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Limits of Eminent Domain as a Policy Tool

– Lessons from *Midkiff* and *Kelo* –

토지수용권의 정책적인 한계

– 미드키프와 켈로 판결을 중심으로 –

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임 현 수

Contents

토지수용권을 통한 사유재산의 수용은 비교적 진보성향을 띄는 주들을 포함하여 미국 전역에서 여전히 논쟁을 불러일으키는 주제이다. 국내법에도 토지수용의 개념이 존재하므로 미국법상 토지수용권이 어떻게 바뀌었는지가 국내학자들과 입법가들에게 흥미로울수 있을 것이다. 토지수용권의 한계에 대한 논의에 기여하기 위하여 본 글은 미국 토지수용권법의 역사에서 가장 중요한 두 대법원 판례(미드키프, 켈로)를 분석하고, 각 판례에서 다뤘던 토지수용이 해당 지역에 미친 현실적인 결과에 대해서도 다룬다. 이를 통해 본 연구는 토지수용이 다른 정책과 마찬가지로 의도하지 않은 결과와 실패를 낳을수도 있다는 점을 시사한다.

[주제어] 토지수용권, 수정헌법제5조, 공공 수용, 헌법, 미국연방대법원

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Ⅰ. Introduction

The inevitable interference with private property arising from the state's use of eminent domain has been a topic of great controversy in the United States. Beyond being the cause of multiple legal disputes, many of which are brought by individuals whose property was taken against their will, the debate on the limits of eminent domain has fueled ideological and political divides as well. While the eminent domain jurisprudence is specific to U.S. law and may not be readily applicable to other jurisdictions, the existence of essentially the same legal concept in Korea makes an analysis of the U.S. jurisprudence potentially meaningful. This article analyzes two of the most prominent eminent domain caselaw from the U.S. Supreme Court − *Hawaii Housing Authority v. Midkiff*[1] and *Kelo v. City of New London*[2] − in hopes of contributing to the discussion on the desirable restrictions on eminent domain in Korea.

At its core, eminent domain is a powerful tool to achieve a commendable purpose of the public good − it "has been used, for instance, to refurbish blighted areas, reconfigure skewed housing markets, and revitalize stagnant economies."[3] Nonetheless, takings under eminent domain are no exception to the possibility of unintended consequences or failure to realize the intended goals. Therefore, in addition to a legal discussion of the jurisprudence, this article provides also an overview of the factual circumstances that led to the state decisions to exercise eminent domain underlying each case, and

1) *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

2) *Kelo v. City of New London*, 545 U.S. 469 (2021).

3) Gregory Roberson, "Kelo v. City of New London: Its Ironic Impact on Takings Authority", *Urb. Law. vol.44 no.4*, American Bar Association, 2012. (internal citations omitted).

which changes materialized – or failed to – as a result of that exercise.

Ⅱ. Hawaii Housing Authority v. Midkiff (1984)

1. Historical background of Hawaii Land Ownership

The concept of private property did not exist in Hawai'i when the traders and missionaries from the west arrived in the late 1700s, who brought to the islands the concept of private ownership. Prior to that, Hawai'i maintained a feudal system:[4] the King was the sovereign owner of all land, the control of which the King delegated to each island's high chief (ali'i nui) for managing by subchiefs and tending by the commoners.

As fears grew of a foreign takeover of Hawai'i, Kamehameha III, the then-ruler of Hawai'i, initiated the "Great Māhele" (meaning "Great Division") with the hope that Hawaii would remain in the possession of Hawaiians when faced with attempts of foreign sovereignty. The Great Māhele essentially transformed the communal lands of Hawaii into private property for the first time. In a process that involved months of planning and discussions between the King and the chiefs, the Great Māhele divided land in Hawaii into three types: land reserved for the King and the royal family (i.e., "Crown Lands"), land given to the chiefs (ali'i), and land dedicated to the commoners (maka'ainana).[5] Nonetheless, these holdings

4) *See, e.g.*, Penrose Clibborn Morris, "The Land System of Hawaii", *Am. Bar Assoc. J. Vol.21 No.10*, American Bar Association, 1935, p. 649. ("This feudal system, where the King was the supreme landlord, and all other holders of land were directly or indirectly his tenants, endured until constitutional rights were acquired by the Hawaiian people…").

