The Templeton Debates

Make Way for Wal-mart! Eminent Domain after Kelo

*Scott Bullock vs. Daniel R. Madelker**

PROFESSOR MANDELKER: As a beginning, I wish to give you some background on urban redevelopment in this country. As a young lawyer, over fifty years ago, I was assigned to the department in the then Federal Housing Agency that was responsible for the then brand new Urban Redevelopment Program. One of our functions was to guide the states and local attorneys whose programs were beginning to be challenged constitutionally because they did not serve a public use. We wrestled with those issues and gave legal guidance.

In the spring of 1936, *Life* magazine published a picture on its front cover of the Capitol of the United States. In the background, from the steps of the Capitol, you could see the slums of Southwest Washington. Those slums were cleared and became the focus of *Berman v. Parker* some twenty years later. Eleanor Roosevelt actually took a delegation of senators around the Southwest Washington slums to get their endorsement of the then pending Public Housing Act, which was passed. When war broke out, President Roosevelt appointed an Interim Committee on Urban Redevelopment to work out a redevelopment policy for the country. There were 450 acres of slums in the Mill Creek redevelopment project in St. Louis alone, which had 10,000 outhouses and relied on burning coal for heat.

During the war, the Interim Committee found there were many reasons for a national role in the redevelopment process. They found there was a need for comprehensive redevelopment of slum areas. There was also a holdout problem, individuals in projects who did not want to sell. The *Kelo* project is a modern-day representation of everything the Interim Committee worried about, because there were holdouts who did not want to sell and the project was the very kind of redevelopment project the Interim Committee endorsed.

The Housing Act of 1949 began a program of federal assistance for urban renewal as a follow-up to the Interim Committee's work. I was in the federal housing agency as the federal urban renewal program was getting started, and we drafted model legislation that was adopted all over the country and that requires a finding of blight for redevelopment. The New London project used a very different kind of law that did not require a blight finding, and which directly posed the question of whether using eminent domain for redevelopment is a public use.

MR. BULLOCK: Thank you very much, Professor. The Institute for Justice litigated the infamous *Kelo* case from its beginning in trial court on up to the U.S. Supreme Court. I argued the case in February (2005) and the Supreme Court released its decision in June, now one of the most infamous Court decisions in recent memory. Few Supreme Court decisions have been met with such, almost universal, disdain and outrage from people across the country, the political spectrum, and the other typical divides in American life.

It is a dreadful, breathtaking decision with dire consequences for homeowners, small-business owners, churches, and property owners throughout the country. For the first time, the Supreme Court held that the use of eminent domain simply for so-called economic development purposes, (for revitalizing the economy in the form of higher tax revenues, more jobs, or the economic well-being of a particular community), is a public use under the Constitution, and that the Constitution does not prevent local, state, or even the federal government from using eminent domain in this manner. Justice O'Connor, who prides herself on moderation, said that under the majority opinion any Motel 6 can be taken for a Ritz-Carlton, any home taken for a shopping mall, any farm taken for a factory. That is why a vast majority of Americans are opposed to and outraged by this decision. They were not aware that this had been happening throughout the country, although awareness had certainly been growing. Certainly they could not believe that the Court would approve something like this.

One of the things you hear in response to the outcry over *Kelo,* and to Justice O'Connor's ominous dissenting opinion, is that these are just hypothetical horror stories. That's simply not true. We're already seeing it, and we've been seeing it increasingly over the past decade. The Institute released a report in 2003 that documented over 10,000 instances of filed or threatened condemnations for private development over just a five-year period. In the months since *Kelo*, the floodgates to eminent domain abuse have already opened. Hours after the *Kelo* case was decided, for example, the City of Freeport, Texas, condemned two family-owned, waterfront seafood businesses for a private developer to build an $8 million private boat marina. That's the equivalent of taking a Motel 6 for a Ritz-Carlton. Justice O'Connor's point was that the government can take lower tax-producing businesses and give the land to higher tax-producing businesses, and that's exactly what happened in Freeport. In July, the City of Sunset Hills, Missouri, voted to condemn eighty-five homes and small businesses to build a $165 million shopping complex. That's taking homes for a shopping mall, just as Justice O'Connor predicted, and there are many other examples.

One of the defenses of the *Kelo* case is that it's different because New London had a plan for the redevelopment of the city, which they called the Fort Trumbull Municipal Development Plan. They had public hearings, went through

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a planning process, and decided to take these homes to give the land to private developers, which would bring more tax revenue into the struggling community.

