

Eminent Domain in the Wake of the *Kelo* Decision

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## ABSTRACT

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The controversial Supreme Court decision, *Kelo v. The City of New London*, allowed a local government to utilize eminent domain to transfer land from one private entity to another in order to enhance economic development. In response, state governments rushed to pass legislation in order to curtail the use of eminent domain. State governments, however, struggled to pass meaningful eminent domain legislation, since many powerful forces, such as major corporations, stood in their way. Opponents of eminent domain claim that the politically weakest in our society, namely the poor and racial minorities, are saddled with the resulting hardship emanating from this policy. Meanwhile, supporters argue that eminent domain is vitally necessary in order to rejuvenate those cities which have fallen on hard times. A prime example of the controversy surrounding the use of eminent domain derives from New York City. Columbia University attempted to expand its campus through the use of eminent domain, resulting in intense controversy. Eventually, the New York State Court of Appeals ruled that the project could move forward. This example clearly attests to the passion exhibited on both sides of the very volatile issue of eminent domain

## Chapter One: Introduction

In 2005, the Supreme Court announced its decision regarding the landmark case, *Kelo v. The City of New London*. In a narrow five four decision, the Court ruled that the City of New London could use eminent domain to take Susette Kelo's property, as well as her neighbors,' in order to build a new plant for the Pfizer company. Eminent domain is not a new phenomenon in the United States as its origins can be traced back to colonial times (Susette Kelo, et al.). However, what made this case so extraordinary was that the Supreme Court allowed the Kelo's property to be taken even though it was well kept, and the Court ruled eminent domain was an acceptable local government sanctioned option in private-to-private transfers of land. This decision led to an emotional outcry from private property advocates who believed their rights were under attack. Local governments now had the ability to seize anyone's property in order to serve the needs of the city; as in the construction of a new building to increase tax revenue (Susette Kelo, et al.). In response, state governments began to take action to curtail the use of eminent domain.

In a direct response to the outcry from their constituents, state governments earnestly began to seek ways to prevent eminent domain from harming their citizens. The most popular way for states to curtail eminent domain abuse was to pass legislation that set strict requirements. These measures were either taken by state legislatures or were sometimes passed by ballot initiatives. Among the stipulations required in the new bills were that for an area be considered blighted before it could be taken, that all private-to-private transfers be outlawed, that the system be much more open with more public

hearing and at times a citywide vote on the issue (Sharp and Markel 559). Meanwhile, some state courts began to interpret their constitutions in a much tighter, defined way than the United States Supreme Court did in *Kelo*, in regard to eminent domain (Hans 5). This was the approach in states, such as Ohio and New Jersey, where meaningful legislation was hard to establish. Finally, some states simply decided to ignore the issue and allowed eminent domain to exist with broad parameters, just as the Supreme Court had done in 2005 (Sharp and Markel 571). For a variety of reasons, eminent domain legislation was never passed. This could have been due to a number of reasons; powerful interest groups working against legislation, state officials determining there was no need to make any changes to its eminent domain, or because local officials did not want their power taken away (Conference of Mayor's Website). Therefore, for a variety of reasons, states have dealt with eminent domain in a variety of ways.

While various states responded to the aftermath of *Kelo* differently, there was no question that the poor and minority groups were victimized by eminent domain at a disproportionately high rate. Much of the literature published in wake of the *Kelo* decision focused on the fact that the poor and minorities remained the most vulnerable in society, especially when it came to losing property as a result of eminent domain proceedings. While authors, such as Dick Carpenter and John K. Ross, acknowledged that it was the middle class who were the most outraged by the *Kelo* decision, since their property was now vulnerable, in reality, it was largely the poor and minorities who actually lost their property due to eminent domain takings (Carpenter and Ross 2248). Meanwhile, other authors, like Will Lovell explained that the legislation passed in many states is written in such a broad manner and is so watered down, that in reality it provides no protection to

the average citizen (Lovell 618). Therefore, even though eminent domain has been a source of outrage to many voters, there remain many serious questions on whether the average person is yet protected from unjust takings in many states. Additionally, those most vulnerable to losing their property, the poor and minorities, often receive the least protection from local governments. David Dona stated that in some cases, laws have been passed to protect the middle class from eminent domain takings, yet leave the poor even more vulnerable to eminent domain abuse (Dona 7).

Three case studies exemplify the successes, struggles and abuses associated with eminent domain, since *Kelo*. The Columbia University expansion project in the Manhattanville section of New York, the Cowboys' stadium in Arlington, Texas, and the construction of new condominiums and townhouses in Long Branch, New Jersey all show the multi-faceted issues that communities must deal with when using eminent domain. Columbia University's project was allowed to move forward because it was able to show how the expansion could lead to cures for debilitating diseases, like Parkinson's (Currie 2). In Texas, the Cowboys' stadium was eventually approved despite the intense controversy surrounding it from opponents who did not believe that an NFL stadium constituted a public good, or that the city should agree to pay half the expenses (Cameron 2). In New Jersey, the state's appeals court blocked eminent domain from going forward, because the city lacked the evidence to prove that the area being considered was indeed blighted. New Jersey had long been considered one of the biggest abusers of eminent domain and private property advocates rejoiced at the new ruling.

This thesis will examine the writings of authors and scholars in regard to state government reforms in the wake of the landmark *Kelo* decision. The following chapters

will focus on what these reforms look like, as well as their effectiveness and ability to prevent eminent domain abuse. In addition, issues such as why some states are unable to pass meaningful eminent domain legislation, and the benefits of eminent domain to communities will be explored. In order to better understand how eminent domain works at the local level, three case studies are analyzed in detail. New York City, New York, Arlington, Texas and Long Branch, New Jersey have all used eminent domain in different ways and for different purposes, reflecting the spectrum of issues associated with eminent domain in the United States today. Legislation, local courts, and special interests all play a vital role in the outcome of future eminent domain reform. Finally, recommendations are given to ensure the minimization of eminent domain abuse in the future, without altogether eliminating government takings

## Chapter Two: Literature Review: Scholars' Opinions of Eminent Domain Reform

On June 23, 2005, Justice Stevens delivered the opinion of the Court, in *Kelo v. the City of New London*, upholding the Connecticut Supreme Court's decision allowing the City of New London to take privately owned property and redevelop it through a private contractor. The decision is one of the most controversial in recent Supreme Court history. Both Justices Thomas and O'Connor wrote powerful dissents arguing that the founding fathers did not intend to use eminent domain to generate more tax revenue. In addition, since the Supreme Court made its ruling, serious questions have been raised regarding whether poor and racial minorities are affected more than other groups. In Justice Stevens' opinion, the possibility that state governments could create legislation limiting the powers of eminent domain was left open. Following the decision, a grass roots movement was formed, and new legislation was passed throughout the nation. However, there have been questions regarding whether the new eminent domain laws discriminate to an even greater extent against the poor and racial minorities. A few key case studies help one to better understand the issue at stake regarding eminent domain post *Kelo*, and whether certain groups are more affected than others.

Since the *Kelo* decision was handed down, one of the key issues in the debate over eminent domain is explored in, "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities." This key source takes the main ideas promoted by Justices O'Connor and Thomas in their powerful dissents, and focuses on them in a study. Authors, Dick Carpenter and John Ross, examined all cases



of eminent domain between 2003 and 2007, and then narrowed their search to those that were well advanced, admitting cases from twenty five different states. The study focused only on those cases in which the power of eminent domain was used for economic development. The results were overwhelmingly supportive of Justices O'Connor and Thomas's dissent. "Results appear to confirm those judicial contentions. Compared with those in surrounding communities, significantly more residents in areas targeted by eminent domain are ethnic or racial minorities, have completed significantly less education and live on significantly less income" (Carpenter and Ross 11). The study found that thirty-four percent of the residents who were being forced out did not have a high school diploma, twenty-five percent lived below the poverty line, fifty-eight percent were minorities, and fifty-eight percent were renting their home. In this study, the results unquestionably supported the fact that minorities and the poor have been asked to sacrifice more in the name of urban development than white middle class members of that city. The fall out effect of this can be devastating for these less powerful groups. Even though 'just compensation' must be paid, the loss of community cannot be rebuilt. These groups tend to depend heavily on their communities, and when residents are displaced, the support groups they have fostered are lost forever.

David Dona's article further articulates this point. He explains that no state has been willing to ensure that affordable public housing will be built for poor residents who are losing their property. This contributes to the loss of community which hurts the poor more deeply than the wealthy and middle class. For example, if a resident, dependent on his local church, was forced out through eminent domain, monetary reimbursement could not possibly replace the emptiness now left in that individual's life. Both Justices

O'Connor and Thomas also acknowledge that leaving the state in charge of fixing the problem is not an adequate solution either. Since minorities, the poor, and the less educated, are also politically less powerful, they are less likely to have legislation written that protects their interests. Dona agrees with the argument made by the dissenting Justices in the *Kelo* case. Specifically, Justices O'Connor and Thomas stated it is the role of the Supreme Court to protect individual liberties when they are violated and it should not left for the states to decide how to handle the situation. Thus, this study proves that minorities and the poor are more likely to lose their property due to eminent domain than any other population. This fallout will result in the poor being hurt to a greater degree since they are, in many instances, more dependent on their community than the middle class, and are less likely to have legislation created to protect their rights by their local representatives. Traditionally, the responsibility to protect these rights falls on the city council and mayor, not the state legislation.

Will Lovell's article, "The *Kelo* Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners," explains that new legislation passed in many states is not efficient enough to prevent property from being taken. One of the main disagreements property advocates had with the *Kelo* decision was that the property taken from Susette Kelo was well kept, even charming. Lovell explains that in most cases, state governments have outlawed the taking of private property for 'economic development' unless it has been termed 'blighted.' However, local government can still determine what is considered blighted. Blight is generally understood to be, "the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions.' If

such property is blighted, local governments are free to take the property under these state statutes” (Lovell 618). Lovell then discusses how many state statutes have very broad language. In the past, cases such as the one in Poletown, a section of Detroit, Michigan, where Polish immigrants were forced to abandon their homes in order to make way for a new GM plant, is an example of the term ‘blighted’ used quite liberally. Past cases have shown that once the government is allowed to interpret the rules, minority and poor residents are often forced to move. As evidenced in the Carpenter and Ross study, minorities tend to be disproportionately affected by eminent domain taking for ‘economic purposes.’ This means that when statutes are broad and easily manipulated, minorities will not be protected. The Institute for Justice is one of the key advocates to discuss this problem. Just as GM did, local governments have also shown that they will interpret ‘blight’ liberally. However, with a loose interpretation of blight, Lovell goes on to argue that eminent domain could result in the middle class losing their property as well. He cites the *Kelo* case as his primary example. Susette Kelo’s property was taken even though she had a good income and her property was not considered blighted. Although some of the laws have been tightened, the middle class, according to Lovell, is still susceptible to having their property taken because state legislature and local government agencies have too much power to decide what is considered blight. Therefore, private property advocates, such as Will Lovell, believe that stronger laws must be in place in order for any eminent domain legislation to truly hold meaning. Until then, minorities and poor residents will continue to be unprotected, and disproportionately uprooted in the name of urban development.

