



# What motivates voters' support for eminent domain reform: Ownership, vulnerability, or ideology?



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## ARTICLE INFO

### Article history:

Received 30 April 2012

Received in revised form 28 June 2013

Accepted 17 July 2013

### JEL classification:

K11

H10

D72

N40

### Keywords:

Eminent domain

Takings

Public use clause

Property rights

History

Voter behavior

Referenda

Fifth Amendment

## ABSTRACT

The analysis evaluates factors that motivate voter support for eminent domain reform. Economic models emphasize property ownership as a motivation for eminent domain restrictions (Fleck & Hanssen, 2010; Lamoreaux, 2011). Other research and court opinions point to ideology and vulnerability to takings as motivations for eminent domain reform. The empirical analysis tests these hypotheses using data from state-level referenda that responded to the Supreme Court decision in *Kelo v. New London*. Property ownership, income, economic vulnerability and ideology have significant impacts on the odds of voting in favor of reform. Ethnic and educational factors do not have significant effects on reform outcomes.

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## 1. Introduction

The U.S. Supreme Court held in *Kelo v. New London* (*Kelo*) that the Constitution does not prohibit eminent domain takings on behalf of private interests as long as there is an expected public benefit, such as employment, tax revenue or economic development (U.S. Supreme Court, 2005). While the decision was unsurprising to legal scholars, the response of the public was immediate, vigorous and negative. Polls showed that more than 80% of the public disagreed with the decision of the Court (Nadler & Diamond, 2008). Thirty-seven state legislatures responded to public concerns with bills to restrict eminent domain takings and define just compensation. In 23 states, legislatures passed the proposed reforms into law (Lopez, Jewell, & Campbell, 2009). Reform proposals were placed before voters in 12 states and voted into law in 10 states, all in less than four years after the *Kelo* decision.

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Fleck and Hanssen (2010) place the *Kelo* backlash in the latest of five historical cycles of expansion and contraction of eminent domain powers in the U.S. Cycles begin with the delegation and expansion of eminent domain powers and end in restrictive reforms that respond to perceived abuses. Over time, the benefits of expansive eminent domain powers decline and the costs rise, leading to a backlash of reform and eminent domain restrictions. The mystery is the source of the backlash. In contrast to the legal histories of other countries, the U.S. seems unique in these cyclical periods of eminent domain abuse, backlash, reform and restriction (Lamoreaux, 2011).

Lamoreaux believes that widespread property ownership in the U.S. solves the mystery. Widespread ownership is a political barrier to eminent domain excesses. Given an initial technological or social change, expansive eminent domain powers result in benefits to the general public and the typically property owner. As these expanded powers are exercised over time, their benefits diminish and their costs rise. Generalized benefits eventually become generalized costs. Property owners and their representatives take political action to restrict eminent domain once it becomes a general threat rather than a general benefit. Governments respond with reforms and restrictions (Lamoreaux, 2011).

The backlash by property owners makes U.S. property rights flexible to technological and economic change, but also dynamically stable. Indeed, research indicates that government decisions are especially sensitive to the political pressure of homeowners (Fischel, 2005). U.S. property rights can adapt to broadly beneficial social and technological changes while maintaining, over time, a high degree of security for property owners. Widespread property ownership resolves the U.S. “mystery of property rights” (Lamoreaux, 2011, p. 275).

Though a compelling hypothesis, empirical evidence for property ownership as a stabilizing influence is mixed and indirect. Kerekes (2011) examines the state-level factors that influence a type of eminent domain action that is sometimes seen as excessive – takings initiated by governments for purposes of transferring property from one private party to another private party. Kerekes calls these takings “for private benefit” (p. 202).<sup>1</sup> Kerekes finds that states with elected state supreme courts are correlated with less frequent takings for private benefit. This result may indicate that elected courts are more likely to defer to voter concerns and restrict takings when they stray outside the domain of actual public use. However, Kerekes also finds that takings for private benefit increase with the percentage of owner-occupied housing, a finding inconsistent with the idea that property owners offer greater resistance to excessive use of eminent domain compared to non-owners and renters. Whether the latter finding is actually a inconsistent is not entirely clear since it may be that the Kerekes’ 1998–2002 data may describe a midpoint in the eminent domain cycle where voters have not yet responded to eminent domain excesses with a political backlash.

Two studies examine legislative restrictions on eminent domain subsequent to the *Kelo* decision. Lopez et al. (2009) finds that enactment of eminent domain restrictions is positively correlated with newspaper coverage of takings, housing values and the number of local governments per capita. In terms of the ownership hypothesis, newspaper coverage may be correlated with voter awareness of takings and housing values may measure the economic size of an ownership interest. However, the evidence is indirect since the dependent variable is legislative activity, not voter behavior. Sharp and Haider-Markel (2008) find that legislative approval of eminent domain restrictions is positively correlated with the number of takings, the concurrent presence of a voter-initiated reform initiative and the dominance of a pro-property rights ideology in a state. Legislated restrictions are negatively correlated with the public redevelopment spending and legislative lobbying by pro-redevelopment local governments. Consistent with the backlash model, Sharp and Haider-Markel conclude that eminent domain reform is a reaction “to a history of. . . controversial eminent domain takings. . .” (2008, p. 569).

