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# *Kelo* and Its Discontents

## *The Worst (or Best?) Thing to Happen to Property Rights*

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**T**he 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—more than medicinal marijuana (*Gonzales v. Raich*), peer-to-peer file sharing (*MGM v. Grokster*), federal sentencing guidelines (*U.S. v. Booker*), and two decisions on the public display of the Ten Commandments (*McCreary County v. ACLU* and *Van Orden v. Perry*).<sup>1</sup> Seldom has a Supreme Court decision provoked such impassioned reactions from all levels of government and every ideological quarter as did *Kelo's* apparent green light to a Connecticut local government to seize fifteen homes in trying to turn around a failing local economy.

The reactions were immediate, widespread, and intense. The U.S. House of Representatives condemned the *Kelo* decision. Libertarians and property advocates lamented the end of private property. Political liberals decried the unjust effect on low-income populations. Newspaper editorial boards across the nation denounced the decision as an unfair invitation to abuse by local authorities. Justice Sandra Day O'Connor, in her dissenting opinion, famously and bleakly remarked, “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory” (*Kelo v. City of New London*, 125

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1. See Harwood 2005 for poll results to support the relative controversy of the *Kelo* decision.

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S. Ct. [2005], at 2676). The *Kelo* ruling hovered like a dark, ominous cloud over property rights.

Did *Kelo* truly unleash the power of local governments, raising the specter of an end to private property? Or did the decision set in motion a process of institutional change that will ultimately rein in local governments and lead to even less use of eminent domain? If the latter upshot eventuates, then the discussion takes on a profoundly ironic twist. Might *Kelo* be the best thing that ever happened to property owners?

In this article, we survey developing events at the state and local levels in the year following *Kelo*, examining the data from the perspective of economic efficiency and constitutional political economy. On the one hand, much evidence suggests that *Kelo* has had an “opening the floodgates” effect, emboldening local policymakers to act more aggressively in acquiring private property for economic development. On the other hand, a competing hypothesis postulates a “backlash and spotlight” effect, whereby public opinion is swinging heavily in favor of property owners so that local policymakers fear negative publicity and prolonged legal battles, and the states are feverishly enacting legislation to restrict the use of eminent domain. *Kelo* ignited a struggle for power among voters, developers, local policymakers, and state governments. In this struggle, states are experimenting with how to achieve the balance of power best suited to meet their unique needs, and property owners are gradually securing a stronger foothold under measures enacted by the state legislatures than they would have had under *Kelo*.

## The End of Private Property

The *Kelo* decision has suffered no shortage of critics and doomsayers decrying the end of private property. Observers of all ideological stripes launched fierce, often emotional reactions at the *Kelo* court. In an editorial titled “Eminent Latitude,” the *Washington Post* called the *Kelo* decision “quite unjust” (2005). Similarly, the *Sacramento Bee* likened the decision to a regressive tax, saying “the history of government takings of private property shows that most often it takes from the poor, or the weak, and gives to the rich and the powerful. And the Supreme Court has just made that even easier” (Weintraub 2005).

Prominent bloggers and policy wonks contributed heavily with their own form of rapid response. *Time* blogger Andrew Sullivan pulled no punches, writing, “[N]ow you can have your property stolen by Walmart and be unable to get any recompense either, as long as your local representatives, financed by the real estate lobby, go along. Is this an unfree country or what?” (2005). On the same note, Will Collier for *Vodkapundit.com* wrote, “[P]roperty rights have ceased to exist in the US” (2005), and free-market philosophy professor Tibor Machan lamented, “[I]ndividual rights are legally dead” (2005). With some resignation, economist and *Marginal Revolution* blogger Tyler Cowen summed up the decision: “this is just awful” (2005).

Attorneys for the petitioners echoed these remarks. Dana Berliner of the Institute for Justice, which represented Susette Kelo, said in a press statement: “It’s a dark day

for American homeowners. While most constitutional decisions affect a small number of people, this decision undermines the rights of every American, except the most politically connected. Every home, small business, or church would produce more taxes as a shopping center or office building. And according to the Court, that's a good enough reason for eminent domain" (Institute for Justice 2005).

Such biting criticisms appeared seemingly everywhere; in fact, the *Kelo* majority needed only to visit their colleagues' chambers to hear the worst. Two dissenting opinions, one each from Justice Sandra Day O'Connor and Justice Clarence Thomas, were as critical as those any journalist, scholar, blogger, or politician could muster. Wrote Justice O'Connor of the decision:

Today the Court abandons this long-held, basic limitation on government power [not to take property from A and give it to B]. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent. (at 2671)

In a separate dissent, Justice Thomas characterized *Kelo* as releasing a “boundless use of the eminent domain power” (at 2687).