Justice Stevens is very enamored of planning and seems to think it will somehow put the brakes on eminent domain abuse. That is completely disconnected from reality. I have worked on dozens of these cases throughout the country, and in virtually every case there is a plan and a process underway for the government to exploit eminent domain. To think this provides any substantive protection against the use of eminent domain for private development is very naïve. It shows that the Supreme Court hasn't looked at these cases realistically. The government knows how to make plans and have public hearings. That's not going to provide a check in most cases. Even if there was any limit on that in the past, I will guarantee you that there will be no limit on the use of eminent domain in the future—(pursuant to a so-called development plan). Attorneys that work with developers, planners, and local governments are already advertising their services for putting together an "airtight redevelopment plan" in *Kelo*'s wake.

The Court emphasized in the *Kelo* case that there was no evidence that these takings were designed to benefit a particular private party. They claimed the evidence showed that the government was motivated by a desire to benefit the "public" in the form of higher tax revenues, more jobs, and a revitalization of the economy. Therefore, because there was no evidence of a plan to specifically benefit a private party, they held that the condemnations were for public benefit, and were thereby constitutional under the Fifth Amendment.

There are several problems with this, many of which Justice O'Connor pointed out in her dissenting opinion. First, it is extremely difficult to figure out what truly motivates public officials, unless you have a *Law and Order* type of moment where somebody breaks down on the stand and says, "Yes, the real reason why we did this is because we want to benefit the Novus Development Corporation!" Novus Development Corporation is the developer in Sunset Hills that's trying to take all the properties there. Absent a whistleblower, confession, or smoking-gun email, it's very difficult to figure out what truly motivates people who vote for the use of eminent domain for private economic development.

An even more fundamental problem is that it's very hard to, in the Court's words, "disaggregate public and private benefit." The takings in this case, the municipal development plan, were put together after Pfizer moved next door to the Fort Trumbull neighborhood. Pfizer agreed to put its global research facility in New London, next to Fort Trumbull. This was a big coup for New London, a poorer city by Connecticut's standards, though not by the standards of many other states. To do this, they had certain requirements they wanted the government to meet as part of the agreement. The wastewater treatment facility had to be cleaned up. The state park had to be renovated. The Fort Trumbull neighborhood had to be redeveloped. Pfizer wanted a five-star luxury hotel, upscale condominiums, short-term condominiums for visiting scientists and employees, and private office space for subcontractors and others it might do business with. This was not for Pfizer itself, but the so-called spin-off developments of Pfizer.

The City went through its planning process, heard public testimony, and listened to people like Susette Kelo and the Dery family that had lived there for over 100 years. They wanted to incorporate the homes in the neighborhood because there are dozens of acres of land available for redevelopment to the City of New London in this area, and the people's homes constituted a mere 1.54 acres in a 90-acre project area. Yet the City and the New London Development Corporation pushed forward despite having so much other land available for development projects.

After the public hearing and the planning process, the municipal development plan had a five-star luxury hotel, upscale condominiums, and private offices—just as Pfizer had requested. The city did this because Pfizer was their largest taxpayer, they were the biggest economic engine in town, and they wanted to please them. Pfizer's voice was obviously much more important than the voice of Susette Kelo.

Their motivation wasn't solely private benefit, though. They wanted the so-called public benefits, the secondary effects of bringing any private business to a particular city. That's one of the good things about a free-market economy. Private businesses are able to make a profit, but they also produce secondary, public benefits in the form of increased tax revenue, more jobs, and business attraction to the area as a result of businesses moving there. When those are considered public uses, how can you separate the public and private benefit? They really become one. They want to give enormous benefits to private companies, but usually the reason is they want more money. They want tax revenue. They want their city to improve.

One of the most radical aspects of the *Kelo* decision is that it isn't in keeping with a broad range of precedents going back fifty years, even where the Supreme Court was very lenient and gave broad deference to governments to make public use determinations and to use eminent domain as they thought fit. Admittedly, there was very broad language in those cases, the *Berman* case from 1954 and the Hawaii Housing Authority case from 1984 (*Midkiff*). But what distinguished those cases—Justice O'Connor incidentally wrote the decision for *Midkiff*—is that in both there was a problem with the land or the land ownership. In the *Berman* case, you were talking about a severely blighted area. Mr. Berman's department store itself was not blighted, but the area immediately surrounding it and the area in which he was located was in bad shape. Over sixty percent of the properties were beyond repair. I think over eighty percent of the properties did not have indoor plumbing. They had twice the disease and death rates, and so forth.

