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Kelo: One Year Later

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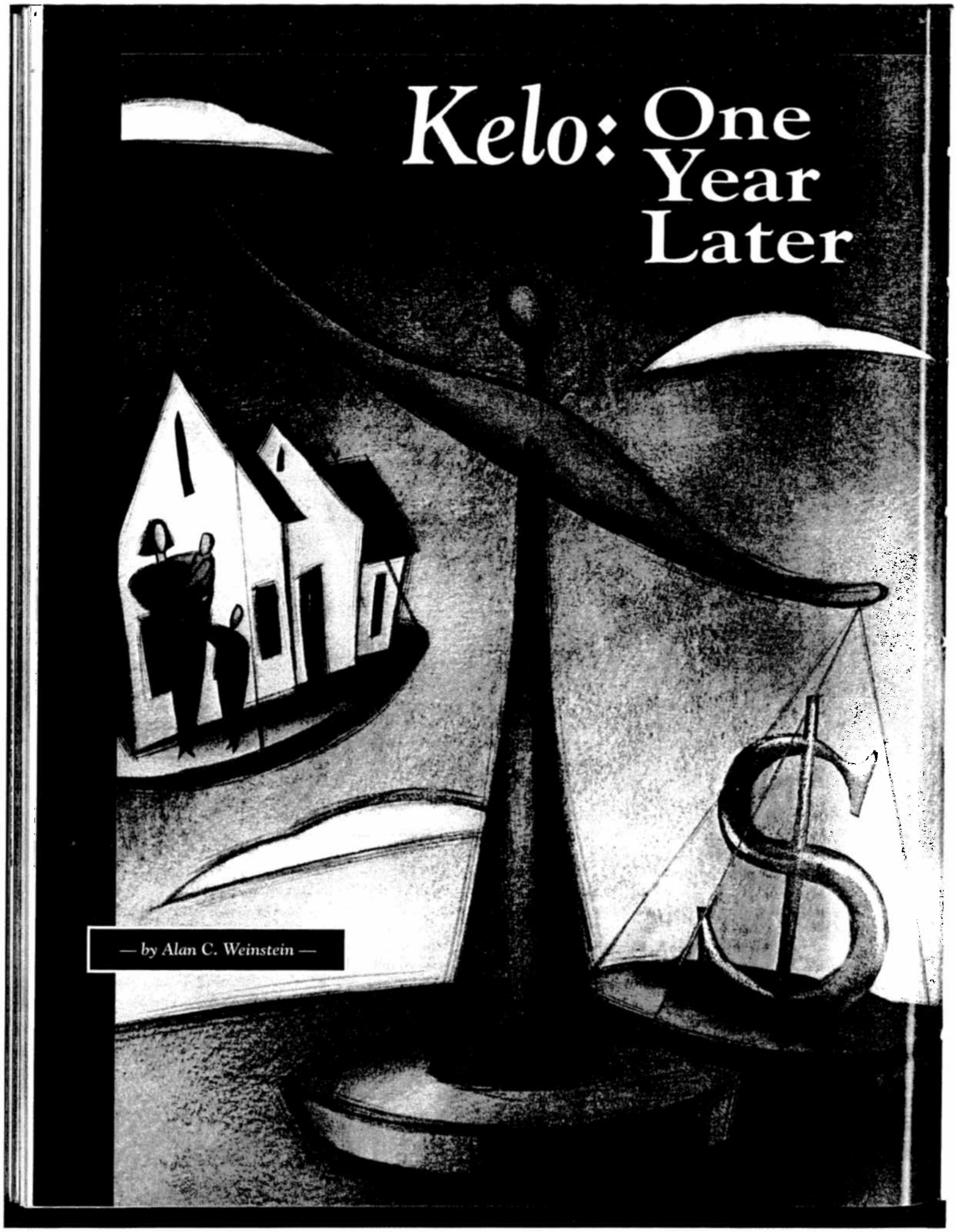

