

Chapter 1

Private Property, Community Development, and Eminent Domain

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Introduction

On March 16, 2007 the Chinese government, by way of the National People's Congress, announced passage of a new national property law designed to protect private property.¹ The new Property Law becomes effective October 1, 2007.² It defines different categories of property,³ defines the meaning of a property right,⁴ and protects private property from illegal State seizure.⁵ This has been hailed as a great step forward for the market economy in China. While China has made great economic progress in recent years and has facilitated a great amount of real estate activity, private property rights have been the subject of ongoing debate. The new Property Law helps to clarify rights as between private parties, collectives, the State, and creditors. While the law provides a new reference point for negotiating the complexity of interests within a market economy, it remains to be seen how effectively the law will be enforced.

The passage of the new Property Law in China is noteworthy not only for its potential benefit to the Chinese people and the Chinese economy but also because it represents an important indicator in the ongoing recognition of the global importance of private property law for economic development and the building of institutions of citizenship.

A concern for private property has been at the core of many debates regarding the reduction of poverty in developing countries,⁶ and in terms of the political and economic reorganization of states after such events as the collapse of the Soviet Union. Likewise, property law has been critical in the negotiating of regime change

1 Story from BBC News: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/6429317.stm> (published March 8, 2007 at 07:07:53 GMT). See also Li & Fung Research Centre, *The Promulgation of Property Law – A New Era for Private Property* 1–8, 38 CHINA DISTRIBUTION & TRADING (MARCH 2007).

2 Li & Fung, *supra* note 1.

3 *Id.* See generally CAO PEI, REAL ESTATE LAW IN CHINA (1998); PATRICK RANDOLPH, CHINESE REAL ESTATE LAW (2000).

4 Li & Fung, *supra* note 1.

5 *Id.*

6 See generally HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

as witnessed in such situations as those involving the turn over by the British of Hong Kong to China, and with the transformation of political and economic order with regime change in such places as Zimbabwe (Rhodesia) and South Africa.

From a market perspective, property is fundamental legal infrastructure for trade and exchange. Property defines the interests that people own and control so that we, as market actors, know what is available for trade and whom to pay.⁷ The rules of property address more than issues of ownership and control. The rules of property also clarify the quality and the quantity of the interest held and capable of exchange.⁸ For instance, the quantity of a parcel of real property might be measured at 1.5 acres and described by a standardized survey process using metes and bounds. The quality of the property might also be identifiable in terms of a recognized estate interest (a life estate vs. a fee simple), and in terms of its environmental characteristics and condition. The ability to describe, qualify, quantify, and fix ownership is crucial to a market economy, and particularly so when a market extends beyond a very local reach to include potential participants who lack personal familiarity with each other.

Property rules also reduce transaction costs (reducing waste and making transactions more efficient),⁹ and they can correct for problems associated with the tragedy of the commons,¹⁰ wherein a lack of private property rights results in over-use and misuse of valuable resources.

Property law connects people to civil society.¹¹ Formal ownership of property connects individuals to the broader community by putting them and their property on public records, it requires them to have a known and knowable address, makes them visible to government officials by placing them on the property tax roles, and provides them with collateral for credit, thus making them visible and valuable to all manner of creditors, sales people, and merchandisers.¹² To have formal legal property is to take on an identity and a place within a given community, for property is a system of organizing social hierarchy within and across communities. Property structures relationships such as landlord-tenant, owner-trespasser, debtor-creditor, and arranges a hierarchy of interests in terms of legal position and in terms of market relationships.¹³ In both legal and economic terms it is frequently better to be an owner rather than a renter. Owners, for instance, generally have higher priority legal rights and also enjoy better credit terms than renters in the marketplace.

Without a coherent and reasonably well developed system of property, market exchange, beyond a very local community, would be costly, difficult, and perhaps

7 See ROBIN PAUL MALLOY and JAMES CHARLES SMITH, *REAL ESTATE TRANSACTIONS* 3RD (2007). See also ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* (2004).