David Dona's article "Expressive Meaning of Condemning the Poor after Kelo" explains in a manner similar to Will Lovell, that the laws passed since the *Kelo* decision help middle class home owners, and in return hurt the poor. Dona argues that since then many states have required eminent domain to only be used in areas that are 'blighted' and have defined what blighted can mean. This often acts to protect middle class home owners, but does nothing to help the poor. In fact, these changes in legislation have actually made poor people's property more susceptible to eminent domain takings. City leaders under pressure to produce jobs and increase tax revenues will still attempt to exercise their power of eminent domain. However, unlike the other literature on the topic, Dona addresses a unique problem for the poor that Justice Thomas touched on in his dissenting opinion. The poor, unlike the wealthy, have few options to turn to once their property has been taken. Just compensation must be paid as part of the Fifth Amendment, yet there are often few resources toward which to turn. "Where (as in most states) Kelo-inspired reform would allow 'blight' condemnation to continue more or less as before, at least in genuinely poor areas, there has been no legal movement to help ensure that households displaced by such condemnations are provided with better (or even as good) substitute housing"(Dona 7). One of the main issues confronting eminent domain today is that after a property has been taken, there is not enough affordable low income housing available for the poor. Justice Thomas explained in his dissent that the poor often have unique needs and may be more dependent than the rest of society. Since large scale affordable housing is often not available, the support system that was created to help the poor becomes too overwhelmed and crumbles. Thus, Dona concludes since no state has passed legislation requiring that adequate low income housing be built, much

of the legislation passed has a discriminatory effect on the poor. When a poor person's land is taken in order to bring in the wealthier, typically white occupant, that policy has a discriminatory effect. Even more alarming to Dona is that fact that the poor have nowhere to turn. "And, once again, there seems to be no legislative effort to address the needs of the displaced, truly poor households" (Dona 8). Thus, the overall policy adapted since the *Kelo* decision was handed down has been discriminatory against the poor since it privileges the middle class but does not protect the poor in the same way. As Dona points out, one of the pillars of American society is that every person, regardless of income, is equal before the law. The new legislation that has passed since *Kelo* has violated this principle. The poor are not protected in the same manner as the wealthy and middle class.

In a rebuttal to David Dona's article in the *Northwestern Law Review*, Ilya Somin voices disagreement that there is a systematic plan to discriminate against the poor when it comes to eminent domain. She states that indeed there should be more attention paid to the plight of the poor, but no systematic attack against the poor is present. Somin argues that there actually have been some benefits to the passed legislation in that, it is better to have some areas safe from economic domain takings than not to have any. According to Ilya Somin, the poor who do not live in 'blighted' areas cannot have their property taken and so are offered some protection. However, there are plenty of poor in the United States, who live in blighted areas and so are not being protected by much of the new legislation. A great deal of the controversy surrounding this issue regards how the legislation has defined 'blighted.' This is one of the main conclusions of Will Lovell's article. However, Ilya Somin believes the blight standard can in fact offer some

protection to the poor, and that the legislation is not a systematic attack on them. She would agree with Will Lovell that the middle class is still vulnerable to having their property taken because the blight laws are too broad, but doesn't believe the poor are at a much greater risk. As Nasim Farjad's article explains, and as local mayors attest, there are some benefits to eminent domain. "There are perfectly no invidious reasons for believing that condemnation is sometimes necessary to eliminate blight" (Somin 196). Ilya Somin goes on to explain that removing blight is one way that eminent domain can be positive. Farjad cites New York as an example of how reducing blight can lead to lower crime and homicide rates. Here she agrees with Dona in that the poor often do receive the short end of the stick, but then reverts to her main conclusion that there is no systematic attack on the poor. In a clear response to Professor Dona, by mentioning his article by name, Ilya Somin holds that Professor Dona is wrong in stating there is a systematic attack, because eminent domain has made no noticeable difference to the poor since the *Kelo* decision. She cites the Poletown case in Michigan as an example of this. Here, Polish immigrants were forced to leave their working class community so that GM could build a new plant. Somin believes that the poor today are just as vulnerable to having their property taken as ever before. Therefore, the majority of the poor in the United States have seen no effect from the eminent domain legislation passed by the states. This line of reasoning fits closely, but focuses more on the poor than does the article by Will Lovell: if the poor are to be protected the definition of blight must be changed. Thus in Ilya Somin's opinion, the legislation passed was not done to intentionally discriminate against the poor.

In a thought provoking article by Nasim Farjad, entitled “Note: Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City,” he believes that the Supreme Court’s broad interpretation is correct and that the right decision was made in *Kelo*, unlike most of the published literature on the topic. Nasim Farjad points to the manner in which New York City has used eminent domain over the past two decades. He cites the lower crime rate, fewer social problems, and decreased blight as reasons why eminent domain laws in New York have been successful. Specifically, Times Square is an example of eminent domain benefitting that section of the city. He states that as a result of the broad interpretation of the ‘public use’ clause which New York adopted, the city has benefitted financially and more jobs have been created. Here, many people choose to sell their property before it is seized to avoid the hassle of an eminent domain hearing. While this makes it difficult to determine the actual number of eminent domain cases, New York City is believed to have one of the highest rates of eminent domain takings in the nation. According to Farjad, New York has the appropriate eminent domain laws in place for a city of its size and the results speak for themselves. Even though Farjad does not offer hard data, he does say that over the past two decades, crime and homicides have gone down as eminent domain has increased. The idea that cities need to have a broad interpretation of eminent domain is not a new one. In the controversial months that followed the *Kelo* decision, mayors and city officials across the country applauded the ruling, stating that cities would collapse without it. Farjad explains that critics of the Court’s decision do not take into account one simple fact, that eminent domain for economic development has revitalized New York City. In his Machiavellian style argument, Farjad states that the results of

New York City's urban renewal projects speak for themselves and were certainly worth the costs in order to achieve lower crime rates, and a better economy. Also, unlike Will Lovell, Nasim Farjad believes that new reforms should be repealed. He also believes that 'blight' should not be a prerequisite in order for an urban renewal project to occur. Those who support this line of thinking hold that a broad interpretation will allow cities to revitalize areas that have become economically stagnate. If 'blight' was a prerequisite, the poor would likely be hurt to a greater degree, and areas just above the poverty line may be stuck there for prolonged periods of time. Thus, a broad interpretation could help poorer residences and stimulate economic growth in areas that are not 'blighted.'

One of the most valuable resources in this endeavor are the documents produced by the United States of Representatives Committee on the Judiciary in a hearing entitled, *Supreme Court's Kelo Decision And Potential Congressional Responses*. The report holds all of the testimony given before the Congressional Committee and the documents that were introduced to the Committee. What is especially important is that it includes documents on both sides of the debate. For those in favor of the use of eminent domain following the Supreme Court's decision, mayors, like Bart Peterson of Indianapolis, Indiana, explain that eminent domain is vital for cities throughout the United States because it bring jobs and keep cities thriving and relevant. Without the power of eminent domain, Mayor Peterson explains, cities will die a slow agonizing death. He also goes on to state that eminent domain has been effective in clearing 'blighted' areas and reducing the crime rate. The argument is very similar to the one Nasim Farjad presents in his article describing how New York City has benefitted from the use of eminent domain. The majority of the testimony in the report however is against the Supreme Court



decision. This is not surprising since the majority of Americans did not agree with the decision at the time of the Supreme Court case. Two interesting testimonies were given by a group of lawyers who worked for the Institute for Justice and represented the *Kelo* family in the Supreme Court. These testimonies mainly explain that the new broad interpretation allows for anyone's personal property to be taken. The article's rationality matches very closely with Will Lovell's thought, that with broad interpretation, no one's individual private property is safe from the government. The second testimony of note is Michael Christofaro, a New London resident, who participated in the law suit. In the aftermath of the *Kelo* decision, Michael Christofaro was one of the most outspoken critics of the Supreme Court's decision. He explains that the city of New London, 'kept its cards hidden' so that the public was not fully aware of what was happening with eminent domain. He then explains that not only was his property well kept, but that his house had been in his family for generations. He also explains that even though the house might not have been in the best section of town, he enjoyed very much its nice water views of Long Island Sound. He then goes on to describe how losing his house has caused him and his family a great deal of agony, which the required monetary displacement fund could not account for. Therefore, these testimonies before the House of Representatives show how the battle over eminent domain affects people in many different ways from both a policy and personal perspective.

Wendell E. Pritchett wrote an article in the *Yale Law and Policy Review* entitled, "The 'Public Menace of Blight: Urban Renewal and the Private Uses of Eminent Domain.'" In the article, Pritchett explains why it is so important for urban developers to have areas considered blighted, due to the ramifications of this word. He explains that

the general public is overwhelmingly much more likely to agree with an eminent domain project, when an area is considered 'blighted'. As Will Lovell's article shows, one of the reasons the *Kelo* decision was so controversial was because the Kelo's property was not 'blighted'. Middle class families realized that their property too could now easily be seized by the government. The Pritchett article explains how blighted can be used in very broad terms. Americans typically think that blighted consists only of run down areas, typically filled with very poor residents. However, as the Pritchett article proves, recent history has shown that governments have the ability to label as blighted those areas occupied by middle class families. In addition to trying to convince the public, governments also label areas as blighted so that they can generate new tax revenue. The Farjad article explains the mindset of many advocates of eminent domain. "To renewal advocates, blight was bad not only because of the damage it caused to residents, but also because it drained urban resources" (Pritchett 17). Thus, when an area is termed 'blighted', it is easier for cities and local governments to justify that they can substantially help the city through urban development in order to raise new revenue. Therefore, Pritchett concludes that it is easier and so more likely for eminent domain to be used against the poor. Local governments can prove with greater ease that they will generate more money and so play into stereotypes promoting the use of eminent domain in 'blighted' areas.

Elaine B. Sharp and Donald Haider-Markel's article "At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the *Kelo* Decision" is a study focusing on eminent domain laws passed since the *Kelo* decision was handed down. The study is based on a key line from Justice Steven's majority opinion. "We

emphasize that nothing in our opinion precludes any state from placing further restriction on its exercise of the takings power” (Sharp 558). This study unearthed a few key findings. First, in those states that had strong organized interests for eminent domain policies, there was less substantial legislation. This is not surprising, since as the “Testing O’Connor” study proved, the poor are more impacted by eminent domain takings due to their status as a politically powerless group. Therefore, policies will likely not be put into effect to protect the poor from the strong interests of pro eminent domain groups. Secondly, Republican controlled states passed more legislation in those states that had Democratic control. This is not surprising given the fact that the Republican Party has run on a platform of little government interference in the daily lives of individuals. However, Republican policies have consistently supported business’ agendas. Thus in order to pass legislation, they had to go against business agenda. Interestingly however, legislation was stronger in the more liberal states. Thus there is the potential that in Republican controlled states, more legislation was passed in order to appear as if they were protecting private property, without hurting big business. Also, there is the potential that the more liberal states are more sensitive to the needs of the poor, minorities and the less educated than the “Testing O’Connor” study proves. Finally, the study found no correlation between strong legislation and eminent domain. Thus, it is hypothesized that the activists were pushing for eminent domain reform much more than the population at large.

The H.W. Wilson Company publication, “Eminent Domain Legislation by State” lists the pieces of legislation that were passed in each state, following the aftermath of the *Kelo* decision. This information fits nicely in the context of Sharp and Markel’s

argument. Sharp and Markel's work explains many of the main downfalls of this legislation. However, the H.W. Wilson source explains what was in the actual legislation that was passed, unlike the Sharp article that does not go into much detail about what the bills said. "Eminent Domain Legislation by States" summarizes each bill passed following the Supreme Court's decision. Instead of going through each of the decisions in this forum, to summarize there are five themes that run through much of the legislation passed. First, any eminent domain taking must be used for a 'defined public purpose.' Delaware passed this type of legislation in 2005, right after the *Kelo* decision was handed down, to ensure that any eminent domain takings would be used for the traditional understanding of public use. Second, eminent domain can only be used for 'blighted' areas, placing restrictions on what is considered blighted. New Jersey passed a law that fits into this category. Interestingly, critics, such as Will Lovell, would say this type of law makes eminent domain more likely to be used against poor and minority residents than other citizens. A third type of law was to enhance public notice, hearing and negotiations. This means that when eminent domain is being utilized landowners must be given more notice, and owners must have the right to a hearing in a public forum. An example of this type of law was passed in New York, requiring public hearings to be held. Next, another type of law was passed to ensure that local, and in most cases, state governments vote on an eminent domain taking before it is allowed to move forward. This is done by the state legislature. In 2005, the Ohio legislature passed a law mandating that the state legislature must vote before the use of eminent domain in individual cases would be allowed to move forward. Finally, the last category of legislation limits eminent domain for specific reasons, such as to increase the tax base.

