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By my calculation, the U.S. Supreme Court has decided twelve eminent domain/public use cases, the first in 1893, and the most recent, the Kelo decision in 2005.¹ Eight of the eleven preceding Kelo were decided unanimously.² Of the remaining three, one had a dissent on a non-public use ground,³ and two had dissents (each by two judges) without opinion.⁴ In every one of the cases, the Court sustained the exercise of the eminent domain power against a claim that it violated the “public use” provision of the Fifth Amendment. Moreover, as Justice Thomas pointed out in his dissent in Kelo, the Court repeatedly used very broad language in disposing of those cases, treating the public use limitation as effectively a “public purpose” standard,⁵ under authority as broad as the police power.⁶ And the Court gave great leeway to legislative authorizations for condemnation, saying “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”⁷

In light of this background,⁸ the intense controversy that the Kelo case itself sparked within the Court, and especially the hard-hitting dissent of Justice O’Connor, came as a surprise to many of us who follow this specialized area of the law.⁹ Similarly, the intense and pervasive publicity the case generated

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¹ James H. House and Hiram H. Hurd Professor of Environmental Regulation, Emeritus, University of California Berkeley, Boalt Hall School of Law.
⁵ Bradley, 164 U.S. at 161-62.
⁶ Midkiff, 467 U.S. at 240.
⁷ Berman, 348 U.S. at 32.
⁸ Though it was clear that “public use” issues were getting serious attention in some state eminent domain cases, and not just Kelo. See, e.g., County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981)).
⁹ Another surprise, to me at least, was that the land development community, which is the primary beneficiary of this technique, never uttered a peep in favor of New London when Kelo was before the Court. Presumably property rights ideology trumped economic self-interest. The municipalities were left to fight the battle on their own. Nonetheless, when one seeks out candid comment, one finds that [a]round the country, developers and city officials say weakening or destroying the power
also came as something of a surprise, since takings cases usually produce little more than a yawn either in the public press or the community.\textsuperscript{10}

At the same time, it was not all surprising to learn that once ordinary people are told that government can expropriate your house in order to turn it over to a private company for its profit-making use (even though paid full value), they are shocked, and strongly believe that such actions must be illegitimate. Nor are their fears fanciful. There is no doubt that the eminent domain power is sometimes misused, with local governments doing the bidding of powerful business interests without sufficient public benefit to justify the decision.\textsuperscript{11}

The question raised by \textit{Kelo}, however, is not whether the decision to condemn was unwise, but whether it violated some constitutional entitlement. A century of very diverse Supreme Court litigation over the “public use” language of the Fifth Amendment has failed to uncover any significant constitutional principle in that phrase that can be meaningfully differentiated from the more general precept that eminent domain must be for a public purpose, that is, justifiable within the general confines of the police power.

Unlike much constitutional language, such as freedom of speech or the free exercise of religion, or even the notion of a property “taken”, there was no historic experience familiar to late eighteenth-century Americans, nor was there contemporary writing as in the Federalist Papers that would help us to understand what sort of problem, distinct from public purpose, the authors of the Fifth Amendment intended to deal with by using the phrase “public use”. In that respect “public use” presents a blank historical page.\textsuperscript{12}

So we turn to the words themselves. Justice Thomas said in his \textit{Kelo} dissent, “the most natural reading... is that it allows the government to take property only if the government owns, or the public has a legal right to use, to condemn property will seriously undermine efforts to rehabilitate decaying cities....

Yet many developers and politicians have been loath to speak up... [F]or many politicians, defending eminent domain was as perilous as endorsing gay marriage. Terry Pristin, \textit{Developers Can’t Imagine A World Without Eminent Domain}, N.Y. TIMES, Jan. 18, 2006, at C5.


\textsuperscript{11} A recent article in Harper’s suggests that many cities are in league with big-box developers such as Wal-Mart and Target, and condemn largely at their behest. It also quotes a study asserting that there are as many as several thousand condemnations a year in which property is turned over to a private party. Joshua Kurlantzick, \textit{Condemnation Nation: The Big Business of Eminent Domain}, HARPER’S, Oct. 2005, at 72.

\textsuperscript{12} A rare study of the provision’s history is Matthew P. Harrington, “\textit{Public Use}” and the Original Understanding of the So-Called “\textit{Takings}” Clause, 53 HASTINGS L.J. 1245 (2002), suggesting that “public use” was not meant to be imposed as a limiting standard on the use of eminent domain, but that the Fifth Amendment was only drafted to assure the payment of compensation. \textit{See also} John F. Hart, \textit{Fish, Dams and James Madison: The Original Understanding of the Takings Clause}, 63 MD. L. REV. 287, 306 (2004).
the property, as opposed to taking it for any public purpose or necessity whatever." That seems a perfectly reasonable thing to say. One difficulty with it, however, is that the first half of the formulation (government ownership), seems every bit as natural as the more expansive interpretation Thomas urges. Another difficulty is that the reading Thomas gives has been rejected by the Supreme Court for well over a century.

