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# Protecting Property in a Post-*Kelo* World

BY STEVEN GREENHUT

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Two years ago, when I began writing a book, people's eyes would glaze over when I told them the subject was eminent domain, the power of the government to take property by force on "just" compensation to the owner. Rarely could I mention the subject without having to explain it in detail, and incredulity was a typical response to the realization that government now takes property for private uses rather than for the public uses allowed by the Constitution.

What a difference a lousy U.S. Supreme Court decision makes.

Now state legislatures, city councils, and Congress are up in arms about the subject. It is a true water-cooler topic. Newspapers, which in the past typically ignored the "abuse" of eminent domain when they wrote glowing reports about "economic development," are touching on the troubling ramifications of *Kelo v. City of New London*, in which a 5-4 Court majority declared in June that the city may hand over unblighted private homes near the waterfront to a developer for high-end condos and other private uses. Opinion polls show that an overwhelming majority of Americans oppose the ruling.

The word *abuse* is in quotation marks above because eminent domain is abusive per se: it *compels* the sale of private property, and since the sale is forced, there can be no "just compensation" as required by the Takings Clause in the Fifth Amendment to the U.S. Constitution. In most discussions, "abuse" pertains exclusively to takings not for "public use," as the clause requires, but for

any vague "public purpose" that might be carried out by the new private owners of the property.

The Court's decision, however wretched, contained an important blueprint for reform. The majority wrote: "We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power." And Americans are taking the Court at its word.

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Already, one state—Alabama—has enacted a law prohibiting the use of eminent domain to increase tax revenue or for private development. Delaware has enacted a law that "requires eminent domain only be exercised for the purposes of a recognized public use." But the Washington, D.C.-based Institute for Justice (IJ), which argued *Kelo* before the Supreme Court, says that law essentially upholds the ruling. The institute reports that, as of August, 31 states have taken some kind of action, with 17 legislatures introducing bills, seven

announcing plans to do so, and other states introducing constitutional amendments or setting up commissions to study ways to stop eminent domain from being used for private development.

Unfortunately, while citizens are reacting to the decision, so too are cities, which are taking *Kelo* as *carte blanche* for the most aggressive redevelopment plans.

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The *New York Times* on July 30 explained that “the ruling has emboldened some cities to take property for development plans on private land. . . . [I]n Santa Cruz [Calif.], for example city officials started legal action this month to seize a parcel of family-owned land that holds a restaurant with a high Zagat rating, two other businesses and a conspicuous hole in the ground and force a sale to a developer who plans to build 54 condominiums.”

Members of Congress also have proposed some limited restrictions on eminent domain. As the *Environment and Energy Daily* reported on July 19, “The Congressional Western Caucus has formed a new task force meant to defend property rights in light of a controversial June Supreme Court decision on eminent domain, as members continue to propose legislation to lessen the effects of the ruling.” The goal, according to the publication, is to create a united front in Congress, given that six bills have been proposed.

“Sen. John Cornyn, R-Texas, has introduced a . . . bill (S. 1313), which would clarify that the power of eminent domain should be available only for public use and specify that economic development does not count as a ‘public use,’ ” according to the article. Also, the House voted 365 to 33 denouncing the decision, a resolution that has no teeth. However, the *Washington Post* reported that the House voted 231 to 189 to ban the use of eminent domain on projects that involve federal housing or transportation dollars.

The legal strategy will vary from state to state, given our federalist system and the fact that each state finds itself in a unique legal and statutory position with regard to eminent-domain uses for economic development.

In six states—Kansas, Connecticut, Maryland, Minnesota, New York, and North Dakota—the highest courts have already ruled in favor of cities in cases of eminent domain for private use. That means that residents of those states must live with the standard set up in *Kelo*—that is, basically anything goes.

Nine state supreme courts have addressed the issue and come down on the side of property owners. These are Arkansas, Florida, Illinois, Kentucky, Maine, Mon-

tana, South Carolina, Michigan, and Washington. But even in these states the situation is shaky for property owners. Many of the decisions are old, and some of the states have statutes that explicitly allow eminent domain for economic development, Dana Berliner, attorney for IJ, explains.

