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Confiscation or Serving the Public Good?

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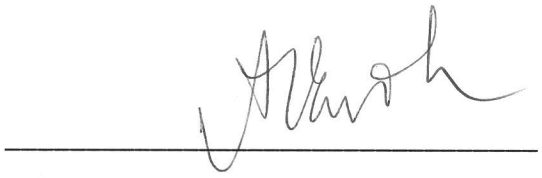

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Executive Summary

Throughout the past decade, the idea of overreaching government policy has sparked a disconcerting impression among the American people. Is it true that the government can take private property for the benefit of private interests? After the Supreme Court decision in *Kelo v. City of New London (*2005), a public firestorm erupted, sparking massive public and political discourse that rocked the sphere of property rights nationwide. Although much of the scrutiny was critical, there were those that attempted to illustrate not only the importance of eminent domain, but the damage that excessive limitation through public policy might cause.

The purpose of this essay is to identify whether eminent domain is for the public benefit, or a government intrusion on one of the most fundamental rights: private property. The concept of eminent domain stretches back to the Norman Conquests, and has deep roots in the founding of the United States. Although legally, most identify eminent domain with the *Kelo* ruling, its initial decent into the judicial system came in 1954. Since then, the Court has merely reiterated its foremost decision; however, critics, on the one hand, are quick to point out inadequacies with current condemnation actions, such as a potential violation of equal protection rights. Proponents, on the other hand, describe eminent domain as an important function of government and societal well-being. Nevertheless, the analysis concludes that eminent domain policy, as with any administrative procedure, has room for improvement.

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Acknowledgement

Completing such a task as the subsequent graduate assignment requires leadership and guidance. Thus, I would like to express my genuine gratitude to my graduate advisor, Dr. Andrew I. E. Ewoh, who provided me with a clear vision and continual support through this tasking process. Dr. Ewoh not only extended his indispensable knowledge and understanding of the research project, but showed patience as I completed my work over one hundred miles away.

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Confiscation or Serving the Public Good?

Introduction

As an itinerant political philosopher of the Seventeenth Century, John Locke saw the creation of government by men for one primary reason: the protection of property rights (Paul 2008). Locke's *Two Treatises of Government* illustrated this by stating that man is willing to join in society with others "for the mutual preservation of their lives, liberties and estates, which I call by their general name, property" (Locke 1960, 350). Locke expounded on this notion, demonstrating the importance of private property.

> Man being born…with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with other man…hath by nature a power, not only to preserve property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others (Locke 1960, 323).

Concurrent to Locke's *Two Treatises of Government*, the Founding Fathers further illustrated the concept of private property, along with its importance, as propagated aptly by "The Father of the Constitution" James Madison:

> A man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and

> free choice of the objects on which to employ them. In a word, as a man is said to have right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions (Summers 2006, 2).

Although many principles can be linked to the United State's founding, perhaps none are more important than that of property rights. Consequently, due to its critical ties to liberty and freedom, any impediment to property rights could be damaging to the fabric of the United States.

Property rights, on the contrary, are new in a historical sense, as our late ancestors lived in a much different world. At the turn of the Tenth Century, William the Conqueror seized nearly all the lands of England. Shortly after the Norman Conquest, stewardships were granted to individuals; however, the English kings maintained the power to take property at their convenience. Over time, the struggle to limit governments power in this arena evolved into private-property rights, and was done so both in England, and then in the United States, though contractual agreements such as Magna Carta and the U.S. Constitution (Benson 2008). As will be seen later, the evolution of this doctrine is now known as *eminent domain*.

Eminent domain refers to the power possessed by the state over all property within its jurisdiction, specifically the power to appropriate property for a public use. In some jurisdictions, the state delegates eminent domain power to certain public and private entities, such as utilities. In most countries, including the United States under the Fifth Amendment, the owner of any appropriated land is entitled to reasonable compensation, usually defined as the

"fair market value" of the property. Proceedings to take land under eminent domain are typically referred to as "condemnation" proceedings (Larson 2004).

Usually, when a unit of government seeks to acquire privately held land, the following steps are taken: (1) the government attempts to negotiate the purchase of the property for the fair market value; (2) if the owner does not wish to sell, the government files a court action to exercise eminent domain, and serves a notice of the hearing as required by law; (3) a hearing is scheduled, at which the government must demonstrate that it engaged in good faith negotiations to purchase the property, but that no agreement was reached. The government must demonstrate that the taking of the property is for a public use, as defined by law. The property owner is then given the opportunity to respond to the government's claims; (4) if the government is successful in its petition, proceedings are held to establish the fair market value of the property. Any payment to the owner is first used to satisfy any mortgages, liens, and encumbrances on the property, with any remaining balance paid to the owner; and (5) if the government is not successful, or if the property owner is not satisfied with the outcome, either side may appeal the decision (Larson 2004).

For the subsequent analysis, I will seek to answer a seemingly lucid question: do eminent domain actions serve the public good, or is the confiscation of property by government unwarranted? In answering this question, I will provide a detailed evaluation of eminent domain and its impact on property rights. It will include the historic nature and constitutional basics of eminent domain, and examine several important court cases involving eminent domain. In addition, by detailing its impact on property rights, I will address key issues such as takings, just compensation, due process, and efficiency and equity.

After the *Kelo v. City of New London* decision, a national firestorm erupted, marking a dramatic turn for eminent domain policy and legislation. Thus, I will catalogue *Kelo's* impact on the nation, and the resulting legislative actions. Finally, I will provide the counter argument to critics of eminent domain, along with recommendations for improvement.

Literature Review

Origins of Eminent Domain

As previously discussed, eminent domain can be traced back to the Tenth Century, during the time of kings, tyranny, and feudalism. In 1066, William the Conqueror along with seizing much of England's land, granted fiefs to Norman barons, some Anglo-Saxon supporters, and important officials in the church, in exchange for various payments and services. Although the king retained authority over land usage, landholders were given control as long as they performed the prescribed duties and paid the required fees (Benson 2008).

Beginning in 1088, revolts by the Norman barons led to promises of reform and justice in the feudalist system. Henry I proclaimed that he would establish a "government in accordance with the principles of justice and the established laws of England" (Benson 2008, 425). Unfortunately, this would not occur, leaving the barons in a constant struggle with government control.

In 1215, the powerful barons renounced their homage to King John and revolted. This time, however, the result would be a compromise in the form of a document, Magna Carta. The purpose of Magna Carta was to curb royal sanction in regards to the baron landowners. It was "in form a donation, a grant of franchise freely made by the king, in reality a treaty extorted from him by the confederate estates of the realm, a treaty which threatens him with the loss of his land

if he will not abide by its terms" (Benson 2008, 426). This document, along with the subsequent events that followed was ultimately referred to as *eminent domain* (the actual term "eminent domain," however, was derived from a legal treatise written by the Dutch jurist Hugo Grotius in 1625) (Davis and Ravenell 2006).

By the Fifteenth Century, British Parliament assumed the right of delegating power to seize land for development of public needs – sewers, ditches, gutters, walls, bridges, and roads – with relative pay of ten percent more than the assessed value for condemned property. Thus, this practice of condemnation was transplanted into the British colonies of North America (Benson 2008, 428).

After the American Revolution, government's authority to seize property was well established, remnant of feudalism in England. In its early years, on the one hand, the United States' power of eminent domain was quiescent, primarily due to the fact that it was thought to be a state power, and beyond the jurisdiction of the federal branch. As the Civil War came to an end, on the other hand, and the Industrial Revolution was in full swing, eminent domain expanded dramatically. In an effort to encourage investment and accelerate economic development, state legislatures granted the power of eminent domain to private corporations building railroads, turnpikes, bridges, and canals. The courts, for the most part, upheld these takings with the mindset that the companies were obligated to provide service to any member of the public, or on the theory that the ultimate uses of the property would produce a public benefit (Davis and Ravenell 2006). As will be seen later, eminent domain not only grows in use, but it became an issue of importance in the United States, particularly as relevant court cases become popular and awareness is raised, similar to its feudal beginnings in England.

Perspectives

Academic literature on eminent domain predominantly consists of speculative views on its constitutional legitimacy. Michael Wilt, in his article "Intermediate Scrutiny for Economic Development Takings: Proposing a New Test Based on Justice Kennedy's Kelo Concurrence," describes the recent *Kelo* decision as a shock to most citizens. In Wilt's words, "your land may be all that stands in the way of a plan to stimulate the local economy" (Wilt 2009, 431). Wilt illustrates how most individuals are unaware of the government's power to seize private property. As long as the "fair market value" is compensated, the government can obtain property from one person (regardless of whether the owner is willing to sell it) and sell it to another for the sole purpose of increasing economic productivity, to which the legislature constitutes a public use (Wilt 2009).

