

“Don’t Know What a Slide Rule Is For:”<sup>1</sup> The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of *Kelo v. City of New London*<sup>2</sup>

INTRODUCTION

It is the day before Thanksgiving. You are in your kitchen busily preparing food for relatives who will begin arriving from out of town the next day. The doorbell rings. You open the door to find a city official, who hands you an eviction notice. After investigating why you are being evicted, you learn that your home is being condemned to make way for a new private development, complete with condominiums and retail stores. The house, which you bought a few years ago and worked three jobs to keep, is located in a great neighborhood and comes with a spectacular water view. In an effort to save your home, you, along with your neighbors who are facing the same plight, file a lawsuit to enjoin the city from continuing with the condemnation proceedings. Your case makes its way through the court system and, nearly five years later, reaches the United States Supreme Court. The fate of the home you have worked so hard for hinges on the meaning the Court gives two words found in the Fifth Amendment of the United States Constitution: public use.<sup>3</sup>

When the Supreme Court released its opinion in *Kelo v. City of New London*,<sup>4</sup> this past summer, it unleashed a firestorm of public criticism.<sup>5</sup> At no time in recent memory has the Court managed to universally irk the basic notions of fairness and justice held by so many across the political spectrum.<sup>6</sup> The Court’s decision to allow government, through the power of eminent domain, to condemn the private property of one party in order to turn it over to another party justified only by some conceivable public benefit<sup>7</sup> sparked outrage throughout the nation. Polls taken immediately after the release of the opinion

---

1. SAM COOKE, (What a Wonderful World (RCA Records 2005) (1960).

2. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

3. Susette Kelo, Op-Ed, *Eminent Domain Up Close*, THE WASH. TIMES, Sept. 20, 2005, available at <http://www.washingtontimes.com/commentary/20050919-085408-3231r.htm>.

4. *Kelo*, 125 S. Ct. at 2655.

5. Editorial, *Hands Off Our Homes*, ECONOMIST, Aug. 18, 2005, available at [http://www.economist.com/world/na/displayStory.cfm?story\\_id=4298759](http://www.economist.com/world/na/displayStory.cfm?story_id=4298759).

6. *Don’t Kelo My House*, WALL ST. J., Feb. 28, 2006, at A16.

7. *Kelo*, 125 S. Ct. at 2668.

indicated the American public's confidence in the Supreme Court was at historic lows.<sup>8</sup>

Members of both houses of Congress and state legislators around the nation, in response to pressure from constituents eager to prevent a similar scenario from unfolding in their own backyards, scrambled to enact laws limiting the power of eminent domain.<sup>9</sup> In North Carolina, legislators contemplated bills and a constitutional amendment to clearly exclude economic development as a justification for private property takings,<sup>10</sup> something North Carolina law now arguably permits.

Media accounts of the Court's opinion in *Kelo* correctly reported the case hinged on the Court's interpretation of the Fifth Amendment's Takings Clause, which states: "[N]or shall private property be taken for *public use*, without just compensation."<sup>11</sup> However, Justice John Paul Stevens, writing for the majority, more precisely framed the parameters of the Court's inquiry: "The disposition of this case therefore turns on the question of whether the City's development plan serves a '*public purpose*.'"<sup>12</sup> In fact, the majority opinion noted that the Court, over time, has completely abolished any distinction between *public purpose* and *public use* and dismissed any differentiation between the two as a product of nineteenth-century jurisprudence.<sup>13</sup>

While the subtlety of the difference between these two concepts escaped the attention of most commentators and reporters, the ramifications of their merger extend far beyond the context of eminent domain. The North Carolina Constitution, like most other state constitutions, contains provisions restricting the raising and spending of tax money to public purposes only.<sup>14</sup> The *Kelo* decision is the latest example of the gradual erosion of the public purpose doctrine by state and federal courts that, combined with the refusal of judges and legis-

---

8. HearTheIssues.com, Americans On: The Supreme Court, <http://www.heartheissues.com/americanson-supremecourt-g.html> (last visited Mar. 22, 2006).

9. *Don't Kelo My House*, *supra* note 6.

10. Paul Chesser, *Kelo Focuses Liberty Concerns*, CAROLINA JOURNAL ONLINE, Aug. 25, 2005, [http://carolinajournal.com/exclusives/display\\_exclusive.html?id=2735](http://carolinajournal.com/exclusives/display_exclusive.html?id=2735).

11. U.S. CONST. amend. V (emphasis added).

12. *Kelo*, 125 S. Ct. at 2663.

13. *Id.* at 2662.

14. N.C. CONST. art. V, § 2(1) explicitly restricts the power of taxation to "public purposes only." The North Carolina Supreme Court extended this restriction to the ability of state and local governments to spend taxpayer money in *Mitchell v. North Carolina Industrial Development Financing Authority*, 159 S.E.2d 745, 749-50 (N.C. 1968) ("The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury.").

lative bodies to set clearly defined boundaries for what qualifies as a public purpose, has detrimentally affected the constitutional rights of every American. This comment argues an amendment to the North Carolina Constitution clearly defining “public purpose” is needed to reverse this trend and to ensure state and local government entities do not act in a manner inconsistent with this limitation as it was originally intended. Such a remedy is specifically permitted under *Kelo*,<sup>15</sup> and would protect North Carolinians from the numerous possibilities for abuse at the hands of an ever-permissive and severely eroded public purpose doctrine.

As the law in North Carolina currently stands, the state may not only use the power of eminent domain to confiscate one party’s private property for the benefit of another but may theoretically also use taxpayer dollars to finance the redevelopment of the confiscated property. This concern becomes especially salient in light of controversial business-incentive packages passed by the North Carolina General Assembly during recent years. It is within this framework that several cases have arisen in North Carolina courts during the past decade challenging the constitutionality of state and local governments’ use of public tax revenue to entice private businesses to locate within the state. Most recently, in June 2005, the North Carolina Institute for Constitutional Law filed suit on behalf of a group of taxpayers seeking to have an incentives package granted to entice computer giant Dell, Inc., to build a manufacturing plant near Winston-Salem declared unconstitutional. The complaint alleged, *inter alia*, that the \$279 million deal – the largest incentives package in state history<sup>16</sup> – was unconstitutional because it ran afoul of the public purpose restrictions found within the North Carolina Constitution.<sup>17</sup>

While, as of this writing, the state and local government entities responsible for putting together the deal that lured Dell to North Carolina have not invoked eminent domain to accomplish their objectives, such a use in future business incentive packages is certainly not incomprehensible. In fact, the North Carolina Supreme Court has, on several occasions, analogized the restrictions of the public purpose

---

15. *Kelo*, 125 S. Ct. at 2668.