In *Midkiff*, the Court approved the use of eminent domain to break up an oligopoly of land ownership. Hawaii was essentially a monarchy until it joined the Union, and the federal government owned about half the land; the other half was owned by a handful of Hawaiian families. The Court said we don't like oligopolies in this country, they're harmful.

Eminent domain can therefore be used under those limited circumstances to remove the harmful, offensive conditions.

What makes the *Kelo* case so different, and why it should be of such concern to everyone, is that the majority said there was no need for a finding of harm. Indeed, the City in the *Kelo* case did not allege that these homes were blighted. This was an ordinary, working-class neighborhood of homes and small businesses. The sole justification was what the property was going to be used for after it was taken: new development, "higher and better uses" of the property. There's now no requirement under Supreme Court precedent for there to be any problem with the land or the land ownership structure. That really does put every neighborhood, every home, and every business potentially at risk for takings for "higher and better uses of property," and that is a frightening prospect.

There is some good news coming out of the decision, though. After the *Kelo* case there was a public outcry against the Supreme Court's decision and a call by people to change the laws on the state and local level to make sure that what happened to the people in New London does not happen in their state or community. One of the high points in the majority opinion of *Kelo* is where Justice Stevens admits that state courts are free to interpret their own state constitutions differently than how the U.S. Supreme Court interpreted the Fifth Amendment to the U.S. Constitution. He says that state supreme courts, under their own takings clause, can give more protections to property owners. The state supreme courts know that, and they always know that federal courts only provide a floor of protection under the U.S. Constitution, and state courts can provide more. For him to almost encourage state courts to reach different conclusions is promising, and there will surely be a lot of action in the state courts about the use of eminent domain for private development.

There are also calls for a change in state laws to ensure what happened in Connecticut does not happen in other states. So far thirty-five states either have introduced legislation or promised to introduce legislation that would provide greater protections and in many instances ban the use of eminent domain for private economic development. That's desperately needed, and we're going to work hard for it. The Congress is seriously considering legislation that would cut off federal funding for projects that use eminent domain for private economic development. It can't overturn the Supreme Court or reinterpret the Constitution short of a constitutional amendment, but the Spending Clause is a very powerful weapon that Congress can use to show its disapproval. The Fort Trumbull Project, for instance, received $2 million in federal funding, and this is true of many of these projects.

One of the most encouraging things about the backlash to this decision is how it has united people across the country. Polls on this are overwhelming: ninety, ninety-four or ninety-six percent oppose the decision. Most issues, especially the more controversial ones the Court has considered, are typically fifty-fifty. This isn't a divided country when it comes to the use of eminent domain for private economic development. George Will is against it. Molly Ivins is against it. Bill Clinton is against it. Ralph Nader is against it. The first person on the floor of the Senate to denounce the *Kelo* case was John Cornyn, conservative Republican from Texas. The first person on the floor in the House of Representatives to denounce the *Kelo* case and demand action from Congress was Maxine Waters, one of the most liberal Democrats in the House of Representatives. When Tom DeLay and Maxine Waters can stand together and say we oppose the *Kelo* decision, something might well come of it.

There are, however, powerful forces on the other side. Mayors and city officials want to retain the power to use eminent domain for private economic development. Developers, private businesses, and big-box retail stores also want to maintain this power and will work very hard to keep it. Mayors control cities; they control votes. Developers give a lot of money to political campaigns, so even though the public is overwhelmingly against the use of eminent domain, these are going to be very hard-fought battles.

In the end, however, I hope you're going to see much good come from a very bad decision. Many people come up to me and say congratulations on the *Kelo* case. That's not typically what people say when you lose a Supreme Court opinion. It's because we've worked very hard to make what was a dreadful Supreme Court decision into a victory for home and small-business owners throughout the country. Thank you.

PROFESSOR MANDELKER: I'm really not outraged at the decision at all. Unfortunately, it was a confusing decision and that, plus the ability of property groups to market their ideas, has caused the public outcry. Justice Stevens even apologized for the case at a Bar Association meeting. There were other voices, however. Before the *Kelo* case a law professor at Notre Dame, Nicole Garnett, wrote a very fine article on the Public Use Clause. When the Supreme Court took the case, thirteen of us signed on to an *amicus* brief endorsing Nicole's approach. The Court paid little attention to what we said, but I hope it will be picked up later. Otherwise, we on the moderate side, the side interested in the redevelopment of our cities, have not come up with our own set of ideas and concepts, and we've lost ground to the other arguments.