5) See Jon J. Chinen, *The Great Mahele: Hawaii's Land Division of 1848*, University of

remained subject to the rights of native tenants who were already living in the lands,[6] which prompted the passage of the Kuleana Act in 1850 that awarded fee simple titles to tenants upon satisfaction of certain conditions (e.g., cultivation or caretaking of the land) in to avoid "continued commingling of landowner and tenant interests."[7]

Given centuries of communal ownership, Hawaiian residents did not readily embrace the idea of private land ownership. The commoners received "divided title to fewer than 30,000 acres, less than one percent of the [kingdom's] land."[8] Other reasons suggested by scholars include the lack of finances needed for an application requirement, fear of upsetting the chiefs, and the limitations posed by the Kuleana Act that the tenant must have "really cultivated" the land to be eligible.[9] As a result, "the great bulk of Hawaiian people was separated from the lands of Hawaii. Transferable title to almost two-thirds of Hawaii was concentrated in the hands of the king and the 245 recipients of mahele grants."[10]

2. The Land Reform Act

The concentration of Hawaiian land in the hands of a few continued to

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Hawaii Press, 1958, pp. 15-16.

6) *Ibid.* at 29.

7) Maivan Clech Lam, "The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land", *WASH. L. REV. Vol.64 No.2*, Students of the University of Washington School of Law, 1989, p.233, 236.

8) Neil Levy, "Native Hawaiian Land Rights", *CALIF. L. REV. Vol.63 No.4*, California Law Review, Inc., 1975, p. 848, 856. (citing 1 R. Kuyken-Dall, *THE HAWAIIAN KINGDOM 1778-1854*, University of Hawaii Press, 1938, p. 294.)

9) *Ibid.*

10) *Ibid.*

the 1960s, when the facts giving rise to the dispute in *Midkiff* occurred.

> As the U.S. Supreme Court observed in *Midkiff*,
>
> … while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners … The legislature concluded that concentrated landownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.[11]

In response, the Hawaii state government enacted the Land Reform Act in 1967, which enabled Hawaiian residents to purchase the interest to the land they were leasing – specifically, individuals who lived on single-family residential lots within developmental tracts of five acres or more could demand the Hawaii Housing Authority (HHA) to condemn the land on which they lived.[12] The HHA was then tasked with determining whether acquisition of the land would "effectuate the public purposes" of the Act.[13] Upon finding of such purpose, the HHA was to acquire the land at a price established either through agreement between the landlord and the lessees, or by a condemnation trial.[14] Subsequently, the HHA would sell fee simple ownership of the land to the tenants who initially applied for the condemnation, with state-funded loans of up to 90% of the price.[15] By focusing on home lessees, the purpose of the Act was largely to reduce the home prices by breaking up the large holdings of land.

11) *Midkiff*, 467 U.S. at 232 (1984).

12) Haw.Rev.Stat. §§ 516-1(2), (11), 516-22 (1977).

13) *Ibid.* at § 516-12.

14) *Ibid.* at § 516-25.

15) *Ibid.* at §§ 516-30, 516-34

The estate of Bernice Pauahi Bishop, a Kamehameha princess, was one of the landowners who held land subjected to the taking under this Act. The Bishop Estate, one of the largest landowners in Hawaii both at the time and at present, had divided its some part of its land to individual lots. As home prices and rent began to soar in Hawaii, there was increasing demand from the home renters on Bishop Estate’s land on the island of Oahu that led to the condemnation of the property. Instead of complying with a compulsory arbitration order from the HHA as part of the condemnation proceeding, 1979, the Bishop Estate filed suit in United States district Court.