From the preceding and countless other negative responses to *Kelo*, one might conclude that it is the worst thing ever to happen to property rights. Is it the end of private property? On its surface, perhaps it is because it further obscures the Fifth Amendment's public-use test, which was already a fuzzy, curvy line. Under *Kelo*, that line can be drawn wherever a majority city council wishes to draw it. Moreover, the preceding reactions suggest that little in the U.S. government can constrain the vast takings power. A declaration of blight is a precondition of an eminent-domain taking in most states. However, what is to stop cities such as San Jose from declaring one-tenth of the city blighted, just in case the city wants it for redevelopment (Berliner 2003, 22)? Why would states such as New York not transfer land from long-time owners to new developers who promise jobs and higher tax bases (Welch 2005b)? What can stop the eminent-domain floodgates from opening?

### **Emboldened Local Governments: Opening the Floodgates**

Welcome to Small City, U.S.A., where citizens are the politicians, and the local paper is the only press at city hall—places such as Riviera Beach, Florida; Yolo County,

California; and Sussex, New Jersey. They used to be quiet and left alone, but after *Kelo*, their city council chambers have standing room only, and their stories have flown over the Internet before the final gavels have struck. These stories and their counterparts in big cities tell us how *Kelo* has emboldened local authorities to implement more aggressive land-use policies.

In Hercules, California, for example, on May 23, 2006, the city council voted unanimously to seize property acquired by Wal-Mart, to prevent the retail giant from opening a store in town. An hour's drive away, in Yolo County, the government exercised its right of eminent domain on a 17,300-acre ranch whose rightful owners had planned to develop small segments of the property while conserving the rest. According to the *Sacramento Business Journal*, county authorities had not released a development plan but wanted to "preserve the ranch as open space and farmland, and to retain its vast natural resources including water rights, natural gas and flood-control capacity" (Anderson 2005). The *Orange County Register* editorialized: "Taking more than 17,000 acres for unclear reasons is a far cry from the taking of a narrow piece of land to make way for a freeway or courthouse. It shows the degree to which governments perceive themselves as economic central planners, rather than agencies that set some ground rules and enforce people's rights" ("Latest Front" 2006).

Not surprisingly, most of the emboldened central planning emerged in states whose courts interpret *public use* broadly or whose legislatures define *blight* vaguely. According to the *New York Times*, "Nine state supreme courts, including those in Illinois, Michigan and Washington, have forbidden the use of eminent domain simply to bring in more revenue and jobs. New York's highest court, the Court of Appeals, has allowed such condemnations. The New Jersey courts have not ruled on the issue" (Salzman and Mansnerus 2005).

Ironically, the *Times* itself stands to benefit from New York's lax law. By late 2006, the New York Times Co. was scheduled to complete construction of its sparkling new fifty-two-story headquarters on Eighth Avenue across from the Port Authority bus terminal, on the edge of the neighborhood long known as Hell's Kitchen. Designed by the postmodern architect Renzo Piano, the elegant skyscraper will "transform the dowdy block and generate millions of dollars in tax revenues," according to an August 2002 *Times* story (Vagli 2002, 3). The *City Review* calls the building "laudatory" and a boon to "bus travelers across the street [who] could use a little respite from the visual cacophony and onslaught of the area" (Horsely 2002). The company acquired the land from the Empire State Development Corporation, which condemned the properties of fifty-five businesses, consolidated the parcels by exercising the power of eminent domain, and transferred the land to the new tenants for \$85 million (Welch 2005b).

Like Gosplan, eminent domain is often used to pursue lofty goals that central planners hatch without due attention to local economic realities. In Lakewood, Ohio, for example, a redevelopment project required that the city designate an entire neighborhood as blighted, but property values and occupancy rates were growing faster

in that neighborhood than in the rest of the city as a whole (Staley and Blair 2005). Such decisions, where property is forcibly transferred between private parties to fulfill a central plan, fail to harness the specialized knowledge that owners and prospective buyers possess about the property's value. As Thomas Sowell sums up the matter in his classic political economy treatise *Knowledge and Decisions*, "Ideas are everywhere, but knowledge is rare" (1980, 3). This analysis applies to the case in New York, where the Times Co. made no private offers for the properties on which its new skyscraper stands, and the city fulfilled the dreams of aesthetes at the cost of aging but viable small-business places. The "knowledge" that a skyscraper is a better use for these properties comes only from the Empire State Development Corporation's bureaucratic edict. The skyscraper presumably would have been erected somewhere in the city, if not on the Eighth Avenue site. So the tax revenues would have materialized without the use of eminent domain, perhaps even more so if the site were closer to Times' Square, where property values are higher. In this way, eminent domain is often a tool that central planners use in pursuing their subjective preferences for a good society.

Florida law also has broad definitions of *public use* and *blight*, and local planners wasted no time in exploiting their expanded powers under *Kelo*. Riviera Beach, for example, is a small city on Florida's Atlantic coast, fifty miles north of Ft. Lauderdale. This city exemplifies the many facets of development takings and the struggle for power that *Kelo* has created among voters, developers, local policymakers, and state governments.

