Ripe for Reform: Eminent Domain Law In Arkansas

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What You'll Find in This Report

PROBLEM 1: "Fair market value" isn't always fair.

- The current requirement of only "fair market value" for eminent domain takings does not account for the subjective value the property holds for the owner.
- Properties that have been in families for generations have sentimental value beyond market value.
- Certain businesses, like churches or schools, are highly dependent on the location and community in which they were founded.

SOLUTION: Consider adding a set premium on top of fair market value (say 20%).

PROBLEM 2: Private pipelines should not have the same privileges as public utilities.

- Arkansas grants eminent domain rights to all pipeline companies whether private companies or public utilities.

SOLUTION: Eminent domain should be limited to genuine "common carrier" pipelines.

PROBLEM 3: Blight condemnations reinforce blight.

- Overly broad and subjective definitions of "blight" could include almost any property.
- So neighborhoods that are borderline blighted have insecure property rights.
- Insecure property rights mean less likelihood of re-investment and repairs, which in turn actually reinforces blight.

SOLUTION: Blight condemnations cause more problems than they solve and should ideally be abolished entirely, if not severely curtailed.

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Introduction

Since the Supreme Court's controversial 2005 decision in *Kelo v. City of New London*,[1] which upheld takings that transfer property to private parties for supposed economic development, public attention has focused on the problem of eminent domain abuse far more than in the past. That is a positive development, as economic development and blight condemnations are not only constitutionally dubious, but also often destroy more development than they create and inflict great harm on the poor, racial minorities, and the politically weak.[2]

Because of the massive political reaction against *Kelo*, which cut across partisan, racial, and ideological divisions, numerous states have enacted reform laws seeking to curb abusive takings.[3] These laws vary widely in effectiveness, with some imposing significant constraints on eminent domain abuse and others only pretending to do so.[4]

Arkansas is one of only five states that failed to enact limitations on the range of purposes for which property can be condemned in the wake of Kelo. Though the state did eventually enact other types of eminent domain reforms, it still has plenty of room for improvement, particularly with respect to increasing compensation for property owners who lose their land to condemnation and limiting the use of eminent domain for blight condemnations and takings for pipelines.

Compensation

The federal Supreme Court requires only "fair market value" compensation for most takings: "'Just compensation'… means in most cases the fair market value of the property on the date it is appropriated."[5] Typically, fair market value is considered to be the amount the property would have sold for had it been put up for sale on the open market.

Many scholars from across the political spectrum have argued that fair market value

Thank you to Anthony McMullen, J.D., for his research help on Arkansas cases.

1 545 US 469 (2005).

2 For extensive discussion of these issues, see Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* (Chicago: University of Chicago Press, rev. pbk. ed. 2016), ch. 3.

3 For an overview of state post-Kelo reform, see ibid., ch. 5.

4 Ibid.

5 *Kirby Forest Indus. Inc. v. United States*, 467 US 1, 10 (1984) (quoting *United States v. 564.54 Acres of Land*, 441 US 506, 511–513 [1979]).

compensation is inadequate.[6] Among other problems, it fails to take account of the "subjective value" that many owners attach to their property over and above its market value. For example, people who have lived in the same home for a long time often place a high value on their ties to the neighborhood. Small-business owners' good will and relationships with customers are often tied to a particular location and may be lost if they are forced to move. Institutions such as schools or houses of worship may also have high subjective value.

Some states have reformed their eminent domain laws to increase compensation above fair market value. For example, in 2012, the Commonwealth of Virginia enacted an amendment to its state constitution that provides compensation for "lost profits and lost access, and damages to the residue caused by the taking."[7]

The state of Arkansas, however, provides only fair-market-value compensation in most cases.[8] It thus likely ends up undercompensating property owners in many situations where there is high "subjective value": the value that owners attach to property over and above its market price. For example, the fair market value of a house is the price it would bring if sold on the open market. But that price probably does not account for the sentimental value a family may attach to the house if they have lived there for a long time, the value of their ties to the neighborhood, and other such factors.

Calculating subjective value is often very difficult or even impossible. For that reason, among others, the problem of eminent domain abuse cannot be overcome by increasing compensation alone.[9] But Arkansas could potentially take several steps to partially mitigate the problem of undercompensation.

