

KELO AND THE LOCAL POLITICAL PROCESS

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Most of the commentary on the recent decision in *Kelo v. City of New London*,¹ in which the Supreme Court upheld a municipality's right to condemn private land for economic development, has focused on the substantive rights allocated by the case. The determination that the concept of "public use" sufficient to support the exercise of eminent domain was not limited to facilities accessible to the public as a whole seems, for some, a significant deviation from the original function of the Takings Clause.² Originalism aside, much of the reaction to the decision evinced hostility to the notion that local governments should ever condemn privately owned property and convey it to private developers in the name of economic development. For others, however, the decision was simply the natural extension of prior decisions allocating to legislative bodies the capacity to determine the appropriate scope of the condemnation power.

In this Idea, I want to consider a less-developed perspective on *Kelo*, one that treats eminent domain in general, and that case in particular, as issues of political process. My concern is less with *what* local governments can do than with *how* they can do it. That is not because I think that the issue of whether government can properly intervene in the local economy, or the effect of such intervention on private property owners is unimportant. To the contrary, I consider that relationship to be crucial to the role of cities as engines of regional economies. Indeed, one would have a difficult time rejecting the majority's conclusion that economic development constitutes a

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1. 125 S. Ct. 2655 (2005).

2. This position was the focal point of Justice Thomas's dissent. *See id.* at 2677-87 (Thomas, J., dissenting).

“traditional and long accepted function of government,” including decentralized government.³

As a consequence, my comments on the case implicitly accept that the substantive result of *Kelo* is neither surprising nor novel. Localities have been intervening in local economies since the Founding, if not by direct condemnation of property, then by the granting of monopolies, the donation of what was previously public property to private owners, and the use of tax monies to subsidize internal improvements considered appropriate to arm the locality with an advantage in the continuing battle of interjurisdictional competition.

The direct taking of private property for similar purposes may be more than simply a variation on these themes, but the historical relationships between local governments and local economies, combined with an understanding of the constraints that local governments face under the decision, may suggest that the list of horrors that have been predicted since *Kelo* are less likely to materialize. The intervention of local government to disturb market allocations of property has not led to the demise of private property as a concept or to the systematic abuse of the governmental prerogative, although occasional abuses can undoubtedly be documented.⁴ The reason to permit the limited incursions into private property does not necessarily lie in the good faith of local officials or the altruism of local business not to offend fellow citizens. Rather, I want to suggest that the reason to believe that *Kelo* will have minimal impact on the allocation of substantive rights of property owners lies in political safeguards that a careful reading of the case itself reveals. Armed with those safeguards, *Kelo* actually reinforces the historic and traditionally peaceful relationship between government and the economy. I will suggest at the end of this Idea, however, that there remain mechanisms that could be employed to diminish some of the residual abuse.

Let me begin by stepping back from the particulars of *Kelo* for a moment and thinking about the problem of eminent domain generally. The eminent domain power is necessary to cure what is itself a political

3. *Id.* at 2665. For evidence of government intervention into markets to generate economic development at early stages of the nation's history, see, for example, OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (Rev. ed. 1969); HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983).

4. For allegations of abuse in the exercise of eminent domain for economic development, see Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, *WALL ST. J.*, Dec. 8, 2004, at B1.

problem—the capacity of individual private property holders to frustrate majority will by refusing to sell privately held land for public purposes. In theory, publicly interested officials will use the condemnation power only to solve what is called the “land assembly” problem and only to do so where the result is to confer net benefits on their constituents, that is, only to make residents as a whole better off, even though some of those residents will lose private property that they might have preferred to retain.

Of course, the grant of such power raises the risk that local officials will exploit it and will condemn private property even where insufficient public benefits result. The underlying assumption of constitutional doctrine that permits takings only for a public use and then only with governmental payment of just compensation is that these twin requirements will deter officials from exercising their condemnation power where public costs would exceed public benefits. But given the vagaries of both those requirements, the doctrinal safeguards may simply reflect a calculation that systemic abuse will create a political backlash, so that fear of electoral redress is the most compelling constraint on local officials.

Naturally, this happy story of a well-working majoritarian system has several difficulties. First, majorities may threaten as well as be threatened with the power of condemnation. Majorities that might gain marginally from the exercise of eminent domain may gang up on a small number of landowners who, by virtue of their number, have insufficient political power to oppose the taking of their property. A coalition that has a small number of members, however, may not be at a disadvantage in this context. Small numbers may mean minority status, but might also mean that those few who bear the entire social cost of creating a public good share an intensity of interest that justifies their entry into the political fray. The political problem with issues such as taxation is that a small amount is taken from many, so that even when taxes are spent on a project that fails to generate net social benefits, no one has an incentive to incur the costs of opposing the proposal. But eminent domain means taking a lot from a few, so those few have significant incentives to raise their voices loudly.

