

CASE COMMENT

Is Our Property Safe? The Effect of *Kelo v. City of New London, Connecticut* on Eminent Domain in California

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Introduction

The Takings Clause of the Fifth Amendment guarantees that governments shall not take private property for public use, without just compensation.¹ The United States Supreme Court decision *Kelo v. City of New London*² dealt with the broad and ever-changing notion of what exactly constitutes a “public use” within the context of the Takings Clause. *Kelo* held that a local government body, or its agent, can use eminent domain to take private property for a “private use,” so long as the taking is justified by being a part of a larger economic development plan that helps or benefits the community. To the non-lawyer, the decision could be seen as a license for state and local governments to take private property and give it to a private enterprise, so long as the latter would use the property more productively. However, *Kelo* did no such thing. It can be argued that *Kelo* did little more than clarify existing law. Indeed, the Supreme Court has upheld takings of land from one private owner to another long before the *Kelo* decision ever came down.³

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1. United States Constitution, Fifth Amendment.

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

3. In *Berman v. Parker* 75 S. Ct. 98 (1954), the United States Supreme Court allowed the National Capital Planning Commission of the District of Columbia, to condemn a non-blighted department store as part of a broader redevelopment scheme. In *Hawaii Housing Authority v. Midkiff* 104 S. Ct. 2321 (1984) where the United States Supreme Court upheld the Land Reform Act of 1967, a land condemnation scheme enacted by the Hawaiian Legislature, whereby title in real property was taken from lessors and transferred to lessees in order to reduce the concentration of land ownership in Hawaii.

Public Use versus Public Purpose

Traditional ideas of “public use” within the context of the Takings Clause include roads, hospitals, military bases, railroads, parks and stadiums.⁴ From these traditional notions, one is likely to assume that in order to fulfill a “public use,” property must actually be *available* for use by the public. Historically, that was indeed a requirement.⁵ However, the definition of “public use” has been relaxed considerably over the years.⁶ Modernly, under the “public purpose” doctrine, so long as the property is destined to serve an overall public purpose, actual ownership or use of the property is of little consequence.⁷

In determining what qualifies as a valid “public purpose”, courts have given wide deference to the Legislature.⁸ This is because the legislature, by way of its broad police powers, are in the unique position of knowing how best to benefit their own communities.⁹

The removal of blight has long been considered a valid public purpose, allowing governments to exercise their eminent domain powers to clean up and redevelop the slums of their cities.¹⁰ Over time, governments have managed to stretch their arms beyond property that is actually blighted and take property considered part of a “blighted area” for purposes of redevelopment. In the 1954 case of *Berman v. Parker*, the Supreme Court allowed the National Capital Planning Commission of the District of Columbia, to condemn a non-blighted department store in the District of Columbia as part of a broader redevelopment scheme.¹¹ The Court held the taking to be proper, holding: “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. . . [i]f those who govern the district of Columbia decide the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”¹²

The United States Supreme Court in *Hawaii Housing Authority v. Midkiff*¹³ expanded the definition of public purpose beyond the need to remove blight. In *Hawaii Housing Authority*, the Hawaiian Legislature enacted the Land Reform Act of 1967, creating a land condemnation scheme

4. See *Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting) (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *Rindge Co. v. County of L.A.*, 262 U.S. 700 (1923)).

5. *Id.*

6. *Berman v. Parker* 75 S. Ct. 98 (1954); *Hawaii Housing Authority v. Midkiff* 104 S. Ct. 2321 (1984)

7. *Berman v. Parker*, 75 S. Ct. at 103

8. *Berman v. Parker*, 75 S. Ct. at 102

9. *Id.*

10. *Id.*

11. *Id.* (question: if I’m just citing the case in general, should I just cite the case?)

