



Written by [Bob Adelman](#) on April 22, 2010

## Eminent Domain and the Kelo Echo

"This is abuse.... It's [another] case of eminent domain abuse," said Renee Smith-Ward, owner of Wag'In Tail, a dog-grooming salon in Auburn, New York. As reported by Fox News, the city is threatening to use "eminent domain" to seize her salon and other private property nearby to allow a builder to construct a hotel conference center.

Smith-Ward said, "I don't believe it's right to take someone's property away from them for a hotel, for a private developer." She said she thought eminent domain was "for power lines, roads, schools, hospitals [but] not for a private developer." Another property owner, Michael Kazanivsky agreed: "These people just want to come in and steal it from you. They're trying to take it from me. It's not right."



Jim Dacy, who heads up the Auburn Industrial Development Agency, wants to allow a private developer to put up an \$11 million, 88-room hotel that would anchor an annual music festival. Dacy said, "I don't think anybody wants to use eminent domain [unless] there [is] a good reason, and in this case there is."

This sounds like *Kelo v. City of New London* all over again. In that Supreme Court case, reviewed on this website [here](#) and [here](#), the New London Development Corporation was allowed to remove private residences for a large commercial development planned by Pfizer because, according to the Supreme Court, the "economic development" envisioned by Pfizer was in the "public interest." Ironically, when Pfizer merged with Wyeth, plans for that development changed, and the land once owned by Suzette Kelo and other private homeowners in New London remains vacant.

Christina Walsh of the Institute for Justice, which helped Suzette Kelo bring her case to the Supreme Court in 2005, said, "In the wake of *Kelo*, we have learned about this abuse of power. There is nothing that Americans cherish more than property rights. We cannot allow local governments like Auburn to think they can take what you've worked so hard to own — your family, home, your small business — simply to give it to someone else who promises to build something bigger and newer." Kazanivsky declared: "I don't want to sell. It's mine, I bought it. I'm going to fight this all the way to the end."

And likely with the same result as *Kelo*.

The relevant part of the Fifth Amendment to the United States Constitution says: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In the *Kelo* case, Justice John Paul Stevens, writing for the majority, found that the donation by the City



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of New London of the property taken from private citizens of that city to the New London Development Corporation for development by Pfizer to be a "public use." He went on to say that the Fifth Amendment clause gave "broad latitude" to determine exactly what uses might be "public."

This amendment, adopted as part of the Constitution in 1791, was derived from the moral basis of property ownership. John Locke [defined](#) property ownership as "lives, liberties, and estates.... Every man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands ... are properly his." When Thomas Jefferson wrote in his plea to King George for "the restoration of that tranquility for which all must wish," he also wrote that that restoration must not include the requirements [by the King] "that our properties within our own territories ... be taxed or regulated by any power on earth but our own."

Dr. Paul Craig Roberts of the Independent Institute [called](#) the *Kelo* decision a "calamity." He said it "has greatly diminished the protection of private property. Prior to [that] decision there were fewer demands for takings and fewer opportunities for government to use eminent domain powers. The distinction between public and private use of eminent domain [deliberately designed into the Fifth Amendment] restricted its use against private property. The *Kelo* decision removed this restriction." Roberts went on to say:

The *Kelo* decision created fundamentally new inroads into private property. Prior to *Kelo*, zoning authorities could restrict what could be built in specific locations, but they had no power to assemble or disassemble land parcels. Thus has *Kelo* greatly enhanced the reach of government planning.

The *Kelo* decision also further corrupts government by creating another avenue of payoffs to public officials in exchange for their power to alter property ownership in behalf of private interests....

*Kelo* expands the definition of public use. Condemnation for "public use" is now justified by higher projected tax revenues.

Ron Paul (R-Texas) also commented on the *Kelo* case: "The notion that the judicial branch of government serves as a watchdog to curb legislative and executive abuses has [now] been entirely exposed as an illusion. Judges not only fail to defend our freedoms, they actively infringe upon them by acting as de facto legislators. Thus *Kelo* serves as a stark reminder that we cannot rely on judges to protect our freedoms." In fact, Paul claims that the court should have refused to hear the case in the first place on the grounds that the Fifth Amendment "does not apply to the states.... The [real] issue in the *Kelo* case is the legality of the eminent domain action under [state] law, not federal law."

Libertarian Lew Rockwell [said](#),

If we are to have a serious debate about eminent domain, we need to get beyond this ridiculous distinction between public and private use. Government is a racket that rewards itself through plunder and always in the name of public purpose. The truth is that there is no coherent way to separate public and private purpose when it comes to government. Its roads benefit private contractors and serve private interests. It's true they are "free," but so are the streets in shopping malls, which are private. As for public schools, the teachers' unions and hordes of bureaucrats are private interests too. Indeed, there is no such thing as the "public," there are only individuals.

Contrary to both the pro-*Kelo* and anti-*Kelo* people, the problem is not public or private use. It is eminent domain itself, which is the best example of how government is not the protector of private property but its main violator. No individual should be allowed to take property from



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others for any purposes. Government should not be judged by a moral code different from that which we use to judge individuals.

In his [review](#) of Judge Andrew Napolitano's book *Lies the Government Told You*, Jacob Huebert discusses the judge's position on eminent domain:

Take eminent domain. Even some libertarians decry "eminent-domain abuse" and complain about government taking property for purposes that aren't a "public use" as the Constitution supposedly requires — as though taking people's property by force for some purposes might be okay. Judge Napolitano will have none of that. He writes that the concept of private property inherently entails "the right to exclude [others] ... *even the right to exclude the government.*" So instead of wanting to curb the "abuses" or condoning eminent domain in some cases, Napolitano says *abolish eminent domain*. [Emphases in the original.]

Timothy Sandefur, writing for the Cato Institute, reminds his readers that while "redevelopment officials insist that they need to be free to seize property to fix bad neighborhoods.... This just isn't true. Major developments routinely succeed without [using] eminent domain: Disneyland was built without condemning property. Seattle [recently] redeveloped much of its downtown without eminent domain."

The real problem in the whole issue of eminent domain, which Kazanivsky is likely to discover if he in fact decides "to fight [it] all the way to the end," is two-fold: First, the Fifth Amendment was written to restrain the federal government from taking private property. To use that amendment as a hammer to bludgeon the state of New York into following that amendment abrogates further the sovereign distinctions between the states and the federal government. Second, it's the "taking" of private property that's the problem, not whether the taking is for "public use" or not. As Rockwell said it so well, "No individual should be allowed to take property from others *for any purposes*. (Emphasis added.)



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