

An Offer You Can't Refuse

WHY DO CONNECTICUT AND OTHER STATES USE EMINENT DOMAIN?

BY STEVEN P. LANZA

The U.S. Supreme Court's decision in *Kelo v. City of New London* did more than vault Connecticut onto the front pages of newspapers nationwide. It also affirmed earlier decisions recognizing governments' power to take property for economic development purposes. By the Court's own admission, however, nothing in the decision keeps states from restricting the use of eminent domain. And in the controversy surrounding the Court's decision, many have done or are doing so. As Connecticut now wrestles with its own legislative proposals to limit this power, it is worth examining the factors that influence governments' use of eminent domain and asking whether legal restrictions make any sense. My analysis suggests that efforts to curb governments' power to condemn property may well not produce their intended effect.

Under the power of eminent domain, governments at all levels can take or authorize the taking of private property for public use without consent, provided owners are compensated fairly. As Miceli and Sergerson argue (p. 4), the ability to condemn property helps governments solve the so-called "holdout" problem, where owners who know their properties are crucial to a project strategically refuse to sell in hopes of eventually pocketing prices far above fair market value. The crux of the *Kelo* case, however, was whether taking property from one private party and turning it over to another, on the promise of certain public benefits, constitutes valid "public use."

WHO TAKES WHAT?

Nine states formally permit property to be taken for development purposes either by constitutional precept or judicial precedent; Connecticut and several neighbors (New York, New Jersey, and Massachusetts) are among them. At the time of *Kelo*, six states expressly prohibited the exercise of eminent domain for development purposes, including Maine and New Hampshire, but in reaction to the decision Alabama and Texas have since joined this group.

Hard data on the prevalence of takings aren't easy to come by. But a recent report by the Castle Coalition, a group that supported the homeowners in the *Kelo* case, provides figures on the number of condemnations by state between 1998 and 2002 for the 23 states for which records are available. Florida topped the list with 14,319 condemnations; California was next with 5,583, followed by Illinois with 4,525. Connecticut, which placed ninth with 1,819, is the only state to distinguish takings for public purposes (70% of the total) from takings for private, redevelopment purposes (30% of the total).

A better measure of the incidence of eminent domain use would control for population, since larger states like California with more residents are bound to have more takings. Adjusting for population, states like California and Illinois move down the list, while smaller states like Connecticut and Arkansas move up. Florida remains number one with 9 takings per 10,000 people (1998-2002), while Arkansas climbs from tenth to second (6.3 takings per 10,000 people). Connecticut moves

My analysis suggests that efforts to curb governments' power to condemn property may well not produce their intended effect.

up to fifth, with 5.3 takings per 10,000—about twice the 23-state average of 2.6.

THE LIKELY SUSPECTS

What accounts for the variation in eminent domain use across states? The *status of the law* is one likely candidate. It is possible, for example, that at least some of Connecticut’s 543 “redevelopment” condemnations during 1998-2002 would not have gone ahead if the state’s constitution had not expressly permitted takings for economic development purposes.

And if a significant share of government takings is devoted to economic development, the number of condemnations might depend on the *health of the economy*. The direction of the likely effect is, however, ambiguous, since eminent domain could just as easily fuel an already-expanding economy as jumpstart one that is moribund.

The *financial fitness of government* and the *prices of area properties* are also possibilities. Invoking eminent domain could be a substitute for the free-market purchase of private property. And the market demand for property, like most other goods, will tend to vary positively with wealth or income and negatively with price. Thus, a government is apt to rely more on the market and less on takings if its fiscal health is better and property prices are lower.

Takings, of course, are formal legal processes and consequently may depend on the *litigiousness of society*.

On the one hand, litigation raises the expected cost of a condemnation and hence should discourage the use of eminent domain. On the other hand, a state with a predisposition for litigation may be more inclined to use legal rather than market processes to resolve disputes.

Finally, to the extent eminent domain helps solve the “holdout” problem, the incidence of takings should depend on *population density*. As an area becomes more densely settled and ownership patterns more fractured, bargaining is likely to grow more complex. If takings reduce transaction costs, they ought to vary positively with population density.

WHAT MATTERS MOST?

Using least-squares, multivariate regression techniques, I tested the relationship between measures of each of the above factors and the number of government takings per capita by state for the 1998-2002 period. The results appear in the table on the next page; asterisks denote statistically significant coefficients.

As expected, the incidence of takings depends on wealth and income factors. Wealthier states are likely to have higher levels of state and local spending per capita. And according to my model, a one-percent increase in per capita spending leads to a 4.3 percent decrease in government takings, as the greater fiscal resources allow governments to pursue market purchases of property more easily.

Federal grants, some of which are earmarked for housing and urban development, are another source of public funding. In my model, the incidence of takings varies inversely with the level of such funding. A one-percent increase in federal urban development grants per housing unit is associated with a 5.3 percent decrease in the incidence of takings.

