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## Eminent Domain: Judicial and Legislative Responses to Kelo

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Commentary

# Eminent Domain: Judicial and Legislative Responses to *Kelo*

Alan C. Weinstein

It has been almost a year and a half since the Supreme Court ruled in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), that the federal Constitution does not bar government from using eminent domain for economic development purposes. That ruling precipitated an unprecedented negative reaction in state legislatures.<sup>1</sup> Now, Ohio has delivered the first post-*Kelo* state supreme court decision to address the constitutionality of eminent domain. On July 26, in *City of Norwood v. Horney*, 2006 WL 2096001, a unanimous Ohio Supreme Court rejected the arguments of the majority in *Kelo* and emphatically stated that the Ohio constitution prohibits the use of eminent domain solely for the purpose of providing an economic benefit to the government and community. This commentary discusses and analyzes both the *Norwood* ruling and the various state and federal legislative responses to *Kelo*.

## THE OHIO SUPREME COURT'S *NORWOOD* DECISION

The *Norwood* case presented facts that should sound familiar to planners in older urban areas. The city of Norwood

is a “first-ring” Cincinnati suburb. As with many such cities, it has seen its job-base erode due to the continuing decline in manufacturing. It also saw the fabric of many of its neighborhoods disrupted by the construction of federal interstate highways from the early 1960s through the early 1970s. With its tax base shrinking, the city eliminated jobs and cut services but still fell millions of dollars in debt. In 2003, the city supported a private developer’s proposal to redevelop a neighborhood that had been in decline since the completion of Interstate 71 in 1974. The project, Rookwood Exchange, would add 200 new apartments and condominiums and more than 500,000 square feet of commercial space, yielding nearly \$2 million in annual revenue to the city.

The developers, Anderson Real Estate and Miller-Valentine Group, requested that the city acquire the properties by eminent domain, but Norwood insisted that the developers first negotiate with the owners. The developers secured sales agreements with a substantial majority of the owners, at which point the city agreed to acquire 12 remaining properties whose owners refused to sell.

As required by the city code, Norwood commissioned a consulting firm—paid for by the developer—to conduct an urban renewal study prior to initiating eminent domain proceedings. That study concluded that the properties to be acquired were in a “deteriorating area,” which allowed the city to proceed with its acquisition effort. After the property owners’ challenge to the exercise of eminent domain lost at trial, they appealed but were unable to obtain an injunction barring the city from acquiring their properties pending the appeal because Ohio statute ORC § 163.19 allows a city to obtain and transfer titles to condemned properties if it deposits with the court the full amount of the compensation awards. Norwood did just that and the developer began demolishing the houses in the neighborhood. But when the owners’ appeal reached the Ohio Supreme Court, it ordered a halt to any further demolitions pending its ruling.

That ruling was announced in a unanimous opinion that is easily the most expansive and scholarly land use decision handed down by the Ohio court in recent decades. Obviously, the

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1. See, e.g., *Kelo and Counting*, PLANNING, June 2006.

Some early media reports of the *Norwood* decision suggested that it called for heightened judicial scrutiny of any exercise of eminent domain. This is not so.

Justices were well aware that theirs was the first state supreme court decision in the wake of *Kelo* and would be closely scrutinized. They likely were also aware that experienced land use law commentators would be looking for any missteps, since this was the court which had somehow managed to announce a conjunctive “two-part takings test”<sup>2</sup> at a time when the U.S. Supreme Court’s *Agins* decision called for a disjunctive test.<sup>3</sup>

The *Norwood* opinion addressed both substantive and procedural concerns. First, as previously noted, the court held that the Ohio constitution prohibits the use of eminent domain solely for the purpose of providing an economic benefit to the government and community. The court framed this part of its opinion in terms of “resolving the inherent tension between the individual’s right to possess and preserve property and the state’s competing interests in taking it for the communal good.” *City of Norwood v. Horney*, 2006 WL 2096001 at 10. The court’s analysis on this point began by affirming that “Ohio has always considered the right of property to be a fundamental right.” *Id.* at 9 (citations omitted).

Turning next to an examination of the state’s power of eminent domain, the court, after documenting at length the evolution of the “public use” concept from its pre-Revolutionary origins to the expansive interpretation given the term in the 20th century, opined that the Ohio Constitution does not support the broad definition of public use announced by the *Kelo* majority. Accordingly, the opinion stressed that whether a particular proposed use is a “public use” is a question of law to be resolved by the courts and “the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community.” *Id.* at 22.