The simplest approach would be to add a set premium, perhaps 20 percent, to the fair market value of condemned property.[10] This would help compensate for subjective value, though it might overcompensate in some cases and undercompensate in others. An alternative approach would have varying premiums based on the nature of the condemned property, with a view to giving the highest compensation in cases where subjective value is likely to be unusually high.[11] For example, there could be extra compensation for homeowners (particularly those who have lived in the same home for a long time), houses of worship, and small businesses.

Such categories are highly imperfect measures of subjective value.[12] But they are preferable to the widespread undercompensation that inevitably occurs under the pure fair-market-value formula. Potentially, the state could give some premium to all victims of condemnation but increase it for owners of property considered likely to have unusually high subjective value.

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6 See, e.g., Yun-Chien Chang, *Private Property and Takings Compensation: Theoretical Framework and Empirical Analysis,* (Northampton, UK: Edward Elgar, 2013), 167–72; Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," *Columbia Law Review* 88 (1988): 1667, 1689–96; Gideon Parchomovsky and Peter Siegelman, "Selling Mayberry: Communities and Individuals in Law and Economics," *California Law Review* 92 (2004): 75, 139–42; Aaron N. Green, "Takings, Just Compensation, and Efficient Use of Land, Urban, and Environmental Resources," *Urban Lawyer* 33 (2001): 517; Richard A. Epstein, "Property, Speech and the Politics of Distrust," *University of Chicago Law Review* 59 (1992): 41, 62n60, 62–63.

7 Virginia Constitution, Art. I, § 11.

8 See, e.g., *Arkansas State Highway Commission v. Frisby*, 951 S.W. 2d 305, 307–8 (Ark. 1997) (noting that "market value" is the relevant metric for compensation). A rare exception is the extra compensation offered in cases where cemeteries are condemned. See Ark. Code Ann. § 18-15-302. Current Arkansas law also entitles landowners to compensation for "costs, expenses, and reasonable attorney's fees" in cases where a court rules that the fair market value of condemned property is 20 percent or more beyond the condemning authority's initial assessment. Ark. Code Ann. § 18-15-103(11).

9 For a more detailed discussion of this issue, see Somin, *Grasping Hand*, 205–9.

10 See, e.g., Richard Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (New York: Oxford University Press, 2008), 91; Chang, *Private Property and Takings Compensation*.

11 Chang, *Private Property and Takings Compensation*, 168–70.

12 On some the difficulties with using homeownership as a proxy for subjective value, see Somin, *Grasping Hand*, 212–13.

Pipeline Takings

Like many states, Arkansas confers the power of eminent domain on firms operating pipelines.[13] However, statutory law does not make clear the extent to which eminent domain can be used to acquire land for purely private pipelines, which do not serve the general public but only selected private customers of the firm that operates them. The Arkansas Code states that "all pipeline companies operating in this state are given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service."[14]

This could be interpreted to mean that all pipelines are common carriers in the traditional sense that they have a legal duty to serve the entire public. But it could also mean they are designated common carriers without having any attached legal duties, perhaps to make it easier to pass muster under the state constitution. The Arkansas Supreme Court has interpreted this provision as mandating that "the pipeline companies are required by law to carry for all alike, and not at [their] option."[15] Thus, the state judiciary interprets common-carrier designation as a status with real legal bite, not merely a toothless label.

In the *Kelo* decision, the US Supreme Court ruled that the Fifth Amendment's requirement that a taking must be for a "public use" is satisfied so long as it creates some possible "public benefit," even if the new owner is a private firm with no legal obligation to serve the public as a whole.[16] That would legitimate virtually any taking that benefits a private business, including almost any pipeline operator. But critics of *Kelo* cite extensive evidence that the text and original meaning of the Fifth Amendment indicate that a public use exists only if the condemned property is used for a publicly owned project or a private one whose operator has a legal duty to serve the entire public, such as a public utility.[17]

Many pipelines are common carriers and therefore have a legal duty to serve the entire public. But those that are not are no different than any other private business. Those who believe that the *Kelo* takings are unconstitutional should, based on the same principles, oppose takings for purely private pipelines.

