

Lessons to Be Learned: The Abuse of Eminent Domain Power for Economic Development in Comparative Perspective

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Introduction

The United States Supreme Court's controversial ruling in the eminent domain case of *Kelo v. City of New London, Connecticut*,¹ ignited nationwide discourses on eminent domain. In a close 5-4 decision, the Supreme Court affirmed the government authority to condemn private property and transfer it to other private parties to promote "economic development."² The court's affirmative decision in allowing the City to strip the petitioner, Susette Kelo, of her home of decades for the development of a Pfizer plant stirred overwhelming widespread outrage and prompted federal and state legislative reactions.³ The startling yet sobering public outcry revealed the nub of the problem, as Professor Thomas W. Merrill testified to the Senate that "the American people believe that property rights are invested with moral significance."⁴

The right to private property is a central part of the American constitutional tradition. However, when people's constitutional property rights conflict with government authorities' and interests, the Court is restrained, if not reluctant, to enforce them.⁵ *Kelo v. City of New London* illustrates one dimension of such a legal controversy, whether "economic development" is a valid public use that satisfies the requirements of the Fifth Amendment Taking Clause. While the Court in *Kelo* affirms such claim, I disagree with its position -- private economic development cannot be the sole objective of eminent domain.

This paper explores the evolution of the economic development rationale in the context of eminent domain power, its rationale and problems, and potential solutions. Part II explores the origin and evolution of the Public Use clause in the Constitution and then focuses on two major Supreme Court decisions that paved the road for the contemporary economic development rationale for eminent domain. Part III examines the establishment of economic development

¹*Kelo v. City of New London*, 545 U.S. 469

² Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p. 2-3.

³ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 711

⁴ *The Kelo Decision: Investigating Takings of Homes and Other Private Property*, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 14 (2005)

⁵ Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p. 2.

rationale, from the state court precedent to the Supreme Court's decision in *Kelo*. Then it distinguishes *Kelo* from Supreme Court precedents and discusses the legislative backlash to highlight *Kelo*'s misuse of eminent domain power. Part IV explicates the inherent problems of using economic development to justify the private-to-private eminent domain. Finally, Part V draws on examples from other jurisdictions combating the issue of expropriation to shed light upon alternative solutions to the abuse of eminent domain power in the name of economic development.

The "Public Use" Limits on Eminent Domain

As one of the most intrusive inherent government powers,⁶ eminent domain is the government's authority to take a citizen's private property for public use without the owner's consent. Realizing that the right to property ownership is indispensable in securing individual's liberty and freedom, the framers of the Constitution placed two fundamental yet loosely defined restraints on the government's exercise of eminent domain, that the government may only take private property for public use, and must provide just compensation to the owner of the said property.⁷ Of the two restraints, the public use requirement has arguably posed a more significant challenge to the judicial system, because its elusive concept has dramatically changed since conception.

Historically, the concept of public use was construed narrowly, requiring that the taken land be for the use of only the general public, such as highways, bridges, and other public utilities.⁸ Many courts saw laws or acts which "took from A to give to B," as shown in *Kelo*, as the paradigmatic abuse of government power.⁹ However, beginning in the Progressive Era, intellectual leaders started to reevaluate the role of government, taking more initiatives to promote public welfare.¹⁰ The landmark case *Nebbia v. New York* reflects such an evolving attitude, upholding that states are free to adopt whatever policy that they deem reasonable for social welfare, establishing the "rational basis test."¹¹ Twenty years after *Nebbia*, as the Court imposed the rational basis test on eminent domain issues in *Berman v. Parker*,¹² the clear boundaries of public use began to erode, and courts gradually understand it more broadly, encompassing not only "for public use" but also "public purpose." Two cases in the Supreme

⁶ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 712

⁷ U.S. Constitution. Amend. V ("[N]or shall private property be taken for public use, without just compensation.").

⁸ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 176.