According to the city's redevelopment agency, properties in Riviera Beach have been in decline for thirty years, creating "blighted physical, social, and economic conditions" (qtd. in Lush 2006). In 1999, residents such as Martha Babson formed a citizen action group to beautify the town, and they had hopeful talks with then mayoral candidate Michael Brown. Born and raised in Riviera Beach, Brown promised to clean things up, fight corruption in the local government, and make the city worthy again of its waterfront status. With Babson's vote, Brown was elected mayor, and within months he announced a major plan to redraw the city's redevelopment boundaries, hire the Viking Group (a yacht-building firm) as master developer, and begin to gobble up properties to build a 400-acre, \$2.4 billion complex of marinas, condos, hotels, shops, restaurants, an aquarium, and a maritime charter school. Having designated an official redevelopment area, the city was empowered under Florida law to take properties for public use as long as they were blighted. Grassroots leaders such as Martha Babson, who received a notice that her property was blighted and subject to eminent domain, were incensed. "We just felt like a donkey had kicked us in the diaphragm," she said (qtd. in Lush 2006).

Riviera Beach illustrates the post-*Kelo* confidence that local officials have in eminent domain as a development tool. The Florida legislature began considering ways to restrict eminent domain in July 2005, and soon afterward Mayor Brown began urging

the city to initiate eminent-domain proceedings before the legislature could enact its restriction. Other city council members were cautious, however, and the redevelopment plan proceeded without threats of eminent domain. When Florida's legislature passed a bill in May 2006 restricting development takings, Mayor Brown saw a missed opportunity. "I think it would have been a good strategy," he said. "Had the city taken the action this would have been water under the bridge" (qtd. in Cooper 2006). Nevertheless, the mayor pushed ahead with the strategy, striking a deal with the master developer in which the city promised to condemn certain properties if necessary.<sup>2</sup>

California is also known for eminent-domain abuse and did not update its takings laws in the year following *Kelo*. If a city deems a property "blighted," it may be transferred to developers through eminent-domain proceedings, and some big California cities have shown the type of post-*Kelo* boldness found in Yolo County and Hercules. One week after *Kelo*, Oakland officials evicted a tire shop and an adjacent auto repair shop, whose owners had been resisting eminent-domain takings, to pave the way for new high-rise housing. "The city thinks I cause 'economic blight' because I don't produce enough tax revenue," the tire shop owner said. "We thought we'd win, but the Supreme Court took away my last chance." The auto shop owner added, "[T]he cost of buying or leasing a new site is prohibitive. The money the city offered me does not cover it" (qtd. in Zamora 2005).

Los Angeles garnered national attention throughout the year following *Kelo* for condemning dozens of business properties near the famous intersection of Hollywood and Vine streets. The city seized the land to allow a private developer to build a luxury hotel, condominiums, shops, and restaurants. Properties were deemed blighted for trivial reasons, such as lack of sufficient parking. The city's redevelopment agency said that developing the area was impossible without exercising the power of eminent domain, but the city council promised that power would be used only as a last resort if developers and property owners failed to reach a private deal (Welch 2005a).

Land-use officials boldly tested the post-*Kelo* waters in New Jersey, a state whose high court has yet to rule on economic-development takings. In an unusual use of eminent domain, state officials seized 17 acres of working farmland from Harvestone Farms, a 154-acre patchwork of fields in a traditional farming region. The state needed the farm land to offset loss of wetlands, following road construction more than fifty miles away in Sussex County. Local mayor Tracy Tobin said, "[T]he state has poured millions of dollars into farmland preservation. Why in the Lord's name would they turn around and attack a working farm?" (qtd. in Wihbey 2006).

Such events, in cities large and small, are part of a national trend. According to the Institute for Justice and the Castle Coalition, *Kelo* has led to an "opening of the

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2. Florida governor Jeb Bush had not yet signed the bill into law when Riviera signed the contract with Viking. Because of this timing, Brown claims that Riviera Beach's plan falls under the previous, more lenient law and an exercise of eminent domain is still the city's option (Gomez 2006). At the time of this writing, the issue was on the way to state court, but arguments had not yet been heard.

floodgates.” In a report of selected case studies, the Castle Coalition detailed thirty-one stories of local governments taking a stronger eminent-domain position after *Kelo* (Institute for Justice 2006). In many of these stories, the project was uncertain or stuck in court, but then moved quickly after a *Kelo*-emboldened local government threatened the exercise of eminent-domain powers. Another study, broader in scope, found 5,783 new eminent-domain uses in the single year following the *Kelo* ruling (Berliner 2006). In comparison, a total of 10,282 properties were under threat of eminent-domain takings in the five years prior to *Kelo* (Berliner 2003).

This trend toward greater abuse should come as no surprise, given the historical development of the political-legal environment surrounding eminent domain. Fueled by Progressive- and New Deal-era attitudes hostile to private-property rights, takings jurisprudence has consistently expanded government’s eminent-domain powers. Sandefur discusses the case history that caused a shift of antitakings arguments from the Fifth Amendment’s due process clause to its less stringent public-use requirement. “The demise of economic substantive due process in the 1930s . . . forced litigants to contend that a challenged condemnation was not a ‘public use’ and was therefore unconstitutional” (forthcoming, 7). The Court had already extended public use to the states via the Fourteenth Amendment’s due process clause in its 1897 *Chicago Burlington* decision (Ely 2005), and “public use” had already become a weakened requirement by that time.

