Published Edit

This is a graded discussion: 7 points possible **due Apr 16, 2018**

What do you think about Kelo?

Jan 4, 2018 at 2:51pm

12 12

What do you think the implications of *Kelo* are for historic preservation as it reinforced that it is constitutional to take private land for economic development and return it to the hands of private individuals or companies? Does this remind you at all of what originally spawned the historic preservation legislation? Is it just the newest form of urban renewal? Do you agree with the outcome?

You may find it helpful to watch Chief Justice John Roberts' discussion of the subject.

Roberts on Kelo

Reply

Evelyn McGill
(https://uk.instructure.com/courses/1909098/users/5167134)
Apr 12, 2018

Having lived through both the urban renewal period, and remembering when the Kelo Decision was decided I find that there are striking similarities. Kelo is just urban renewal under another name. Eminent Domain is of course perfectly legal, and justified in many cases. However, both urban renewal and Kelo disproportionately impact the poor, minorities, and the politically weak in favor of the powerful. Kelo was not poor, but she did not have the clout of the powerful special interests that wanted to build the new project. While not knowing how "blighted" the neighborhood that was being destroyed was, and I use the term blighted with some hesitation, it is impossible to say whether the neighborhood needed to be bulldozed. By the time Kelo was decided neighborhoods were being revitalized, rather than being torn down so if the goal was neighborhood improvement or economic development there were other options. In one sense Kelo was worse than the urban renewal movement of the 1960's. The urban renewal movement at least was based on the idea of improving neighborhoods by replacing distressed housing with new developments. While in hindsight these efforts were misguided, at least on paper the goal was well intentioned. I would like to point out that legality and what is morally correct are not necessarily the same thing.

I do disagree with the outcome for the following reasons:

Kelo was based on "economic development", and this in itself is an ambiguous term. There is no guarantee that any action will promote economic development, so to use a device such as eminent domain which is a pretty radical action to seize private property is beyond the scope of public use. The writers of the Constitution obviously saw eminent domain as a pretty radical action as they saw fit to include it in the Constitution.

However, the Kelo Decision stretched the limits of public use to a degree, that was denounced by both Conservatives such as Clarence Thomas who wrote one of the dissenting opinions and many liberal constitutionalists such as consumer advocate Ralph Nader. The NAACP, Howard Dean, and even Bernie Saunders have also criticized Kelo. When you find a decision that unites this many different ideologies there is the suggestion that there is a problem with the decision.

I would like to quote O'Connors dissenting opinion as she so succinctly describes my view of the decision:

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take

private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public–such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.

As Thomas wrote in his decision Kelo construes "the public use clause to be a virtual nullity."

The decision rendered the definition of " public use" to be so broad that anything could fit under the umbrella of "public use."

Reply

Elise Kline
(https://uk.instructure.com/courses/1909098/users/6901798)
Apr 13, 2018

The whole time I was watching the news coverage of the Kelo case I was thinking that it was urban renewal all over again. Unfortunately, it looks like the developers took a perfectly livable and pleasant historic neighborhood and destroyed it. As far as I could ascertain from the videos, the Kelo house was as far from blighted as you can get. In my opinion, the decision of the Supereme Court is problematic for the historic preservation community because it opens the door for private buyers like corporations to displace working class people as well as destroy historic areas even if the area is livable. It's just one more hurdle for working class people to clear in order to find affordable housing.

The decision displaced an entire neighborhood of working class people with the intention being that luxury housing and commercial space be put up. This is just gentrification under a new name. Now, not only have the neighborhood's inhabitants been displaced, but the city has destroyed the historic character of the area. Of course the tragedy is furthered by the fact that no economic

development actually occurred and any jobs that would have been created were taken elsewhere.

I agreed with Justice O'Connor's statement of dissent because the land was not being taken for a public use, but would be placed in the hands of private developers who stood to make a lot of money. Applying the logic used by the Court in the decision, any home can be taken by the government and used for commercial purposes because it would create jobs thus boosting the local economy. I understand that the Court wanted to leave this possibility open and allow state and local governments to make the decision, but it seems that a line should be drawn somewhere. In certain cases eminent domain is justifiable, but this decision did not respect the rights of the property owners who maintained their respective parcels.