⁹ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 712

¹⁰ *Id.* at p. 716

¹¹ *Id.*

¹² *Id.*

Court reflect the evolution of the public use constraint and paved the way for economic development eminent domain: *Berman v. Parker*,¹³ *Hawaii Housing Authority v. Midkiff*.¹⁴

From “Public Use” to “Public Benefit”

The 1930s brought an upsurge in urban projects, designed to eliminate slums and blight, aided by legislative funding aid, such as the United States Housing Act of 1937.¹⁵ While some courts initially struck down government’s attempts to use eminent domain power to carry out urban renewal programs, the majority upheld such taking by adopting the “public purpose” approach to the public use rule.

Berman v. Parker

This frenzy of slum clearing set the stage for a new era of public use jurisprudence in the Supreme Court with its landmark decision in *Berman v. Parker*, in 1954. In this case, the Supreme Court unanimously upheld the District of Columbia’s authority to condemn private property and transfer it to other private parties for the purpose of removing plight and slums and revitalize inner-city neighborhoods.¹⁶ Adapting the rational basis test to the public use context, Justice Douglas holds the deference that “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”¹⁷ In *Berman*, the Congress had determined public needs that a large area of the city has fallen into the slum state, posing a pressing danger to the public health and safety.¹⁸ To remedy the problem, the Congress enacted District of Columbia Redevelopment Land Act of 1945. It authorized the city’s redevelopment agency to take the blighted properties and transfer them to a private developer, who would then revitalize this area by constructing and managing new commercial and residential complexes.¹⁹ The owner of a department store in that land sued, arguing that the property was transferred by the government to a private party.²⁰ Nonetheless, the Court deemed the government approach to be reasonable in furtherance of a proper legislative purpose of removing plight and rebuilding the city’s economy, thus constitutional.²¹

However, before asserting the rationality of the government action, the Court must establish that the transfer of private property to another private party with a public purpose is within the

¹³ *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁴ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁵ Cohen, Charles E. “Eminent Domain After *Kelo v. City of New London*: An Argument for Banning Economic Development Takings.” *Harvard Journal of Law & Public Policy*, vol. 29, no. 2, p. 510

¹⁶ *Berman v. Parker*, 348 U.S. 33-35 (1954).

¹⁷ Sandefur, Timothy. “The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform.” *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 716

¹⁸ *Berman v. Parker*, 348 U.S. 28 (1954).

¹⁹ *Id.* at 29-30.

²⁰ *Id.*

²¹ *Id.* at 33-35.

boundary of “public use.” While Congress declared that redevelopment of slums and blighted areas has public benefit,²² the word “use,” after all, is not synonymous with “purpose.” The Court then broadened the term “use.” Referring to several nineteenth-century cases involving railroads, where some courts allowed the government to take private properties and transfer them to private railroads corporations because railroads were essentially public utilities, the *Berman* Court thus upheld that “public use” and “public purpose” are equal.²³ However, while the previous courts limited eminent domain by requiring the government to manage the railroads, instead of the private corporations, the *Berman* Court disregarded such requirements and further showed deference to the legislative by leaving the determination of what acts benefit the public to the legislature’s discretion.²⁴

Hawaii Housing Authority v. Midkiff

Thirty years later, the Supreme Court reinforced its decision in *Berman* by unanimously upholding takings of property for public benefit against the argument that they are private takings. The setting for *Midkiff* was Hawaii, when, in the mid-1960s 94% of the privately owned land was owned by seventy-two citizens, while the governments owned 49%.²⁵ The Court endorsed the legislative’s claim that the unequal distribution of property is harmful to the local land market, inflating land prices and injuring the social welfare and stability.²⁶ The Hawaii legislature responded to the skewed land market by passing the Land Reform Act of 1967, under which the government agency could condemn the properties of large landowners and transfer to existing lessees.²⁷ Employing the rational basis test, the Court found that the government’s eminent domain condemnation is rationally related to the state’s conceivable public purpose to diminish land oligopoly, thus constitutional under *Berman* precedent.²⁸

Establishment of Private Economic Development Rationale: The Birth of Economic Development Doctrine in the States *Poletown Neighborhood Council v. City of Detroit*

In the interim between *Berman* and *Midkiff*, the Supreme Court of Michigan issued one of the most notorious public use decisions. In *Poletown Neighborhood Council v. City of Detroit*,²⁹ the

²² *Id.* at, 34

²³ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 718

²⁴ *Id.*

²⁵ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

²⁶ *Id.*

²⁷ *Id.* at 233.