8 See *id.*

9 See MALLOY, *MARKET CONTEXT*, *supra* note 7, at 184–5, 177; ROBIN PAUL MALLOY, *LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS* 91–4, 96, 98–100, 102–4, 108, 118, 121, 155–6 (Cambridge, 2000).

10 See MALLOY, *MARKET CONTEXT*, *supra* note 7, at 21, 106.

11 DE SOTO, *supra* note 6.

12 *Id.*

13 See MALLOY, *MARKET CONTEXT*, *supra* note 7, at 82–9. See generally MALLOY, *MARKET ECONOMY*, *supra* note 9 (on the idea of relational exchange and meaning).

barely existent. In saying this, we do not ignore the idea of informal property systems and exchange networks that emerge privately through custom, kinship groups, and by personal arrangement and enforcement. There is a literature addressing these kinds of market functions. But pragmatically, extensive, global, and positive market networks require a degree of transparency, stability, predictability, and access which cannot be efficiently and effectively attained by purely informal means. Property law systems establish rules and standards that favor stability of interests, predictability of outcome, and transparency of information. All of this advances economic exchange and civic institution building.

Issues arise, however, when circumstances change. In all cases of property there is tension between competing claimants to property, and with respect to the appropriate balance between public and private authority over property. When circumstances change legal systems need to be responsive and dynamic. This may be difficult however, when property rules are generally fostered to enhance stability, predictability, and a sense of permanence in the hierarchy of social organization. With the advent of new technology, changes in demographics, shifts in preferences, reorganization of political power, and the obsolescence of prior land uses, adjustments need to be made. Private reordering can be accomplished by private contract. Public reordering may be done by consent or by coercive force.

In this book we look at the issues that arise when private property rights come into conflict with public (community) interest. Whether stated as such, or not, such tensions involve changed circumstances. Technology, demographics, political structure, or preferences change, and tensions arise with respect to the perceived needs of change and the established organization of society through property. New uses are sought for properties, and questions arise with respect to the public's ability to change prior established uses and rights through the exercise of state power. This exercise of state power is typically referred to as a "takings power" or as a right of eminent domain.

In this chapter we address this tension between private property and the community. We proceed in several steps. First, we briefly address some concerns regarding the regulation of property that expresses itself in the law of various countries.¹⁴ This includes an explanation of some of the key concepts used in land regulation generally, and relevant to eminent domain.¹⁵ Second we put this general information into context with reference to the recent *Kelo* decision by the U.S. Supreme Court.¹⁶ The *Kelo* case has attracted global attention by triggering reconsiderations of fundamental questions of private property and the proper exercise of the power of eminent domain.

14 TOM ALLEN, *THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS* (2000).

15 See DANIEL R. MANDELKER, *LAND USE LAW* 5th (2006).

16 *Kelo v. City of New London*, 545 U.S. 469 (2005). (See Full Court opinion in Appendix of this book.)

General Concepts in Land Use Control and Development Law

In general there are two primary background principles involved in land use and its regulation. The first relates to traditional common law concepts of nuisance, and the second to the political and constitutional balance struck between the rights of the community and the rights of individuals to own and control private property.¹⁷ We will explore these ideas with reference to the tension between private interest (self-interest) and public interest.¹⁸

