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### IN DEFENSE OF EMINENT DOMAIN

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*Editor's Note: In The Uselessness of Public Use, 106 Colum. L. Rev. 1412 (2006), Professors Abraham Bell and Gideon Parchomovsky argue that criticisms of the Supreme Court's landmark eminent domain decision in Kelo v. City of New London are "ill-conceived and misguided." The authors claim that "eminent domain is the government power least pernicious to property owners because it is the only one that guarantees them compensation." In the essay below, Michael Cardozo, Corporation Counsel for the City of New York, responds to Bell & Parchomovsky's analysis.*

The authors' opening observation, unlike many of their factual assertions, is correct. There are days when it seems that everyone really *does* hate *Kelo*.<sup>1</sup> On those days, politicians, neighborhoods, editors, think tanks, and law professors vie to attack *Kelo*, and by extension eminent domain, with the most venom. But as the lawyer for a client that regularly needs to, and thoughtfully exercises, its eminent domain power—in order to undertake projects ranging from a vitally needed third water tunnel to affordable housing, to rebuilding an entire neighborhood like Times Square—I have a very different view of *Kelo*. New York and other cities are now struggling against a backlash that is all the more frustrating to public officials because it is a backlash against false perception and not actual practice. Like other municipal lawyers, I find that I often have to cut through layers of misunderstanding about eminent domain and *Kelo* before a real conversation can begin.

What we do not need is further distortion of the facts, which the authors unfortunately perpetrate. Instead, we need a careful and balanced study to learn how eminent domain is being used in this century, whether the projects that have resulted have been successful, and whether the affected property owners have been fairly compensated.

The current essay, which purports to defend the use of eminent domain, is an excellent example of the misunderstanding we need to

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1. Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 Colum. L. Rev. 1412, 1413 (2006).

dispel. Well-written, carefully-constructed, and provocative, it nonetheless describes a governmental decisionmaking process—allegedly often arbitrary and with little public input—that bears little relation to the actual use of eminent domain by actual municipalities, including New York City. The authors discuss the harms of eminent domain and other sovereign powers by which the government may seize or regulate private property. They propose a model of decisionmaking that they feel is predictive of when government attempts to take property by eminent domain or use other means, such as taxation (tax “seizures”) or regulation, and thereby avoid compensation. Because of the availability of these other means of affecting property interests, they argue that limiting the government’s eminent domain powers through a narrowing of acceptable “public uses” will simply result in more uncompensated takings and regulation.

Perhaps I should be happy that they are “defending” eminent domain, but their defense is based on so many flawed assumptions that I fear it does more harm than good. In support of their argument, the authors assert that they take an “instrumental” approach. Like much of the anti-*Kelo* rhetoric, the authors’ history and model are based on assumptions that no longer exist, if they ever did. Moreover, their use of outdated research and characterizations like “takings victims”<sup>2</sup> is hardly neutral. Similarly, very little of what I read and hear in the *Kelo* debate actually describes current practice. This problem begins with the dissents in *Kelo* itself. As the authors note, Justice Thomas marshaled examples of admittedly aggressive uses of eminent domain by government—in the 1940s-60s—including large-scale public works projects that had disproportionately disruptive impacts on African-American communities.<sup>3</sup>

Similarly, today’s proponents of federal legislation to severely curtail or simply abolish the states’ exercise of eminent domain point to government overreaching in the 1950s in connection with the construction of the Interstate highway system. In our city we hear about Robert Moses scheming, a half century ago, to run a highway under Washington Square, flatten what is now SoHo, and “rationalize” Brooklyn Heights.

Indeed, the entire *Kelo* debate begins to feel like a meeting of Civil War reenactors who don their great-grandfathers’ woolen uniforms to join the battle again, as if time has disappeared. But unlike the citation of older cases in a brief, which may be appropriate for the very good reason that no subsequent cases have challenged their correctness, governmental actors and policymakers cannot afford to rely upon stale and outdated information.

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2. *Id.* at 1440 n.153.

3. *Kelo v. City of New London*, 545 U.S. 469, 521–522 (2005) (Thomas, J., dissenting).

The authors themselves draw inferences from relatively ancient and questionable data. They attack the fairness of compensation decisions and argue that owners of expensive property are better compensated than owners of inexpensive property.<sup>4</sup> Yet the foundation for this argument is a 1976 study, and the source data for this thirty-year-old study are property transactions in one part of Chicago between 1968 and 1972, long before most practicing lawyers had even entered law school.<sup>5</sup> Chicago in 1968 was a place of social and historic ferment and worthy of academic study, but I think it's safe to say that its eminent domain practices and real estate market bear little in common with Chicago, or any American city, in 2007.

Similarly, the authors accuse governments of using blight determinations as a weapon to decrease compensation, but they rely for their conclusions not on any current data, but on studies from 1972<sup>6</sup> and 1973.<sup>7</sup> Further, armed with information about decades-old practices, the authors take as a given the existence of “condemnation blight;” that is, that a government’s declaration that an area is blighted decreases property values, and that “[m]any sales are distress sales, where buyers are limited to those interested in short term uses only.”<sup>8</sup> Yet in New York City, the trend has been for property values in affected areas to increase, and certainly not to decrease. The authors’ entire argument ignores the leverage that a government’s interest in a neighborhood can give to owners in depressed neighborhoods, where owners know that condemnation proceedings consume the government’s time and resources, and that playing a waiting game usually results in a winning hand.

