Eminent Domain: In Theory – It Makes Good Cents

Benjamin A. Neil
Towson University

ABSTRACT

The underlying issue in eminent domain currently, is not only about development, but also governmental and institutional choices. The concept has sparked a lively and legitimate public debate. Kelo vs. New London has certainly brought public use of public property to the forefront. It also highlights the disproportionate affect on racial and ethnic minority groups. For all intents and purposes, Kelo appears to be a "game changer". In that the test now sets the standard of "public purpose" and not "public use".

Keywords: Eminent domain, Kelo vs. City of New London, government taking, public use, public purpose.

Beginnings

By definition, the concept of eminent domain is not new. It has existed since biblical times, when King Ahab of Samaria offered Naboth compensation for Naboth's vineyard. In 1789, France officially recognized a property owner's right to compensation for taken property, in the French Declaration of Rights of Man and of the Citizen, which reads, "Property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity."
In 1625, Hugo Grotius, the Dutch jurist credited with coining the phrase "eminent domain", described "extreme necessity" as one condition under which the State may alienate or destroy private property for a public purpose.[1]

American Application

Shortly after the French declaration, the United States acknowledged eminent domain in the Fifth Amendment to the Constitution, which states, "….nor shall private property be taken for public use, without just compensation." The Fifth Amendment requires that private property be taken only when three requirements are met. It must be taken (1) by a procedure that grants due process of law to those whose property is to be taken, (2) payment of just compensation must be made for that which is taken, and (3) it must be taken for a public purpose.[2]

The power of eminent domain was created to authorize the government or the condemning authority, called the condemnor, to conduct a compulsory sale of property for the common welfare, such as health or safety. Just compensation is required, in order to ease the financial burden incurred by the property owner for the benefit of the public.

Eminent domain represents one of the government's "most drastic non-penal incursions" into individual rights.[3] "It requires that [private] owners relinquish their property without their consent," pitting private interests against a public good.[4]

Application Expansion

Prior to the post-World War II era, the power of eminent domain had been limited to taking property for schools, roads and other unambiguous public uses. It had gradually expanded,

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[1] Nichols on Eminent Domain Section 1.12 [1] (Julius L. Sackman ed., 3d. ed. 2007).

[2] Geoffrey T. Stewart, et al, The Influence of Kelo v. City of New London, Connecticut on the Use of Eminent Domain in Place Marketing and Economic Development, The Marketing Management Journal, Volume 18, Issue 2, Pages 179-190 (2008).

[3] Zygmunt J.B. Plater & William Lund Norine, Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions, 16 B.C. Envtl. Aff. L. Rev. 551, 663-64 (1989).

[4] James W. Ely Jr., Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain. Prob & Prop., Nov-Dec. 2003, at 31.

but the Kelo decision marked the first time the U.S. Supreme Court approved eminent domain with the sole justification of economic development.[5]

In the wake of the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005), state legislatures, academics, and activists all expressed their concern for the status of property rights. In the face of the ever impending threat of the government's eminent domain power, Kelo seemed to stand for the sweeping proposition that private property could be condemned by a public entity whenever such an action was economically beneficial. A swell of statutes and scholarships quickly followed, suggesting that additional procedures should be put in place to curb potential governmental abuse of the taking power. On the legislative front, many states altered their eminent domain statutes or amended their constitutions to ensure that economic development could not serve as a legitimate basis for exercising the state's eminent domain power.[6]

Some commentators proposed that states impose additional transparency requirements to ensure that the processes used to determine whether to exercise the eminent domain power were open to the public.[7] Others suggested that local government actors voluntarily adopt rules to make the exercise of the eminent domain power procedurally more difficult.[8] Still others have argued that regardless of what level of government requires it, additional process is necessary so that the judiciary can provide a check on the use of eminent domain.[9]

At first glance, one would think that much reform of eminent domain has already been completed. Kelo v. New London, 545 U.S. 469 (2005) brought the topic of eminent domain generally, and of public use specifically, to the forefront of public consideration.[10] Quickly disseminated through mainstream media, Kelo allowed many lay people to learn about eminent domain for the first time.[11] Although the Kelo case relied upon fifty-year old precedent regarding

[5] Kmiec, D.W. (2007) Hitting home: the Supreme Court earns public notice opining on public use, Univ. of Penna. Journal of Constitutional Law, 9, pp.501-543.