In many ways land use law embodies the classic market tension between private and public interest. To understand this we need to think in terms of Adam Smith's classic metaphor of the invisible hand. Smith argued that, in general, people pursuing their own self interest will end up promoting the public interest even though the advancing of the public interest is no part of their original plan.¹⁹ It is as if they are lead by an invisible hand that simultaneously promotes both private and public benefit. This has been referred to as the equivalence or invariance theory to understanding law in a market context and it suggests that laws promoting the pursuit of self-interest likewise advance the public interest because the market mechanism calibrates an equivalence between the two. In such an environment, private ordering of property rights is all that is needed since by definition successful private ordering would be equivalent to successful public planning. In fact, private ordering under the equivalence theory makes public gain available without having to incur administrative costs and without needing to identify a complex calculus for adjusting individual preferences across a broad exchange network. Problems arise, however, the instant that we recognize situations of variance between private (self) interest and the public interest.²⁰ Such variance occurs in a number of situations. Common and well explained instances of this occur in settings where decision making is governed by the dynamics of the so called prisoner's dilemma,²¹ when property rights are not clearly identified as in the Tragedy of the Commons, and when there are transactions costs that hinder the ability of individuals to make rational, efficient, and optimal choices. In many cases, certain land uses and individual preferences are suboptimal because of externalities that are not internalized into the individual's decision-making process. Likewise, problems arise when individuals experience difficulty in processing complex information related to such things as long-term risk to the environment and public health due to certain types of land use.²² For all of these reasons it is frequently the case that one can observe variance between self-interested land use preferences and the interests and preferences of the community. An important goal of public regulation of land, therefore, is to mediate these tensions between public and private interests and to

17 See generally MANDELKER, *supra* note 15.

18 MALLOY, MARKET CONTEXT, *supra* note 7, at 26–30.

19 *Id.* (Malloy has identified this relationship as one of equivalence or invariance. *Id.*)

20 *Id.*

21 *Id.* at 130–32, 174, 203.

22 See generally BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein, ed., 2000) (addressing a variety of behavioral and cognitive issues that make purely rational calculus difficult for individual decision makers).

navigate the delicate process of correcting for variances that might otherwise lead to negative impacts on the public health, welfare, and safety.

In seeking to achieve this balance between public and private interest a number of factors come into play concerning the basic characteristics of ownership, and the limiting principles governing the exercise of state power through the process of eminent domain.

Characteristics of Property Ownership

To best understand a discussion of state limitations on individual property rights one needs to appreciate the basic characteristics of property ownership. There are philosophical debates on the meaning and purpose of property that can be read in summary form elsewhere.²³ In this chapter we simply set out to identify the basic characteristics of property to establish a foundation for the more focused discussion of eminent domain.

Property may be categorized in various ways. Recognized legal categories include real property (land and related fixtures attached to and connected to the land), personal property (movables such as equipment, inventory, and personal goods), intangible property (contract rights and insurance), intellectual property (copyrights, patents, trademarks), and cultural property (traditional medicines and goods or products identified to a specific cultural community and context). To a large extent the legal concept of property is a conclusion. It is a conclusion in law based on an evaluation of the presence or absence of certain characteristics which permit one to identify a given interest as fitting within one of the legally recognized categories set out above. Having an interest so categorized is important because the legal designation of an interest as property generates important consequences. Property is generally given strong protection under the law. There is typically a heightened review of state action to regulate or invade a private property right relative to other types of non property interest, often involving a fundamental constitutional set of principles with respect to the terms and conditions upon which the state may intrude upon private property rights of citizens. There are also special private law remedies for intrusions on property rights. This might include, for example, the ability to demand specific performance, ejection, or to seek an injunction rather than having to accept money damages.

The idea of a property right can vary from one legal system to the next. In general, Common Law countries (Britain and many of its former colonies; U.S.A., Australia, and Canada for instance) conceive of property in terms of a metaphor of a bundle of sticks.²⁴ This metaphor presents the idea of property as being a multiplicity of interests that can be divided and legally recognizable in numerous discrete ways. Thus, one might own a piece of land and reserve a life estate in it while giving a future interest to one person and an easement to a third person. All can have constitutionally protected property rights as all hold sticks in the bundle

23 See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003); JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 1–18 (2001); MALLOY, *MARKET CONTEXT*, *supra* note 7, at 1–21.

