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# The Evolution of Eminent Domain

## *A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?*

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**A**s López and Totah note, “The U. S. Supreme Court’s 5-4 decision in the property-rights case *Kelo v. City of New London* ignited more controversy than any issue decided during the court’s 2004–2005 term” (2007, 397). Virtually contemporaneously with that decision, I explained (Benson 2005) that although the “holdout problem” cited as the primary economic justification for eminent-domain powers may be a significant problem for government purchase of contiguous parcels of land, it is much less significant for private purchases for development, such as those involved in the *Kelo* situation, and government takings powers, including eminent domain, actually result in substantial government failure. Thus, even if market failure arising from the holdout problem does prevent some potentially desirable (efficient?) property transfers, it does not follow that eminent domain is justified. In the present article, I reinforce these points by demonstrating that even if holdout is a serious problem for government, it does not explain why eminent-domain powers actually developed. This market-failure argument is actually an ex post

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rationalization for eminent domain rather than an *ex ante* explanation or justification for government's possession of this power.<sup>1</sup> To see evidence for my claim, we need only consider the historical evolution of the government's power to confiscate property and the resulting demand that compensation be paid for such seizures.

The legal positivists maintain that eminent domain is "a peculiarly American branch of law" because of the takings clause of the Fifth Amendment, but the roots of this law go back, as does much of American law, to England (Stoebuck 1977, 4, 7–9).<sup>2</sup> Indeed, eminent domain reflects the feudal underpinnings of English property law (Paul 1988, 8–9). In the discussion here, I deal first with the historical development of and resistance to takings powers in England and with efforts to constrain it. I then turn to colonial America and the efforts to limit government powers to confiscate property in the U.S. Constitution.

### Condemnation and Compensation in England

In 1066, William the Conqueror seized virtually all the lands of England. Although he retained control of many large estates, he also granted fiefs of land to Norman vassals, some Anglo-Saxon supporters, and important officials in the church in exchange for various payments and services. The king retained absolute authority over the use and disposition of land, however, so landholders controlled land only as long as they performed the required duties and paid the required fees. The primary payments were "aids" (paid when the king's eldest son was knighted, his eldest daughter was married, or the king was captured and held for ransom) and "incidents" (paid supposedly by the vassal's heir, but frequently by the highest bidder when a vassal died and the king regranted the fief). The vassals or barons performed various administrative functions for the king, but the most important services were military. Each fief provided a quota of knights, castle guards, or sergeant's services. In sum, landholders were "stewards" for the king, rather than landholders free to determine how the land should be used or disposed of.

William Rufus, William the Conqueror's successor, "was greedy, hateful, revengeful, inconstant in purpose, unfaithful to all, impious and a despoiler of the church, and highly irregular in his private life. . . . His whole reign is characterized by the extortion of money from persons, private or corporate" (Lyon 1980, 120). Not surprisingly, William Rufus had to put down open revolt by a group of Norman barons in 1088. He prevailed with support obtained by promising major reforms,

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1. My argument here is very much in the spirit of and complementary to Holcombe's (1997) examination of the theory of public goods, which also is used to "explain" or justify many government powers. Holcombe "shows how it is in the best interest of those who run government to promote public goods theory" (2), and similar interests appear to explain the holdout justification for eminent domain.

2. England also has similar expropriation law, but the English tend to use the terms *compulsory acquisition*, *compulsory powers*, and *expropriation*, rather than *eminent domain*, and "[i]n England the whole subject is still a highly practical affair, attended by few of the abstractions with which we (in the United States) surround it" (Stoebuck 1977, 5).

including better justice. He kept none of his promises, however, and another group of barons revolted in 1095. William Rufus again prevailed, and various rebels were punished by “heavy fines, confiscations of lands, exile, beating, blinding, castration, and hanging” (120).

Henry I’s reign began in 1100. In his coronation charter, Henry promised to end his predecessor’s injustices and to establish a “government in accordance with the principles of justice and the established laws of England,” but he did not actually intend to fulfill all the charter promises, and he never did. “The charter only represented a bid for support” (Lyon 1980, 122). Another baronial revolt followed in 1101, but it was suppressed. The revolting barons were exiled, and their lands confiscated.

