AFTER "KELO"
POLITICAL RHETORIC AND POLICY RESPONSES

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New London, Connecticut

Harvey M. Jacobs and Ellen M. Bassett

In June 2005 the U.S. Supreme Court issued a much anticipated decision in the case of *Kelo v. City of New London, Connecticut* (545 U.S. 469 [2005]). The close decision (5–4) galvanized the planning, development, redevelopment, and property rights communities, and continues to have national and international repercussions. What was at issue?

New London, Connecticut is an old, industrial, port city on America's east coast. Its economic height in the 1920s was based on shipbuilding. Since that time the city has experienced substantial economic and population decline. As the property tax base dwindled, the city's ability to provide basic public services also deteriorated. In the 1990s, New London developed a plan for economic revitalization, focused on a neighborhood with 115 separate properties. The plan required consolidation of these properties into a single parcel. The city further proposed to transfer ownership of some sections of the newly configured parcel to a multinational pharmaceutical company for a research and production facility.

The city approached landowners about their interest in the voluntary sale of their land, and 100 landowners agreed to sell. The city then proposed the use of eminent domain on the outstanding 15 properties (an action where the city would pay fair market value for each property). In so doing, the city did not assert that these properties were "blighted"—the legal and planning standard under which such eminent domain actions have existed since the 1954 U.S. Supreme Court decision in *Berman v. Parker* 348 U.S. 26 (1954).

Rather, under the authority of state enabling legislation and based on a comprehensive plan, both of which the court later acknowledged, the city asserted only that the outstanding parcels were required as part of the plan to accomplish a greater public good—increased jobs for the community, increased pubic revenues (taxes), and increased economic competitiveness.

The *Kelo* Case

Fighting to save her "little pink house," Susette Kelo became the spokesperson for the opposition to New London's proposed action on the remaining 15 parcels. Kelo and her co-litigants argued that the type of eminent domain proposed by the city was a misreading of the original intent of the U.S. Constitution's takings clause ("nor shall private property by taken for public use, without just compensation").

According to Kelo's lawyers, the original constitutional clause was intended to allow for governmental actions that create public facilities (e.g., roads, parks, airports, hospitals), but not for government to take private land from one owner to give to another owner. They asserted that if the court found in favor of New London (and against Susette Kelo, which the court did) there would be no effective limit to any proposed physical taking of privately owned land by government. That is, government could always assert that a proposed new use of land was in the greater public interest.

The reasoning and final decision in *Kelo* was unsurprising. On a base of strong legal and historical analysis, the majority of the court showed why the action by the City of New London was acceptable. In so doing, it affirmed 50 years of similar actions by local and state governments throughout the country—actions which, while often clothed in a justification of blight, regularly had no more (or less) justification to them than that provided by New London.

The court itself provided the basis for much of the public policy controversy that followed when it stated that the decision was only about whether New London's action was acceptable under the U.S. Constitution: Did it violate the terms of the takings clause in the Fifth Amendment? But, the court noted, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (545 U.S. 469 [2005] at 489). That is, while New London's and similar local and state governmental actions were legal under the federal constitution, the U.S. Supreme Court invited state legislatures to decide whether such actions should be legal under state constitutions.

The negative reaction to the court's decision was swift and strong. Within a week a proposal was floated that then-U.S. Supreme Court Justice David Souter's home in Weare, New Hampshire should be condemned so it might be replaced by the Lost Liberty Hotel. Using the threat of unconstrained governmental action against ordinary homeowners, a national movement emerged to thwart the impact of *Kelo*.

Following the invitation of the court, 43 states adopted laws that appear to challenge *Kelo* (see figure 1). The explicit intent of most of these laws is to prohibit governmental eminent domain actions both for the sole purpose of economic development and in cases where privately owned land is taken from one owner to be transferred to another owner.