24 ALLEN, *PROPERTY*, *supra* note 14.

of property rights associated with the land. In contrast, countries with a Civil Law legal system (France, Spain, Germany, and their former colonies, along with most of continental Europe and South America) have a different conception of property.²⁵ Rather than using a bundle of sticks metaphor Civil Law systems might best be understood by Common Law lawyers as having a “one big log” approach to property rights. In a Civil Law system property rights are not able to be so easily split and typically one person has a “property right” while others may enjoy “an interest in property,” as opposed to a property right.²⁶ Again, from a Common Law perspective, the Civil Law idea would be akin to the person with the property right having an interest that would rise to the level of Constitutional protection from an unlawful government taking under a provision such as the Fifth Amendment to the United States Constitution, whereas the people with “rights in property” would have a lower status. In the common law system many people may hold a property rights stick in the bundle of property rights, and each such stick would give rise to the constitutional level of scrutiny of an interest protected by the Fifth Amendment to the United States Constitution.

Given these differences there are still similarities recognizable across countries with respect to some basic characteristics of what it means to have property, and some basic standards for limiting state interference and regulation of property. In this regard, however, our discussion will focus on the basic outline of Common Law jurisprudence (as opposed to that of the Civil Law).

There are four primary characteristics of property although various authors may identify more or different ones in given jurisdictions. Generally, when the legal conclusion is made that an individual owns property it means that the person enjoys the following four characteristics of ownership:

- 1) the right to use and possession;
- 2) the right to exclude others (private parties and the public, with the public having certain rights via the state police power and its power of eminent domain);
- 3) the right to transfer (by sale, gift, credit arrangement, death, etc.); and
- 4) the right to enjoy the profits of ownership (such as enjoying the fruits of the land, the offspring of animals, and the equity appreciation of the interest).

Basically, when these characteristics are present one can legally conclude that an interest that can otherwise fit into one of the established categories of property is going to be treated as property.

Standards for Exercising the Power of Eminent Domain

In general, the sovereign (the state) has the power and authority to define, regulate, and protect property within the reach of its jurisdiction. In most developed market economies power over property is divided between the state and private individuals.

²⁵ *Id.*

²⁶ *Id.*

Individuals are given private property rights as part of democratic political structures, as a means of promoting citizenship, and as a vehicle for advancing economic development. In both Civil Law and Common Law traditions the legislative power includes the authority to exercise control over private property.²⁷ The exercise of this power is, however, constrained by legal rules and standards. Professor Tom Allen has done significant work in detailing many of these rules and standards in his book *The Right to Property in Commonwealth Constitutions*,²⁸ and has put many of these standards into the current context of European Union human rights law in his book, *Human Rights Law in Perspective: Property and the Human Rights Act of 1998*.²⁹

In this book we are primarily concerned with the exercise of the power of eminent domain which involves a physical taking of private property by the state. We are not focused on issues of “regulatory takings” which are more ambiguous as to standards applied in different jurisdictional contexts, and in fact rather unclear even in one jurisdiction such as the United States. Suffice it to say that regulatory takings involve state action that so diminishes the use and value of the property by regulation that it is argued to be the equivalent of a physical taking. The variables to be considered in all of this are many and complex. In the United States we know only that regulation which results in completely eliminating *all* economic value of ownership is considered a taking for which compensation is due under the Fifth Amendment to the United States Constitution.

Having said this we now turn our attention to outlining some of the basic standards that govern the exercise of eminent domain. These standards describe the basic considerations used in exercising the power of eminent domain, with respect to a physical taking of private property, across numerous Common Law jurisdictions.

There are three generally applicable standards used to govern the lawful exercise of the power of eminent domain. These can be identified as standards of:

- 1) proportionality,
- 2) public purpose, and
- 3) compensation.

A brief consideration of each is provided.

Proportionality

While exact wording and standards may vary as between jurisdictions the general requirements are that the government action be rationally connected to the stated objective; that the government action seeks reasonably to minimize the intrusion onto private property; and that the intrusion is proportional to the objective. Other ways of stating this include the idea of striking a fair balance between the need to achieve an appropriate public objective and the infringement on the rights of a

²⁷ *Id.*

²⁸ *Id.*

²⁹ TOM ALLEN, HUMAN RIGHTS LAW IN PERSPECTIVE: PROPERTY AND THE HUMAN RIGHTS ACT OF 1998 (2005).

private property owner. Generally, the attempt is to avoid placing a disproportionate burden on a discrete individual or group of individuals when seeking to advance a legitimate public interest.

