1889 INSTITUTE
Expanding Opportunity | Fighting Privilege

Independent, principled state policy fostering limited and responsible government, free enterprise, and a robust civil society.

Policy Recommendation

October 2021

Better Late Than Never: Enacting Eminent Domain Reform in Oklahoma

Brad Galbraith

Introduction

In 2005 the United States Supreme Court issued one of the most controversial decisions in the history of property rights. It was a landmark decision that sent shockwaves throughout the country. In *Kelo v. City of New London* (*Kelo*), the Supreme Court upheld the power of government to take property from one private party for the direct benefit of another private party in a perversion of the "public use" requirement of the Fifth Amendment to the United States Constitution. The court's expansion of the power of eminent domain dramatically diminished private property rights in favor of oppressive authority to steal from the poor and the powerless and give to the rich and powerful under the guise of economic development.

Oklahoma remains one of only a few states that have yet to better protect private property rights from unjust takings.

In the wake of *Kelo*, states across the nation and political spectrum began amending their constitutions and codifying laws to counteract the decision and protect individuals and their property rights from invasive government favoritism. Oklahoma remains one of only a few states that have yet to better protect private property rights from unjust takings. Now is the time to act – better late than never.

Eminent Domain

John Bouvier, the author of one of the first American law dictionaries, defines eminent domain as the "right which the people or the government retain over the estates of individuals, to resume the same for public use."[1] In other words, eminent domain describes the power of a government to take private property for public use. The doctrine is neither unique to American jurisprudence nor is it a modern concept.

The term seems to have debuted in the 17th Century work of Dutch jurist Hugo Grotius.[2] In *The Rights of War and Peace*, Grotius explains that among the powers of a sovereign to act for the good of the public is "that eminent Dominion which a State has over its Subjects, and their Goods, for the Publick Use."[3] He further explains that private rights were often seen as inferior to those possessed by the community, that the sovereign's rights over the people and their property were superior to those of private property owners themselves. He writes:

> *[A] King has a greater Right in the Goods of his Subjects for the publick Advantage, than the Proprietors themselves. And when the Exigencies of the State require a Supply, every Man is more obliged to contribute towards it, than to satisfy his Creditors.*[4]

Eminent domain has long been considered an inherent right of a sovereign. With it, a sovereign power could take the property of others when deemed necessary to accomplish the common good. However, eminent domain is one of the most intrusive, tyrannical powers possessed by a sovereign. Given that one of the purposes of government in the United States is to protect private property,[5] it was necessary to limit such a despotic power.[6]

Eminent Domain in the United States

During the founding era of the United States, eminent domain seems to have been taken for granted. In the U.S. Constitution, there is no clause expressly granting the power of eminent domain to the federal government. However, it is implied by the limitations to its use established by the Takings Clause of the Fifth Amendment. The Takings Clause limits government's power to take private property to those circumstances in which it is necessary for a "public use" and for which the property owner is

Brad Galbraith *is Land Use Fellow at the 1889 Institute.*

1889 Institute
1401 N. Lincoln Boulevard, Suite 175
Oklahoma City, OK 73104
1889institute.org

This paper, in its entirety, can be found at **www.1889institute.org/**

provided "just compensation."[7]

While defining both the public use and just compensation clauses has been the subject of ongoing debate, "public use" has been particularly complicated. On one side, there is the literal interpretation of "public use." Under this approach, private property can only be taken if it is subsequently used by the public. On the other side, "public use" has been defined more broadly to encompass public purposes. Modern jurisprudence has rejected the literal meaning, favoring the more expansive view–taking private property to achieve some public purpose. In determining whether the character qualifies as a legitimate public purpose, courts will defer to legislative bodies.[8]

Kelo, which rested on the expansive view, virtually eradicated any semblance of a public-use limitation to takings. It granted plenary authority for the government to take private property for almost any reason so long as there was some discernible, indirect benefit to the public.

Abrogation of the Public Use Clause in Kelo v. City of New London

Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Wilhelmina and Charles Dery, James and Laura Guretsky, Pataya Construction Limited Partnership, and William Von Winkle owned property in the Fort Trumbull neighborhood in New London, Connecticut. At the hand of the New London Development Corporation (NLDC), their places of business, investment properties, and primary residences had been condemned to make way for Pfizer, one of the wealthiest pharmaceutical companies in the world. For many of these individuals, they weren't just losing tracts of land and construction materials–they were losing their homes, places where they had lived and raised their families and developed life-long memories.