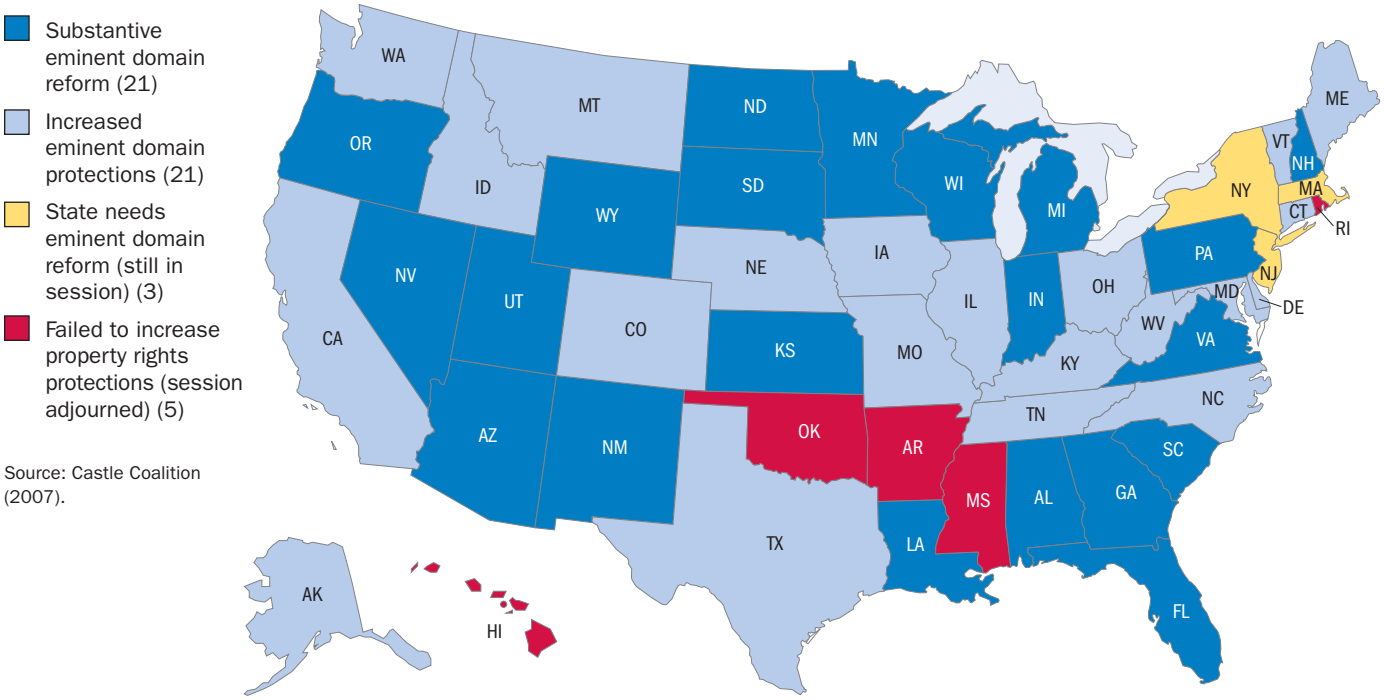
Analysis of State-based *Kelo* Laws

Beginning in 2007, we began a two-year research project on the impact of these state-based laws. Planners, public sector lawyers, and redevelopment officials were already expressing strong concern about the constraints these new state laws could have on normal planning practice. Our question was, Would these laws impact planning, and if so, how? To investigate these laws, we adopted a multilevel approach that:

- inventoried and cataloged *Kelo* laws that had been adopted since 2005;
- undertook exploratory interviews with key stakeholders in the post-*Kelo* debate (ranging from representatives of the American Planning Association and the National Conference of State Legislatures to the Castle Coalition, the organization actively promoting the state-based laws);
- conducted a Web-based survey about the impacts of the laws with groups including planners, municipal attorneys, and developers; and
- tracked the emerging literature, mostly from opponents of the *Kelo* decision (that is, those who supported the new state-based laws) about their perceptions of the impacts these laws were having.

State and local governments are now grappling with circumstances quite different from those of a decade ago, especially since the economic recession in 2008 and 2009. Declines in development activity, property values, and property tax revenues appear to be leading a public discussion less focused on rapacious government activity and more concerned about how to encourage development. This

FIGURE 1
Eminent Domain Legislation Status Since *Kelo*



Source: Castle Coalition (2007).

change in the economic climate has had a substantial impact on the reach of the adopted state-based *Kelo* laws.