3. The Supreme Court’s Decision

In sum, the issues presented to the Supreme Court were twofold: whether the federal District Court should have abstained from the exercise of jurisdiction in order to allow the state judiciary to rule on the dispute, and whether the Land Reform Act violated the “public use” requirement of the Fifth and Fourteenth Amendments of the U.S. Constitution. Since the first question was a procedural question arising from the U.S. system of federalism under which federal courts are required to abstain from certain decisions involving questions of state law, this article will not discuss it at length. Put simply, the Court concluded that the federal courts had jurisdiction because there was a federal question at the center of the case: whether the Act is constitutional.[16)]

The substantive question presented was whether the Land Reform Act violated the Fifth and Fourteenth Amendments, which protects private

16) *Midkiff*, 467 U.S. at 237.

property and allows it to be taken only "for public use" and with proper compensation.[17] On the Bishop Estate's side, the strongest argument was that the Land Reform Act transferred the property taken under eminent domain to *private* beneficiaries (i.e., individual lessees). In response, the Court distinguished between the presence of private *beneficiaries* versus a private *purpose*, holding that the former does not equal the lack of a public purpose. Condemned property did not need be "put into use for the general public" in order to meet the constitutional "public use" requirement.[18] The Court then described the legitimate public purpose of the Act as:

> The people of Hawaii have attempted … to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.[19]

In recognizing this policy goal as satisfying the "public use" requirement, the Supreme Court adopted a broad interpretation that was deferential to the state legislature, arguably allowing any public purpose as a legitimate ground for an eminent domain taking.

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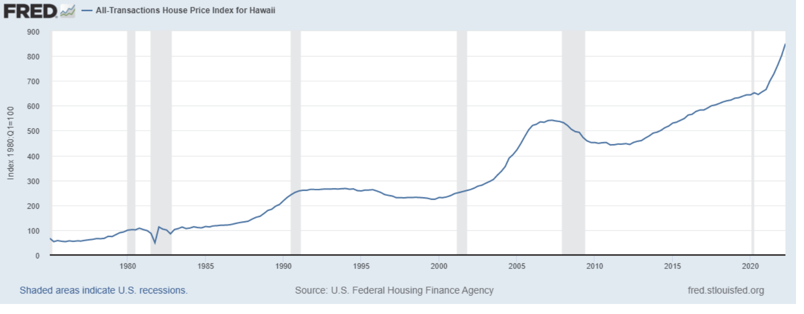
17) U.S. Const. amends. XI ("…nor shall private property be taken for public use, without just compensation."); XIV, § 1 ("…nor shall any state deprive any person of life, liberty, or property, without due process of law").

18) *Midkiff*, 467 U.S. at 244.

19) *Ibid.* at 241-242.

4. Effects of the Land Reform Act in Hawaii

While *Midkiff* was a complete victory for the Land Reform Act, the Supreme Court's acknowledgment that "this Act, like any other, may not be successful in achieving its intended goals" unfortunately proved to be true.[20] As one scholar has argued, "the land redistribution approved in Midkiff not only failed to lower or even stabilize housing prices on Oahu, but on the contrary, led to a dramatic escalation in values."[21] Indeed, U.S. Federal Housing Finance Agency data shows that the increase of housing prices in Hawaii accelerated further in the latter half of 1980s following the *Midkiff* decision, and continued only to grow throughout the 90s and 2000s, with only slight dips in the latter half of the 1990s:



Federal Reserve Economic Data, All Transactions House Price Index for Hawaii, January 1975 – April 2022.

While the rise in housing prices was not limited to the urbanized islands, the Island of Oahu, where urbanization was and remains the highest, drove

20) *Ibid.* at 242.

21) Gideon Kanner, "Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment", *URB. LAW. Vol.38 No.2*, American Bar Association, 2006, p. 201.