Let's look at both halves of the Thomas "natural reading" proposition. Can the government condemn property only if it is to own it? If so, utilities like the railroads and telephone and electric companies could not be given eminent domain authority. Yet everyone (except perhaps the most doctrinaire property rights libertarian) agrees that such use of condemnation is desirable and constitutional. That brings us to the more interesting point, Justice Thomas's suggested test whether "the public has a legal right to use the property." This is by no means a perfectly clear standard, as I shall explain presently. But in any event, it would invalidate many of the uses that the Court has sustained over many decades. It is not only at odds with modern cases such as Midkiff (condemnation power to shift ownership of land from lessors to lessees), Berman (slum clearance and redevelopment of private structures), Monsanto (where new drug applicants get data condemned from previous applicants), and Boston & Maine (track condemned and transferred from one railroad to another to assure adequate maintenance), but also the old cases where private condemnation was allowed so an appropriator of water who wanted to irrigate his farm could obtain a right-of-way for a ditch over private land from the river to the appropriator's land; or where a miner could condemn a right of way over intervening land to get his ore to a location for transportation or processing. These early cases were justified by the Court on the ground that they were supportive of needed commercial activity,
mining, and irrigation, though through the medium of private entrepreneurs, and not on the ground that there was any public right of use of the condemned property interests. Indeed, there was no such right in those cases.

Aside from these long-standing and consistent precedents to the contrary, the notion that eminent domain can be justified only if the public has a "legal right to use the property" raises a number of questions. I suspect a great many people who were disturbed by Kelo would be more favorable to the exercise of the eminent domain power if the issue was a city's desire to provide a new baseball or football stadium for its team, to keep it from moving to another town. Indeed, the State of Texas, which moved rapidly to pass a new law limiting economic development condemnations in the wake of Kelo, inserted an explicit exception for a sports stadium.20

Of course such facilities are open to the public, as are private shopping malls, though I'm not sure if Justice Thomas would consider that "a legal right to use the property." In any event, in that sense hotels are open to the public too (and under many innkeepers laws perhaps even more legally obliged to serve the public than are sports facilities). Yet condemnation for hotel use was one of the very concerns that the dissenters in Kelo raised both in oral argument and in the dissents: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton ...."21 One can imagine other facilities that are not open to the public at all, such as a private university's medical research facility, yet whose product will be available to the general public. Or places on public property, that serve and are open to the public, but are private, profit-making economic developments, such as the newly-created and highly successful farmers' market on the San Francisco waterfront. I don't know what Justices Thomas or O'Connor would think of a case in which the lease of a private warehouse on that waterfront would be condemned to make way for a lease to private farmers' market stands.

My purpose is only to suggest that once one moves away from the narrowest view of "public use", such as a governmentally owned facility used directly by the government for a public service, such as a fire station, a military base or a school, it is difficult indeed to see where (and why) a court should draw a line. Intuitively, it seems that if a facility is somehow 'purely private' that ought to be over the line. But is a new factory that a rust-belt city

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21 Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2676 (2005) (O'Connor, J., dissenting). At the oral argument the following was directed to the lawyer for the city:
   Justice Scalia: [Assume] I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be a public use, wouldn't it?
   Justice O'Connor: For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?
has induced to locate there, and that will cut deeply into a high unemployment rate, and huge welfare burdens, 'purely private'? After all, promoting a viable economy seems to be one of the primary functions of government today, though it is almost always accomplished through the medium of private enterprise. It seems unlikely that the dissenters in *Kelo* think the Constitution compels government to return to the most limited functions of the so-called night watchman state, or to accomplish economic goals solely by voluntary means. So what economy-promoting goals are seen as being constitutionally prohibited by the "public use" language?

The Constitution itself gives no direction, and as one can see from the various opinions in *Kelo*, judges feel free to find the line pretty much where they wish. Justice O'Connor sought to justify her opinion sustaining eminent domain in *Midkiff* (and the earlier decision in *Berman*) on the ground that the condemnation was a response to some harm, though that wasn’t the way the decisions were justified at the time, and it isn’t a ground on which most of the earlier decisions can be justified. And what in the Constitution suggests that physical blight is a harm to the public but unemployment isn’t? The same claim of judicial inventiveness may be charged against the concurring opinion of Justice Kennedy who came up with "impermissible favoritism" as a test.²² So too with Thomas's theory. Where does the "legal right" of use—as contrasted with use as it occurs in a shopping mall—test come from if not from the Justice's own head? It is based on nothing more than what he thinks is a "natural" way to read the language, though it’s not the way other Justices over more than one hundred years ever read the language in any of a dozen previous cases. Maybe it’s not so "natural" after all.