— by Alan C. Weinstein —

June of 2006 marked the first anniversaryof the United States Supreme Court's ruling in *Kelo v. City of New London*,[1] making this a good time to analyze the past year's flurry of legislative activity and assess what it means for local governments.[2] As of mid-May of 2006, more than forty states were considering legislation in reaction to the *Kelo* ruling, and fifteen have already enacted such legislation.[3]

The intensity and extent of the negative reaction to the *Kelo* ruling has been almost unprecedented. Why is this? Three factors stand out: first, the uncharacteristically shrill and alarmist tone of Justice Sandra Day O'Connor's dissent; second, the change in the legal and political climate in the United States since the Court's last ruling on eminent domain, the 1984 case of *Hawaii Housing Authority v. Midkiff*;[4] and third, the media's and public's outcry against the ruling.[5]

The mere fact that Justice O'Connor dissented in *Kelo* was a surprise — but the tone of her dissenting opinion was a shock. Long seen as a moderate occupying a centrist position on the Court, in *Kelo*, Justice O'Connor not only voted with the more conservative members of the Court but authored a dissent that rivaled any by the Court's most conservative justice, Antonin Scalia. Despite Justice Stevens's carefully argued majority opinion stressing the factors a court must examine to determine whether the use of eminent domain for economic development is truly serving a legitimate public purpose (rather than improperly promoting a purely private benefit), Justice O'Connor's dissent insisted that the majority's ruling made nearly all private property "susceptible to condemnation."[6] Hammering the point home, she declared: "The specter of condemnation hangs over all property. 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."[7]

Justice O'Connor's inflamed rhetoric was immediately picked up and widely disseminated by advocates of the so-called "property rights movement," which was still in its infancy when *Midkiff* was decided in 1984.[8] The media also appeared to have been strongly influenced by Justice O'Connor's rhetoric, perhaps because capitalizing on the hyperbole of "replacing any Motel 6 with a Ritz-Carlton" proved irresistible when compared with the parsed tone of Justice Stevens's opinion. A forthcoming law review article that surveys the print and electronic media coverage of the *Kelo* decision concludes that the overwhelming majority of news stories and editorials have been critical of the ruling.[9]

Although it is uncertain whether the media outcry heightened — or simply reflected — public opposition to the *Kelo* ruling, it is clear that in the past half-century, only one other Supreme Court case has sparked a similarly extreme reaction: *Roe v. Wade*, the 1973 decision upholding a woman's right to an abortion.[10] At first, it seems implausible that the power of eminent domain could rank with abortion as a "hot-button" issue for the American public, but one critical factor links the two decisions: each was seen as allowing government to "violate" a "right" that many viewed as inviolable. Thus, while the rulings differed "doctrinally"— *Roe* deciding that the federal Constitution limited state government authority (over Jane Roe's "right" to make decisions about her body) and *Kelo* deciding that the federal Constitution did not limit state government authority (over Susette Kelo's "right" to make decisions about her home) — both decisions deeply offended a large portion of the country because each "legalized" an action viewed by many as immoral: destroying a life in *Roe* and destroying a home in *Kelo*.

A critical difference between the two decisions, however, was their effect on existing law. *Roe* was truly a landmark case: for the first time, the Supreme Court found a "right to privacy" guaranteed by the Due Process Clause of the federal Constitution. *Kelo*, in contrast, merely followed the Court's precedents in ruling that the power of eminent domain could be used for a public purpose (such as economic development), as well as for a public use.[11] Moreover, the *Kelo* majority made it clear that states were free to impose greater limits on the power of eminent domain than those required by the federal Constitution.[12] In fact, starting long before *Kelo* was decided, a number of states had already interpreted their state constitutions as either barring or significantly limiting condemnation for economic development purposes.[13]

Given that *Kelo* really did not change the state of the law, what arguably accounts for the virulence of the reaction to it is the combined effect of the other two factors: Justice O'Connor's inflammatory rhetoric, and a well-organized and well-financed property rights movement eager to fan those flames.