Some early media reports of the *Norwood* decision suggested that it called for heightened judicial scrutiny of any exercise of eminent domain. This is not so. The opinion does explicitly call for heightened scrutiny when a court reviews an eminent domain statute or regulation under the void-for-vagueness doctrine—an issue raised here due to the lack of clear guidance in the *Norwood* code’s definition of the term “deteriorating”—but the court did not extend heightened scrutiny beyond that issue. Rather, the opinion emphasized that courts retain a vital, albeit limited, role in reviewing exercises of eminent domain and should not simply defer to legislative judgments. The opinion criticized the lower courts in Ohio for their “misunderstanding of the scope of review” by engaging in an “artificial judicial deference to the state’s determination that there was sufficient public use.” *Id.* at 16. In the court’s view, the correct role for the judiciary, while limited, remains vital: “. . . it is for the courts to ensure that the legislature’s exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use in bad faith.” *Id.* at 19.

Having “clarified” the courts’ “proper role as arbiters of the scope of eminent domain,” the opinion considered whether economic gain alone is a sufficient public use to support an exercise of eminent domain. Citing with approval the analyses of the dissenters in both the United States Supreme Court and Connecticut Supreme Court *Kelo* opinions, and the Michigan Supreme Court’s opinion in *Wayne County v. Hathcock*,<sup>4</sup> the Ohio court ruled that while “economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a

taking, it cannot serve as the sole basis for finding such a benefit.” *City of Norwood v. Horney*, 2006 WL 2096001 at 22.

In so holding, the Ohio court made no effort to address Justice John Paul Stevens’s carefully argued majority opinion in *Kelo*, which stressed the factors a court must examine to determine whether the use of eminent domain for economic development alone is truly serving a legitimate public purpose rather than improperly promoting a purely private benefit. Had the Ohio court approved those factors, emphasizing public participation and comprehensive planning, and then applied them to the facts in this case without “artificial judicial deference,” it could easily have called into question and struck down this particular exercise of eminent domain solely for economic development without adopting a rule prohibiting all such uses of the condemnation power.

As previously noted, the court also held that heightened scrutiny should be applied to definitions in eminent domain statutes and ordinances. Having already determined that an individual’s property interest is a fundamental right under the Ohio Constitution, the court held that in reviewing an eminent domain statute or regulation under the void-for-vagueness doctrine, courts should “utilize the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right.” *Id.* at 24. In *Norwood*, the challenged definition was for a “deteriorating area,” which was the basis for finding the plaintiffs’ properties could be condemned. The *Norwood* code provided an extensive list of conditions that would support a finding that an area was “deteriorated,” including: incom-

2. See, e.g., *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 638 N.E.2d 533 (1994) (holding that a party who attacks municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that enactment deprives him or her of economically viable use and that it fails to advance legitimate governmental interest.)

3. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), overruled by *Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074 (2005).

4. 471 Mich. 445, 684 N.W.2d 765 (2004) (overruling *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455.)

The *Norwood* decision is, however, not the last word on eminent domain in Ohio.

patible or nonconforming land uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership. The court expressed skepticism about these factors, noting that they "exist in virtually every urban American neighborhood," *Id.* at 25, and thus were suspect. The court also noted that some of the factors listed in the definition—such as "diversity of ownership"—were themselves not defined in the Norwood code and thus would be susceptible to different meanings.

Applying heightened scrutiny to the definition of "deteriorating area" as the standard for a condemnation in the Norwood code, the court found it void for vagueness "because it fails to afford a property owner fair notice and invites subjective interpretation." Further, the court held "that the term 'deteriorating area' cannot be used as a standard for a taking, because it inherently incorporates speculation as to the future condition of the property into the decision on whether a taking is proper rather than focusing that inquiry on the property's condition at the time of the proposed taking." *Id.* at 26.

While the court's skepticism about the vagueness of these terms is not misplaced, the implications of a ban on targeting a "deteriorated area" for redevelopment by eminent domain are distressing. Cities in declining urban areas will not be well served by having to wait for an area to finish "deteriorating" and arrive at "blighted" or slum status before intervening through a well-planned economic development project. This part of the court's opinion calls out for a response from the planning community. A worthwhile research project would be an effort to document objective measurements that would allow planners to predict with a high degree of confidence that a "deteriorating area"

that falls below a set of thresholds for well-defined factors (e.g., absentee ownership, abandoned/vacant property, unemployment, residents 20 percent or more below the poverty level, etc.) will, without public sector intervention, inexorably decline into blight. This should address the Ohio—or any other—court's vagueness concerns and allow a city to take preventive measures to salvage a neighborhood sooner rather than later.

