

Empire State Eminent Domain: Robin Hood in Reverse
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In 2005, the U.S. Supreme Court ruled that the town of New London, Conn., could use eminent domain to seize modest, well-maintained homes on desirable waterfront property for a private development project. Prior to the ruling, the Supreme Court had held that for such a taking to be a legitimate “public use,” the properties in question must have “veered to such an extreme that the public was suffering as a consequence.”¹

For the first time, the Supreme Court declared that any property may be condemned so long as officials can envision a better use for it. According to Justice Sandra Day O’Connor, “[T]he specter of condemnation hangs over all property.”² The court’s decision in *Kelo v. New London* sparked nationwide outrage and in the backlash some 43 states passed laws increasing protections for property owners.

Despite many high profile instances of eminent domain abuse, particularly in New York City, New York is not one of them.

To make matters worse, in November 2009, the New York Court Appeals, the state’s highest court, upheld the use of eminent domain to take homes and small businesses to make way for wealthy developer Bruce Ratner’s so-called “Atlantic Yards” development of 16 mammoth skyscrapers centered around a basketball arena. The ruling puts property owners across the state, particularly those in New York City, at risk and makes legislative reform an even more pressing priority.

And as we found in an analysis of the populations living in areas of New York City under threat of condemnation, eminent domain abuse disproportionately targets those who are less well-off and less educated, as well as ethnic and racial minorities—populations least able to fight back and thus most in need of protection from abuse. In New York, even more than elsewhere in the country, eminent domain abuse acts as Robin Hood in reverse, taking from the poor to give to the rich.

New York Law and Practice

Though the U.S. Supreme Court did not sanction private-to-private takings until 2005, seizing well-maintained properties has long been common practice in New York.³ To be sure, municipalities must initiate a complicated legal process that gives the appearance of checks and balances before seizing property. But the process is rigged in favor of the condemnor and safeguards for property owners have been rendered toothless.

For instance, only “blighted” property can be seized for private development in New York—but the legal definition of the term has little to do with public health and safety. Any neighborhood can be declared “in need of redevelopment” if officials claim it has “outmoded design,” the “lack of suitable off-street parking,” or the “danger of becoming a substandard or insanitary area.”⁴ In practice, municipalities have enough latitude that virtually any property fits the bill—courts rarely scrutinize blight designations. In the Atlantic Yards case, New York’s highest court approved the seizure of what dissenting Judge Robert Smith called a “normal and pleasant residential community.”⁵

At public hearings mandated by law, officials are not required to answer questions from property owners, provide them with relevant documents, or allow them to directly challenge the government's evidence.⁶ Once officials approve a "Determination and Findings," the document that triggers eminent domain, property owners must sue within 30 days if they wish to contest the findings. New York is one of only a few states that requires property owners to file a lawsuit *before* officials move to condemn.⁷

If property owners miss the 30-day window, they permanently lose the right to object to the blight finding or—importantly—to challenge an eventual condemnation.⁸ Until 2005, officials did not even need to inform property owners that their property was targeted for redevelopment—thus the 30-day window would expire before property owners even knew they had to act.⁹

When property owners do attempt to defend their property, the case usually heads directly to Appellate Court, where they have ten minutes to address a judge—but cannot call witnesses, introduce evidence or engage in discovery. Judicial review is limited to the transcript of the public hearing.¹⁰

Not Random

In *Kelo*, the Supreme Court had the opportunity to restore traditional safeguards to property owners. Instead, the court turned a blind eye to regimes like New York's, which afford citizens few practical options to protect their rights. Moreover, according to Justice O'Connor, "[T]he fallout from this decision will not be random...the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result." Citing the legacy of urban renewal, Justice Thomas declared "losses [from eminent domain] will fall disproportionately on poor communities."¹¹

In 2007, we tested that hypothesis. Using census data, we constructed a demographic profile of residents from 112 cities in 26 states, including New York, living in project areas where eminent domain had been used or threatened. As we reported in the journal *Urban Studies*, when compared to residents of communities surrounding the project areas, those living under the cloud of condemnation are significantly more likely to be poor, minority and have a lower education level.¹²