Stakeholder interviews provided some interesting insights as to agreements and conflicts among those focused on these new laws. Both proponents and opponents are willing to acknowledge that there have been instances of abuse by local governments in the exercise of eminent domain; they differ in whether they see this as an occasional or a regular occurrence.

Both groups comment on how the public discussion about the appropriate response to state-based laws has brought together seemingly unusual and unexpected allies. For example, libertarians and property rights activists who are opposed to expropriation on philosophical grounds are finding themselves allied with community activists who see an historical pattern of eminent domain abuse against communities of color and the poor.

Proponents and opponents also note that much of the change to date is in the legal framework for takings actions, and they agree it is less clear what the impact has been on actual planning and governmental practice. Even opponents of these laws (many planners, for example) see some good coming from them. They argue that eminent domain is becoming more tied into the planning process, more open, and more participatory.

Our survey results reinforced some of these points and added others (Jacobs and Bassett 2010). Respondents reported mixed reactions to the assertion that state-based *Kelo* laws were negatively impacting urban revitalization efforts, economic development planning, or programs for affordable housing (see table 1). Despite these results, respondents did note a negative effect on the willingness of local governments to use eminent domain, though there appeared to be no impact on blight designations by these governments.

With regard to changes in the planning process toward becoming more open and transparent, the majority reported no changes to date, and nearly half of the respondents saw no impact on the extent of conflict within the process (see table 2). When respondents were asked to share exactly how their localities were grappling with new requirements regarding eminent domain, most identified what we characterize as soft or tacit approaches—building networks, enhancing communication,

and linking eminent domain into citizen participation processes.

Despite these relatively mild responses to the passage of state-based laws, 76 percent of respondents suggested that the property rights movement (the proponents of these laws) remains strong or very strong in their areas, versus 19 percent neutral and 4 percent reporting a weak or very weak movement. Yet the respondents also suggested that it was their perception that neither the average citizen nor the majority of elected officials were focused on the issues raised by the property rights movement.

The recent writings of supporters and proponents of the state-based *Kelo* laws add further understanding of what is (and is not) happening with these laws (see Ely 2009; Morriss 2009; Somin 2009). There appears to be a broad consensus that there has been little substantive impact from the state-based laws. Overall, the laws are characterized as more symbolic than substantive in nature and content. In the words of Ely (2009, 4), they are "merely hortatory fluff." Why this is true, however, is a subject of some disagreement. Some analysts suggest it is because of the way key interest groups shaped the legislation. Others argue that while citizens appear to be concerned about the *Kelo* decision, they are less motivated to focus on the particular solution crafted by state legislatures.

There appears to be little expectation of substantive follow-up action by Congress or the U.S. Supreme Court, so whatever occurs will continue to be a function of actions by state legislatures and state courts. Nevertheless, the public is more aware

TABLE 1
Sector Impacts of *Kelo* Laws

What has been the impact of your state's *Kelo* initiative on…	All Respondents		Planning Community Respondents		Nonplanning Community Respondents	
	Value	%	Value	%	Value	%
…economic development planning at the local level?	(n = 58)		(n = 36)		(n = 22)	
Positive/Strongly Positive	2	3	1	3	1	5
No Impact	30	**52**	20	**56**	10	45
Negative/Strongly Negative	26	45	15	41	11	**50**
…urban revitalization activities of central cities?	(n = 56)		(n = 35)		(n = 21)	
Positive/Strongly Positive	1	2	0	0	1	5
No Impact	23	41	14	40	9	43
Negative/Strongly Negative	32	**58**	21	**60**	11	**53**
…the willingness of local governments to publicly con-template and discuss projects that might utilize eminent domain?	(n = 56)		(n = 34)		(n = 22)	
Positive/Strongly Positive	7	13	5	15	2	9
No Impact	16	29	10	29	6	27
Negative/Strongly Negative	33	**59**	19	**56**	14	**64**
…the willingness of local governments to designate areas as blighted?	(n = 55)		(n = 36)		(n = 19)	
Positive/Strongly Positive	8	15	6	17	2	11
No Impact	30	**55**	23	**64**	7	37
Negative/Strongly Negative	17	31	7	20	10	**53**
…local efforts to provide affordable housing?	(n = 53)		(n = 34)		(n = 19)	
Positive/Strongly Positive	0	0	0	0	0	0
No Impact	43	**81**	27	**79**	16	**84**
Negative/Strongly Negative	10	19	7	21	3	16

