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INSTRUCTOR’S FOREWORD

Keith’s argument about eminent domain—the right of the government to take private property for public use—is built on a flash of wonderful insight. But that flash didn’t come out of nowhere. While Keith was drawn to the debate over the Supreme Court’s recent decision in _Kelo v. City of New London_ because he saw eminent domain as representing a “radical departure from the other values expressed in the Constitution,” he didn’t approach the issue with a clear sense of how it might be resolved, what his own stance might be. His compelling insight that antitrust law might provide a basis for remedying what he calls “Kelo’s excess” was the product of his thorough and thoughtful reading of both that case and its significant precedents. But having the insight, he understood, wasn’t enough. He needed to persuade his reader that the owner of a home sitting in the middle of a planned urban renewal project could be seen as a monopolist. If he couldn’t get his reader to accept that comparison, his argument would fall flat, so he came up with an extended analogy as a way of creating the conceptual links necessary for the reader to see his point of view. For me, this extended, artful argument is what makes this essay stand out. Keith might have argued on purely pragmatic grounds, a case he does ultimately make. But legal arguments, especially arguments around constitutional issues, must be grounded in constitutional principles and backed by precedent. By using his extended analogy to gain his reader’s assent to the connection he makes between antitrust law and eminent domain, Keith crafts a highly persuasive argument that reflects the spirit and principles of legal scholarship.

—Shay Brawn
Eminent Domain and Antitrust: 
A Proposal to Remedy *Kelo’s Excess*

*Keith Schwarz*

On June 23, 2005, the United States Supreme Court voted 5-4 to take Wilhelmina Dery’s house away. She had lived in her home since her birth in 1918 (*Kelo* 6). In order to restart the local economy, the City of New London deemed it necessary to acquire Dery’s home to build a marina, a pharmaceutical research facility, and several retail stores near her property. Her home was not blighted, nor did she live in a slum or crime-ridden area. Rather, she was inconveniently located in the mysteriously labeled “Parcel 4,” a plot of land slated for renovation (*Kelo* 5).

Dery and eight others were the first to feel the impacts of the landmark eminent domain case *Kelo v. City of New London*. The New London city government condemned their properties in order to construct, among other things, a three-hundred-million-dollar Pfizer research facility (*Kelo* 4). But the *Kelo* decision had much wider ramifications than simply the loss of Dery’s home. Writing in a dissenting opinion, Justice O’Connor noted that the *Kelo* case sets a dangerous precedent—property can be condemned via eminent domain and transferred to new owners provided these new owners create public benefit:

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process (*Kelo* 27).

Compounding this danger, she noted, is the fact that virtually any use of property can be construed to provide public benefit (*Kelo* 34), perhaps through increased tax revenue or the creation of local jobs.

The *Kelo* decision further endangers private property by limiting judicial authority to check legislative power in eminent domain cases. The Fifth Amendment’s “Public Use Clause” prevents governments from exercising
eminent domain unless the acquired property is put to “public use” (Fifth Amendment). Courts, therefore, can declare a taking unconstitutional only if the condemnation does not promote public benefit. However, *Kelo* reaffirmed and expanded the 1954 case *Berman v. Parker*, which ruled that in eminent domain suits, courts must defer to local legislatures to determine what constitutes public use (*Kelo* 2). That is, courts cannot contest a taking that a legislature believes is “related to a conceivable public purpose” (*Kelo* 23). This combination allows legislatures to act as both judge and executioner, defining public use as they see fit and exercising eminent domain accordingly. As Justice O’Connor noted, *Kelo* “effectively [deletes] the words ‘for public use’” from the Constitution (*Kelo* 28) and allows legislatures almost full discretion in eminent domain. Justice Thomas agreed that something “has gone seriously awry with” the Court’s “interpretation of the Constitution” (*Kelo* 53).

