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Introduction: The Impact of Kelo v. City of New London on Eminent Domain

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When the Supreme Court held in *Kelo v. City of New London*[1] that a family home could be condemned and then conveyed to a private enterprise as part of an economic redevelopment project, protests erupted across the nation. Why?

For centuries, the governmental power to take private property has been seen as an essential element of sovereignty. The Fifth Amendment imposes two constraints on this inherent power. Private property may be taken only for "public use" and upon payment of "just compensation."[2] Nineteenth-century courts interpreted the Public Use Clause as requiring the government or the public to physically use the property being taken; this "physical use" standard turned on the identity of the user.

But the twentieth century presented new social and economic challenges. As suburbs expanded with the post-World War II boom, the downtown areas of many large cities began to decay. The idea of "slum clearance" gained popularity: local government would develop an urban renewal plan, condemn land in blighted areas, and resell the property to private entrepreneurs who would construct new housing, businesses, and other projects consistent with the plan.

The 1954 decision in *Berman v. Parker*[3] signaled the Supreme Court's shift to a new standard for defining "public use." There, a business owner asserted that the condemnation of his non-blighted store as part of a redevelopment project in the District of Columbia did not meet the public use standard because it was merely a "taking from one businessman for the benefit of another businessman"[4]—a taking of private property for purely private use. But the Court rejected this claim, reasoning that the public use requirement was met because the land was taken for a legitimate public purpose: improving the quality of housing. In its decisions after *Berman*, the Court continued to use this "public purpose" standard to define the scope of "public use."

Kelo raised a novel question: can government, consistent with the public use requirement, condemn a non-blighted, owner-occupied home as part of a city-approved economic revitalization project? By a five to four majority, the Court found that the plan "unquestionably serves a public purpose"[5] because it would provide new jobs, increase tax revenue, and generally revive the depressed downtown area of New London, Connecticut. Refusing to second-guess the wisdom of the city council's approval, the majority opinion stressed the need to

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1. 545 U.S. 469 (2005).
2. U.S. CONST. amend. V.
3. 348 U.S. 26 (1954).
4. *Id.* at 33.
5. *Kelo*, 545 U.S. at 484.

defer to local legislative judgments. Thus, for the majority, the decision was a logical application of the Court's modern public purpose jurisprudence.

But the decision sparked sharp dissents from Justices O'Connor and Thomas. Justice O'Connor argued that the majority had misinterpreted *Berman* and its progeny by creating a new test that expanded the meaning of "public use" and threatened all private property rights: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[6] In turn, Justice Thomas complained that the "public purpose" approach—from *Berman* forward—violated both the most natural reading of the Public Use Clause and the intent of the Framers. In effect, he advocated a return to the historic "physical use" standard.

Kelo ignited a firestorm of public outrage—probably the most negative response to any Supreme Court decision in recent years. Polls showed that more than seventy percent of Americans in various states disagreed with the decision,[7] regardless of political affiliation; Democrats, Republicans, and independents all opposed *Kelo* with equal fervor.[8] As a result, legislation to limit the *Kelo* holding was quickly adopted by most states and by the federal government.

What explains this remarkable public outcry? The home has always occupied a special place in our legal culture. Just as the Third and Fourth Amendments ensure privacy inside the home, the law has specially protected the home in many other situations.[9] As the Supreme Court observed in a 1980 decision, "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[10] Consistent with this tradition, Americans generally expect that the law will safeguard their family homes.

Kelo shocked the nation because it highlighted an unpleasant reality: under some circumstances, the government may seize a home despite the owner's objections. Across the country, millions of Americans worried that their own homes might be taken. The theoretical risk of eminent domain—a vague concept to most citizens—had suddenly become disturbingly real. In addition, ideological opposition appeared from both ends of the political spectrum. Conservatives viewed the decision as the most significant attack on private property rights in

6. *Id.* at 503 (O'Connor, J., dissenting).

7. *See* Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 822-24 (2006) (collecting polling data from different states).

8. *Id.* at 822.

9. *See* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006); John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783 (2006).

10. Carey v. Brown, 447 U.S. 455, 471 (1980).

decades; liberals saw it as a major threat to traditional privacy rights within the home.[11]

Over the last two years, *Kelo* has generated continuing debate among lawyers, law professors, and judges, as reflected in a number of law review articles.[12] The three pieces in this collection offer helpful perspectives that will enrich this ongoing discussion.

First, David L. Breau provides the first comprehensive analysis of Justice Thomas' *Kelo* dissent. This article is particularly valuable because Thomas is the foremost advocate of the historic "physical use" standard, which he views as reflecting the Framers' original intent. Accordingly, Breau considers the validity of Thomas' textual analysis of the phrase "for public use," which is based on citations to a founding-era dictionary and other sources; explores Thomas' use of Blackstone as common law background; and questions Thomas' review of early eminent domain practices of the states. Ultimately, Breau rejects Thomas' view, finding that the Framers' intent was unclear.

Moving from the merits of the *Kelo* decision to potential responses, Elisabeth Sperow argues that increased political accountability is the remedy for abuse of the eminent domain power. Characterizing *Kelo* as a decision that reflects careful judicial restraint, not judicial activism, her article suggests that members of the public should participate more actively in the political processes leading to redevelopment approvals and other activities that give rise to eminent domain. Ultimately, elected representatives who make improper legislative judgments should be held accountable at the ballot box.

Finally, the Comment by Dale Orthner examines another possible response to *Kelo*: increasing the amount of compensation paid to homeowners. He argues that payment of fair market value does not provide full compensation, in part because a home has non-economic value to its owner. Increasing the required compensation to 150% of fair market value, he suggests, would both discourage government from abusing the eminent domain power and reduce the incentive of homeowners to challenge condemnations.

It is still too early to assess the legacy of *Kelo*. The decision may prove to be merely a step in the evolution of the public purpose test. Or it may be a transitional case that leads to a new public use standard. At this point, one can only predict that *Kelo* will remain controversial. The collection of articles that follows will shed new light on that controversy.

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11. *See, e.g.*, Robyn E. Blumner, *Putting 'Home' Back in the Homeland*, ST. PETERSBURG TIMES (Tampa Bay, Fla.), Feb. 20, 2005, at 8P, *available at* http://www.sptimes.com/2005/02/20/news_pf/Columns/Putting_home_back_i.shtml (on file with the *McGeorge Law Review*).

12. A LexisNexis search on May 2, 2007 revealed that *Kelo* had been cited in 448 law review articles, notes, and comments. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006); Douglas W. Kmiec, *Hitting Home—The Supreme Court Earns Public Notice Opining on Public Use*, 9 U. PA. J. CONST. L. 501 (2007); Julia D. Mahoney, Kelo's *Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103 (2005).

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