²⁸ *Id.* at 241-242.

²⁹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)

rationale of government exercising its eminent domain for economic development took root. Suffering from financial distress and high unemployment, the City of Detroit tried to displace 3438 residents and 1176 structures in the Poletown neighborhood, condemning the land to make room for General Motors' (GM) new manufacturing factories.³⁰ Deferring to the government's view that GM plant's expected economic revitalization would generate public benefit during an economic recession, the Supreme Court of Michigan upheld that a public use existed under the Michigan Constitution.³¹ However, because, in this case, eminent domain exercised by the government will benefit specific and identifiable private interests, the court purported to inspect with heightened scrutiny whether the public benefit is the predominant interest over the "incidental" private gain.³² The court answered in affirmative that the projected benefit was "clear and significant."³³ Hence, the doctrine of economic development emerged: the government can legitimately take non-blighted properties if other economic stimuli were at stake.³⁴

The Aftermath and Reversal of *Poletown*

The *Poletown* decision sparked a new latitude of exploiting "public use" for economic development. In the 1980s, with *Poletown* decision specifically in mind, local condemnations with the asserted purpose of economic growth began to increase.³⁵ Consequently, litigations challenges to such eminent domain increased in tandem, where property owners charged that even under the expanded definition of public use, some particular projects could not pass.³⁶

In one of the earlier property-owner successes, in *County of Wayne v. Hathcock*,³⁷ 2004, the Michigan Supreme Court overruled *Poletown*, one of the most notorious cases in laws on eminent domain.³⁸ The case involved the condemnation of several homeowners' property for the construction of a 1,300-acre business and technology park.³⁹ Despite the economic prospect and relatively smaller costs for individual private property owners, compared to *Poletown*, the court declared *Poletown*'s interpretation of the state taking clause to be unconstitutional.⁴⁰ Recognizing that the county was motivated by the *Poletown*'s disregard for constitutional limits of its eminent domain power, the court established that the vague public benefit that would

³⁰ *Id.* at 465-470

³¹ *Id.* at 457-459.

³² *Id.* at 459.

³³ *Id.*

³⁴ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 190

³⁵ Meltz, Robert, American Law Division. *Condemnation of Private Property for Economic Development: Kelo v. City of New London*. Congressional Research Service. 2005. p. 3

³⁶ *Id.*

³⁷ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

³⁸ *Id.* at 769.

³⁹ *Id.* at 770.

⁴⁰ *Id.* at 786-787

result from the economic development project could not satisfy the constitutional public use requirement.⁴¹ All set the stage for *Kelo*.

The Supreme Court's Approval of Economic Development *Kelo v. City of New London*

Having lessened the constraint of Public Use limits on eminent domain power, the Supreme Court, as predicted, further affirmed the state's authority to condemn private property and transfer it to private developers to revitalize the local economy in *Kelo v. City of New London*.⁴² Desperate for economic revival, the City of New London was Susette Kelo's hometown, where she purchased a pink Victorian dream house in the Fort Trumbell neighborhood ten years before and had lived there ever since. To combat the city's economically distressed status, the local officials launched a series of attempts, including the creation of The New London Development Corporation (NLDC), to oversee the revitalization project.⁴³

In 1998, the city received the good news that Pfizer, an international pharmaceutical giant, planned to construct a \$300 million research facility on a New London site adjacent to Fort Trumbell.⁴⁴ Hoping the new plant would anchor the local economic redevelopment plan and capitalize Pfizer's potential new business, the city approved NLDC's municipal development plan (MDP) for the Fort Trumbell neighborhood and granted NLDC the power to acquire property within the development area through eminent domain.⁴⁵ Although the specifics of the plan were never articulated, as the NLDC never precisely defined the respective purposes of MDP's seven parcels, city officials still argued that the redevelopment project would benefit the public, thus constitutional.⁴⁶ Faced with the opposition from Susette Kelo, along with several other residents refusing to give up their homes, the NLDC initiated condemnation procedures merely because their properties, in no blighted condition, resided within the development area.⁴⁷