16. David Rice, *N.C.’s Offer to Dell Largest in State History*, WINSTON-SALEM JOURNAL, Nov. 5, 2004, at A1.

17. These allegations were premised on the theory that the “public purpose” restrictions contained in Article V, Sections 2(1) and (7) were violated because the Dell incentives package provided “direct government subsidies for a private business enterprise” the benefits of which would accrue primarily to “Dell and Dell’s shareholders” making them “not for a ‘public purpose only.’”

doctrine with respect to the government's exercise of its eminent domain powers with its exercise of the powers of taxation.<sup>18</sup> Furthermore, the court has explicitly held that once a proposed expenditure of tax revenue is established to be for a public purpose, government can use its power of eminent domain to acquire private property to accomplish the purpose of the expenditure.<sup>19</sup> This is true even if the result is to transfer that private property to a private company for its own use and benefit.<sup>20</sup>

At the heart of the debate over the use of business incentives and eminent domain is the meaning and scope of the public purpose doctrine. The North Carolina Supreme Court has twice noted "a slide-rule definition of public purpose for all time cannot be formulated."<sup>21</sup> Consequently, with no clear definition of public purpose in place, North Carolina courts have permitted an increasing number of activities to qualify as a public purpose.

Although a strict, all-purpose definition for "public purpose," or any other legal term of art, would likely prove cumbersome and therefore ineffective, it is clear that now, after the *Kelo* decision, the public supports clear limits on what actions government can undertake under the guise of a public purpose. This comment, in Part I, traces the gradual erosion and decline of the public purpose doctrine in North Carolina from its roots in the Constitution of 1868 to recent North Carolina court decisions interpreting its meaning and scope. In examining the public purpose doctrine as it is addressed in North Carolina case law, four distinct categories of cases where the term has been invoked and applied are analyzed. Part II proffers a definition of "public purpose" as set forth by the cases discussed in Part I and proposes a more stringent test for courts and public bodies to apply in determining whether a proposed government expenditure satisfies the public purpose requirements of the North Carolina Constitution. Part II further argues that the public purpose doctrine, as it is now defined by the North Carolina courts, is inadequate to safeguard public funds from abuse by private interests. Accordingly, this Part contends a clearer, more stringent definition should be formulated as an amendment to the North Carolina Constitution. Finally, the comment concludes by asserting now, in the aftermath of *Kelo*, is the appropriate

---

18. *E.g.*, *Briggs v. City of Raleigh*, 141 S.E. 597 (N.C. 1928).

19. *Mitchell*, 159 S.E.2d at 755.

20. *Id.*

21. *Piedmont Triad Airport Auth. v. Urbine*, 554 S.E.2d 331, 332 (N.C. 2001) (quoting *Mitchell*, 159 S.E.2d at 750).

time for the courts and the North Carolina General Assembly to address this issue.

## I. THE ERODING PUBLIC PURPOSE DOCTRINE

### A. *Roots of the Public Purpose Doctrine in North Carolina*

#### 1. *Constitutional Evolution*

North Carolina’s public purpose doctrine traces its origins to the Constitution of 1868. The State of North Carolina has adopted three different constitutions throughout its history.<sup>22</sup> The Constitution of 1868 was adopted after the Civil War and contained much more detail than the state’s original constitution, adopted in 1776.<sup>23</sup> Included among these details were specific restrictions regarding the manner and items for which state governmental entities could raise and spend money.<sup>24</sup> However, it was not until seventy years after its adoption that a provision with wording similar to the public purpose doctrine found in the current constitution was inserted.<sup>25</sup> In 1936, voters ratified an amendment to Article V, Section 3 of the Constitution of 1868, providing in relevant part: “Taxes shall be levied only for *public purposes*, and every act levying a tax shall state the object to which it is to be applied.”<sup>26</sup> Some commentators have suggested the motive behind the insertion of the “public purpose” qualifier in this amendment was to make restrictions on government taxing and spending less prohibitive.<sup>27</sup> The current state constitution, adopted in 1971, uses the phrase “public purpose,” or some variant thereof, a total of six times. The phrase appears three times in Article V, which regulates the power of state and municipal governments to raise and spend money,<sup>28</sup> and three times in Article XIV, which pertains to miscellaneous functions of state and local governments, including the conservation of natural resources.<sup>29</sup>

---

22. John V. Orth, *THE NORTH CAROLINA STATE CONSTITUTION 1* (1995).

23. *Id.* at 13.

24. John H. Vernon III, Comment, *The Public Purpose Doctrine Revisited*, 3 *INTRAMURAL L. REV. WAKE FOREST* 37, 41 (1967).

25. N.C. SECRETARY OF STATE, *NORTH CAROLINA GOVERNMENT, 1585-1974: A NARRATIVE AND STATISTICAL HISTORY* 920-21 (John L. Cheney, Jr. ed., 1975).

26. *Id.*

27. Vernon, *supra* note 24.

28. N.C. CONST. art. V, §§ 2, 4.

29. *Id.* at art. XIV, § 5.

## 2. Loan Association v. Topeka: *Setting a National Standard*

The United States Supreme Court first recognized the principle that the power of taxation is reserved only for public purposes in its 1875 ruling in *Loan Ass'n v. Topeka*.<sup>30</sup> In *Topeka*, the Court considered the constitutionality of a statute enacted by the state legislature of Kansas authorizing the City of Topeka to issue and donate bonds, payable with taxpayer money, to a manufacturer of iron bridges to entice the manufacturer to build a plant within the city.<sup>31</sup> The Court condemned the practice of taking public money through taxation and, in turn, giving it to private parties. The majority held doing so was “perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.”<sup>32</sup>

While the Court unambiguously pronounced, “there can be no lawful tax which is not laid for a public purpose,” it also acknowledged, “it may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.”<sup>33</sup>

This case also provided what was perhaps the first useful test given by any court for delineating public from non-public purposes. Included among the factors the Court stated should be considered:

[T]he course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal, lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.<sup>34</sup>

As in nearly every opinion that followed, the *Topeka* decision afforded great deference to the will and judgment of legislative bodies in deciding what expenditures qualify as public purposes.<sup>35</sup> Some state courts afterwards expressly rejected the Court's holding in *Topeka*. Those courts argued later opinions by the Court undermined

---

30. *Loan Ass'n v. Topeka*, 87 U.S. 655 (1875).

31. *Id.* at 658.

32. *Id.* at 659.

33. *Id.* at 664.

34. *Id.* at 665.

35. *Id.* at 664 (“It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent.”).

many of *Topeka*’s pronouncements.<sup>36</sup> The opinion, however, is still probative in determining the basis of factors considered by courts today in determining what activities qualify as a public purpose. In fact, the North Carolina Supreme Court incorporated a significant portion of the *Topeka* decision, including the public purpose test quoted above, in an opinion striking down the use of taxpayer funds to construct a municipal hotel.<sup>37</sup>

3. *Wood v. Commissioners of Oxford: Establishing Public Purpose in North Carolina*

The foundation for the North Carolina public purpose doctrine was laid by the North Carolina Supreme Court’s 1887 opinion in *Wood v. Commissioners of Oxford*.<sup>38</sup> In *Wood*, the court upheld the constitutionality of an act of the General Assembly permitting municipalities to use public funds to purchase stock in railroad companies that agreed to build railroads through them, upon the authorization of a majority of voters in the municipality.<sup>39</sup>

Despite declaring the act constitutional, the *Wood* court made it clear all taxation and expenditures must be for a public purpose.<sup>40</sup> Although at the time there was no express state constitutional provision requiring public funds be raised or spent for a public purpose, *Wood*, like *Topeka*, implied this requirement was an inherent limitation on government power by virtue of the fact that the funds were raised from the public.<sup>41</sup> The *Wood* opinion also set out its own definition of a public purpose:

It may not always be easy to apply the rule of law to determine what is a legitimate object of such expenditures. It is clear, however, that they may be made for such public improvements and advantages as tend directly to provide for and promote the general good, convenience and safety of the county or town making them, as an organized community,

---

36. *Common Cause v. State*, 455 A.2d 1, 26 (Me. 1983) (“*Topeka* has been substantially undermined by later Supreme Court decisions making clear that the Court will defer to the states in the area of taxation so as to permit local economic experimentation.”).