Second, the assumption that the compensation requirement is an effective check on abuse of the eminent domain power is itself fraught with difficulties. Officials must pay compensation, but not out of their own pockets. They make payments from the public treasury. As long as officials can tax more, or as long as the benefits to them of a particular

condemnation proposal outweigh their personal costs, not the public costs, they have little personal incentive not to proceed.⁵

Third, the assumption that eminent domain addresses a majoritarian need, especially in the area of economic development, may be somewhat heroic. A new big-box store may or may not return economic benefits to a locality. If it does, the per capita effect on any resident is unlikely to be sufficient to generate substantial enthusiasm among residents. If the project is unlikely to generate net revenues for the municipality, the downside consequences for any given resident are also unlikely to generate much adverse reaction. But the big-box store owner, which expects to benefit from siting within the locality, will care a lot, enough to attempt to invest heavily in lobbying local officials to approve the condemnation. I do not mean corruption or undue influence is at play. But when the big-box store promises a cash-strapped municipality—a status for which all municipalities qualify—untold riches for accommodating a siting proposal, it is difficult for political officials to ignore the entreaty simply because a few residents will be required to surrender their private abodes. A distinct fear that underlies the use of eminent domain for economic development, therefore, is not simply the risk that the majority will gang up on a minority, but the risk that a distinct but powerful political minority can exploit a less powerful one, while the majority stands apathetically on the sidelines.

The use of eminent domain, therefore, is essentially one of balancing the public needs of a particular community with the capacity of public officials to exercise their condemnation power for less public purposes. How, then, does *Kelo* affect this political balance? The claim I want to make is that, the uproar and backlash that the decision has generated notwithstanding, *Kelo* is a very conservative opinion that fits neatly within the tradition of counteracting the need for flexibility in urban planning with political process protections.

Let me defend this heretical position by recasting the majority's decision. The majority found that the public use requirement could be satisfied where a taking for economic development "would be executed pursuant to a 'carefully considered' development plan."⁶ Moreover, the Court adopted a broad interpretation of "public use," reflecting deference to legislative judgments about the proper use of public expenditures and the proper interaction between government and

5. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-48 (2000).

6. 125 S. Ct. at 2661.

business. Thus, the Court rejected any monolithic metric for economic development such as a “blight” requirement, at least as a federal constitutional issue.⁷ Instead, at least where the locality was proceeding pursuant to a “carefully considered” development plan, the Court was of the view that the judiciary should defer to the judgment that emerged from those legislative deliberations. At the same time, the Court did find it necessary to note that nothing in the *Kelo* case indicated that the City’s development plan was adopted “to benefit a particular class of identifiable individuals.”⁸

I want to suggest that the Court’s language is heavy with negative predicates. I do not read the majority decision as a grant of blanket permission to local governments to use eminent domain for economic development whenever officials so desire. The opinion does not, for instance, necessarily authorize the actions such as those alleged to have occurred in St. Louis, where a national department store responded to a landlord’s demand for a rent increase by having the city condemn the property and turn it over to the store itself.⁹

Why do I say that? Because so much of the language of the decision implies that, given the process utilized in *Kelo*, the Court could not identify any apparent political process failure that courts could detect and correct better than the political process itself. None of the indicia of either majority ganging up or minority ganging up that underlie our concerns about the exercise of eminent domain appeared to exist.

But that interpretation does not deny the propriety of judicial intervention in all circumstances. It only establishes the need to articulate those conditions under which judicial intervention *is* warranted. Look at the language that the majority employs over and over again to justify its deference to local decision making: “The takings before us . . . would be executed pursuant to a ‘carefully considered’ economic plan”;¹⁰ “[t]he disposition of this case . . . turns on the question [of] whether the City’s development plan serves a ‘public purpose’”;¹¹ “[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community”;¹² “[g]iven the comprehensive character of the plan, the

7. *Id.* at 2664-66.

8. *Id.* at 2661-62.

9. See Starkman, *supra* note 4, at B1.

10. 125 S. Ct. at 2661.

11. *Id.* at 2263.

12. *Id.* at 2665.

thorough deliberation that preceded its adoption,”¹³ the entire plan will be judged for its satisfaction of the public purpose requirement.