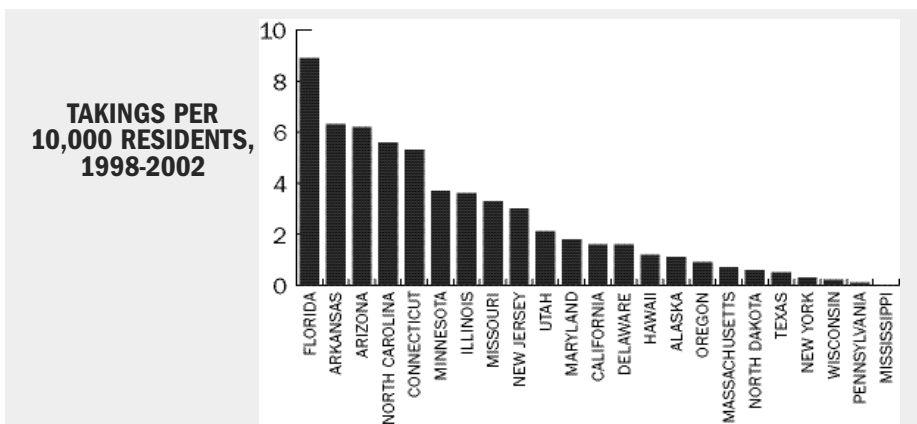
Takings depend on property values as well. A one-percent rise in home prices is accompanied by a 2.2 percent increase in takings, as higher prices encourage governments to turn to the non-market acquisition of property.

As expected, litigiousness seems to matter too. A one-percent increase in the number of legal workers per capita—somebody has to bring all those suits—is associated with a 3.4 percent rise in the incidence of takings. Presumably, a larger share of employment in the law reflects a local predisposition toward legal, rather than market, resolution of conflict.

Several factors that were expected to influence governments’ use of eminent domain appear to have no effect. The coefficients on the variables for the status of takings law, economic performance, and population density are all statistically insignificant (denoted by the absence of an asterisk).

Particularly noteworthy is the lack of a significant relationship between the incidence of takings and the status of takings law. The frequency of eminent domain use doesn’t seem to depend on whether the law expressly permits the condemnation of property for development purposes. Why might that be?

One possibility is that governments can use other grounds to take property. It is common, for example, for governments to justify condemning property to eliminate “blight,” and then allow new private development to take its place. As is often the case, constraining behavior along one margin of



activity simply shifts it to another, less regulated margin.

WHAT IT MEANS

Combined, the seven variables in my model account for about 44% of the total variation in the data. (Dropping the insignificant variables boosts the explanatory power to about 48%.) That means that this simple model explains nearly half the variation in the number of takings per capita across the 23 states for which we have data.

Applying the model's coefficients predicts that Connecticut would have about 3.0 takings per 10,000 residents, compared with the actual value of 5.3. For most states in the sample, the predicted value is within 1.0 taking of the actual value. Despite the relatively large error for Connecticut, the model still predicts that the Nutmeg State would place near the top of the list in takings per capita—8th of 23, compared with our actual 5th place position.

Why does Connecticut rank so high? Connecticut is about average in its level of housing and urban development grant money, about \$270 per housing unit, so that does not play much of a role. And Connecticut's state and local public spending per capita is actually 10% above the average, \$6,289 versus \$5,730, which by itself would imply that condemnations should be *below* average by about one-half a taking per 10,000 residents.

But the Nutmeg State has property values and a concentration of legal personnel that exceed the averages of the other states in the sample by 25 percent. Connecticut's higher property values—median home prices here were \$166,900 versus \$133,200 in the other states, according to the 2000 Census—translate into more than 1 additional taking per 10,000 residents. And our relatively large number of legal workers—4.4 per 1,000 residents versus 3.5 in the other states, according to Bureau of Labor Statistics data for

2000—adds another 2 takings to our predicted number.

That my model underpredicts the incidence of government takings in Connecticut likely traces to unique characteristics of the state that can't be captured easily in a one-size-fits-all model. Consider just one possibility. Two colleagues at the University of Connecticut, Thomas Miceli and C.F. Sirmans, have suggested that eminent domain may be an effective weapon of "last resort" against sprawl, because it encourages redevelopment of existing urban space rather than new development at the metropolitan fringe. (<http://ideas.repec.org/p/uct/uconnp/2004-38.html>.) And Connecticut holds the dubious distinction of ranking first in sprawl among the 50 states (see page 3) as measured by the ratio of non-urban to urban population density. (For related data on the degree of development, see our centerfold.)

There is no evidence of a systematic use of eminent domain by states to combat sprawl: in one formulation of my model not discussed above, the sprawl variable was statistically insignificant in explaining takings. But that doesn't mean it's not used

aggressively in Connecticut for that purpose, which could account for the higher incidence of takings here.

The *Kelo* decision has generated a storm of controversy, and created some strange bedfellows along the way. Neither side in the debate argues in favor of eminent domain abuse, but the decision does raise legitimate questions over the proper limits on government's power to condemn property.

My analysis suggests, however, that the current effort to rein in the exercise of eminent domain will likely disappoint its proponents. States that expressly permit the use of eminent domain for development purposes have no higher incidence of takings than those that do not. And those factors that seem to influence the use of eminent domain are not amenable to simple policy responses.

Perhaps the most effective constraints will be found not in legislative initiatives, but in a careful, case-by-case application of the principles of "public use" and "just compensation" that underlie government's power to invoke eminent domain.

FACTORS THAT MAY INFLUENCE GOVERNMENTS' USE OF EMINENT DOMAIN

Variable	Elasticity	Description
State and Local Spending Capita	-4.3*	A one-percent increase in state and local spending per capita reduces government takings by 4.3 percent
Federal Urban Development Grants per Housing Unit	-5.3*	A one-percent increase in federal urban development grants per housing unit reduces government takings by 5.3 percent
Median Home Price	2.2*	A one-percent increase in median home prices increases government takings by 2.2 percent
Legal Workers per Capita	3.4*	A one-percent increase in legal personnel per capita increases government takings by 3.4 percent
Eminent Domain Law	0.5	Not statistically significant at the 10% level or better
Economic Performance	-4.0	Not statistically significant at the 10% level or better
Population Density	-0.3	Not statistically significant at the 10% level or better