The Supreme Court upheld the constitutionality of the development plan in a close 5-4 decision. The majority adhered to the principle regarding public use established in case laws that public benefit falls within the interpretation of public use and took a deferential stance to the legislature's determination that MDP's plan served sufficient public purpose of economic rejuvenation.⁴⁸ Asserting that the promotion of economic development is a traditional and long accepted function of government, the majority rejected setting a bright-line rule that economic

⁴¹ *Id.*

⁴² *Kelo v. City of New London*, 545 U.S. 469

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

development does not constitute a valid public use.⁴⁹ However, the majority did find two conditions that would violate the public use requirement, that either the taking is to benefit private interests, or under the pretext of public purpose, such as economic growth, but conferring private interests.⁵⁰

In dissent, Justice O'Connor took a drastically different stance than her earlier authorship of the Court's opinion in *Midkiff*, arguably the most deferential of all the Court's public use decisions.⁵¹ Acknowledging the history of the Court's deferential attitude towards legislative determination as to what government actions benefit the public, Justice O'Connor insisted that some external judicial check is necessary for such decisions.⁵² Distinguishing from *Berman* or *Midkiff*, Justice O'Connor reasoned that, in *Kelo*, the condemnation itself did not directly benefit the public, but incidental to the private taking.⁵³ Furthermore, not only did Justice O'Connor, along with other dissenting judges, strive to invalidate New London takings but would have categorically forbidden all private-to-private condemnations for economic development.⁵⁴ The problem with economic development condemnations, she argued, is that private benefits and public interests are mutually reinforcing.⁵⁵ Therefore, it is extremely challenging to isolate an intent to benefit the public from one that advances private interests,⁵⁶ thus foreclosing the possibility of any meaningful limits on the scope of eminent domain power.

Differences from *Berman* and *Midkiff*

In light of the Court's prior holdings in *Berman* and *Midkiff*, both the majority and dissenting opinions referenced to these landmark cases for interpreting the Public Use Clause in *Kelo*. The Court's majority gutted the constitutional significance of public use constraint, arguing that there was no principled difference between economic development and other public purposes that the Court had recognized before, such as slums and blight elimination in *Berman* and elimination of land oligopoly in *Midkiff*.⁵⁷ Consequently, there was no reason to treat *Kelo* differently from the previous unanimously ruled cases.⁵⁸ That conclusion, however, was arbitrary and misguided. As the dissent explicated, the majority effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."⁵⁹ The private economic

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p. 127

⁵² *Kelo v. City of New London*, 545 U.S. 469, at 2673

⁵³ *Id.* at 2675.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 2665-2666.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2671.

domain is distinguishable from how the Court had defined and interpreted public use in the past, even under the broad terms in *Berman* and *Midkiff*.

The first distinction between economic development eminent domain and others with public purpose is whether the source from which the public benefit flows is the condemnation itself. Traditionally, private property taken by the government is put into public use or government ownership, directly generating an immediate public benefit.⁶⁰ Even in *Berman* and *Midkiff*, when the Court broadened term public use to permit private-to-private ownership transfer, the condemnation itself directly resulted in public benefits.⁶¹ In her dissenting opinion, Justice O'Connor framed such a distinction with the term "affirmative harm."⁶² In *Berman*, the slums and blighted properties in Washington, D.C., had already inflicted affirmative harm on society.⁶³ The condemnation itself, regardless of further actions by government or private parties, immediately rid the public safety hazard and promote public welfare.⁶⁴ Similarly, the oligopoly of land ownership had skewed the land market and inflated prices in *Midkiff*, resulting in an extreme wealth gap and affirmative harm.⁶⁵ Therefore, the very act of transferring the condemned property from wealthy landowners to the lessees terminated the harmful pre-condemnation property use.⁶⁶ Condemnations for economic development, however, do not themselves benefit the public, which will accrue only after the private party has put the property into use and capitalize on its business.⁶⁷ In *Kelo*, Justice O'Connor observed that the City of New London did not categorize Kelo's home as the source of any social harm.⁶⁸ Hence, the taking will not achieve any public purpose but serve as a stepping stone to the realization of anticipated public benefit, during which the private party is the primary beneficiary.⁶⁹