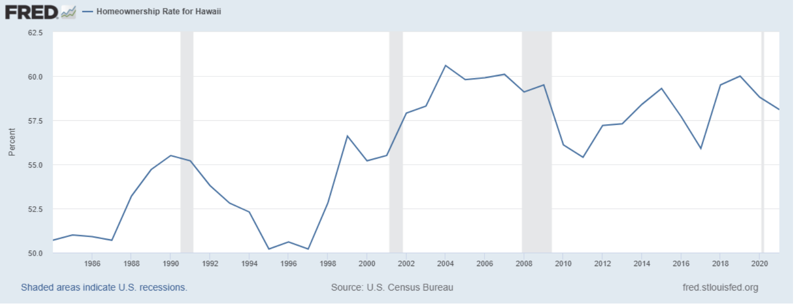
the marked growth of housing prices in the late 1980s immediately after the *Midkiff* decision:

MEDIAN & AVERAGE SALES PRICES

	Single Family				Condo			
Year	Median Sale Price	Percent Change	Average Sale Price	Percent Change	Median Sale Price	Percent Change	Average Sale Price	Percent Change
1985	$ 158,600	N/A	$ 205,400	N/A	$ 89,800	N/A	$ 105,900	N/A
1986	$ 171,200	7.9%	$ 211,100	2.8%	$ 94,000	4.7%	$ 108,100	2.1%
1987	$ 190,200	11.1%	$ 281,963	33.6%	$ 104,500	11.2%	$ 126,394	16.9%
1988	$ 210,000	10.4%	$ 312,300	10.8%	$ 114,000	9.1%	$ 140,377	11.1%
1989	$ 270,000	28.6%	$ 372,361	19.2%	$ 135,500	18.9%	$ 164,496	17.2%
1990	$ 352,000	30.4%	$ 498,511	33.9%	$ 187,000	38.0%	$ 225,901	37.3%
1991	$ 340,000	-3.4%	$ 432,338	-13.3%	$ 192,000	2.7%	$ 219,318	-2.9%
1992	$ 349,000	2.6%	$ 411,868	-4.7%	$ 193,000	0.5%	$ 211,649	-3.5%
1993	$ 358,500	2.7%	$ 436,898	6.1%	$ 193,000	0.0%	$ 210,573	-0.5%
1994	$ 360,000	0.4%	$ 423,371	-3.1%	$ 190,000	-1.6%	$ 210,762	0.1%
1995	$ 349,000	-3.1%	$ 429,613	1.5%	$ 182,000	-4.2%	$ 206,134	-2.2%
1996	$ 335,000	-4.0%	$ 409,441	-4.7%	$ 175,000	-3.8%	$ 202,494	-1.8%
1997	$ 307,000	-8.4%	$ 380,507	-7.1%	$ 150,000	-14.3%	$ 178,090	-12.1%
1998	$ 297,000	-3.3%	$ 370,021	-2.8%	$ 135,000	-10.0%	$ 160,978	-9.6%
1999	$ 290,000	-2.4%	$ 377,497	2.0%	$ 125,000	-7.4%	$ 157,418	-2.2%
2000	$ 295,000	1.7%	$ 406,331	7.6%	$ 125,000	0.0%	$ 165,674	5.2%
2001	$ 299,900	1.7%	$ 375,857	-7.5%	$ 133,000	6.4%	$ 168,013	1.4%
2002	$ 335,000	11.7%	$ 418,231	11.3%	$ 152,000	14.3%	$ 181,933	8.3%
2003	$ 380,000	13.4%	$ 479,377	14.6%	$ 175,000	15.1%	$ 205,165	12.8%
2004	$ 460,000	21.1%	$ 591,354	23.4%	$ 208,500	19.1%	$ 251,328	22.5%
2005	$ 590,000	28.3%	$ 744,174	25.8%	$ 269,000	29.0%	$ 320,003	27.3%
2006	$ 630,000	6.8%	$ 778,393	4.6%	$ 310,000	15.2%	$ 363,639	13.6%
2007	$ 643,500	2.1%	$ 794,183	2.0%	$ 325,000	4.8%	$ 381,263	4.8%
2008	$ 624,000	-3.0%	$ 792,520	-0.2%	$ 325,000	0.0%	$ 383,418	0.6%
2009	$ 575,000	-7.9%	$ 684,341	-13.7%	$ 302,000	-7.1%	$ 346,103	-9.7%
2010	$ 592,750	3.1%	$ 712,251	4.1%	$ 305,000	1.0%	$ 359,151	3.8%
2011	$ 575,000	-3.0%	$ 707,402	-0.7%	$ 300,000	-1.6%	$ 357,881	-0.4%
2012	$ 620,000	7.8%	$ 754,142	6.6%	$ 317,500	5.8%	$ 374,343	4.6%
2013	$ 650,000	4.8%	$ 804,933	6.7%	$ 332,000	4.6%	$ 393,396	5.1%
2014	$ 675,000	3.8%	$ 856,826	6.4%	$ 350,000	5.4%	$ 418,186	6.3%
2015	$ 700,000	3.7%	$ 875,373	2.2%	$ 360,000	2.9%	$ 415,533	-0.6%
2016	$ 735,000	5.0%	$ 891,332	1.8%	$ 390,000	8.3%	$ 447,512	7.7%
2017	$ 755,000	2.7%	$ 916,506	2.8%	$ 405,000	3.8%	$ 469,381	4.9%
2018	$ 790,000	4.6%	$ 991,420	8.2%	$ 420,000	3.7%	$ 497,974	6.1%
2019	$ 789,000	-0.1%	$ 953,772	-3.8%	$ 425,000	1.2%	$ 519,375	4.3%
2020	$ 830,000	5.2%	$1,014,167	6.3%	$ 435,000	2.4%	$ 502,965	-3.2%
2021	$ 990,000	19.3%	$1,250,113	23.3%	$ 475,000	9.2%	$ 558,067	11.0%