37. *Nash v. Town of Tarboro*, 42 S.E.2d 209, 211 (N.C. 1947).

38. *Wood v. Comm’rs of Oxford*, 2 S.E. 653 (N.C. 1887).

39. *Id.* at 656.

40. *Id.* at 655 (“[The General Assembly] may confer upon [municipalities] power to raise revenue by levying taxes and otherwise, and to use and apply the same for all legitimate public purposes, and likewise to create debts and issue their obligations to pay money for the like public purposes, except as its powers may be restrained by constitutional limitations.” (emphasis added)).

41. *Id.*

although the advantage derived may not reach every individual citizen or taxpayer residing there.<sup>42</sup>

Considered together, *Topeka* and *Wood* firmly establish the existence of a “public purpose” restriction on the government’s authority to collect and appropriate tax revenue and provide a basis for the opinions that follow on the issue in North Carolina.

*B. A Sliding Standard: The Case Law and the Public Purpose Doctrine*

Since *Topeka* and *Wood*, four general categories of cases have developed providing insight into the factors North Carolina courts use to test whether a government action meets the requirements of the public purpose doctrine. The first category involves cases dealing with the distinction between public and private functions when determining the liability of government-created entities in tort claims. The second category includes cases dealing with delineation between public and private functions to determine tax liability for government-created entities. The third category encompasses cases dealing with the definition of “public purpose” in the context of eminent domain. The fourth and largest category includes taxpayer suits requiring courts to apply the public purpose doctrine to determine the constitutionality of an expenditure of public money. This comment discusses each of these categories of cases in the above-mentioned order with a special focus on the final two categories, as these appear to encompass the majority of cases most likely to arise involving the public purpose doctrine in North Carolina.

*1. Public Purpose as a Test for Tort Liability*

Although the principle of sovereign immunity is well established in North Carolina, courts have held a governmental entity may be subject to liability in tort if it is performing functions not considered of a traditional “public” nature. One of the first cases on record to address this issue was *Rhodes v. City of Asheville*.<sup>43</sup> The *Rhodes* opinion, for the first time, recognized that while all government activities must qualify as a “public purpose,”<sup>44</sup> government often wears two different hats: it performs “proprietary” functions, which are of a “ministerial or corporate character,” but can also perform more traditional “governmental”

---

42. *Id.*

43. 52 S.E.2d 371 (N.C. 1949).

44. *Id.* at 373.

functions that involve making “judicial, discretionary, or legislative” decisions.<sup>45</sup>

The delineation between “governmental” and “proprietary” functions was the deciding factor in a 1975 case in which the North Carolina Supreme Court held a municipally owned and operated hospital could be subject to tort liability for the negligent acts of one of its employees.<sup>46</sup> In *Sides v. Cabarrus Memorial Hospital, Inc.*, the court stated “governmental” functions “are those historically performed by the government, and which are not ordinarily engaged in by private corporations.”<sup>47</sup> “Proprietary functions,” the court noted, are often those that involve a “monetary charge of some type” generally in excess of the cost of the services rendered, although actual profit generation is not a necessity for this type of public function.<sup>48</sup>

The North Carolina Court of Appeals further refined the distinction between governmental and proprietary functions in *Pulliam v. City of Greensboro*.<sup>49</sup> The court held two Greensboro residents could recover damages when the sewer system the city maintained backed up into their home while the city crews were attempting to unstop sewer mains.<sup>50</sup> In *Pulliam*, the court noted while providing sewer services had often been considered a traditional “governmental” function, the trend was toward privatization.<sup>51</sup> The court added the operation of a public sewer system was one of the “public enterprises” listed in Section 160A-311 of the North Carolina General Statutes, all of which the courts had recognized as “proprietary” functions of local government.<sup>52</sup> Included among the other “public enterprises” the statutes authorize municipalities to operate are the following: electric power generation, transmission, and distribution systems; water supply and distribution systems; gas production, storage, transmission, and distribution systems; public transportation systems; solid waste collection and disposal systems and facilities; cable television systems; off-street parking facilities and systems; and airports.<sup>53</sup>

This category of cases demonstrates while North Carolina courts have held a wide variety of government activities, including those in direct competition with the private sector, can fall within the purview

---

45. *Id.*

46. *Sides v. Cabarrus Mem’l Hosp., Inc.*, 213 S.E.2d 297, 304 (N.C. 1975).

47. *Id.* at 303.

48. *Id.*

49. 407 S.E.2d 567 (N.C. Ct. App. 1991).

50. *Id.* at 571.

51. *Id.* at 568-69.

52. *Id.* at 569-70.

53. N.C. GEN. STAT. § 160A-311 (2005).

of a “public purpose,” there are at least two distinct categories of public purposes: “governmental” functions and “proprietary” functions. Judicial recognition of the different types of public purposes also has been central to North Carolina courts’ determinations as to what types of activities can subject governmental bodies to tax liability.

## 2. *Public Purpose as a Test for Tax Liability*

Article 5, Section 2(3) of the North Carolina Constitution expressly exempts “property belonging to the state, counties, and municipal corporations” from taxation.<sup>54</sup> However, there is a great deal of conflicting case law considering whether property owned by a government entity must be used for a “public purpose” to fall within one of these tax-exempt categories.

In its first holding on the issue, the North Carolina Supreme Court abided by the principle of absolute sovereign immunity, holding any property owned by a state or local government was automatically exempt from taxation, regardless of whether its purpose was a public one.<sup>55</sup> The court later clarified its stance in *Wells v. Housing Authority*, stating it was up to the courts to decide what activities constitute a public purpose by “looking to the end sought to be reached and to the means to be used, rather than to statutory declarations to aid its decision.”<sup>56</sup> The *Wells* court also appeared to mandate that a governmental body exist for a public purpose to escape state and local tax liability.<sup>57</sup>

The court ultimately settled the question of whether a government-owned property may be subject to local taxation nearly forty years later with its holding in *In re Appeal of University of North Carolina*.<sup>58</sup> Here, the court unequivocally declared, “[A]ll property of the University of North Carolina is tax exempt due solely to its ownership by the State of North Carolina.”<sup>59</sup> In reaching this resolution, the court overruled the line of cases endorsing the requirement that property be used for a public purpose in order to be exempt from taxation.<sup>60</sup>

This category of cases is instructive in determining what sorts of government activities North Carolina courts have considered “public

---

54. N.C. CONST. art. V, § 2(3).

55. *Town of Andrews v. Clay County*, 156 S.E. 855, 857 (N.C. 1931).

56. 190 S.E. 693, 695 (N.C. 1938).

57. *Id.*

58. 268 S.E.2d 472 (N.C. 1980).

59. *Id.* at 474.