The Legislative Reaction: Congress

Both Congress and the majority of state legislatures reacted to *Kelo* by introducing, and in some instances enacting, laws ranging from authorizing a legislative study of the eminent domain questions raised by *Kelo*, through tinkering with condemnation procedures, to severe restrictions on its use.[14]

While a number of bills were introduced in the U.S. House and Senate, the major "*Kelo* bill" in Congress is H.R. 4128, introduced by James Sensenbrenner (R-WI), which passed the House in November 2005 by a vote of 376-38, but has since been languishing in the Senate Judiciary Committee.[15] That bill seeks to prevent the use of eminent domain for economic development by denying federal economic development funds to any state or local government that uses eminent domain to transfer

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private property to other private parties for economic development purposes. The proposed funding ban is for two years following a judicial determination that the law has been violated, and the bill allows for private rights of action to enforce the law.[16]

Another far more limited measure addressing economic development has already been enacted by Congress.[17] Senator Kit Bond (R-MO) successfully attached an amendment to a federal appropriations bill that prohibits use of funds appropriated under the act for "economic development that primarily benefits private entities," and requires the General Accounting Office (GAO) to submit to Congress, within one year, a study "on the nationwide use of eminent domain."[18] Since the funding prohibition does little more than echo existing law — *Kelo* prohibits eminent domain that "primarily benefits private entities"— the effect of the so-called Bond Amendment remains to be seen; namely, the findings the GAO will report from its study. The passage of the Bond Amendment has taken the wind out of the sails for those pushing to enact H.R. 4128, as it appears the Senate is content to await the forthcoming GAO study before taking any further action.

In the most recent development at the federal level, on June 23, 2006, President Bush issued an Executive Order limiting the use of eminent domain by federal agencies.[19] The Order, titled "Protecting the Property Rights of the American People," limits "the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." Given the *Kelo* Court's broad definition of "public use" and its recognition that a condemnation "merely" to benefit private parties would not meet even that broad definition, this Executive Order appears to do nothing more than restate the Court's ruling in terms that sound as though they are "protecting property rights," but actually have no substantive effect.

The Legislative Reaction: States

By mid-May of 2006, legislation in response to *Kelo* had been enacted or introduced in more than forty states.[20] These legislative proposals and enactments can be placed into several distinct categories.

The most radical are those that seek to "repeal" *Kelo* by effectively banning, or placing severe limitations on, the use of eminent domain for economic development purposes. Legislation in this category can seek to accomplish that goal in various ways. Some measures simply prohibit the use of eminent domain for "economic development" — using that exact term — while others use language such as "for the primary purposes of creating jobs, generating tax revenue" or "to transfer private property to another private use" to identify the prohibited purpose. Alabama, the first state to enact legislation in response to *Kelo*, took this approach in August 2005 in legislation that prohibits the use of condemnation "for the purpose of nongovernmental retail, office, commercial, residential, or industrial development or use..."[21] Legislation in other states accomplishes the same goal by limiting eminent domain to achieving a "public use," and then defining that term so as to exclude economic development. Examples are the bills introduced in South Carolina (which defines "public use" as requiring the "possession, occupation and enjoyment of the condemned property by the public at large or by public agencies")[22] and South Dakota (which prohibits the use of eminent domain either to transfer condemned property "to any private person, nongovernmental entity, or other public-private business entity; or primarily for enhancement of tax revenue").[23]

Before describing other categories of anti-*Kelo* legislation, the Alabama law[24] is worth discussing further because it illustrates a critical point: the importance of a detailed analysis of the actual legislative proposal or enactment. While the Alabama law seemingly bans condemnation for economic development, it contains a crucial exception: it does not apply to the exercise of eminent domain "based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan."[25] In the view of one property rights group, this exception swallows the rule and effectively allows Alabama cities and development agencies to take private property for economic development because other provisions of state law define "blight" broadly.[26] An Indiana bill, S.B. 391,[27] has a similar loophole. It prohibits condemnation for "commercial use," but exempts property that is blighted, or cases where "it is likely that the property will promote employment or create business opportunities."[28]