The second distinction concerns the "trickle-down" benefits of condemnations for economic development. While the Court had established in previous cases that a government's pursuit of public interests might benefit private parties, such as, in *Midkiff*, the lessees gained secure property ownership in the city's effort to eliminate land oligopoly, the realization of public

⁶⁰ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 204

⁶¹ *Id.*

⁶² *Kelo v. City of New London*, 545 U.S. 469, at 2674.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 206

⁶⁸ *Kelo v. City of New London*, 545 U.S. 469, at 2675.

⁶⁹ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 207

benefit was dependent on government action instead of the subsequent private use.⁷⁰ On the contrary, in economic development eminent domain, the private party determines if and when the public benefit will accrue.⁷¹ Justice O'Connor voiced her concern in *Kelo* dissent, describing the public benefit accruing from private gains as a secondary, incidental, and mere positive side-effect of the private profit,⁷² at the expense of individuals' constitutional right to private property.

The third distinction stems from the diminishing effects of the taking itself on the realization of public use, meaning that there is no guarantee that anticipated economic development and corresponding public benefits will ever materialize.⁷³ Neglecting the volatile nature of economic development, the *Kelo* appeal court focused only on its purported purpose.⁷⁴ In reality, however, the prospect, let alone the actual achievement, could drastically deviate from the proffered purpose, as the development projects often involve unpredictable financial markets and uncertain competitive factors.⁷⁵ The reversal of the *Poletown* attests to such uncertainty - although GM projected its plant would provide over 6000 jobs, the plant, at the height of its operation, only employed fewer than 3000 employees.⁷⁶ Furthermore, when the city permits a development project without any definitive plans of the condemned land, the uncertainty increases. In *Kelo*, the development plan firstly never specified the use of parcel 4A, in which several petitioners lived, besides a vague definition of "park support."⁷⁷ Secondly, at the time of condemnation, the NLDC had not signed an agreement with the developer officially.⁷⁸ Without a specific plan or signed agreement to guarantee, or predict the least, potential public benefit, the economic development rationale for eminent domain can hardly satisfy the public use requirement in the Fifth Amendment.

The Kelo Backlash

While most Supreme Court decisions get little public attention, *Kelo* stood out as the exception, generating more public attention than all but a handful of other Supreme Court rulings.⁷⁹ The negative, if not hostile, public reactions resulted in significant gains for property rights

⁷⁰ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

⁷¹ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 208

⁷² *Kelo v. City of New London*, 545 U.S. 469, at 2675.

⁷³ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 209

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p.

advocates and led to more new state legislation than any other Supreme Court decision ever did.⁸⁰ Forty-five states have enacted reforms laws in response to the *Kelo* decision expanding the eminent domain power, seeking to change the preexisting status quo.⁸¹ While the political backlash failed to provide the same level of protection for property owners as a judicial ban would, it is crucial to recognize that many states have enacted strong post-*Kelo* reform laws, which substantially strengthened protection for property rights than had existed before *Kelo*.⁸²

The Public Reaction

The public reaction to *Kelo* decision was fierce and swift, with both state-level and national polls indicating overwhelming public opposition.⁸³ Such condemnation cut across gender, racial, ethnic, and partisan lines. The U.S. House of Representatives immediately passed a Condemnation and resolution denouncing *Kelo*.⁸⁴ Many political elites and activists joined forces, some of which testified against the Court's decision in the United States Senate Judiciary Committee hearing on the ruling.⁸⁵ Public opinion, shown in two national surveys, reflected the opposition running deep and broad.⁸⁶ The near-consensus leads one to anticipate that the state and federal legislation would soon follow suit to abolish, or at least limit, economic development eminent domain.⁸⁷