60. *Id.* at 478.

purposes.” First, in *Wells*, the North Carolina Supreme Court gave two considerations for courts to use in determining whether a government activity constitutes a public purpose: (1) the end to be reached and (2) the means to be used.<sup>61</sup> *Wells* further established the courts have the authority to review legislative decisions as to what constitutes a public purpose.<sup>62</sup>

Additionally, while it is clear from *In re Appeal of University of North Carolina* that all property owned by a governmental entity in North Carolina is exempt from taxation regardless of its use, the cases considering the role public purpose plays in determining tax liability give rise to the implication that the courts recognize not all functions of government are public purposes. If no such recognition existed and all functions of government were presumed to be public purposes, there would be no need for the courts to have even considered the cases in this category in the first place. That the court in *In re Appeal of University of North Carolina* specifically noted all state property was exempt from taxation *regardless* of its use clearly demonstrates a recognition of such a distinction.

North Carolina courts, in these first two categories of public-purpose cases, have broken down governmental activities using a two-tiered approach. First, two different types of governmental activities exist: those that constitute “public purposes” and those that do not. Second, among those governmental activities that constitute “public purposes,” some are traditional “governmental” functions while other are non-traditional “proprietary” functions.

The delineations provide an important framework from which to view the next two categories of cases: eminent domain and taxpayer suits. Nearly all of the current judicial changes to the public purpose doctrine are occurring on the state and national levels within these two categories.

### 3. *Public Purpose in Eminent Domain Cases*

The issue of public purpose in the context of eminent domain first surfaced in *City of Charlotte v. Heath*, where the North Carolina Supreme Court reiterated two long-established principles: (1) when government exercises its powers of eminent domain, “private property can be taken only for a public purpose and upon just compensation;” and (2) the determination of what is a public purpose or public use is one for the courts.<sup>63</sup> The *Heath* court held the condemnation of pri-

---

61. *Wells*, 190 S.E. at 695.

62. *Id.*

63. 40 S.E.2d 600, 603 (N.C. 1946).

vate property by the City of Charlotte to extend sewer services to sixty non-city residents satisfied the public purpose restrictions for eminent domain.<sup>64</sup> In announcing its decision, the court held:

The public use required need not be the use or benefit of the whole public or state or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates.<sup>65</sup>

The court again discussed the definitions of public purpose and public use in *Piedmont Triad Airport Authority v. Urbine*, when it considered whether the Piedmont Triad Airport Authority (PTAA) could condemn private property owned by Kent Urbine to build an expanded air-cargo terminal for the Federal Express Corporation (FedEx), a private company and existing tenant at the airport.<sup>66</sup> Urbine, the property owner, argued the exercise of eminent domain for this purpose was unconstitutional because it was not for a “public purpose” as mandated by Article V, Section 2(1) of the North Carolina Constitution.<sup>67</sup>

Before the court began its analysis, it noted although there remained a distinction between “public purpose” and “public use” in that the former refers to the government’s use of tax revenue and the latter refers to the exercise of eminent domain, the analysis courts use in determining both is very similar.<sup>68</sup> In fact, in *Urbine*, the court employed a two-prong test, adapted from one developed in *Madison Cablevision, Inc. v. City of Morganton*,<sup>69</sup> a traditional “public purpose” case, to determine whether the PTAA’s condemnation of Urbine’s property was for a public use. The court looked at two factors: (1) whether the condemnation “involves a reasonable connection with the convenience and necessity of the particular municipality” and (2) whether “the activity benefits the public generally, as opposed to special interest[s] or persons.”<sup>70</sup>

The court, with little analysis, answered the first question in the affirmative, declaring, “The convenience and necessity of having an air-cargo facility adjacent to existing airport runways and facilities is undisputed.”<sup>71</sup> In applying the second prong of the test, the court

---

64. *Id.* at 605.

65. *Id.*

66. 554 S.E.2d 331 (N.C. 2001).

67. *Id.* at 332.

68. *Id.*

69. 386 S.E.2d 200 (N.C. 1989).

70. *Urbine*, 554 S.E.2d at 333.

71. *Id.*

noted, “[a]ny determination of what is a public use must rest upon the notions of the types of activities in which governmental bodies are to be engaged,” and stated such notions could be found by looking to the state constitution.<sup>72</sup> While the North Carolina Constitution contains an express provision allowing the state to engage in the development and expansion of airports, the *Urbine* court held this provision must be read and interpreted in conjunction with the confines of Article V, Section 2(1), which requires activities involving the use of state tax revenue be for a “public purpose.”<sup>73</sup>

The court eschewed concerns the expanded cargo terminal would be used for the “special interest” of FedEx instead of benefiting the public generally by noting the PTAA had discussed expanding the terminal before FedEx ever requested it do so.<sup>74</sup> The court concluded the condemnation sought by the PTAA passed the second prong of the test and was therefore constitutional.<sup>75</sup>

*Urbine* bears a striking similarity to the final, and perhaps most important, case this comment considers in this category, *Kelo v. City of New London*.<sup>76</sup> In many respects, the logic and reasoning contained in these cases is nearly identical but for the fact the United States Supreme Court in *Kelo* sought to determine whether the City of New London’s proposed taking met the “public use” requirement within the Fifth Amendment of the United States Constitution rather than the “public purpose” requirement of Article V of the North Carolina Constitution. For instance, both courts endorsed the idea of using the same test to determine whether a government activity qualifies as a “public use” or a “public purpose.”<sup>77</sup>

Both courts were also forced to confront perceived notions that private property was being taken by government for the benefit of another private party rather than for a public use. In *Urbine*, the court balanced whether allowing the condemnation of the plaintiff’s prop-

---

72. *Id.* at 334.

73. *Id.* (“Reading the Constitution of North Carolina as a whole and giving significance to each part, we believe that the people did not intend to abrogate the public purpose doctrine upon the adoption of Article V, Section 13. Article V, Section 2(1) and Article V, Section 13 operate concurrently. To hold otherwise would create a *per se* presumption of public purpose and public use under Article V, Section 13 for any and all undertakings. This would be inconsistent with this Court’s holdings that public purpose and public use cases are to be decided on a case-by-case basis.”).

74. *Id.* at 334-35 (“While the overtures of Federal Express may have hastened the timing of this development, they are not the genesis of PTAA’s actions.”).

75. *Id.* at 335.

76. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

77. *Id.* at 2662.

erty so the PTAA could expand an air cargo terminal for a private company benefited the general public more than the private interests of the company to be housed in the expanded terminal.<sup>78</sup> Similarly, in *Kelo*, the Supreme Court dealt with the perceived unfairness associated with condemning private homes and transferring the property on which they were located to a private developer who planned to build private homes and businesses on the property.<sup>79</sup> However, the courts in both instances had almost identical answers to this concern: “It is only the taking’s purpose, not its mechanics” that matters.<sup>80</sup>

Despite these similarities, these two cases are very different in the impact they have on the public purpose doctrine in North Carolina. The *Urbine* court, while providing great deference to legislative judgment in determining what governmental activities qualify as a public purpose, noted that this judgment must ultimately be reviewed by the courts on a case-by-case basis and that a government activity should not be considered per se valid simply because a legislative body endorsed it.<sup>81</sup> The *Kelo* court, however, provided almost total deference to legislative judgment and rejected the idea of “an artificial restriction on the concept of public use.”<sup>82</sup> The Court outright rejected a case-by-case judicial review of whether takings are for a public use and arguably did what the *Urbine* court expressly sought not to do: create a per se presumption any activity in which a legislative body may engage is a valid public purpose.<sup>83</sup> In fact, the Supreme Court in *Kelo* noted, “the Takings Clause largely operates as a conditional limi-

---

78. *Urbine*, 554 S.E.2d at 333 (“The second prong of our analysis requires us to determine whether the activity benefits the public generally as opposed to special interests or persons.” (internal quotation marks omitted)).