An example of this type of law can be seen in Pennsylvania, where the legislature passed HB1835 and HB1836 in 2005. It is important to note that state Constitutions are often worded more strictly, thus limiting eminent domain takings. For example, the Ohio Supreme Court, using the Ohio Constitution, stated that eminent domain cannot be used to simply generate more tax revenue. Thus, this source explains how actual legislation fits into the *Kelo* fallout and how different states dealt with the problems arising from it, as well as some of the problems with the types of legislation passed.

Another popular option for private property advocates, following the *Kelo* decision, was to place initiatives on the ballot and allow the voters to determine how the redefined approach to eminent domain and the ‘public use clause’ should be handled. This approach was especially popular west of the Mississippi River. In particular, the ballot initiatives in California and Idaho were given a great deal of attention by the media. Marcilynn A. Burke argues that ballot initiatives have many undesirable effects that hurt the public. In her article entitled, “The Emperor’s New Clothes: Exposing the Failures of Regulating Land Use through the Ballot Box,” she explains why ballot initiatives do not produce the results expected for the betterment of the community. Burke cites two main examples of why ballot initiatives fail. First, although each voter receives one vote, media messages, funded by private interest groups, work to sway the voter. Special interest groups are spending large sums of money in order to sway votes that sometimes go against the best interest of the states. She explains that ‘American’s for Limited Government’, headed by millionaire real estate mogul, Howard Rich, spent over one million dollars to defeat a ballot initiative limiting eminent domain. “What began as tools for the majority to liberate its democratic institutions from the clutches of

a few powerful corporations has evolved into a bludgeon used by interest groups to thwart the legislative process.” (Burke 7) Therefore, Burke believes clear evidence supports the fact that the voice of the wealthy is heard more in society than that of the poor. It also means that the wealthy are able to bypass the legislature and use their wealth to further their agenda. This opens the flood gates for the interests of the minority and the poor to be trumped by the wealthy, just as Justices Thomas and O’Connor feared in their dissenting opinions. Furthermore, Burke’s evidence also makes sense in relation to Dick Carpenter and John Ross’ study that the poor are affected by eminent domain at a higher rate than the wealthy. Since the poor cannot afford to pay for media advertising, their rights are not given equal representation. In addition, one of Burke’s key points is that voters either do not have time or simply choose not to follow every detail about ballot initiatives. Therefore, these advertisements play to voters’ confusion, leaving the voter thinking his vote is helping those less fortunate in society, when in reality it is hurting them. A second main point is that legislators are better suited to determine whether eminent domain is useful than are ballot initiatives. Eminent domain is typically a highly technical problem and its impact will be felt both in the short and long term. Voters, however, are often only able to often see the short term effects and not the long term plan. For example, local mayors testified in the Congressional hearings following the *Kelo* decision that cities depend on eminent domain powers in order to stay viable. City officials are better suited to speak with professionals who understand the benefits and pitfalls of eminent domain in a particular case than are voters. Burke notes that voters do not often know the long term plan and thus only vote with the short term in mind. There is also the fear that race relations will be put to the test through ballot

initiative. For example, one study of the use of ballot initiatives to enact local growth controls in California demonstrated that the adoption of such measures had "a significant effect on the racial/ethnic composition of the population" (Burke 12). In California, for example, one initiative made it much easier for eminent domain to be used on low income housing. These homes are often occupied by minorities and the poor. Just as the Carpenter study proved, minorities therefore would be more affected by eminent domain than the general population. Therefore, ballot initiatives are not an appropriate way to settle the debate regarding eminent domain following the *Kelo* decision.

Another important article is "Eminent Domain and City Redevelopment in California: An Overview and Case Study" by Adalberto Aguirre, Jr., and Frances Vu. This looks at eminent domain in the state of California since the *Kelo* decision was handed down. Aguirre and Vu begin their essay with background information regarding why the founding fathers wanted individual property to be protected. The authors state that the founders based their ideas regarding private property on the old common laws. "In general, however, the framers of the Constitution promoted a common law principle regarding property: a distinction between individuals who own things and individuals who desire to own things owned by other individuals" (Adalberto 101). At the same time, the authors acknowledge that there are times when eminent domain must be used. The article then shifts gears focusing on how the *Kelo* decision has impacted the way eminent domain laws are interpreted in the United States. The most valuable aspect of this source is that it examines the shift in California's use of eminent domain since the *Kelo* decision. In particular, the authors look at Riverside California. At the time of the *Kelo* decision, the city of Riverside, in lockstep with the state university, was attempting,

through eminent domain, to take property near the campus and develop a ‘campus village.’ This village was to be a place for students to gather, socialize and participate in recreational activities, thereby generating money for the city. Riverside Redevelopment Agency, in charge of overseeing the program, was forced to use eminent domain after the owners of the land refused to sell their property. In the events that followed, the Superior Court granted RDA the right to seize the property. In a public hearing following the Court’s decision, the City Council, by unanimous vote, upheld the decision to allow the RDA to take the property and begin construction. In a strange twist of events, some of the neighbors were able to persuade the city not to take their property. Those neighbors, who were not able to be released, challenged the RDA’s decision. They secured over 17,000 signatures allowing a special election with the only ballot question that between the neighbors and the RDA. The RDA then sued before the Superior Court, but this time the Court ruled in favor of the neighbors, and the ballot initiative was allowed to go forward.

Another key case study is Andrew Han’s, “New London to Norwood: A Year in the Life of Eminent Domain.” This article explains that a year after the *Kelo* decision was handed down in Washington, the Ohio Supreme Court struck down a similar case using a slightly different line of reasoning. It goes on to explain that the courts are likely to play a major role in protecting individual property in the future. The article begins by explaining how the court interpreted the ‘public use’ clause, just as other articles, such as Will Lovell’s, have done. It then moves on to explain how the Ohio Supreme Court ruling differs from the *Kelo* decision. Next, it explains that Norwood, a suburban city right outside Cleveland, had undergone a serious decline in its economy due to the loss of



manufacturing jobs. The city, operating with a deficit, decided to take some property and develop it into apartments and public parking in an attempt to generate over two million dollars. However, some property owners filed a lawsuit to stop the taking. The residents lost the initial trial and the appeal, but won before the Ohio Supreme Court in a unique court decision that directly contradicted the United States Supreme Court.

The court unsurprisingly held: In addressing the meaning of the public-use clause in Ohio's Constitution, we are not bound to follow the United States Supreme Court's determinations of the scope of the Public-Use Clause in the federal Constitution, and we decline to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause in *Midkiff* (Han 5).

The decision was a major victory for private property advocates. In reaching this decision the Court decided not to use the Supreme Court's majority opinion in *Kelo*, but felt instead that the Michigan Supreme Court's interpretation and the dissenting opinion in the *Kelo* case were more relevant to Article 1 section 19 of the Ohio Constitution. Using this reasoning, the Court rejected Norwood's plan to use eminent domain to seize property. It is important to note, that the Ohio Supreme Court did not overrule the Supreme Court, but rather used a different 'baseline' test in order to reach a new conclusion. Based on Supreme Court precedent and the law, states can interpret their constitutions in their own way, but cannot have laws or rulings that deprive people of their own rights. The article goes on to explain how the Ohio Supreme Court was able to use these other cases to prevent the city of Norwood from using eminent domain to transfer private property from one person to another. The Court used a stricter interpretation than the Supreme Court did, stating that 'economic development' was not an acceptable reason to use eminent domain. Since the stricter standard did not take way

anyone's individual rights or their due process, the stricter standard was legal. The Ohio Supreme Court did leave the door open however for cities to use eminent domain for 'urban revitalization,' the main distinction being that an area must be considered blighted for it to be taken. Some advocates of the poor, like David Dona, would argue that once again this is discriminatory against the poor. Overwhelmingly it is the poor who are living in these blighted areas, and thus it is the poor whose property will be taken at a much higher rate than the middle class. This article fits in nicely with the Sharp and Markel article, as well as with Will Lovell's. The Sharp and Markel article examines the characteristics of legislation passed since the *Kelo* decision, while the Will Lovell article criticizes that legislation for not doing enough to protect individual property. This article by Andrew Han is a nice contrast since it shows that the Ohio Supreme Court was able to prevent eminent domain transfer of property from one private entity to another. The article explains the reasoning by which state courts are able to stop eminent domain from happening without directly contradicting the Supreme Court. By employing a stricter standard, the Ohio Supreme Court was able to prevent eminent domain, which many of the state legislatures were not able to do, while others were more successful in legislating provisions that protected individual from eminent domain.

Another valuable article is one by Edward Lopez and Sasha Totah entitled, "*Kelo And Its Discontents The Worst (Or Best?) Thing To Happen To Property Rights*" This explores many of the ideas found in the Sharp article, while offering a few case studies to illustrate the point. The article examines many of the same points that Will Lovell article explores, stating that the *Kelo* decision has exposed property owners to having their property taken by the government in ways never before legal. The article explains that

local governments no longer need to condemn an area as blighted in order to take the property, and that government only has to prove that such property will result in more revenue than the previous building. Many of these themes have been covered in other articles, such as the one by Will Lovell. Lopez and Totah hold that since the *Kelo* decision, local governments are able to seize whatever property they desire as long as they can justify it as being economically beneficial for the city. Some excellent examples are cited to illustrate their point. In Los Angeles, a tire shop owner's property was seized to build a new high rise, yet the city did not offer him enough money to open a new shop. This was one of the main criticisms discussed in the article; eminent domain funds are often not sufficient enough to support the land owner in a new location. David Dona's article examines this issue in terms of the poor not being able to find affordable housing once theirs has been taken. This article shows that the same problem exists for small business owners. These owners often do not have the abdicate funds available to cover the start up costs of running a business. The article also offers other excellent case studies. The most important of which was a case out of Riviera Beach, where over one thousand residents were forced to move for eminent domain purposes. Local residents were outraged. "Although the city had not used eminent domain to acquire any property, its plan was enough for a *Tampa Tribune* editorial to conclude, 'Riviera Beach exemplifies how local governments can abuse eminent domain'" (Lopez 405). Mayor Brown had decided to take the land and give it to a local developer, who would then determine how best to use the land, most likely building high rise apartments. Before construction could begin, Florida legislators passed a law restricting eminent domain unless the property seized was considered blighted. Local residents successfully slowed

the process down with the help of King of the Castle, a national organization that protects individual property rights.

Finally, a *Wall Street Journal* article, published the week after the *Kelo* decision was handed down, explains why the Supreme Court made the wrong decision when deciding this case. “Supreme Folly” is written by Richard Epstein, a professor of law at Chicago University, and considered the most prestigious scholar on economic takings. He holds that the Supreme Court made a poor decision here, interpreting the ‘public use’ clause too broadly. Will Lovell made a similar observation, while Nasim Farjad, a supporter of the Court’s decision, disagrees. Epstein firmly believes that the founding fathers wanted eminent domain to be used only in cases where a public benefit was offered that was more substantial than additional tax revenue. Another reason Epstein disagrees with the decision in the *Kelo* case is that it runs contrary to capitalist principles. In the case of New London, no developer was forced to pony up his own money, and thus the developer had less at stake to ensure the project succeeds. Local government, who took the property from residents, will most likely blame the developer if the project fails, and the developer will in turn blame the government. Meanwhile the real losers will be the tax payers and the local residents who now have lost either homes or businesses. Thus, Epstein states, the government must do more to protect individuals and to check the power of local government. Before eminent domain is exercised, local government and the developer must provide detailed plans on how the project will work. Interestingly, in retrospect, the New London project failed for exactly the reason Richard Epstein explained. Therefore, eminent domain might be more successful if the states and the

courts followed the guidelines that Richard Epstein laid out in his Wall Street Journal article.