Understandably, the *Kelo* decision was met with widespread disapproval. The House of Representatives overwhelmingly voted to limit funding to states using eminent domain for economic development (H.R. 4128). Thirteen states immediately proposed laws significantly restricting the power of eminent domain, and ultimately forty state legislatures debated similar statutes (Weinstein 26). An angered Californian even traveled to Weare, New Hampshire, home of Justice David Souter, to propose that the Souter family home be condemned and the “Lost Liberty Hotel” be constructed on the spot (Weinstein 25).

However, had the Court chosen the extreme opposite view—stringently restricting eminent domain power—the result would have been equally unpopular. In many cases unorthodox land transfers may be in the public interest. For example, in the 1984 case *Hawaii Housing Authority v. Midkiff*, the Court permitted the State of Hawaii to break apart a land oligopoly via eminent domain. Because of historical landowning patterns, more than 90% of privately owned land in Hawaii was controlled by only seventy-two individuals (Hawaii 232). As a result, “a sufficiently large number of persons” declared that they were “willing but unable to buy lots at fair prices” (*Hawaii* 242) and the state recognized the need to redistribute land titles. In order to minimize federal tax costs to the seventy-two land owners, the state decided to use eminent domain to acquire and redistribute their property (*Hawaii* 233). Although the transfer directly moved land from one set of owners to another, seemingly straining the definition of “public use,” the state rapidly and dramatically corrected the “malfunctioning” land market (*Hawaii* 242). Had the Court ruled in *Kelo* to greatly restrict eminent domain power, governmental authority to remedy problems such as those in the *Midkiff* case
would have been seriously jeopardized.

With *Kelo* the Supreme Court missed a valuable opportunity to develop a middle ground view of judicial authority in eminent domain. The national uproar against the *Kelo* decision suggests that Americans are not ready to accept judicial lenience in eminent domain, and established jurisprudence dictates that strict limitations on eminent domain may do more harm than good. To combat *Kelo*'s excesses without overly limiting eminent domain power, we need to develop a flexible, robust metric by which courts can determine the legality of government takings. To provide such a metric, I propose that we turn to antitrust law.

At first glance, antitrust law and eminent domain have little in common. After all, the government uses antitrust power to prevent monopolists from running competition into the ground, while legislatures acquire property via eminent domain to promote public welfare. But despite these apparent differences, the powers of eminent domain and antitrust are rather similar. In both cases the government manipulates private property—whether a homeowner’s dwelling or a shareholder’s corporation—to promote general welfare. And many landmark eminent domain cases, such as *Midkiff*, blur the boundary between eminent domain and antitrust.

However, the greatest similarity between antitrust and eminent domain is their shared basis in case law. Although antitrust and eminent domain powers allow the government to directly control private property, the explicit restrictions on these powers are minimal. The Fifth Amendment’s limitations on eminent domain state, in their entirety, that “nor shall private property be taken for public use, without just compensation” (Fifth Amendment). Similarly, the Sherman Antitrust Act consists of seven sections, each no more than a paragraph long, of which only the first three enumerate illegal activities (Sherman Act). Consequently, most limitations on the two powers have been decided by the courts. But while the Justice Department’s antitrust authority is limited by the “rule of reason,” to which I will return below, post-*Kelo* courts lack a viable mechanism for determining the legality of proposed takings. It may behoove us to consider eminent domain as an economic tool akin to antitrust power. From there, we may apply the jurisprudence of antitrust to eminent domain, creating the legal guidelines so needed after the *Kelo* decision.