In other states, legislation that contains a "blight exception" to a general ban on condemnation for economic development — or limits condemnation to blighted property — is more restrictive. Texas, for example, enacted a ban on condemnation for economic development with a "blight exemption" in September 2005, just a month after Alabama, but the Texas law adopted a far more restrictive definition of blight, requiring that the condemnation seek to "eliminate an existing affirmative harm on society from slum or blight areas."[29] The critical term here is "affirmative harm," which refers to a distinction that Justice O'Connor emphasized in her *Kelo* dissent. She noted that the Supreme Court's prior approvals of eminent domain had all involved uses that "inflicted affirmative harm on society"; thus, she reasoned, the only permissible use of eminent domain for a "public purpose" is to address a police power violation or a public nuisance — a far more constricted scope for eminent domain than the majority's view that the condemnation power is coextensive with the police power.[30]

Other examples of legislation that places greater limits than those of *Kelo* on a government's ability to use eminent domain to address "blight" include measures in Arizona (which limits its condemnation to "slum" property and requires that the determination be made on a property-by-property, not area-wide, basis, and imposes a two-thirds supermajority requirement on the legislative body making the determination);[31] Oklahoma (which redefines "blighted area" as a place where the presence of a majority of listed factors substantially impairs the sound development and growth of the area as a menace to the public health, safety, morals, or welfare of the area, and redefines a "blighted property"

to be a structure that endangers life or property due to its unsafe conditions);[32] and Illinois (limiting condemnation to a "blighted area," and further requiring that prior to the condemnation, the condemning governmental entity enter into an agreement with a private entity to undertake the proposed redevelopment project).[33]

Another significant category of legislation comprises laws that either prohibit condemnation of residential property or impose additional compensation requirements for acquisition of such property. Some of these limit the protection to primary residences only or to acquisition for particular purposes. Legislation calling for additional compensation takes two basic forms: requiring compensation to exceed fair market value (FMV), as with Indiana's H.B. 1010 (requiring 150 percent of FMV for acquisition of a primary residence),[34] or allowing for the reimbursement of costs not normally covered, such as S.B. 2746 in Illinois (which permits the reimbursement of condemnees' appraisal costs, legal fees, and relocation expenses).[35] Illinois is not unique in considering the compensation issue more broadly than the residential context; several other states are pondering whether just compensation should include providing compensation to displaced renters and business lessees.[36]

Moreover, a number of proposals seek to restrain abuses of eminent domain by enhancing procedural protections. Many of these involve the imposition of a two-thirds or three-fourths "super-majority" voting requirement on legislative approvals of condemnations, or enhanced notice to intended condemnees of imminent governmental action. Delaware enacted such legislation in July 2005, requiring six months' notice prior to initiating condemnation procedures, a public hearing prior to condemnation, and the publication of a report describing the purpose for the exercise of eminent domain; the law also requires that the government pay attorneys' fees for parties in condemnation proceedings.[37]

Another category of state legislation addressing perceived abuse of eminent domain comprises measures allowing a former owner to reacquire condemned property if the purpose for which it was acquired under eminent domain does not come to fruition. Some proposals provide a right to repurchase if the condemned property is not used for the stated public purpose or for a public use within a specified period of time (ten years after condemnation, for example, in South Carolina[38]) while others either require the government to offer the property back to the original owner (for example, in Oklahoma, at the lower of FMV or the price that was originally paid[39]) or to allow the former owner to petition the government for the property's return if it is not used for a public purpose.

Finally, some of the state laws and proposals postpone any substantive reaction to *Kelo* until completion of a "study," the approach adopted in the Bond Amendment.[40] For example, Ohio S.B. 167, signed into law by Governor Taft in November 2005, created a "Legislative Taskforce to Study Eminent Domain" that is to report back to the Legislature by December 31, 2006, and it imposes a moratorium on eminent domain for economic development for the duration of the study.[41] This law is another example that shows "the devil is in the details" for these various proposals, as the moratorium applies only to condemnation of land for economic development purposes if the land is not blighted and the condemnation was "initiated on or after the effective date" of the act.[42] In New Mexico, Governor Bill Richardson promised to create a similar study task force after vetoing legislation that would have barred condemnation for economic development,[43] and Indiana and Tennessee are considering proposals authorizing similar studies.[44]

Where Are We Now?