Over the last few years, an unusual coalition of left of center environmentalists and right-of-center property rights advocates have raised serious questions about abusive pipeline takings that may damage the environment and harm politically weak property owners for the benefit of influential business interests. This has resulted in new legislation restricting pipeline takings in Georgia and South Carolina.[18] State courts in Kentucky and Texas have recently invalidated takings for pipelines that do not qualify as common carriers.[19]

Condemnations for pipelines are sometimes more defensible than blight or economic-development takings because pipeline construction may encounter holdout problems that are

13 See under Ark. Code Ann. § 23-15-101.

14 Ibid.

15 Linder v. Arkansas Midstream Gas Corp., 362 S.W. 3d 896–97 (Ark. 2010).

16 Kelo, 545 US at 476–77.

17 For a review of the relevant evidence, See Somin, *Grasping Hand*, ch. 2.

18 For an overview of these developments, see Ilya Somin, "The Growing Battle over the Use of Eminent Domain to Take Property for Pipelines," Volokh Conspiracy, *Washington Post*, June 7, 2016, available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-growing-battle-over-the-use-of-eminent-domain-to-take-property-for-pipelines/?utm_term=.b6613a090548. See also Somin, *Grasping Hand,* xiii–xiv.

19 See *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain* 478 S.W.3d 386, 391–92 (Ky. Ct. App. 2015) (ruling that eminent domain cannot be used for a pipeline that does not qualify as a "public utility"); and *Texas Rice Land Partners v. Holland*, 457 S.W. 3d 115, 121–22 (Tex. App. Ct. 2015) (requiring firm to prove it was a "common carrier" before proceeding with taking).

unusually difficult to avoid.[20] But even if the use of eminent domain for pipelines should not be eliminated completely, it must be carefully restricted and monitored.

Arkansas legislators should pass laws making clear that eminent domain may only be used for pipelines that are genuine common carriers, and requiring those that seek to use eminent domain to provide proof of common-carrier status in advance. They could perhaps be required to present it to appropriate state regulatory agencies.

Arkansas should also consider adopting reforms similar to those enacted in Georgia and South Carolina in order to curb excessive use of eminent domain by influential business interests. Even pipelines that are constitutional may inflict more harm than their benefits justify.

Blight Condemnations

Arkansas's Community Redevelopment Financing Act allows condemnation of "blighted" property for transfer to private parties, under an extremely broad definition of what qualifies as "blighted":

> (A) "Blighted area" means an area in which the structures, buildings, or improvements, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for access, ventilation, light, air, sanitation, or open spaces, high density of population, and overcrowding or the existence of conditions which endanger life or property, are detrimental to the public health, safety, morals, or welfare.
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> (B) "Blighted area" includes any area which, by reason of the presence of a substantial number of substandard, slum, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax on special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a city, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use, or any area which is predominantly open and which because of lack of accessibility, obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community.[21]

This definition is very similar to broad definitions found in many other states that have been interpreted to authorize blight designation and subsequent condemnation of almost any property where additional development might be possible.[22] Almost any feature that impedes development in some way can be characterized as an "economic or social liability" or as detrimental to public welfare. More recent legislation, enacted a few months before the *Kelo* decision in 2005, slightly narrows the definition of what qualifies as blight:

> The local governing body shall not approve an ordinance creating a redevelopment district, unless the local governing body determines that the boundaries of the proposed redevelopment district are in a blighted area that includes

20 Cf. Somin, *Grasping Hand,* 95–96, which explains why facilities that must be built on a predetermined straight line for many miles might face unusually severe holdout problems.

21 Ark. Code Ann. § § 14–168–301(3). See also ibid. § 14-169-604(1) (similar definition). Local governments are authorized to use the power of eminent domain to carry our redevelopment projects for the purpose of eliminating "blight." Ibid., § 14-168-304(7)(A).

22 See discussion in Somin, *Grasping Hand,* 146–47.

the presence of at least one (1) of the following factors:

> (1) Property located in the proposed redevelopment district is in an advanced state of dilapidation or neglect or is so structurally deficient that improvements or major repairs are necessary to make the property functional;
>
> (2) Property located in the proposed redevelopment district has structures that have been vacant for more than three (3) years;
>
> (3) Property located in the proposed redevelopment district has structures that are functionally obsolete and cause the structures to be ill-suited for their original use; or
>
> (4) Vacant or unimproved parcels of property located in the redevelopment district are in an area that is predominantly developed and are substantially impairing or arresting the growth of the city or county due to obsolete platting, deterioration of structures, absence of structures, infrastructure, site improvements, or other factors hindering growth.[23]

This language, from Section 14-169-305 of the Arkansas Code, is a bit less sweeping than the broader language of Section 14-169-304, quoted above. But it still puts few meaningful constraints on blight takings. As a practical matter, few if any neighborhoods lack at least some "vacant or unimproved parcels of property," and such parcels can almost always be characterized as "impairing or arresting the growth" of the local economy because a variety of factors hinder growth.