Faced with losing their homes and left with little recourse, the victims sued. After battling it out in the state courts, ultimately, the United States Supreme Court granted cert to determine whether economic development satisfied the public-use clause of the Fifth Amendment.[9] Susette Kelo and the other plaintiffs asked the U.S. Supreme court to limit the application of the "public use" by prohibiting taking private property for economic development.[10]

The Supreme Court of the United States Dramatically Expands Eminent Domain

In its 2005 opinion, the court held that because the city had "carefully" devised an economic development plan that it "believed" would indirectly benefit the city's residents through new jobs and an increased tax base, it "unquestionably [served] a public purpose" and satisfied "the public use requirement of the Fifth Amendment."[11] In essence, the majority embraced the erosion of any limit the public use clause may have held, validated economic development as an acceptable use of eminent domain, and, in so holding, virtually abrogated any limitation on the power to take private property.

Under this interpretation, as Justice O'Connor stated in her dissenting opinion, "The specter of condemnation hangs over all property."[12] The court's interpretation was so broad, and any purported limitation proposed by the court so minimal, that only the "stupid staffer" could fail to identify a public purpose or public benefit that would justify the public use requirement.[13] In other words, the broad interpretation of the "public use" limitation to eminent domain puts every property at risk of being forcibly taken for virtually any purpose.

[T]he broad interpretation of the "public use" limitation to eminent domain puts every property at risk of being forcibly taken for virtually any purpose.

National Response to Kelo

As one might expect, there was bipartisan outrage in response to the majority opinion in *Kelo*. It was attacked as an affront to individual property rights, disproportionately victimizing poor, vulnerable, and powerless communities. Yet, states were not left powerless to right the wrong.

Despite rendering the public use clause virtually meaningless, the majority in *Kelo* made it clear that states remained free to enact stricter limitations on eminent domain than the justices had interpreted into the Fifth Amendment. The court emphasized, "nothing in [its] opinion precludes any State from placing further restrictions on its exercise of the takings power."[14] Thus, in the wake of *Kelo*, states across the country began enacting eminent domain reforms that protected private property owners against the U.S. Supreme Court's expansion of eminent domain.

In response to the Supreme Court's decision, by 2012, all but a small handful of states had enacted statutory or constitutional amendments that attempted to narrow the scope of eminent domain.[15] Colorado, Kansas, Missouri, New Mexico, and Texas have prohibited using eminent domain for economic development to varying degrees of effectiveness. While nearly all of Oklahoma's neighbors have enacted laws intended to restrict eminent domain in response to *Kelo*, Oklahoma has not.[16]

Eminent Domain in Oklahoma

In Oklahoma, "[t]he power of eminent domain is a special proceeding created as a necessary attribute of sovereignty to facilitate the *emergency* acquisition of private property for *public use*."[17] Similar to the Fifth Amendment, the Oklahoma Bill of Rights limits eminent domain. Taking a step that the U.S. Bill of Rights did not, the Oklahoma Constitution provides, "No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner." Additionally, "[p]rivate property shall not be taken or damaged for public use without just compensation."[18] While generally, private property cannot be taken for another's private use, the Oklahoma constitution does allow private takings for "ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes."[19]

Oklahoma's constitution puts specific limits on eminent domain while statutes generally specify who may use it and how it may be used. Statutes also prescribe the procedures that must be followed to condemn property. Through the process of condemnation, designated entities can take private property for public use or private ways of necessity. The Supreme Court of

Oklahoma has emphasized that "eminent domain proceedings may only be initiated in strict compliance with the specific constitutional mandates and legislative enactments that confer eminent domain powers to the condemning entity so as to prevent an unlawful intrusion of a landowner's rights."[20] It further explained that these constitutional and statutory provisions must be construed "in the light most favorable to the landowner."[21]

The duty to determine the character of a use of condemned property is assigned to the courts.[22] Despite being a limited power and a sovereign attribute, state statutes have assigned the power to condemn private property to numerous private entities. Due to these constitutional and statutory discrepancies and because the U.S. Supreme Court has effectively muddied the waters of takings jurisprudence, Oklahoma should join the vast majority of states across the country who have worked to rein in the power of eminent domain and clarify the scope of public use.

Despite being a limited power and a sovereign attribute, state statutes have assigned the power to condemn private property to numerous private entities.

Attempts to Reform Public Use in Oklahoma

In the wake of *Kelo*, Oklahoma seemed like it should have been one of the first states to enact legislation protecting private property owners. However, to date, the legislature has failed to rein in the expansive interpretation of the public use requirement. Not only was it not one of the early adopters of eminent domain reform, but it took the legislature a few years to introduce a bill that attempted to restore the definition of "public use" to its original intent.