TABLE 2
Process Impacts of *Kelo* Laws

	All Respondents		Planning Community Respondents		Nonplanning Community Respondents	
	Value	%	Value	%	Value	%
What has been the impact of your state's *Kelo* initiative upon the transparency and accountability of local governments when they make eminent domain decisions?						
Processes are:	(n = 53)		(n = 30)		(n = 23)	
...significantly/somewhat more transparent and accountable.	12	23	5	17	7	30
...unchanged (no impact).	40	**75**	24	**80**	16	**70**
... significantly/somewhat less transparent and accountable.	1	2	1	3	0	0
What has been the impact of your state's *Kelo* initiative upon levels of conflict and disagreement in public planning and decision-making processes?						
Processes have:	(n=53)		(n = 33)		(n = 20)	
...significantly/somewhat lower levels of conflict and disagreement.	0	0	0	0	0	0
...not changed (no impact).	33	**62**	23	**70**	10	**50**
...significantly/somewhat higher levels of conflict and disagreement.	20	38	10	30	10	50

of the eminent domain issue after *Kelo*, and that may affect future citizen and landowner actions. Where there is a distinction between substantive and symbolic legislation, the more substantive laws appear to be a function of both strong economic growth conditions in states and the promotion of laws through the initiative process versus the legislative process.

Impacts and Implications

Immediately after the *Kelo* decision, commentaries and reports by property rights advocates warned of impending danger for the American homeowner and the fundamental threat to American democracy. However, little has changed in the decade since a Lincoln Institute report examined the first generation of property rights laws (Jacobs 1999). That study concluded that state-based laws were having little impact on actual policy and planning practice. It appears that the same is largely true now.

That there should be social conflict over the public's efforts to manage privately owned land is, in and of itself, not surprising (Jacobs and Paulsen 2009). That the physical taking of land would be the source of this conflict is even less surprising. What is surprising is that, beyond the spirited focus of a set of dedicated activists, it is not clear that the American public or their elected representatives really see the issues raised by the state-based laws as requiring substantial attention, and especially not now. The impacts of the state-based *Kelo* laws can be viewed in three ways.

Changes in Eminent Domain Activity

Both supporters of state-based *Kelo* laws and independent researchers find little change in what local and state governments are actually doing, or anticipate doing, as a result of the laws. There are several possible explanations. One is that few *Kelo*-style takings actually occur (Kayden 2009). The New London, Connecticut action was intended for economic development and was not based on a declaration of blight.

Physical takings can be initiated for a wide range of activities, but for at least 50 years (since *Berman v. Parker*) eminent domain for inner-city redevelopment has usually been accompanied by a declaration of blight. Almost none of the recent state-based laws prohibit physical takings when blight is declared. A second explanation is that even in situations where some physical taking is required, many of the transactions are (or at least appear to be) voluntary. Even in the New London situation, 100 of 115 landowners sold their land voluntarily and did not require an eminent domain action by the city. It is possible that the state-based laws are a solution to a problem that does not really exist.

Changes in Planning Practice

The state-based laws have not been all bad for planning practice. In fact, they have helped sensitize a broad range of interests to a core set of planning issues. In so doing the laws have made the planning and decision-making process a more central focus of public discussion and debate. Where there are indications of change to planning practice, they appear to be welcomed by planners. State-based laws are leading to requirements that when eminent domain is exercised it needs to be tied more explicitly to a broader planning and development process, as was the case in New London.