Finally, the court also held that statute ORC § 163.19, which had allowed the city to obtain and transfer titles to condemned properties when it deposited with the court the full amount of the compensation awards, was unconstitutional because it violated the separation of powers principle. The court emphasized that once a condemnation case enters a court's jurisdiction, it has the inherent authority to take any lawful action regarding the subject matter of the litigation, including the issuance of a stay or injunction. This inherent authority regarding matters over which it has jurisdiction is exclusively within the constitutional realm of the courts and it is beyond the power of the legislature to limit that constitutional authority. The importance of this last procedural holding cannot be overemphasized. Developers understand that time is money and are far less likely to request that a city use its eminent domain power if acquisition can be stayed or enjoined pending the exhaustion of one or more appeals.

The *Norwood* decision is, however, not the last word on eminent domain in Ohio. Just five days after the court's ruling, a state legislative task force on eminent domain, formed in reaction to *Kelo*, issued its final report. While the report affirms *Norwood's* ban on using eminent domain solely for economic gain, it proposes that

government should still be allowed to use eminent domain to eradicate blight. The report calls for a state constitutional amendment to establish a uniform definition of blight statewide and allow cities to use eminent domain so long as a bare majority of the properties in a given area meet that definition.

#### WHY SUCH A REACTION TO KELO?

Ohio is unique, to date, in having had both a legislative and state supreme court response to *Kelo*. But the vast majority of states—more than 40 as of early summer 2006—were considering legislation in reaction to the *Kelo* ruling, and 15 had already enacted such legislation.<sup>5</sup>

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*, 467 U.S. 229 (1984) and third, the media's and public's outcry against the ruling.<sup>6</sup>

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

5. The 15 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)).

6. For example, 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), available at [www.conservative.org/press-room/06232005\\_un.asp](http://www.conservative.org/press-room/06232005_un.asp).

Although it is uncertain whether the media outcry heightened public opposition to the *Kelo* ruling, 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.

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." 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting). 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." *Id.* at 2676

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.<sup>7</sup> 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.<sup>8</sup>

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. 410 U.S. 113 (1973) 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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-Wis.), which passed the House in November 2005 by a vote of 376–38 but has since been languishing in the Senate Judiciary Committee. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong., 1st Sess. (2005). 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 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. *Id.*

Another far more limited measure addressing economic development has

7. 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 University 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) [www.ij.org/private\\_property/connecticut/6\\_23\\_05pr.html](http://www.ij.org/private_property/connecticut/6_23_05pr.html).

8. Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, GA. ST. U. L. REV. (forthcoming 2006). A draft is available at <http://indylaw.indiana.edu/instructors/cole/cole.htm>.

9. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954).

10. "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).

11. Cole, *supra* note 8, 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).

12. 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).

More recently, on June 23, 2006, President George W. Bush issued an Executive Order limiting the use of eminent domain by federal agencies.

already been enacted by Congress. (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)). Sen. 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.” *Id.* 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, in 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.

More recently, on June 23, 2006, President George W. Bush issued an Executive Order limiting the use of eminent domain by federal agencies.<sup>13</sup> 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 most recent “takings” bill, H.R. 4722 (the Private Property Rights Implementation Act of 2006), passed by the House in late September, is not a direct reaction to the *Kelo* ruling since it deals with regulatory takings rather than the exercise of eminent domain. While a full discussion of that bill is beyond the scope of this Commentary, it would allow those claiming that a state or local regulation has taken their property to bring that claim in federal court without first seeking just compensation in state court as has been required since *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), and would also make it easier for property owners to claim that rezonings or dedication/exaction requirements are unconstitutional takings.

#### The Legislative Reaction: States

By the summer of 2006, legislation in response to *Kelo* had been enacted or introduced in more than 40 states.<sup>14</sup> 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 . . . .” [ALA. CODE § 18-1B-1 (2005)]. 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 a bill introduced in South Carolina that defines “public use” as requiring the “possession, occupation and enjoyment of the condemned property by the public at large or by public agencies” [H.B. 4310, 116th Gen. Assem. (S.C. 2006)] and in 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” [H.B. 1080 (S.D. 2006)].