We recently completed a similar analysis of projects in New York City and Long Island to determine if the national trend holds for New York. To do so, we used 11 project areas for which we could find maps to ensure an accurate alignment between block groups in the census data and project area inhabitants. The 11 project areas are:

West Harlem-Manhattanville:

In 2002, Columbia University announced plans to expand its campus onto 17 acres in West Harlem, which will displace 400 residents and light industrial businesses employing more than 1,600 people.¹³ A study of the area revealed that the substandard property in the area is owned by Columbia. Nevertheless, the plan calls for using eminent domain to remove private property owners who were maintaining their properties.¹⁴ In December 2009—a week after the Court of Appeals ruled in the Atlantic Yards case—a lower court declared Columbia's blight designation was "mere sophistry" and handed property owners a rare win.¹⁵ The university plans to take the case to the Court of Appeals.¹⁶

Atlantic Yards:

In 2003, developer Forest City Ratner announced plans to build a basketball stadium and 16 office towers on 22 acres in Brooklyn. The project will displace some 330 residents, 33 businesses with 235 employees, and a homeless shelter.¹⁷ The plan was approved, despite competing offers from other developers that would not have relied on eminent domain and would not have required an estimated \$1 billion in public subsidies.¹⁸ The neighborhood, which consists of warehouses converted into condos, light industrial businesses and a still-operating Prohibition-era bar, has been declared blighted because it sits next to an unused rail yard owned by the state.¹⁹

East Harlem:

In 2006, city officials backed off Uptown New York, a \$1 billion private development project on three blocks in East Harlem that would have required eminent domain.²⁰ But the threat of eminent domain is still present. In 2008, the city selected developers to build another large mixed use project on the site, which sits within the Harlem-East Harlem Urban Renewal Area.²¹

The city created the urban renewal area in 1968 and now controls 81 percent of the properties in the project area. The 2008 blight study commissioned for the area meticulously categorizes all of the blighting factors—including numerous vacant and demolished lots—but does not mention that city owns the offending properties.²² Property owners have filed suit to save their properties.²³

There are five other urban renewal areas in East Harlem: Upper Park Avenue, Milbank Frawley Circle-East, East River, Metro North and Bella Vista.²⁴

Jamaica:

In September 2007, city council members approved the Jamaica Gateway Urban Renewal Plan, which called for using eminent domain to seize 42 private properties, including 19 residential units and 19 businesses. Passed as part of a plan to rezone 368 blocks of downtown Jamaica in Queens, the plan calls for new office, retail and residential space adjacent to the Jamaica Air-train station.²⁵ Though the project has been beset by financial difficulties, property owners cannot rest easy; the urban renewal designation—and threat of eminent domain—is active for 40 years.²⁶

Baldwin:

In September 2005, town officials commissioned a blight study on a six-acre project area containing at least 14 small businesses and 47 apartments.²⁷ Though the consultants found that only three buildings were in poor condition, officials adopted the report in March 2006, declaring the area blighted and putting the properties under a cloud of condemnation.²⁸ Officials selected a private developer in November 2007 to build new retail space and restaurants, but the project has been on hold since the developer dropped out.²⁹

New Cassel:

Officials have kept much of New Cassel under a cloud of condemnation for decades as part of the Prospect Avenue Corridor and Union Avenue Corridor urban

renewal plans.³⁰ In 2002, the town seized property from St. Luke’s Pentecostal Church, which had spent a decade raising funds to buy the site for a new church. Officials had slated the property for condemnation in 1994 and never mentioned that fact while St. Luke’s was going through the permitting process.³¹ Instead, officials selected private developer Stoneridge Homes, Inc., to build residential space.³² In May 2009, federal agents arrested for tax evasion a county legislator who had worked on the project. The legislator had received 81 checks totaling \$226,000 from Stoneridge Homes’ principal.³³ In 2003, officials created the New Cassel Urban Renewal Plan, which keeps the neighborhood under a cloud of condemnation.³⁴

“Perverse Results”

Our analysis of these project areas indicates Justices O’Connor and Thomas were correct. Eminent domain for private use is disproportionately trained on the poor and particularly on minorities in New York City and Long Island. Project areas where eminent domain is authorized have a greater percentage of minority residents (92 percent) compared to surrounding communities (57 percent). Median incomes in project areas are less (\$21,323.32) than surrounding areas (\$29,880.25). And residents of project areas are more likely to be impoverished (28 percent) than in surrounding communities (17 percent).