In the *Kelo* case, Justice Kennedy's concurring opinion suggests that the government should bear the burden of proving that a legitimate public benefit exists in some cases, rather than relying on the opinion of the legislature. Essentially, Kennedy is calling for a meaningful rational basis standard of review and recognizes the possibility of a stricter standard of review. In the article, Wilt analyzes these standards of review and provides a framework for a three-part intermediate scrutiny test to be applied in certain economic development cases (Wilt 2009).

Zachary Hudson, in his article titled "Eminent Domain Due Process," claims that there is an obvious disconnect between an eminent domain doctrine and a due process doctrine. The due process clause should guarantee that landowners receive a notice and an opportunity for judicial determination of the legality of the taking before it occurs; and although clearly stated in the Constitution, neither federal nor state case law uniformly recognizes the necessity of applying basic procedural protections in the eminent domain context. Consequently, Hudson points out

that "[t]his fact has led many state courts to arrive at the conclusion seemingly contrary to the plain text of the Constitution and counterintuitive to modern conceptions of property and procedural rights: due process does not apply to state eminent domain actions" (Hudson 2010, 1283).

Lynda Oswald, in her article, "Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law," takes a different perspective on the eminent domain debate. A majority of disputes, she asserts, surrounding eminent domain comes from the fact that condemnors and courts alike misunderstand the extent of the condemnor's power to condemn. In the non-use framework, "the condemning authority condemns to prevent an undesirable use – or, at least, one undesired by the condemnor or its most vocal constituents – be it a landfill, low-income housing, (or) a rehabilitation facility" (Oswald 2008, 47).

Both the courts and the condemnors seem to assume that condemnations for non-uses are not constitutionally permitted, so the condemnors try to conceal their motivations as to proceed with the condemnation they desire. Oswald argues that municipalities do have the constitutional power to engage in non-uses condemnation, as it is, in effect, a form of public use. The caveat, is that the municipality must provide that: "(1) it is willing to pay the just compensation price tag; and (2) it is prepared to show that the condemnation is motivated by actual public use (which would include prevention of a private use deemed detrimental to the public as a whole), as opposed to an intent to benefit private parties (such as protection of one or a few local neighbors)" (Oswald 2008, 49). Oswald concludes that it is not the action of the municipalities engaging in condemnation for non-uses, it is the lack of transparency in governmental action, such as condemning property for the sole purpose of preventing a specific land usage. Although much of the academic perception on eminent domain seems to question aspects of its legitimacy,

there are some in the academic world that see the importance of eminent domain (or takings) and its role in our government.

Abraham Bell, in his article "Private Takings," describes how the *Kelo* decision sparked a public firestorm based on the incomprehension that government may simply take property from one private owner and give it to another private owner. Bell (2009) contends that this firestorm was unwarranted, as private takings have long existed in our legal system. Furthermore, private takings, as was the case in all of the major Supreme Court rulings, can be government-mediated, where the government is formally responsible for taking the property, but simply acts as an intermediary transferring the property from one private entity to another.

Bell (2009) goes on to argue that the "power to seize ownership of property notwithstanding, the owner's objections is as necessary to overcome strategic problems in the private market – when they arise – as it is when the government seeks to obtain property for a public use. And, while there is need to police such takings to prevent abuse, there are better means of doing so rather than requiring the government to carry out the taking" (Bell 2009, 521).

Gideon Parchomovsky makes a similar argument in his essay on "The Uselessness of Public Use," claiming that criticisms of *Kelo* are "ill conceived and misguided." These criticisms are based on a narrow analysis of eminent domain that fails to take into account the full panoply of government power with respect to property. Given that the government can achieve any land use goals through the powers of regulation and taxation, without paying compensation to the distressed property owner, eminent domain is the government power least pernicious to property owners, as it is the only one that guarantees them compensation (Bell and Parchomovsky, 2006). Furthermore, "[a]n important and counterintuitive implication of this insight is that the calls to restrict the government's ability to use eminent by narrowly construing

public use are going to harm, rather than help, private property owners" (Bell and Parchomovsky 2006, 1412).

Methodology

The research approach for this analysis will be a case study method. A case study method was chosen on the basis that it allows me to explore the details about a particular issue or subject; in this case eminent domain. Furthermore, a distinctive characteristic and advantage of using a case study for this project is the ability to gather and include information from a multitude of sources to help me answer the general questions of "what" and "why" on the issue at hand.

Disadvantages to this design are time and access to diverse sources of information. Although research techniques to collect data under a case study method can include such things as interviews and participation, it takes an extended amount of time and skills to develop and implement each design, which are therefore excluded from the following analysis.

Through a qualitative exploratory platform, the purpose is to examine eminent domain and its impact on property rights. The method's qualitative aspect permits me to state an issue, formulate a set of research questions, indentify the case to be studied, collect the data, analyze the data, and write the report. Moreover, with the exploratory platform, while the project is under construction, I can establish new research questions and a continuing research agenda. To achieve this goal, several characteristics of eminent domain are to be thoroughly reviewed.

The United States Constitution

In 1789, James Madison proposed to the House of Representatives what was to become the first form of the Takings Clause. The proposal was redrafted, adopted by Congress, and ratified by the states as part of the Bill of Rights, specifically the Fifth Amendment (Wilt 2009). The relevant part of the Fifth Amendment states, "no person shall …be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (U.S. Constitution).

Thus, the Takings Clause makes two distinct stipulations: (1) that taking of property shall be for public use, and (2) that just compensation is paid to the property owner. Prior to the adoption of the Fourteenth Amendment, however, the power of eminent domain via state governments was unrestrained by the federal authority. Therefore, the just compensation provision of the Fifth Amendment did not apply to the states (Davis and Ravenell 2006). Eventually, and rejected at first, the Fifth Amendment was incorporated by the Fourteenth Amendment's due process clause to apply to the states, stating, "the due process clause …has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public use" (U.S. Constitution).

In regards to condemnation, the U.S. Constitution does not explicitly grant such powers to the federal government. This power is generally inferred today from Article I, Section 8, that gives Congress the authority to establish post offices and post roads as well as the authority over property obtained for forts, arsenals, and other similar facilities, and from the Takings Clause of the Fifth Amendment. This inference, however, was not made for almost a century after its

writing, lending credence to Alexander Hamilton's argument against the Bill of Rights, saying "it would contain various exceptions to power which are not granted" (Benson 2008, 429).

The Courts

Since the 1950s, eminent domain policy has been legally defined by a series of Supreme Court cases. In 1954, the Court upheld a rejuvenation plan targeting a blighted area of Washington, D.C. Under this plan, the area would be condemned and utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low cost housing. An owner (Berman) of a local department store located in the "blighted" area challenged the condemnation, demonstrating that his store was not blighted and arguing that the city's proposal toward a "better balanced, more attractive community" was not a valid public use (*Berman v. Parker* 1954; Davis and Ravenell 2006, 208).

Justice Douglas, refusing to evaluate the claim in isolation, deferred to the legislative and agency judgment. Also, Justice Douglas said the concept of the public welfare is broad and inclusive. Thus, it is in the power of the legislature to determine that the community should be beautiful and healthy, spacious as well as clean, and well balanced as well as carefully patrolled. Moreover, Congress and its authorized agencies have made determination that take into account a wide variety of values. If those who govern the District of Columbia decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way (*Berman v. Parker* 1954; Davis and Ravenell 2006).

Berman v Parker (1954) was the first major case dealing with eminent domain, which as a result, set the precedent on a legislative policy. In 1980, the country saw further extensions of

public use in the arena of private-to-private condemnation. Detroit, at the time, sought to condemn an entire neighborhood to provide a site for a General Motors assembly plant. The city leaders selected the Poletown neighborhood, a working class area that was fifty percent African American and fifty percent Polish. Unlike *Berman*, however, the neighborhood was not blighted; the city simply wanted to improve the neighborhood's economy and increase its tax base. The Michigan Supreme Court interpreted public use in its state constitution to allow the condemnation (*Poletown Neighborhood Council v. Detroit* 1980; Davis and Ravenell 2006).

A few years later, the U.S. Supreme Court saw its second major case, this time in Hawaii, dealing with the use of condemnation to relieve the highly concentrated land ownership. After extensive hearings dating back to the 1960s, the Hawaii legislature discovered that while the state and federal governments owned 49 percent of the state's land, another 47 percent was in the hands of only 72 private landowners. At the time, the concentration of land ownership was so dramatic that on Oahu, the state's most urbanized island, 22 landowners owned 73 percent of the land. The Hawaii legislature concluded that the "oligopoly" in land ownership was "skewing the state's residential market, inflating land prices, and injuring the public tranquility and welfare," and enacted a condemnation plan for redistribution (*Hawaii Housing Authority v. Midkiff* 1984; Davis and Ravenell 2006, 209).