I believe I can tell you why this happened. Cities were beginning to gear up for urban redevelopment in the 1950s, and the question was, How should we defend this? After all, in redevelopment you take land from A and give it to B. Where is the public use? There were two thoughts in the federal housing agency. One was to defend redevelopment as an implementation of the comprehensive plan because the statutes require a comprehensive plan. The leadership of the agency thought that wouldn't work because courts would not accept that argument, so they decided to defend the law not on what was coming into the city but on what was being taken out. That was the public use, we argued. This may seem a little strained to you, but take southwest Washington, D.C. as an example. We were taking this terrible slum out of the city and making the area into a healthier and

better place to live. That was the public use, and the state courts mostly went along with that idea.

Berman v. Parker presented the issue to the Supreme Court, but unfortunately Justice Douglas confused everything by sweeping it under the table. He said the question of public purpose was not for him or the Court to decide, and that there could be a very broadly stated public purpose of redevelopment in the city. He also said the issue of taking property from A and giving it to B was a means to an end and could not be challenged, which was totally contrary to what the Supreme Court had said earlier. To compound the difficulties, when we drafted those blighting statutes we included a section called "economic blight and social blight," and we meant areas that were seriously economically distressed. This authority has been abused by cities that blight areas that are not really blighted in the sense we meant in order to assist redevelopment by private entities. This abuse of the power of eminent domain partly explains why there has been a terrible reaction to the *Kelo* decision, which was a marginal extension of previous decisions.

This has quite properly led to outrage. When the *Kelo* case came before the Court, it involved a statute authorizing eminent domain for redevelopment. It's easy to characterize the case as Scott did, but I view it as a poster-child for redevelopment: a declining waterfront city that had lost a naval base and a program in which the state had taken a direct interest. But the use of eminent domain in redevelopment was dodged in *Berman v. Parker*, was never decided, and was ignored for many years. The question certified to the Supreme Court in *Kelo*, I believe, was the constitutionality of redevelopment as a public use. It was not whether the New London project was a proper and correct use of that power. It wasn't supposed to be about New London. If you read the decision, Justice Stevens states the certified question in one paragraph, but later he says that New London had a great project because they had a comprehensive plan for it. People became concerned because lower-income plaintiffs were to be displaced and because of other issues, including the city's decision to leave a building standing apparently because its owner's had local political connections, which is simply awful.

My reaction to Justice Stevens' reliance on comprehensive planning is a little different. If it's planning for a particular project, that's not planning; that's site development. The statutes have had a requirement that urban redevelopment must be consistent with a city comprehensive plan for a long time. If you really have decent, comprehensive planning at the city level, and the city decides in the plan that a neighborhood has to be redeveloped, that's different. The planning side of this is an important part of the whole process, as it affects the public use concept, and I'm glad to see that Stevens discussed it a little, though perhaps not enough.

The other side is the individual property owner, especially people living in older homes. Imagine an old neighborhood in St. Louis. If the city condemned it, those people could not replace those homes anywhere else in the city. You are compensated in eminent domain only for the value on the market, not the value to you. We've understood that to be a long-standing problem. The Uniform Federal Relocation Act, which applies when there is federal assistance, requires adequate compensation though it doesn't reach this problem. The Act doesn't apply when there's no federal assistance, however, and there isn't any federal assistance for urban redevelopment anymore. Kirkwood, a St. Louis suburb, dealt with this problem by paying compensation as required by the federal act, and did not have a land acquisition issue. Adequate compensation should be part of the public use equation, and I hope this issue will be considered as legislatures begin to revise their eminent domain statutes.

Finally, the Motel 6 issue. In the *Kelo* decision, Justice Stevens left the door open for that kind of case, where the Court thinks there has been some abuse. Justice Kennedy's concurring opinion was very explicit on this problem. That is where the Court should have given some guidance, and where we tried to give some guidance in our brief.

Professor Fennell, in a very interesting recent article, talked about what she calls thin markets and thick markets. We're bothered if the government takes one piece of property and gives it to someone else. If you have a large area like New London, however, and the government takes a large number of properties and uses them for a variety of purposes that serve public needs, she thinks that should be viewed differently. This insight may provide some guidance to legislatures as they deal with this problem. My hope is that legislatures and courts will take up Justice Kennedy's invitation and deal with arbitrary uses of the eminent domain power in redevelopment. Thank you.