How does eminent domain function as an economic tool? To answer this question, let us first consider the workings of antitrust power. According to John Shenefield, former attorney general of the Antitrust Division of the Justice Department, and Irwin Stelzer of Harvard University, the overarching purpose of the antitrust acts is to preserve competition (1). Market
economies tend to maximize quality and savings with a minimum of regulation, but when “competition extinguishes itself” the government must step in to redistribute market power (7). Essentially, antitrust law ensures businesses minimal barriers to market entry by eliminating anticompetitive practices. Eminent domain for economic development acts similarly to promote competition by controlling blight. “Blight,” as described by G. E. Breger, economist at the University of Southern California, is that which “all [people] find manifestly offensive in the city” (371). Blighted slums spawn diseases, pose fire hazards, and foster crime. Because they are highly undesirable locations, blighted areas frequently lack vigorous economies. Moreover, blighted plots of land are commonly haphazardly shaped and often impossible to develop. Since the 1954 Berman v. Parker case, local governments have aggressively acquired these blighted areas (Kelo 57), redeveloped them, and turned them over to private industry. Thus, while antitrust aims to restart businesses that are willing but unable to build, eminent domain aims to restart businesses that are both unwilling and unable to build.

However, one might argue that eminent domain and antitrust are inherently different because monopolists actively scheme to control markets while eminent domain holdouts simply protect their properties. I disagree and instead contend that both the monopolist and the eminent domain holdout actively harm the general public. To illustrate why, consider an analogy of two gatekeepers. Imagine, if you will, a market surrounded by enormous stone walls with but a single gate. This gate is staffed by a guard, Good Gatekeeper, who faithfully protects the market. She charges a fee to enter, but uses this fee to maintain the condition of the walls that protect the market from outside invaders. Were Good Gatekeeper to reduce her fees, a few more people might be able enter the market, but the subsequent deterioration of the market walls would expose it to wandering villains and bandits. Far from the market protected by Good Gatekeeper lies another market under the iron fist of Bad Gatekeeper. As with Good Gatekeeper, Bad Gatekeeper controls the only gate to his market, and will permit people to enter only if they pay a substantial fee. Unlike Good Gatekeeper, though, Bad Gatekeeper pockets this fee and gives no thought to maintaining the city walls; consequently, the enclosure is home to outlaws and thieves. Many people are outright unable to enter the market because Bad Gatekeeper’s fees are extraordinarily high, and visitors rarely return since the market is no longer desirable. Let us now say that both Good Gatekeeper and Bad Gatekeeper protect markets in the realm of The Monarch. The Monarch has absolute authority over the subjects of the realm but is a compassionate sovereign who acts in the interests of the people. Once The Monarch receives word of Bad Gatekeeper’s actions, The
Monarch will issue a royal decree forever banishing Bad Gatekeeper and instating a newly trained Good Gatekeeper in his place.

Most people would agree that Bad Gatekeeper is in the wrong and ought to be driven from the realm. But what are the salient features of his actions that would lead us to conclude this? First, unlike Good Gatekeeper, Bad Gatekeeper charges a fee unrelated to the market he guards. Both Good and Bad Gatekeeper are obligated to defend their markets, but Bad Gatekeeper shirks this responsibility and charges the fee solely for his own enrichment. Second, Bad Gatekeeper bars the only practical access to the market. Bad Gatekeeper's market is far from Good Gatekeeper's, and even though people are disgusted by Bad Gatekeeper's greed they cannot instead travel to Good Gatekeeper's market. While it is possible that if people were truly willing to enter Bad Gatekeeper's market they could just scale the stone walls, it is unreasonable to assume that such an action is a viable alternative to paying the fee. Third and finally, Bad Gatekeeper adversely affects the market because he refuses to pay upkeep on the city walls. As evident from Good Gatekeeper's actions, there is nothing inherently wrong with charging a fee, but Bad Gatekeeper misappropriates the money and consequently damages the walled market. While there may be other important aspects of this scenario, I will primarily consider these three points because they are of most consequence to our discussion of eminent domain and antitrust.