79. *Kelo*, 125 S. Ct. at 2662 (“On the other hand, this is not a case in which the City is planning to open the condemned land - at least not in its entirety - to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this Court long ago rejected any literal requirement that condemned property be put to use for the general public.” (internal quotation marks omitted)).

80. *Id.* at 2664.

81. *Urbine*, 554 S.E.2d at 334.

82. *Kelo*, 125 S. Ct. at 2667 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts.”).

83. *Id.* at 2668 (“A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.”).

tation, permitting government to do what it wants as long as it pays the charge.”<sup>84</sup>

While many of the North Carolina cases discussed above contain dicta or other language suggesting the definitions of public purpose and public use must necessarily change with the times, the Court in *Kelo* rejected any judicial standard or definition of these terms in favor of complete legislative discretion.<sup>85</sup>

Both *Kelo* and *Urbine* provide clear illustrations of how, in the absence of an absolute and permanent standard for “public purpose,” politically influential parties, like the developers in these cases, will have the ability to use the political process to obtain private property for their own use through eminent domain. Additionally, after *Kelo*, not only do these developers have the ability to obtain private property for development through eminent domain, but they may also, as the next category of cases demonstrates, be able to use taxpayer funds to subsidize the redevelopment of that property.

#### 4. *Public Purpose in Taxpayer Suits*

Lawsuits by taxpayers seeking to enjoin government from spending money for a particular purpose are the most prolific category of cases where North Carolina courts have discussed the meaning of the public purpose doctrine. The first significant case in this category after *Wood*, discussed earlier as the foundation of the public purpose requirement in North Carolina law today, is *Briggs v. City of Raleigh*.<sup>86</sup> In *Briggs*, the North Carolina Supreme Court held the use of taxpayer money by the City of Raleigh to finance the construction of a state fairground qualified as a valid “public purpose.”<sup>87</sup> The *Briggs* court, in approving the expenditure, warned future courts against construing the public purpose restriction too narrowly.<sup>88</sup> However, the court also cautioned against extending its ruling too far, declaring, “Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish

---

84. *Id.* at 2667 (internal quotation marks omitted).

85. *Id.* at 2663 (“The disposition of this case therefore turns on the question of whether the City’s development plan serves a ‘public purpose.’ Without exception, our cases have defined that concept broadly, reflecting our long-standing policy of deference to legislative judgments in this field.”).

86. 141 S.E. 597 (N.C. 1928).

87. *Id.* at 599-600.

88. *Id.* at 599.

them.”<sup>89</sup> According to *Briggs*, “It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community.”<sup>90</sup> However, the court in *Briggs* pronounced a balancing test where “the ultimate advantage of the public as contrasted with that of the individual” separates those expenditures that are acceptable public purposes from those that are not.<sup>91</sup> When the outcome of this balancing test is unclear, deference to legislative determinations should control.<sup>92</sup>

Despite giving great deference to legislative bodies to determine what a public purpose is, the *Briggs* decision contained strong language condemning the use of taxpayer funds to subsidize the activities of private businesses:

Indeed, it is well settled by all the decisions on the subject, with none to the contrary, that the power of taxation may not be employed for the purpose of establishing, aiding or maintaining private business enterprises, whose sole object is the individual gain of the proprietors, no matter how beneficial to the community such enterprises may be. . . . However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means.<sup>93</sup>

Also significant in *Briggs* is the court’s link between the “public purpose” restriction on the government’s power to collect taxes from citizens and its power to exercise eminent domain. The court explicitly noted, the “same tests must apply to and control in each.”<sup>94</sup>

The court reiterated many of the *Briggs* directives nineteen years later when it struck down the use of taxpayer funds to construct a municipal hotel.<sup>95</sup> The court in *Nash v. Town of Tarboro* ruled in favor of a taxpayer who alleged Tarboro’s decision to issue bonds and levy a tax to build a city hotel violated the “public purpose” restriction contained in the North Carolina Constitution at the time.<sup>96</sup> This ruling came despite the fact a majority of the town’s voters supported build-

---

89. *Id.*

90. *Id.* at 599-600.

91. *Id.* at 600.

92. *Id.* (“It is only when the unconstitutionality of an act of the Legislature is clear that the courts, in the exercise of their judicial powers, are required to hold it for naught. Hence, every presumption is indulged in favor of the validity of the legislation called in question.”).

93. *Id.*

94. *Id.* at 601.

95. *Nash v. Town of Tarboro*, 42 S.E.2d 209, 214 (N.C. 1947).

96. *Id.*

ing the hotel with public funds in a municipal referendum.<sup>97</sup> The *Nash* holding was largely based on the fact that no prior precedent had included the operation of a hotel within the definition of a public purpose<sup>98</sup> and noted that a municipality cannot use the power of taxation to promote business interests when the benefit to taxpayers is merely “indirect” or “incidental.”<sup>99</sup>

In *Mitchell v. North Carolina Industrial Development Financing Authority*, the court again struck down the use of taxpayer funds for the direct benefit of a private enterprise, when it held an appropriation of public funds to operate a state economic development agency violated the public purpose doctrine of the North Carolina Constitution.<sup>100</sup> The court in *Mitchell* considered whether the North Carolina Industrial Financing Authority, created to construct buildings and other structures to attract business and industry to the state and eventually turn those structures over to the private businesses located in them, constituted a public purpose for which taxpayer money could be used.<sup>101</sup> In declaring the act that created the development authority unconstitutional, the court explored the history and application of the public purpose doctrine in North Carolina and other states, ultimately deciding “[t]he financing of private enterprise with public funds contravenes the fundamental concept of North Carolina’s constitution.”<sup>102</sup> The court in *Mitchell* held consent of the citizens through a constitutional amendment was necessary before the state could provide direct subsidies to private businesses or become involved in the “ownership and operation of the means of production.”<sup>103</sup>

Also noteworthy in *Mitchell* is the court’s extension of the analogy first drawn in *Briggs* between the constitutional public purpose restrictions governing the government’s exercise of its power of taxation and its use of eminent domain. The court in *Mitchell* noted that if it had decided the development authority served a valid public purpose and could use taxpayer funds to support its activities when the authority sought a location to build a manufacturing plant or other structure for a private business, then it would also be entitled to use eminent domain to acquire the property for the structure, since the public pur-

---

97. *Id.*

98. *Id.* at 212.

99. *Id.* at 214.

100. 159 S.E.2d 745, 761 (N.C. 1968).

101. *Id.* at 750.

102. *Id.* at 758.

103. *Id.* at 760.

pose tests underlying both functions are the same.<sup>104</sup> This analogy provides elected officials and courts a valuable vantage point from which to determine whether a proposed governmental expenditure satisfies the public purpose doctrine, to wit: if eminent domain should not be used to accomplish it, the expenditure should not qualify as a public purpose.

