

Background

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States Vote to Strengthen Property Rights

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The U.S. Supreme Court struck a blow against homeowners and small businesses on June 23, 2005, when it ruled in *Kelo v. City of New London* that eminent domain could be used for economic development purposes. By implication, the Court ruled that government could take land from one private owner and sell or give it to another if government officials believed that the new owner would use the land in a more productive manner to create jobs and increase tax revenues. By ruling in favor of the city, the Supreme Court greatly expanded the permissible uses of eminent domain beyond the traditional purpose of taking private property only for broadly used public facilities such as roads, schools, and fire stations. In the process, the Court has substantially weakened individual property rights.

Although many responded to *Kelo* with anger, many others greeted it warmly, setting in motion two conflicting responses that will take years to resolve. In many states, intense citizen anger led elected officials to enact much stronger state laws and constitutional amendments to better protect individual property rights and to prohibit *Kelo*-type takings. In other states, however, efforts to enhance such protections failed to become law, and many businesses and local officials have used the *Kelo* decision as the excuse to escalate their use of eminent domain for economic development purposes.¹

The Erosion of Property Rights

By vastly expanding government's ability to take private property, *Kelo* continued the erosion of the

Talking Points

- The U.S. Supreme Court struck a blow against homeowners and small businesses on June 23, 2005, by ruling in *Kelo v. City of New London* that government (local, state, and federal) can more easily take private property for economic development purposes.
- As a result, the *Kelo* decision has expanded the permissible uses of eminent domain well beyond the traditional purpose of taking private property only for broadly used public facilities.
- Citizen anger has led more than 29 states to respond by enacting much stronger state laws and constitutional amendments to better protect individual property rights and to prohibit *Kelo*-type takings.
- The U.S. Congress should support state and local efforts by following their examples and passing legislation to protect property rights.

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constitutional protections for private property that in recent years have been further compromised by a growing propensity in many communities to impose strict regulations on how private land may be used. Such a “regulatory taking” occurs when government allows the property owner to keep the land but greatly restricts his freedom to use it.

Zoning and growth boundaries are the most common forms of regulatory taking at the state and local levels. At the federal level, laws such as the Endangered Species Act and the Clean Water Act give certain environmental goals preference over the rights of property owners.

Although zoning has been practiced in the United States since 1916, when New York City implemented the first citywide land use plan, its application in recent years has extended to increasingly restricting the extent to which individuals can develop their property. In turn, these abusive land use regulations have limited the supply of building lots and increased the price of land, thereby making home ownership increasingly unaffordable for moderate-income American families.²

In many instances, federal and local regulations reduce individual freedom and diminish property values. Whereas eminent domain requires government to compensate the former owner fairly for the taken property, courts have ruled consistently that compensation is not required in most regulatory takings.

Congressional Efforts Die in the Senate

In response to *Kelo*, many Members of Congress introduced legislation to limit the scope of the ruling and to provide greater protection to homeowners and small businesses. In the House of Representatives, Judiciary Committee Chairman James Sensenbrenner (R-WI) introduced the Private Property Protection Act of 2005 (H.R. 4128) to

prevent any government entity receiving federal funds from using eminent domain for economic development. A violation of the prohibition would disqualify that entity from receiving federal funds for two years. H.R. 4128 was passed in November 2005 by a vote of 376 to 38 and sent to the Senate for consideration.

In September 2006, the House also passed Representative Steve Chabot’s (R-OH) Private Property Rights Implementation Act (H.R. 4772) to allow property rights cases to be filed in federal court rather than in state courts as is customary today. Mr. Chabot’s legislation was an attempt to expedite a judicial process that often gets bogged down in state courts where lengthy delays and appeal processes often exhaust the plaintiff’s resources long before a settlement can be reached.