It wasn't that the laws impacting eminent domain were left untouched. Since the United States Supreme Court issued the *Kelo* decision, numerous bills have been introduced that sought to expand, contract, or clarify various aspects of eminent domain in Oklahoma. For example, there have been proposals to establish task forces and interim study committees that either failed to pass or did not result in meaningful changes to law or policy.[23] Other bills attempted to protect property owners by establishing new governmental bodies.[24] Some bills tried to set a minimum amount of just compensation or prescribe methods for its calculation.[25] Still others sought to establish uniform procedures for handling eminent domain appeals.[26] There was even a successful attempt to create a "Landowners' Bill of Rights."[27] Unfortunately, nearly all of these attempts either failed to pass the legislature or otherwise failed to address the core deficiency of the *Kelo* decision–the judicial abrogation of the public use limitation to eminent domain.

Despite the numerous and various attempts to amend eminent domain in Oklahoma, only three bills have attempted to turn the tide eroding the definition of public use in a meaningful way. The first of these attempts did not occur until the introduction of House Bill 1331 (H.B. 1331) in 2009. Amending municipalities' urban renewal and neighborhood redevelopment authority, H.B. 1331 defines "public use" as:

a. *the possession, occupation, and enjoyment of land by the general public or by public agencies,*
b. *the use of land for the creation or functioning of public utilities or common carriers, or*
c. *the use of eminent domain or condemnation … to remove a public nuisance … to remove a structure that is beyond repair or unfit for human habitation or use, or … to acquire abandoned property, and … to eliminate a direct threat to public health and safety caused by the property in its current condition.*[28]

The bill expressly excluded economic development from the meaning of public use, declaring "an increase in tax base, tax revenues, employment, or general economic health" are not public uses and insufficient to justify taking private property. In addition to defining public use, it also defined "blighted area," or "blighted conditions," as well as "economic development." While H.B. 1331 unanimously passed the House Judiciary Committee, it never received a vote on the House floor.

A subsequent attempt to properly define the scope of public use for condemnation proceedings was not made for another decade. In 2020 and 2021, two substantially similar bills sought to amend the state's eminent domain law, Senate Bill 1864 (2020) and Senate Bill 994 (2021).

These bills attempted to amend Oklahoma's eminent domain law by eliminating references to "public purpose" and replacing them with "public use." Similar to H.B. 1331, these bills defined public use as:

a. *the possession, occupation, ownership and enjoyment of the land by the general public, or by public agencies,*
b. *the possession, occupation and ownership of land necessary for operations of a public utility that serves the general public,*
c. *the remediation of a blighted property, or*
d. *the possession of an abandoned property.*[29]

Additionally, the bills sought to foreclose the use of eminent domain for economic development under the pretense of clearing abandoned property or eliminating blight by specifying what conditions may qualify under each term.[30]

Beyond definitional changes, the bill generally prohibits taking private property unless necessary for a qualifying public use and accompanied by just compensation. Expressly excluded from the purview of public use is any benefit derived from economic development, including an "increase in tax base, tax revenues, employment or general economic health."[31]

Further protecting private property rights, where a condemning authority seeks to remediate blight, the condemner would be required to satisfy a heightened standard of proof when arguing that taking that particular property was necessary for a legitimate public use. They also granted the owner of an allegedly blighted property the right to have a court determine the character and necessity of the taking. Finally, while the bills prohibited governmental bodies "subordinate to the state" from expanding the power of eminent domain absent statutory authority, they did allow for the creation of other procedures, remedies, and limitations so long as they did not diminish the rights and protections established by the bills.[32]

While none of the bills were perfect, each would have made significant progress toward restoring the limiting effect of "public use." Because eminent domain is one of the most intrusive

powers possessed by a sovereign and ripe for misuse by corrupt bureaucrats and crony politicians, if it is allowed at all, it must be narrowly defined and strictly construed in favor of property owners. The legislature must clearly define the limits of takings for public use, foreclosing even the possibility of its future misuse.

Legislative Considerations for Limiting "Public Use" In Oklahoma

In takings jurisprudence, the original understanding of "public use" has evolved. Over time, courts have interpreted the "public use" clause to mean "public purpose." In turn, taking property for a "public purpose" has come to justify any taking so long as there is an indirect benefit to the general public. The gradual erosion of the definition of "public use" and significant judicial deference to legislative bodies in determining what takings may satisfy public use requirements has paved the way for eminent domain abuse and government overreach.