The State Response

Acknowledging that condemnations may entail great hardship, Justice Stevens, in his majority opinion in *Kelo*, emphasized that states were free to impose more significant limitations on eminent domain power.⁸⁸ A total of forty-five states welcomed the invitation and enacted post-*Kelo* eminent domain reform laws.⁸⁹ Despite the numbers, many of them are mostly symbolic and ineffective, providing little or no protection for private property owners.⁹⁰ On the other hand, laws enacted by some states legislature did impose significant limits on eminent

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 726

⁸⁴ Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p. 135

⁸⁵ *Id.*

⁸⁶ *Id.* at 136.

⁸⁷ *Id.* at 141.

⁸⁸ Sandefur, Timothy. "The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform." *Michigan State Law Review*, vol. 2006, no. 3, Fall 2006, p. 726

⁸⁹ Somin, Ilya, *The Grasping Hand: Kelo V. City of New London and the Limits of Eminent Domain*, p. 141

⁹⁰ *Id.*

domain.⁹¹ For example, both Pennsylvania and Minnesota passed laws forbidding economic development eminent domain and restricting the definition of blight.⁹² Notably, fourteen states stood out by enacting reforms by popular referendum.⁹³ As citizen-initiated referendum initiatives have led to stronger laws protecting property rights, nine of those provide property owners significant protection against economic-development eminent domain beyond the existing laws.⁹⁴ Analyzing the mixed results of state reforms, Timothy Sandefur observes the two obstacles faced by property rights advocates: the political influence of powerful developers and redevelopment proponents, and the lack of philosophical foundation and support in opposition to *Kelo* decisions.

The Federal Response

Compared with the far more extensive state-level reforms, the federal efforts are notable for their modest effects and minimalistic nature.⁹⁵ On November 3, 2005, the U.S. House of Representatives passed the Private Property Rights Protection Act of 2005 (PRPA) by an overwhelming margin of 376 to 38.⁹⁶ As the most significant federal reform effort, PRPA failed to pass the Senate, despite repeatedly getting through the House in 2012, 2014,⁹⁷ and 2018.⁹⁸ When the Senate Judiciary Committee rejected its passage in 2018, the committee argued that PRPA's heavy-handed approach to preventing economic development eminent domain punishes faultless communities, while failing to protect individual property owners adequately.⁹⁹ Furthermore, in light of over 40 states' active legislative responses to *Kelo*, the committee purported that the Congress should not substitute its judgment for that of the individual state, therefore opposing PRPA.¹⁰⁰

The Problems of Economic Development Rationale

Blurring the boundaries between public use and private benefits, eminent domain for economic development raises concerns about the abuse of government power to advance private interests at the expense of individual rights and the public good. In addition to the potential misuse of

⁹¹ *Id.* at 155

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 160.

⁹⁶ *Id.* at 161.

⁹⁷ *Id.*

⁹⁸ *Private Property Rights Protection Act of 2017 Report Together with Dissenting Views (to Accompany H.r. 1689) (including Cost Estimate of the Congressional Budget Office)*. 2018

⁹⁹ *Id.* at 22.

¹⁰⁰ *Id.* at 23.

local government's police power, the economic development rationale is riddled with other problems that would compromise the institution of private property ownership.¹⁰¹

The first inherent problem stems from the fact that the concept of public use has so broadened that it could not stand as a barrier against the capture of eminent domain power by private interest groups.¹⁰² The “interest group capture” describes the phenomenon that individuals will use the public policy process to gain benefits from the government at a lower cost than they would receive under fair market competition.¹⁰³ When the municipalities invoke eminent domain power, land acquisition is usually less costly and more efficiently.¹⁰⁴ Then the interest groups will have little incentive to negotiate with the property owners as they would in fair market situation.¹⁰⁵ The economic development eminent domain, therefore, would have damaging effects on the small private property owners in their negotiation with influential developers.