Table 1: Averages for Project Areas and Surrounding Communities

	Averages	
	Project Area	Community
Minority	92%	57%
Median Income	\$21,323.32	\$29,880.25
Poverty	28%	17%
Children	28%	23%
Senior Citizens	11%	12%
Less than High School Diploma	40%	24%
High School Diploma	24%	24%
Some College	19%	20%
Bachelor’s Degree	9%	18%
Master’s Degree	5%	9%
Professional Degree	2%	4%
Doctorate	0.5%	1%
Renters	87%	62%

Residents of project areas are less educated than their neighbors—40 percent do not have high school diplomas, compared to 24 percent outside of the project areas. Residents are also less likely to have earned a college or post-collegiate degree.

Residents of project areas are also far more likely to be renters (87 percent) than residents of surrounding areas (62 percent). We found little difference in percentages of senior citizens in the project areas and surrounding communities. Project areas were

more likely, however, to be home to children (28 percent) than surrounding communities (23 percent).

Taken together, the data reveal that eminent domain falls more heavily on minorities, the poor and less educated members of society—exactly as O’Connor and Thomas predicted. Of course, these results do not suggest that local authorities intentionally target these communities for removal (though historically this was the case).³⁵ Nonetheless, the data show that local governments wield condemnation against those least equipped to defend their homes and businesses.

The results for displaced property owners can be disastrous. In a seminal study, researchers found that “affective reaction to the loss of the West End [a massive urban renewal project in Boston] can be quite precisely described as a grief response showing most of the characteristics of grief and mourning for a lost person.”³⁶ Subsequent research has uncovered tremendous psychological³⁷ and economic³⁸ hardships to individuals following forcible removal from their communities.

The loss of social networks—strong attachments to friends, family, neighbors, churches and local small businesses—elicits negative emotional and health reactions. Research into powerlessness reveals distinct physiological, psychological and emotional implications for individuals who perceive a lack of control over their personal circumstances.³⁹ As Justice Thomas wrote, “[N]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.”⁴⁰

Attempts at Reform

While legislators have introduced many bills dealing with eminent domain for private development since *Kelo*, New York’s General Assembly has not made any serious attempt to protect home and business owners. In 2009, for instance, legislators introduced dozens of bills ranging from forbidding condemnation for private projects⁴¹ to superficial remedies like requiring another round of hearings, an additional vote on the project and the creation of a “comprehensive redevelopment plan” prior to condemnation.⁴² No fewer than six bills recommended the creation of a state commission on eminent domain to review the issue.⁴³ All the bills languished in committee.

In fact, since *Kelo* one of the only bills regarding eminent domain legislators have managed to pass was narrowly tailored to save a private Long Island golf course from condemnation—to be used as a semi-public golf course. After the bill passed overwhelmingly in June 2006, its sponsor even bragged that a layman reading the law would have no idea it what it referred to.⁴⁴ Another bill stopped the use of eminent domain for a large electric line project.⁴⁵

The Need for Reform

For now, the predictions of Justice Thomas and O’Connor remain unheeded in New York. But the Court of Appeals ruling should be a clarion call to state legislators that they cannot avoid the issue any longer. And the extreme deference the court granted even the flimsiest of blight designations, coupled with the Robin-Hood-in-reverse nature of eminent domain abuse, suggest that mere procedural reforms will not be enough. To

truly protect New York property owners, real reform must bring an end to eminent domain for private development.

¹ O'Connor, S.D. (2005). *Susette Kelo, et al., petitioners v. City of New London, Connecticut, et al.*; Justice O'Connor dissenting. Washington, DC: United States Supreme Court, pp. 12.