Successes in putting down rebellions by groups of powerful landholders (barons) tended to strengthen the feudal property-rights arrangement, with the king as the ultimate landowner and other landholders serving only as stewards. The kings were not all-powerful rulers, of course; the barons probably would not have revolted unless they thought they could win. Moreover, the kings also faced institutional constraints, one of which, the *Curia Regis*, deserves recognition here.

One of the services that vassals were obliged to render in exchange for privileges associated with being tenants-in-chief on large tracts of lands (along with other benefits) was attendance at court to consider and advise on matters of law, war, and justice. Such obligations were owed by the barons; by the archbishops, bishops, and abbots of the church (who, like the barons, received fiefs of land from the king); and by members of the royal household. This group, the *Curia Regis*, gathered regularly during the great festivals of Easter, Whitsuntide, and Christmas and when summoned by the king. The members served primarily as a sounding board, reflecting the opinions of the most powerful elements of Anglo-Norman society, and as a source of backing for the king in his relations with the pope and other foreign powers. The *Curia Regis* had some independence (for example, it could act as a court), but the king’s will generally dominated. The king and the barons often had complementary interests, of course, but on occasion the barons advised against the king’s wishes and induced him to concede.

The king needed the support of a substantial portion of the *Curia Regis* in order to maintain power, so he and his vassals depended on one another. When a king failed to recognize this dependence, he sometimes faced serious consequences. One of the most famous instances of this sort occurred in 1215, when powerful barons renounced their homage to King John and revolted. John built up his mercenary army, but he could not force the united barons to reduce their demands. They wanted a document specifying the laws and customs that would govern them. On June 15, 1215, John and the barons met at Runnymede, and John put his seal on a rough document called the Articles of the Barons. This document was revised, and on June 19 it was issued as *Magna Carta*, with both the king and the barons swearing to abide by its provisions.

Magna Carta's primary purpose was to curb royal prerogative in regard to the barons by specifying certain laws according to which a king should interact with the barons and others—concessions were made, for example, to the church and the merchants. The charter looked back to the days of Henry I and represented an effort to constrain the king in order to regain positions of power and privilege that kings subsequent to Henry I had attenuated.

Magna Carta was “[i]n form a donation, a grant of franchise freely made by the king, in reality a treaty extorted from him by the confederate estates of the realm, a treaty which threatens him with the loss of his land if he will not abide by its terms, it is also a long and miscellaneous code of law” (Pollock and Maitland 1959, 1:171). This event and the resulting document are relevant for the evolution of the rules that ultimately would be referred to as *eminent domain*. It demonstrated that the barons opposed the increased royal takings, many forms of which they considered illegal: John’s “greed for money made a mockery of feudal custom and of the king as a feudal lord” (Lyon 1980, 312). The king therefore was forced to agree, for instance, that no scutage (a tax in lieu of military service) would be levied without consent. More important, the king’s confiscation through law was limited. Chapter 29 of Magna Carta proclaims: “No Freeman shall be taken, or imprisoned, *or be disseized of his Freehold* . . . but by lawful Judgment of his Peers, or by the Law of the Land” (emphasis added; *disseized* means deprived of a freehold, as when a freeman was forcefully ousted from the land he possessed). This chapter did not require that compensation be given if a freeman was legally ousted from his freehold, but the barons were also concerned about compensation for takings. The king’s prerogative had been used to take provisions for his household or for defense (these takings were called “purveyances”). Chapter 28 of Magna Carta recognizes this power of expropriation, but it requires that immediate cash payment be made for the provisions taken. The barons did not prevent the seizure of property, however, in part because they, too, wanted the power to seize property. The aggressive king’s courts had made substantial inroads into areas of justice that had been under the jurisdiction of the barons’ feudal courts, thus reducing the barons’ sources of power and income. For example, the king had been confiscating the property of felons, but under Magna Carta the barons regained the feudal right to confiscate a felon’s land, and a felon’s chattel was to go to the lord holding the court.<sup>3</sup>