[I]n the late nineteenth century both state and federal courts gradually adopted a broader reading of governmental authority to acquire private property. The constitutional norm of “public use” was increasingly equated with the more expansive concept of “public benefit” or “interest.” Moreover, judicial review of legislative decisions about the need to exercise eminent domain grew slack. In the face of such trends the significance of the “public use” requirement steadily eroded. The decline of the “public use” limitation was hastened by the larger jurisprudential shift associated with the political triumph of the New Deal. (Ely 2005, 55, footnotes omitted)

Thus, the expanding eminent-domain powers were nurtured by a hostile view of private-property rights in favor of elected officials’ ideas of the public interest, as influenced by redistributionist political pressures. Two leading public-choice scholars recently assessed these developments as follows. “Nineteen thirty-five’s [*sic*] infamous ‘switch in time that saved nine’ launched a period of judicial activism that established new ‘rights’ nowhere found in the Constitution written by the Founding Fathers in 1787. The view that the Constitution is an organic, living document adaptable as necessary to accommodate changing circumstances of time and place quickly entered the mainstream of American legal thinking” (Shughart and Tollison 2005, 239).

In this legal climate, one can appreciate how the Supreme Court repeatedly deferred to takings that the government said were in the public interest. In the

landmark 1954 decision in *Berman v. Parker*, the Court allowed takings in pursuit of bureaucratic visions of urban renewal, and in the 1984 decision in *Hawaii Housing v. Midkiff*, it upheld takings to break up what politicians claimed was a land oligopoly. In both cases, as well as in the Michigan state court ruling in *Poletown v. Detroit*, the courts stepped aside in deference to what politicians of the time and place dictated to be the public interest. In this climate, the *Kelo* decision seems to have been an almost foregone conclusion, and legal scholars expressed shock that the minority garnered four votes (SCOTUSblog 2005). In fact, *Kelo* was one of a trio of property-rights cases heard in the 2004–2005 term, and in all three the Court strengthened the governments takings power even further (Ely 2005).

Eminent-domain powers have become ever stronger in this nurturing legal-political environment. The effect is detrimental to the public interest because strong eminent-domain powers make policy decisions vulnerable to rent-seeking dynamics, which can lead to inappropriate and abusive uses of power. Land-use policymakers attract political pressure from developers looking for a less costly way to acquire land. Local officials get to plan development according to their subjective preferences, and bureaucrats get to further their careers by taking credit for economic-development projects. With strong eminent-domain powers, land-use decisions are shaped by cozy-triangle political incentives more than by economic realities or by the public interest. With the growth of the economic-development industry around these rent-seeking dynamics, eminent-domain taking has become a standard, commonly used tool in economic development (Staley and Blair 2005). Property owners' rights no longer enjoy constitutional protection but flow instead with the currents of political expedience and trends of fashion in development planning. Seen in its proper context, *Kelo's* emboldening effect is part of the movement toward a rent-seeking society in property rights and away from a constitutional order (Buchanan, Tollison, and Tullock 1980). As a result, a response to *Kelo* by grassroots groups, voters, and property-rights advocates has been mounted through the political process.

### Spotlight and Backlash Effects

It has been a bumpy ride for Riviera Beach and Mayor Brown's master plan, as big projects in little places have come under the microscope after *Kelo*. Property-rights advocates howled that Riviera Beach, a city of 31,000, would displace some 5,100 residents (McCabe 2001), making its action the second-largest eminent-domain relocation since the urban renewal of southwestern Washington, D.C. (which displaced approximately 5,000 residents) in the 1950s and 1960s. Some newspapers reported that Riviera would dispossess 6,000 people, but even the 5,100 number was exaggerated. In truth, only about 1,350 residents were threatened under the Riviera master plan. Although the city had not used eminent domain to acquire any property, its plan was enough for a *Tampa Tribune* editorial to conclude, "Riviera Beach exemplifies

how local governments can abuse eminent domain” (“Florida Must Properly Define ‘Blight’” 2005).<sup>3</sup>

In addition to switching on the media spotlight, *Kelo* produced a considerable backlash among voters and legislators. As Dana Berliner, attorney for the Institute for Justice, commented, “The court has just told homeowners that the government can take their house for someone who pays more in taxes” (qtd. in Salzman and Mansnerus 2005, 20). One state senator in Connecticut, Republican John McKinney, remarked, “[V]ery few issues are this easy to understand. My constituents have shown feelings of outrage, surprise, and some are scared. Few homes *will* be taken by eminent domain, but anyone’s home *can* be taken by eminent domain” (qtd. in Lucas 2006). In stark recognition of this threat, public opinion swung heavily in favor of property owners soon after *Kelo*. Pollsters and newspapers quickly gauged the public’s sentiment, and the results were overwhelmingly negative. In several on-line polls, more than 90 percent of those polled disagreed with the *Kelo* Court. Another nationwide poll of registered voters indicated 68 percent support for legislative restraints on eminent domain.<sup>4</sup>