Reply

(http

Heather Hemmer

(https://uk.instructure.com/courses/1909098/users/5172931)

Aug 3, 2018

I don't know if it is nessecarily fair to say the land wasn't being used for a public use *just* because private developers were involved. In this case, yes, there is an argument. Stereotypically, I would say private developers are more focused on their own financial growth, but I would argue there are examples where private developers have had a positive affect while still catering to the community and the needs of the community.

Reply

(https:/

James Thobaben

(https://uk.instructure.com/courses/1909098/users/5199459)

Apr 16, 2018

US Supreme Court: The reasons given by New London "… even if not 'reasonably certain' are sufficient…" In endorsing this claim, Roberts emphasized the courts should not second guess local decisions based on local fact-gathering. I do appreciate his argument, but not its application. For, it seems the court combined a rightist 'we don't micro-manage' and a leftist 'let's support government planners' to end up with a predictably unsatisfying result.

The government is supposed to maintain checks-and-balances on its own abuse. The function of the state in the Lockean-Jeffersonian social contract is not creation of utopia, but the protection of prior existing negative rights [including to property]. Then – as capacity allows – the state can (post-social-contract establishment) facilitate the offering of entitlements to assist in the pursuit of happiness (each person's *telos*) if such entitlements are favored by the people. In other words, the majority can have their way, but only within limits that protect the minority – to not do so inevitably leads to rule by mob or oligarchy.

O'Connor dissented because New London's eminent domain claim was really a transfer to private owners without clear public use / access (as with public carriers). Thomas seemed to dissent for more of a libertarian reason – a sort of 'anti-bully' argument. I agree with both arguments.

The decision sided with those on the Left and Right favoring centralized power – be it for some unverifiable 'public use' as defined by the government employees or by for-profit corporations that will (supposedly) -- through the invisible hand -- serve the public. Presumably, if there is an invisible hand (of the Right's rhetoric), it does not need micromanaging by power-holders; and, presumably the little people (of the Left's rhetoric) should be protected from their own elected representatives 'deciding' they paternalistically know what is best (when that 'best' or its "best-ness" is not reasonably assurred)

Reply

(http

James Thobaben

(https://uk.instructure.com/courses/1909098/users/5199459)

Apr 16, 2018

Interesting coincidence: Kelo had an editorial in USA Today this morning (if I read site correctly)

Reply

(http

Janet Kelly-Scholle

(https://uk.instructure.com/courses/1909098/users/6900715)

Apr 18, 2018

Yes, apparently there is a "Little Pink House" moving coming out soon!

Reply

Janet Kelly-Scholle
(https://uk.instructure.com/courses/1909098/users/6900715)
Apr 18, 2018

It does seem to smack of urban renewal and seems a slippery slope related to preservation. Two homes within feet of my home were recently "claimed" for a road widening project. They literally razed the homes, and the next day widened the road for a subdivision, which is now being built where the previous homes were located. Talk about murky eminent domain claims!

I don't agree with the outcome but taking property is nothing new and part of what most of us accept about living in the U.S. It is clear that the court takes broad view of public use -- if economic development benefits the city, city's public will benefit. That makes sense on paper, but an eminent domain action of the magnitude used in New London is a multi-year process. It stands to reason that during such a long-term process, some things would shift -- the economic climate, corporate headquarters, etc. It seems short sighted to bank on one company's interest in the property.

I can understand some of the judges' view that the whole is greater than the sum of its parts. If they made decisions based on one small fight/house, it could have a catastrophic outcome for precedent setting. That said, I think Justice O'Conner got it right. If economic development is the only public use benefit, it doesn't really qualify for eminent domain. (I'm paraphrasing here, obviously.) She stated what I was thinking throughout all the videos.

However, the "line" as Justice Roberts referenced, is murky. One could argue that it is the court's role to define where that line is. Justice Roberts attempts to punt to the legislature as the ultimate decision making authority. Ultimately, it seems this is another example of the court deferring to the "informed" local authorities who should have given more consideration to the people and community they had a responsibility to protect.