Honolulu Board of Realtors, Oahu Annual Residential Resales Data 2021, *available at* 〈https://www.hicentral.com/pdf/annsales.pdf.〉

On the other hand, the rate of home ownership in Hawaii went up as well. Percentage of home ownership made gains in the late 1980s, from 50.7% in 1984 to 55.5% in 1990. While that growth could not be sustained in the mid-1990s, home ownership rate generally has maintained those gains – notwithstanding some fluctuations – and averaged out at 58.1% in 2021:



Federal Reserve Economic Data, All Transactions House Price Index for Hawaii, January 1984 – January 2021.

Thus, the Land Reform Act and the Court's blessing of it may have contributed to battling "concentrated landownership" in Hawaii but could not address the "skewing [of] the State's residential fee simple market and inflat[ed] land prices." In the end, while the number of homeowners may have slightly grown, it remains unclear whether there were any substantive gains for "public tranquility and welfare" as the Court understood to be the purpose of the Land Reform Act. In other words, the small number of large private landowners in Hawaii was not the correct target to be blamed as the primary reason for the inflation of land prices.

Instead, the shortage of usable land for building residences, the restrictions imposed by unique land use regulations (involving a Land Use Commission which must review all zoning change requests) that elevate the barrier for new housing, and growing demand caused by population growth all contributed to the acceleration of housing prices in the islands. Moreover, the Land Reform Act did little to deal with the largest landowner in Hawaii: the state and federal governments, which together owned around 49% of land at the time of *Midkiff* and which continue to own around 44.6% and 15% of the total land in Hawaii as of 2017.[22] Such concentrated land ownership by the government further restricts the availability of land available for housing development. The state's failure to address these other intertwined and significant issues affecting home value resulted in the Land Reform Act's failure to control housing prices – an ill that continues to this day.

5. Legacy of *Midkiff*

Notwithstanding the Land Reform Act's failure to achieve its stated purpose of combatting inflation of housing prices in Hawaii, the *Midkiff* decision paved the way for other state and city governments around the country to employ the eminent domain to address a variety of issues in the local economy beyond housing prices.