Chief Justice R. Hunt Parker, in a dissenting opinion, argued the court should have considered a different set of factors in determining whether the development authority served a public purpose, among them, “the aggregate income it will make available for community distribution, the resulting security of [citizens’] income, and the opportunities for more lucrative employment for those who desire to work for it.”<sup>105</sup> The public purpose doctrine should be construed “in light of conditions existing today,” Parker argued.<sup>106</sup>

Later cases regarding the public purpose doctrine tended to follow Justice Parker’s dissent in *Mitchell* rather than the majority opinion. In *Madison Cablevision, Inc. v. City of Morganton*, the court declared establishment of a cable television system by the City of Morganton constituted a public purpose sufficient to satisfy the requirements of the North Carolina Constitution.<sup>107</sup> The court considered two conflicting tests in reaching its decision, one proffered by the defendant city and the other by the plaintiff, Madison Cablevision, which sought to preserve its exclusive right to provide cable television services in Morganton.<sup>108</sup> The test urged by Madison Cablevision contained three elements based on the court’s language in an earlier case indicating a preference for allowing government to provide public services only when the private sector demonstrated an inability or unwillingness to provide the service.<sup>109</sup> The court rejected this test, arguing it would call into question the constitutionality of too many public services provided by government, in favor of a two-prong test followed by North Carolina courts ever since:

---

104. *Id.*

105. *Id.* at 764 (Hunt, J., dissenting).

106. *Id.* at 770 (Hunt, J., dissenting).

107. 386 S.E.2d 200, 214 (N.C. 1989).

108. *Id.* at 207.

109. *Id.* (“Madison Cable contends that a careful reading of this Court’s ‘public purpose’ decisions suggests that the test of whether an enterprise or activity constitutes a ‘public purpose’ is a three-part inquiry: (1) Is the activity one traditionally performed by the government? (2) Is there a public need for the activity? and (3) Is private enterprise unwilling or unable to engage in the activity? Plaintiff contends that unless all three questions can be answered in the affirmative, the activity or enterprise does not constitute a public purpose.”).

Two guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.<sup>110</sup>

This test was central to the court’s decision in its most recent opinion interpreting the public purpose doctrine, *Maready v. City of Winston-Salem*.<sup>111</sup> The court in *Maready* upheld the expenditure of approximately \$13.2 million in public funds to provide economic incentives for certain businesses that agreed locate in Winston-Salem.<sup>112</sup> The funds were spent pursuant to the authorization of a state statute permitting municipalities to spend public money to recruit industry that “will increase the population, taxable property, agricultural industries and business prospects of any city or county.”<sup>113</sup>

In applying the first prong of the *Madison Cablevision* test, the court noted “whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action.”<sup>114</sup> After listing a number of government expenditures North Carolina courts have upheld as public purposes,<sup>115</sup> the court in *Maready* concluded the expenditure of tax revenue to provide economic incentives for private companies fell within the range of activities deemed permissible public purposes by the courts.<sup>116</sup>

The court also upheld the constitutionality of the incentives upon applying the second prong of the *Madison Cablevision* test, holding, “The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is

---

110. *Id.* (citations omitted).

111. 467 S.E.2d 615, 625 (N.C. 1996).

112. *Id.* at 631.

113. *Id.* at 620 (citing N.C. GEN. STAT. § 158-7.1(a) (1994)).

114. *Id.* at 624.

115. *Id.* at 623-24 (listing activities North Carolina courts have held qualify as “public purposes,” as follows: aid to a teacher training school; aid to a railroad; airport facilities; education generally; municipal hospital; public housing; parking; port terminal facilities; public auditorium; public library; public park; lake and a generating plant; state fair).

116. *Id.* at 624.

merely incidental.”<sup>117</sup> In addition to adopting the two-prong test from *Madison Cablevision*, the *Maready* court, in reaching its decision, also reinforced the extreme deference to legislative determinations of what activities qualify as a public purpose granted by previous courts.<sup>118</sup>

However, in addition to reinforcing the holdings of prior courts, the *Maready* majority opinion outlined another factor for courts to consider when determining whether a governmental expenditure is for a public purpose: the circumstances surrounding the enactment of the legislation.<sup>119</sup> In distinguishing the facts of the principal case from the facts of *Mitchell*, where the court expressly decried grants from the public coffers to private businesses,<sup>120</sup> the *Maready* majority noted, “One of the bases for the *Mitchell* decision was that the General Assembly had unenthusiastically passed the enacting legislation, declaring it to be bad policy.”<sup>121</sup> However, the legislative act authorizing the expenditures questioned in *Maready* was “unequivocally embraced.”<sup>122</sup>

The *Maready* dissent criticized the majority’s assertion that the level of lawmakers’ enthusiasm in authorizing public expenditures should be a consideration in determining whether the expenditure is for a public purpose.<sup>123</sup> The dissent added, “It is evident from a wide range of sources included in the record that the primary argument for such assistance to private industry is that ‘all the states are doing it’ and, thus, that North Carolina must do it too in order to be competitive.”<sup>124</sup>

Additionally, the *Maready* dissent took issue with the majority’s application of the second prong of the *Madison Cablevision* test, arguing the majority’s erroneous holding was premised on the incorrect assumption that “[t]he creation of new jobs and an increase in the tax base *ipso facto* benefits the general public.”<sup>125</sup> Instead, the dissent argued, empirical data suggested the majority of the benefits from the

---

117. *Id.* at 625.

118. *Id.*

119. *Id.* at 626 (“Finally, while this Court does not pass upon the wisdom or propriety of legislation in determining the primary motivation behind a statute, it may consider the circumstances surrounding its enactment.”).

120. *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 159 S.E.2d 745, 758 (N.C. 1968) (“The financing of private enterprise with public funds contravenes the fundamental concept of North Carolina’s Constitution.”).

121. *Maready*, 467 S.E.2d at 621.

122. *Id.* at 622.

123. *Id.* at 633 (Orr, J., dissenting).

124. *Id.*

125. *Id.* at 631.

\$13.2 million incentive package accrued to the private companies receiving the funds, not the public at large, which enjoyed only a limited residual benefit from the expenditure of the funds.<sup>126</sup> Because the benefits received by the private companies far outweighed the benefits received by the general public, the dissent stated the incentives package in question did not qualify as a public purpose.<sup>127</sup>

While the North Carolina Supreme Court has not re-examined the public purpose doctrine in the context of a taxpayer suit since *Maready*, the North Carolina Court of Appeals last addressed the issue in a 2000 taxpayer challenge to the constitutionality of an agreement entered into by the City of Charlotte with Charlotte Hornets basketball team owner George Shinn regarding the use of the Charlotte Coliseum.<sup>128</sup> In *Peacock v. Shinn*, the plaintiff-taxpayer alleged provisions of the agreement giving half of all parking, food, and beverage profits at the coliseum to Shinn contravened the public purpose provisions of the Article V of the North Carolina Constitution.<sup>129</sup> The court in *Peacock*, however, easily upheld the agreement using the two-prong public purpose test outlined in *Madison Cablevision* and *Maready*.<sup>130</sup> The *Peacock* decision also appeared to endorse the *Maready* majority’s underlying ends-justifies-the-means philosophy, holding the test for whether an activity is a public purpose “is whether the transaction will promote the welfare of the local government and results from the local government’s efforts to better serve the interests of its people.”<sup>131</sup>

Viewed collectively, these cases are demonstrative of the increasing permissiveness with which North Carolina courts have viewed the scope of the public purpose restrictions contained in the state constitution. While the *Wood*, *Briggs*, and *Mitchell* opinions generally provided great deference to legislative judgment when deciding whether to declare an act of the General Assembly appropriating money for a given purpose unconstitutional, these courts did not hesitate to strike down legislative appropriations they felt crossed the line from being for the public good to private gain.