The struggle for power between the king and the barons (as well as the church and other groups that had become influential, such as the growing merchant class) continued for several more centuries, with some kings ignoring Magna Carta and others recognizing it under duress. The king’s powers were gradually reduced, and feudal relationships were broken down. Tenants were increasingly regarded as having ownership rights rather than mere possessory rights, and they expected to hold the land as long as they fulfilled their various feudal obligations. This trend distressed the

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3. The primary motivation for royal involvement in law enforcement was financial gain (Benson 1994).

kings, of course. Edward tried to stem it through a series of statutes. By doing so, he implanted a great deal of feudal custom into English land law, and as a direct consequence “modern Anglo-American law is more feudalistic than are other law systems” (Lyon 1980, 431).

Kings generally had to exchange rights and privileges for the support of powerful interests, and government institutions grew and changed form to facilitate such exchanges. Institutions evolved for determining the strength of interest groups and their demands—in effect, ascertaining how much had to be exchanged for needed support or how much could be taken because of a relative lack of power. The primary institution for this purpose was already in place, the Curia Regis. It was obviously an imperfect institution, however, given the frequency with which the barons resorted to military action (rebellion) to impress the king with their power. The Curia Regis nonetheless evolved and grew as new groups gained political powers and as kings sought nonviolent ways to exchange privileges and rights with these groups for their payments and support. Economic wealth was shifting from its feudal foundation in the control of land to the growing commercial sector and the owners of personal property. The merchants and the knights (also major landholders) controlled much of this wealth, so the king sought taxes from the boroughs and counties. Thus, he increasingly had to exchange domestic privileges for cooperation from these sources of taxes, and the great council was gradually expanded to become a “parliament” in which representatives of these new sources of political power could petition the king for special rights and privileges, generally in exchange for support and taxes.

By creating a representative institution, the king created a rival for power. Indeed, the relationship between the king and the Parliament involved both cooperation and conflict, with each side’s status changing as shifts in power occurred. Thus, rivalry and cooperation between the Parliament and the king shaped important parts of English legal history, and kings ultimately lost power to the parliamentary forces: “Parliaments are both bulwarks of legitimacy and hotbeds of rebellion” (Levi 1988, 64). Above all, however, the basic representative institution of English government formed to facilitate exchanges of privileges and wealth between relatively powerful groups. “Public-interest” justifications for the resulting “democratic” arrangements that now appear in the literature and rhetoric must be viewed as *ex post* rationalizations, rather than as *ex ante* explanations of their development. The power to seize property, for example, did not disappear as Parliament’s powers grew at the expense of the king’s. Rather, it shifted to Parliament. Indeed, Lord Edward Coke, chief justice of the King’s Bench and a leader in Parliament’s struggle for power with the king during the seventeenth century, would go so far as to declare in 1610 that the king could not take an estate in land, either with or without compensation, because that power belonged to Parliament alone.<sup>4</sup> This claim was obviously extravagant, of

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4. *Ilse of Ely*, 10 Coke, 141, 77 Eng. Rep. 1139 (1610), discussed in Stoebuck 1977, 8.

course, because the early Norman kings undeniably had the power to seize real property. Indeed, under feudal law, the king owned all land, so he could take it as he pleased, subject only to concerns about how the barons and prelates might react. Coke's declaration simply illustrated that Parliament had assumed that formerly royal power—that is, the land of the realm now belonged not to the king, but to Parliament, with landholders (many of whom were Parliamentarians, of course) acting as their stewards.