Public Purpose/Use

Various jurisdictions speak to the need for the power of eminent domain to be exercised for a public purpose or a public use. The exact meaning of this standard varies but the idea is that the government is using this power to achieve a public goal, and to advance the production of public goods. There are some disputes about the nature of the government action in terms of the meaning of “use” and “purpose.” Some interpretations hold that public use requires actual access and use by the public as in taking private property to build an airport, a highway, or a public school. The more difficult question concerns taking private property for a public purpose which may or may not result in a so-called public use. A public purpose may involve the taking of private property in the context of clearing out a blighted slum area for purposes of urban redevelopment. The redevelopment may or may not include public uses, as there may be construction of new private buildings and housing in the area. Similarly, in an age of privatization the state may seek to acquire private property rights for a right of way to be granted to a privately owned utility company agreeing to supply needed power to a community.

Compensation

When the state exercises its power of eminent domain to take title to property or to acquire another recognized ownership interest, such as a leasehold or an easement, the state generally must compensate the private property owner.³⁰ Compensation is a key restraint on the exercise of this power by the state as it requires government to think about the costs and benefits of a project and to allocate resources to the undertaking. It is also a critical component of proportionality and fair balance as it takes funds from general revenues and pays for the project, thereby more fairly equalizing the impact and burden on the discrete individuals whose property is taken for the benefit of the public at large. Requiring compensation is of course further complicated by the question of what compensation is due. The compensation standard can vary in several ways. Some tests speak in terms of market value, others in terms of fair value. Questions arise with respect to the best way to calculate these values. In addition, some jurisdictions require additional compensation based on such factors as the time period over which the individual held private ownership of the property or the costs of relocating or acquiring substitute property.

³⁰ One exception is taking pursuant to a forfeiture statute, when an owner’s criminal misconduct justifies the expropriation. See *Bennis v. Michigan*, 516 U.S. 442 (1996) (state declared forfeiture of automobile in which husband had sex with a prostitute; innocent wife, who held one-half interest, had no right to compensation under takings clause).

In general, one will observe these basic standards in many Common Law jurisdictions and in current and former Commonwealth countries.³¹ Some of these basic standards prevail across the European Union and the fair balance test is being developed in this area as a result of the application to all member states of the European Convention on Human Rights.³²

Forced Transfers to Private Owners

With this as background we turn now to one of the more interesting questions concerning the exercise of the power of eminent domain. This question concerns the appropriate limits to the use of eminent domain in situations in which the state intends to take private property from one private property owner and turn it over to another. The issue here involves consideration of the public use and purpose distinction noted above. The public purpose standard seems to offer a broader basis than that of public use for the exercise of eminent domain, and opens the door to increased tension with respect to the balance between private and public interests in the use of state power to achieve certain goals.

The United States Supreme Court's decision in 2005 of *Kelo v. City of New London* has spotlighted the tension with respect to the balancing of private and public interests. Public reaction in the United States was intense and immediate, and soon the case attracted global attention. Within the United States, a large majority of commentators both inside and outside the legal community were highly critical of *Kelo*. By the narrowest of margins, the Court held that the City could take single-family homes to develop an office park and to provide parking and retail services for visitors to an existing state park and marina. Many observers thought the Court would take this opportunity to display its "conservative" activism by reining in the power of eminent domain. After all, the Court has grown increasingly protective of property rights during the past two decades.³³ The Court, however, passed on the chance to redefine the "public use" requirement to protect property owners from many forms of government takings. However, the Court refused to turn the ship around. Instead, the majority followed its long-standing rule that the government takes for a "public use" under the Fifth Amendment whenever its purpose is to provide a public benefit. And for a public benefit to exist, members of the general public need not have a right to enter the property, and title to the property need not remain in a public entity.