Congress did not waste any time, either. In the days following the decision, then House majority leader Tom DeLay called *Kelo* “a horrible decision” (Associated Press 2005), and the House passed a resolution by a vote of 365 to 33 to express “grave disapproval” of the *Kelo* Court. Later, the House approved by 231 to 189 a measure to withhold federal economic-development funding related to eminent-domain land transfers to private developers. Although dozens of bills have been introduced by members of both parties, Congress has yet to pass a law at the time of this writing.<sup>5</sup>

This spotlight-and-backlash environment has had the effect of constraining local policymakers. After *Kelo*, they would risk negative publicity and voter unease in resorting to eminent-domain proceedings for economic-development projects. Such projects would also face greater legal costs because property owners have become more educated about eminent domain and enjoy a broader support network. Thus, many local officials have shied away from eminent domain, and some have pledged never to use it except as a last resort. In Riviera Beach, Councilwoman Liz Wade repeatedly promised as much in news articles. In San Jose, the Redevelopment Agency vowed not to use eminent domain on single-family homes and asked the city council to reconfirm this policy to reassure residents further (Roberts 2006).

3. The 5,100 number was first reported in McCabe 2001 and later touted by activist groups such as the Castle Coalition (Berliner 2002) and the Association of Community Organizations for Reform Now (ACORN) (2005). The 6,000 number was reported in the *Washington Times* (Price 2005). More recently, the 1,000 figure is routinely reported as being more accurate; see, for example, Cooper 2006.

4. For the 90 percent finding, see “Hands Off Our House” 2005. Poll results were taken from various news Web sites, including msnbc.com, cnn.com, chronicle.augusta.com, haptonroads.com, and bradenton.com. For the 68 percent finding, see Andres 2005.

5. The House vote of 365 to 33 was on H.R. 340, 109th Congress, sponsored by Rep. Phil Gingrey (R-GA).

State legislatures have acted strongly on eminent domain. With so much exposure to information about an issue that had become so sensitive, voters would be unlikely to have memory problems when incumbents stood for reelection. As Riviera Beach's Liz Wade pointed out, legislators felt strong political pressure because of the *Kelo* backlash. "You had a national outcry that was heard from coast to coast. Legislatures across the country had to answer that cry. They had to respond or none of them would be in office" (qtd. in Cooper 2006). Two states, Utah and Nevada, limited eminent domain in anticipation of the *Kelo* decision. Florida's legislature was not far behind; it started working on the issue one day after the *Kelo* decision was released. As of June 15, 2006, eminent-domain measures had been considered in forty-three of the forty-four states whose legislatures had convened (National Conference of State Legislatures 2006). Bills had been passed in twenty-seven state legislatures. The bills had been enacted into law in eighteen of those legislatures, been vetoed in three others, and awaited the governor's signature in the others.

Several state high courts also began to interpret economic-development takings more narrowly. Most notably, in 2004, the Michigan Supreme Court overturned the 1981 *Poletown* decision, which had allowed Detroit to transfer an entire working-class neighborhood to General Motors to build a Cadillac plant.<sup>6</sup> Under the new Michigan court rules, the government still has the power of eminent domain, but that power is more restricted.<sup>7</sup> In suburban Cincinnati, seventy homes stood in the way of a \$125 million office-and-retail development. Three of the property owners challenged the city's power of eminent domain, and in the resulting lawsuit a state court ruled in favor of the city.<sup>8</sup> On appeal, the case became the first involving eminent-domain takings for economic development to reach a state supreme court after *Kelo*. On July 26, 2006, the Ohio Supreme Court reversed the lower court's ruling, favoring the property owners. This decision brings to ten the number of state supreme courts that now disallow takings for economic development. Several others, such as those in New Hampshire and Massachusetts, restrict development takings without banning them (Somin forthcoming).

At least on the surface, then, the pendulum appears to have gained some momentum toward stronger protection of private-property rights in the year following *Kelo*, as the states generally appear to be constraining the powers of eminent domain. In particular, most of the state legislation through 2006 has restricted economic-development takings, with exceptions such as transferring property to common carriers (Kansas) or public utilities (Maine). Many of the laws attempt to define public use or purpose more carefully as not including economic development (Florida), and others sharpen meanings of blight to prevent loophole mining (Georgia). Also, most of these laws feature

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6. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), reversing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981).

7. For an excellent analysis of the Michigan court on public-use takings, see Somin 2004.

8. *City of Norwood v. Horney*, 161 Ohio App.3d 316, 2005-Ohio-2448.

procedural changes, such as requiring approval by the local government's oversight body (Utah), greater than fair-market value for residential takings (Indiana), and more public notice (West Virginia). In Connecticut, lawmakers intend that any law passed with regard to eminent-domain takings should be retroactive and therefore stop the New London project (Lucas 2006).