Parliament also assumed the prerogative of delegating the power to seize land. At least as early as 1427, a statute was enacted appointing commissioners of sewers in Lincoln County to maintain ditches, gutters, walls, bridges, and causeways used for draining lowlands. This act (and others like it) granted the commissioners the power to take land “where shall need of new to make” (Stat. 6 Hen. 6, c. 5 [1472], as qtd. in Stoebuck 1977, 8). This statute did not require compensation, but after the early 1500s Parliamentary authorization of land condemnation for purposes such as river improvements, roads, bridges, fortifications, and the large fen-drainage projects of the seventeenth and eighteenth centuries generally required compensation (Stoebuck 1977, 9). In fact, the common practice in England until relatively recently was to pay 10 percent more than the assessed value for condemned property (Epstein 1985, 184). Because only property owners had voting rights until well into the nineteenth century, the groups represented in Parliament were the powerful landed aristocracy, the landholding knights, and the merchants who owned homes and businesses in the towns. Thus, the projects approved and the requirement of compensation greater than the assessed value are not surprising.

But why allow seizures at all? Building roads and bridges generated the greatest benefits for those who had enough wealth to engage in trade, and draining lowlands benefited those who would then be able to put the resulting new land into production, so public subsidization of these kinds of projects was desired by Parliamentarians and their constituencies. Such projects also required access to the land of some of the individuals represented in Parliament, so the 10 percent bonus meant that they generally were compensated for their losses. As the voting franchise expanded to include many nonlandowners, the practice of awarding a bonus was discontinued. Indeed, England had no “constitutional” mandate of compensation, which was specified only in each statute authorizing a taking. Thus, Parliament maintained the prerogative not to compensate, although compensation gradually became established as a customary obligation.

## **Condemnation and Compensation in North America**

The practices of condemnation were transplanted into the British colonies in North America. Condemnation was used regularly to obtain highway rights-of-way, some of which were public. Many of the roads at that time were private, and condemnation by the government was sometimes used to obtain rights-of-way for them, too (Paul

1988, 73). Land was also condemned for other private purposes, such as the drainage of lowlands and the erection of private mills run by water power that required dams and flooding of land upriver from the mill. As Paul notes, “[t]he various mill acts enacted by the New England and several southern colonies are interesting because they afford an early example of the delegation of sovereign ‘taking’ authority to private businesses” (1988, 73). By the American Revolution, government’s power to take property was clearly well established, a remnant of feudalism in England. For the most part, it was customary for the government to pay compensation, a result of the long struggle to limit the English king’s power, so such payments were clearly expected. Compensation was not always paid, however. In at least some colonies, no payments were made if the land was unimproved—an acceptable practice given that land was so abundant that property owners could easily obtain replacements at very low costs.

The U.S. Constitution does not explicitly grant condemnation powers to the federal government. Such power is generally inferred today from clauses of Article 1, Section 8, that give Congress authority to establish post offices and post roads as well as authority over property obtained for forts, arsenals, and other similar facilities, and from the takings clause of the Fifth Amendment. This inference was not made, however, for almost a century.<sup>5</sup> Indeed, one of Alexander Hamilton’s arguments against including the Bill of Rights was that “it would contain various exceptions to powers which are not granted” ([1788] 1961, 513). Furthermore, the clauses in Article 1 appear to limit federal takings by requiring the “Consent of the Legislature of the State,” so Hamilton’s point appears to apply at least to federal eminent-domain powers.

Some of the Founding Fathers actually argued for an explicit recognition of private-property rights that the government could not take. Thomas Jefferson contended that all remnants of feudalism in regard to property should be eliminated. He pushed vigorously for allodial ownership, wherein landowners would hold absolute dominion over their property with no feudal obligations to the state. In other words, he contended that landholders should not be treated as stewards, with property ultimately controlled by the prerogative of the state (Paul 1988, 9). He believed that if the state was considered to be the ultimate owner of land, freedom would not be