[6] *See,* Amanda W. Goodin, Rejecting the Return to Blight in Post-Kelo State Legislation, 82 N.Y.U.L.Rev. 177, 195 (2007) (describing the passage of legislation in twenty-eight states by state legislatures circumscribing the government's ability to exercise its eminent domain power in the wake of *Kelo).*

[7] *See,* e.g. Patience A. Crowder, "Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making, 18 J. Affordable Housing & Community Dev. L. 113 (2008) (discussing transparency in making decisions about land use).

[8] *See,* e.g., Christopher Serkin, Local Property Law; Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883, 905 (2007) (outlining various proposals responding to the *Kelo* decision).

[9] *See,* Kristi M. Burkard, No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court decision in *Kelo v. City of New London,* 27 Hamline J. Pub. L. & Pol'y 115, 150 (2005); Nicole Steele Garnett, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101, 111 (2006).

[10] Steven J. Eagle. Does Blight Really Justify Condemnation? 29 URB. Law. 833,844 (2007).

[11] James W. Ely, Jr., Kelo: A Setback for Property Owners, 20 Prob & Prop. 14, 15 (2006).

public use and arguably did not change the law.[12] To most of the public, the decision was novel and shocking. Citizens viewed the policy as an unwarranted intrusion into cherished ownership rights.[13]

Although seizure methods, compensation amounts, and even the terms used to refer to eminent domain may vary, many governments have equivalent powers to eminent domain. For example, in India, the government granted itself wide authority to seize land for government purposes. In the United Kingdom, both England and Wales term the action "compulsory purchases", allowing the government seizure of property in exchange for compensation.[14]

Post Kelo Reaction

A 2006 article reported that approximately one-half of the states had enacted laws since Kelo that increase regulation of eminent domain takings in some fashion.[15] Meanwhile, a 2009 article reported that approximately 44 states had enacted post-Kelo reform laws limiting or suspending eminent domain takings for economic development endeavors. According to Somin's analysis, a majority (26) of these new laws are either "largely symbolic in nature" or are likely to be largely ineffective.[16]

The legislative momentum quickly slowed.[17] Many legislative endeavors were largely symbolic and did not affect real change. According to one analyst, at least sixteen of these state laws have created little meaningful protection for property owners against eminent domain.[18] These laws accomplish little, imposing minor procedural burdens on redevelopment officials or simply reaffirming the existence of vague terms such as "public use."[19] Subsequent research by another analyst chronicles similar ineffectual reform efforts.[20] Kelo-style public use has received modest pruning, but in the main, the deferential doctrine remains intact.

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[12] *See*, Corinne Calfee, Kelo v. City of New London. The More Things Stay the Same, the More They Change, 33 Ecology L. Q. 545, 567 (2006).

[13] *See,* Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo. 93 Minn. L. Rev. 2100, 2109 (2009) (Two national surveys conducted in the fall of 2005 revealed that 81% and 95% of respondents were opposed to the Kelo decision. Opposition crossed racial, ethnic, gender and political lines. Center for Economic and Civic Opinion 2005; Zogby International 2005).

[14] Michele M. Hoyman, "Not Imminent in My Domain!" County Leaders Attitudes toward Eminent Domain Decisions, Public Administration Review, November/December (2010) p. 886.

[15] Timothy Sandefur, The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform? (2006) Mich. St. L. Rev. 709, at 711-120.

[16] Somin, supra.

[17] *See,* Asmara Tekle Johnson, Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Organizations, 56 AM. U. L. REV. 455, 468-69 (2007).

[18] Sandefur, supra @ 727.

[19] Id.

[20] Somin, supra.

Professor David Dana, in his essay published in the Northwestern University Law Review, suggests that most post-Kelo reform efforts are seriously flawed because they tend to forbid the condemnation of the property of the wealthy and the middle class for "economic development," but allow the condemnation of land on which poor people live under the guise of all alleviating "blight".[21] This, he claims, results in reform laws that "privilege the stability of middle-class households relative to the stability of poor households" and "express the view that the interests and needs of poor households are relatively unimportant.[22] Historically, it has been too easy to characterize minority, elderly, or low-income communities as "blighted" for eminent domain purposes and subject them to the will of the government.

Government Focus

Municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas of low property values with those with higher property values.