I suggest that the problem lies deeper than any of these formulae suggest. It goes to the intense difficulty of drawing any sort of even moderately clear public vs. private line when it comes to modern-day urban development. Anyone who has dealt with contemporary land use development knows that most projects these days are done collaboratively between developers and the local government. If a city condemns land for a parking structure to facilitate access to a new shopping mall, does it really matter constitutionally whether it continues to own the facility, or sells or leases it to a private entrepreneur to operate under certain regulations designed to protect the public who uses it? If a city condemns a right-of-way to provide railroad freight access to a new auto manufacturing plant it has lured to town, is that the sort of economic development, tax generating activity that Justice O’Connor condemned in her *Kelo* dissent?²³ Is the constitutional key the fact that railroad tracks are not

²² ___ U.S. ___, 125 S. Ct. at 2669.

²³ The following little local historical tidbit may be of interest. In 1876, Hawai‘i enacted a law to promote the development of sugar cane and other crops vesting in the Minister of the Interior authority to condemn such land and water as may be required to meet the needs of such
legally open to the public, whereas a road for truck access might be, even though that particular road spur might never be used for any traffic other than access to the factory?24 Or is the private railroad’s right-of-way constitutionally distinct from the private factory it serves?

The real issue, it seems to me, is not whether some (or many) exercises of eminent domain are inappropriate or even outrageous, but whether controlling misuse of the power should be seen—except in the sort of extreme case (outside the police power, ultra vires) the Court has traditionally cited—as raising a federal constitutional question at all, rather than as a matter that is dealt with by restrictions imposed by local or state legislation. Where drawing the line between “public use” and somehow “not public use” is as vague and slippery as it plainly is (dealing with housing for the poor is acceptable, but dealing with employment for the poor isn’t), one may truly wonder what constitutional principle is at stake.

Of course property rights are constitutionally protected, and the Court has been vigilant in recent decades to protect owners’ economic values.25 But the question raised by the “public use” cases, where compensation is paid, is what sort of local publicly approved projects are constitutionally impermissible as being insufficiently public in their use? Is there some constitutionally significant difference to be found among the economic purposes government seeks to advance by promoting irrigated agriculture,26 facilitating mining,27 using private companies to effect slum clearance,28 assembling parcels for a key local industry to save jobs,29 inducing new industry to come to a depressed city,30 or keeping the local football team from leaving?31 For a full century, the Supreme Court has been unable to identify any such principle, and I see nothing in the several Kelo opinions to suggest that any of the current justices

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24 That sort of distinction was the very issue in the Malibu Ranch case, in which the Court allowed condemnation for an allegedly private (though technically public) road. Rindge v. L.A. County, 262 U.S. 700 (1923).


31 City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982).
have discovered something where so many of their predecessors said there was nothing to discover.

That, of course, isn’t to say at all that the public should accede to every proposed use of the eminent domain power. Where the problem is left to the legislative process, states can legislate in ways that offer flexibility to deal with the wide range of situations that arise, and can even make specific rules to deal with particular cases that may call for special attention. When states do legislate on these matters, I think it is the course of wisdom not to do so by amending the state constitutions (as has been proposed in a number of places post-Kelo). Eminent domain development projects present the sort of highly varied issues that are most likely to benefit from the flexibility a legislative approach affords. Some existing laws require findings of blight, for example, to limit condemnation by redevelopment agencies. States may quite appropriately wish to make exceptions for specific sorts of facilities, such as sports stadia or waterfront redevelopment.

I personally feel very sympathetic to the individual whose home is condemned so that Wal-Mart or General Motors can make more money (while stimulating the local economy); and I most certainly would not want my house taken for that purpose. Moreover, personally I have no interest in public assistance to the local baseball or football team, and could care less whether they go elsewhere. But all these seem to me to be just the sort of issues that raise disputable policy issues that are far more amenable to the judgment of the community’s own elected officials than to a nonet of judges in Washington with no principled constitutional precept to guide them.

While some may strongly feel that no project, public or private or mixed, is worthy of success if it cannot be achieved by voluntary acquisition, it is impossible by any accepted means of interpretation to demonstrate that such a view is constitutionally mandated. The majority view in Kelo may give a green-light to bad public policy, but it’s good constitutional law.


33 Interestingly, a case currently before the California Court of Appeals involves the condemnation of an undeveloped desert tract in Kern County under a statute that limits eminent domain to blighted urbanized lands under HEALTH & SAFETY CODE § 33000 (Deering 2006). Ass’n for Legal Desert Dev. v. Cal. City, No. 251026JIK (Cal. Ct. App. filed Nov. 3, 2005); see CAL. CIV. PROC. CODE § 1240.010 (Deering 2006); HEALTH & SAFETY CODE § 33367.

34 In one celebrated case, Oakland condemned a football franchise to keep its football team from going to Southern California. Oakland Raiders, 646 P.2d 835.