12. *Berman v. Parker*, 75 S. Ct. at 103

13. *Hawaii Housing authority v. Midkiff*, 104 S.Ct 2321 (1984)

whereby title in real property was taken from lessors and transferred to lessees in order to reduce the concentration of land ownership.¹⁴ The Supreme Court held that a compensated taking is not constitutionally prohibited so long as the exercise of the eminent domain power is rationally related to a conceivable public purpose.¹⁵ The Court concluded that regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.¹⁶ Thus, the redistribution of land to reduce such evils is a rational exercise of the eminent domain power.¹⁷

Both *Berman* and *Hawaii Housing Authority* involved property taken from one individual and given to another. The Supreme Court has justified this type of taking by drawing a firm line separating the use to which the property will be put from the means by which it will be achieved,¹⁸ holding that once a public purpose has been established, the means of executing a project are for the Legislature alone to determine.¹⁹ Again, this is because the Legislature, by way of its broad police powers, is in the best position to determine what is in the best interests of the community.²⁰ As the *Berman* court reasoned: "the public end may be as well or better served through an agency of private enterprise than through a department of government – or so Congress might conclude."²¹ Thus, any conclusion by the Legislature that the public end may be as well or better served through an agency of private enterprise than through a department of government is likely to be upheld by the courts.²²

The Effect of *Kelo* on the Public Use Requirement

When one realizes property may be taken from one private owner and given to another so long as a valid "public purpose" has been established, the true holding of *Kelo* can appear to be a bit of a mystery.

Kelo arose from condemnation proceedings initiated by the development agent of the City of New London ("City") in southeastern Connecticut.²³ The City, suffering from decades of economic decline, sought to redevelop the Fort Trumbull area, comprised of 115 privately owned properties.²⁴ When Pfizer announced it would build a \$300 million re-

14. The Legislature had discovered only a small number of landholders owned the state's land, and that this concentrated land ownership was responsible for skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

15. *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. at 2323

16. *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2334, citing *Exxon Corp v. Governor of Maryland*, 437 U.S. 117 (1978); *Block v. Hirsh*, 256 U.S. 135 (1921)

17. *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2336

18. *Berman v. Parker*, 75 S. Ct. 98 (1954)

19. *Id.*

20. *Berman v. Parker*, 75 S. Ct. at 102

21. *Berman v. Parker*, 75 S. Ct. at 103

22. *Berman v. Parker*, 75 S. Ct. 98; *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321

23. *Kelo*, 125 S. Ct. at 2659

24. *Kelo*, 125 S. Ct. at 2658

search facility on a site immediately adjacent to Fort Trumbull, local planners were exuberant, hoping the new facility would draw business to the area and serve as a catalyst.²⁵ The development plan for revitalization included a hotel, restaurants, a riverwalk, single family residences, a museum, and office and retail space.²⁶ The main goal of the redevelopment project was economic rejuvenation to the City.²⁷ After the plan was approved, the City authorized its development agent to acquire property by exercising eminent domain in the City's name, invoking a state statute specifically authorizing the use of eminent domain to promote economic development.²⁸ Nine protesting landowners refused to give up their property, suing the City.²⁹

The United States Supreme Court held the City's redevelopment plan a proper use of eminent domain power.³⁰ In doing so, the Court relied on two principles already well established in American jurisprudence. First, a government cannot take the property of one person for the sole purpose of transferring to another, even though that person is given just compensation.³¹ Second, a government can transfer property from one private party to another if future use by the public is the purpose of the taking.³² As discussed above, these rules were already in existence well before *Kelo* was decided.

The property owners in *Kelo* argued the use of eminent domain for economic development blurred the boundary between public and private takings.³³ The Court disagreed, reiterating the long-established principle that public ownership is not the sole method of promoting public purposes. In fact, the government's pursuit of a public purpose will often benefit individual private parties.³⁴ The property owners further argued that a bright-line rule must be established to prevent a city from taking property from one private person to give to another for the sole reason that the latter will put the property to a more productive use and thus pay more taxes.³⁵ However, the Court declined to adopt such a rule, finding that such one-to-one transfers of property would be looked at with a skeptical eye, having raised a suspicion that a private purpose was afoot.³⁶

The property owners' last argument was that for takings of this kind, there should be a "reasonable certainty" that the expected public benefit

