



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Popular Media

Faculty Scholarship

1-1-2006

Kelo v. City of New London: Supreme Court Refuses to Hamstring Local Governments

James C. Smith

University of Georgia School of Law, jim@uga.edu

Repository Citation

Smith, James C., "Kelo v. City of New London: Supreme Court Refuses to Hamstring Local Governments" (2006). *Popular Media*. 75.

https://digitalcommons.law.uga.edu/fac_pm/75

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Popular Media by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

2004)). On the other hand, a "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot"; such cases could "be confronted if and when they arise." *Id.* at 2667. "Courts have viewed such aberrations with a skeptical eye." *Id.* at 2667 n.17 (citing, inter alia, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)).

Private noncharitable developers *always* have private purposes afoot. The issue is whether *public* officials are guided by bribery or self-dealing. If so, they violate existing laws. If not, what does it mean to claim that their actions are "pretextual"? In *99 Cents Only Stores*, for instance, officials condemned a competitor's store at the behest of Costco, a principal tenant in the agency's most successful project and the only shopping center in Lancaster with a regional draw for customers.

Justice Stevens stated:

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.

Kelo, 125 S. Ct. at 2665.

In light of this statement, was Lancaster wrong in condemning the *99 Cents Only Stores* parcel? That a city might be interested in "comprehensive" redevelopment of a wide area might imbue the entire scheme with a public purpose, but that fact does not mean that the taking of an individual small parcel necessarily is for a public use.

Looking After Pfizer's Progeny

Justice Stevens stated that the New London development plan "was not intended to serve the interests of Pfizer." *Id.* at 2662 n.6 (citation omitted). But Justice O'Connor noted that "any boon for Pfizer or the plan's developer is difficult to disaggregate

from the promised public gains in taxes and jobs." *Id.* at 2675-76 (O'Connor, J., dissenting).

The record certainly indicates that the needs of Pfizer were not far from the minds of redevelopment officials. Ultimately, however, the quest for the definitive *quid pro quo* is not only illusive but irrelevant. New London and Connecticut want the reputation of a redevelopment partner. If major companies like Pfizer are pleased with the upscale hotels, executive housing, attractive shops, and other amenities adjoining the sites they have redeveloped, other corporations that might be significant redevelopment partners in the government entity's future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy,

future redevelopment efforts would become more difficult.

Companies desirous of favorable relocation deals and localities desirous of jobs and tax revenues will find each other. "Comprehensive" redevelopment plans will be prepared and agency records built. Procedural due process will be copiously supplied.

New London was a distressed city, but it is also a political subdivision of a wealthy state. If the issue is whether cities should seek relief from state legislators on one hand, or from the profits inuring from condemning the home sites of people like Susette Kelo on the other, the answer suggested by the Supreme Court's decision requires neither elaborate forecasts nor comprehensive study. ■



Kelo v. City of New London

Supreme Court Refuses to Hamstring Local Governments

By James C. Smith

The Court's decision last term in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), has drawn heavy fire, most of it unmerited. By the narrowest of margins, the Court held that the city could take single-family homes to develop an office park and to provide parking or retail services for visitors to an existing state park and marina. Many observers thought the Court would take this opportunity to display its "conservative" activism by reining in the power of eminent domain. After all, the Court has grown increasingly protective of property rights during the past two decades. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (right to build house notwithstanding beach protection legislation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (right to operate group home notwithstanding zoning). The Court, however, passed on the chance to redefine the "public use" requirement to protect property owners from many forms of government takings. Instead, the majority followed its long-standing rule that the government takes for a "public use" under the Fifth Amendment whenever its purpose is to provide a public benefit. And for a public benefit to exist, members of the general public need not have a right to enter the property, and title to the property need not remain in a public entity.

James C. Smith is the John Byrd Martin Chair of Law at the University of Georgia School of Law and a contributing editor to *Probate & Property's* "Keeping Current—Property" column.

The outcome in *Kelo* stands solidly on the shoulders of the Court's existing precedents. To begin with, when a governmental entity condemns land to build a government facility, such as a school or library, its power is unquestioned. Takings for public transportation—highways and airports, for example—also raise no legal controversy about the government's right to condemn. Citizens may complain that the government's plan is not sound. They may say that there is a better site for the

private owner to another. This practice became popular more than a century ago to promote the private development of transportation and utility infrastructures. See *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883). Today, condemnations for the benefit of privately owned railroads are rare because that form of transportation has long been in decline. Condemnations to support power companies and other utilities, however, still happen frequently. Although few owners

properties to their residential tenants, thus breaking up large Hawaiian estates, the size of which had prevented the development of a normal market for the purchase of owner-occupied housing. In *Kelo*, the question was whether the public benefit theory properly extended to government efforts at economic development, designed to revitalize the community with new jobs and a higher tax base. Relying on its earlier rulings, a five-Justice majority concluded that it did.

In their dissenting opinions, Justices O'Connor and Thomas argued that the majority had stretched "public use" beyond recognition, in effect reading that limit out of the Constitution. The dissenters' opinions, however, are laced with flaws, thus suggesting that the majority reached the right result in refusing to strike down "economic development" takings. Justice O'Connor advanced a twofold argument for overturning the city of New London's development plan, without overruling *Berman* or *Midkiff*. As to *Berman*, she reasoned that economic development is different from, and less important than, rectifying urban blight. 125 S. Ct. at 2674-75. The assertion (1) is not self-evident, (2) does not fit the underlying facts of *Kelo* because the state identified the entire community as a "distressed municipality," and (3) if generalized, would invite a nightmarish sprawl of litigation over whether particular takings qualify as "important." Second, Justice O'Connor claimed that *Berman* and *Midkiff* are best understood as cases in which the landowners were inflicting "affirmative harm on society" by their present use of the properties, *id.* at 2674, while the New London homeowners were blameless in this respect. This interpretation of the cases is especially unconvincing. There was nothing wrong with Mr. Berman's department store; indeed, the government conceded it was not blighted and did not contribute at all to the slum characteristics of the surrounding neighborhood. Whether the Hawaiian landlords in *Midkiff* were "harming" their tenants and society is debatable, to say the least. If they were, the harm they were causing by refusing to sell their properties to tenants does not look much different from the harm New London homeowners were causing by refusing to sell to the