### Chapter Three: State Governments Respond to the *Kelo* Decision

In the aftermath of the unpopular decision reached by the Supreme Court in *Kelo vs. City of New London*, the public searched for ways to curtail the power that the decision granted state and local governments. State governments who opposed the Court's majority opinion immediately began working to pass legislation that would curtail the use of eminent domain.

In response, there were four typical approaches taken by the states. The most popular of these was to pass new laws and statutes in state legislatures. The goal of these legislative measures was to roll back the *Kelo* decision by having local representatives protect the property of the individuals who elected them. In some form or another, every state legislative body that met in the year following *Kelo* discussed eminent domain regulation (NCSL website). Secondly, initiatives, both constitutional and legislative, were placed on each state's ballot for a vote by its citizens. In the year following the decision, thirteen states had some type of ballot initiative allowing voters to decide whether any changes were necessary to their eminent domain laws. A third option in the aftermath of the *Kelo* decision was for private property advocates to challenge eminent domain cases in local courts. The Supreme Court allows stricter standards to be used as long as individual rights or due process are not violated. In many instances, states' individual constitutions are written in ways that make the use of eminent domain stricter than the

United States Constitution. Finally, some states opted not to make any changes regarding eminent domain. These states tended to have a moderate political culture and no active interest groups on the issue. Although these states were in the minority, it did show that not every state was outraged enough by the *Kelo* decision to draft new legislation or make a constitutional amendment (Sharp and Markel 570).

State governments most commonly tried to pass new legislation limiting how state and local governments were able to use eminent domain. The National Conference of State Legislatures (NCSL) is an organization whose goals include improving the quality and effectiveness of state legislatures, and allowing representatives of different states to share ideas. The NCSL also advocates for state governments before Congress and federal agencies. According to its website, in the year following the *Kelo* decision, states typically passed seven types of legislation. The first category dealt with putting an end to the use of eminent domain for economic development, greater tax revenue, and the transfer of private property to another private enterprise. With the second type, states attempted to define what exactly constituted ‘public use.’ In the legislation, most states declared that ‘public use’ was the possession, occupation or enjoyment by the public at large, of public agencies or public utilities. The third category attempted to limit eminent domain to blighted areas only. In doing so, states defined ‘blight’ as that which posed a risk to public health or safety. The fourth category of legislation set a requirement for greater public notice, more public hearings, and that any final decisions had to be approved by an elected governing body. In the next category, state legislators passed measures mandating that more than market value be paid to those whose seized property was their primary residence. The sixth category of legislation placed a moratorium on

the use of eminent domain in cases where the property was being taken for economic development purposes. The seventh and final category required the formation of legislative study committees to gain a greater understanding of the need for eminent domain in individual cases, and then report these findings back to state legislatures. Of the forty four state legislatures that debated the issue of eminent domain in the year following the *Kelo* decision, twenty eight ultimately passed some form of legislation, while two, Arizona and New Mexico, passed a bill before it was later vetoed by the governor. Interestingly, support in the Iowa legislature was high enough to overrule that governor's veto. In many cases, the bill that eventually made it through state legislature contained one of these seven elements and many bills contained multiple elements.

While the National Conference of State Legislatures' website explains the types of legislation passed in the aftermath of *Kelo vs. New London* decision, another equally valuable source explains why states passed the type of legislation they did. Elaine B. Sharp and Donald Haide-Markel in, "At the invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision," explore why certain states came to adopt their type of legislation by examining the legislation each passed in 2006. Using a grading system established by the Castle Coalition, the leading anti-eminent domain advocacy group in the country, each individual state's legislation is ranked based on the strength of the new bill according to two fronts: its ability to eliminate takings for economic development, and a tighter definition of blight. The Sharp and Markel study found five reasons why some states passed tougher eminent domain laws than others. First, states that commonly used eminent domain laws in the late 1990's, passed stricter legislation, and experienced population growths, were more

likely to pass stricter eminent domain legislation. Secondly, organized interests appeared to play an important role, especially in pro eminent domain legislation. “The substantial support shown for the organized interest explanation is in some ways the least surprising result given the consensus about its importance in research on both state legislative responses to Supreme Court action and research on state policy change more generally” (Sharp and Markel 568). Not surprisingly, states where real estate and development interests were strong tended to pass weaker eminent domain legislation. Interestingly, Sharp and Markel pointed out that liberal groups advocating for the poor and minorities tended to side with conservative property groups, thereby making the impact of interest groups for development unknown due to this unusual alliance. However, Sharp and Markel still contend that in states with strong pro eminent domain interest, weaker reform was passed. Next, the Sharp and Markel article was not able to find any correlation between the populous ideology and the strict legislation. Citing studies conducted by Erikson, Wright, and McIver, as well as another by Berry, published in the *American Journal of Political Science*, Sharp and Markel were able to gauge where each states’ populous ideology lay. In fact, it appears that legislators passed eminent domain reform to appease the activists on both ends of American politics. “Presumably, legislatures were reacting not to the broad, ideological orientation of the general public but to aggrieved activists coming from both ends of the political spectrum” (Sharp and Markel 570). Therefore, it is not surprising that Sharp and Markel did not find any correlation between strong reform and the populist’s ideology.

Another key factor in determining the type of legislation that states passed was found by examining the composition of each state's legislation. Sharp and Markel



expected to find that eminent domain reform was more powerful in states dominated by Republicans, due to their belief in limited government and protection of small businesses. However, Sharp and Markel did not find there to be a significant relationship between the political party in power and eminent domain reform. On the other hand, they did find that states with divided party dominance in each House passed weaker legislation, according to the ranking given by the Castle Coalition. “Divided government (across legislative chambers) has the straightforward and conventionally expected impact of deterring reform” (Sharp and Markel 569). Thus, states that did not have one party in control of the state government often passed weak and watered down legislation. Regarding the makeup of the state legislature, Sharp and Markel found another rather surprising tendency. Using a study produced by Peverill Squire in 2007, Sharp and Markel ranked the professional level of each state’s legislature based on salary, the length of session, and staffing resources. Rather surprising, according to the Castle Coalition, the states with the most professionalized legislatures passed the weakest legislation “Rather than encouraging state adaption of strong eminent domain reform, the presence of a more professional legislature also appears to be a substantial deterrent to strong reform” (Sharp and Markel 567). Unlike the hypothesis that Sharp and Markel expected to prove, they found instead that states with a professionalized legislature passed weaker eminent domain laws. The explanation for this, according to Sharp and Markel, is that these states have more crowded legislative agendas and therefore did not spend as much time debating the fallout from the *Kelo* decision in the year following the Supreme Court case. They argued that states with a less professionalized legislature had the time to adjust their schedules in order to debate and ultimately pass strong eminent domain reform. Sharp

and Markel briefly touch on the point that professionalized legislatures tend to be found in large states, where a powerful real estate lobby is likely to be present (Sharp and Markel 570). Legislators who are seeking re-election therefore may be less willing to pass legislation which will go against the wishes of these powerful lobbying groups. Thus surprisingly, those states with strong eminent domain reform emanated from states without a professionalized legislature; the less busy schedule allowed them the flexibility to pass meaningful eminent domain legislation.

A second type of action taken by states in the aftermath of the *Kelo* decision was to put initiatives on statewide ballots thereby allowing the populous to determine how strict eminent domain laws should be in their state. In an article on the National Conference of State Legislatures' website entitled, "Property Rights Issues on the 2006 Ballot," it explains that in the year following the *Kelo* decision, some states opted for ballot initiatives instead of trying to pass legislation in the more traditional way. Arizona, Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina were all able to pass ballot initiatives in the year following the *Kelo* decision (NSCL Website). Interestingly, all of the initiatives that passed were constitutional amendments, with the exception of Oregon and Arizona, where statutory ballot initiatives were adopted. In Washington, Idaho, and California, places where ballot initiatives were voted down, all three were statutory ballot initiatives. Also, some of these states had eminent domain ballot initiatives recommended by the state legislature. "Five of the eminent domain measures on the ballot this November were referred by legislatures: Florida, Georgia, Michigan, New Hampshire and South Carolina. Louisiana's primary ballot question was also a legislative referendum." (NCSL Website).

In the case of Louisiana, the ballot initiative ratified by voters was done during the primaries and not the general election. In the case of the other states, the eminent domain question was brought to the ballot by concerned citizens. Using the same Castle Coalition grading scale that was used for legislative bills dealing with eminent domain reform, all of the ballot initiatives were considered to be strong reforms. “Not surprisingly then, our measures of presence of a voter-initiated ballot measure is a significant predictor of stronger eminent domain reform” (Sharp and Markel 568). Sharp and Markel go on to explain that this could be another key reason why a state legislative’s professionalized level was not a significant factor in passing strong eminent domain reform. In such states as North Dakota, which had a low rated professionalized legislature, and did not even meet in 2006, significant reform was possible through these initiatives. Therefore, ballot initiatives were a way for states to pass eminent domain reform without having to carry out lengthy debates during the legislative session. Without lengthy debates, states were able to put strong measures on the ballot and allow the voters, in most cases, to pass a constitutional amendment. Since the majority of Americans throughout the country were angry with the Supreme Court’s decision in *Kelo vs. New London*, it was not surprising then, that in 2006, ten of the thirteen states where eminent domain reform initiatives were on the ballot passed. Therefore, in the aftermath of the *Kelo* decision, states turned to ballot initiatives to pass meaningful eminent domain in order to restrict governments from taking private property.

A third action that states took in the aftermath of the *Kelo* decision was for the courts to make critical decisions on the limits of eminent domain in each state. Two states in particular, Ohio and New Jersey, each had eminent domain cases before their

state Supreme Courts and in each case the end result was different than the *Kelo* decision. It is important to note that state Supreme Courts cannot overrule the United States Supreme Court. However, because the wording of state constitutions is often stricter, state Supreme Courts can rule that the situation in question violates the state constitution, as long as it does not violate individual liberties.

In Ohio, the case of *City of Norwood v. Horney* (2006) eventually made its way to the Ohio Supreme Court. Here, the City of Norwood was attempting to use its eminent domain powers to condemn property that was owned by the Horney family for over thirty five years. The City of Norwood had fallen on hard economic times, and was trying to lure manufacturing jobs back to the city by building a new plant. When the city announced its plans, Joseph Horney filed a case in district court stating that condemning his property was unconstitutional. Eventually, the Ohio Supreme Court ruled that the state could not take the Horney family's property. "On this legal basis, the Ohio court ultimately held that "although economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit." (Han 5). Ultimately, however, the decision by the highest court in Ohio did not have the power that private property advocates had hoped. The Court ruled that because Norwood's plans for the site were vague and did not guarantee that a company would ultimately move in, Horney's due process rights were violated. "The court instead chose to use the void-for-vagueness doctrine and notions of due process to attack the Norwood Code that authorized the takings of deteriorating areas. It was therefore able to sidestep further definition of the public use concept" (Hans 5) This meant that in cases where cities in Ohio did not have a

definite new use for the property, eminent domain could not be used. However, it did little to limit eminent domain in places where there was a new use for the land. Still, it was the first case of a state Supreme Court limiting the way in which local governments could use eminent domain following the landmark *Kelo* decision.