The interest group capture phenomenon gives rise to the second problem that state and local governments may have incentives to sell their eminent domain power to the extent that the private interests trump public benefits as the primary objective.¹⁰⁶ Especially when desperate for an economic boost, the municipalities may utilize eminent domain power as a “recruiting tool” or competitive advantage to attract large developers or tax- and job-generating corporations by promising them site condemnation for their projects.¹⁰⁷ The *Poletown* case attests to the government’s willingness to abuse its condemnation power to meet the developer’s demands.¹⁰⁸ After GM offered to build a new facility in the city as long as they could find a suitable site, the municipality allowed GM to conceive the project, select pick the site, and even make other demands for tax reductions and infrastructure upgrades.¹⁰⁹ Finally, the city turned over the site to GM for \$8 million, while the projected public cost was \$200 million.¹¹⁰

One of the most troublesome aspects of eminent domain power is that the government deprives on an asymmetrical basis, leaving a particular property owner to bear the large personal cost for the sake of the community benefit.¹¹¹ When economic development is the driving force, and the accrued social benefit become indirect and uncertain, such asymmetry is

¹⁰¹ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 212

¹⁰² *Id.* at 213.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 218

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 220

further amplified, unfairly burdening the low-income residents and low-tax business while serving the development firms and large corporations.¹¹² Such practice is inconsistent with the letter and spirit of the Constitution and the institution of private ownership, which aims to secure to every man whatever is his own.¹¹³

Under the theory of *Kelo*, as Justice O'Connor warned, nearly all property is at the risk of condemnation.¹¹⁴ The permissibility of the economic development rationale diminishes the security of private ownership. Furthermore, as the government retains the authority to determine whether a different use will create more substantial public use than its current one, no property, however valuable to its owner, is immune from the government's takings for a higher purpose.¹¹⁵

Proposed Solutions to Eminent Domain Abuse Under Economic Development

While many commentators have proposed that a categorical prohibition on the economic development rationale for eminent domain is the best solution to prevent its abuse, an arbitrary ban would also prevent many transactions in public interests and force developers to seek other loopholes.¹¹⁶ As the dilemma between private property rights and economic development is not exclusive to the US context, comparative analysis across different countries may shed light on some potential solutions available to American society after *Kelo*.

Germany: Public Purpose and Proportionality Tests

Similar to the United States, in Germany, property rights and the government's right to expropriate are based in Article 14 of the Basic Law (*Grundgesetz*), and such expropriation, stated in Section 3, shall only be permissible for the public good.¹¹⁷ What distinguishes Germany from U.S. constitutional property scheme is that property, in *Grundgesetz*, entails obligations, and, therefore, its use shall serve the public purpose.¹¹⁸ However, recognizing various property interests as constitutionally protected rights, the Federal Constitution Court in Germany takes complete discretion over the definition of property from the legislature.¹¹⁹

¹¹² *Id.*

¹¹³ *Id.* at 222

¹¹⁴ *Kelo v. City of New London*, 545 U.S. 469, at 2677

¹¹⁵ Fuhrmeister, Ashley J. "In the Name of Economic Development: Reviving Public Use as a Limitation on the Eminent Domain Power in the Wake of *Kelo v. City of New London*." *Drake Law Review*, vol. 54, no. 1, 2005, p. 223.

¹¹⁶ Caylor, Matthew P. "Eminent Domain and Economic Development: The Protection of Property Four Ways." *Arizona Journal of International and Comparative Law*, vol. 36, no. 2, 2019, p. 170

¹¹⁷ *Id.* at 175

¹¹⁸ *Id.* at 176

¹¹⁹ *Id.* at 175

The Basic Law states that taking must meet two broad public interest criteria: the principles of public purpose and proportionality.¹²⁰ Firstly, only serious public purposes are valid, and, if the state transfers the expropriated property to a private party, the state must show that the private party is committed to the public purpose, either by contracting or taking collaterals.¹²¹ Unlike the US, however, takings for purely financial reasons, such as increasing tax revenue, are not constitutionally permitted in Germany.¹²² Furthermore, as the Basic Law requires every expropriation to fall under a federal or state statute that authorizes takings for that purpose, no state law has ever allowed expropriation for job creation, thus preventing the state government from abusing its power.¹²³