This means that eminent domain will be more transparent, and planners (and the elected officials to whom they report) will become more accountable. All in all, these new laws suggest that planners need to further improve the communication techniques and processes they use for planning in general, and eminent domain proceedings in particular. Few planners find objection to this, and many embrace it.

Changes in Public Discourse

As argued by even the supporters and proponents of state-based legislation, the most significant impact of these laws seems to be in the area of public awareness. The wide-ranging media coverage of the *Kelo* decision, the apparent bottom-up backlash against the decision, and survey data about the common understanding and appropriateness of the decision all suggest significantly heightened attention to eminent domain, and to the role of governmental activity in physical takings. It is precisely this situation that provides the conditions for changes in planning practice.

Conclusions

This research was conceptualized and begun at a time when public discussion about land use, taxation, and takings was set within a very different frame than it is today. Now, local, state, and national discussion is focused on the aftermath of the subprime mortgage collapse, the recession, and their systemic impacts on the domestic economy. Communities and states nationwide are having uncomfortable discussions about the provision of local and state services as the property tax and income tax bases that support those services soften and frequently decline, sometimes significantly and precipitously.

The national media seems to have a constant stream of articles detailing this problem. What is particularly significant for our research is the interrelationship of these events. In years past when

local governments found themselves in a fiscal crisis, they could and would turn to their states for assistance. And in turn, when states found themselves in a parallel fiscal crisis, they could and would turn to the national government. Today neither the states nor the national government are able to provide assistance as their own fiscal positions stagnate, if not decline.

It is in this context that it is necessary to understand the present and then project the likely future of eminent domain actions by state and local governments and planning authorities. Research by supporters and proponents suggests that substantive, state-based legislation could be explained in part by the level of economic activity in the different states. States with strong economies, especially in the homebuilding sector, were more likely to pass substantive legislation.

What happens when there is not a strong state or local economy or when they are in a downward spiral? For the foreseeable future, we believe it is likely that planning in general and eminent domain in particular will be reexamined, and perhaps even witness a resurgence in support. Communities severely affected by the credit, housing, and mortgage-finance crises are being forced to reexamine eminent domain and related powers as ways to address abandoned housing and facilitate economic and social redevelopment. It is not at all clear what, if any, resistance they will experience from a citizenry wanting and needing solutions to real and seemingly ever more complex problems.

Even though survey respondents spoke to the continued strength and presence of the property rights movement, the results also indicated that it was not clear that the core issues of importance to the property rights movement were important to citizens in general, or even to elected officials. Does this mean that the property rights activists will abandon their activism? No. Just as they have sought to continuously advance their agenda and learn from their policy experiments for more than a decade, they will again learn from their successes and failures with state-based *Kelo* legislation. These laws represent the latest, not the final, wave of policy activism on property rights issues in the United States.

The planning community should not ignore the property rights advocates who have succeeded in changing the way the American public thinks about the core issue in physical and regulatory takings—the appropriate balance of the government vis-a-vis the individual with regard to property rights. But at the same time, it is not clear that the institutional changes these advocates have brought forth through state-based *Kelo* laws have changed public administrative practice, or that the laws fundamentally matter to the public and its representatives.

Was *Kelo* decided properly? That is a different question than our research focus. Are the state-based *Kelo* laws warranted as a response to the *Kelo* decision? That is a question that individuals and interest groups need to answer for themselves. Is there anything about the state-based *Kelo* laws that most planners should worry about? No there is not, but this does not mean that these laws or their supporters should be ignored. It does mean that planners and their allies and what they do in the public interest are on much stronger ground than the passage of these laws would seem to indicate.

ABOUT THE AUTHORS

HARVEY M. JACOBS *is a professor at the University of Wisconsin-Madison, where he holds a joint appointment in the Department of Urban and Regional Planning and the Gaylord Nelson Institute for Environmental Studies. Contact: hmjacobs@wisc.edu*

ELLEN M. BASSETT *is an assistant professor in the School of Urban Studies and Planning at Portland State University in Oregon. Contact: bassette@pdx.edu*

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