Indeed, "[a] series of bitter battles throughout the country" arose in the two decades following *Midkiff*. Notably, while *Midkiff* involved the transfer of property to private lessees, many initiatives took the form of "local government's taking private residential property and then transferring that property to private developers and companies in an effort to boost local economies."[23] These cases were particularly common in states that struggled with unemployment, economic depression, and decreasing income. For instance, the Supreme Court of Minnesota held that a municipality was not acting in violation of the U.S. or state constitution when it condemned state

22) *See* Hawaii Department of Business, Economic Development and Tourism, "State of Hawaii Data Book 2017", June 7, 2017, available at <https://files.hawaii.gov/dbedt/economic/databook/2017-individual/06/060717.pdf>, last visited: 2022.11.6.

23) Sara B. Falls, "Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After Hawaii Housing Authority v. Midkiff", *WASHBURN L. J. Vol.44 No.2*, Washburn University School of Law, 2005, p. 355.

residents' private property for the construction of a paper mill, recognizing a "public use" where the condemnation served the purpose of alleviating unemployment and revitalizing the economy.[24] Similarly, the Kansas Supreme Court rejected a challenge that the development of an auto race track facility is not a valid public purpose justifying eminent domain, noting that "[a]s a type of tourism, race track facilities provide unique economic benefits to a state"[25] and thus "bears a rational relationship to the furtherance of the economic development of the state."[26]

The *Midkiff* deference to state lawmakers to define the public purpose, however, had not been accepted by all courts. For example, the Michigan Supreme Court halted the condemnation of private land for an airport technology park, holding that public use could not be found "simply because one entity's profit maximization contributed to the health of the general economy;"[27] the Court specifically noted that "alleviating unemployment and revitalizing the economic base of the community – has no support in the Court's eminent domain jurisprudence."[28] Likewise, a California lower court held that the condemnation of a store in order to accommodate another store's expansion could not serve a public purpose where the city's supposed public purpose was the prevention of "future blight" that could not be supported by the evidentiary record.[29]

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24) *Duluth v. State*, 390 N.W.2d 757 (Minn. 1986).

25) *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 543, 792 (Kan. 1998).

26) *Ibid.* at 791.

27) *County of Wayne v. Hathcock*, 471 Mich. 445, 481 (2004).

28) *Ibid.* at 482 (footnote omitted).

29) *99 Cents Only Store v. Lancaster Redevelopment Agency*, 237 F.Supp. 2d 1123, 1130 (C.D. Cal. 2001).

Ⅲ. Kelo v. City of New London (2005)

1. Background

The significant number of legal challenges to government takings under eminent domain eventually led the Supreme Court to again address the outer boundaries of the public domain in *Kelo v. City of New London*. In *Kelo*, as with many other municipalities that had employed eminent domain to rejuvenate their economy, the city of New London in southeast Connecticut was suffering from "[d]ecades of economic decline" that earned it an official designation as a "distressed municipality" by a state agency by 1990.[30] Part of the economic decline in the city could be attributed to the closure of a federal government office in 1996 which had previously provided employment for over 6% of the total population of the city.

In response, the New London Development Corporation (NLDC), a private nonprofit that assisted New London in economic planning, received finances and authorization from Connecticut to plan a development that included residential, hotel, research, and development space as well as a new state park. Shortly thereafter, Pfizer announced that it would build a multi-million-dollar research facility in the city, accelerating plans for the state park to become a center of leisure, recreation, as well as commercial activity. Once its plans were approved by the city council in 2000, the NLDC engaged in negotiations with landowners in the area designated for the park. These negotiations failed, and NLDC soon began condemnation proceedings – the petitioners were nine owners whose properties were subject to this condemnation.

30) *Kelo*, 545 U.S. at 473.