We can easily see that a monopolist is a Bad Gatekeeper because the monopolist parallels these three Bad Gatekeeper criteria. First, the monopolist's price is independent of the quality of his service because he charges high prices solely for profit, rather than to improve his product. Second, the monopolist compels buyers to begrudgingly pay high prices because buyers may have no substitute for the monopolized goods. For example, if the silicon microprocessor industry were monopolized, computer manufacturers would have little choice but to buy expensive chips. Finally, the monopolist damages the market, since without competition he has little incentive to manufacture high-quality goods. The horrors found in Upton Sinclair’s *The Jungle*, such as “potted ham” made from “waste ends of smoked beef [...] tripe, [...] [and] the hard cartilaginous gullets of beef,” testify to the abysmal quality of certain monopolized products (Sinclair). Monopolists thus satisfy the three aforementioned criteria and are Bad Gatekeepers. Just as The Monarch banished Bad Gatekeeper from the realm, through antitrust law the federal government prosecutes monopolists and breaks apart monopolies.

Let us now consider eminent domain in the context of Good and Bad Gatekeeper. Suppose a city government decides to comprehensively redevelop its slums. Initially, the city approaches property owners in this blighted
zone and asks to purchase their properties. While many owners voluntarily sell, one owner, Owner, will sell his property only at a high price the city refuses to pay. Let us further suppose that the city plans to construct a condominium complex on Owner’s land. Because Owner refuses to sell his property, the city cannot construct the condominiums and consequently the entire development plan will suffer. Is Owner a Bad Gatekeeper?

Recall that Owner is a Bad Gatekeeper if he meets all three of the Bad Gatekeeper criteria. Does Owner satisfy the criterion of charging needlessly high prices? Clearly Owner charges a high price, but is it irrelevant, as was Bad Gatekeeper’s fee? To answer this question we first need to determine what the market in the Gatekeeper analogy corresponds to in Owner’s world. When the city approaches Owner to purchase his land, it wants to acquire his property not for the property in itself, but as a means to successfully implement the redevelopment plan. In this sense, the walled market in the Gatekeeper analogy corresponds not to Owner’s property but to the ability to redevelop the city. But Owner bases his price on his perceived property value, not in anticipation of the city’s development plan. More importantly, though, no matter what price the city agrees upon for Owner’s property, the redevelopment plan will proceed in the same fashion. After all, whether Owner charges ten-thousand or ten-million dollars for his property, the city plans to build exactly the same condominium complex on the land. Thus Owner’s price is akin to Bad Gatekeeper’s fee since it is independent of the success of the development plan.

Does Owner also meet the criterion of lack of alternatives? As mentioned earlier, Owner’s property sits in a blighted area. According to Breger, blight often results from obsolescence of existing infrastructure or a disparity between the services provided by an area and the services demanded in the surrounding area (375). Consequently, the only feasible means for correcting blight is often a sweeping overhaul of the entire area (Public Use 1423). When Owner refuses to sell his property, he halts the overhaul process because his property is incompatible with the city planners’ new design. It may be impossible for the city to continue the redevelopment effort by building around Owner’s property because often lots are of “unsatisfactory shapes or sizes” (Public Use 1423). The city must therefore either acquiesce to Owner’s high price or abandon its redevelopment project, thus facing a gate similar to Bad Gatekeeper’s.

Does Owner satisfy the final criterion, decay of the market? As mentioned above, the market corresponds to the city’s ability to redevelop the blighted area. As Bad Gatekeeper’s refusal to maintain the market walls led to their decay, Owner’s refusal to sell in accordance with the city’s development
plan leads to the plan’s failure. Thus all the criteria are met, and by refusing to sell his property Owner becomes a Bad Gatekeeper. As The Monarch drove Bad Gatekeeper from his gate, the city is empowered to compel Owner to sell at a reasonable price via eminent domain.

There is one crucial aspect of Bad Gatekeeper I have ignored so far—that Bad Gatekeeper actively harms the walled market; that is, Bad Gatekeeper’s effects on the market result from conscious action rather than incidental effect. Clearly, Owner, the Bad Gatekeeper, actively interferes in the economy through anticompetitive business strategies. Less obviously but more importantly, Owner, the Bad Gatekeeper, also actively injures the surrounding area. His refusal to sell directly impedes his community’s development and as a result maintains the status quo of economic paralysis and blight. True, Owner does not consciously want to harm his neighbors, but such is the direct consequence of his actions. To argue that Owner merely defends his property is to ignore the situation leading the city to compel Owner to surrender it, and to claim that Owner’s property does not directly harm the surrounding area is to ignore the massive opportunity costs the community incurs as a result of Owner’s refusal.