When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area, This is borne out not only by common sense, but also be statistics: one study in the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling.[23]

A government's exercise of eminent domain can be an unjust and traumatic process that favors the wealthy and hurts the poor.[24] Because eminent domain takings incongruously fall on the poor, uneducated, or minorities who have difficulty competing in the political process, Kelo greatly impacted the ability of the weakest parts of society to keep their own homes free from the path of the bulldozer.[25]

It also disproportionately affects the minority groups.[26] A number of books chronicle the impact that insensitive municipal planners and overzealous planners have on the targets of eminent domain.[27] Kelo has only amplified this perception creating a backlash against land use

[21] David Dana,The Law of Expressive Meaning of Condemning the Poor after Kelo. 101 Nw. U.L.Rev. 365 (2007).

[22] Id @ 365.

[23] Herbert J. Gans, The Urban Villagers: Group and Class in the Life of Italian Americans, p. 380.

[24] *See,* Audrey G. McFarlane, The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power. 8 U. Pa, J. Const. L. 1, 38-51 (2006).

[25] Josh Blackman, Equal Protection from Eminent Domain: Protecting the Home of Olech's Class of One. Loyola Law Review, Vol 55, p. 697(2009).

[26] *See*, Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 6 (2003).

[27] *See,* Jean Boggio, Stolen Fields: A Story of Eminent Domain and the Death of the American Dream (2008); *See Also,* Steven Greenhut, Abuse of Power: How the Government Misuses Eminent Domain (2004); *See Also,* Carla T. Main, Bulldozed: "Kelo", Eminent Domain, and the American Lust for Land (2007).

controls and prompting a flurry of legislative activity.[28] Lastly, according to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore were African Americans.[29]

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles.[30] In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities.[31]

The expansion of eminent domain to allow the government or its designee to take the property simply by asserting that it can put the property to a higher use will systemically sanction transfers from those with fewer resources to those with more.[32] The vast disparities of African Americans or other racial or ethnic minorities that have been removed from their homes due to eminent domain actions are well documented.[33]

As Justice O'Connor stated in her dissent in Kelo, under the new construction of public use, "the specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[34]

Defying Logic

The notion that states would use eminent domain to take properties in stable neighborhoods populated by middle-class residents to some would seem to defy logic. Since contemporary eminent domain for private development is largely oriented towards improving the local tax-base, the most attractive way to do so is to remove the low tax-revenue yielding use and change it to a high tax-revenue one. Thus, the bigger difference in revenue yield provides a more attractive prospect for eminent domain. Removing minority residents in the process, who would tend to be poorer than whites, can then be said to be mere chance rather than design, and the social implications are rationalized away. Using this logic, it appears irrational to pursue areas inhabited by the middle class or the wealthy.[35]

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[28] Somin supra.

[29] Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities, p.29.

[30] Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It, p.17.

[31] Derek Werner: Note: The Public Use Clause, Common Sense and Takings, pp. 335-350 (2001).

[32] Hilary O. Shelton, NAACP Washington Bureau, before the House Energy & Commerce Committee, Subcommittee on Commerce, Trade and Consumer Protection, "Protecting Property Rights After Kelo", October 19, 2005.

[33] Shelton, supra.

[34] *Kelo v. City of New London*, 545 US 469, 503 (2005) (O'Connor, J., dissenting).

[35] Dick M. Carpenter and John K. Ross, Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?, Urban Studies Journal, (October, 2009)26 (11) 2447-2461 at 2451.

Kelo's silver lining has been that it transformed eminent domain from an arcane government power into a major concern for voters who suddenly wonder if their own homes are at risk. According to the Institute for Justice, which represented Susette Kelo, 43 states have since passed laws that place limits and safeguards on eminent domain, giving property owners greater security in their homes.

The laws generally fall into the following categories:

1). Restricting the use of eminent domain for economic development, enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes.)
2). Defining what constitutes public use
3). Establishing additional criteria for designated blighted areas subject to eminent domain.
4). Strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property.
5). Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.[36]

Changing Standards

State courts have also held local development projects to a higher standard than what prevailed against the condemned neighborhood in New London. If there is a lesson from Connecticut's misfortune, it is that economic development that relies on the strong arm of government will never be the kind to create sustainable growth.[37]

The underlying issue in eminent domain today is about not only economic development but institutional choice as well.[38] Courts struggle – or should struggle – "with the question of which institutions in our society should decide what the proper limits of eminent domain are."[39] As Justice Stevens stated, "the necessity and wisdom of using eminent domain to promote economic development are currently matters of legitimate public debate."[40]

Although the Kelo ruling created no new law, nearly all the state legislatures have since considered changing their eminent domain laws. However, these new eminent domain laws do not necessarily increase the protection of individual rights against economic development takings. The Supreme Court left much protection to the states' political systems, which are run by fallible policymakers subject to swells of public opinion and pressure by organized interests.