The U.S. Supreme Court revisited *Berman v Parker* (1954), and the decision held that the takings to correct concentrated property ownership were for a legitimate public purpose; although the decision placed limits on the government's power (Davis and Ravenell 2006). Thus, it was determined that "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. Government does not itself have to use property to legitimate the taking;

it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate" (*Hawaii Housing Authority v. Midkiff* 1984).

Although legally speaking, not much different from the previously mentioned cases, *Kelo v. City of New London* (2005) is easily the United States' most significant Supreme Court case on private property. The city in question, located in southeastern Connecticut, suffered from decades of economic decline, which led a state agency in 1990 to designate it as a "distressed municipality." Such conditions prompted state and local officials to target New London for economic revitalization, similar to *Berman*. Furthermore, the city council authorized a private nonprofit development corporation to assist the city planning and economic development (Davis and Ravenell 2006).

In February of 1998, the pharmaceutical company Pfizer, Incorporated announced that it would build a $300 million research facility on a site adjacent to the specified property of Fort Trumbull. The local planners anticipated that Pfizer would draw new business to the area and that the project would serve as a catalyst to the area's rejuvenation. In view of this, the city council approved the plan in January of 2000, and designated the corporation as its development agent in charge of implementation, to acquire (purchase) property by exercising eminent domain in the city's name (Davis and Ravenell 2006).

Once the plan was put in place, nine people who owned fifteen properties in Fort Trumbull did not want to sell their property to the City of New London. Interestingly enough, there was no allegation that these properties were blighted or in poor condition; rather they were condemned only because they happened to be located within the development area.

Consequently, Susette Kelo and others brought a class action suit to the New London, Connecticut Superior Court. They claimed, among other assertions, that the taking of their property would violate the public use restriction in the Fifth Amendment. Thus, the Connecticut Superior Court granted a permanent restraining order prohibiting the taking of the property in question. On appeal, the Supreme Court of Connecticut ruled against the property owners by a 4-3 vote. The case was appealed subsequently to the U.S. Supreme Court, and the Court agreed to review the decision based on the Fifth Amendment as a provision (*Kelo v. City of New London* 2005; Davis and Ravenell 2006).

On June 23, 2005, the Supreme Court ruled, in a 5-4 decision, in favor of City of New London. John Paul Stevens, in presenting the majority opinion, stated that local governments should be afforded a wide latitude in seizing property for land-use decision of a local nature (Davis and Ravenell 2006). "The city has carefully formulated a development plan that it believed will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue." The Court concluded that "[p]romoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized" (*Kelo v. City of New London* 2006).

Findings

A consequential issue pertaining to eminent domain action is the perceived notion of infringed rights by government. This perception was inflamed after the *Kelo* decision, where a nation, and subsequently its politicians, came down on eminent domain policy. The following text will examine three important aspects of eminent domain: takings, just compensation, and due process. Then, a comparison will be drawn between efficiency and equity in eminent domain, in combination with an in-depth analysis of the *Kelo* aftermath. Lastly, successive eminent domain legislation following *Kelo* will be identified.

Takings

The taking of property can be traced back to biblical times. Illustrating the custom of biblical kings, for example, the prophet Samuel would inform the people of Israel that the king will "take your fields, and your vineyards, and your oliveyards, even the best of them" (1 Sam. 8:14 King James Version). Even in biblical times, however, this power was limited. Ahab, the king of Israel, seemingly lacked the power to take land from Naboth, and resorted to fabricating charges of blasphemy and sedition in order to seize property. Similarly, the Magna Carta declared that no free man shall be dispossessed, "except by the legal judgment of his peers or by the law of the land," and that when crown officials seized chattels, they could not "take anyone's grain or other chattels without immediately paying for them in money" (Bell 2009, 525).

Upon the founding of the United States, it was argued that eminent domain was not one of the powers enumerated in the Constitution. Eventually, however, Congress authorized the use of eminent domain in 1867 to aid the development of national cemeteries following the Civil War. This statute was followed by a more comprehensive declaration of federal eminent domain

authority in 1888 that increased the scope of the takings power, but still required a process that mirrored conventional civil litigation (Hudson 2010).

Subsequent to these broader statutes, government taking was constitutionally challenged in a set of cases. The first, *Cherokee Nation v. Southern Kansas Railway Company* (1890), inquired at what point during a government taking of private property compensation should be paid to the property owner. The Court held that a payment did not have to be delivered prior to governmental acquisition of property, per the Fifth Amendment. In issuing the statement, the Court held that "a property owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed, but actual compensation need not be paid prior to transfer" (Hudson 2010, 1294). Reaffirming its decision in *Cherokee*, the Court held just five years later in *Sweet v. Rechel* (1895) that "so long as adequate provision be made for compensation, it was necessary to actually compensate the owner of the condemned property prior to completing the taking" (Hudson 2010, 1295).

After *Cherokee* and *Sweet*, there was no case law allowing government to take possession of private property by eminent domain power without prior process. Moreover, the government was not subjected to pay the property owner prior to taking possession of land, but the taking authority was required to invoke an "adversarial judicial process to obtain title to the condemned property… In 1931, however, the federal government created a method allowing for the stream-lined exercise of eminent domain authority" (Hudson 2010, 1295). The Takings Act, passed by Congress, sought to "expedite the construction of public buildings and works… by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain" (Hudson 2010, 1295).

The Taking Act was eventually challenged under *Catlin v. United States* (1945). The Court stated, in *Catlin*, that "in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property" (Hudson 2010, 1296). While this does not explicitly define the process that must occur prior to a taking, it does tie compensation to other legal issues. *Cherokee* and *Sweet* stood for the proposition that property can transfer without payment of compensation, thus *Catlin* suggests that property can transfer from a private property owner to the government without some form or final judgment (Hudson 2010).

Just Compensation

In *Armstrong v. United States* (1960), it was stated that the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens that should be borne by the public as a whole" (Davis and Ravenell 2006, 206). Theoretically, just compensation required by the Constitution represents a full and perfect equivalent for the taking of property, and is measured by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community (Davis and Ravenell 2006).

The general standard for just compensation is fair market value, which is normally what a willing buyer would pay a willing seller. Specifically, *The Free Dictionary* defines market value as "the price which a seller of property would receive in an open market by negotiation, as distinguished from a distress price on a forced or foreclosure sale, or from an auction. Market value of real property is normally determined by a professional appraiser who makes

comparisons to similar property sales in the area, which are often called comparables" (Davis and Ravenell 2006, 207). Market value can also be defined as "the price that an interested but not desperate buyer would be willing to pay and an interested but not desperate seller would be willing to accept on the open market assuming a reasonable period of time for an agreement to arise" (Investor Words Glossary 2007; Davis and Ravenell 2006, 207). Thus, it can be concluded from these definitions that an eminent domain taking would not be considered a fair market transaction, since the seller was under pressure to enter into the transaction (Davis and Ravenell 2006).

Due to the different types and uses of property, problems can occur while computing just compensation. For example, if only a portion of land is taken, the owner's compensation includes any element of value arising out of the relation between the parts taken, to the entire piece of land. Furthermore, interests in intangible, as well as tangible, property are subject to protections under the Takings Clause. Thus, compensation must be paid for the taking of contract rights, patent rights, and trade secrets. Also, the franchise of a private corporation is property that cannot be taken for public use without just compensation. Lastly, if condemnation of a lock or dam belonging to a navigation company occurs, the government is required to pay for the franchise to take tolls as well as for the tangible property (Davis and Ravenell 2006).

Generically speaking, whatever property the citizen has the government may take. Compensation does not require payment for losses or expenses incurred by property owners or tenants incidental to, or as a consequence of, the taking of real property, if they are not reflected in the market value of the property taken. Once the property has been taken, fees, leases, and whatever else one may owe must be paid (Davis and Ravenell 2006).

The Court has established an exception to the general principle of compensation, where only a temporary occupancy is assumed. Here, "the taking body must pay the value which a hypothetical long-term tenant would require when leasing to a temporary occupier. Included in the market value of the interest is the reasonable cost of moving out personal property stored on the premises, the costs of storage of the goods against their sale, and the cost of returning the property to the premises" (Davis and Ravenell 2006, 207).

Enforcement of the right to compensation is at the discretion of the legislature and may be issued by a regular court of law, a commission, or an administrative body. The estimate of just compensation is not required to be made by a jury, but by a judge or commission; and federal courts may appoint a commission in condemnation actions to resolve the compensation issue. Thus, all that is essential is that appropriate inquiries shall be made as to the amount of compensation before a properly constituted tribunal, and when this has been provided, due process of law is required by the Constitution (Davis and Ravenell 2006).