Let us depart from the hypothetical world of Bad Gatekeeper and enter the concrete realm of antitrust jurisprudence. As I mentioned above, the actual language of the antitrust acts is quite vague. In fact, as Shenefield and Stelzer argue, the antitrust acts’ inherent ambiguities could be used to prosecute virtually any buyer or seller regardless of intent:

Read literally, the words of Section 1 [of the Sherman Act] would prohibit all contracts or any collective action that had the incidental effect of restraining trade regardless of the effect on competition or economic welfare. After all, every sales contract removes one buyer and one seller from the market for the duration of the contract, and to that extent restrains trade (15).

But the breadth of the Sherman Act, they argue, was deliberate; Congress intended for the scope of the Sherman Act “to be developed and applied by the courts” (14). In 1911 the Supreme Court did just that in the landmark antitrust case Standard Oil Co. of New Jersey v. United States. In the Standard Oil case, the Court developed what would become known as the “rule of reason.” Writing in the majority of Standard Oil, Justice Edward Douglass White stated that the “rule of reason” restricts antitrust power only to actions that clearly run contrary to the spirit of the antitrust acts: the rule of reason is “the plain duty to enforce the prohibitions of the [Sherman Act] and thus the public policy which its restrictions were obviously enacted to subserve” (Standard Oil 221 emphasis added).

The Supreme Court’s ruling in Kelo v. City of New London parallels the
literal interpretation of the Sherman Act because it provides legislatures a wide breadth of eminent domain power with the intent of determining later how that power should be restricted (Kelo 18). But while antitrust law was limited and clarified in the Standard Oil case, eminent domain lacks a restriction akin to the rule of reason and the door remains open to eminent domain abuse. The concept behind the rule of reason is appealing, because it restricts governmental power without categorically rejecting certain practices. Therefore, I propose that we adopt the rule of reason in eminent domain.

However, one major factor prevents us from directly applying the rule of reason to eminent domain jurisprudence: the problem of efficiency. Shenefield and Stelzer note that under the rule of reason, an action is anti-competitive if its “net competitive effect” is detrimental to the market. This is difficult to determine; therefore, rule of reason cases are typically expensive and lengthy because they “frequently require the use of expert witnesses and intricate economic and statistical studies” (17). Time and money, however, are rarely available in eminent domain cases. Justice Thomas noted in his Kelo dissenting opinion that targets of condemnation proceedings tend to be poor (Kelo 57), and it would be unreasonable to assume that they could afford the legal fees necessary to win a traditional rule of reason case. Also, as Justice Douglas noted in the Berman case, the repercussions of legal delays on condemnation proceedings may endanger development plans (Berman 35); if legal challenges to proposed takings are too lengthy, contractors may back out of redevelopment deals. Thus we must modify the rule of reason to be inexpensive and expedient. There are two main features of the rule of reason that make it attractive. First, it considers actions holistically, weighing their pros and cons before reaching a final decision. Second, it is based in an understanding of the spirit of the law, rather than its letter. I believe we can adopt the rule of reason test without its cumbersome legal baggage by developing a legal framework based on the above two features.

At first glance a holistic test to determine the legality of a taking may seem impossible. After all, to precisely estimate the impacts of a proposed taking would be expensive and time-consuming. However, courts could consider a slightly scaled-down version of the holistic benefit test. In antitrust law, the Justice Department evaluates rule of reason cases by comparing the state of the market before and after a potentially illegal business action. When the end market state is less desirable than the status quo, the Justice Department typically exercises antitrust power; otherwise the government does not interfere. Similarly, in eminent domain jurisprudence, courts should consider the condition of the condemned property and its surrounding area before and after its acquisition. If the planned land use would either damage
the area or fail to sufficiently improve it, courts should declare the proposed taking unconstitutional. This analysis need not be rigorous nor include complex economic analyses; rather, a simple examination of how the land is and would be used could be sufficient.