The legislatures' quick response to public sentiment was dramatic news to Larry Morandi, an infrastructure analyst for the National Conference of State Legislatures. "I have never seen a response to a Supreme Court decision this dramatic," he said (qtd. in Lucas 2006). Yet critics and partisans have cautioned that the pendulum may swing too far, leaving the states too restrictive on eminent domain. David Parkhurst, legislative counsel for the National League of Cities, said in a March 16, 2006, interview that tight restrictions on eminent domain might harm municipal bond ratings and jeopardize public-private partnerships that create jobs (Lucas 2006). In Connecticut, state senator Eric Coleman told *Stateline.org*, "I have concerns about an absolute prohibition, particularly in relation to urban centers where there is little land to assemble for an economic development project" (qtd. in Lucas 2006). And in Florida, state representative Ron Greenstein expressed special concern for ongoing projects, telling *Builder* (a home-construction trade magazine), "[W]e should not be throwing the baby out with the bath water. You can't tell people who have already invested money, 'The hell with you.' Why would anybody want to redevelop in the state of Florida?" (qtd. in Curry 2006).

The critics' and partisans' arguments, though clearly suffused with political rhetoric, have some basis of support in economic theory. In terms of economic efficiency, the optimal extent of the eminent-domain power is greater than zero. In certain circumstances, the well-known holdout problem can prevent transfer of property to higher-valued uses under voluntary exchange. In the formal economics literature, the question is not whether eminent domain is efficient under holdouts, but rather what the efficient amount of compensation is (Blume, Rubinfeld, and Shapiro 1984; Hermalin 1995).<sup>9</sup> Traditional uses for eminent domain, such as securing rights of way for infrastructure and transportation, are likely to create net positive effects for communities; however, transfer of property through eminent domain for urban renewal does not have such effects because the compensation offered distorts relative prices of high- and low-value properties (Munch 1976). In addition, given the received legal-constitutional context discussed in the previous section, a state law cannot overly restrict eminent-domain powers with much expectation of being upheld in court.

In sum, the legal climate has gradually become more favorable to eminent-domain powers, and the political environment has encouraged rent-seeking dynamics that lead to politicized land-use decisions. The available evidence indicates a trend of increasing eminent-domain use in the years prior to *Kelo*, and a strong acceleration of that trend in the year after *Kelo*. Yet certain legitimate uses for eminent domain

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9. **Editor's note:** For a strong challenge to the orthodox economic-theory justifications of eminent-domain takings, see Bruce Benson's article in the fall 2005 issue of this journal.

remain, and state laws to restrict eminent-domain powers are themselves limited by a massive body of judicial precedent. Thus, after *Kelo*, the central issue from a political economy perspective is how best to protect property owners' rights while maintaining traditional eminent-domain authority. Equivalently, the problem can be stated as a classic political economy question of institutional design:

The Scholastic philosophers looked upon the tradesman, the merchant, and the moneylender in much the same way that many modern intellectuals look upon the political pressure group. Adam Smith and those associated with the movement he represented were partially successful in convincing the public at large that, within the limits of certain general rules of action, the self-seeking activities of the merchant and moneylender tend to further the general interests of everyone in the community. An acceptable theory of collective choice can perhaps do something similar in pointing the way toward those rules for collective choice-making, the constitution, under which the activities of political tradesmen can be similarly reconciled with the interests of all members of the social group. (Buchanan and Tullock 1962, 22–23)

The ideal state law in response to *Kelo* will limit eminent-domain abuse while empowering local policymakers so that their decisions serve the public interest. Such a law would insulate eminent-domain decisions from interest-group and majoritarian politics, as well as from officials' subjective preferences for central planning. Within this framework, a brief analysis of the currently developing state laws can provide a basis for concluding whether *Kelo* will turn out to be a net improvement or a detriment to private-property rights.

### **Assessing State Restrictions on Eminent Domain**

By July 2006, eighteen states had enacted legislation to restrict eminent-domain powers. In six other states, legislation awaited gubernatorial signature, and in three other states the governors had vetoed legislation. As many as sixteen additional states were considering some form of similar legislation (National Conference of State Legislatures 2006). As we have noted, this wave of new laws is motivated in large part by the electoral politics of the popular backlash against *Kelo*, but the backlash is not the only political force in play. Organized interests opposed to restrictions of eminent domain include local governments, redevelopment agencies, planning groups, and corporate real-estate developers. The list of amicus briefs filed with the *Kelo* Court makes clear how the interests are aligned. Filing for the petitioners were public-interest groups advocating individual rights and business groups concerned for their own property.<sup>10</sup>

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10. Among the public-interest groups were America's Future, the Becket Fund for Religious Liberty, the Cato Institute, and the NAACP jointly with the AARP. Among the business groups were the King Ranch

On the opposing side, filing in support of the respondents, were the National League of Cities and the American Planning Association, a thirty-six-thousand-member association of professional planners. These same groups lobbied against restriction of eminent-domain powers at the state and federal level (National League of Cities 2005; Cooper and Gomez 2006; Sandefur forthcoming).