It appears that more moderate voices are now beginning to be heard. In contrast to the veritable flood of invective against *Kelo* immediately following the decision, we are now hearing and seeing a different message. Congress and several states have chosen to study the issue of eminent domain, rather than rush an ill-considered "quick fix" into law. The media has begun to feature stories that question the call of *Kelo* opponents for a ban on the use of eminent domain for economic development. In the last few months, for example, stories have appeared in *The New York Times* and other major newspapers stressing how difficult it might be to move forward with major real estate developments if eminent domain is not an available tool.[45]

In addition, as eminent domain proposals slowly move through the legislative process and we get further away from the initial uproar against *Kelo*, we should expect that other interest groups that have been relatively quiet will start to assert their views to lawmakers. Such groups are not limited to real estate developers and advocates for local government. Groups concerned with protecting lower-income and minority neighborhoods, for example, are beginning to recognize that the "blight exceptions" in many legislative proposals will make their constituencies even more vulnerable than before *Kelo*. The mobilization of "pro-*Kelo*" interests, combined with the "let's study the problem" approach in Congress and a growing number of states, suggests that much of the legislation that finally emerges in response to *Kelo* may be more nuanced and less draconian than originally feared. Indeed, some of the legislation will be a much-needed improvement on the status quo. There are few reasons, if any, to argue against enhanced procedural protections for condemnees so long as these do not impose unnecessary delays. The same is true for proposals that seek to ensure compensation for the full range of costs borne by those whose property is condemned; to provide assistance for renters, business tenants, and others who are displaced by eminent domain but who themselves are not property owners; or that permit a former owner to reacquire property condemned for a project that never comes to fruition.

No doubt some states will choose a more extreme route and enact laws that effectively limit eminent domain to the most "traditional" public uses: roads, public utility facilities, airports, and the like. But even that may prove to be a blessing in disguise. It will allow us, over time, to compare outcomes such as inner-city revitalization in those states whose response to *Kelo* is well-considered reform with those that enact the most severe restrictions on the availability of eminent domain. In short, by giving a green light to states to experiment with different approaches to reforming eminent domain

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— an approach famously dubbed "the laboratory of the states" by Supreme Court Justice Louis Brandeis [46] — *Kelo* may provide us with data we now lack about how to make eminent domain a more effective tool for economic development while curbing the shortcomings that have eroded public support for its use.