The legislature should statutorily limit the use of eminent domain to those circumstances in which it is necessary for public use, expressly excluding takings that result in nothing more than an indirect benefit to the public, as is the case with economic development. In addition to clearly declaring its intent, the legislature should create a statutory framework that will provide a clear metric for the courts when determining the character of a taking. In defining public use, legislators should consider what potential activities or uses rightfully belong within the government's jurisdiction and qualify as public use.

In defining public use, legislators should consider what potential activities or uses rightfully belong within the government's jurisdiction and qualify as public use.

The Expansive Interpretation of Public Use Exceeds the Proper Scope of Government

In a landmark publication, the 1889 Institute outlined a principled approach to spending taxpayer money. In so doing, it helped define the legitimate scope of a limited government. While the extent to which the power of eminent domain is coterminous with the state's police power has been, and continues to be, argued by jurists at the highest level, an analysis of the proper scope of eminent domain should begin with determining the legitimate scope of government.

In "Rising Above Mere Politics: General Principles for Spending Taxpayers' Money," the 1889 Institute asked five crucial questions:

1. Is a program consistent with the mission of Oklahoma's state government?
2. *Is the program fulfilling a need only government can effectively fill?*
3. *Are the benefits from a program unambiguous, obvious, and universal?*
4. *Do the benefits of a program or agency indisputably outweigh the costs?*
5. *Does the existing program or agency show evidence of past success?*[33]

Even without delving into the jurisprudence of eminent domain, this inquiry justifies prohibiting its use for economic development and could be used to justify eliminating eminent domain. For example, this analysis looks at whether a program is consistent with the State of Oklahoma's constitutional directive to "secure and perpetuate the blessing of liberty"[34] and to preserve individuals' "right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."[35] One of the most fundamental components of liberty is the right to property, including the use and enjoyment of the product of one's labor. If it were not for both the U.S. and Oklahoma Constitutions contemplating the existence of and providing limitations to eminent domain, such provisions would seem to indicate that eminent domain is fundamentally unconstitutional. However, given that both constitutions recognize it, the legislature should define the scope of eminent domain as narrowly as possible to fulfill its constitutional mission.

The second question asks if the program is something that only government can effectively do or if it could be more effectively accomplished in the free market. Many legislatively and judicially justified applications of eminent domain could be more effectively achieved through the free market. Economic development and its pursuit under the pretense of urban renewal or neighborhood redevelopment exemplify an activity that has been justified as a governmental function but could be done more effectively by private individuals and firms in the free market. Generally, government officials lack the knowledge and the economic incentives to engage in economic development successfully. In fact, the public subsidies and incentives often used to create economic development distort the free market. Individuals engaging in a free market unobstructed by government interference possess the knowledge necessary to develop the economy under properly aligned incentives.

The third inquiry asks if the program's benefits are available to everyone or if they target only a few. It also asks if the stated benefits are obvious and measurable. With economic development and many other eminent domain applications, the benefits claimed are often ambiguous, uncertain, and directly benefit the few, the rich, or the politically powerful. With economic development, the public will benefit only indirectly, if it benefits at all.[36] In *Kelo*, Pfizer received heavy subsidization and various direct benefits while the public was promised ambiguous, uncertain, and indirect benefits. In the end, residents of New London *never* realized the promised economic windfall. Homes were demolished to make way for a Pfizer facility that *never* arrived, leaving the condemned land vacant to this day.[37] Residents were robbed of their property, taxpayers' dollars were thrown away, and the vague promise of indirect benefits was *never* realized.

If the benefits are obvious and measurable, the governing body should look at the costs and ask if the benefits outweigh the costs. In the case of eminent domain, the costs are high. It deprives individuals of the right to enjoy and use their property, the product of their labor, and threatens the foundation of American liberty by sowing insecurity in individual rights. Thus, to satisfy this question, condemning authorities should be required

to meet a very high standard of proof. The proposed use must be necessary, and the benefits must be near-universal, real, attributable to the taking, and capable of proximate realization.

The final question asks about success. In the context of eminent domain, there must be more than an idea or well-thought-out plan. It must clearly and convincingly articulate that the taking is necessary for public use, that there are no other reasonable, free-market alternatives, and that the project is ready to begin once the property is acquired. With its long history and potential for abuse, any exercise of eminent domain must have a high likelihood of successfully fulfilling its proposed public use.

Once the legislature determines the legitimate scope of a limited government, it must then define "public use" as a subset of those activities.

If a proposed use of condemned property falls outside the legitimate scope of government, then, to the extent possible, the government and its assignees should be precluded from taking private property, regardless of whether they can justify it under a broad interpretation of "public use." Working through this analysis should lead legislators to a minimal scope of governmental authority. Once the legislature determines the legitimate scope of a limited government, it must then define "public use" as a subset of those activities.