The second major case of this type came out of New Jersey. In this case, George A. Gallenthin III owned a large parcel of open land in the Borough of Paulsboro. The land was occasionally used for temporary parking, but rarely for anything else. The planning and development board in Paulsboro decided to bring a BP Development project into that area to generate more tax revenue for Paulsboro. The Gallenthin family, which had owned the land for years, filed a suit that eventually made its way before the New Jersey State Supreme Court. First, the Court had to decide whether the area was considered ‘blighted.’ As did most states following *Kelo*, New Jersey had adapted legislation requiring an area to be ‘blighted’ in order for the government to use its eminent domain powers. However, as with most states, the definition of blight was extremely broad. Ultimately, the New Jersey Supreme Court decided that the intent of the legislation was to protect landowners, like Gallenthin, and that without these checks the government would have almost unlimited powers when it came to eminent domain. “‘Under such an ‘all-encompassing definition,’ the court observed, most property in the state would be eligible for redevelopment. Chief Justice Zazzali concluded therefore, that the term's meaning obviously could not extend so far and that Paulsboro's interpretation was unconstitutional” (Ostrowski 9). The Court went on to state that local government could not take property for the purpose of eminent domain, merely because the government felt the property was not being utilized to its fullest benefit. It should be

noted that the New Jersey Court stated that a major reason why it reached this decision was because it felt that the Gallenthin's property was not necessary for the BP development project. Nevertheless, the precedent that *Gallenthin Realty Development, Inc. v. Borough of Paulsboro* set was a major win for private property advocates and limited the power of local governments, including how they defined 'blight.'

For private property advocates these two cases exemplify state Supreme Courts pushing back in the aftermath of *Kelo v. New London*. In these cases, the Courts through their state constitutions, limited the way in which local governments were able use eminent domain. In the Ohio case, there needed to be a specific reason for how the eminent domain land would be used. The New Jersey case proved that state courts are able to define 'blight,' and thus greatly restrict the use of eminent domain. For many this was a welcomed outcome. However, for others, like Will Lovell, the New Jersey case only proved further that eminent domain legislation needs to be stricter (Lovell 617). The New Jersey Court qualified its finding by stating that had the Gallenthin's land been essential to the redevelopment of the BP Development project, the Court may have found differently. Ultimately, these two cases show how local Courts have played a major role in defining how and where eminent domain can be used since the *Kelo* decision.

A fourth category of action occurred in those states that chose not to pass any new legislation, not to create ballot initiatives and not to challenge eminent domain in state court. Instead, these states chose to keep eminent domain restrictions loose leaving the final decision of when and how eminent domain would be used up to their local officials to decide. In some states like Arizona and New Mexico, governors chose to veto eminent domain legislation (White). One of the main groups against eminent domain reform was

local mayors. As Joe White reported on the National Conference of State Legislatures' website, mayors were disheartened by state legislatures passing more restrictive laws and taking power away from their decision making. "“My concern is the same as the concern of mayors and of urban advocates,” he said. “Legislatures’ practice for decades has been to make tools available to cities. Now tools have been taken away,” Nolon said.”” (White)

John Nolan, a Pace Law School professor, explained why mayors do not want any restrictions on their power to bring jobs to their community. Making the problem even more difficult was the fact that many states, like Georgia for example, passed laws stating that eminent domain was not allowed for cases of economic development. However, Nolan explained that for some cities their only hope for revitalization of some areas was to use the takings clause. With the new restrictions in place, these cities would potentially lose all hope of being rejuvenated, leaving only the worst neighborhoods available for the use of eminent domain. (White)

This was a key reason why four states did not even debate the issue of eminent domain reform and why a third of the states eventually voted down new restrictions on eminent domain. A second reason some states did not pass eminent domain reform was the fact that powerful groups, especially those in real estate, have power in the state legislature. Redevelopment agencies often received hefty sums of money from the state governments and did not want to see any changes to eminent domain reform (Saunders 1). As the Sharp and Markel study showed, states that had a powerful lobbying influence in real estate either failed to pass any laws or only weakened ones.

The issue of special interests and redevelopment agencies is currently being playing out in California, where the newly elected governor, Jerry Brown, is attempting

to cut 1.7 billion from redevelopment agencies in there. Ironically, when Jerry Brown was Mayor of Oakland, he was a staunch supporter of eminent domain. ““When he was mayor, he ‘liked redevelopment.’ I didn’t quite understand it. It seemed kind of magical”” (Saunders 1). Similar to many states, California is facing major budgetary issues, and the Governor sees this as a way to cut back, while still allowing other more vital programs to continue to receive funding. Assemblymen, like Chris Norby, applaud the Governor and believe that eminent domain projects are generally a major waste of money, citing a 1998 Public Policy Institute Report to support their claim (Saunders 1). However, not surprisingly there are those who believe that cutting money to redevelopment agencies is a major mistake. Groups, such as the League of Cities, and Democratic Treasurer Bill Lockyer are opponents of the budget cut. Lockyer was outspoken in his criticism of Governor Brown’s ideas and believes redevelopment agencies help bring new jobs to California. He contends that in times like these, government needs to focus on improving the job market in California (Saunders 2). Thus, clearly California is an example of a special interests being able to prevent eminent domain reform. If California is unable to cut funding for redevelopment, then cuts will likely come from education, public safety and child welfare (Saunders 2). Therefore, in the larger professionalized states, special interests are able to derail any attempts to cut back on the use of eminent domain.

Along with special interest not wanting to see meaningful eminent domain legislation passed, powerful local politicians have also come out against passing more eminent domain reform. Larry Jones reports on the United States Conference of Mayors’ website that local officials, especially mayors do not want their eminent domain power



stripped away. In an emergency meeting the of the Executive Committee for the Conference of Mayors an eminent domain resolution was passed asking for the Federal Government to deny any eminent domain reform (Jones). While no resolution was passed regarding state governments' limitations on local leaders' abilities to use eminent domain, some mayors, like New York City's Michael Bloomberg, clearly want eminent domain issues left to individual cities to determine the appropriate course of action. Mayor Bloomberg was quoted as saying he believes that eminent domain is a local decision and one that should be left to local officials (Jones). This general atmosphere offers another explanation on why eminent domain has failed to pass in some states. Many government officials view eminent domain as a local issue and therefore state government officials should be differential to local government officials. As a result, some states have been reluctant to pass meaningful eminent domain reform.

Thus, in the aftermath of *Kelo* states have varied as to how best to deal with the problems of eminent domain. The Sharp and Markel study concludes that states that had a powerful economic incentive not to pass legislation likely did not pass reform or passed a weaker version of it. Therefore, some states chose to buck the typical trend of passing economic development reform and chose instead to allow their local officials to make the critical decisions on when to use eminent domain in an appropriate manner. Other states, because of lobbying interests, did not pass eminent domain reform. Some states have decided to be differential to local officials believing eminent domain is a local problem, and local officials are best equipped to handle these problems. Regardless of the reason, only a few states did not amend their eminent domain laws after the *Kelo* decision outraged the majority of the nation.

#### Chapter Four: The Benefits of Eminent Domain: A Case Study of Columbia University's Satellite Expansion Plan

In practice, the issue of eminent domain is often complex for our nation's cities, with major legal, social and financial factors needing to be considered. Since the Supreme Court handed down its *Kelo* decision, private property advocates have been passionate in persuading their local representatives to limit local governments' use of their eminent domain legislation. Three case studies in particular; the expansion of Columbia University's satellite campus, the building of a new stadium for the Dallas Cowboys, and construction of luxury condominiums and town houses in New Jersey, highlight the complex nature of eminent domain. In New York, Columbia University was allowed, through eminent domain, to force two small businesses to vacate their property in order for campus expansion to occur. Supporters quickly pointed out that the new campus would benefit the entire country in ways the two small businesses never could. In Texas, criticism surrounded the construction of the Cowboys' new stadium. Opponents were vehement in their conviction that an NFL stadium did not constitute a public good. Meanwhile, in New Jersey, a state epitomizing some of the most outrageous examples of eminent domain abuse, the Appellate Court ruled that the City must prove an area is 'blighted' in order to use eminent domain. These three very diverse and complicated cases exemplify the complexity and challenge posed by the issue of eminent domain, both in the immediate neighborhood and in the respective community.

One of the most intriguing eminent domain cases to date came out of New York City, when Columbia University attempted to expand its campus. In 2004, the Ivy League institution began moving forward on plans to expand its campus into the Manhattanville neighborhood in West Harlem. The University already owned seventeen buildings in the area and was hoping to clear out an additional seventeen acres located between 129th street and 134th streets. “The new plan seeks to take 17 acres in Manhattanville (from just below 129th to 134th, and between Broadway and Riverside Drive, which is elevated at that point) and dig down seven stories into the ground” (Last 2). The University wanted to then build new arts, science and business buildings on this new satellite campus. In total, the project was expected to cost the elite university approximately seven billion dollars and was not due to be completed until 2030 (Last 2). The University was also quick to point out that the project would generate a significant number of jobs in the Manhattanville neighborhood. “Besides creating an expanded, high-tech academic campus, the plan would create 14,000 construction jobs, 6,000 permanent jobs and 100,000 square feet of public open space” (Martinez and Lombardi 2). Currently, the area is zoned for small industrial work, such as auto shops, storage facilities and gas stations. The project would therefore draw a significantly higher percentage of employees to the area and raise the current employment rate.

From its initiation, the plan had been controversial, as those few business owners, who ultimately lost their land in this plan, refused to go down without a fight. In particular, Nicholas Sprayregen and the Kaur Family refused to sell their land to Columbia University. Nicholas Sprayregen, a NYU business graduate, owned the highly successful Tuck It Away Storage Company. The company originally opened its facility

in the Manhattanville neighborhood in 1980. Since Nicholas Sprayregen took over the business from his father in 1990, it had grown to include fourteen facilities located in New York and New Jersey. The company had over seven thousand customers and occupied one million square feet of space. (Last 2). Meanwhile, the Kaur Family, the other major party that refused to sell its land to Columbia University, owned two gas stations on the land that Columbia wanted for its satellite campus. Unlike, Nicholas Sprayregen, the Kaur family's sole source of income was the two gas stations. Columbia did ultimately take this land to build its new facilities.

Given the heated debate that followed the decision in the *Kelo* case, it is not surprising that another private-to-private property exchange through eminent domain would become a passionate issue. Those who supported the Columbia University expansion plan proudly cited numerous reasons why they believed Columbia had a right to expand its campus. It is important to note that key New York City officials, such as Mayor Bloomberg, supported Columbia in its quest to expand the campus. In addition, the City Council also voted in favor of the Columbia plan. (Martinez and Lombardi 1). The City Council voted 35-5 in favor of the expansion project. One of the major hurdles the University faced when trying to use the eminent domain was to have the area rezoned as a mixed use academic area. Previously, the area had been zoned as a light industrial area (Columbia Website). First, Columbia promised not to use eminent domain against anyone who lived in the designated area, and in fact ultimately less than three hundred residences were voluntarily displaced as a result of this project. In addition, Columbia pledged to make sure every resident found equal or better housing in which to voluntarily move, and guaranteed twenty million dollars towards the building of 1,000 affordable

housing units in New York City. “To counter fears that development will gentrify the community, Columbia has seeded a \$20 million fund to increase affordable housing and will build more than 1,000 units outside the campus” (Crain’s New York Business 1). Supporters stated that this sizeable pledge proved how committed the University was to residents in the area, and to ensuring so that everyone involved had as smooth a transition as possible. This commitment quickly quieted those in the community who believed that Columbia, one of the most powerful universities in the country, was not simply picking on a minority neighborhood. When the plan was originally announced some were concerned how racial minorities and the poor would be affected. Nellie Hester Bailey, executive director of the Harlem Tenants Council, stated that she believed the project area was chosen based on the race of its inhabitants (Kilgannon and Stowe 2). However, as the University unveiled its promise that no resident would be forced from his home through the use of eminent domain, leaders in the African American community quickly shifted and supported the project, citing the economic benefits the new satellite campus would bring to the community (Currie 2). For these reasons, supporters of the project had no sympathy for Nicholas Sprayregen, who had refused to sell his land to the University as a matter of principle. Mr. Sprayregen owned a successful business and was quite wealthy; therefore profit was not a factor. Some supporters believed that ideology was the reason he refused to sell his land and that it had nothing to do with its value (Crain’s New York Business 1).