25. *Kelo*, 125 S. Ct, at 2659

26. *Id.*

27. *Kelo*, 125 S. Ct, at 2658

28. *Kelo*, 125 S. Ct, at 2659

29. *Kelo*, 125 S. Ct, at 2660

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

31. *Kelo*, 125 S. Ct, at 2661

32. *Id.*

33. *Kelo*, 125 S. Ct, at 2665

34. *Id.*

35. *Id.*

36. *Kelo*, 125 S. Ct, at 2667

will actually occur.³⁷ The Court rejected this contention, again turning to judicial precedent: “[w]hen the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of the takings – no less than debates of the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts.”³⁸

Giving wide deference to the City in determining what constitutes a valid public purpose, the court held that economic revitalization constituted proper grounds for exercising their eminent domain powers.³⁹ When making this decision, the Court again drew a firm line between the purpose of the taking (economic revitalization) and the means by which it would occur (private enterprise.)⁴⁰

The Court was careful to point out “nothing in [the] opinion precludes any State from placing further restrictions on its exercise of the takings power.”⁴¹ Thus, the Court’s ever-broadening interpretation of public purpose notwithstanding, States are free to restrict the circumstances under which eminent domain proceedings may be instigated. This is why the decision in *Kelo* has little to no effect on California.

Justice O’Conner wrote a scathing dissent to the *Kelo* decision, in which Justices Rehnquist, Scalia and Thomas joined.⁴² Justice Thomas also wrote a separate dissent.⁴³ The dissenters took a strict constructionist view of the Takings Clause, viewing the Fifth Amendment as a limit on governmental takings, requiring less deference to the Legislature as the majority opinion allowed.⁴⁴ Justice O’Conner argued that while some deference must be given to the Legislature, “were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than horatory fluff.”⁴⁵ The dissenters felt that the majority opinion erased any remaining distinction between private and public use, distinguishing *Berman* and *Midkiff* on the basis that in those two cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society, leaving eminent domain as the only remedy.⁴⁶ Thus, the public purpose was realized when the harmful use was eliminated. In contrast, the homes being taken via eminent domain in *Kelo* were not the source of any social harm. Rather, they were merely not being put to as economically lucrative a use as the government would prefer. This, the

37. *Id.*

38. *Id.* (quoting *Midkiff*, 467 U.S., at 242.)

39. *Kelo*, 125 S. Ct, at 2665

40. *Id.*

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

42. *Kelo*, 125 S. Ct, at 2671

43. *Kelo*, 125 S. Ct, at 2677

44. See generally *Kelo*, 125 S. Ct, at 2671-87 (O’Connor, Thomas, J.J., dissenting).

45. *Kelo*, 125 S. Ct, at 2673 (O’Conner, J., dissenting.)

46. *Kelo*, 125 S. Ct, 2674-2675 (O’Conner, J., dissenting.)

dissent argued, was crossing the line.⁴⁷ Indeed, as Justice O’Conner argued, “if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.”⁴⁸

Public reaction in the form of newspapers and blogs revealed a surprisingly large portion of the public adopting the dissenter’s view of *Kelo* when the decision came down. The public outcry was so alarming, it prompted state legislators to introduce a swarm of reactionary legislation designed to impose strict restraints on local government’s use of eminent domain powers.⁴⁹ Some of this legislation, discussed below, would actually take power away from local governments that existed long before *Kelo* even came down, posing a grave threat to local communities.

Eminent Domain in California

For eminent domain to occur for redevelopment purposes in California, blight must be present.⁵⁰ By statute, there are two types of blight found in California: physical and economic.⁵¹ Physical blight consists of buildings unsafe for people to live or work in or the presence of physical factors that could substantially hinder economically viable use or capacity of property.⁵² Physical blight may also be found in properties located adjacent to one other having incompatible uses, preventing the economic development of those parcels or other portions of the project area.⁵³

Economic blight may be caused by depreciated or stagnant property values, as well as abnormally high business vacancies or lease rates, abandoned buildings, or excessive vacant lots within an area developed for urban use and served by utilities.⁵⁴ A lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions may also constitute economic blight, as well as residential overcrowding and high crime rates.⁵⁵

As one can surmise from analysis, the requirement of blight prevents a taking such as the one in *Kelo* from occurring in California. Nevertheless, the Legislature began to crank out reactionary legislation before the ink on the *Kelo* decision ever had a chance to dry. The most extreme example is a ballot measure proposed by State Senator Tom McClintock and Assem-

47. *Kelo*, 125 S. Ct. 2675 (O’Conner, J., dissenting.)