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5. The clauses of Article 1 appear to limit federal takings by requiring the “consent of the legislature of the state” in which the property is located. This constraint raised the cost of federal seizures somewhat (the states faced no such constraint) and limited their use until the Supreme Court eliminated the constraint in *Kohl v. United States* (91 U.S. 367 [1875]), in which the federal government was determined to have the power to take property directly in its own name. Before this case (which arose because Congress authorized the secretary of the Treasury to acquire land in Cincinnati for a public building, and federal officials condemned the land directly rather than obtaining it through state condemnation or voluntary exchange), the federal government had condemned land only through the intermediary of the state government. Paul explains, however, that “Justice Strong deduced a federal power to condemn in its own name both from the very nature of sovereignty and, more concretely, from the Fifth Amendment’s taking clause. . . . The latter inference was, undoubtedly, inventive. The requirement that the government must pay compensation when it takes was construed to imply a power to take in the first place. This clause, as virtually all commentators agree, is a restriction on government’s powers, not a concession” (1988, 73).

secure because the state would be in a position to reduce men to poverty or even to serfdom. Others obviously had a different view, perhaps because the former colonies had already been actively confiscating property to benefit powerful business interests, and their leaders did not want to repudiate these actions. During the revolution, loyalists' property was seized, debts owed to British subjects by the tobacco-producing states were cancelled, and a number of other takings were made (Paul 1988, 74), so if the new government did not have similar powers, claims by the dispossessed owners of these assets might have legal standing.

James Madison, who wrote the Fifth Amendment, hoped to restrict the takings that had been made in the colonies under British rule and in the new states after the revolution because he wished to make individual property rights more secure, but he did not go as far as Jefferson would have liked, perhaps as a compromise to garner sufficient support for the Constitution. He chose instead to require compensation explicitly, and he used the term *public use* rather than *public purpose, interest, benefit*, or some other term in an effort to establish a narrower and more objective requirement than such alternative terms might require (Jones 2000, 290).<sup>6</sup> This restriction was regarded at the time as a strong constraint because the Framers did not recognize a nonpublic authority in government; “an express prohibition on ‘private’ taking would [therefore] have been superfluous” (Jones 2000, 289 n. 23). Although the voting franchise was limited originally to property owners, the Constitution’s framers were well aware that it might change, as the *Records of the Federal Convention of 1787* show: “In future times a great majority of people will not only be without land, but any other sort of, property. These [people may] combine under the influence of their common situation; in which case, the rights of property and the public liberty” will be insecure in the hands of their legislature (Farrand 1911, 203–4). Although the prediction has proved to be accurate, the constitutional constraint has proved to be insufficient to secure property rights or liberty (Benson 2005).

## Conclusions

The rhetoric of market failure used to justify government takings assumes that the starting point in the analysis is private-property rights, which underlie the models of perfect competition and general equilibrium against whose outcomes the market failures are contrasted. Then, given the potential for holdout problems that can prevent beneficial (efficient) transfers of property through voluntary agreements, it follows that private-property rights should be modified so that government can take property in certain limited circumstances: specifically, when the property taken is for “public use” and when “just compensation” is paid. The strength of these limitations

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6. The breakdown of the public-use requirement is discussed in Benson 2005, 2006; Benson and Brown 2007. Madison was probably influenced also by the writings of the seventeenth- and eighteenth-century philosophers (Paul 1988, 74).

has been substantially sapped by the U.S. Supreme Court (Benson 2005). My point in this article, however, is an entirely different one. The assumptions that underlie the market-failure rhetoric in support of eminent-domain powers actually have the story about the evolution of eminent domain backwards. The starting point was government ownership of property. English kings after the Norman conquest granted stewardship to individuals, but maintained the “right” (power) to take the property back. Over a long history of struggle to limit the government’s power, property rights gradually evolved in the direction of private-property rights protected by various constraints on government. Government in England and then in the United States never fully relinquished its power to confiscate property, but efforts continued to limit such power through revolts and contractual constraints, such as Magna Carta and the U.S. Constitution. The Constitution therefore included the Fifth Amendment’s requirements of just compensation and public use, which have since been undermined to a substantial degree (Benson 2005). The backlash against the *Kelo* decision that is playing out in state legislatures all over the country (López and Totah 2007) is another episode in a long series of reactions against government officials’ ever-present incentive to expand the scope and strength of the claim that the state is the actual property owner and that private landholders are only stewards for the state.

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