Not only did Columbia go far beyond what was legally required for those residents inconvenienced to accommodate the new project, a large number of jobs were also created, and in addition, the public would benefit from the research that was to be

done in the new buildings. Supporters, in admiration of the new science building, hoped that one day a cure would be found right there at Columbia for some of the most damaging diseases in society. One University press release stated that the project would “allow the University to construct the kind of academic research buildings with the floor space needed for the type of research and study that confronts some of the most critical health issues facing the community and world, such as strokes, Alzheimer's and Parkinson's disease.” (Currie 2). Therefore, supporters of the project believed that there was a clear ‘public good’ from this project, and making a few businesses and residents move was not too much to ask for the major advancements in key medical fields that were to come. The University also claimed it needed to expand its campus in order to stay competitive with other Ivy League universities. “Columbia, shoehorned into Morningside Heights, has less space than any other Ivy League school, and its ability to compete with those elite universities will be threatened if it can't build the classrooms, offices, laboratories and housing it needs” (Crain’s New York Business 1). Columbia believed it would not be able to stay competitive and provide a world class education if it did not continue to evolve and expand as demand expands. For these reasons, the supporters of the Columbia expansion plan deemed that the University was justified and that the community would benefit from the expansion.

Meanwhile on the other side of issue were those who passionately opposed the Columbia project for several reasons. One of the main reasons that opponents disapproved of this project, and private to private property transfers in general, was the idea that the strong and powerful of society, like Columbia University, were picking on the ‘little guy’ or small business owner. Even though Nicholas Sprayregen was a fairly

wealthy businessman, his resources and connections were still relatively small compared to Columbia's. "Perhaps the absurdity resides in the law itself, and how it is applied. Unfortunately, we've become comfortable slanting the law in favor of the 'big guy's interests over those of the 'little guy'" (Perkins 1). Supporters, like David Perkins, were quick to point out that those with the monetary and legal means had a huge advantage over others, and that when one person's property was not safe from the wants of powerful groups, no one's was. Using this line of reasoning, David Perkins jokingly turned Columbia's argument against itself. "We have an affordable housing crisis in New York City. And yet imagine what would happen if a publicly operated affordable housing agency got the go-ahead to seize a parcel of land on Columbia University's campus to build apartments for low-income residents of Harlem" (Perkins 1). While it was clear that Perkins knew this statement was rather ridiculous, it pointedly illustrated the point that the powerful in society had a distinct advantage over the less powerful when it came to the use of eminent domain. Others point to the fact that Columbia and the Empire State Development Corporation (ESDC), a state hired group, worked too closely together. According to their website, the Empire State Development Corporation was the main agency responsible for bringing jobs to the state of New York and for generating money into local economies. It was the group's responsibility to recommend that eminent domain projects move forward so that local government officials could vote on the project (ESDC Website). In fact, ESDC hired the contractor who conducted the Columbia study that was presented to the City Council. Since ESDC was in a position to benefit from the contractor finding Manhattanville a blighted area, some, including Nicholas Sprayregen's attorneys, believed the study, which was turned into the local

authorities, most notably the City Council, could not be considered credible. The state appeals courts that originally heard the case used this as a major reason for declaring that Columbia's expansion plan violated the state constitution. Ultimately, the New York Supreme Court overturned the appeals court's decision, but opponents of the project still held that Columbia used its power and influence to gain an unfair advantage.

In the case of the Columbia satellite expansion plan, it seemed quite clear that Columbia University and the Empire State Development Corporation stretched the definition of 'blight' in order to have the ability to condemn the property. As stated, the Empire State Development Corporation (ESDC) was the state run group ultimately responsible for overseeing eminent domain projects. ESDC was responsible for submitting a recommendation to the City Council before they voted on the Columbia expansion project. If they did not declare the Manhattanville neighborhood 'blighted', the vote by the City Council would likely have been much closer (ESDC Website). Opponents charged that Columbia lobbied to get the land declared blighted by using its influence and promising local politicians that it would create new jobs. Nicholas Sprayregen's property was well kept. In fact, opponents charged that the main reason why the surrounding area was in such bad shape was that Columbia intentionally let the neighborhood fall apart so that the land would be condemned as blighted. The Supreme Court in *Berman v. Parker (1954)* declared that states have the right to condemn land if the overall neighborhood is bad. Therefore, the issues involved in this case centered on New York State Law and New York City Law and not Federal Law. Opponents, however, and nearly everyone involved in the project acknowledged that Columbia was at least partially to blame for allowing the once proud neighborhood to fall into despair.



“And then there's the eyeball test: Walking around Manhattanville with a guide to ownership of the parcels, it is immediately clear which buildings belong to Columbia: They're the ones that are vacant and shuttered” (Last 6). Jonathan Last’s article went on to explain that Columbia University owned both of the properties in the area that were considered hazardous, and owned three of the four properties that were not being used for a certified purpose during their last inspection. Therefore, opponents argued it was inherently unfair that Mr. Sprayregen and the Kaur Family lost their land when Columbia allowed the neighborhood to fall into disarray, and would in return then benefit from eminent domain procedures.

While the definition, ‘blighted characteristics,’ and the perception of a powerful university picking on small business owners, were two contentions of opponents, they were certainly not the only ones. For some, race and class were still major conjectures in this case. While it was clear that Columbia has gone above and beyond the legal requirements in eminent domain cases, some believed this project would have never gone this far if the majority of the Manhattanville residents were not African American and Hispanic. One resident put it in blunt terms. ““This is a diabolical plan that is racist in nature and intended to drive us out -- and they don't care where we go,’ she said, referring to the area's working-class, predominantly black and Latino residents” (Williams 2). It is difficult to speculate on the exact number of affordable housing units that would be lost, since residents were not forced to leave their land, as were business owners. However, approximately 3000 residents may have been displaced since Columbia first began to buy up the land in the Manhattanville neighborhood (Williams 2). The issue of class and race is almost always an issue when eminent domain is involved in inner city

communities, and despite Columbia's best efforts some still believe it was an issue in this particular case also.

Despite passionate outcries from both supporters and opponents, the decision to move forward with the Columbia expansion plan was ultimately decided by the New York Appeals Court. On June 24, 2010, almost exactly five years after *Kelo* was decided, the Court ruled that Columbia's expansion plan was constitutional, and eventually the United States Supreme Court declined to hear the case, legally finalizing Columbia's plan. However, the road to this decision was anything but smooth. According to New York law, one of the few states not to change its laws after the *Kelo* decision, an area cannot be taken unless it is considered 'blight.' This is one reason why opponents of the project were so outraged that the state allowed that particular contractor, employed by a company that would clearly profit from the Columbia project, to be acceptable to the state. Second, state law requires that for eminent domain to be used there has to be a 'public purpose.' Here, supporters of the project cited the potential for curing diseases, like Alzheimer's and Parkinson's, as meeting this requirement. In the state of New York, cases dealing with eminent domain proceed directly to the New York State Supreme Court Appellate Division.

State law does not allow property owners to challenge eminent domain claims in a trial court. New York routes challenges to eminent domain takings directly to an appellate court, where property owners are given 10 minutes to argue their case before a judge and cannot embark on any findings of fact" (Lost 3).

For those who opposed the plan, this seemed to be a major advantage for the proponents. In a trial court, Nicholas Sprayregen and the Kaur Family would have had much more time to argue their case, but according to appeals court rules, both sides had only ten

minutes. In controversial cases like this one, the panel of two or three judges is often differential to the state. This is one of the main reasons why Nasim Farjad argued that New York had some of the most liberal laws regarding eminent domain. (Farjad 1134). Surprisingly, however, the appeals court ruled in favor of Nicholas Sprayregen and the Kaur Family.

In the initial trial, the appeals court ruled in favor of Nicholas Sprayregen and the Kaur Family. With a slim two one decision, the court ruled that the Columbia expansion project was unconstitutional. The appeals court stated that Nicholas Sprayregen's constitutional rights were violated by ESDC, because it worked too closely with Columbia University, and should not have been allowed to pay for the survey that concluded the Manhattanville neighborhood was blighted. "The process employed by ESDC predetermined the unconstitutional outcome,' the judges ruled" (Martinez and Lombardi 1). The Court cited other information that suggested the area was in fact, not blighted and therefore Columbia could not take the property under New York law. The appeals court went on to question whether this project was indeed for the 'public good,' or rather an attempt by Columbia to improve its image and prestige. This initial ruling was a major victory for the property owners, although the case did eventually make its way to the New York Court of Appeals.

In the New York Supreme Court, the decision by the appeals court was overturned and Columbia was given the right to use eminent domain to proceed with its expansion project. This decision by the New York Supreme Court was not a surprise given the fact that earlier in the year, the Court ruled that the NBA could use eminent domain to build a new arena in a section of Brooklyn known as Atlantic Yards. In the

Manhattanville case, a unanimous decision was reached, with the Court ruling that the Columbia University project provided a public good, and that the Manhattanville area was indeed blighted. “The ruling held that the courts must give deference to the state's determination that the area was 'blighted' and that condemnation on behalf of a university served a public purpose, two ways that the project could qualify for eminent domain under state law” (Bagli 1). The Court, clearly differential to the state, did not question the blight report presented by ESDC, and agreed with Columbia’s line of reasoning as to the project benefiting the public good. Mr. Sprayregen and the Kaur Family appealed to the United States Supreme Court, but the Court chose not to hear the case. Therefore, the decision by the New York Appeals Court gave Columbia University the legal right to begin moving forward with its project.

Chapter Five: A Question of 'Public Good' vs. Abuse: Why the Dallas Cowboys'  
New Stadium Constitutes Eminent Domain Abuse

A second case study is from Arlington, Texas and involves one of America's most popular football teams, the Dallas Cowboys. For years the Cowboys had been referred to as 'America's Team' and owner, Jerry Jones, dreamed of building a new state of the art stadium for his beloved team to play. In 2005, the citizens of Arlington, Texas, a large suburb just outside of Dallas, accepted by popular vote, a plan allowing the Dallas Cowboys to build a new stadium in the city. The stadium was to be located between two main highways, quite close to the Texas Ranger's baseball stadium. This meant that much of the infrastructure was already in place to host major events, like an NFL game. In order to make room for the new stadium, an estimated 150 people would have to relinquish their homes or small businesses. In addition, by agreeing to build the new stadium, the city and ultimately the taxpayers would have to pay half of the 650 million dollars it would cost (Cameron 2). The city hoped to generate over 236 million dollars a year in economic revenue brought to the city. "A new stadium with a retractable roof would generate \$238 million a year in economic impact and could be the big-time player the city needs to reinvigorate itself" (Getz and YIP 1). According to the article by Getz and YIP, local hotels and restaurants would see the largest initial increases in revenue, but by bringing in close to 90,000 fans, other industries would soon follow in experiencing an increase in revenue.

