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The Myth That *Kelo* Has Expanded the Scope of Eminent Domain

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In the wake of the Supreme Court's June 23, 2005, decision in *Kelo v. City of New London*, some have contended that the Court's decision expanded government authority to condemn private property for economic development. For example, a story in *The Washington Post* states, "The ruling greatly broadened the types of projects for which government may seize property to include not only bridges and highways but also slum clearance and land redistribution." The idea that *Kelo* expanded the law of eminent domain is simply *incorrect*.

I. The Law Before *Kelo*

In the modern era prior to *Kelo*, there were basically four Supreme Court cases dealing with the use of eminent domain for economic development. In each of these cases the Court, applying a deferential standard, upheld the use of eminent domain because the taking was found to serve a legitimate public purpose and the owner received just financial compensation.

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), involved an Interstate Commerce Commission order requiring one railroad to transfer a rail line to a second railroad. The ICC issued the order because the first railroad had neglected to maintain a portion of the line which carries the Amtrak "Montrealer" through New England, and it believed the second railroad would do a better job of maintaining the line. The Court unanimously rejected the first railroad's objection that the taking was not for a public use because the use of the rail line would not physically change. The Court said it could not "strike down a condemnation... so long as the taking is rationally related to a conceivable public purpose." In this case, Justice Kennedy said, "there can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution...."

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Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), involved a challenge to a Hawaii statute designed to deal with the problem that a very few owners held most of the private land in the state. The statute required owners of large holdings, under certain conditions, to sell residential lots to individual citizens so that they could own their own homes. The unanimous Court, in an opinion by Justice O'Connor, recognized that the Constitution does not permit a compensated taking "for no reason other than to confer a private benefit on a particular private party." However, the Court said it had an obligation to uphold the use of eminent domain where it is "rationally related to a conceivable public purpose." Under that standard, Justice O'Connor concluded that the Hawaii statute was constitutional. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), involved a takings challenge to the Federal Insecticide, Fungicide, and Rodenticide Act. The Act authorizes the Environmental Protection Act to rely on trade secret data submitted by a prior pesticide applicant in considering the application of a subsequent applicant, subject to payment of compensation to the first applicant. While it acknowledged that subsequent applicants permitted to exploit confidential business information in this fashion were the "most direct beneficiaries," the Court had no difficulty concluding that this use of the eminent domain power served a public use.

Finally, Berman v. Parker, 348 U.S. 26 (1954), involved a major urban redevelopment project in southwest Washington, D.C. that displaced numerous homeowners, renters, and small businesses. The owner of a non-blighted department store in the redevelopment area challenged the taking as not being for a public use. The Court unanimously rejected the challenge, reasoning that the eminent domain power can be exercised to achieve any legitimate legislative objective. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.... This principal admits of no exception merely because the power of eminent domain is involved." The Court also rejected the argument that eminent domain can only be used to eliminate "slum" properties. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

These modern decisions are consistent with a long line of Court decisions stretching back to the 19th century. Indeed, if anything, the older decisions even more emphatically uphold the power of government to take and retransfer property, upon payment of just compensation, in order to promote economic development. To cite a few examples, in Head v. Amoskeag Manufacturing Co., 113 U.S. 9 (1885), the Court authorized a manufacturing company to build a mill pond that flooded upstream landowners so that it could produce hydropower to drive a manufacturing facility. In Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527 (1906), the Court approved condemnation of a right of way over private property so that a private mining company could operate an aerial bucket line to its mine. And in Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896), the Court upheld condemnation so an irrigation district could build an irrigation ditch across neighboring private property.

II. The Law After Kelo

In light of the state of the law prior to Kelo, it is incorrect to suggest that Kelo broke new ground and expanded government's power of eminent domain. If anything, Kelo moved the law in the direction of *more* restrictions, not fewer restrictions, on the use of eminent domain for economic development.

The Court affirmed a decision by the Connecticut Supreme Court upholding use of eminent domain to assemble over 100 separate parcels within a 90-acre area characterized by high vacancy rates, significant disinvestment and neglect. The City of New London has lost a substantial portion of its population and suffers an unemployment rate twice the state average. Seeking to take advantage of the economic spark generated by the decision of the Pfizer company to construct a major new facility on an adjacent site, the city sought to implement a comprehensive redevelopment of the area for residential, commercial, office, and recreational purposes.