new school than the one selected by the school board, or it may be wiser to rebuild an existing school rather than acquire a new site, that the highway will destroy an urban neighborhood, or that the value of the new airport is speculative. All these objections are political in nature. If substantial, the objections may cause the government to modify or abandon its plan. But if the landowner goes to court to question the legal need to take her or his land for the public project, the government wins hands down. The Court applies a deferential rational basis standard of review, just as it did in *Kelo*.

Not all exercises of eminent domain result in government ownership of the condemned property. As the Supreme Court recognized early on, the government sometimes employs eminent domain to transfer property from one

want an easement taken from their property for power lines, no one questions the legality of the practice. The power grid is important.

Decades ago the Court could have drawn the line at privately owned transportation and utility infrastructure uses, prohibiting all other eminent domain exercises that transfer ownership to the private sector. The Court, however, chose not to confine the concept of "public use" in this way. Instead, it broadly interpreted that concept to include any use that benefits the public, whoever the transferee may be. Of particular importance were two modern rulings. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court upheld slum clearance for urban renewal. Then in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court permitted Hawaii to compel landlords to sell their

builder of an office park. In each case, the challengers of the government's program were simply putting their own self-interest above that of their neighbors.

Justice Thomas's opinion was more radical and more forthright than Justice O'Connor's. Invoking what he perceived to be the original intent of the framers of the Constitution, Justice Thomas argued that "public use" must be narrower than "public purpose," and therefore *Berman* and *Midkiff* should be overruled. Justice Thomas would permit forced transfers to a private owner only if "the public has a legal right to use" the property after the taking occurs. 125 S. Ct. at 2679. It is not clear, however, why the "legal right to use" rule did not apply on the facts of *Kelo*. Members of the public, after all, could rent space in the developed project just as surely as members of the public can use a railroad if (but only if) they buy a ticket. New London's plan for the parcel that supports the state park seems especially unassailable under Justice Thomas's test because parking and retail services would presumably be open to one and all. Justice Thomas's assertion that we should look to the intent of the drafters of the Bill of Rights would also support the city's position because the Fifth Amendment as written limits only the federal government. The Court did not invent the "selective incorporation" doctrine until late in the 19th century.

Kelo is a major victory for state and local governments, but it does not mean that "economic development takings" will now take place routinely in all states. The Court interpreted the federal Constitution, and state courts may choose to interpret the takings clauses of their state constitutions more narrowly. Indeed, the Michigan Supreme Court did so just last year, ruling that a county could not condemn land adjacent to an airport to develop a privately owned industrial park. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In the future, other state courts will face the issue of whether to follow *Kelo*'s public benefit theory or to grant greater protection to property owners under principles of state law. A number

of state legislatures also have entered the fray. Several of them acted to restrict the use of eminent domain even before *Kelo*, and since *Kelo*, lawmakers in Alabama, Delaware, and Texas have followed their lead. Other states are likely to adopt similar measures soon, spurred by the much-publicized ruling in *Kelo* itself. See, e.g., Sonji Jacobs, *Legislators Give Property Seizure Laws High Priority*, Atlanta J.-Const., Aug. 25, 2005, at 1C ("Grandma's house is at risk if she isn't in the best part of town and a corporate entity wants to build a plant there") (quoting Shannon Goessling of

the Southeastern Legal Foundation). Such state-law development, rejecting the broad public benefit theory, does not prove that the *Kelo* majority got it wrong. Rather, it proves that federalism is working. The Court properly decided not to have the federal judiciary decide, for every community in every state, how broad or narrow the power of eminent domain ought to be. These choices—like most land-use law choices—should be made at the state and local levels, taking into account local norms and circumstances. ■



Kelo v. City of New London

Six Myths About *Kelo*

By Thomas W. Merrill

K*elo v. City of New London*, 125 S. Ct. 2655 (2005), is unique in the modern annals of law in terms of the negative response it has evoked. The initial reaction by lawyers familiar with the case was one of lack of surprise. Within days, however, Internet bloggers, television commentators, and neighbors talking over backyard fences decided that *Kelo* was an outrage. Even Justice Stevens sought to distance himself from his own majority opinion, declaring in a speech to a bar association that he thought the outcome was "unwise," and that he would not have supported it if he were a legislator. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. Times, Aug. 25, 2005, at A1.

This author is not one who believes that eminent domain should be used routinely. Nor does the author doubt that the current system of eminent domain is in need of significant reform. But flogging *Kelo* is not a particularly illuminating way to start a constructive dialogue about what is right and wrong with eminent domain. In particular, six myths have been propagated about the decision—myths that are likely to cloud our collective judgment about how to reduce abuses of eminent domain and provide greater security for property rights, if they are not dispelled.

Myth 1: *Kelo* Breaks New Ground by Authorizing the Use of Eminent Domain Solely for Economic Development

Echoing Justice O'Connor's dissenting opinion, it is widely asserted that *Kelo* is the first decision in which the Supreme Court permitted the use of eminent domain solely for economic development. See *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (characterizing the question presented as one of

Thomas W. Merrill is Charles Keller Beekman Professor at Columbia Law School. The author filed a brief amicus curiae in *Kelo v. City of New London* on behalf of the American Planning Association.