² O'Connor, S.D. (2005). *Susette Kelo, et al., petitioners v. City of New London, Connecticut, et al.*; Justice O'Connor dissenting. Washington, DC: United States Supreme Court, pp. 10.

³ Berliner, D. (2003). *Public Power, Private Gain*. Arlington, VA: Institute for Justice; Berliner, D. (2006). *Opening the Floodgates*. Arlington, VA: Institute for Justice; Stern, W. *The Truth about Times Square*. Arlington, VA: Institute for Justice; (2009). *Building Empires, Destroying Homes*. Arlington, VA: Institute for Justice.

⁴ N.Y. CLS Unconsol., ch.252, § 2; N.Y. Unconsol. § 6252; *see also Cannata v. City of New York*, 11 N.Y.2d 210,213 (1962); N.Y. CLS Gen. Mun. § 501, 505(4)(a).

⁵ *Goldstein v. New York State Urban Development Corp.*, 2009 N.Y. LEXIS 4090, *73, slip op. at 10 (Smith, J., dissenting) (N.Y. Nov. 24, 2009).

⁶ N.Y. CLS Gen. Mun. § 505.

⁷ N.Y. EDPL 207 ,208.

⁸ N.Y. EDPL 207, 208.

⁹ Reisman, P. (2009, June 18). Port Chester honors merchant who fought good fight and won. *Journal News*, p. 1B.

¹⁰ Declaration of Dr. Cleve B. Tyler, Exhibit 4 (November 25, 2007). On file; Last, J. (2008, December 8). Columbia University, Slumlord; A case study in abusing eminent domain law. *Weekly Standard*, 14(12).

¹¹ O'Connor, S.D. (2005). *Susette Kelo, et al., petitioners v. City of New London, Connecticut, et al.*; Justice O'Connor dissenting. Washington, DC: United States Supreme Court, pp. 12-13; Thomas, C. (2005). *Susette Kelo, et al., petitioners v. City of New London, Connecticut, et al.*; Justice Thomas dissenting. Washington, DC: United States Supreme Court, pp. 17-19.

¹² Carpenter, D. Ross, J. (2009). Testing O'Connor and Thomas: Does the use of eminent domain target poor and minority communities? *Urban Studies*, 46(11), 2447-2461.

¹³ Astor, M. (2009, September 4). Columbia maps future in Manhattanville despite lawsuit challenging eminent domain. *Columbia Daily Spectator*, at <http://www.columbiaspectator.com/2009/08/31/columbia-maps-future-manhattanville-despite-lawsuit-challenging-eminent-domain> (retrieved January 14, 2010);

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¹⁴ Last, J. (2008, December 8). Columbia University, Slumlord; A case study in abusing eminent domain law. *Weekly Standard*, 14(12).

¹⁵ Bagli, C.V. (2009, December 3). Court bars New York's takeover of Land for Columbia Campus. *New York Times*, p. A1.

¹⁶ *Kaur v. New York State Urban Dev. Corp.*, 2009 N.Y. App. Div. LEXIS 8799, at *17 (N.Y. App. Div. Dec. 3, 2009).

¹⁷ Berkey-Gerard, M. (2005, December 12). Eminent domain revisited. *Gotham Gazette*, at <http://www.gothamgazette.com/article/issueoftheweek/20051212/200/1678> (retrieved January 14, 2010).

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¹⁹ Gelinis, N. (2009, November 14). The Empire State and Eminent Domain; A neighborhood with \$600,000 apartments is declared 'blighted.' *Wall Street Journal*, p. A13.

²⁰ Duggan, D. (2006, January 10). Big shots betting on Harlem. *Newsday*, p. A15; Williams, T. (2006, May 4). Facing neighbors' concerns, city kills East Harlem project. *New York Times*, p. B1.

²¹ Topousis, T. (2008, October 8). High on Harlem: \$700 million deal OK'd. *New York Post*, p. 27; (2008). East 125th Street Development; Harlem-East Harlem Urban Renewal Area Blight Study. New York, NY: STV Incorporated.

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