Neither bill became law. Following passage in the House, both bills were sent to the Senate and referred to the Senate Judiciary Committee, which is where they remained until early December 2006 when the 109th Congress adjourned. The Senate also failed to act on similar bills introduced by Senator John Ensign (R-NV) and by Senator John Cornyn (R-TX). The Bush Administration has not viewed the issue as one of its higher priorities, although it did issue a statement supporting H.R. 4128.³

States Take the Lead

Although the federal role in protecting property rights has ranged from diffident to counterproductive, many state legislatures and courts have taken a number of positive actions in recent years to enhance private property protections, and voters have passed several ballot initiatives that strengthen property rights.

Perhaps one of the most dramatic enhancements of property rights occurred in November 2000 when

1. Joyce Howard Price, “Eminent Domain Surges After Ruling,” *The Washington Times*, June 21, 2006, at www.washingtontimes.com/national/20060620-101252-5764r.htm (January 19, 2007).
2. Wendell Cox and Ronald D. Utt, Ph.D., “Housing Affordability: Smart Growth Abuses Are Creating a ‘Rent Belt’ of High-Cost Areas,” Heritage Foundation *Background* No. 1999, January 22, 2007, at www.heritage.org/Research/SmartGrowth/bg1999.cfm.
3. Office of Management and Budget, “Statement of Administration Policy: H.R. 4128—Private Property Rights Protection Act of 2005,” November 3, 2005, at www.whitehouse.gov/omb/legislative/sap/109-1/hr4128sap-h.pdf (January 19, 2007).

the citizens of Oregon voted in favor of Measure 7 to provide some relief to some property owners whose land values were adversely affected by Oregon's mandatory growth boundaries. Although a state court voided the referendum on technical grounds, a revised initiative—Measure 37—passed in 2004. After several court challenges, the Oregon Supreme Court ultimately upheld it in February 2006.⁴

Under the new law, qualifying landowners whose property lies outside the growth boundaries would now be allowed to develop their property unless the community agrees to compensate them financially for the diminished value caused by any extant regulations that would limit such development. Recognizing that broad citizen support for both referenda may indicate declining public support for strict growth boundaries, Portland's METRO (the area's land use planning authority) agreed in 2004 to expand the area's growth boundary to geographic limits that it previously expected to reach in 2040.⁵ As a result of the increase in available land for development, home prices in the Portland area have become more affordable compared to prices early in this decade.

There have also been some state-level successes in protecting private property through the courts. Notably, in July 2004,⁶ the Michigan Supreme Court unanimously reversed its infamous 1981 *Poletown* decision, in which it had ruled against property owners in the Poletown neighborhood of Detroit.⁷ In an act similar to New London's use of eminent domain to take the property of Suzette Kelo and her neighbors and transfer it to other private owners for redevelopment, Detroit had sought to seize Poletown's more than 1,000 homes and 600 businesses and churches and to transfer the land to

General Motors for a new factory. The city's action was challenged in court, and the Michigan Supreme Court ruled in 1981 that it was an acceptable use of eminent domain. Although the surviving Poletown landowners will receive no compensation, the court determined in 2004 that it must overrule its 1981 decision "to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law."⁸ The decision is also having the more important effect of preventing such seizures—based on *public benefit* rather than *public use*—from happening again in Michigan.

The Michigan decision, however, was a rare instance in which a court sided with the property owner. For the most part, the courts have been reluctant to rule against the use of eminent domain for economic development purposes or against restrictive zonings and rezoning (regulatory takings) no matter how significant the loss to the owner. Typical is the October 2000 ruling by a Virginia state court against two elderly women whose combined 320 acres were part of a 500-acre area that had been downzoned from four houses per acre to one house per acre by the Prince William County Board of Supervisors in 1998. The sisters sued to have the original zoning density (in effect since 1958) restored, but the court ruled that the action was "unfair but not unlawful."⁹

While successful state and local efforts to protect and strengthen property rights have been rare, this may be changing in response to broad-based anger at the Supreme Court's controversial *Kelo* ruling. Unlike the previous property rights abuses inflicted on ordinary people, the *Kelo* decision seems to have been sufficiently irresponsible as to demonstrate