2. The Majority's Analysis

The question presented to the Supreme Court was whether New London's decision to take private property for the purpose of economic development serves a "public purpose," thereby satisfying the "public use" requirement of the Fifth Amendment. The petitioners argued that economic development should not qualify as a public purpose because it only provides purely economic benefits. In response, the majority found "no principled way of distinguishing economic development from the other public purposes that we have recognized,"[31] noting that the needs of communities in different parts of the country vary widely, reiterating the prudence of "longstanding policy of deference to legislative judgments in this field."[32]

Justice Kennedy sided with the majority but wrote a concurrence to express his concerns about the use of eminent domain as a means of transferring property from one private actor to another. Stressing the importance of the rational-basis test, Justice Kennedy argued that any taking intended to "favor a particular private party, with only incidental or pretextual public benefits," should be struck down as it fails the rational-basis review.[33] In the instant case, Justice Kennedy concluded that New London satisfied the public use requirement because the city's economic development plan sought to revitalize the local economy, not to serve the interests of any private party.[34]

Unlike the unanimous decision in *Midkiff*, *Kelo* was bitterly divided five to four. As Justice O'Connor wrote for the dissenting justices,

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31) *Ibid.* at 484.

32) *Ibid.* at 480.

33) *Ibid.* at 491.

34) *Ibid.* at 492.

> Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public— in the process.[35]

The dissent distinguished the taking in *Kelo* from that in *Midkiff* by noting that the condemnation in *Midkiff* "directly achieved a public benefit" by eliminating a harmful use of the property attributed to "oligopoly resulting from extreme wealth" − by contrast, Justice O'Connor described, the plaintiffs' homes were not the "source of any social harm."[36] The dissent criticized the majority opinion as unjustifiably expanding the meaning of public use from the original condemnation of harmful property. Yet, "harmful" use of property was never an expression used by the *Midkiff* decision; this distinction was therefore rooted less in the language of *Midkiff* and more in the minority's appalled reaction at the broadening of the definition of public use.

3. Practical Impact

Ironically, much of the condemned land was never developed, and the promised development never came into reality. Pfizer, which was planned to be located adjacent to the original project in New London, closed their facility as the major tax breaks that had motivated its entry into the city were ending.[37] Ten years after Kelo, the land on which the named plaintiff's

35) *Ibid.* at 494.

36) *Ibid.* at 500 (emphasis in original).

house used to stand reportedly remained a vacant lot.[38] The private developer which had originally acquired exclusive rights to develop a significant portion of the area allowed its rights to expire after multiple extensions due to inability to secure financing.[39] As of July 2022, a 104-unit residential development and extended stay hotel as well as a community recreation center were being planned for the area,[40] but it remains to be seen whether the projects will actually be completed.

While the years of legal battle over the proposed project in New London would have impacted the popularity and profitability of the project, the fact that the project crumbled despite the dedication of significant public funds and the state's commitment in the face of political backlash is a cautionary tale of the limits of eminent domain.

4. Legacy of *Kelo* on Eminent Domain

Kelo garnered much debate and controversy in politics as well as academia.[41]

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37) The New York Times, Patrick McGeehan, "Pfizer to Leave City That Won Land-Use Case", <https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>, last visited: 2022.11.6.

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41) The controversy also sparked much interest in the media. The story of Susette Kelo, the named plaintiff in *Kelo*, was captured in a book published in 2009 (Little Pink House:

That then-President George W. Bush issued an executive order restricting the use of eminent domain only "for the purpose of benefitting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken"[42)] is indicative of the public's interest in the matter. While the executive order had little practical effect given that eminent domain is rarely exercised by the federal government, the order represented the strong concerns, especially from the Republicans, regarding the protection of private property.

The public opposition against the Kelo decision and the fear of unrestrained state power for private property takings led to a flurry of new legislation across the country. According to the National Conference of State Legislatures, by the end of 2011, 23 states (including Florida and Texas) enacted prohibitions on using eminent domain for economic development, increase of tax revenue or employment, or the transfer of property to another private entity; 12 states (including the Delaware and Virginia) passed limitations to what constitutes "public use" by limiting it to the possession, occupation or enjoyment of property by the public; 12 states (including Pennsylvania and Wisconsin) redefined blight to emphasize public health, safety, and welfare, and restricted the use of eminent domain to "blighted properties"; 8 states (including Connecticut and Utah) passed stricter process requirements like public hearings and approval by elected bodies; and 5 states (including Connecticut and Kansas) required larger-than-fair-market-value compensation to those whose private property was taken.[43)]

A True Story of Defiance and Courage) and was adapted into a feature film (Little Pink House) in 2018.