Due Process

The Supreme Court has never fully defined the due process rights of a property owner faced with eminent domain action taken by government, whether it be federal, state, or local. To expound this notion, the limited amount of Court precedent only lends credence to the obscurity of due process rights. The Court's rulings pertaining to the interaction of property rights and due process rights suggest that prior notice and prior determination of the appropriateness of the state action are warranted prior to a taking. A number of state eminent domain laws provide full due process rights to landowners whose property is the object of a state-initiated eminent domain action, including personal notice and a form of pre-condemnation hearing. Conversely, some

states allow the exercise of eminent domain power with no notice to the property owner and no meaningful judicial proceeding prior to the taking. Some states possess a middle ground between the two extremes, allowing the exercise of eminent domain authority with some prior process in specific instances. Although these divisions become less clear when state case law complementing eminent domain statutes are considered, several states allow the transfer of property without notice or hearing (Hudson 2010).

As previously noted, state condemnation of private property using eminent domain is often accompanied by full process rights. The exercise of the takings power typically involves the initiation of condemnation proceedings against the property owner. In most states, "condemnation litigation bears a striking resemblance to a normal civil judicial proceeding, and in many instances it is governed by similar procedural rules" (Hudson 2010, 1287). Under the usual condemnation process providing full procedural rights, the condemning authority begins by determining that a privately owned parcel of land is needed for a public use, and the taking entity commences eminent domain proceedings against the property owner. The property owner is formally served and entitled to defend against the taking, after which a formal proceeding to decide whether the property at issue may be taken occurs. Once a judgment for the condemnor is entered and just compensation has been paid, title vests in the taking authority. This process can take several years, and regardless of whether the ultimate resolution of a conflict between a property owner and a taking authority is the product of negotiation or litigation, the process is arduous, expensive, and time consuming. Though burdensome, "these condemnation procedures serve to fully protect the due process rights of property owners and act as a serious deterrent to eminent domain abuse" (Hudson 2010, 1287).

States have an alternative expedited mechanism for exercising eminent domain authority. Although accelerated, these state actions offer the procedural protections that one would expect the law to provide a property owner. Twelve states have expedited eminent domain procedures that provide the same type of notice and adversarial process that is established in the course of normal civil litigation. For example, under Alabama law,

> …an action to condemn property may not be maintained over a timely objection by the property owner unless the condemnor has offered to acquire the property by purchase and made reasonable attempts to negotiate a price. If these negotiations fail, then the condemnor must file a complaint, along with a legal description of the property, such as a zoning map. Notice of the complaint must be served on the property owner, after which a hearing is held that concludes in the court either granting or refusing the complaint. If the condemnation is approved, a three-judge panel assesses the appropriate damages and compensation, and once that amount has either been deposited with the court or paid to the property owner, title is conveyed to the condemning authority by court order (Hudson 2010, 1288).

On the other side of the spectrum, twenty-one states and the District of Columbia allow for the exercise of eminent domain authority without any prior notice or pre-condemnation hearing. The Rhode Island statute, for example, used by the Economic Development Corporation (EDC), is an example of perhaps the most nefarious form of process abuse committed in the name of eminent domain. The power of eminent domain, under this law, is delegated to a quasi-governmental entity such as the EDC. The company has the ability to make independent decisions about condemnation and carry out these decisions with little or no prior

review. To exercise this authority, the EDC must simply file a declaration with the city clerk where the property is situated, along with a statement that the property will be put to a public use and an estimation of compensation. The taking is then completed by the ex parte act of the filing itself, and the title to the property immediately transferred to the state without any involvement by the property owner or any review of the taking. This statute does not require that notice be given to the property owner until after the taking is completed (Hudson 2010).

Found between complete process and a lack thereof, several states have statutes that allow for "active judicial consideration on the merits of the exercise of eminent domain authority but fail to provide notice to the condemnee or fall short in some other important way of providing full procedural protections to property owners" (Hudson 2010, 1289). In Illinois, for example, condemnors may file a petition with the court for possession of the land in question either immediately upon receiving court approval, or at some specified time in the future. While deciding whether to grant or deny this motion, the court must consider whether the eminent domain authority was appropriately invoked. Although there is neither a notice nor adversarial proceeding requirement under this statute, the court can provide protection against bad faith or ill-conceived action by the state as it must make an affirmative finding for the condemnor (Hudson 2010).

Other states require notice by statue prior to allowing the exercise of eminent domain power, but do not specifically engage in any form of pre-condemnation process. For example, under Hawaii law,

> …a taking can be accomplished by a simple filing with the court, but the condemnor must also provide notice to the owner of the property it seeks to condemn. There is no specific judicial proceeding provided for under this statute,

> but by ensuring notice to the property owner, the statute at least gives the individual the opportunity to attempt to insert [themselves] in the process by seeking an injunction or pursuing some other equitable remedy (Hudson 2010, 1289).

Providing more process, some states require both notice to the property owner that is targeted by an eminent domain action, and provide for limited court review of the action's propriety. Under Connecticut law, for example, a designated agency or municipality initiates condemnation proceeding to obtain access to property by filing a statement of compensation with the clerk of courts. At the same time, the condemning authority must provide notice to the property owner. Any person claiming to be aggrieved by the eminent domain action may seek judicial review of its validity, but this review is largely constrained to the amount of compensation deposited, and does not prevent the property from vesting with the takings authority. Though falling short of providing the full array of procedural protections, states in this category at least provide some due process to property owners (Hudson 2010).

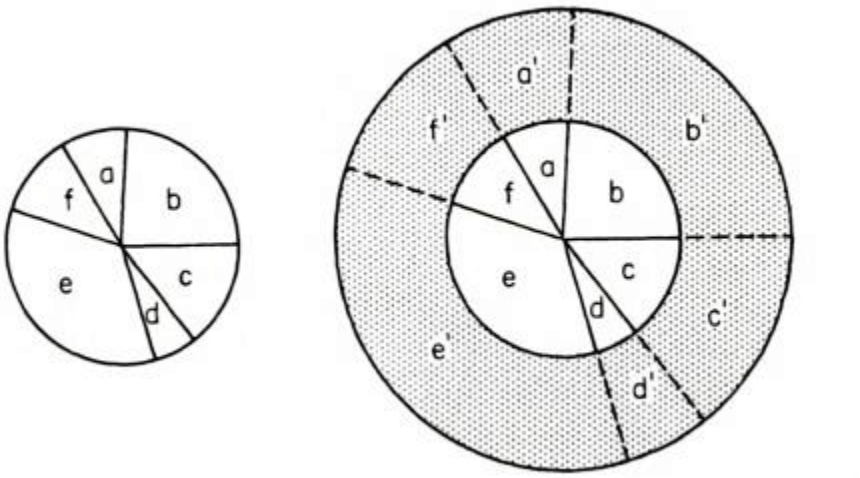
Efficiency versus Equity

In public administration theory, two principles are often identified as a cornerstone to organizational survival: efficiency and equity. As government institutions interact, delegate, and expand, developing a tradeoff between these two doctrines is critical.

As it relates to government, efficiency can be illustrated as a pie, and equity is how evenly the pie is being divided. When government policies develop, there is often a conflict between these goals, because for one to be gained, the other must sacrifice. Thus, when government policy is designed, it must attempt to maximize scarce resources, while making sure

that the distribution of benefits from those resources are divided somewhat evenly among society. This is also known as "tradeoff" (Efficiency v Equity 2010).

Figure 1. A Tale of Two Pies (1985)



Richard Epstein expounds on this analogy seen in Figure 1. The smaller pie, on the one hand, represents the situation in a world without effective government control. As similarly stated under the Constitution, each individual is endowed with certain individual rights. Yet, the values of these rights are low because some individuals try to take that which by right belongs to others. Uncertainty makes it difficult to plan, which prevent individuals from effectively utilizing their talents and external goods. The question of governance, Epstein writes, "is how the natural rights over labor and property can be preserved in form and enhanced in value by the exercise of political power" (Epstein 1985, 4).

The larger pie, on the other hand, indicates the gains that are possible from political organization. The outer ring represents the total social gains, while the dotted lines indicate the proportion of the gain received by each individual member. Accordingly, the normative limit

upon the use of political power is that it should preserve the relative entitlements among the members of the group, both in the formation of social order and its ongoing operation. All government action must be justified as moving a society from the smaller to the larger pie (Epstein 1985).

Epstein further illustrates how these two pies isolate all the elements that surround both the origin and the operation of the takings clause. The boundaries of the slices in the first pie are the limits of private rights protected by the states: they identify the private property that cannot be taken without just compensation. To achieve this end, a police power must be vested in the sovereign to protect the private violation of the boundaries. With the inherent power of all government, it must be limited in the ends that will be served and in the means chosen to serve them. The formation and operation of the state, moreover, requires transferring resources from private to public hands (Epstein 1985).

Accordingly, private property must be converted to public hands. Yet, the power of the state to take it for public use arises because the state will not obtain the resources needed to operate by voluntary donation or exchanges. If these sources of revenue were sufficient, however, the state would raise no problem that a system of ordinary markets could not solve. Thus, these exchanges do not occur voluntarily, and therefore must be coerced (Epstein 1985).