Another provision of Arkansas law gives housing authorities the power to condemn property under an even broader definition of "blight":

> Areas, including slum areas, with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors are detrimental to the safety, health, morals, or welfare of the community.[24]

Almost any area can be described as having "faulty arrangement or design" or "deleterious land use" that is "detrimental to the welfare of the community."

Unlike the Connecticut law at issue in *Kelo*, Arkansas legislation apparently does not authorize takings that transfer property to private parties purely on the basis that doing so might promote economic development. In the aftermath of *Kelo*, the state attorney general issued an opinion clarifying this point.[25]

In 1967, the state supreme court ruled that economic development takings violate the state constitution.[26] However, the extremely broad leeway for blight condemnations in practice allows the use of eminent domain for what are essentially pure economic-development projects. There is little if any meaningful difference between a condemnation of an area that may have insufficient development and one where there are factors "arresting" or "hindering" growth.

Arkansas legislators can rectify this problem in one of two ways. First, they could follow the example of numerous other states and adopt reforms limiting the definition of blight to areas that are severely dilapidated or pose a direct threat to public health.[27] That would eliminate the danger of using blight condemnations to promote private economic-development projects, and would bring the definition of blight in line with what is intuitive to most nonexperts.

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23 Ibid., § 14-168-305.

24 Ibid. § 14-169-604(1). Housing authorities are given the power of eminent domain for purposes of taking blighted property in ibid., § 14-169-215(4), & 219.

25 See Ark. Op. Atty. Gen. No. 2005-150. The opinion was issued by then attorney general Mike Beebe and authored by future Arkansas Supreme Court justice Elena Wills.

26 *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967).

27 For a listing of those states and their laws, see Somin, *Grasping Hand,* 154–60.

A more comprehensive approach would be to follow the example of Florida and New Mexico by abolishing blight condemnations entirely, even in genuinely "blighted" areas.[28] No one can seriously claim that blight is somehow desirable. But the use of eminent domain in an attempt to eliminate it often causes more harm than good, and particularly tends to victimize the poor and racial minorities.[29] Eliminating blight can be pursued without destroying neighborhoods for the supposed purpose of saving them. Among other things, one key to the development of poor areas is the security of property rights, without which residents may be reluctant to form valuable community ties or invest and start businesses.[30]

Defenders of blight and economic development takings argue that they are needed to overcome "holdout" problems that might otherwise impede the assembly of land for valuable development projects. While the holdout argument is not completely without merit, it is greatly overblown. Actual condemnations rarely track genuine holdout problems, and where holdout problems do exist, private developers often have good ways to get around them without resorting to the use of eminent domain.[31]

Conclusion

Arkansas's present eminent domain laws have a number of notable shortcomings that leave property owners vulnerable to abusive takings. The state could improve the situation by adopting several improvements including increasing the compensation paid to owners of condemned property, constraining pipeline takings, and limiting or abolishing "blight" condemnations.

28 For a description of these laws, see ibid., 154–55.

29 For extensive discussion of the relevant history and evidence, see ibid., ch. 3.

30 Ibid.

31 For a detailed analysis, see ibid., 90–99.

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Somin's work has appeared in numerous scholarly journals, including the *Yale Law Journal, Stanford Law Review, Northwestern University Law Review, Georgetown Law Journal, Critical Review*, and others. Somin has also published articles in a variety of popular press outlets, including the *Wall Street Journal, Los Angeles Times*, the *New York Times* Room for Debate website, CNN, *USA Today, US News and World Report, Newark Star Ledger, South China Morning Post, Legal Times, National Law Journal* and *Reason*. In 2009, he testified on property rights issues at the United States Senate Judiciary Committee confirmation hearings for Supreme Court Justice Sonia Sotomayor. He writes regularly for the popular Volokh Conspiracy law and politics blog, affiliated with the *Washington Post*. From 2006 to 2013, he served as Co-Editor of the *Supreme Court Economic Review*, one of the country's top-rated law and economics journals.

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