42) President George W. Bush, Executive Order: Protecting the Property Rights of the American People, Executive Order 13406 (June 23, 2006).

43) Larry Morandi, National Conference of State Legislatures, "Eminent Domain Legislation:

Similarly, some state courts have diverged from the broad recognition for state discretion in Kelo. For instance, the Ohio Supreme Court rejected the City of Norwood's plans to use eminent domain to redevelop a neighborhood, finding that the neighborhood could not be considered blighted.[44] In striking down the City's plans, the Court held that the economic benefit anticipated from the redevelopment is insufficient to satisfy the public use requirement. Such response from the states led some commentators to remark, "[w]hile some saw Kelo as a departure from previous Supreme Court precedent and expected it to cause a wave of abuse, Kelo did just the opposite − states and courts reacted by banning economic development takings and tightening up other aspects of their eminent domain laws."[45]

However, some scholars have argued that these efforts are more symbolic than actually restrictive of eminent domain, as the majority of states have stopped short of banning condemnation for economic development.[46] In part due to the necessity of government-led development and the complexity of politicizing and rallying the public around such development projects, there seems to be less legislative development than anticipated from the public backlash against *Kelo*. Thus, one scholar has concluded, "the essence of

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Post-Kelo Update", Jan. 1. 2012, available at <https://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf>, last visited: 2022.11.6.

44) *See City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

45) Stephen F. Broadus, "Ten Years After: Kelo v. City of New London and the Not So Probable Consequences", *Miss. C.L. Rev. Vol.34 Iss.3*, University of California, 2015, p. 323, 347.

46) *See* Marc Mihaly & Turner Smith, "Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later", *ECOLOGY L.Q. Vol.38 No.3*, University of California, 2011, p. 703, 727. (citing Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo", *MINN. L. REV. Vol.93 No.6*, University of Minnesota Press, 2009, p. 2100, 2120).

the redevelopment power will survive and eventually thrive simply because it is necessary […] It is difficult to believe that the United States will deprive itself of the tools necessary to ensure the continued vitality of its own great cities."[47)]

Ⅳ. Conclusion

As with many policy decisions, the employment of eminent domain as a means of resolving housing or other development issues has not always realized the intended goals of such efforts. Despite the broad discretion given to local governments by the U.S. Supreme Court to determine the public use of a condemnation, exemplified by *Midkiff* and *Kelo*, the public reception of private property takings and its economic effects have not always been positive.

Thi article does not deny that eminent domain is a potentially useful tool that can be used to further the public interest, especially in regions that struggle with issues like housing supply, land use, and community rejuvenation. However, multiple concurrent strategies are necessary to resolve the target problem, including the consensus and support of the resident community, other legal reform that ensures that the primary beneficiaries of the taking are the people, rather than private developers or transferees, and a proper reading of the market realities to determine whether the takings would actually further the policy goal. Particularly in the exercise of eminent domain for economic development, there must be both market interest and capacity of the local economy to meet those demands.

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[Abstract]

Limits of Eminent Domain as a Policy Tool

- Lessons from *Midkiff* and *Kelo* -

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In the United States, the taking of private property under the doctrine of eminent domain has been controversial, even in progressive-leaning states. As the concept of eminent domain also exists in Korean law, the development of the eminent domain jurisprudence may be of interest to Korean scholars and lawmakers as well. To contribute to the discussion on the limits of eminent domain, this article analyzes the most significant U.S. jurisprudence on eminent domain (*Hawaii Housing Authority v. Midkiff* and *Kelo v. City of New London*) as well as the resulting effect on the communities affected by the takings at issue in those cases. In sum, this article finds that the exercise of eminent domain, like any policy, was not immune to unintended consequences and failures.

[Key Words] Eminent domain, Fifth Amendment, Public Use, Constitutional Law, U.S. Supreme Court

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