Notes

1. 125 S. Ct. 2655 (2005).
2. This article is an expanded version of Alan Weinstein, Kelo *and Counting*, which appeared in PLANNING, June 2006, published by the American Planning Association (APA).
3. The fifteen states are Alabama, Delaware, Georgia, Idaho, Indiana, Kentucky, Maine, Nebraska, Ohio, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin. In addition, Pennsylvania legislation (H.B. 1835, H.B. 1836, 189th Gen. Assem., Reg. Sess. (Pa. 2005)) is awaiting the Governor's action; New Hampshire has placed an eminent domain constitutional amendment on the November 2006 ballot (Con. Res. 30, 2006 Leg., 159th Sess. (N.H. 2006)); and a New Mexico act was vetoed by the Governor (H.B. 746, 47th Leg., 2d Sess. (N.M. 2006)).
4. 467 U.S. 229 (1984).
5. For example, the American Conservative Union (ACU) Chairman, David Keene, stated: "It is outrageous to think that the government can take away your home any time it wants to build a shopping mall. [The *Kelo*] ruling is a slap in the face to property owners everywhere." ACU Press Release, *Judicial Activism Strikes Again* (June 23, 2005) http:/ www.conservative.org/pressroom/06232005_un.asp.
6. 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).
7. *Id.* at 2676.
8. The movement's intellectual "father," University of Chicago law professor Richard Epstein, would not publish his conservative critique of takings and eminent domain until the following year (RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, Harvard U. Press 1985); the Federalist Society had been formed by a group of law students only two years before; and the Institute of Justice (IJ), which represented Susette Kelo, was not founded until 1991. The IJ's press release in response to the *Kelo* ruling noted that "One of the key quotes from the Court to keep in mind today was written by Justice O'Connor, . . . [who] wrote, 'Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'" IJ Press Release, *Homeowners Lose Eminent Domain Case* (June 23, 2005) http://www.ij.org/private_property/connecticut/6_23_05pr.html.
9. Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 23 GA. ST. U. L. REV. ___ (forthcoming 2006). A draft is available at <http://indylaw.indiana.edu/instructors/cole/cole.htm>.
10. 410 U.S. 113 (1973).
11. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).
12. "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." 125 S. Ct. 2655, 2677 (2005).
13. Cole, *supra* note 9, identifies the following states, with the date of the ruling in parentheses: Maine (1957), Arkansas (1967), South Carolina (1978), Kentucky (1979), Washington (1981), New Hampshire (1985), Illinois (2002), and Michigan (2004).
14. The Ohio law, Amended Substitute S.B. 167, 126th Gen. Assem. (Ohio 2005), imposes a moratorium until the end of 2006 on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted, and it creates a task force to study eminent domain issues. Delaware's law, S.B. 217 with H. Amendment 1, 143 Gen. Assem. (Del. 2005), would limit the use of eminent domain to a "stated public purpose" or a "recognized public use." The law in Texas, S.B. 7, 79th Leg., 2d Sess. (Tex. 2005), prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes (but contains certain exemptions).
15. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong., 1st Sess. (2005).
16. *Id.*
17. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 726, 119 Stat. 2396 (2005).
18. *Id.*
19. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006).
20. The Web site of the American Planning Association tracks eminent domain legislation; see http://www.planning.org/legislation/eminentdomain.
21. ALA. CODE § 18-1B-1 (2005).
22. H.B. 4310, 116th Gen. Assem. (S.C. 2006).
23. H.B. 1080 (S.D. 2006)
24. ALA. CODE § 18-1B-1 (2005).
25. *Id.*
26. Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?* A.L.I.-A.B.A. Continuing Legal Education, January 5-7, 2006, SL049 ALI-ABA 703 (Westlaw). Working Paper No. 05-105 (2005), p. 20.
27. S.B. 391, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006).
28. *Id.*
29. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (2005).
30. *Kelo*, 125 S. Ct. 2655, 2674 (2005) (O'Connor, J., dissenting).
31. H.B. 2675, 47th Leg., 2d Reg. Sess. (Ariz. 2006), vetoed by the Governor on June 6, 2006.
32. S.B. 1066, 50th Leg., Reg. Sess. (Okla. 2006).
33. S.B. 3086, 94th Gen Assem., Reg. Sess. (Ill. 2006); sent to Governor on June 1, 2006.
34. H.B. 1010, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006).
35. S.B. 2746, 94th Gen. Assem., Reg. Sess. (Ill. 2006).
36. *See, e.g.*, FLA. STAT. § 73.071(allowing business owners, including lessees, to make claims for "business damages") and A.B. 9050 (N.Y. 2005-05 Regular Session) (compensating tenants who have resided at the property for 6 months or more).
37. DEL. CODE ANN. Tit. 29, §§ 9503 & 9505 (2005).
38. H.B. 4292, 116th Gen. Assem. (S.C. 2006).
39. S.B. 1035, 50th Leg., Reg. Sess. (Okla. 2006).
40. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 726, 119 Stat. 2396 (2005).
41. Amended Substitute S.B. 167, 126th Gen. Assem. (Ohio 2005).
42. *Id.*
43. The bill is H.B. 746, 47th Leg., 2d Sess. (N.M. 2006). Barry Massey, *Governor Vetoes Eminent Domain Legislation*, FREE NEW MEXICAN, Mar. 8, 2006, http:/www.freenewmexican.com/news/40445.html.
44. H.B. 2428/S.B.2424 (Tenn. 2006) (would create a special joint committee to study the exercise of eminent domain in this state and report its findings to the 105th General Assembly by February 1, 2007); the Indiana Legislative Council's Interim Study Committee on Eminent Domain issued its Final Report in November, 2005.
45. *See, e.g.*, Editorial, *Eminent Good Sense*, NEW YORK TIMES, April 9, 2006, Section 14LI, Page 17; Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, NEW YORK TIMES, January 18, 2006.
46. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). **ML**