As in most eminent domain cases, the Dallas Cowboys' new stadium was not without controversy. Unlike the Columbia University expansion project, where the

benefits of finding a cure for such debilitating diseases as Parkinson's or Alzheimer's was undoubtedly a public benefit, a new football stadium does not breed such results. Opponents of the project claimed that an NFL stadium was not enough of a 'public good' because it was not used enough to be considered as such. Typically, an NFL team plays only eight home games a year, meaning the impact on local business was small, while a powerful corporation, such as the NFL, and more specifically the Dallas Cowboys, would be the only ones to benefit from the project (Cameron 2). Not surprisingly, opponents of the project claimed that once again the powerful were using their power to selfishly benefit themselves at the expense of those less politically connected. Some opponents argued that this was exactly why strong eminent domain reform was needed in Texas. Governor Perry, the longest serving governor in the United States, twice vetoed eminent domain legislation which would have required these projects to follow the stricter 'public use' clause found in the Texas Constitution, rather than the broader 'public good' interpretation used by the Supreme Court in the *Kelo* decision (Funk 2). Other opponents, like Steve Cameron, in an editorial for *Business Media*, explained that Arlington barely saw any economic impact after the Rangers built their new stadium in 1994, and the Rangers played eighty one games a year not eight. He concluded this would mean Arlington would see even less of an economic impact. Cameron went on to question the wisdom of public money paying for fifty percent of a project that would benefit the Cowboys and result in only marginal gains for the city. This was a major distinction from the Columbia project. Columbia was funded strictly by private university money, whereas with the Cowboys, the residents would be paying for half of the project. While a report was generated showing Arlington could expect to see a major increase in

revenue, others were more skeptical. Andrew Zimbalist, a professor at Smith College specializing in sports economics, stated that the report was not accurate and that the issue needed to be studied in greater depth before moving forward. “(This Report) has every appearance of being the standard puffery that you get in these types of economic impact reports. They use an inappropriate methodology, faulty assumptions and come up with projections that are meaningless.” (Getz and YIP 1). Critics also claimed that the numbers cited for job creations were overemphasized in this case. While few opponents questioned that the construction jobs generated by the new stadium would benefit the communities, other believed that the majority of jobs would not be the type the city should be trying to generate in the first place, much less spend 325 million dollars in doing so. Since the Cowboys only played eight home games, many of the jobs created would be temporary minimum wage type jobs, such as food vendors and parking lot attendants (Currie 1).

In addition to these reasons, critics of the project also disliked the way in which the Cowboys used their eminent domain privilege. While initially the Cowboys claimed that they did not want to use eminent domain, they quickly realized that in order for the project to move forward, they would have to force residents off their land. ““We were hoping that this (eminent domain) would be the last resort,” Dr. Cluck said. “We were hoping there would be more willing sellers.”” (Mosier 1, 10/05) This again is a major difference from the Columbia project, in that with Columbia only businesses were affected, while with the Cowboys, Arlington residents would be forced to leave their homes. Eminent domain was the best way for the Cowboys to seize the land needed to

build the stadium. Critics stated that since the area was not financially well off, residents had little choice, but to sell their land, since it would be too costly to fight in court, especially given that the precedent for such cases likely meant the residents would lose (Mosier 1, 10/05). Mosier went on to report that those who did challenge the eminent domain procedures in court, received on average twenty percent more than they were originally entitled, which some critics said proved that the Cowboys were low balling residents. It also showed that those without access to legal help would typically have received less. In addition, most of the homes seized were older homes, built right after WWII, and so affordable, replacement housing was hard to find in the area. “Also, he said that home builders aren't constructing houses in this price range - most of the house are valued at less than \$70,000 - so that further limits homeowners' options” (Mosier 2, 10/05). Meanwhile, for those owners who rented out their property, this meant a major source of income would be taken away by the Cowboys’ new stadium. “He said he represents the owners of some rental properties who were counting on that monthly revenue for their retirement” (Mosier 3, 10/05). The Cowboys had offered extra incentives for those who owned their land, as opposed to renting, but did not take this type of economic hardship into account when they determined the value of the property. As a result, many of those displaced by the new stadium would be forced to leave the community in order to find affordable housing. Critics stated that it was inherently unfair that those forced to sacrifice the most for the project would in turn receive no benefits, since they would then have to live elsewhere.

Meanwhile, the Dallas Cowboys and the supporters of the new stadium believed that the Cowboys were justified in using eminent domain. First, they held that the



stadium was a 'public good' and since over 80,000 fans, from all walks of life, filled the stadium whenever the Cowboys played a home game, it did constitute 'public use' (Currie 2). The Cowboys' future plans for the stadium also included much more than football, so that the stadium would be used for more than just NFL football games. Jerry Jones said he wanted to bring in college football, boxing, pro and college basketball, as well as other events, such as concerts (Blow 1). With retractable roof, the new stadium would be able to hold both indoor and outdoor events, making it accessible year round. Supporters stated that in addition to it qualifying as a year round public use building, the new stadium would pass plenty of political hurdles before it could be built. The Mayor of Arlington, Robert Cluck, and the City Council approved the new stadium even before the people of Arlington did. (Getz and YIP 1). Local law requires that both the city council and a local referendum pass before an eminent domain project is allowed to move forward. Supporters therefore, claimed that the decision to build the new stadium was in the best interest of both the Cowboys and the city of Arlington, as evidenced by so much political and popular support for the project.

Additionally, while opponents questioned the study's validity and the projected economic impact on the city, supporters believed the study justified their opinion. Stadium supporters were adamant that the land was taken because of its proximity to two major highways and not because it was occupied by poorer members of the community. Before the stadium was built, Arlington was experiencing budget problems, with an estimated 16 million dollar gap in its 2006 budget, and so hoped the money generated from the stadium, through extra tax revenue, would help booster the local economy (Getz and Yip 2). Therefore supporters held that the economic impact of such a grand stadium

would greatly benefit the city. “The consultant, which used some data supplied by the Cowboys, believes that Arlington would gain \$238 million a year (in 2010 dollars) in economic impact and 807 long-term jobs averaging \$38,000 a year” (Getz and Yip 2). These numbers, supporters claimed, would jumpstart Arlington’s economy and help create some much-needed jobs. They believed the hardship of a handful of people losing their property was justified by the benefits that would result to the local economy. In addition, the Cowboys offered to pay \$2,500 above the market value to renters displaced by the new stadium, and \$10,000 to homeowners and small business owners misplaced as well. Meanwhile supporters of the new stadium were also emphatic that the location was selected because of its placement between two highways and not because it was owned by the poor. “The stadium site is centrally located near major highways - State Highway 360 and Interstate 30 - and the city's entertainment district” (Mosier 2, 10/05). Stadium supporters therefore argued that the location was vital for the stadium's success and this location would bring in the most revenue since the infrastructure already in place.

Ultimately, the Texas Supreme Court granted the final go ahead to the Dallas Cowboys’ new football stadium. Seventeen homeowners filed suit in district court and the case eventually made its way to the Texas Supreme Court. The plaintiffs, who originally agreed to sell their property, changed their minds (Mosier 2, 9/08). They claimed that the deal with the Cowboys should be voided since the lease the Cowboys reached with the city was counter to the Texas Constitution. Technically, the City of Arlington owned the stadium, while the Cowboys ran the daily operations of the new stadium. The Cowboys’ ownership and the City agreed to a thirty-year lease, and the plaintiffs protested that this long-term deal should not be constitutional. They claimed it

violated the 'special privileges clause' of the Texas Constitution (Mosier 1, 6/09). It is widely speculated that the plaintiffs brought this case to Court in the hopes of reaching a deal for more money with the Cowboys than was originally set (Mosier 1, 9/08).

Ultimately, the District Court, the Second Court of Appeals, and the Texas Supreme Court all ruled in favor of the City of Arlington, and said the deal reached between the City and the Cowboys was in fact constitutional. Thus the original deal between the landowners and the Cowboys was valid. Since construction of the stadium was virtually completed by this point, had the plaintiffs in fact won, they would not have prevented the stadium from being built but would rather have received monetary rewards, estimated at approximately \$25,000 for each piece of property.

## Chapter Six: Long Branch, New Jersey and the Court's Role in Preventing Eminent Domain Abuse

Unlike in the previous two case studies, there are times when proposed eminent domain projects are blocked. For example, in Long Branch, New Jersey a proposed eminent domain project was stopped by a panel of judges on a New Jersey Appellate Court (Porter 2). This was a noteworthy example because for years, New Jersey had been considered one of the biggest perpetrators of eminent domain abuse. In this case, the City of Long Branch wanted to force landowners off their land in order to build new luxury condominiums and townhouses to revitalize a beach front city, which had fallen on hard times. Eminent domain projects had been used in other parts of the City, most notably when a park was seized to construct a new hotel. (George 1) This time, however, the City was hoping to transfer property from one private owner to another in the name of economic development. The City was hoping to generate more tax revenue, and help bring in a new wave of tourism to help the local economy (Snother 1).

In 2004, a year before *the Kelo* case was decided, longtime Mayor of Long Branch, Adam Schneider announced that the City would use eminent domain to seize thirty nine homes and replace them with upscale condominiums and townhouses. The new townhouses were expected to be worth between \$600,000 and 1.5 million per unit (George 3). These new buildings would help generate a significant new revenue stream to a city that had experienced an economic decline. In prior decades, Long Beach had been a popular summer destination, but the oceanfront city had now fallen on hard times. “The city tries to reclaim its glory days, when seven United States presidents vacationed

here and New York's business barons traveled by stagecoach to fill the gambling halls” (George 1). Today however the area consists of many outdated cottages, but that does not mean the residents of Long Branch do not take pride in their homes, especially those residents who have lived there for decades.

While the residents in Long Branch were outraged by the proposed project, it was not until 2005 that the case truly became the focus of a great deal of media attention. After the *Kelo* decision was announced, local groups were formed to raise awareness for what was deemed an abuse of power by local government officials. “(Since *Kelo*) anti-development groups have felt at once energized yet under siege, their avenues of legal recourse uncertain” (Snother 2). It is clear that since *Kelo*, the amount of interest shown by private property advocates increased dramatically (Snother 2). However, David Barry, overseer of the construction of these new condominiums and townhouses, viewed the protests by owners as nothing more than a scheme to receive more money for their properties. He felt that a major reason why so many land owners joined in the legal suite to prevent the seizure of their property was so they could then set their price far above market value. Mr. Barry explained that when governments lose their ability to use eminent domain, home owners are now in the position of power, knowing that local governments will overpay for the property in order to move forward with the project (Snother 1).

It is important to note here that New Jersey, a state with influential special interests, and realtors, was one of only seven states not to pass meaningful eminent domain reform in the four years following the *Kelo* decision (Porter 2). Donald Trump was unsuccessful in his bid to convince local officials to condemn a man’s house because

it was located near one of his casinos and Trump wanted to build a parking lot for his limousines there (Porter 2). Luckily for the resident this followed a time when a great deal of backlash from the *Kelo* decision was being felt and so local officials did not go along. However, Porter went on to say that it was quite prevalent in New Jersey for private-to-private transfers of land to occur. For example, in cities like Newark, New Jersey, which had fallen on hard economic times and hosted a high percentage of poor and minority residents, property was often condemned in the name of economic development (Porter 3). Thus, in the state of New Jersey, with a lack of any meaningful legislation passed, and a history of eminent domain abuse, one would surmise that these thirty nine property owners would surely lose their homes in the name of economic development (George 1).

Meanwhile, similar to the previous two case studies in New York and Texas, opponents and proponents of the project cited reasons to support their convictions. Those who opposed the project felt that this was a gross overreach of the law. For longtime residents, like Joanne LaRosa, these eminent domain projects felt once again as an abuse of power with the rich and powerful exerting their influence over the poor. She could not conceive that her local government would seriously consider taking her home, merely to build another in hopes of generating more revenue for the City (Snother 3). Opponents argued that the 'public good' in this project was minimal, and that the City should not be allowed to mandate a private-to-private transfer of property simply to add minimal tax money. For those forced to move, the decision would also have meant that their dreams of living by the ocean would be destroyed by the government. Many of the residents in the Long Branch neighborhood were older,

retired citizens, who bought these homes so their families could vacation by the ocean (Snothers 3). It was unlikely that in today's real estate market, these residents could find another affordable waterfront home, and most certainly could not afford the million dollar condo that replaced their cottage (George 2). On the other side of the issue were those who believed that the project should move forward. They stated that Long Branch had been a struggling city in New Jersey, and cited other eminent domain projects that had already begun to transform the City back to the vacation area it once was in its heyday (Snothers 2). Some New Jersey mayors, like the former Mayor of Newark, Sharp James, supported the use of eminent domain to replace these cottages with condos and town homes. He too cited evidence that eminent domain projects had helped his city, which had also suffered economically (Snothers 2). James and several other mayors believed these decisions should be left up to local officials, and not private property groups who demonstrate and then leave, while the mayors are left to deal with the City's resulting issues (Snothers 2). Still others felt that eminent domain was a necessary evil, given the economy in such states as New Jersey. William Dressel who is the head of the New Jersey Municipalities, explains that businesses and states must work together to help the economy improve. "'Given the fiscal condition of our state... towns have been encouraged to work with the private sector ever since the redevelopment law in the state was passed in 1949...Where do people think development comes from?'" (Snothers 2). Mayor Schneider of Long Branch, who supported the project, stated he that while he felt sorry for those individuals who would be losing their cottages, the project should move forward for the betterment of the City.