4. Laura Oppenheimer, "Court Upholds Measure 37," *The Oregonian*, February 21, 2006, at www.oregonlive.com/news/oregonian/index.ssf?base/front_page/1140548106115720.xml&coll=7 (January 19, 2007).
5. Demographia, "Portland Urban Growth Boundary Expanded to Above 2040 Plan," at www.demographia.com/db-porugb.htm (January 19, 2007).
6. *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004).
7. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616; 304 N.W. 2d 455 (1981).
8. *County of Wayne v. Hathcock*.
9. Lisa Rein, "Judge Upholds Board Limitation on Development," *The Washington Post*, November 1, 2000, p. V1, at <http://pqasb.pqarchiver.com/washingtonpost/access/63062458.html?dids=63062458:63062458&FMT=ABS&FMTS=ABS:FT&date=Nov+1%2C+2000&author=Lisa+Rein&pub=The+Washington+Post&edition=&startpage=V.01&desc=Judge+Upholds+Board+Limitation+On+Development> (January 23, 2007).

vividly just how vulnerable homeowners and small businesses are to covetous corporations, elitist municipal planners, and economic development bureaucrats. The consequence was a firestorm of national indignation that led citizens to demand better protection from their public officials at the federal, state, and local levels.¹⁰

Many elected officials responded, and within weeks of *Kelo* scores of bills were introduced in state legislatures across the country, while petitions to put the issue on the ballot were circulated in states that allowed voter referenda. According to a November 2006 report by the U.S. Government Accountability Office, between June 23, 2005, and July 31, 2006, 29 states enacted at least one of three general types of change in their eminent domain laws: 23 placed restrictions on its use for economic development; 24 added additional procedural requirements; and 21 tightened their definitions of “blight,” “economic development,” and “public use.”¹¹

Even more protections have been proposed since July 2006. In the year and a half since the *Kelo* decision, many of these initiatives have led to changes in state laws and constitutions, while some reform efforts have failed in the face of withering and well-financed opposition, notably from environmental groups, municipal governments, and state government agencies. All in all, the wins significantly outnumber the losses. Below is a summary description of the recent successes and failures in the effort to strengthen property rights at the state level by way of referenda and legislation.¹²

Referenda Results: The Winners

In November 2006, voters in 10 states passed constitutional amendments or other measures designed to protect property rights.

South Carolina. By a vote of 86.1 percent to 13.9 percent, South Carolina voters approved an amendment to the state constitution prohibiting the use of eminent domain for economic development except for public use. The amendment limits the definition of “blight” to conditions that pose a danger to public health and safety. The amendment also removed constitutional provisions that allowed several counties to use eminent domain for private use.¹³

Florida. By a vote of 69.1 percent to 30.9 percent, Florida voters passed a state constitutional amendment prohibiting the government from taking property for reasons of blight, complementing the state legislature’s earlier passage of laws that limit the use of eminent domain.

Georgia. By a vote of 82.7 percent to 17.3 percent, Georgia voters endorsed a constitutional amendment requiring that elected officials formally vote for or against each use of eminent domain in their communities. This amendment complements new property rights protections passed earlier in the year by the state legislature.

Michigan. By a vote of 80.1 percent to 19.9 percent, Michigan voters approved a constitutional amendment that builds on and strengthens the Michigan Supreme Court’s reversal of the infamous *Poletown* decision. Among its many provisions, the amendment requires that property owners must receive 124 percent of fair market value for property taken by eminent domain, explicitly prohibits the use of eminent domain for economic development and/or tax revenue enhancement, and specifies that condemnations based on blight must be subject to a higher standard of evidence.¹⁴

New Hampshire. By a vote of 86 percent to 14 percent, voters ratified a constitutional amendment

10. Even some members of the business community were openly opposed to property rights abuses and changed their business practices to reflect these views. See Paul Nowell, “BB&T Takes a Stand,” *The Free Lance-Star* (Fredericksburg, Virginia), March 5, 2006, p. D6.