Reply

Cameon Eisenzimmer
(https://uk.instructure.com/courses/1909098/users/6885048)
Apr 22, 2018

This is nearly the same thing that is happening in my town. City and government officials are condemning or taking by eminent domain structures along the river for flood protection. Some of these structures are brand new since 2011. Even though these structures are not technically within the 100 year flood plain, when USACE re-routed the river in 1980, they caused these areas to become lower than surrounding areas. After a once in 5,000 year flood in 2011, the government decided to increase flood protection measures using levees and flood walls. Well, it was determined it was too costly to protect some of these areas, so they condemned the structures or used eminent domain. These areas are in the poorer sections of town and in areas where elderly have lived for over 50 years. It is quite sad.

There is also a huge political battle brewing as the State Historical Society has mandated the City save and relocate a historically significant house. The must keep the architecture intact and move it across the road, keeping the integrity of location and setting. Well, our government contractor stated it will cost $600,000 to move it and there is no avenue to apply for historic incentives. He has said on numerous occasions that since it is moved (albeit less than 500 feet), it will lose all historical meaning and the City cannot apply for any state or federal historic grants. Citizens are made that it will cost $600,000 to move but they are only getting half the story. It has pitted citizens against citizens and most people against me (as the Project Archaeologist). It is really quite sad to see.

Reply

Meghan King
(https://uk.instructure.com/courses/1909098/users/6889534)
Apr 23, 2018

The first thing that stuck me about this case is that it dealt with far more than just an issue of public taking. It has as well important discussion of various sub issues, including equal protection in how the taking occurs, how you determine legislative intent in interpreting a statute, and the role of trial and appellate courts in challenges to a statute. The Supreme Court in this case reviewed the trial Court for a “clearly erroneous” factual decision about “public purpose” under the state statute. It also reviewed the state statute for constitutionality under the US Constitution. It made other

determinations about the nature of the development corporation as a public or private entity. This is not, therefore, to me a case about urban renewal (this was not a blighted area) or just about eminent domain. At its heart it seems to me to be more about how much a state legislature can do and how broadly it will be allowed to exercise its perspective in fact finding of a public purpose.

The Supreme Court here I think makes it clear that the Court doesn't write statutes, it determines if statues that exist are constitutional in themselves and/or have been applied in a constitutional manner. I think this is the point made by Justice Roberts in his discussion of this case. States could choose to limit the application of public purpose, and some have done so. If the purpose in this case was considered overreaching, then it is the responsibility of the state legislature to act to address that. It is not the role of the courts, even the Supreme Court, to rewrite legislature. The standard, in turn, for finding something unconstitutional is very high. In this case, while I don't care for the results under a "slippery slope" application, I also cannot see that the decision was wrong under the case law and precedence that the Supreme Court cited in its analysis of the "public benefit" said to exist in this case. Justice Connor takes a strict view, that would have justified an alternate opinion, if she had persuaded a majority of the other justices, but she did not, at least this time.

In that regard I think is correct that this opinion does show some retreat from the *Berman* and *Hawaii Housing* cases. A five /four split is a very close decision, and can I think indicate at lease a modification to the Court's past position. "Public use " is a factual decision, and facts in each case are different. *Berman* states that "…when legislature has spoken, the public interest has been declared in terms that are well nigh conclusive". However, the Court here still went to great lengths to analyze the public benefit issue, as it would be required to do in all such appeals. The *Kelo* Court said it would not second guess the legislature or city findings. It looked at the development corporation to determine if it was in fact some "free wheeling" private entity" . Overall , its decision seemed to be based on very strong evidence of economic benefit, which the Court on the basis of long standing other decisions was considered a "public benefit".

To challenge state statutes that allowed this kind of development on constitutional grounds, therefore, would seem to require a complete redirection a cases going back to the late 19th century. It all gets back to the state statute, was is constitutional? If so, was it applied in a constitutional manner? I think, therefore, that the answer for preservationists, and to protect the goals of historic preservation, should start at the state legislative level. I do not think that this is a death blow to historic preservation, it is a wakeup call however to pay attention to state law, and remember that it is state law that provides the first and perhaps strongest line of defense.