This analysis evaluates factors that motivate voter support for eminent domain reform. Economic models emphasize property ownership as a motivation for eminent domain restrictions (Fleck & Hanssen, 2010; Lamoreaux, 2011). Other research and court opinions suggest that ideology and vulnerability to takings motivate public support for eminent domain reform. The empirical analysis tests these hypotheses using data from state-level referenda that responded to the Supreme Court decision in *Kelo v. New London*. Property ownership, income, economic vulnerability and ideology

have significant impacts on the odds of voting in favor of reform. Ethnic and educational factors do not have significant effects on reform outcomes.

## 2. The *Kelo* decision and public response

The *Kelo* petitioners sought relief from an eminent domain taking by the city of New London, Connecticut. The city designed a redevelopment plan, purchased properties required for the project and initiated eminent domain proceedings to take properties from owners unwilling to sell voluntarily. The redevelopment plan was intended to create jobs, generate new tax revenue, and help revitalize the economic base. The nine *Kelo* petitioners believed that the proposed takings violated the public use clause in the Fifth Amendment of the Constitution. The petitioners noted that the properties subject to condemnation were not blighted and simply had the misfortune of a location within the redevelopment boundaries. A Connecticut Superior Court decided for the petitioners, but the Connecticut Supreme Court reversed the decision, holding that redevelopment plan was lawful and consistent with the public use clause (U.S. Supreme Court, 2005).

The petitioners’ brief to the U.S. Supreme Court argued that the planned takings were not for public use, but would simply transfer their properties to private developers. The petitioners noted that the city did not claim that condemnations would renew blighted areas, but only asserted that redevelopment would bring higher tax revenues and increased employment. The petitioners argued that the Connecticut courts had endorsed the takings not for public use, but simply to obtain “the ordinary benefits that derive from private enterprise. . .” (Mellor, Bullock, Berliner, & Sawyer, 2004, p. 26).

The Court ruled against the *Kelo* petitioners in a five to four split-decision. Justice Stevens wrote the majority opinion. His opinion recognized that takings for purely private purposes are inconsistent with public use clause of the Fifth Amendment. Stevens acknowledged that private property may not be taken from “A for the sole purpose of transferring it to another party B, even though A is paid just compensation” but asserted that *Kelo* was not such a case (U.S. Supreme Court, 2005, p. 474). Stevens’ said the takings proposed by the city satisfied the public use clause since the redevelopment plan “unquestionably serves a public purpose” (p. 481). The opinion cited prior Court decisions that defined public use broadly, as an intent to improve “the welfare of the States in question” (2005, p. 482). In *Berman*, the Court allowed a taking of a non-blighted commercial property to transform a “blighted area into a ‘well-balanced’ community” (U.S. Supreme Court, 1954, p. 14). In *Midkiff*, the Court asserted that transfers to private parties satisfied the public use requirement because the purpose was to eliminate the “social and economic evils of a land oligopoly” (U.S. Supreme Court, 1984, p. 229). Writing for the *Midkiff* majority, justice O’Connor concluded that “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause” (U.S. Supreme Court, 1984, pp. 230–231).

Justices O’Connor and Thomas submitted dissents to *Kelo*. O’Connor argued that the redevelopment benefits were incidental to the *Kelo* takings. O’Connor found that the public benefits of the *Kelo* takings were mere predictions of increases in tax revenue and employment. O’Connor’s dissent argued that such predictions of secondary benefits were insufficient to satisfy the public use clause. In O’Connor’s view, the *Kelo* majority essentially erased the idea of public use from the Fifth Amendment. O’Connor asserted that the decision raised the “specter of condemnation” over all private properties; there was nothing “to prevent the State from replacing. . . any home with a shopping mall, or any farm with a factory” (U.S. Supreme Court, 2005, pp. 504–505).

Thomas concurred with O’Connor and added his own dissent. Thomas noted that eminent domain proceedings were inherently

<sup>1</sup> Eminent domain takings for private benefit are distinct from private takings. Takings for private benefit are takings by governments for purposes of transferring title to a different private party (Kerekes, 2011). In contrast, private takings are eminent domain takings exercised by private party that has eminent domain powers delegated to it by a government authority. In private takings, a private party has the authority to initiate and take property from other private parties (Bell, 2009). The millpond, mining and railroad takings discussed by Fleck and Hanssen (2010) are examples of private takings.

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