The Expansive Interpretation of Public Use Promotes Corporate Welfare

Corporate welfare is essentially government-granted privilege created through various incentives, subsidies, or other supports, all of which can negatively impact individual liberty and the economy. The discriminatory practice focuses "on specific industries and businesses," while "policymakers often ignore the bigger picture of a state's overall policy structure." Pursuing economic development through such a narrow-minded approach incentivizes self-dealing and corruption, as people seek governmental favors over more productive behavior.[38] The results range from "artificially rearranging how people live their lives, to raising the cost of living, to redistributing income, to negatively impacting economic growth."[39] Eminent domain can become a particularly invasive form of corporate welfare through the broad interpretation of public use.

With an almost limitless interpretation of "public use," every private property is subject to eminent domain for virtually any purpose so long as someone can identify a better or more profitable use than its current one. Effectively, through judicial erosion of "public use," the door has been thrown wide to abuse eminent domain for corporate welfare. The takings in *Kelo* epitomize this reality. In *Kelo*, the NLDC employed eminent domain to benefit a large, wealthy, politically connected company.

At the turn of the 21st Century, the city of New London adopted a new municipal development plan primarily driven by the NLDC, a private, nonprofit development corporation. Government officials hoped the plan would create more than a thousand jobs, dramatically increase tax revenue, and revitalize the city's downtown and waterfront areas.[40] NLDC saw the plan as leverage for improved aesthetics and new leisure and recreational opportunities.[41]

One of the goals of this revitalization initiative included attracting a *Fortune 500* company to New London.[42] Wading knee-deep in the mire of corporate welfare, through various concessions, incentives, and subsidies, the NLDC successfully convinced Pfizer to locate its facility in New London, even though the Fort Trumbull site failed to meet Pfizer's essential criteria.[43] This began a long and questionable relationship between the state, the City of New London, the NLDC, and Pfizer.

While the NLDC and state and local governments courted Pfizer, the process was set in motion to condemn the homes, income properties, and businesses to make way for private offices and parking, among other ambiguously described uses.[44] One particularly calloused rationale for demolishing these properties was to give Pfizer "a nice place to operate," a place not "surrounded by tenements."[45] Considering that none of the condemned properties were allegedly blighted, they were condemned simply because they obstructed the grand vision of the NLDC.[46] Worse, the properties were arguably unnecessary to the redevelopment plan.

The expansive view of "public use" allows for the disparate treatment and mistreatment of individuals and businesses, violating basic principles of equality. Wielding eminent domain in such a discriminatory fashion can have a dramatic impact on liberty and the economy. With due consideration of the effect that the expansive view of eminent domain has, permitting government overreach and cronyism, the legislature should take decisive action to protect individual rights and liberties by defining its legitimate scope.

Recommendations

Define "Public Use"

The Fifth Amendment Takings Clause prohibits taking property unless it is for a public use and the owner is provided with just compensation.[47] "Public" means "belonging to the state or nation"[48] and the "general body of mankind, or of a state or nation,"[49] generally referring to the people. "Use" means "[t]he act of employing any thing to any purpose,"[50] especially "a long-continued possession and employment of a thing for the purpose for which it is adapted."[51] These basic definitions seem to justify a more literal interpretation of public use–that the property taken must be for the general public, the people, to collectively own, possess, or employ property taken through eminent domain, such as roads. At a minimum, the definition should preclude any use that falls outside the government's legitimate scope of authority, amounts to corporate welfare, or unnecessarily burdens private property rights.

However the legislature decides to define public use, it should, at the very least, exclude economic development as justification for eminent domain. Government-led economic development: falls outside the legitimate scope of a limited government's authority; grants certain privileges to preferred individuals and organizations; creates an unequal playing field; provides few, if any, discernable benefits to the general public; and the costs far outnumber the benefits. Therefore, the legislature should exclude economic development from the definition of public use.

Additionally, the legislature should foreclose on the possibility of government-sponsored economic development from finding its way into takings via alternative mechanisms, such as urban renewal and redevelopment.

Define "Necessity"

Condemning authorities should be required to show that the proposed taking satisfies the definition of "public use" and that taking that unique property is necessary. Even if a project would result in public use, it may not be necessary to condemn land to accomplish it. For example, public roads generally satisfy the definition of public use. However, given the expansive network of existing roads, eminent domain may not be as necessary as it once may have been. Power lines may also satisfy the public use requirement, but taking private property may not be necessary if reasonable alternative routes exist.