When deciding under pressure from opposing lobbies, legislators create policies that distribute political benefits in proportion to the relative effectiveness of the respective lobbies (Peltzman 1976; Denzau and Munger 1986). Because cities and developers have lobbied state lawmakers on this issue, the rational-choice expectation is that the laws will not restrict local officials' eminent-domain powers completely. Furthermore, under certain conditions, legislators will have an incentive to obfuscate the effects of the laws they pass. Given the widespread anxiety among property owners following *Kelo*, legislators may tend toward "symbolic politics," in which legislation imparts real benefits for organized interests while offering only symbolic reassurances to the general public (Edelman 1964, 1971). Legal scholar Cass Sunstein describes such laws as frequently "making statements" rather than controlling behavior (1996, 2024). Also, legislators may intend to obfuscate the effects of the laws to avoid appearances of corruption (Boylan and Long 2003). Although an evaluation of the relative explanatory power of these theories is not within the scope of this article, we invoke these explanations to provide a basis for our expectation that some of the states' laws will have more bark than bite in restricting eminent-domain powers. Further, in the case of laws that lack bite, some effort will be made to portray them as more powerful than they actually are. In other words, the backlash-and-spotlight effect may be more symbolic than real. Steve Anderson of the Castle Coalition is concerned that states are focused too much on restricting takings and that they are not paying enough attention to defining *blight*: "Blight is defined so vaguely. This gives government agencies a chance to do economic development through the back door" (qtd. in Lucas 2006).

By analyzing the twenty-seven bills that have passed state legislatures, we can delineate specific provisions that by their language appear on the surface to restrict eminent domain, but in actuality will do little to change the scope of powers enjoyed under *Kelo*. At the same time, we can also identify provisions that impose real constraints.

Many of the new state laws ban takings for economic development but attach seemingly reasonable exemptions that actually maintain or even expand eminent-domain powers. The most pervasive exemption is to allow eminent domain if the

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(an 825,000-acre tract in south Texas that is vulnerable to eminent domain) and the National Association of Home Builders (NAHB) jointly with the National Association of Realtors. In their brief, the home-building and realtor industry groups expressed concern mainly for their own properties. "NAHB recognizes that housing will almost never afford a community with the economic development benefits that a commercial application will. If economic development as a sole justification for public use is decided using a rational basis test with deference to local legislative bodies, then the door is left open for local governments to abuse their eminent domain powers and take developable land from NAHB members as they could from any other property owner" (Pickel 2004, 1).

local legislative body has declared an area or a specific property to be blighted, where *blight* is defined vaguely or broadly. The definition of *blight* in West Virginia’s new law exemplifies this trend well:

(c) “Blighted area” means an area, other than a slum area, which by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site improvement, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, 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 the community, 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.

(d) “Blighted property” means a tract or parcel of land that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air or sanitation, high density of population and overcrowding, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is detrimental to the public health, safety or welfare. (Code of West Virginia, 1931, Chapter 16, Article 18, Section 16-8-3 as amended by H.B. 4048, March 11, 2006)

Local officials can apply such an encompassing definition of blight to practically any area or property—all they need is a modicum of creativity and the will to do so. Thus, West Virginia’s law ultimately places the protection of private property in the hands of city council majorities, rendering the law’s restriction on eminent domain effectively meaningless. Similar loopholes exist in new laws passed in Alabama, Maine, Minnesota, Nebraska, Texas, Vermont, and Wisconsin.

Another type of loophole is a ban on eminent domain when economic development is the *sole* purpose of the taking, as provided in Missouri’s new law. Under this stipulation, the government has only to add *some* public purpose, no matter how minor, to the taking rationale, which is an easy task, not only in Missouri but in every state where *public use* is defined broadly and therefore easy for local governments to justify. As Justice Scalia declared in 1992 for the Court majority in *Lucas v. South Carolina Coastal Council*, in “practically every case” only a “stupid staff” would fail to muster such a rationale (505 U.S. 1003 1025-6, note 12 [1992]).

Aside from loopholes, many state laws simply leave policymakers with too much discretion to pursue their subjective preferences. In Alabama, policymakers can declare an area blighted “whenever it fails to perform economically up to a standard that they would prefer to see” (Sandefur forthcoming). Similarly, the new Texas law “authorizes

local government to use eminent domain to take property from private parties whose use of the property does not satisfy planners” (Sandefur forthcoming).

Many of the new state laws, in contrast, do impose substantive restraints on eminent domain. The best example is a narrow definition of *public use*, as in the laws passed by Arizona, Georgia, Iowa, Kentucky, Minnesota, and Indiana. These statutes use language similar to that of Thomas M. Cooley’s famous treatise on limiting government power in a federal system, which defined *public use* as the “possession, occupation and enjoyment of the land by the public, or public agencies” ([1868] 1972, 766). In Indiana, *public use* is defined even more narrowly to exclude enhancing the tax base, increasing tax revenue, or fostering employment or general economic health. Similarly, Georgia’s new law excludes the public benefits of economic development, and Florida’s new law excludes tax-base preservation or enhancement as well as blight.

In a few states, the blight exemption is retained, but *blight* is defined more narrowly. Pennsylvania’s law imposes a ten-year limitation on any designation of blight. Georgia’s new law excludes aesthetic considerations from the determination of blight, and both Georgia and Pennsylvania require that any blighted property must pose a danger to public health *and* meet the statutory definitions of *blight* (Sandefur forthcoming).