11. U.S. Government Accountability Office, *Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited*, GAO-07-28, November 2006, p. 5, at www.gao.gov/new.items/d0728.pdf (January 19, 2007).

12. For comprehensive and up-to-date information on the status of property rights protection throughout the United States and a source of information for this report, see Castle Coalition, Web site, at www.castlecoalition.org (January 19, 2007). The Castle Coalition is a property rights project of the Institute for Justice.

13. Castle Coalition, “Legislative Action Since Kelo,” January 16, 2007, p. 12, at www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (January 19, 2007).

that the state legislature had passed by the overwhelming vote of 277 to 61. The new amendment provides that “No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”¹⁵

Louisiana. In the September 2006 primary election, by a vote of 55 percent to 45 percent, Louisiana voters approved a constitutional amendment that had earlier been passed by the legislature. The amendment prohibits the use of eminent domain for economic development purposes to boost jobs and tax revenues. It also limits the definition of “blight” to threats to public health and safety.

Nevada. By a vote of 63.1 percent to 36.9 percent, Nevada voters took the first steps toward endorsing State Question No. 2, a citizen initiative supporting a constitutional amendment that, among other measures, limits the use of eminent domain for private development by more clearly defining “public use”:

Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use.¹⁶

Nevada law requires that constitutional amendments must be approved by voters in two consecutive elections. Therefore, a second successful vote (in 2008) is required before it is included in the state constitution.

Oregon. For the third time in three consecutive elections, Oregon voters endorsed a ballot measure to change the state’s statutes to strengthen the protection of property rights. By a vote of 67 percent to 33 percent, voters favored Measure 39, a citizen initiative that states:

[A] public body...may not condemn private real property used as a residence, business establishment, farm, or forestry operation if at the time of the condemnation the public body intends to convey fee title to all or a portion of the real property, or a lesser interest than fee title, to another private party.¹⁷

North Dakota. By a vote of 67.5 percent to 32.5 percent, North Dakota voters approved a state constitutional amendment that prohibits the use of eminent domain when the government’s intention is to transfer the property from one private owner to another.

Arizona. By a vote of 65.2 percent to 34.8 percent, Arizona voters endorsed an initiative that restricts the application of eminent domain by tightening the definitions of “blight” and “public use.” The initiative also imposes some restraints on regulatory takings.

Referenda Results: The Losers

In November 2006, voters in three states rejected state constitutional amendments to protect property rights.

Washington. By a vote of 58.8 percent to 41.2 percent, Washington voters rejected Initiative Measure No. 933, a ballot initiative that would have required compensation to property owners for regulatory takings. Created and endorsed by the Washington Farm Bureau, the initiative would have required compensation when government regulation damages the use or value of private property, would have forbidden regulations that prohibit existing legal uses of private property, and would have provided exceptions or payments. The initiative was introduced in response to an increasing number of environmental regulations and prohibitions being imposed on farm land. Advocates of the initiative estimate that their

14. For more details, see Patrick J. Wright, “Proposal 4: A Legal Review and Analysis,” Mackinac Center for Public Policy *Policy Brief*, October 5, 2006, at www.mackinac.org/archives/2006/s2006-09.pdf (January 19, 2007).

15. CACR 30, § 1, New Hampshire Legislature, 2006 Sess., at www.gencourt.state.nh.us/legislation/2006/CACR0030.html (January 19, 2007).

16. State of Nevada, State Question 2, § 1, 2006 General Election, at www.co.clark.nv.us/election/2006/gen/St_Quest_2_FullText.pdf (January 19, 2007).