Relatedly, the authors suggest that governments make blight declarations in order to drive down compensation and even to “induce blight.”<sup>9</sup> “Blight” may be a loaded term, but New York’s requirement for blight before property can be condemned for economic development is a bulwark against government overreach rather than a government tool to drive down values. This necessity of demonstrating blight before condemnation can occur stands in sharp contrast to the relevant Connecticut statute in *Kelo*, which held that economic development, in and of itself, was a valid public use under the Constitution. A blight-less, *Kelo*-like taking for economic development purposes could not occur in New York without express—and rare—legislative authorization.

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4. Bell & Parchomovsky, *supra* note 1, at 1414

5. *Id.* at 1414, 1424 (citing Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. Pol. Econ. 473, 495 (1976)).

6. *Id.* at 1435–36 (citing Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 Notre Dame L. Rev. 765 (1973)).

7. *Id.* at 1438 (citing Jonathan M. Purver, *Annotation, What Constitutes “Blighted Area” Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096 § 3 (1972)).

8. *Id.* at 1435 (citing Kanner, *supra* note 6).

9. Bell & Parchomovsky, *supra* note 1, at 1438.

There are other flaws in the authors' approach. They repeatedly assert the equivalence of eminent domain, taxation, and regulation as tools by which government can modify or eliminate private property interests. But this assumes that the large-scale economic development projects are achievable by other means. How, for example, can the government tax a large blighted area—one characterized by crime, environmental contamination and economic stagnation—into a healthy, clean, and vibrant area? How can such an area be zoned into a better neighborhood? A municipality does not have the luxury of ignoring these practical issues.

The excesses cited by the authors that, in some instances, characterized the use of eminent domain are a relic of the past, at least in New York City. The City does not—and cannot afford to—purchase and level vast stretches of land for enormous, government-owned housing projects. The City does not run superhighways through parks or quiet neighborhoods. The federal government does not hand out enormous sums to New York City or other cities contingent upon their “urban renewal” or construction of concrete plazas.

What the City does do with its eminent domain power is build and improve infrastructure, create public spaces, and most crucial of all, create opportunities for affordable housing. For example, the City has used its eminent domain power to acquire property for the construction of a critically needed third water tunnel to supplement and, if necessary, replace the two seventy-five-year-old tunnels that bring water to the City's eight million inhabitants. Over the past thirty-five years the city has used eminent domain to acquire thirty-two miles of the sixty miles of land needed for the tunnel, as well as several shaft sites that could not be acquired by negotiated purchase.

In Brooklyn, in the late 1960s, the City identified the blighted and underutilized Metro Tech area as an appropriate site for urban renewal. The area had 123 small and irregular lots which impeded development; and despite the availability of vacant lots, no new construction had been undertaken in over 20 years. Metro Tech is now one of the most successful urban renewal sites in the City, with a seven-million-square-foot academic and office campus on sixteen acres, with new and renovated buildings containing retail, restaurants, and a large public plaza. Without the assistance of condemnation, such a project would not have been available.

Similarly, the Melrose Commons neighborhood in the South Bronx was devastated by decades of abandonment. While much of the area was owned by the City, key pockets were still privately owned. Working hand in hand with a local community group, the City used eminent domain to assemble viable building sites. Had the power of condemnation not existed, hold-out owners could have blocked all progress, and the entire area would have continued to remain in its blighted state. Developers

have neither the resources nor the patience to wait forever, and by exalting romantic notions of ownership over the needs of an entire community, nothing happens. When the Melrose project is completed, it is anticipated that the neighborhood will consist of over 3,000 units of housing.

The use of stale and questionable data in the anti-*Kelo* rhetoric illustrates that the current national dialogue about eminent domain suffers greatly because it is grounded so stubbornly in the past. The argument about past practices may be rhetorically rich and historically interesting, but it does not advance sound policy. In a recent report by a Task Force of the New York State Bar Association,<sup>10</sup> the reporters found that little state-specific research and data existed to accurately assess both the need for, and impact of, the proposed eminent domain reforms.

For this reason the Task Force has urged that the Legislature collect and analyze such data before modifying state law. Basic questions remain to be answered—not by thirty-year-old studies—but by fresh data on actual practices in New York and across the country. These questions include: How is eminent domain used in New York and other major cities? How often are condemnation proceedings instituted? How often does the use of eminent domain result in the loss of homes or businesses? Are current measures of compensating homeowners and businesses adequate? How often is eminent domain used for economic development, and how successful are such projects? The Task Force has formulated several more such questions that would elicit the type of information necessary to inform the ongoing dialogue.

As lawyers, we owe it to the public to compile and determine the most current and comprehensive data on eminent domain before enacting reforms that may have significant, unintended consequences.

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10. New York State Bar Association, Report of the New York State Bar Association Task Force on Eminent Domain (2007), available at [http://www.nysba.org/Content/ContentFolders/SubstantiveReports/ED\\_Task\\_Force\\_Final\\_Report\\_June07\\_2\\_.pdf](http://www.nysba.org/Content/ContentFolders/SubstantiveReports/ED_Task_Force_Final_Report_June07_2_.pdf).