Since economic development takings are a form of wealth transfer that attracts political competition, rational policymakers balance competing interests according to their relative abilities to exert political pressure. Whether these state laws further restrict eminent domain, and in what manner, are empirical questions.[41]

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[36] National Conference of State Legislatures, 2010.

[37] The Wall Street Journal, Nov. 11, 2009, p. 20.

[38] Douglas W. Kmiec, (2006), Templeton Lecture: Eminent Domain Post-Kelo, 9 U. Pa. J. Const. L. 501, 527.

[39] Id.

[40] *Kelo v. City of New London*, 545 US 469, @ 489 (2005).

[41] Edward J. Lopez, R. Todd Jewell, Noel D. Campbell. Pass a Law, Any Law, Fast!: State Legislative Responses to the Kelo Backlash. Review of Law and Economics, (2009) Vol 5, Issue 1, pp 102-135.

Controversy revolving around eminent domain is as strong today as it was over 200 years ago – and for good reason. What is crucial now is to stop this slippery slope of abuse before it goes any further. Following the Kelo decision, a public outcry led dozens of state legislatures to draft bills that would further limit the ability of the state governments to appropriate private property.

In the first major eminent domain case after Kelo, Norwood v. Horney, 110 Ohio St. 3d, @ 363, the Ohio Supreme Court held that "the municipality could not take property for an economic development project. The Court also found that classifying an area as "deteriorating" does not justify condemnation.

On June 26, 2006, in response to Kelo, President Bush signed an executive order in which he limited the federal government's ability to seize private property for other than public use, such as a road or a hospital.

Broad Application of Power

Theoretically, eminent domain is a power available at all levels of government in the United States – including federal, state and local governments. However, on a federal level, since it is abundantly clear from the cases of Berman v. Parker, 348 US 26 (1954), Hawaii Housing Authority v. Midkiff, 467 US 229 (1984), and Kelo v City of New London, 545 US 469 (2005), that the Supreme Court will defer to the Congress to define "public use". Since it would appear from reading the Kelo decision that the Supreme Court now considers the test to be one of "public purpose" instead, and no longer one of "public use".

Ironically, the same U.S. Supreme Court which handed down Brown v. Board of Education, 347 U.S. 483 (1954), also issued Berman v. Parker, in which the Court allowed the District of Columbia to forcibly expel some 5,000 low income African-Americans from their homes in order to facilitate "urban renewal." It was Berman that enabled the massive urban renewal condemnations of later decades, which many critics dubbed "Negro removal" because they too tended to target African-Americans.[42]

Solving the dilemma

The Supreme Court has never fully defined the due process rights of a property owner faced with an eminent domain action undertaken by a government – local, state or federal – what little court precedent there is directly bearing on the subject of eminent domain and procedural rights serves only to confuse the issue.[43] And so it continues. In the end, this kind of economic development "has failed to produce the two most important goals of a proper eminent domain regime: efficiency and justice."[44]

[42] David Beito and Ilya Somin, Battle Over Eminent Domain is Another Civil Rights Issue, The Kansas City Star, April 27, 2008.

[43] D. Zachary Hudson, Eminent Domain Due Process, The Yale Law Journal, Vol. 119, @ 1286 (2010).

[44] Charles E. Cohen (2006) "Eminent Domain After *Kelo v. City of New London:* An Argument for Banning Economic Development Takings", Harvard Journal of Law and Public Policy (29) (2); p.497.

One possible resolution is for state legislatures to provide a certain and definite definition to the term eminent domain and the procedures involved in the "taking". As it appears that the standard established by the Supreme Court in Kelo is that of "public purpose" and not one of "public use". A reasonable course of action would be to return to the "governmental" process, as in the construction of public roads, schools and the like; thereby eliminating the more expansive application of "private economic development". Of course, this resolution is one that must, by necessity, be addressed by the Supreme Court.

Author's Biography

Benjamin A. Neil is an Associate Professor of Business Law and Legal Studies at Towson University, located in Baltimore, Maryland. He has published other works relating to real estate issues and has presented at numerous conferences.