Let us consider several situations likely to arise in eminent domain and how a holistic rule of reason test might apply. Suppose a city wants to redevelop its slums by acquiring all its blighted property via eminent domain. In this blighted zone is Grocer’s market, a local store that has served customers faithfully for years. Despite its surroundings, Grocer’s market is economically healthy and is one of the few successful stores in the area. Citing her store’s successful business record, Grocer appeals to the local courts, arguing that the taking is unconstitutional because her market is not itself blighted. Grocer further argues that if the court would prevent the city from condemning her property, she would be willing to pay out-of-pocket to renovate her building. Nevertheless, under current jurisprudence (and particularly after the *Kelo* decision), Grocer would most likely lose her store because courts are not empowered to question the legislature’s determination of the development plan. However, under a rule of reason test holistically evaluating the situation, Grocer ought to be allowed to keep her store, because her market is economically healthy, and were she to remodel her building, Grocer would clearly promote the area’s vitality. Thus the goal of the redevelopment plan would be achieved even if the city did not condemn Grocer’s store. The taking is therefore superfluous, and with a holistic rule of reason test, courts would have the authority to prohibit it. In situations such as these, a holistic evaluation of proposed takings seems preferable to current jurisprudence since it equitably balances the city’s wishes with personal property rights.

Consider also the hypothetical city of City, which suffers from high unemployment and general economic stagnation. Although City’s employment rate is low, City is not a vast slum, nor does it have a high crime rate. To combat unemployment, the city council proposes to condemn several apartment complexes in order to construct a corporate headquarters, thereby attracting new jobs and increasing tax revenue. Residents of the condemned apartments band together and challenge the taking because it directly transfers their private property to another set of private owners. Current jurisprudence dictates that since the taking is clearly related to a public purpose (restoring employment), the residents would be forced to move. Alternatively, a stricter reading of the Fifth Amendment would invalidate the taking, since the corporate headquarters is private property and thus does not qualify as public use. The holistic benefit test, however, would look beyond these simple factors and instead focus on the future of the displaced residents. The
Fifth Amendment requires the government to pay eminent domain evictees “just compensation” for their property (Fifth Amendment), and usually this payment covers moving expenses. But even so, if housing within City’s limits is inadequate, remote, or unavailable, the residents would be forced out of City and would not reap the benefits of the new corporate headquarters. Thus the holistic test would consider, for example, whether City could provide adequate housing for the former residents. If housing exists within the city limits, the benefits of a new corporate headquarters would outweigh the evictee’s troubles. Therefore, courts should allow the taking. But if adequate and sanitary housing cannot be found, the evictees’ hardships would surpass the benefits of the taking and courts should prevent the condemnation. The holistic benefit test thus acts as an equitable balance between public interests and private enjoyment.

But what of the second aspect of the rule of reason: fidelity to the spirit of the law? To answer this question we must first clarify the nature and purpose of Fifth Amendment restrictions on eminent domain. In his *Kelo* dissenting opinion, Justice Thomas argued that Fifth Amendment limitations on eminent domain are positive restrictions on governmental authority—while normally the government would have the right to acquire any property it would see fit, the Fifth Amendment prevents the government from doing so unless the acquisition is intended for public use (*Kelo* 42). In other words, the Fifth Amendment categorically invalidates takings until the government can demonstrate that they act in the public interest. The Fifth Amendment therefore presents a sort of “presumption of guilt” in eminent domain suits whereby the government must prove itself “innocent” of acting against public welfare. However, it is not merely enough that a taking provides public benefit; rather, to be consistent with Fifth Amendment limitations, the primary reason for the taking must be the enhancement of public good. For example, if a city proposes to condemn an Albertson’s supermarket in order to construct a Wal-Mart on the spot, even though theoretically the Wal-Mart might provide new jobs in the area, it is highly unlikely that the city primarily intended the taking to promote the public welfare. Without the power to prevent such “letter of the law” takings, courts cannot protect private individuals from legislative excess. The rule of reason thus empowers courts to challenge takings with shaky primary motives or shady ulterior motives.