17. State of Oregon, Measure 39, § 2, 2006 General Election, at www.sos.state.or.us/elections/irri/2006/057text.pdf (January 19, 2007).

opponents outspent them by \$3.7 million to \$700,000, with one environmental group providing \$500,000 to the opposition.¹⁸

California. By a vote of 52.5 percent to 47.5 percent, Californians rejected Proposition 90, a constitutional amendment that would have limited the use of eminent domain and regulatory takings in the state. The amendment would have prohibited the use of eminent domain for any private use or to transfer to another private owner, except when the other private entity is performing a “public use.” The amendment also provided a new and narrower definition of “public use.” As for regulatory takings, the proposal would have required the “government to compensate landowners for substantial economic losses to private property that may result from the adoption of new state and local government regulations and statutes, except when those actions are taken to protect public health and safety.”¹⁹

Idaho. By a vote of 76 percent to 24 percent, Idaho voters rejected Proposition 2,²⁰ a citizen initiative designed to protect private property by prohibiting the use of eminent domain for economic development or to transfer property from one private owner to another, except for certain uses explicitly included in the constitution. The amendment would also have required compensation for any diminution in a property’s value as a result of a regulatory taking, broadly defined.

Legislative Actions: The Winners

The **Florida** legislature enacted a 10-year prohibition on the use of eminent domain by local governments to take property from one private owner for transfer to another.

As of July 2006, the following states had enacted laws limiting the use of eminent domain for certain public purposes: **Alaska, Idaho, Colorado, Kansas, Nebraska, Minnesota, Iowa, Arkansas, Mich-**

igan, Texas, Illinois, Indiana, Ohio, Kentucky, West Virginia, Alabama, Georgia, Pennsylvania, New Hampshire, and Maine.²¹

Among some of the changes, **Maine** and **Alabama** prohibited the use of eminent domain on non-blighted areas for the purpose of private retail, office, commercial, residential, or industrial use.

Ohio imposed a moratorium on the use of eminent domain through the end of 2006. During this time, a government-appointed commission will study the issue and make recommendations. **Kansas, Minnesota, and Pennsylvania** passed laws prohibiting or limiting the public sector’s ability to use eminent domain for economic development and private benefit.

Georgia’s constitutional amendment to improve property rights protection allows only elected officials to invoke eminent domain and limits its use for economic development as described “by general law.” The relevant statutes were strengthened earlier in the year by the state legislature. Under the new laws, “Small businesses and homes can no longer be taken by local government for economic development purposes.”²² The legislation also tightened the definition of “blight.”

Legislative Activities: The Losers

The **South Carolina** legislature passed and the voters subsequently endorsed a strong constitutional amendment limiting the use of eminent domain for economic development and private benefit, but the effort to enact an even more ambitious proposal that would compensate for and/or limit regulatory takings failed, although the legislature is expected to revisit the issue in its 2007 session.²³ Among the opponents of the takings proposal were environmental groups that complained “that local governments won’t be able to plan properly for growth if legislation requires them

18. Property Fairness Coalition, “Learn About 933,” at www.propertyfairness.com/933learn.htm (January 19, 2007).

19. Leonard C. Gilroy, “Analysis of California’s Proposition 90: The Protect Our Homes Act,” Reason Foundation Policy Brief No. 54, October 2006, at www.reason.org/californiaballot/pb54_eminentdomain.pdf (January 19, 2007). Emphasis in original.

20. See State of Idaho, Proposition 2, 2006 General Election, at www.idsos.state.id.us/ELECT/INITS/06init08.htm (January 19, 2007).

21. U.S. Government Accountability Office, *Eminent Domain*, pp. 37–44.

22. Kelly McCutcheon, “Unfinished Business, Pro-Business, New Business,” *Georgia Policy Review*, May 2006, p. 4, at www.gppf.org/pub/Newsletter/May06.pdf (January 19, 2007).

to pay property owners when zoning reduces property values”²⁴—which is exactly the point.