As in the previous two case studies, the Long Branch case eventually made its way to the Courts. However, unlike the previous two cases, this time the petitioners were able to stop the eminent domain project from being adopted. Without question, the thirty nine landowners who filed a suit against the City of Long Branch benefitted by hiring lawyers from the interest group, The Institute for Justice. The Institute of Justice, which had followed eminent domain cases closely for years, represented *Susette Kelo* in the landmark case, and was well experienced in eminent domain cases. (Institute for Justice Website). This case eventually became known as *City of Long Branch v. Brower* (Institute for Justice Website). In the initial decision, the New Jersey Superior Court ruled that eminent domain could be used to move the project forward. This would have meant that all thirty nine property owners would have lost their land (Spoto 2). However, in a unanimous three member panel decision, the New Jersey Appellate Division of the Superior Court overruled the Superior Court decision. The panel stated that the city had to prove that the cottages they were seizing were indeed ‘blighted’ and not simply say they were. Upon learning of the Court’s decision, the City of Long Branch decided it would not appeal the decision, and would not submit a proposal explaining why the cottages were ‘blight’ (Spoto 1). It was largely agreed that the cottages were just working class homes and not a danger to anyone in the community, and that the City had only considered the cottages ‘blight’ in order to use its power of eminent domain to advance the project (George 2). The decision by the Appeals court was not without precedent however. Shortly before this case was decided, the highest court in New Jersey ruled that under state law cities were required to prove an area was indeed blighted (Spoto 2). The case name was *Gallenthin Realty*



*Development, Inc. v. Borough of Paulsboro* (2007). The Court stated in its opinion that the city had to be able to show it an area was in need of redevelopment. The Court did not mention the *Kelo* case by name, but it did say that the ‘other purpose’ clause of the New Jersey Constitution referring to eminent domain takings. (Gallenthin Case)

While the state of New Jersey had struggled to pass meaningful legislation in the wake of *Kelo*, the state judicial branch recognized that eminent domain was being abused in New Jersey, and set a precedent that cities had to actually prove the area was blighted before they could move forward with a project. Upon the decision, Mayor Schneider stated that with some minor adjustments, he felt the project could still move forward without eminent domain (Spoto 2). Residents, meanwhile, were joyful with the decision, and that the City would not appeal the case. However, they also hoped their story would inspire the New Jersey legislature to finally pass meaningful eminent domain legislation so that other property owners would be protected without having to go through the exhausting trial process (Porter 2).

In review, the Cowboys’ new stadium was the most controversial study of the three, after the New Jersey Appeals Court sided with the property owners. While the Columbia project was painful for the two small business owners forced to move, it certainly had both the long and short term potential to be of great benefit to the public. In the short term, job creations would certainly aid the community, while the long term benefits of potentially discovering a cure for diseases, like Parkinson’s, is impossible to measure. Thus, the benefits of the Columbia expansion project were a very justifiable way to use eminent domain. On the other hand, the Cowboys’ new stadium was a much more complicated issue. In this case, the benefits of the new stadium were

questionable and many believed the Cowboys used their influence so that the tax payers of Arlington would pay for part of the new stadium. Therefore critics questioned whether watching a football game should be considered a ‘public good’ because the Cowboys, a private entity will benefit the most from the new stadium. Meanwhile, the example of Long Branch, New Jersey showed that in the wake of *Kelo*, the nation’s response to eminent domain had shifted. New Jersey, traditionally considered one of the biggest violators of the just use of eminent domain, was restrained by a state Supreme Court ruling requiring that cities prove an area is blighted before they can continue with an eminent domain project. While the New Jersey legislature failed to pass meaningful legislation, at the least property owners now have some protection in the legal system. It is for these reasons that many states decided to pass legislation banning the private-to-private use of eminent domain. Thus, these three case studies exemplify the fine line between the use of eminent domain for the greater good, and eminent domain used so that the rich may extend their influence over those less connected in society.

Thus, after examining various eminent domain proceedings in action, it is clear that those authors calling for stronger eminent domain reform were in fact correct. Will Lovell, David Dona, and Richard Epstein, were all adamant that eminent domain legislation must be worded in stronger and more definitive language in order to ensure that abuse does not occur. At best the Cowboys’ new stadium is a questionable use of eminent domain, and most objective observers are clear that it is an abuse of government power. Not surprisingly, Texas is one of the few states that have not passed reform. However, even if this were not so, it is unlikely that the outcome would

be any different. Meanwhile, New Jersey, with its history of eminent domain abuse, owes any abatement of these transgressions to its active judicial branch. Texas, a Republican controlled state, and New Jersey, a Democratic state, prove that political parties do not, in fact, make a difference when it comes to eminent domain, as attested to in the Sharp and Markel study. Here, also it is proven that professionalized legislature actually hurts passage of eminent domain, as seen with both Texas and New Jersey; developed states with highly professionalized legislatures. Meanwhile, the Columbia University case study, an example of a beneficial taking, is a testament to why authors, like Nasim Farjad, were correct in that eminent domain must not be completely banned, for there is a reason the Founding Father put eminent domain in the Constitution. New York, however, has a professionalized state legislature and yet may not have stronger eminent domain laws because of special interests. Nevertheless, these case studies prove that eminent domain is shaped by local state legislatures. All three examples testify to Sharp and Markel's described characteristics. Ultimately, however, each case study portrays a different facet of eminent domain. Useful takings to provide a greater public good are symbolized in the Columbia University project. On the other hand, the malleability of eminent domain toward abuse when the proper measures are not in place is seen with the Cowboys. Finally, Long Branch is an example of local courts confronting and so preventing their local governments from abusing power. Each case study explores a unique aspect of the eminent domain dilemma thereby allowing a more complete examination of its impact without which advancements are not possible.

### Chapter Seven: Conclusion

Overall, eminent domain is a multi faceted problem that should be dealt with on a case by case basis. Without question, there is a tremendous potential for eminent domain to be used in an abusive way. It is extremely disheartening to view the statistics cited in the Carpenter and Ross study, which confirms that the poor and minorities often bare the brunt of eminent domain takings. The least influential in society are the ones the government should be protecting from being taken advantage of by private contractors and abused by eminent domain. Will Lovell made a stronger point that eminent domain laws need to be stricter so that everyone is protected and no one can be taken advantage of by eminent domain (Lovell 617). Unfortunately, too often local politicians spend their time bickering among themselves and so are unable to create any real change to eminent domain laws. As the Sharp and Markel article explained, most states were able to pass some type of legislation. Unfortunately, however, as Will Lovell stated these laws are either too broadly worded or have loopholes making the reforms in many cases weak. One of the main reasons for this is the amount of control that special interests have in dictating eminent domain reforms. Whether it is state agencies with billions dollar budgets or powerful lobbyists working for real estate groups, as in Connecticut, New York and New Jersey, states must protect their constituents, and limit the ability of powerful economic interests to end exploitation (Saunders 2). Unfortunately, there is not much literature published on the role of special interest in creating eminent domain

reform. Additional research is needed to determine to what extent special interest play in derailing attempts at eminent domain reform. While the Sharp and Markel article does an excellent job of explaining why certain states passed various types of reform, a further extension of this study focusing on how those states with large real estate lobbyists and powerful state agencies differ from states that lack these two special interests is needed.

Another disheartening fact in regards to eminent domain reform has been the role the courts have had to assume since local legislators have been unable to pass meaningful reform. Despite the fact that the courts have done what is right in many cases, and tightened eminent domain regulations, as in that of Long Branch, without strong legislation not everyone will be protected unfortunately. For example, it is likely that the poor and less educated will not be able to afford lawyers to protect them in court, or they may not understand that they could prevent their property from being seized by local government. As eminent domain becomes a less salient public issue, there will be less publicity to alert property owners that the government is breaking the law by taking their property. For these reasons many property owners continue to lobby their local representatives for stronger eminent domain reform that would force the law to be crystal clear on what can and cannot be legally taken from a property owner in the name of eminent domain. (Spoto 2). Therefore, it is time for every legislator to put special interests aside so eminent domain reform can benefit the people of their state. While passing eminent domain reform is indeed important, representatives must realize that at times eminent domain is an appropriate governmental tool. Building schools, hospitals and roads are all traditional uses of eminent domain (Pritchett 1). These clearly constitute a 'public good' and local governments should retain their right to use eminent

domain here. Without these essentials, society as we know it cannot function properly, and future generations of Americans will therefore be placed in a difficult position. A school, for example, benefits the public in a way that makes eminent domain necessary in some circumstances. What needs to change however are stronger and clearer guidelines indicating what constitutes a ‘public good.’

Ultimately, the *Kelo* decision in some respects took the ‘public good’ clause out of the Constitution and substituted the words ‘public use.’ Today, state legislators around the nation must clarify their eminent domain wording so that ‘public good’ means a direct public good. In the case of Columbia University, it is unfortunate that two small business owners had to surrender their businesses so that Columbia could expand its campus.

(Currie 2) However, the benefits of the project outweighed the negatives. Every year thousands of families around the world suffer from diseases, like Parkinson’s and Alzheimer’s. Columbia University was in a unique position to address this suffering. Therefore, it is for cases such as these that local governments were originally given the powers of eminent domain, and local governments should still hold some control over the exercise of these rights, especially when there is a clear benefit to the public good.

Even this however, would not entirely eliminate eminent domain taking in the name of economic development. While local officials claim that eminent domain is needed to rebuild crumbling cities, there is very little evidence to support that eminent domain brings large scale results. In fact, evidence exists to the contrary in that eminent domain more often fails than it succeeds (Saunders 2). In the *Kelo* case, Pfizer never did move into New London, meaning that the Kelo’s lost their property for nothing; a failed attempt at eminent domain (Han 1). However, local officials must be given the right to

decide what is best for their city. In order to prevent abuse, cities must prove that an area is blighted. Blighted should be defined as living conditions that are nearly uninhabitable. In large part this would prevent eminent domain abuse so that only in cases where living conditions were dangerous would eminent domain be exercised. While this could still leave the possibility for abuse, especially toward the poor, if the language was worded strongly enough, it would certainly limit the abuse to a great extent. Thus, it would require detailed regulations that would remove much of the discretion from local government officials. As the Will Lovell article explained, a handful of states have written their laws in a powerful language making eminent domain abuse less likely to happen. Also, all bills should include public hearings, and informational sessions so that the homeowners are aware of their rights as property owners. These protections should be extended to businesses as well as residential owners. Therefore, while it is impossible to totally eliminate all possibilities of eminent domain abuse, without eliminating the use of eminent domain, by holding local governments to a higher standard when it comes to economic redevelopment, the probability of abuse is greatly reduced. Meanwhile important projects which will benefit the public as a whole and not only the wealthy, such as NFL owners, should be allowed to continue just as they have been for centuries. With stricter standards, the vast majority of eminent domain abuses can be prevented, as occurred with the Long Branch project which was scrapped when the judge determined that the city had not proven the building was 'blighted.' Therefore, moving forward, strong, well-written legislation is the key to preventing eminent domain abuse in America.

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