Now, why does the Court systematically emphasize the presence of what it variously refers to as a “plan,” or a “comprehensive plan,” or a “carefully considered development plan”? I want to suggest that there is an analogy here to comprehensive versus spot zoning and that the underlying rationale for the distinction is similar. The existence of a comprehensive plan, as opposed to land use planning that affects a single or small number of parcels has two implications. First, it entails a process that involves significant engagement by multiple actors in public hearings concerning what should be constructed where and by whom. One would anticipate that any such process will attract competing views—not only between property owners and developers, but also among developers, contractors, and planners. As a result, the capacity of a small rent-seeking group to impose its will on a complacent majority or an under-represented minority is diminished.

Second, the presence of a plan implies that multiple current landowners are at risk. Comprehensiveness and planning entail simultaneous consideration of multiple parcels. The importance of that characteristic is derived from the political concerns about eminent domain that I expressed at the outset. If eminent domain creates a risk of ganging up on a discrete minority of landowners who, by virtue of their small numbers, have little political power, then those concerns should diminish as the number of landowners increases. There is little need for the affected landowners to reach anything close to a majority to have effective political voice. Recall that most residents will either be indifferent to the proposed comprehensive plan or, more likely, will be insufficiently affected by it to warrant the personal costs of becoming involved either to support or oppose it. But those directly affected, those whose personal landholdings are at risk, have sufficient incentive to become involved that even moderate numbers of them can swamp the political process by which a final determination is made.

Thus, the implicit conditions established by the Court for judicial abstention ensure both a forum in which opposition to a proposed condemnation can be articulated—the hearings process that is implicated in the promulgation of a comprehensive plan—and an environment in which those who do oppose the plan have sufficient political weight that their voices can effectively be heard. This, of course, does not ensure victory for the vocal minority. It does not prohibit local officials from

13. *Id.*

ignoring their loudly and intensely expressed opposition. But unless we believe, counter-intuitively, that economic development is intrinsically or systematically inconsistent with the interests of the majority, it is not clear why a decision that considered but rejected minority views reflects anything other than an inevitable outcome of democratic processes.

Those democratic processes are not static in their result, and not unidirectional. The historical relationship between local government and business that I acknowledged at the outset has shifted significantly over America's 230-year history. At times, governmental grants and subsidies have been common and well-accepted, whether by New York City granting land lots to private entrepreneurs who promised to develop them at the turn of the 18th century,¹⁴ or the use of tax-exempt bonds to subsidize the borrowing costs of retail chains.¹⁵ At other times, any dedication of municipal resources to private endeavors has been considered anathema, whether by the refusal of the Supreme Judicial Court of Massachusetts to use state funds to rebuild private housing structures after the Great Boston Fire of 1872,¹⁶ or the initial invalidation by state courts, particularly in the South and Northwest, of the proposed use of even revenue bonds to finance industrial plants.¹⁷

But this very flexibility in defining the proper relationship between local government and the local economy is what makes the inquiry uniquely *unsuitable* for judicial investigation. Courts are pretty good at applying principles of law that have staying power over time. Where the principle is one of political will, however, courts do best by deferring to the political institutions that can best gauge the political sentiment of the time—*assuming*, of course, that the political bodies can be trusted to interpret and apply that sentiment properly.

That, I want to suggest, is what the majority in *Kelo* was intimating. I do not read the Court as concluding that the political process will inevitably work itself pure, that local officials will never fail to favor politically powerful developers over individual residents, even when they collectively lobby for their position, especially when those residents are likely—post-taking—to move to other jurisdictions and thus be less able to exact electoral redress from those same local officials. Indeed, even comprehensive plans, as Justice O'Connor's dissent suggested, can

14. See HARTOG, *supra* note 3.

15. Bd. of Dirs. of the Indus. Dev. Bd. of New Orleans, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of New Orleans, 848 So. 2d 740 (La. Ct. App. 2003).

16. Lowell v. City of Boston, 111 Mass. 454 (1873).

17. See, e.g., South Carolina *ex rel.* McLeod v. Riley, 278 S.E.2d 612 (S.C. 1981); Vill. of Moyie Springs, Idaho v. Aurora Mfg. Co., 353 P.2d 767 (Idaho 1960).

be designed and implemented in a manner that is ridden with abuse.¹⁸ My claim is only that the capacity of the judiciary to make inquiries into the process, to reverse engineer the political decision to determine whether it was tainted or whether the same decision would have been reached on objective grounds, is minimal. Thus, perhaps the best that a court can do is to define the conditions under which the probability of abuse is minimal and defer to the political process when those criteria are satisfied.