While Oklahoma law currently requires a showing of necessity when taking land under certain circumstances,[52] lawmakers should define how condemning authorities can demonstrate that a proposed taking is necessary. At a minimum, the legislature should require condemning authorities to conduct a cost-benefit analysis that accounts for the intrusion on private property rights and show that the proposed public use is definite and achievable.

This analysis could be accomplished in many ways. For example, the legislature could require a condemning authority to analyze realistic alternative proposals that do not involve condemning the property of an unwilling seller. For each of these proposals, the condemning authority would bear the burden of proving that each alternative is unreasonable. Mere inconvenience should be insufficient to justify taking private property. Additionally, the legislature could require the condemning authority to demonstrate that the intended public use is proximately achievable by requiring the condemning authority to presents a detailed plan for completing the project on a reasonable timeline and on a budget the condemning authority can fund.[53] If there is no reasonably detailed plan to complete and fund a project, it hardly seems that the proposed taking could be considered necessary.

Define "Blight"

Remediating "blight" has been and continues to be a way condemning authorities expand the scope of eminent domain. When permitting the use of eminent domain to clear blight, the legislature should define blight to include only those properties that pose a real threat to public health and safety.

In modern vernacular, blight can be used very broadly or very narrowly. It can describe something superficial such as a style or aesthetic that does not fit the surrounding neighborhood—in other words, an eyesore. Such a broad definition would validate the unjust taking of private property. Alternatively, blight can describe a property that has become so dilapidated as to pose a significant safety risk, such the risk of collapse or fire, or threaten the health of the community, as in properties that have become a breeding ground for disease or vermin. The legislature should narrowly define blight and require condemning authorities to objectively prove the existence of blight and that no less-intrusive means of remediating problematic conditions is reasonably possible.

Limit the Delegation of Eminent Domain

While analyzing the proper scope of government and narrowing the limits of public use, lawmakers should survey current state law for all delegations of eminent domain. Across multiple sections of law, various entities have been granted the authority to condemn property.[54] Given that the government's mission is to preserve and protect individual rights and liberties, the wholesale delegation of such a despotic power as eminent domain to private parties is tantamount to an abdication of government's duties.

[L]awmakers should define how condemning authorities can demonstrate that a proposed taking is necessary ... Mere inconvenience should be insufficient to justify taking private property.

Unlike private companies, Government officials are, to some extent, accountable to the public through sunshine laws and elections. As a general rule, only a sovereign power subject to public scrutiny should possess even the limited power to take private property. However, if circumstances exist that necessitate a delegation of that power, it should only be delegated under necessary and limited circumstances. The legislature should review all delegations of eminent domain and retract those that are not necessary to perform a proper government function for a legitimate public use.

Consolidate Statutory Provisions

The laws that specify how and when eminent domain may be used should be consolidated under a single title of law. Current law frequently redirects entities empowered with eminent domain to railroad companies' condemnation power and procedures.[55] Eminent domain is a sovereign power that should only be used when circumstances necessitate taking private property for legitimate public use—it is not a tool of private convenience or special privilege. As such, the legislature should consolidate the laws, policies, and procedures for using eminent domain under a single title wherein the legislature clearly and decisively subjects all condemning authorities to the same limitations, policies, and procedures necessary to protect private property rights.

Revert Condemned Property to the Victims of Eminent Domain Abuse

Current law does not provide a sufficient remedy for eminent domain abuse. Several of the properties condemned in *Kelo*, were never used by the public, and many remain vacant to this day. Individuals were unnecessarily forced out of their homes. These homes were subsequently demolished to supposedly make way for a more profitable use. Requiring the former owners to buy back a property they were unwilling to sell and from which they were unnecessarily evicted to pander to a wealthy private company is unconscionable. In cases of eminent domain abuse,

property owners should not be forced to buy back what was forcibly taken, even when they were provided compensation, since that compensation lacked mutual assent – necessitating the exercise of eminent domain.

In such cases where property owners are forced out of their property unnecessarily and the acquiring entity fails to put the land to the intended public use within a reasonable amount of time, the legislature should create a legal mechanism for the land to revert to the original property owner. In other words, the victim forcibly evicted from their land gets the property back in its present condition, at no additional cost, and keeps the money initially paid as "just compensation." By so doing, the legislature would create a deterrent to unnecessary takings and provide restitution to victims of eminent domain abuse.

The Oklahoma Legislature has an opportunity to reform the law of eminent domain to prevent its abuse and preserve the people's property rights.

