Circuit failed to consider the degree to which its decision may enable dangerous circumvention of the public use requirement of the Takings Clause.[72] In fact, the decision in this case swings the door wide open for economic development takings that may eliminate a vast amount of public benefit—in the form of a permanently extinguished public trust—but create relatively little in return.[73] Such a scheme would result in the creation of less public benefit than existed before the taking, which may be a violation of the Takings Clause.[74]

For example, consider the repercussions of *32.42 Acres of Land* if a municipality engages in a *Kelo*-like condemnation of private land for

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[67] *See Kelo*, 545 U.S. at 487–88; *Midkiff*, 467 U.S. at 241; Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty. *(Mono Lake)*, 658 P.2d 709, 724 (Cal. 1983); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[68] *Mono Lake*, 658 P.2d at 719; *Marks*, 491 P.2d at 380.

[69] *Mono Lake*, 658 P.2d at 724.

[70] *See id.*; *Marks*, 491 P.2d at 380–81.

[71] *See Mono Lake*, 658 P.2d at 712, 724 (noting that state courts should attempt to minimize, so far as is feasible, any harm to public interests protected by the public trust); *Marks*, 491 P.2d at 380.

[72] *See 32.42 Acres of Land*, 683 F.3d at 1039. The court limited its analysis to determining whether the equal-footing doctrine, the law of federal navigational servitude, or the public trust doctrine prevented the permanent extinguishment of the public trust. *Id.* at 1035, 1036, 1037, 1038.

[73] *See Kelo*, 545 U.S. at 482–83; 3*2.42 Acres of Land*, 683 F.3d at 1039; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[74] *See* U.S. CONST. amend. V, cl. 4; *32.42 Acres of Land*, 683 F.3d at 1039. Eminent domain takings of this kind may be fundamentally irrational, and thus not subject to judicial deference. *See Kelo*, 545 U.S. at 488 (noting that the court will only defer to a determination that the use of eminent domain is necessary when a legislature's "purpose is legitimate and its means are not irrational" (quoting *Midkiff*, 467 U.S. at 242–43)).

economic development purposes, but the land to be condemned is burdened by the public trust.[75] The municipality in such a situation takes land for a public purpose, but because the public trust applies, it takes land that already provides extensive public benefits and serves a strong public purpose.[76] Given that economic development takings sometimes produce only minor public benefits and that courts will generally defer to legislative determinations of public use, if the public use requirement of the Takings Clause is to be satisfied, courts should consider the following proposition.[77] When X amount of public benefit is eliminated by a taking that permanently extinguishes the public trust's provision and protection of fundamental public uses, the condemnation must create some amount of public use greater than X in order to fulfill the public use requirement of the Takings Clause.[78] Applying this proposition, a legislature must assert a theory that values the future public uses for the condemned land more than the public uses protected by the public trust.[79] It is difficult to imagine such a theory, especially given *Marks* and *Mono Lake*'s robust articulation of the government's responsibility to be a conscientious steward of the public trust, and to only relinquish this stewardship in "rare cases."[80]

Justice Anthony Kennedy, in his *Kelo* concurrence, stated that there might be situations that demand a "more stringent standard of review than that announced in . . . *Midkiff*," such as condemnations where the benefits are "trivial or implausible."[81] Although this "demanding level of scrutiny . . . is not required simply because the purpose of the taking is economic development," Kennedy's heightened scrutiny should apply when the purpose of the taking is economic development *and* the land being taken is burdened by the public trust.[82] Such a taking has the potential to actually *reduce* overall public use because of the potential mismatch between a modest public benefit created through an economic development condemnation and a large

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[75] *See Kelo*, 545 U.S. at 474–75; *32.42 Acres of Land*, 683 F.3d at 1039.

[76] *See Kelo*, 545 U.S. at 483–84; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[77] *See* U.S. CONST. amend. V, cl. 4; *Kelo*, 545 U.S. at 488; *Midkiff*, 467 U.S. at 241, 242–43.

[78] *See Kelo*, 545 U.S. at 488; *Midkiff*, 467 U.S. at 242–43; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[79] *See Kelo*, 545 U.S. at 488; *Midkiff*, 467 U.S. at 242; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d 374 at 380–81.

[80] *See Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[81] *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring); *Midkiff*, 467 U.S. at 240–41, 242–243; *Berman*, 348 U.S. at 32, 33.

[82] *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

public benefit destroyed through extinguishment of the public trust.[83] If states are to uphold the public trust responsibilities articulated in *Marks* and *Mono Lake*, then, at the least, economic development takings of public trust land deserve a more probing scrutiny, as suggested by Justice Kennedy in *Kelo*.[84] At the most, economic development takings of public trust land calls for a presumption of invalidity, due to the potential for the streamlining of the destruction of important public use protections and the circumvention of the public use requirement of the Takings Clause.[85]

Conclusion

Whether the federal government, when exercising its eminent domain power, has the authority under the Constitution to extinguish a state's public trust rights in its tidelands is a question that has significant implications for the utility and strength of the public use requirement of the Takings Clause. Although the notion of quiescent public trust rights was found to be unsupported by precedent in *United States v. 32.42 Acres of Land*, the decision in that case problematically opens the door to economic development takings that may extinguish a vast amount of public benefit and create relatively little in return. If states are to uphold the robust public trust responsibilities articulated in *Marks v. Whitney* and *National Audubon Society v. Superior Court of Alpine County (Mono Lake)*, then economic development takings of public trust lands should be subject to a more demanding level of scrutiny.

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[83] *See id.* at 488 (majority opinion); *Midkiff*, 467 U.S. at 242–43; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[84] *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring); *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.

[85] *See* U.S. Const. amend. V, cl. 4; *Kelo*, 545 U.S. at 484–85; *Mono Lake*, 658 P.2d at 724; *Marks*, 491 P.2d at 380–81.