Secondly, the expropriation must adhere to the German Basic Law legal principle of proportionality.¹²⁴ An uncodified legal construct, the principle of proportionality, in the context of eminent domain, requires that taking is the mildest possible, yet necessary, infringement on a right, and that the government can only take as much property as the project needs.¹²⁵ Furthermore, the proportionality test requires that the net public benefit generated in the expropriation outweighs the owner's private interest in the property.¹²⁶

Japan: Land Readjustment as Alternative to Expropriation

As eminent domain brings constant tensions between private property rights and public purpose, one tool could be particularly useful in the US context: land readjustment.¹²⁷ It consists of pooling all land parcels within a designated area, joint planning for servicing the land, and redistributing the land parcels orderly for public improvements.¹²⁸ Widely used in many countries, land readjustment mainly addresses three challenges: a disorderly plot pattern, insufficient public space, and lack of funding or ability to expropriate private land for public use.¹²⁹ Additionally, through the creation and sale of extra land parcels, land readjustment can raise funds, thus allowing neighborhood upgrade to be self-financing.¹³⁰

Arguably the leading example of land readjustment scheme in Asia, Japan has one of the most participatory land readjustment processes in the world, used in over 50% of all new

¹²⁰ *Id.* at 177

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 178.

¹²⁷ Lai, Lawrence , "The United States' Experience With Expropriation and The Lessons Yet To Be Learned," in *Routledge Handbook of Contemporary Issues in Expropriation* ed. Frances Plimmer and William McCluskey (Abingdon: Routledge, 03 Oct 2018), p. 427.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

development areas.¹³¹ Projects in Japan have a wide range of executors, from individuals, landowner associations, and housing and town corporations, to local governments and government agencies.¹³² As land readjustment project usually requires a minimum number of participating landowners' approval, in Japan, the two-thirds of owners and leaseholders must agree on the plan if initiated by the private sector.¹³³

To develop a successful land readjustment, the government ought to establish the following primary conditions. Firstly, the legislature must construct a legal framework and articulate at the state level, specifying what options exist if the landowner resists providing the land parcel, as well as the entities, purposes, and timeframes permissible to initiate land readjustment projects.¹³⁴ Secondly, the sharing of costs and benefits between the public body and landowners should be transparent and specified throughout the development timeline, from initial pooling to final redistribution.¹³⁵ While the municipality and the landowners do not have to share costs and benefits equally, the distribution should reflect their respective contributions.¹³⁶

Conclusion

In the decision of *Kelo v. City of New London*, the Supreme Court had stretched the concept of public use far beyond its constitutionality, to encompass the economic development rationale. Though the Court's decisions in *Berman* and *Midkiff* expanded the scope of public use and paved the way for *Kelo*, eminent domain for the purpose of economic development is distinctly separate from these two precedents, regarding the sources of public benefit, its dependence on private profits, and its uncertainty of economic prospect. All the differences point to the fact that eminent domain, under the guise of economic development, prominently benefits the private parties, thus rendering the Public Use doctrine in the Constitution nugatory. The striking public reaction against the *Kelo* decision further highlights the legislative resistance against the misuse of eminent domain power. Besides its unconstitutionality, the economic development rationale has various problems that also compromise the institution of private ownership in American society. As the inherent conflict of interests between the private property rights and the government's eminent domain authority is not exclusive to the US context, comparative analysis across various nations may provide valuable lessons. Germany has approached the problem by allowing more judicial scrutiny in the process of expropriation and imposing strict limitations on the beneficiaries. Japan, along with various countries in the world, has adopted the land readjustment to avoid the complications in expropriation while achieving needed public use for private land. The states in the United States would do well to learn from the numerous strategies to protect private ownership while advancing urban development.

¹³¹ *Id.* at 428.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 429.

¹³⁵ *Id.*

¹³⁶ *Id.*

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