In summary, the rule of reason test applied to eminent domain would consist of two tests. The first: holistically, would the proposed taking create more benefit than harm? The second: does the proposed taking genuinely promote public welfare? These two tests, I believe, would empower courts to
combat legislative excesses while maintaining a stable balance between public and private needs.

There is one question that remains to be answered. No matter which means we choose to limit the power of governmental eminent domain, how are such changes to take effect? Through *stare decisis*, only a new Supreme Court ruling on eminent domain can amend the *Kelo* decision. Fortunately, recent changes in the Court’s structure suggest that it may soon revisit eminent domain. Since the case of *Kelo*, the conservative Justices Alito and Roberts joined the Court, and should the Court’s recent trend of conservative decisions continue, the issue of eminent domain may soon come under Court scrutiny. But with history as a guide, it is unlikely that we will see such a reversal. The three major eminent domain cases—*Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Kelo v. New London*—span a period of fifty-one years, and in each case the Court maintained precedent. Moreover, while Alito and Roberts are both new to the Court, the Justices they replaced (Rehnquist and O’Connor) both dissented in *Kelo* (*Kelo* 27), and should a new eminent domain suit come before the Court, it is unclear whether the Court’s new constitution would have a meaningful impact. Complicating the issue is the widespread outcry against the *Kelo* decision. Alan Weinstein, director of the Law and Public Policy Program at Cleveland-Marshall College of Law, notes of *Kelo* that “only one other Supreme Court case has sparked a similarly extreme reaction [:] *Roe v. Wade*” (27). Although national furor may influence the Court to reconsider its decision, it may also have the opposite effect of distancing the Court from eminent domain suits until tempers cool. We will have to wait to see how these subtle and conflicting factors play out in the Court.

Implicit throughout this discussion of eminent domain jurisprudence is the balance between the rights of the individual and the state. With *Kelo* the Court categorically ruled that in eminent domain suits public benefit supersedes private property rights. But eminent domain cases encompass a vast spectrum, from local economic development as in *Kelo* to statewide land markets as in *Midkiff*, and to automatically find in favor of public interest is to oversimplify the subtleties of each case. In all issues of eminent domain, the question of public versus private rights should not be decided unconditionally in advance, but rather on a case-by-case basis in light of the relevant facts. The government should not table debate of a nuanced issue in the interests of efficiency. ◆
NOTES

1 There is another restriction on eminent domain, that owners be paid “just compensation” for their property (Fifth Amendment), but this limitation is irrelevant to the Kelo case.

2 The State of Hawaii and Federal governments controlled 49% of the land. Of the other 51%, 47% was controlled by these seventy-two individuals (Hawaii 232). This amounts to control of 92% of all privately-owned land (my calculation).

3 The 1958 Supreme Court case Northern Pacific Railway v. United States established that a specific set of business practices should always be considered illegal. However, that this decision came almost fifty years after the Standard Oil case (Shenefield and Stelzer 16) suggests that such a policy required years of experience with the rule of reason to develop. Hence, when applying the rule of reason to eminent domain, I recommend that we not immediately categorize anything as wrong per se and instead leave these decisions to future courts.

4 Development plans where cities redevelop one property at a time with the cooperation of the original owners are sometimes referred to as rehabilitation programs. While not nearly as common as full-blown redevelopment projects, they are comparably successful and far less disruptive (Public Use 1424). Under a holistic rule of reason test I would not be surprised if such programs became the norm in renewal projects.

5 For example, Gonzales v. Cabart, which upheld the Partial-Birth Abortion Ban Act.

WORKS CITED


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