It becomes critical to regulate the terms on which the exchanges take place. The requirement of just compensation assures that the state will give to each person a fair equivalent to what has been taken; this is area "a" in the second pie equals area "a" in the first pie, and so forth. Lastly, the public use requirement conditions the use of coercive power by demanding that any surplus should be generated by the action. Here, the outer ring is divided among individuals

in accordance with the size of their original contributions. Therefore, each gain by public action is uniquely assigned to an individual, so that none is left to the state (Epstein 1985).

Efficiency and Takings

In regards to takings specifically, Bell labels efficiency as "necessary to allow government to fulfill its important function of providing public goods, and, more specifically, warranted by the need to overcome strategic barriers that would block the government's consensual acquisition of such property as would be used in the provision of the public good" (Bell 2009, 529). The claim rests on the idea that there are times when it is ideal for the government to own property in order to ensure its preservation, or because the government is the highest-value user. Occasionally, the government will be able to purchase such property on the open market; at other times, however, impediments to bargaining prevent owners from voluntarily reassigning assets to the government (Bell 2009).

Thus, there is nothing in the law of takings that limits the power to take where the government is the preferred owner on the grounds of efficiency. Bell considers the following cases. In the first case, the government seeks to preserve a habitat for an endangered species, and it can accomplish this mission cost efficiently by owning the land. In the second case, the government seeks to improve airline safety, which can best be accomplished by leaving airlines to private ownership, subject to public inspections. Nevertheless, in response to a public panic about inadequate air safety, the government seeks a governmental monopoly on the provision of air transportation services, notwithstanding the likelihood that the scheme will cause considerable economic inefficiency and dislocation, without appreciable change in safety, or public confidence. In the first case, the takings power should pave the way to government

ownership of the property; in the second case, it should not. Yet, the takings power does not distinguish between the cases (Bell 2009).

(In)Equality and Taking: The Kelo Aftermath and Public Use

In 2005, the Supreme Court upheld the seizure of private property for the purpose of economic development. Although the *Kelo* ruling merely affirmed a longstanding statute of takings, the publics' reaction was immediate, intense, and harsh. But why was the backlash so extreme, if the Court simply confirmed previous rulings? Two thousand and five was much different from 1985, or 1954 for that matter.

Media coverage and easy access drove critics from all sides of the political spectrum to denounce the decision as a violation of basic property rights and an engine for social inequality. To libertarians, *Kelo* constitutes a judicial endorsement of massive government intervention in the private property market. They argued that the Court's reverent approach to questions of public use extends an open invitation to the government to take private property at anytime it believes it has identified a better use, public or private. In their view, "this intervention extends well beyond the narrow need to supply public goods, and permits government to second-guess private owners' autonomy in deciding how to develop their property and when to transfer it" (Bell and Parchomovsky 2006, 1413).

Even those whose political views lean left denounced *Kelo*. Liberals hate *Kelo* for permitting large corporations to acquire the property of small owners without their consent, and for the sanction it places on state victimization of the poorest property owner. The facts of *Kelo* illustrate two primary concerns for them. The first was the fact that New London took Kelo's property, along with more than a hundred others, in order to assemble land for the

pharmaceutical giant Pfizer. Therefore, *Kelo* represents an affirmation of the infamous *Poletown* (1981) case, in which the Michigan Supreme Court upheld the seizure of nearly all private realty in a working-class neighborhood and transferred the land to General Motors. The second concern was the issue of social inequality, compounded by a belief that government's exercise of eminent domain has a disparate negative impact on the least well off. This concern finds empirical support in a study by Patricia Dazon in which she demonstrated that owners of less valuable properties are systematically undercompensated when their properties are taken, while owners of greater-value property receive excess compensation. Succinctly put, broad interpretations of public use are extremely unappealing on distributional grounds (Bell and Parchomovsky 2006).

To further expound this notion of inequality, some critics tie the distributional concern to race and ethnicity by highlighting the correlation between poverty and membership in certain minority groups. In this view, *Kelo* reaffirms the ruling of *Berman* (1954), which found public use permissible in the seizure of private properties for transfer to private developers as a part of an urban renewal plan. Representative John Conyers (D-MI) beset such exercises of the takings power as having been used "historically to target the poor, people of color, and the elderly" (Bell and Parchomovsky 2006, 1414). Similarly, Justice Clarence Thomas noted in his *Kelo* dissent, "[o]f all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite" (Bell and Parchomovsky 2006, 1414).

The *Kelo* decision became a lightning rod for more generalized criticisms of governmental abuse. Nobel Prize winner Gary Becker, for example, argued that, given shortcomings in takings compensation doctrine, authority to seize property by eminent domain opened the door to inefficient projects born of corruption, which enabled an abusive exercise of

government authority. Furthermore, in Becker's view, *Kelo* represents a missed opportunity to cut back on the government's takings power (Bell and Parchomovsky 2006).

Kelo has even come under the attack of communitarians, such as Amitai Etzioni. Notwithstanding his general belief that "individual rights have been unduly expanded, often at the cost of the common good," Etzioni identified *Kelo* as the case that "opened the floodgates to excessive seizures without setting adequate limits to secure private property" (Bell and Parchomovsky 2006, 1415).

Along the lines of the response to *Kelo*, Lynda Oswald demonstrates the precarious nature of "public use," or non-use. It is difficult to characterize public use limitations because the rules are packed with complex and often conflicting notions. For example, if a municipality condemns a piece of property to prevent the construction of racially integrated housing, are they subject to constitutional limits such as equal protection? The courts have historically applied a conjecture of legitimacy to legislative declarations of public use, which can only be overcome where, as one treatise summarized it, "the use is clearly, plainly, and manifestly of a private character, or the declaration by the legislature is manifestly arbitrary or unreasonable, involves an impossibility, or is palpably without reasonable foundation, or was induced by fraud, collusion, or bad faith" (Oswald 2008, 57). To sum up, when the purpose is to hide some sinister scheme, the courts can intervene to redress bad faith action by the legislature. These types of untenable actions, however, would appear that almost anything goes in terms of legislative determinations of public uses. Moreover, while these general prohibitions regarding legislative overreach in the public use arena are relatively easy, applying them in specific cases is much more difficult (Oswald 2008).

When defining the scope of appropriate judicial scrutiny of condemnation actions, the courts rely heavily on the unclear distinction between motive and purpose. Legislative motives are considered outside the realm of appropriate judicial inquiry, while legislative purpose, commonly viewed as a more verifiable concept, is considered fair game for judicial scrutiny. Nevertheless, some courts have recognized the inherent opportunity for legislative gaming, and have tried to address the issue by examining whether the purpose articulated by the condemnor is a real one, or is just a sham. This lead the court into tortuous issues of true versus stated purpose and raises the ill-defined role of bad faith in takings analysis (Oswald 2008).

Sometimes the courts will inquire into whether the stated purpose of the taking is the true purpose – an inquiry that often leads into evaluations of bad faith on the part of the condemnor. In fact, issues of motive can also be introduced through the back door of bad faith. In Pennsylvania, for example, the courts have stated that "[b]ad faith is generally the opposite of good faith and …implies a tainted motive of interest and the bad faith becomes palpable when such motive is obvious or readily perceived" (Oswald 2008, 61). Although the courts theory avoid the notion that they can inquire into the motives of a taking, they in practice, by acknowledging a role for evaluating the condemnor's actions for bad faith, open the door to at least limited inquiries about motive (Oswald 2008).

The real difficulty exists in defining legislative actions that constitute bad faith. Some cases can be easy, such as where the government articulates a valid public purpose for the taking, but the real purpose is demonstrably otherwise. In *City of Miami v. Wolfe* (1963), for example, the City of Miami sought to condemn the appellee's property, allegedly for extending an existing roadway. The property owner challenged the action on the grounds that the city's true purpose was not to acquire the lands for a public street, but rather to acquire the title to contiguous by-

bottom land. The court found that "the city had attempted to condemn the appellee's land so as to acquire the riparian right to purchase contiguous bay-bottom land under the state statute, and not to construct a road extension," and this action "was brought in bad faith, amount[ing] to a gross abuse of discretion, and should have been dismissed" (Oswald 2008, 62).

Not all cases present such candid facts, however, and many courts, even in the context of bad faith, will fall back on the practice that so long as the articulated public purpose is pursued, the taking is valid. In *Incorporated Village of Hewlett Bay Park v. Klein* (1966), for example, the city had proposed to condemn a parcel for construction of a garage and storage facility after the property owner had petitioned repeatedly to have the parcel rezoned for construction of a parking lot. The court found that "the facts surrounding the condemnation suggested that the stated purpose was suspect and concluded that the real purpose of this condemnation proceeding in larger part is not to use this property for something affirmative, so much as it is to prevent its use for something else which the village authorities regard as undesirable. Such is a perversion of the condemnation process" (Oswald 2008, 63). On appeal, the appellate division reversed, stating that "because there was no proof that the city would not use property for the stated public purpose, there was no proof of bad faith on the part of the condemnor, either as to whether the proposed use in a public one or as to whether there would be adherence to such use after the taking of the property" (Oswald 2008, 63).