The facts of *Kelo* merit close attention. In 1990, a Connecticut state agency designated the City of New London as a "distressed municipality." Six years later the United States closed a naval base in the Fort Trumbull neighborhood, and by

31 See ALLEN, PROPERTY, *supra* note 14; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1995); DAVID A. DANA and THOMAS W. MERRILL, PROPERTY: TAKINGS (2002); MANDELKER, *supra* note 15, SINGER, *supra* note 23, at 595–700.

32 ALLEN, HUMAN RIGHTS, *supra* note 29.

33 See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (right to build house notwithstanding beach protection legislation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (right to operate group home notwithstanding zoning).

1998 the City had an unemployment rate that was roughly double the state average. A redevelopment authority began plans for the economic revitalization of Fort Trumbull. Shortly after the authority disclosed its plans, which included bond financing for the creation of a Fort Trumbull State Park, the pharmaceutical giant Pfizer Inc. announced plans to build a \$300 million research facility next to Fort Trumbull. In 2000, the City approved a development plan for a 90-acre site in Fort Trumbull, which included 115 privately owned properties in addition to the former naval base. Many of the private parcels contained homes. The authority negotiated the purchase of a vast majority of these properties. Nine owners (including Susette Kelo) who owned a total of 15 lots refused to sell. They then became defendants in the City's eminent domain action.

Many but not all "economic development" takings involve land assembly plans, as in *Kelo*. Such "neighborhood buyouts" raise a fundamental issue of property ownership: Who owns the right to determine the future of a neighborhood? Changed circumstances, within the neighborhood and exterior to the neighborhood, make the question more acute and more important. When someone wants a drastic change to a neighborhood – a redevelopment or reinventing of the neighborhood – may this happen? If so, how? In other words, who owns the "redevelopment right" for the neighborhood?

The opposing sides in *Kelo* have radically different answers to this basic question of ownership. The government claims that the community as a whole may assert ownership of the right to redevelop a neighborhood by invoking the power of eminent domain. In other words, the concept of "economic development" allows the political processes to operate to determine when, if, and how a neighborhood will change. On the other hand, the *Kelo* homeowners asserted that their properties were "non blighted," that economic development was not a proper public use or purpose, and that therefore each of them individually had the right to refuse to sell to the redevelopment authority. This would mean that each neighbor owned a "veto power" over the plan to redevelop the neighborhood. Such "blockage rights," identified by Michael Heller as an anti-commons regime, often result in the inefficient use of resources.³⁴

The intense public criticism of the *Kelo* Court's decision is largely undeserved. The outcome stands solidly on the shoulders of the Court's existing precedents. To understand how *Kelo* fits within the Court's eminent domain jurisprudence, we should start by considering the prototypical taking for a publicly owned facility. When a governmental entity condemns land to build a government facility, such as a school or library, its power is unquestioned. Takings for public transportation – highways and airports, for example – also raise no legal controversy about the government's right to condemn. Citizens may complain that the government's plan is not sound. They may say that there is a better site for the new school than the one selected by the school board, or it may be wiser to rebuild an existing school rather than acquire a new site. Similarly, opponents of a proposed new highway that will pass through

34 Michael Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

a city may assert that its construction will destroy a valuable urban neighborhood.³⁵ For a new highway that will pass through sparsely populated rural land, critics may be skeptical of the government's justification that the project will spur economic development. The new airport's value may be speculative. All these objections are political in nature. If substantial, the objections may cause the government to modify or abandon its plan. But if the landowner goes to court to question the legal need to take her land for the public project, the government wins hands down. The Court applies a deferential rational basis standard of review, deferring to the decision made by the legislative branch. In such "public ownership" condemnations, issues of proportionality and the measurement of compensation may arise, necessitating judicial resolution, but under modern law the need for public ownership of the asset in question is never subjected to meaningful judicial scrutiny.