The negative implication of all this is that no similar presumption of procedural propriety can be entertained when eminent domain is exercised against a single or a small number of parcels and then transferred to a particular private party. Just as spot zoning raises concerns that the person who got the exception had the fix in, in ways that are less probable when a locality adopts a comprehensive zoning plan, so too are the conditions for deference relaxed where the takings decision implicates so few parcels that one reasonably fears a heightened risk of abuse. Indeed, Justice Stevens invited just such an exception when he wrote “a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”¹⁹ Hanging over those words is the unspoken parenthetical: “And when it is presented, I will vote against it.”

If what we are ultimately attempting to do, however, is reduce the probability of abuse by establishing procedural requirements that we think coincide with its absence, then we might reasonably ask whether we can do even more than the *Kelo* opinion demands. Some of the state legislation that has been proposed and enacted post-*Kelo* adds procedural safeguards, such as hearing requirements, to the condemnation process.²⁰ If I am right that openness and opportunity for collective action will generate more publicly-interested decisions, then that is all to the good. But I want to suggest that there is an alternative mechanism that I think would similarly improve, though not perfect the takings process.

The litigation to date has focused on that part of the process that permits condemnation only when the result will be public use. I want to conclude by invoking a suggestion of some commentators, most notably

18. 125 S. Ct. at 2671.

19. *Id.* at 2667.

20. For a summary of legislation that has been enacted by states in the wake of *Kelo*, see Memorandum from Larry Morandi, Group Dir., Env't, Energy & Transp., Nat'l Conference of State Legislatures to State Legislators Interested in Eminent Domain Issues (Nov. 30, 2005), available at <http://www.ncsl.org/programs/natres/EmindomainMemo.htm>.

Professor Thomas Merrill,²¹ that the next wave of litigation on this issue should involve the question of just compensation. But I say this not in order to reduce the unhappiness of the condemnees or to help overcome the holdout problem that requires a collective land assembly mechanism in the first instance. Rather, I say this because I believe that revisiting just compensation may further reduce abuses in the use of eminent domain for economic development.

Recall that one of the concerns expressed in *Kelo* was the speculative nature of the public benefits that would materialize if New London implemented its plan. Many of the condemned parcels had not been leased, and in some cases even the future use of the parcels remained unsettled. But there is little reason for local officials not to forecast the financially rosiest of futures for those parcels, since doing so gains political support for the project, allowing them to take credit for what is described as the impending economic boom. Of course, those officials may be far removed from their local office when those expectations turn out to be exaggerated. And those claims add nothing to the cost of the project, since the general rule currently is that those displaced by eminent domain receive compensation based on the value of their property prior to creation of the new project.

The incentive for undue optimism, my fancy term for governmental speculation at the expense of property owners, diminishes if compensation is evaluated in a manner that incorporates the publicly-expressed expected benefits of the project. Assume, for the moment, that we were to modify the meaning of just compensation in economic development cases to reflect not just the current value of the condemned land, but also some percentage of the proposed project's expected benefits to the municipality. This would have the effect of requiring local officials to pay more for the land, which should restrict their willingness to make highly speculative uses of eminent domain.

Assume, for instance, that officials justified their use of eminent domain for economic development by claiming that the locality would realize \$10 million worth of benefits over the next ten years. If the locality were required to pay current landowners a small percentage of the current expected value of those benefits, officials presumably would be less willing to inflate expected values, since any expected values

21. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986); *The Kelo Decision: Investigating Takings of Homes and other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Sept. 20, 2005) (statement of Thomas A. Merrill, Charles Keller Beekman Professor of Law, Columbia University), available at http://judiciary.senate.gov/print_testimony.cfm?id=1612&wit_id=4661.

would generate additional payments. Of course, this would not be a complete constraint on local officials. As I indicated earlier, local officials are spending the public's money, not their own, so spending more of the public's money may be less troublesome to them than we might hope. On the other hand, officials can only spend the same tax dollar once, and if we require them to spend more on eminent domain, they may have to forgo some alternative pet project. Thus, a requirement that just compensation include some sharing of the upside risk of a project with condemnees may reduce undue optimism and thus induce a more meaningful comparison of the costs and benefits of a proposed economic development.

So *Kelo* may not be the harbinger of doom, the end of private property rights, or the grasp of an omnipotent state apparatus. It may simply be a recitation of the conditions under which courts refrain from interfering with political decisions. Those conditions do not perfectly reflect a distinction between the abusive and desirable exercise of the awesome power of eminent domain. But the courts could have done worse. They could, for instance, have made that determination a matter for judicial appraisal on a regular basis. At least the Court knew enough to know the limits of its own competence.