Misinterpretations

Although much of the debate surrounding eminent domain is seemingly critical, there are those that purport a misguided notion of eminent domain, and its importance, after the *Kelo* decision. Abraham Bell and Gideon Parchomovsky, for example, maintain that the *Kelo* ruling was rightly decided, and criticisms of the decision are ill conceived and misguided. They explain that any other interpretation of the public use component of the takings law would produce inconsistencies within the constitutional law of property rights and create obstinate motivations for government decision makers considering eminent domain and property rights. Certainly, adopting the narrower construction of public use proffered by the *Kelo* dissenters and critics would aggravate, rather than remedy, the erosion of private property rights and the potential abuse of government power (Bell and Parchomovsky 2006).

The Achilles heel of the anti-*Kelo* movement, as Bell and Parchomovsky continue, is its failure to consider the place of the public use doctrine within the government regulatory powers over property. The genuine problem posed by situations such as that addressed in *Kelo* is how to protect private property owners against abusive government acts in a legal world that gives great deference to economic judgments of political branches and wishes to continue to do so (Bell and Parchomovsky 2006).

It is also important to note that government's power to take property is not limited to eminent domain actions. The government actually has, to its disposal, functionally equivalent powers, such as property regulation and taxation, which enable it to transfer a title from private property owners to itself and others without having to pay full compensation, commonly unknown to the average eminent domain opponent. Furthermore, the broad reading of public use in *Kelo* is necessary to preserve the best-case scenario for private property owners. Limiting the

government's ability to use eminent domain to further economic goals will not prevent the government from using its more invasive powers to inflict similar harm on private property rights, but without compensation. Subsequently, public sentiment of eminent domain should be seen as the least offensive of government's property related powers (Bell and Parchomovsky 2006).

Thus, the question is asked, why does the government not use one of its more invasive powers? The fact of the matter is, it does, and this is the mistake of *Kelo's* critics. In targeting the public use doctrine as a key to thwarting government abuse of property rights, "the critics have made the compensated seizure a less-attractive option for government decision makers and missed the opportunity to fight the promiscuous use of government's other powers without compensation. Indeed, if the public use doctrine were now narrowed as *Kelo* critics demand, the situation would only worsen, as the government would be forced to use its nontakings power to accomplish any property-related missions" (Bell and Parchomovsky 2006, 1416-1417).

Legislative Backlash

Regardless of the sentiment, or realities, concerning eminent domain policy following *Kelo*, politicians, at both federal and state levels, heeded to the public outcry, and rushed to introduce a massive wave of reform restricting the government's power to use eminent domain. Thus, within three weeks of the ruling, Senator John Cornyn (R-TX) proposed legislation that would construe the Public Use Clause, to bar the use of eminent domain in order to achieve economic development. Similar bills were introduced in the House of Representatives by Dennis Rehberg (R-MT), Phil Gingrey (R-GA), Maxine Waters (D-CA), Henry Bonilla (R-TX), Joel Hefley (R-CO), and James Sensenbrenner (R-WI) together with ninety-seven cosponsors, and in

the Senate by John Ensign (R-NV) (Bell and Parchomovsky 2006). In addition, the most sweeping federal legislation would have to be House Bill H.R. 4128, the Private Property Rights Protection Act of 2005, which was passed unanimously by 376 votes for, and 38 against. Unfortunately, for eminent domain critics, it remains in the Senate Judiciary Committee to be voted upon (Gilroy 2006).

Along with legislation at the federal level, within two years of the decision, forty-two states passed statutes or amendments to their constitutions restricting various parts of eminent domain. Some of this legislation merely restates the long held rule that eminent domain may not be used to benefit a particular private party, while other states have taken a more drastic approach and have completely eliminated economic development as a public use (Wilt 2009). The following literature will detail this legislation per year.

In 2005, eminent domain legislation was considered in thirteen states. Of these states, four enacted laws – Alabama, Delaware, Ohio, and Texas, and a fifth – Michigan – passed a constitutional amendment (see Figure 1). This legislation generally fell into five categories:

- Prohibiting eminent domain for specified economic development purposes, to generate tax revenue, or to transfer private property to another private use.
- Limiting eminent domain to a "stated public purpose" or a “recognized public use.”
- Restricting its use to blighted properties or to areas where most properties are blighted and the remaining parcels are necessary to complete a redevelopment plan.
- Placing a moratorium on the use of eminent domain for economic development purposes until a specified date, and establishing special legislative committees or task forces to study the issues.

- Increasing the amount of compensation for condemned property that is a person's principal residence (National Conference of State Legislatures 2005).

Figure 1. State Eminent Domain Legislation 2005

Enacted
Alabama
SB 68
Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.
Delaware
SB 217 (with House Amendment 1)
Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.
Ohio
SB 167
Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task force to study eminent domain issues.
Texas
SB 7
Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.
Passed Legislation--Approved on November 2006 Ballot
Michigan
SJR E
Stipulates that if a person's principal residence is taken for public use, the amount of just compensation shall not be less than 125 percent of the property's fair market value; public use does not include transferring private property to another private entity for economic development or generating additional tax revenue.

Source: Data from ncsl.org (accessed July 23, 2010).

In 2006, the response was much more significant, as legislation was considered in 44 states that were in session, with 28 passing bills. Of those states, 24 enacted the legislation – Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, South

Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin; two passed a constitutional amendment – Louisiana and South Carolina; and two were vetoed by the governor – Arizona and New Mexico (see Appendix 4). This legislation fell into seven categories:

- Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes "public use," generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.
- Requiring compensation greater than fair market value where property condemned is the principal residence.
- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings (National Conference of State Legislatures 2006).

In 2007, eight more states enacted laws: Connecticut, Montana, Nevada, New Mexico, North Dakota, Utah, Virginia, and Wyoming (see Figure 3). Although in 2008, two ballot measures were proposed in California (see Figure 4), 2007 was the last wave of eminent domain reform in the United States.

Figure 3. State Eminent Domain Legislation 2007

Enacted Laws
Connecticut
SB 167
Requires a two-thirds vote of the legislative body of a municipality to approve the acquisition of real property through eminent domain by a development agency. If the municipality decides not to use the property for the purpose for which it was acquired, it must offer to sell it back to the original owners or heirs at the original purchase price or fair market value, whichever is less. Increases the level of compensation for property acquired through eminent domain by a development agency to 125 percent of its average appraised value. Prohibits the acquisition of real property through eminent domain if the primary purpose is to increase tax revenue.
Montana
SB 363
Limits the use of eminent domain for urban renewal purposes to property in blighted areas where the property is a detriment to the public health, safety or welfare, and prohibits its use if the primary purpose is to increase tax revenue.
Nevada
AB 102
Stipulates that public uses for which property may be acquired through eminent domain do not include transfer of the property to another private entity. Exceptions include where the private entity uses the property primarily to benefit a public purpose; the entity leases the property to a person that occupies an incidental part of a public facility; or the property taken was abandoned by the owner or the purpose was to abate a threat to the public health and safety.
AJR 3
Stipulates that public uses for which property may be acquired through eminent domain do not include transfer of the property to another private entity. Exceptions include where the private entity uses the property primarily to benefit a public purpose; the entity leases the property to a person that occupies an incidental part of a public facility; or the property taken was abandoned by the owner or the purpose was to abate a threat to the public health and safety. (Note: AJR 3 must be adopted by the legislature again in 2009 and be passed by the electorate on the 2010 ballot before becoming effective.)
New Mexico
HB 393
Prohibits the use of eminent domain by municipalities for redevelopment projects under the Metropolitan Redevelopment Code.
North Dakota
SB 2214
Prohibits the taking private property for use or ownership by another private entity, except for common carriers or public utilities. Stipulates that public use or public purpose does not include the public benefits of economic development, including an increase in tax base, tax revenue, employment or general economic health.
Utah
HB 365
Prohibits the use of eminent domain to acquire single-family residential owner occupied property unless requested by the owners of at least 80 percent of the owner occupied property within the area representing at least 70 percent of the value of owner occupied property in the area, and two-thirds of all agency board members approve of the acquisition. For the acquisition of commercial property, the figures are 75 percent and 60 percent, respectively. Authorizes the use of eminent domain in an urban renewal project area if an agency determines the property is blighted, the urban renewal project area plan provides for the use of eminent domain and acquisition of the property begins no later than five years after the date of the plan. Requires advance written notice and good faith negotiations with property owners before exercising

eminent domain.
Virginia
SB 781, SB 1296, HB 2954 **Defines public use for which eminent domain may be exercised to be, among other uses, the possession, ownership, occupation and enjoyment of property by the public or a public corporation, or for the removal of blight where the property condemned is actually blighted. Stipulates that property may only be taken where the public interest dominates any private gain and the primary purpose is not for an increase in tax base, tax revenue or employment.**
Wyoming
HB 124 **Defines public purpose for which eminent domain may be exercised to be the possession, occupation and enjoyment of property by a public entity. Prohibits the transfer of private property to another private entity except to protect the public health and safety. Prohibits a municipality from delegating eminent domain authority to an urban renewal agency. Requires advance written notice and good faith negotiations with property owners before exercising eminent domain.**

Source: Data from ncsl.org accessed (July 23, 2010).