Not all exercises of eminent domain result in government ownership of the condemned property. As the Supreme Court recognized early on, the government sometimes employs eminent domain to transfer property from its present owner and transfer it to another private person. This practice became popular more than a century ago to promote the private development of transportation³⁶ and utility infrastructures.³⁷ Today, condemnations for the benefit of privately owned railroads are rare because long ago the Nation developed an extensive rail right-of-way system; and rail transportation, confronted with competition from other forms of transport, has waned. Condemnations to support power companies and other utilities, however, still happen frequently. Although few owners want an easement taken from their property for power lines, no one questions the legality of the practice. The power grid is important.

In principle, decades ago the Court could have drawn the line at privately owned transportation and utility infrastructure uses, prohibiting all other eminent domain exercises that transfer ownership to the private sector. Although such a demarcation was conceivable and justifiable, the Court, however, chose not to confine the concept of "public use" in this way. Instead, it broadly interpreted that concept to include any use that benefits the public, whether or not the land will be publicly owned, and whether or not members of the public have the right to enter the property. Of particular importance were two modern rulings. In *Berman v. Parker*,³⁸ the Court upheld slum clearance for urban renewal. Then in *Hawaii Housing Authority v. Midkiff*,³⁹ the Court permitted Hawaii to compel landlords to sell their properties to their residential tenants, thus breaking up large Hawaiian estates, the size of which had prevented the development of a normal market for the purchase of owner-occupied housing.

35 JOHN MOLLENKOPF, *THE CONTESTED CITY* (1983); Yan Zhang & Ke Fang, *Is History Repeating Itself? From Urban Renewal in the United States to Inner-City Redevelopment in China*, 23 *JOURNAL OF PLANNING EDUCATION AND RESEARCH* 286-98 (2004).

36 See *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 657-8 (1890) (Congress may authorize railroad corporation to condemn land through Indian territory).

37 See *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (Holmes, J.) (state may allow private corporation to condemn land for hydroelectric purposes).

38 348 U.S. 26 (1954).

39 467 U.S. 229 (1984).

In *Kelo*, the question was whether the public benefit theory properly extended to government efforts at economic development, designed to revitalize the community with new jobs and a higher tax base. Relying on its earlier rulings, a five-Justice majority concluded that it did.

In their dissenting opinions, Justices O'Connor and Thomas argued that the majority had stretched "public use" beyond recognition, in effect reading that limit out of the Constitution. The dissenters' opinions, however, are laced with flaws, thus suggesting that the majority reached the right result in refusing to strike down "economic development" takings. Justice O'Connor advanced a twofold argument for overturning the City of New London's development plan, without overruling *Berman* or *Midkiff*. As to *Berman*, she reasoned that economic development is different from, and less important than, rectifying urban blight.⁴⁰ The assertion (1) is not self-evident, (2) does not fit the underlying facts of *Kelo* because the state identified the entire community as a "distressed municipality," and (3) if generalized, would invite a nightmarish sprawl of litigation over whether particular takings qualify as "important." Second, Justice O'Connor claimed that *Berman* and *Midkiff* are best understood as cases in which the landowners were inflicting "affirmative harm on society" by their present use of the properties,⁴¹ while the New London homeowners were blameless in this respect. This interpretation of the cases is especially unconvincing. There was nothing wrong with Mr. Berman's department store; indeed, the government conceded it was not blighted and did not contribute at all to the slum characteristics of the surrounding neighborhood. Whether the Hawaiian landlords in *Midkiff* were "harming" their tenants and society is debatable, to say the least. If they were, the harm they were causing by refusing to sell their properties to tenants does not look much different than a charge one could level against the New London homeowners – that they were harming their community by refusing to recognize that the office park would help the entire community. In each case, the challengers of the government's program were simply putting their own self-interest above that of their neighbors.