However, beginning with *Madison Cablevision* and the adoption of the two-prong public purpose test,<sup>132</sup> the courts appear to have granted

---

126. *Id.* at 632.

127. *Id.* at 633.

128. *Peacock v. Shinn*, 533 S.E.2d 842 (N.C. Ct. App. 2000).

129. *Id.* at 845.

130. *Id.* at 847.

131. *Id.* at 847-48.

132. *Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200, 207 (N.C. 1989).

a license for legislators to appropriate money for any purpose they choose, provided some member of the public will benefit. Because the first prong of the *Madison Cablevision* test, as defined by the *Maready* majority, simply requires courts to look to whether a proposed expenditure falls within the range of things deemed public purposes in the past,<sup>133</sup> anyone utilizing the test is able to analogize any new expenditure to a previously sanctioned one. Moreover, if a direct analogy is unavailable, the ever-reliable argument “times are changing and the courts must adapt” has been repeatedly invoked.<sup>134</sup> The result is that the *Madison Cablevision* test is essentially a toothless one-part balancing test, where the courts must determine whether the benefits accruing to private interests from a government undertaking exceed those reaching the general public. In essence, this test requires the courts to second-guess the legislature’s policy decisions on a case-by-case basis and provides no real guidance as to what factors legislators should weigh before enacting a given piece of legislation to comply with the public purpose doctrine. The total lack of judicial oversight in this area endangers the rights of property owners to prevent politically powerful private parties from using government to not only take their property through the use of eminent domain, but also to use the public treasury to finance the redevelopment of that property.

## II. MANAGING THE PUBLIC PURPOSE DOCTRINE: A WORKABLE SOLUTION

### A. *Public Purpose: A Defining Moment*

While North Carolina’s public purpose doctrine has greatly evolved since its emergence in the nineteenth century, through all of these changes the doctrine was meant to serve as a clear restriction for lawmakers. Over time, however, courts have gradually loosened these restraints upon lawmakers to the point that today it appears the public purpose doctrine is more of a suggestion than a concrete rule.

The term “public purpose” can mean different things in different contexts. As established above, the courts have implicitly recognized that as government has continually grown and become increasingly intertwined in the state’s economic life and the lives of North Carolina citizens, not all government activities may qualify as public purposes in the traditional sense.<sup>135</sup> Government activities that are not public

---

133. *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 624 (N.C. 1996).

134. *See, e.g., Madison*, 386 S.E.2d at 210; *Kelo v. City of New London*, 125 S. Ct. 2655, 2665-66 (2005).

135. *See, e.g., In re Appeal of Univ. of North Carolina*, 268 S.E.2d 472, 479 (N.C. 1980) (recognizing that all state government property may not be used for traditional

purposes may further include those where citizens pay a user fee or otherwise absorb most or all of the total cost of the activity or service, often with insignificant subsidy from general tax revenues.<sup>136</sup>

However, most governmental activities must necessarily fall within the scope of those that are “public purposes.” Among these activities, the courts have determined at least two types exist: governmental functions and proprietary functions. Governmental functions encompass those activities or services traditionally paid for and used by everyone, such as roads, traffic lights, jails, and police.<sup>137</sup> Proprietary functions include all of those governmental undertakings denoted by statute as “public enterprises” and similar activities such as electrical service, generally paid for by those who use them but also subsidized in part with general tax revenues.<sup>138</sup>

Labeling proprietary functions “public purposes” is arguably a misnomer. Black’s Law Dictionary defines the word “public” as “[r]elating or belonging to an entire community, state, or nation” and “[o]pen or available for all to use, share, or enjoy.”<sup>139</sup> In fact, many proprietary services do not fit this definition at all. The electricity produced by a municipal electric service, for example, is available only to those who are within the service area and is available for use only insofar as those who use it pay for the amount they use.

By increasingly expanding the definition of public purpose to encompass these non-traditional governmental functions, a danger arises that courts and legislators could construe this label to mean these activities should be afforded the same protections and advantages as traditional public purposes, including the right to use eminent domain and taxpayer money to accomplish them. Urban redevelopment and economic development activities, which in some cases are

---

“governmental” purposes, but mandating that all such property is exempt from taxation by virtue of its ownership by the state).

136. See, e.g., *Sides v. Cabarrus Mem’l Hosp., Inc.*, 213 S.E.2d 297, 302 (N.C. 1975) (“Nonetheless, an analysis of the various activities that this Court has held to be proprietary in nature reveals that they involved a *monetary charge* of some type.” (citations omitted)).

137. See, e.g., *id.* at 303 (“Furthermore, it appears that all of the activities held to be governmental functions by this Court are those historically performed by government, and which are not ordinarily engaged in by private corporations.”).

138. See, e.g., *Pulliam v. City of Greensboro*, 407 S.E.2d 567, 569-70 (N.C. Ct. App. 1991) (“Thus it seems to be an accepted practice in North Carolina for cities and towns to compete with private enterprise by the ownership and operation of these public enterprises recognized by the General Assembly. Additionally, our courts have clearly stated that in setting rates for public enterprise services, municipalities act in a proprietary role.”).

139. BLACK’S LAW DICTIONARY 1264 (8th ed. 2004).

even designated by statute as public uses or public purposes,<sup>140</sup> fall into this category of non-traditional government functions.

In considering an appropriate definition of “public purpose,” which allows the term to serve as a useful restriction on governmental activity while still providing deference to legislative judgment, five principles originally set out by the courts in *Wood* and *Topeka* provide the best foundation. According to these two cases, a public purpose is a governmental expenditure or activity that is: (1) made for a public improvement or advantage;<sup>141</sup> (2) provided for and promoting the general good, convenience, and safety of the citizens;<sup>142</sup> (3) necessary to the support and for the proper use of government;<sup>143</sup> (4) consistent with the history and traditions of government;<sup>144</sup> and (5) the advantages of which need not reach every citizen to promote the general good.<sup>145</sup>

Of these five principles, the last presents the most difficulty in determining whether a government activity is for a public purpose. Neither the courts nor legislators can seem to reach a consensus as to exactly how much an activity can benefit a particular individual, corporation, or group before it falls outside the realm of a public purpose and becomes primarily for private gain. Additionally, it is not clear how small or narrow a category of citizens can be to reap the advantages of a given government activity for it to qualify as a public purpose. Any new definition of public purpose should address this problem and provide a clear balancing test to determine how much an activity can benefit a particular minority of citizens in comparison to the benefits derived by the general public before government should no longer perform it. In the meantime, it is up to the courts to apply a public purpose test stringently enough to safeguard private property and ensure that taxpayer funds are, in fact, used for the public good instead of private gain.

#### B. *The Test for Public Purpose*

As it now stands, the two-prong *Madison Cablevision* test is applied in nearly every case where the public purpose doctrine is at

---

140. See, e.g., N.C. GEN. STAT. § 160A-501 (2005) (“[Urban redevelopment activities] are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain.”).