Figure 4. Eminent Domain Ballot Measures 2008

California
Proposition 98
Prohibits the taking or damaging of private property for private use; prohibits rent control; and requires state and local governments to offer to sell back property taken through eminent domain to the original owner if the property is put to a substantially different use than originally stated. (Failed, 39.1%)
Proposition 99
Prohibits the use of eminent domain to acquire an owner-occupied residence to convey it to a private entity. (Passed, 62.4%)

Source: Data from ncsl.org accessed (July 23, 2010).

Recommendations

Improvements to eminent domain policy are noteworthy, particularly in the aspect of preventing transgression by government entities. In the foregoing analysis, due process rights are reviewed, a supposition from Justice Kennedy's concurrence is examined, and the issue of non-use is clarified.

It is important that the courts recognize the due process rights of property owners facing eminent domain action. The courts have long considered themselves constitutionally competent to arbitrate questions of public use in the takings context. This was addressed specifically in *Kelo*, "This Court's authority… extends… to determining whether… proposed condemnations are for a public use within the meaning of the Fifth Amendment to the Federal Constitution" (*Kelo v. City of New London* 2005). A number of courts have also determined that they should play a primary role in restricting the use of eminent domain to those actions that benefit the public. Thus, if the courts made a determination with respect to the public utility of an eminent domain action prior to allowing the completion of the taking, it could potentially prevent the condemnation of property for the purpose of economic development. Just as the courts have the authority to decide whether an eminent domain action is for a public use, should they not have the authority to discontinue a taking before it causes irreparable harm (Hudson 2010)?

In addition, depending on the specific ruling, perhaps a pre-condemnation hearing could be used to determine whether a certain eminent domain power was necessary. Many state laws, for example, "require a determination of necessity prior to exercising eminent domain authority with certain procedural shortcuts" (Hudson 2010, 1312). Most of the time, this determination is made without any means for the condemnee to challenge it prior to the taking. The Supreme Court has expressed a strong preference for "as-applied" constitutional challenges, which, under

eminent domain procedures, might require a showing that eminent domain powers was necessary to the success of a project (Hudson 2010, 1312-13). The authorization, then, of a hearing prior to premise a taking of property would allow these issues to be addressed in a timely fashion (Hudson 2010).

A pre-condemnation hearing could also be used to determine whether the power to exercise eminent domain authority has been appropriately delegated. Some states delegate their takings power to public economic development corporation and in some cases private entities, such as in *Rhode Island Economic Development Corp. v. Parking Co*. Also, several legislative acts delegating state takings power have been deemed illegitimate by the courts. The supreme court of Pennsylvania, for example, "has invalidated state agreements delegating eminent domain authority to a private redeveloper whose services were acquired by the state" (Hudson 2010, 1313).

Whereas issues related to just compensation could also be addressed before a condemnation action, if a court justifies that the taking is for a public use and appropriately executed, these issue could most likely be disposed of post-condemnation. Furthermore, permitting definitive compensation after a condemnation action will reduce the hardships presented to the government in providing pre-deprivation process, lessening concerns about the provision of additional process (Hudson 2010).

Another suggestion in confronting government's involvement with suspicious economic development cases is taking guidance from Justice Kennedy's concurrence illustrated by Wilt. Justice Kennedy's principal concern with economic development takings is that private entities will receive the majority of the benefits and the public will receive benefits that are more incidental. These circumstances involve cases where the transfers are very suspicious, the

procedures employed are prone to abuse, or the purported benefits are trivial or implausible. Therefore, some form of intermediate scrutiny should be developed whenever a court determines that a case falls within one of these categories (Wilt 2009).

According to Wilt, a three-prong analysis of government action may determine if a taking advances a legitimate public interest. Firstly, the court must determine whether the asserted public purpose is substantial. Secondly, the court must determine whether the taking advances the asserted public interest. Thirdly, the court must determine whether the taking is more extensive than necessary to advance the substantial public interest (Wilt 2009).

The public benefit prong focuses on whether the public benefit is substantial. In most economic development cases, the declared benefits include increased employment and tax revenue as well as rejuvenation of the local economy. Kennedy's main concern is that private entities will receive a premium by showing only a minimal public benefit. Thus,

> Taking homes in an effort to revitalize a local economy may seem harsh to the landowner. However, when a city falls on economically troubling times, public officials feel political pressure to jumpstart growth. To attract business that will create new jobs and generate tax revenue, cities offer incentives in the form of land acquisition through condemnations and tax abatements. As demonstrated in *Poletown*, sometimes the demands of new businesses grossly outweigh the benefits. Often, cities have no recourse when the expected benefits do not materialize, leaving communities with an even larger economic burden (Wilt 2009, 452-453).

Although not an easy task, the court must weigh the extent of private benefits through the taking and compare them to the proclaimed public benefit. The condemning authority will have

to calculate a dollar figure based on specific criteria, such as the potential for job creation and economic rejuvenation. Essentially, the court will determine whether the public benefit is a disguised private benefit (Wilt 2009).

The second prong is the relationship between the public benefit and the government's exercise of eminent domain for economic development. Usually, the claimed benefits in economic development cases increase jobs and tax revenue, as well as rejuvenate the local economy. Therefore, to satisfy this prong, there must be a substantial link between the public benefits and the takings, and proclaimed benefits in economic development cases are always more speculative in nature than those claimed in regulatory land use cases.

The third prong requires a reasonable relationship between the amount of land taken and the use that would generate a public benefit. Compared to regulatory takings, "this prong is most similar to the rough proportionality requirement. Courts have long had the authority to interfere with and prevent any excessive taking of land upon a showing of bad faith or palpable unreasonableness" (Wilt 2009, 455).

To further this inquiry toward eminent domain improvement, it is important to consider the realities of non-use takings. For example, a municipality's effort to condemn for a non-use should be stopped if (1) the municipality breaks statutory or state constitutional limits; (2) the municipality runs into a federal constitutional limit, such as equal protection; or (3) the municipality conceals its true intent, thereby acting in bad faith, and threatening the political process, along with denying accountability to voters. The first two categories are straightforward and easy to apply, as the municipality has exceeded its authority, and its actions must be set aside by the courts. The third category, however, raises complicated issues of motives versus purpose

and bad faith, which causes inconsistent outcomes that permeate the current case law on non-use takings (Oswald 2008).

Furthermore, a non-use case suggests an underlying assumption by condemnors and courts that it is not acceptable to take property for non-use; therefore, municipalities will hide their true intent of the condemnation. Interestingly enough, this assumption may not be so true. For example, suppose a municipality condemns a piece of property, but openly provides a clear explanation, such as its harmful effects on the community, and the societal benefits of clearing the land for public use. This direct approach gets rid of the confusion of bad faith. As a result, the concern is not on the condemnors' engagement in non-use takings, but rather the fact that government subverts the political process to prevent backlash. Therefore, honesty is the best policy, as it is critical to ensuring proper protection of property rights and preservation of constitutional integrity (Oswald 2008).

Conclusion

Clearly, the issues surrounding eminent domain policy are significant. Thus, the question is posed: do eminent domain actions serve the public good, or is the confiscation of property by government unwarranted? Although much of the criticism is seemingly in opposition to eminent domain policy, noting its importance allows for a discretionary perspective. As the literature suggests, specific eminent domain policy can be constitutionally unsound, and in some cases, err on the side of inequality and equal protection. Conversely, eminent domain policy can be for the good of society, and often necessary for economic stability and social well-being.

Consequently, eminent domain must be kept in perspective, since government acquisition of land for purposes of growth is rooted in the founding of this country, to criticize it without the

proper context would be ill-advised. In sum, if the role of a public administrator is that of a problem solver, she or he must objectively assess and conclude with all of the possible facts. Is there room for improvement? The literature certainly suggests so, however, it is up to those in the current arena of public affairs to move forward.