In **Virginia**, as many as 40 different public authorities (e.g., school boards) have the power to use eminent domain,²⁵ and *Kelo*-like takings and worse have become common. In 2006, the Virginia legislature failed to enact a bill that would have limited the ability of government and other public entities to use eminent domain for purposes of economic development. Among the major entities opposing the legislation were the Virginia Department of Transportation, the state’s counties and cities, and the associations that represent them, including the Virginia Municipal League. In effect, Virginia taxpayers were footing the bill for their government officials to lobby against their interests. At the same time, key legislators who count several local governments and condemning authorities as clients in their law practices played a role in killing the legislation.²⁶

Other states that failed to enact stronger property rights protections in 2006 include **Maryland, Massachusetts, Hawaii, Connecticut, New Jersey, New Mexico, New York, and Washington**. In Maryland, 42 bills were introduced in the state legislature to enhance protections for private property owners, but all remained bottled up in committee through the end of the session. As in Virginia, the opposition to better protection was spearheaded by the state’s municipal and county officials. The executive director of the Maryland Association of Counties justified its anti-private property position by arguing that better protection “will cause more people to be interested in playing the jury wheel of fortune than at the present.”²⁷

Sustaining the Momentum

The property rights battles that the Supreme Court spawned in nearly every state in the past year often went beyond protecting against *Kelo*-like seizures to addressing the even more common abuses that occur through regulatory takings. While most of the efforts to limit regulatory takings did not succeed, either in the state legislatures or at the ballot box, the debate surrounding the harmful effects of regulatory takings brought the issue to the public’s attention and has opened the way for future reforms.

To sustain this momentum, states that have not yet taken steps to protect their citizens’ property should:

1. Prohibit the use of eminent domain to transfer property from one private owner to another, except for a very limited number of well-defined purposes involving broad public use;
2. More clearly define the term “public use;”
3. More clearly define the term “blight” and limit it only to instances in which public health and safety are at stake; and
4. Enact laws to discourage regulatory takings and provide compensation when they occur.

At the same time, the federal government should support state and local efforts by:

1. Prohibiting the use of federal funds by any development project, state, and/or local agency that uses eminent domain to transfer land from one private owner to another for purposes of economic development;

23. Home Builders Association of South Carolina, “Legislative Report,” updated July 27, 2006, at www.hbaofsc.com/Legislative%20Report.htm (January 19, 2007).

24. Yvonne M. Wenger, “Conservation Group Battles ‘Takings’ Action,” *The Post and Courier* (Charleston, South Carolina), November 25, 2006.

25. U.S. Government Accountability Office, *Eminent Domain*, p. 3.

26. Jeremy Hopkins, “Special Interests vs. Virginia Taxpayers,” *The Washington Times*, March 23, 2006. See also Jeremy Hopkins, *The Real Story of Eminent Domain in Virginia: The Rise, Fall, and Undetermined Future of Private Property Rights in the Commonwealth*, Virginia Institute for Public Policy Report No. 11, December 2006, at www.virginiainstitute.org/pdf/V002-0017EminentDomain.pdf (January 19, 2007).

27. Dori Berman, “Eminent Domain Reform Proponents Will Try Again,” *The Daily Record* (Baltimore, Maryland), December 13, 2006, at www.findarticles.com/p/articles/mi_qn4183/is_20061213/ai_n16906861 (January 19, 2007).

2. Withholding federal funds for affordable housing and community development from any jurisdiction that does not compensate land owners for value lost from abusive zoning practices and other land use regulations; and
3. Enacting legislation to clarify the intent of the U.S. Constitution with regard to compensation for regulatory takings.

Conclusion

Much to the surprise of property rights defenders, the infamous *Kelo* decision may ultimately lead to a strengthening of individual property rights in the United States. Although many states, municipalities, and government bureaucrats saw the Supreme Court's decision as a green light to

continue recklessly seizing private property for transfer to wealthy developers and corporations, the vast majority of the voters and many elected officials saw the Court's decision as a serious threat to be deterred and defeated.

In many cases, this threat *has* been defeated. Within little more than a year of *Kelo*, 29 states had enhanced their statutes and constitutions to prohibit or severely limit the use of eminent domain, and more states will likely join their ranks in 2007 as the effort to protect ordinary citizens against the covetous predations of bureaucrats and unscrupulous businesses continues.

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