Conclusion

It has been over a decade and a half since the U.S. Supreme Court issued its opinion in *Kelo*. While the Supreme Court has eroded the meaning of public use in the Takings Clause, it left the door open for states to enact greater protections for property owners. The Oklahoma Legislature has an opportunity to reform the law of eminent domain to prevent its abuse and preserve the people's property rights.

It is time for the legislature to act. It must define limits of eminent domain so that it is only available when necessary to acquire the property for a legitimate public use. Lawmakers should repeal inappropriate delegations of eminent domain and ensure that all condemning authorities are subject to the same limitations, policies, and procedures intended to protect property owners from unconstitutional intrusion on their rights. Finally, the legislature should ensure that when a property is taken, it is done for the general public's possession, use, or employment. If it is not, the legislature needs to ensure that victims of eminent domain abuse receive adequate restitution.

End Notes

1889 INSTITUTE

1 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and the Several States of the American Union* (Philadelphia: T. & J. W. Johnson, 1848), 508, https://ia800203.us.archive.org/2/items/lawdictionar_bouv_1848_01_201602/lawdictionar_bouv_1848_01_201602.pdf.

2 Hugonis Grotii, *De Jure Belli ac Pacis* (Vienna: Printed for Joannis Pauli Karausii, 1658), 89, https://archive.org/details/hugonisgrotiidej00grot/page/89/mode/2up?ref=ol&view=theater&q=dominium+eminens.

3 Hugo Grotius, *The Rights of War and Peace* (London: Printed for W. Innys and R. Manby, et. al., 1738), 63, https://archive.org/details/rightsofwarpeace00grot/page/63/mode/1up?ref=ol&view=theater&q=supreme.

4 Grotius, *The Rights of War and Peace*, 45.

5 James Madison, "For the National Gazette, 27 March 1792," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-14-02-0238. [Original source: Robert A. Rutland and Thomas A. Mason, eds., "6 April 1791 – 16 March 1793" in The Papers of James Madison (Charlottesville: University Press of Virginia, 1983), vol. 14, 266–268.]

6 Michael J. Coughlin, "Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule," *Catholic University Law* Review 54, no. 3 (2005): 1001-1002, https://www.academia.edu/35678709/Absolute_Deference_Leads_to_Unconstitutional_Governance_The_Need_for_a_New_Public_Use_Rule.

7 U.S. Const. amend. V.

8 *Kelo, et. al. v. City of New London, Conn.*, et. al., 545 U.S. 469, 514 (Thomas, J. dissenting).

9 *Kelo*, 545 U.S. 469 at 477.

10 Scott Bullock, "On Petition for a Writ of Certiorari To the Supreme Court of Connecticut," 5-6, https://ij.org/wp-content/uploads/2000/12/NL_cert_petition.pdf.

11 *Kelo*, 545 U.S. 469 at 483-484.

12 *Kelo*, 545 U.S. 469 at 503 (O'Connor, J. dissenting).

13 *Kelo*, 545 U.S. 469 at 502 (O'Connor, J. dissenting).

14 *Kelo*, 545 U.S. 469 at 489.

15 Larry Morandi, "Eminent Domain Legislation: Post-Kelo Update," *National Conference of State Legislatures* (2012), 2, https://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf; See also Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo," Minnesota Law Review 93, no. 6 (June 2009): 2100-2178, George Mason Law & Economics Research Paper No. 07-14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298&download=yes.

16 Larry Morandi, "Eminent Domain Legislation: Post-Kelo Update," 2.

17 Richardson v. State ex rel. Okla. Dept. of Transp., 1991 OK CIV APP 100, 818 P.2d 1257 at ¶5 (emphasis added), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=15282.

18 Okla. Const. art. II, § 24.

19 Okla. Cosnt. art. II, § 23.

20 D-Mil Production, Inc. v. DKMT, Co., 2011 OK 55, 260 P.3d 1262 at ¶13 (internal citations omitted), https://www.oscn.net/applications/oscn/deliverdocument.asp?lookup=Next&listorder=54&dbCode=STOKCSSC&year=2011.

21 *D-Mil Production*, 2011 OK 55 at ¶13.

22 Okla. Const. art. II, § 24.

23 See, e.g., H.C.R. 1001, Legislature (2007-2008) (establishing the Task Force on Urban Renewal Authority of Oklahoma City and the Ability to Take by Eminent Domain).

24 *See, e.g.,* "Property Rights Advocate Act," H.B. 1469, 52nd Legislature (2009-2010) (creating a new office of Property Rights Advocates in the Oklahoma Department of Commerce as well as the Eminent Domain Advisory Board).

25 *See, e.g.,* H.B. 1087, 51st Leg. (2007-2008); see also, H.B. 1832, 51st Leg. (2007-2008).