“The remaining 35 states are up in the air,” Berliner said. “Most haven’t looked at [eminent domain] in decades, and most haven’t looked at it since the modern practice of taking property just for business development. So state supreme courts need to revisit this issue now.”

Even the states with the best protections could use new laws or constitutional amendments banning the practice of eminent domain for private uses, she argues. In her report looking at such abuses from 1998 to 2002, Berliner found that eminent domain for private use had been carried out or threatened in 41 states, and she later found some other states to add to that list. That shows the degree to which this is a nationwide problem.

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### Poletown Decision Overturned

Last year the Michigan Supreme Court overturned the infamous 1981 Poletown decision. The original decision set the stage for the abuses evident in New London. The cities of Detroit and Hamtramck used their power of eminent domain on behalf of General Motors, which wanted to build a Cadillac assembly plant on the site of a 425-acre neighborhood—a thriving middle-class area filled with nicely kept homes, businesses, and churches.

The cities didn’t argue that the neighborhood, named for the Polish immigrants who first settled the area, was blighted. Rather, officials argued that the economic fate of the depressed Detroit region was at stake if eminent domain wasn’t used to help GM. The facility was built, though it never performed up to promises. The ruling was on the books 23 years until Michigan’s high court revisited it in July 2004.

The Court described the original Poletown decision as a “radical departure from fundamental constitutional principles. . . . [I]f one’s ownership of private property is

forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." That decision reads like Justice O'Connor's dissent in *Kelo*. Unfortunately, Michigan is the rare state where the court has spoken so clearly.

Several states don't go nearly as far as Michigan, but require that governments prove that blight exists before invoking eminent domain. That is the standard in California, but I've found it to be an ephemeral protection at best.

Following *Kelo* the California Redevelopment Association (CRA), in its overheated response to efforts to restrict eminent domain, argued that a proposed constitutional amendment "is a solution in search of a problem. California is not Connecticut." The CRA emphasizes that the blight requirement keeps cities from abusing the process.

Yet my reporting in Orange County and elsewhere has shown the degree to which this is a genuine problem desperately in need of a substantive solution, as city governments routinely declare nice neighborhoods blighted in order to clear them away and build tax-generating facilities.

IJ's Berliner echoes that view, pointing out that property owners who challenge a blight designation in California often win, but it is so costly and difficult to fight that challenges are rare. It's similar in other states with blight requirements.

"The statutory definition of blight in Illinois is broader than the Mississippi River at its mouth," said Illinois state Sen. Steve Rauschenberger, who recently sponsored legislation to ban eminent domain for private uses, according to the Associated Press.

Berliner, speaking before the Illinois Assembly, offered specific advice to protect property owners in Illinois. One idea gets to the heart of the blight-protection problem:

"Illinois needs to . . . remove from the various definitions of blight factors that are too vague or allow condemnation simply for what local planners think is a better use." Indeed, blight becomes whatever government officials want it to be. They have declared newer

housing tracts, decent shopping centers, upscale buildings with chipping paint, and empty desert land as "blight." In Mammoth Lakes, California, a rural resort community in the Sierras, officials called the downtown blighted because of excessive urbanization—something so absurd that even the courts overturned that finding.

### The California Model

In California two main reform efforts failed in the final days of the legislative session. Unsurprisingly, neither challenged eminent domain per se. The first, introduced by state Sen. Tom McClintock and Assemblyman Doug LaMalfa, proposed an amendment to the state constitution. Here's the key language: "Private property may be taken or damaged by eminent domain only for a stated public use and only upon an independent judicial determination on the evidence that no reasonable alternative exists. Property taken or damaged by eminent domain must be owned and occupied by the condemnor or may be leased only to entities regulated by the Public Utilities Commission. All such property must be used only for the stated public use."