Other meaningful restrictions are achieved by placing procedural and fiscal costs on governments that choose to use eminent domain. In some states, governments must now cover property owners’ legal costs in condemnation proceedings and pay more than the average assessed market value of condemned property. Florida’s new law requires a waiting period of five years before transferring condemned properties to private parties. In Texas, the new statute introduces meaningful judicial review (Sandefur forthcoming).

The most stringent law is South Dakota’s, which simply prohibits takings for economic development without exemptions. New Mexico’s legislature passed a similar bill, but Governor Bill Richardson vetoed it in March 2006, saying the bill was too vague and could stop worthy projects simply because a private developer was involved (Gessing 2006).

In sum, laws with bark but no bite are characterized by vague and encompassing definitions of *blight* and *public use* and by broad deference to local legislative majorities. In contrast, laws with bite tend to limit the option of development takings available to land-use policymakers while otherwise respecting their authority to support development peculiar to the needs of their communities. As states continue to consider and enact legislation, the extent to which a particular law has bite will depend on the legislature’s response to opposing lobbying forces from grassroots and property advocates and from local governments and developers.

## Outlook

The *Kelo* ruling has had a profound impact on land-use policymakers’ incentives throughout the country. The emboldening effect has been real, as we see in places such as Hercules, Memphis, Riviera Beach, New Jersey, San Jose, New York, and

Los Angeles. However, the spotlight and backlash effects have also worked to break up the dark cloud that *Kelo* would have placed over property rights. Virtually every state legislature, many of the courts, and Congress are acting to restrict eminent domain in various ways. Thus, individual property owners ultimately may benefit from the effects of *Kelo*. Says John Shirey, executive director of the California Redevelopment Agency: “The irony of that Supreme Court decision is that the winners are turning out to be the big losers and the losers are emerging as the winners. There has been such a public backlash against that decision that it’s much easier than it has been in years for the opponents of that decision to pass state and federal laws” (qtd. in Fine 2006).

How far the pendulum swings will vary among the states and will depend on the character of each state’s new restrictive laws. Of course, each state is unique in its land, politics, and economy. *Kelo* set in motion a familiar process of institutional experimentation in which the states serve as the great laboratory of democracy. This activity makes it unlikely that *Kelo* will spell the end of private property. Critics of the state laws warn, however, that these laws lack sufficient procedural teeth, define *blight* too loosely, and leave too many exemptions that local policymakers will turn into loopholes over time. Thus, *Kelo* is also not likely to be the best thing to happen to private property.

Nevertheless, property owners have reasons for a guardedly optimistic outlook. Legislation in the year following *Kelo* points to a tightening of public use. Based on this trend, we can say that local land-use policymakers will face greater political and procedural costs in their use of eminent domain in the near future. That change places more decision-making power in the hands of buyers and sellers, who are closest to the property and who possess the specialized knowledge necessary to put land to its highest valued uses. On balance, this outcome benefits society. Not only does it afford greater protection to existing property owners—a value that opinion polls indicate is broadly shared—but it enhances efficiency in land-use decisions as well. Properties will be more likely to be used for purposes that communities value most highly, rather than for purposes that city planners, with their frequently unrealistic visions, and their political supporters prefer. In the future, developers will have less capacity to acquire land through the government, and as a result they will spend less time seeking rents and more time building houses, stores, and office buildings. If state legislatures can eschew symbolic politics and lobbying pressure from organized interests, an important effect of *Kelo* will be to restrict government’s ability to seize land for economic development and thereby to constrain policymakers to reconcile their own interests with those of “all members in the social group” (Buchanan and Tullock 1962, 23).

## Conclusion

*Kelo v. New London* immediately became one of the most controversial Supreme Court decisions in recent decades, igniting a struggle for power among voters, developers, local policymakers, and state governments. Initial fears of unbounded eminent-domain power sparked numerous pronouncements of the end of private

property. Yet powerful spotlight and backlash effects have prompted action by state legislatures and courts. Almost all of the state legislatures are considering or have passed laws that, at least ostensibly, restrict eminent domain for economic development. Many states are also requiring more careful definitions of and processes for determining blight, and a growing number of state courts are interpreting public use more narrowly. Although *Kelo* may have opened the floodgates on eminent domain, the states acted quickly to shift power in the opposite direction.

To the extent that the backlash outweighs the floodgate effect, the more limited eminent-domain power that results is almost certainly good for the public interest. The postbacklash environment will put more land-use decisions in the hands of sellers and buyers, who possess the specialized knowledge to negotiate about market prices most competently in determining a property's highest-valued use. Weakened eminent-domain powers also discourage rent seeking and the pursuit of the planners' subjective preferences with regard to development. To the extent that the *Kelo* backlash ultimately limits takings for economic development, this outcome will equip land-use policymakers to serve the public interest better.

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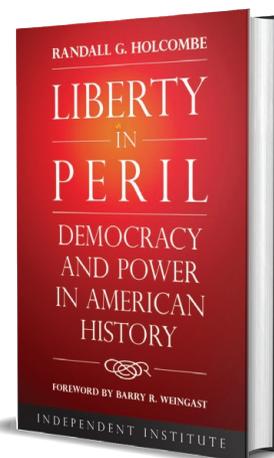
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