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Appendices

Appendix 1. State Eminent Domain Legislation 2006

Enacted
Alabama
SB 654
Prohibits the use of eminent domain to acquire non-blighted property for a redevelopment project without the consent of the owner. Defines blighted property to emphasize characteristics that are detrimental to the public health and safety.
Alaska
HB 318
Prohibits the use of eminent domain to transfer private property to another private entity for economic development purposes.
Colorado
HB 1411
Stipulates that a public use for which eminent domain may be exercised does not include transferring private property to another private entity for economic development purposes or to generate additional tax revenue.
Florida
HB 1567
Prohibits the transfer of private property acquired through eminent domain to another private entity with certain exceptions, including for use by common carriers, public transportation, public utilities, or where the private use is incidental to a public project. Prohibits the use of eminent domain to eliminate blight conditions or to generate additional tax revenue. Authorizes the use of eminent domain under the Community Redevelopment Act if it is necessary to remove a threat to the public health or safety.
Georgia
HB 1313
Defines public use for which eminent domain may be exercised to be the possession, occupation and enjoyment of property by the public, public agencies or public utilities, or for the removal of blight. Prohibits the use of eminent domain for economic development purposes, including enhancement of the tax base or tax revenue, increased employment or improvement in the general economic health when the property is to be transferred to another private entity. Redefines blighted areas to emphasize characteristics that are detrimental to the public health and safety. Requires approval of eminent domain actions by the governing body of a city or county, and greater public notice before proceeding with condemnation authority.
Idaho
HB 555
Prohibits the use of eminent domain for a public use that is merely a pretext for transferring the property to another private entity, or for promoting economic development.
Illinois
SB 3086
Prohibits the use of eminent domain to confer a benefit on a particular private entity or for a public use that is merely a pretext for conferring a benefit on a particular private entity. Limits the use of eminent domain for private development unless the area is blighted and the state or local government has entered into a development agreement with a private entity.
Indiana
HB 1010
Defines public use for which eminent domain may be exercised to be the possession, occupation and enjoyment of property by the public, public agencies or public utilities, and does not include an increase in the tax base, tax revenue, employment or general economic health. Redefines blighted areas to emphasize properties that are detrimental to the public health and safety. Requires payment of compensation where the

property condemned is the person's primary residence at a rate equal to 150 percent of fair market value. Establishes a legislative study committee to study eminent domain and report its findings to the legislature no later than November 1, 2007.
Iowa
HF 2351
Defines public use for which eminent domain may be exercised to be the possession, occupation and enjoyment of the property by the general public or a public utility; where private use is only incidental to a public use; or to redevelop blighted areas where at least 75 percent of the properties in the area are blighted. States that public use does not include economic development activities that generate additional tax revenue or employment, or result in private residential, commercial or industrial development. Requires public notice before condemnation proceedings may begin. Includes a buy-back provision whereby the original owner of condemned property that is not put to a public use within five years may purchase it.
Kansas
SB 323
Prohibits the transfer of private property acquired through eminent domain to another private entity with certain exceptions, including property transferred to a common carrier; unsafe property acquired by a municipality; or property approved by the state legislature. The restrictions do not apply to property in a redevelopment district created prior to enactment of the law. Increases the level of compensation to landowners whose property is condemned to 200 percent of the average appraised value of the property.
Kentucky
HB 508
Defines public use to be ownership, possession, occupation or enjoyment of the property by a governmental entity; removal of blighted properties; or for use by a public utility. Prohibits the transfer of private property to another private entity for economic development purposes, including enhancement of the tax base or tax revenue, increased employment or promoting the general economic health of the community.
Maine
LD 1870
Prohibits the use of eminent domain to condemn land used for agriculture, fishing or forestry or land improved with residential, commercial or industrial buildings, for private retail, office, commercial, industrial or residential purposes; primarily to generate additional tax revenue; or to transfer private property to another private entity. Provides a blight exception and use of land by a public utility.
Minnesota
SF 2750
Limits the use of eminent domain to a public use or public purpose, defined as the possession, occupation, ownership or enjoyment of the property by the general public or a public agency, or for the mitigation of blight. Stipulates that the public benefits of economic development do not, by themselves, constitute a public use or public purpose. Requires good faith negotiations with property owners and increases public notice and public hearing requirements.
Missouri
HB 1944
Prohibits the use of eminent domain solely for an economic development purpose, which is defined to mean an increase in the tax base, tax revenue or employment in the area. Stipulates that eminent domain may only be used to take property in blighted areas or for a public use. Requires public notification of affected property owners before condemnation may begin, and negotiation in good faith with property owners. Establishes an Office of Ombudsman for property rights in the Office of Public Counsel in the Department of Economic Development to assist property owners in obtaining information about eminent domain.
Nebraska
LB 924
Prohibits the use of eminent domain primarily for economic development purposes, which is defined to mean use by a commercial entity or to increase tax revenue, the tax base, employment or general economic conditions.
New Hampshire

SB 287

Defines public use for which eminent domain may be exercised to be the possession, occupation and enjoyment of property by the public, public agencies or public utilities; the removal of properties that pose a threat to the public health and safety; or private uses that occupy an incidental area within a public project. Stipulates that public use does not include enhanced tax revenue and increased employment opportunities.

North Carolina

House Bill 1965

Stipulates that eminent domain may be used only for specified public purposes contained in the statutes, which do not include economic development projects. Restricts the use of eminent domain by a redevelopment commission to blighted parcels only.

Pennsylvania

SB 881

Prohibits the use of eminent domain for private enterprise, except where the private enterprise occupies an incidental area within a public project. Does not affect the authority of the Pennsylvania Public Utility Commission, apply to the exercise of eminent domain where the property is blighted or taken pursuant to the urban redevelopment law or taken to provide low-income housing, among other considerations. Defines blight to emphasize characteristics that are detrimental to the public health and safety.

South Dakota

HB 1080

Prohibits the use of eminent domain to transfer private property to another private entity or to be used primarily to generate additional tax revenue.

Tennessee

SB 3296

Stipulates that public use for which eminent domain may be exercised does not include private use or benefit, or public benefit resulting indirectly from private economic development, including increased tax revenue and employment. Exceptions include use of eminent domain by public or private utilities, housing authorities or community development agencies to remove blight, private use that is merely incidental to public use, or the acquisition of property by a local government for an industrial park.

Utah

SB 317

Requires approval by the governing body of a local government before eminent domain may be exercised for a public use. Requires a written notice to be sent to the affected landowner at least 10 days prior to the public hearing where the proposed taking will be considered. Expands the definition of public use to include bicycle paths and sidewalks adjacent to paved roads, while limiting the use of eminent domain for certain recreational purposes.

Vermont

SB 246

Prohibits the use of eminent domain primarily for economic development purposes, except in accordance with the state's urban renewal law. Other exceptions include uses for transportation, public utilities, public property and water projects.

West Virginia

HB 4048

Prohibits the use of eminent domain primarily for private economic development. Contains a blight exception and redefines blighted areas to emphasize properties that are detrimental to the public health and safety. Requires greater public notice and negotiation in good faith with the property owner.

Wisconsin

AB 657

Prohibits the use of eminent domain to condemn non-blighted properties to be transferred to another private entity. Redefines blight to emphasize properties that are detrimental to the public health and safety.

Passed Legislature--Approved on the 2006 Ballot

Florida

HB 1569

Requires a three-fifths vote of both houses of the state legislature to approve the use of eminent domain to transfer private property to another private entity.

Georgia

HR 1306

Requires approval by the elected governing body of a local government before eminent domain may be used for a redevelopment purpose.

Louisiana

SB 1

Prohibits the taking of private property predominantly for use by a private entity or to transfer ownership of the property to another private entity. Stipulates that neither economic development nor enhancement of tax revenue shall be considered in determining whether the taking of property is for a public purpose.

HB 707

Prohibits the sale or lease of property, with certain exceptions, that has been taken through eminent domain and held for less than 30 years unless the property is first offered to the original owner or his or her successor at fair market value. Stipulates that within one year after completion of a project for which eminent domain has been used, any surplus property must be offered to the original owner or his or her successor at fair market value.

New Hampshire

CACR 30

Prohibits the use of eminent domain if the property is to be transferred to another private entity for private development.

South Carolina

SB 1031

Prohibits the use of eminent domain for any use, including economic development, that is not a public use. Authorizes the legislature to enact laws allowing eminent domain to be used to remedy blight with the property put to public or private use provided just compensation is paid.

Passed Legislature--Vetoed by Governor

Arizona

HB 2675

Limits the use of eminent domain to the clearance and removal of slum conditions in a slum area as determined by a two-thirds vote of the city council based on clear and convincing evidence on a property-by-property basis. Defines public use to be the possession, occupation and enjoyment of the property by the general public or a public agency or public utility, and specifies that public use does not include an increase in tax revenue, tax base, employment or general economic health.

New Mexico

HB 746

Prohibits the use of eminent domain to promote private or commercial development and title to the property is transferred to another private entity.