The second, introduced by Assemblywoman Mimi Walters, offered a simple statutory improvement: "This bill would provide that 'public use' does not include the taking or damaging of property for private use, including, but not limited to, the condemnation of nonblighted property for private business development." If passed, the legislation would reinforce that the Connecticut standard does not apply in California, but it would not fix the abuse of the blight provisions by zealous California cities.

In addition to California, IJ reports that Texas and four other states are pursuing a constitutional amendment.

The Reason Public Policy Institute has offered sample state legislation. As Reason explains, the simplest method is to "delete the statutory authority for such uses of eminent domain. . . . [I]n 2004, Utah simply removed the authorization for eminent domain from its act giving powers to redevelopment authorities. . . . Three other types of provisions that also discourage the abuse of eminent domain are (1) allowing a former owner to regain ownership of condemned property if the government fails to use it within a given period of time; (2)

time limits on blight or redevelopment designations; (3) attorneys fees for condemnees challenging the validity of takings.” Reason also proposes possible language that specifically prohibits eminent domain for private business.

The final approach, described by Reason, would ban eminent domain for economic development, and includes a definition of such as “any activity to increase tax revenue, tax base, employment or general economic health.”

Various state bills typically embody one of these forms. IJ’s list of proposed state legislation includes Colorado, which would limit the ability of agencies to declare a property blighted; Massachusetts, which would ban eminent domain unless the property is blighted; Minnesota, which would forbid using eminent domain to transfer property to a “nongovernmental entity without the power of eminent domain”; and New Jersey, which would forbid eminent domain under redevelopment law.

Many states have several proposals circulating at once. The Connecticut legislature defeated one measure that would prohibit the taking of residential dwellings for use “in a municipal development project that will be privately owned or controlled.” But the governor called on the legislature to issue a moratorium on eminent domain until the law is revised.

Even cities are getting in on the act. The city of Orange, California, voted to express opposition to the *Kelo* decision. Although such resolutions by city councils have no real weight, what does have weight is the understanding that council members will vote against eminent-domain actions. In California 90 percent of redevelopment agencies are run by the city councils and state law requires a supermajority of members to invoke eminent domain.

Most California city councils have five members. If every one of those councils had two members opposed to eminent domain for private use, these projects would always be stopped. Cities can also pass ordinances and change their charters to limit eminent-domain abuses. Those ordinances would have language similar to the language in Reason’s model statutes.

The best response in California has come from Anaheim. Mayor Curt Pringle announced, immediately following the *Kelo* decision, that his city would never use eminent domain for private development. These words are backed up not only by an anti-eminent-domain council majority, but also by several years of taking an alternative approach that contradicts the conventional wisdom offered by redevelopment agencies. Anaheim has refused to use subsidies and eminent domain, preferring to expand free-market opportunities for redevelopment.

For instance, the city targeted an area that it perceives as the next downtown. It is an area comprising one-story warehouses near the baseball stadium and hockey arena. So the city council said to developers: Come bring us your plans for the area. Build what you want. The only thing we will do is change the zoning so virtually anything can be built there. Sure enough, there are fascinating development proposals for the site.

This, ultimately, is the alternative to the redevelopment mindset, and the antidote to wanton eminent domain.

Until cities across the country embrace the Anaheim model, or until states impose legislative reforms that at least restrict eminent domain, there is only one avenue left to citizens who face such abuses. They can organize.

In Garden Grove, California, I watched hundreds of residents turn out to oppose a plan that would have leveled their neighborhood through eminent domain to allow for a theme park. Council members heard their voices and decided to stop the plan. In Lakewood, Ohio, where the city wanted to clear lovely historic homes along a park to make way for new condos and shopping, residents stopped the plan through a referendum and eventually succeeded in recalling the mayor.

It would have been best had the Supreme Court stopped the abuse of American homeowners and the Constitution, but even with this bad decision Americans have many avenues to pursue. The best news is that a backlash is in full swing. The key now is to keep the movement going until residents of every state are protected in the way the nation’s founders envisioned. 