141. *Wood v. Oxford*, 2 S.E. 653, 655 (N.C. 1887).

142. *Id.*

143. *Loan Ass’n v. Topeka*, 87 U.S. 655, 665 (1875).

144. *Id.*

145. *Wood*, 2 S.E. at 655.

issue, no matter what governmental activity is in question.<sup>146</sup> However, as established above, this test essentially amounts to nothing more than a balancing test requiring courts to decide whether a legislative body correctly decided that an activity benefited the general public more than some private party. Since this test appears solidly rooted in North Carolina jurisprudence and completely overhauling it would call for a significant departure from judicial precedent, courts should use a far greater level of scrutiny and make additional considerations when applying both prongs of the test.

In applying the first prong of the test, courts should seek to determine whether a reasonable connection with the convenience and necessity of a particular area exists by closely analyzing whether the governmental activity in question truly fits clearly within the history and traditions of government. If the activity does not fall clearly within these parameters, it should be struck down. Courts have been far too willing to expand the class of activities qualifying as public purposes in the name of “progress” or on the basis that “all the states are doing it.”<sup>147</sup> In determining the convenience and necessity of an activity, courts should heed the advice of the court in *Mitchell*: if eminent domain shouldn’t be used to accomplish it, the activity shouldn’t qualify as a public purpose.<sup>148</sup> When viewing the convenience and necessity of a government action in this context, it is likely many courts would hold the recent incentives packages granted to entice business to locate in the state not necessary.

In applying the second prong of the *Madison Cablevision* test, courts should adopt the *Wells* public-purpose test that looks to the end to be reached and the means to be used to accomplish a given activity.<sup>149</sup> If neither the means nor the end appears to benefit the public generally, the activity should be declared unconstitutional.

More importantly, however, this prong of the test turns on the balance between public and private benefits that result from a governmental undertaking. The *Maready* and *Urbine* courts seemed willing to simply eyeball this balancing test, assuming that economic develop-

---

146. See, e.g., *Piedmont Triad Airport Auth. v. Urbine*, 554 S.E.2d 331, 333 (N.C. 2001); *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 624 (N.C. 1996).

147. *Maready*, 467 S.E.2d at 633.

148. *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 159 S.E.2d 745, 760 (N.C. 1968) (“In passing upon the validity of an act, this Court must consider the consequences of its decision. Were we to hold that Authority serves a public purpose when it acquires a site, constructs a manufacturing plant, and leases it to a private enterprise, we would thereby authorize the legislature to give Authority the power to condemn private property for any project which it undertook.”).

149. *Wells v. Hous. Auth.*, 190 S.E. 692, 695 (N.C. 1938).

ment and job creation carried a far greater benefit to the public as a whole than to the individual companies who also profited from the government's actions in those cases. However, the *Maready* dissent used empirical data to reach the opposite conclusion.<sup>150</sup> Without the use of such empirical data to determine exactly how much of a benefit citizens actually receive from a governmental action, it seems courts are largely in the dark when attempting to apply this balancing test. Therefore, courts would be well advised to seek out empirical data when applying this prong of the *Madison Cablevision* test in future cases and require a clear benefit to the public before deciding an expenditure is for a public purpose. The courts should also revive the guidelines outlined by the *Nash* court requiring the benefits to taxpayers from a government expenditure not be merely "indirect" or "incidental."<sup>151</sup>

Finally, courts should apply a heightened level of scrutiny to any case where public funds or property acquired through eminent domain flow directly to a private party, especially when that party is politically influential. Such a scenario should serve as a warning sign to courts that the true intent behind a governmental activity may be to benefit a special interest, not the general public.

### C. *A Time for Action: The Kelo Wake-Up Call*

While *Wood* and *Topeka* provide a foundational basis for defining "public purpose," the legislature should formulate a more precise definition in accordance with the desires of North Carolina citizens. In formulating this definition, legislators should keep in mind the lessons learned from *Kelo*, and construct a framework for public purpose sufficiently narrow to protect private property rights but with enough leeway to allow government to perform its essential functions. Once that definition is established, it should be proposed as an amendment to the North Carolina Constitution to give courts clear guidance in deciding whether a government activity constitutes a public purpose to satisfy constitutional requirements. Such an amendment would not conflict with the edicts of the Supreme Court's holding in *Kelo*, as the Court clearly noted, "[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."<sup>152</sup> This amendment seems especially necessary in light of the North Carolina Supreme Court's rulings in *Mitchell* and *Maready*,

---

150. *Maready*, 467 S.E.2d at 631-35.

151. *Nash v. Town of Tarboro*, 42 S.E.2d 209, 214 (N.C. 1947).

152. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

which, taken together, appear to permit economic development as a justification for taking private property under the state's eminent domain laws.<sup>153</sup> Although *Urbine* is the only case to reach North Carolina's appellate courts in the past decade where a government entity has arguably used eminent domain to take private property from one private party for the benefit of another using economic development as a justification, it is not inconceivable government entities and the courts will be emboldened to allow such takings after *Kelo*. While outrage over the *Kelo* decision is still fresh in the public mind, those in positions of government authority, especially elected officials, are likely to tread lightly when dealing with issues of public purpose and in balancing the rights of private property owners with the government's interest in creating jobs and promoting economic development. However, as the memory of *Kelo* slowly fades, the seemingly endless erosion the public purpose doctrine has suffered at the hands of the courts and legislative bodies in North Carolina and throughout the nation is likely to continue. As financial incentive packages continue to grow, it seems there are very few limits as to what North Carolina governmental bodies will do to attract business to the state or a particular locality.

#### CONCLUSION

While the "public purpose" doctrine has been gradually eroded by the courts over the last several decades, there has never been a better time to reverse this trend. The nearly universal outrage brought on by the *Kelo* decision creates an unprecedented opportunity to address the problem of an ever-expanding judicial and legislative view of what constitutes a "public purpose."

With this issue now at the fore, members of the public have a clear idea of the real-life consequences the definition of this relatively abstract term can have on their individual rights. Specifically, *Kelo* demonstrated if the public purpose restrictions on eminent domain are applied with little fortitude by the courts, then politically powerful individuals can use the political process to subvert the property rights of citizens. Similarly, the recent rash of business incentives packages granted to entice business to locate in the state demonstrates the abil-

---

153. As discussed above, *Maready* established the principle that economic development in the form of financial incentives to private companies was a "public purpose" within the meaning of the North Carolina Constitution. Additionally, the *Mitchell* court held that once it is determined that a governmental expenditure is for a public purpose, government bodies in the state may use eminent domain to accomplish the purpose of the expenditure. See *supra* Part I.B.4.

ity of large corporations to wield power and influence to gain access to the public coffers, with little thought given by lawmakers as to how much the money they are granted will truly benefit the general public.

The North Carolina General Assembly should use this historic opportunity to revive the public purpose doctrine by clearly defining it and proposing a constitutional amendment containing this definition. If courts have clear guidance as to what activities qualify as a public purpose under North Carolina's constitution, outcomes like the *Kelo* decision will be avoided and citizens can rest assured their property will neither be taken nor taxed for anything other than a true public purpose.

*Michael McKnight*