Justice Thomas's opinion was more radical and more forthright than Justice O'Connor's. Invoking what he perceived to be the original intent of the framers of the Constitution, Justice Thomas argued that "public use" must be narrower than "public purpose," and therefore *Berman* and *Midkiff* are wrongly decided, meriting overruling. Justice Thomas would permit forced transfers to a private owner only if "the public has a legal right to use" the property after the taking occurs.⁴² It is not clear, however, why the "legal right to use" rule did not apply on the facts of *Kelo*. Members of the public, after all, could rent space in the developed project just as surely as members of the public can use a railroad if (but only if) they buy a ticket. New London's plan for the parcel that supports the state park seems especially unassailable under Justice Thomas's test because parking and retail services would presumably be open to one and all. Justice Thomas's assertion that we should look to the intent of the drafters of the Bill of Rights would also support the city's position because the Fifth Amendment

40 545 U.S. at 500-01.

41 *Id.* at 500.

42 *Id.* at 508.

as written limits only the federal government. The Court did not invent the “selective incorporation” doctrine until late in the 19th century.

The dispute among the *Kelo* justices can be seen in terms of the tension between private and public ordering of market relationships. The equivalence theory posits that the self interest of private landowners, guided by Smith’s invisible hand, will produce the optimum public benefit. Faith in that proposition counsels for the imposition of limits on the power of eminent domain, which in the *Kelo* context would mean the invigoration of “public use” as a meaningful brake on government power. Conversely, the perspective of the City of New London, which the *Kelo* majority sanctioned, rests upon the perception that there is variance between the public interest and private (self) interest. Thus, the City’s “economic development” taking was designed to overcome a problem with externalities: the *Kelo* homeowners ignored community benefits when making the decision to accept or reject the development authority’s offers to purchase their homes, which preceded the judicial filing of the eminent domain action.

Kelo is a major victory for state and local governments, but it does not mean that “economic development takings” will now take place routinely in all states. The Court interpreted the Federal Constitution, and state courts may choose to interpret the takings clauses of their state constitutions more narrowly. Indeed, the Michigan Supreme Court did so just one year before the *Kelo* decision, ruling that a county could not condemn land adjacent to an airport to develop a privately owned industrial park.⁴³ In the future, other state courts will face the issue of whether to follow *Kelo*’s public benefit theory or to grant greater protection to property owners under principles of state law. A number of state legislatures also have entered the fray. Several of them acted to restrict the use of eminent domain even before *Kelo*, and since *Kelo*, lawmakers in Alabama, Delaware, and Texas have followed their lead. Other states are likely to adopt similar measures soon, spurred by the much-publicized ruling in *Kelo* itself.⁴⁴ Such state-law development, rejecting the broad public benefit theory, does not prove that the *Kelo* majority got it wrong. Rather, in the balance between national and local land regulation, it proves that federalism is working. The Court properly decided not to have the federal judiciary decide, for every community in every state, how broad or narrow the power of eminent domain ought to be. Within a Federal Constitutional framework, these choices – like most land-use law choices – should be informed at the state and local levels, taking into account local norms and circumstances.

Conclusion

The *Kelo* decision and the public debate arising in its aftermath provide an important opportunity for us to step back and assess the legal landscape related to the ability

43 County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

44 See, e.g., Sonji Jacobs, *Legislators Give Property Seizure Laws High Priority*, ATLANTA JOURNAL – CONSTITUTION, Aug. 25, 2005, at 1C (“Grandma’s house is at risk if she isn’t in the best part of town and a corporate entity wants to build a plant there”) (quoting Shannon Goessling of the Southeastern Legal Foundation).

of government fairly to balance the tension between private property and the public interest. This tension and the need successfully to strike a balance are not unique to any one country or any one political system. In this light, the *Kelo* decision provides an opportunity for us to explore a rich set of legal principles with broad applicability. From the United States to the United Kingdom, to the People's Republic of China, property and its legal regulation are of prime importance to matters of economic development and civic institution building.