Once of the ironies of this case of course is that the development never occurred. This was not a blighted area, it could have been left alone were it not for the idea of economic growth. It is obvious however since the project never proceeded that somewhere this analysis went very

wrong. To me therefore, this is a red flag that the state laws involving this kind of taking need work. There needs to be hard evidence, not just a hope, for economic development. There needs to be a review process , set out in the statues , that looks at all elements and perhaps , requires committed funding, penalties for failing to proceed, etc. Basically, it seems more statutory oversight. This is want Justice Roberts points out, and I think he is correct. At end these seem to be local /state issues that should be handled at that level for best results. AS an object lesson, I would also think that the *Kelo* case, and the fact that at end the taking was anti economic benefits with vacant . uninhabited lots, serves as a warning and strong point of argument for this kind of exercise of state police power.

Therefore, I do not see it as necessarily pushing “urban renewal” to a new level. I think. rather it is an opportunity to look at how the Court will interpret these kinds of situations, and then act proactively with legislature to enact safeguards. That doesn’t mean I like the decision, I don’t. But I think you have to carefully read what the Court says in reaching its conclusion, because it is not just the Opinion that matters going forward, it is WHY the Court reached that opinion. I think the Court is clear that it is deciding this as part of a broad , multi faceted economic plan, though what that seemed at end ill conceived. It is not (getting back to the Slippery Slope argument”) saying one parcel can be taken for what is ultimately private use. As pointed out by the Court, the state legislature has eminent domain power, but how and when it is used is also up to state legislature. That is where I think the focus for historic preservation protection needs to be.

Reply

Sharyn LaCombe
(https://uk.instructure.com/courses/1909098/users/6916662)
May 4, 2018

This is where my planner education conflicts with my historic preservation desires. The focus of Kelo is the support of economic development, which is intended to be for the greater public good. With that, comes the responsibility to define the future use as something that meets the public use for public good and not just for economic gain or an increase in property taxes that is often the result of "economic development' projects. I support the broader concept of Kelo in cases where there is a larger context and framework that does indeed serve the public good. For example, if there were planning documents in either a long range comprehensive land use plan or a long range transportation plan, and the use of eminent domain described in Kelo provides for the implementation and realization of that plan to come to fruition and it is consistent with the policies set forth in them, then yes, I feel that the expanded power provided under Kelo should be

allowable. I would hope that these larger plans had also considered historic resources in their development and was a target of what we formerly knew as "urban renewal" to eliminate blighted areas. So, I suppose my answer is, if there was good planning, then yes, I'd support it, but if it was done on a small area basis without a broader vision for an area because a developer approached the city with some idea, then no, I wouldn't support it.

Reply

(http

Heather Hemmer

(https://uk.instructure.com/courses/1909098/users/5172931)

Aug 3, 2018

I really agree with your post. The concept of Kelo wasn't bad and I can see the benefits of economic development. I also hope that larger plans consider historic places, cultures and don

R

Search entries or author Unread Subscribed

(https:/

Heather Hemmer

(https://uk.instructure.com/courses/1909098/users/5172931)

Jul 30, 2018

I am not sure I completely understand the difference between urban renewal and what happened in the Kelo case and eminent domain. The developers seemed smart enough to turn it into an eminent domain case, arguing for the greater good for the public. Eminent domain, in the Kelo case, was obviously abused and it created an act of urban renewal. I think with the lessons learned and the revisions to many eminent domain laws, there will be fewer opportunities to take advantage of private property and put a bow on urban renewal. I see the justification in eminent domain, however, this is not an example of that. The area was not blighted, but the developers had enough power to basically just take it anyway. I don't agree with the Supreme Court ruling, and after watching the interview with one of the victims and seeing the amount of work that hasn't been done, I am sickened they are just going to rebuild a neighborhood. In my opinion, building an office/commercial building would have caused less negative backlash compared to settling with a neighborhood plan. I see more weight in the argument for the commercial building than the neighborhood.

Their private land was going to be given to private developers. Not to the public. Authentic culture,

history and family legacy were lost. I understand both sides of the argument, but there will almost always be a "better for the public" argument. As I am rereading and thinking about this case, I think there could have been cooperation between the neighborhood and city if the correct measures and steps were taken. It is also hard to see both sides of the argument because we all know nothing was built...but it did have potential to be good for the public.

Reply