The Court said that New London's redevelopment plan easily met the public use test. "It would be incongruous," the Court said, "to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of... [the] other interests" endorsed in prior cases. Applying its deferential standard for local legislative judgments about how and when to deploy the eminent domain power, the Court also rejected plaintiffs' novel argument that it should demand a "reasonable certainty" that the redevelopment program would actually succeed.

Significantly, none of the dissenters in Kelo made a strong argument that the majority opinion departed from longstanding precedent. Justice O'Connor acknowledged that her position was inconsistent with the language, if not the specific holdings, of Berman and Midkiff. She suggested that those decisions could be distinguished on the ground that eminent domain had been used to address an "extraordinary, precondemnation condition of the targeted property [that] inflicted affirmative harm on society." But, in reality, nothing in the analysis or facts of those cases – much less the full body of relevant Supreme Court precedent – supports a sharp distinction between harm-preventing and benefit-conferring government action. Furthermore, as Justice Scalia observed in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), this difference is often "in the eye of the beholder," making it a weak potential basis for distinguishing action that serves a legitimate public use.

Justice Thomas argued, based on the language and original understanding of the phrase public use, that eminent domain should be used only when the public will own the property or have a legal right to use it. But this constitutional analysis is fundamentally flawed. Dictionaries (modern and old) include public "advantage" among the definitions of public use, meaning that actions which serve a legitimate public purpose fit comfortably within the language "taking for a public use." Moreover, other scholarly examinations of the constitutional history indicate the drafters intended the phrase "public use" to impose few, if any, constraints on the eminent domain power. See, e.g., Mathew P. Harrington, "'Public Use'" and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245 (2002). Justice Thomas acknowledged that his position required overruling over a century of Supreme Court precedent. This candid statement confirms that Kelo does not expand the eminent domain power.

Even as it followed well-settled precedent in Kelo, the Court placed new limits on the use of eminent domain for economic development purposes. First, the Court emphasized that New London was seeking to implement a “carefully considered development plan” for the area based on “thorough deliberation,” including several public hearings and explicit approvals by the city council. The Court indicated that while it approved this type of carefully considered redevelopment program, it would not necessarily uphold “a one-to-one transfer of property, executed outside the confines of an integrated development plan.” The Court’s virtual mandate that future exercises of eminent domain proceed in accord with a comprehensive, carefully considered plan represents an important new limit on the eminent domain power.

Second, the Court strongly suggested that it is critical that the developer chosen to implement the development be bound to carry out the redevelopment and serve as the public’s agent. Opponents of redevelopment projects sometimes suggest that property is being turned over to private developers without strings, with the public benefitting solely through enhanced tax revenues and a general increase in economic activity. In fact, in Kelo the city will retain title to the property and lease the property to the redeveloper on a long-term basis. An enforceable agreement binds the developer to provide specific facilities and services in accord with the city’s plan. Public welfare and private profit are no doubt inextricably linked – as in any effective public/private partnership – but there is no question that firm controls are in place to ensure the public interest will be protected.¹

Finally, the limits placed on the eminent domain power in Kelo are underscored by Justice Kennedy’s concurring opinion. Because his fifth vote was necessary to make a majority in Kelo, Kennedy’s concurring opinion is likely to be especially influential in determining how courts interpret and local jurisdictions apply the decision. Although the judicial standard is deferential, Justice Kennedy said, courts should review exercises of eminent domain using a “meaningful” rational basis standard. He also echoed the concerns about one-to-one transfers, stating that there might be categories of eminent domain in which “a presumption (rebuttable or otherwise) of invalidity” might be warranted. He identified a set of factors that justified upholding use of eminent domain in this case, suggesting that the absence of these factors might lead to a different outcome in another case. These factors included that “[t]his taking occurred in the context of a comprehensive development plan,” the plan was meant to address “a serious city-wide depression,” the “economic benefits of the project cannot be characterized as *de minimis*,” the identities of project beneficiaries “were unknown at the time the city formulated its plans,” and the city followed various “procedural requirements” that facilitated review of the project’s *bona fides*.

In sum, while Kelo, in line with prior precedent, upheld the city’s use of eminent domain for economic development purposes, the decision represents a change in the direction of less, not more, deferential judicial examination of the use of the eminent domain by state and local governments.

¹ The Court also suggested in a footnote that the traditional measure of just compensation, based on fair market value, might not be an appropriate measure of compensation when government takes private property for economic development purposes. The Court said that this issue, while “important,” was not raised by the Kelo litigation.