26 *See, e.g.,* "Eminent Domain Procedural Protections Act," H.B. 1550, 51st Leg. (2007-2008) (establishing a uniform process for eminent domain cases including timely resolution of condemnation proceedings and a hearing on the right to take the contested property).

27 "Landowner's Bill of Rights," H.B. 1562, 53rd Leg. (2011-2012).

28 H.B. 1331, Floor (House), 52nd Leg. (2009-2010), 4-5.

29 H.B. 1864, Introduced, 57th Leg. (2019-2020), 5; H.B. 994, Engrossed, 58th Legislature (2021-2022), 5.

30 H.B. 1864 at 3-4; H.B. 994 at 3-5.

31 H.B. 1864 at 5; H.B. 994 at 5.

32 H.B. 1864 at 5-6; H.B. 994 at 5-6.

33 Byron Schlomach, *Rising Above Mere Politics: General Principles for Spending Taxpayers' Money*, 1889 Institute, February 2017, 2-14, https://secureservercdn.net/198.71.233.110/qkm.4a8.myftpupload.com/wp-content/uploads/2020/12/1889_Rising-Above-Mere-Politics-Full_Edit.pdf.

34 Okla. Const. preamble.

35 Okla. Const. art. 2, § 2.

36 *See*, Tyler Williamson, Spencer Cadavero, and Byron Schlomach, *Policymaker's Guide to Evaluating Corporate Welfare*, September 2020, https://secureservercdn.net/198.71.233.110/qkm.4a8.myftpupload.com/wp-content/uploads/2021/06/1889_CorporateWelfare_PolicyPrescription-3.pdf; See also, Byron Schlomach, Stephen Slivinski, and James Hohman, *Multilateral Disarmament: A State Compact to End Corporate Welfare*, 2019, https://secureservercdn.net/198.71.233.110/qkm.4a8.myftpupload.com/wp-content/uploads/2020/01/1889_Compact-Corp-Welfare.pdf.

37 "New London, CT," (Sep. 27, 2021), *Google Maps*, Google. Retrieved from https://www.google.com/maps/place/New+London,+CT/@41.3431815,-72.0953551,148m/data=!3m1!1e3!4m5!3m4!1s0x89e60e6eb612cdbd:0xd01603e69c2b939d!8m2!3d41.3556539!4d-72.0995209.

38 Tyler Williamson, Spencer Cadavero, and Byron Schlomach, *Policymaker's Guide to Evaluating Corporate Welfare*, September 2020, 1, https://secureservercdn.net/198.71.233.110/qkm.4a8.myftpupload.com/wp-content/uploads/2021/06/1889_CorporateWelfare_PolicyPrescription-3.pdf.

39 Williamson, *Policymaker's Guide to Evaluating Corporate Welfare*, 1-2.

40 *Kelo*, 545 U.S. 469 at 472.

41 *Kelo*, 545 U.S. 469 at 474-475.

42 Jeff Benedict, *Little Pink House* (New York: Grand Central Publishing, 2009), 24.

43 Benedict, *Little Pink Hous*e, 45-46, 48-51.

44 Bullock, "On Petition for a Writ of Certiorari To the Supreme Court of Connecticut," 2-3.

45 Benedict, *Little Pink House*, 219.

46 *Kelo*, 545 U.S. 469 at 475.

47 U.S. Const. amend. V.

48 Samuel Johnson, "Publick, adj." in *A Dictionary of the English Language*, vol. 2, sixth ed. (London: Printed for J.F. and C. Rivington, et. al.,1766), https://archive.org/details/dictionaryofengl02johnuoft/mode/2up.

49 Johnson, "Publick, n." in *A Dictionary of the English Language*.

50 Johnson, "Use, n." in *A Dictionary of the English Language*.

51 Bryan A. Garner, ed., "Use, n." in *Black's Law Dictionary*, Third Pocket Edition (St. Paul: West Publishing Co. 2006), 750.

52 27 O.S. § 2.

53 "Model Eminent Domain Legislation," §100.04, Institute for Justice (April 2021), https://ij.org/wp-content/uploads/2021/04/04-01-2021-Model-Eminent-Domain-Legislation-for-Remediation-of-Blight-and-Necessity.pdf.

54 *See e.g.,* 27 O.S. §§ 4-8 (granting the power of eminent domain to water power companies, local governments, cemeteries, private persons and corporations, utility companies, and common carriers) and 66 O.S. §§ 52-66 (granting the power of eminent domain to railroad companies and outlining procedures).

55 27 O.S. §§ 4-8.