48. *Id.*

49. Footnote Added.

50. Cal Health & Safety Code 33000 et seq (the Community Redevelopment Law)

51. Cal Health & Safety Code 33030

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

blymember Doug LaMalfa, SCA 15,⁵⁶ which would disallow the use of eminent domain unless the property to be acquired is going to actually be owned and occupied by governmental agencies. This measure would prohibit revitalization of run-down areas, even when the buildings sought are abandoned and blighted.⁵⁷ Dozens of pieces of similar legislation have also been introduced, most of which prohibit any taking of property which will be given to a private party, regardless of any public benefit.⁵⁸ Such legislation is a blatant overreaction to *Kelo*, borne from misunderstanding what the decision actually held and poses a grave threat to local government's ability to do what they feel is in the best interests of their communities. As discussed above, the statutory requirement of blight imposes enough restraints on local government's eminent domain powers that the situation in *Kelo* is unlikely to occur in California. Thus, California's "solution" to *Kelo* poses a threat to local communities non-existent before or after the decision came down.

Conclusion

The fear that *Kelo* will allow property in California to be taken from one private owner and given to another so long as the latter could put the property to a more productive use, is very unlikely. Under California law, in the absence of blight, no such taking can occur. Could an economic redevelopment plan such as that in *Kelo* occur in California? Perhaps. However, it would not be due to the *Kelo* decision. Rather, it would be due to decades of judicial precedent giving wide deference to our Legislature in

56. 2005 CA A.C.A. 15 (status: In Senate committee on Judiciary August 30 2005; failed passage, reconsideration granted.)

57. John Shirey of the California Redevelopment Association: *Kelo* Backlash Ignores Benefits of Eminent Domain For Redevelopment

58. 2005 CA A.C.A. 15 (A constitutional amendment prohibiting a redevelopment agency from acquiring property through eminent domain unless it first makes a written finding that the property contains conditions of both physical and economic blight. Sponsored by State Assembly Members Gene Mullin and Joe Nation); 2005 CA A.C.A. 22 (A constitutional amendment stating that eminent domain may be used "only for a stated public use" and that "if the property ceases to be used for the stated public use the former owner or a beneficiary. . . would have the right to reacquire the property for the compensated amount or its fair market value, whichever is less, before the property may be sold or transferred." Sponsored by State Assembly Member Doug LaMalfa); 2005 CA A.B. 590 (A bill providing that eminent domain is used "only for a public use. . . 'public use' does not include the taking or damaging of property for private use, including, but not limited to, the condemnation of nonblighted property for private business development." Sponsored by State Assembly Member Mimi Walters); Protect Our Homes Act (Summary: ". . . Private property may not be taken or damaged for private use. . . All property that is taken by eminent domain shall be used only for the stated public use. . . (b) (1) 'Public use' shall have a distinct and more narrow meaning than the term 'public purpose;' its limiting effect prohibits takings expected to result in transfers to non-governmental owners on economic development or tax revenue enhancement grounds, or for any other actual uses that are not public in fact, even though these uses may serve otherwise legitimate public purposes. . . (e) Nothing in this section shall prohibit the use of condemnation powers to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions provided those condemnations are limited to abatement of specific conditions on specific parcels." Proponents: Anita S. Anderson.)

determining under what circumstances eminent domain may occur. However, so long as the public outcry in response to *Kelo* continues, there is a danger that the reactionary legislation designed to take existing power away from local governments will pass, to the potential detriment of the very communities it seeks to help.