Before describing other categories of anti-*Kelo* legislation, the Alabama law 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 cru-

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13. The Presidential Order may be found at [www.whitehouse.gov/news/release/s/2006/06/20060623-10.html](http://www.whitehouse.gov/news/release/s/2006/06/20060623-10.html)

14. The APA website tracks eminent domain legislation; see [www.planning.org/legislation/eminentdomain](http://www.planning.org/legislation/eminentdomain).

Another significant category of legislation comprises laws that either prohibit condemnation of residential property or impose additional compensation requirements for acquisition of such property.

cial 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.” [ALA. CODE § 18-1B-1 (2005)]. 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.<sup>15</sup> An Indiana bill, S.B. 391, 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.” [S.B. 391, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006)].

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.” [TEX. GOV’T CODE ANN. § 2206.001(b)(3) (2005).] 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. *Kelo*, 125 S. Ct. 2655, 2674 (2005) (O’Connor, J., dissenting).

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 condemnation to “slum” property and requires that the determination be made on a property-by-property, not areawide, basis, and imposes a two-thirds supermajority requirement on the legislative body making the determination, H.B. 2675, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (vetoed by the governor on June 6, 2006); 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 [S.B. 1066, 50th Leg., Reg. Sess. (Okla. 2006)]; 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 [S.B. 3086, 94th Gen. Assem., Reg. Sess. (Ill. 2006); (sent to the governor on June 1, 2006)].

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 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, which was signed by Gov. Mitch Daniels on March 24, 2006, requiring 150 percent of FMV for acquisition of a primary residence, [H.B. 1010, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006)] 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. [S.B. 2746, 94th Gen. Assem., Reg. Sess. (Ill. 2006)] 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 compensation to displaced renters and business lessees.<sup>16</sup>

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 supermajority 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. [DEL. CODE ANN. Tit. 29, §§ 9503 & 9505 (2005)].

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

15. 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; SLD49 ALI-ABA 703 (Westlaw). Working Paper No. 05-105 (2005), p. 20.

16. See, e.g., FL. ST. § 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 six months or more).

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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 (10 years after condemnation, for example, in South Carolina) [H.B. 4292, 116th Gen. Assem. (S.C. 2006)]; 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) [S.B.1035, 50th Leg., Reg. Sess. (Okla. 2006)] or to allow the former owner to petition the government for the property's return if it is not used for a public purpose.

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.<sup>17</sup> For example, Ohio S.B. 167, signed into law by Gov. Bob Taft in November 2005, created a "Legislative Task Force to Study Eminent Domain" that was to report back to the Legislature by August 1, 2006—which, as noted previously, it has—and imposed a moratorium on eminent domain for economic development until December 31, 2006. 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. [Amended Substitute S.B. 167, 126th Gen. Assem. (Ohio 2005)] In New Mexico, Gov. Bill Richardson created a similar study task force in June after vetoing legislation that would have barred condemnation for economic development,<sup>18</sup> and Indiana and Tennessee are considering proposals authorizing similar studies.<sup>19</sup>

Finally, and of greatest concern to planners and local officials, were the efforts by "property rights" advocates in a number of western states to capitalize on the public's distaste for the *Kelo* ruling by placing on the ballot measures that couple restrictions on eminent domain with compensation mandates for regulations that lower property values, the latter modeled on Oregon's notorious Measure 37.<sup>20</sup> Ballot measures to limit both eminent domain and regulatory powers were initially scheduled to appear in six western states<sup>21</sup> this November, but court rulings removed them from the ballot in Montana (citing fraud in obtaining the petitions) and Nevada (ordering the removal of sections on regulatory takings because two separate issues cannot be combined in a single ballot measure). Washington's Initiative 933 and California's Proposition 90 exemplified the measures that remained on the ballot. The Washington Initiative most closely resembled Measure 37. It would require government either to exempt property owners from regulations approved after 1995 that diminished their property values or compensate them for the diminution. The California Proposition focused almost entirely on eminent domain, but had one small subsection that required government to compensate property owners for "damage" to their property when "government action" results in "substantial economic loss."

#### WHERE ARE WE NOW?

Despite the concerted efforts of property rights advocates, 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.<sup>22</sup>

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 compensa-

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. 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, [www.freewnewmexican.com/news/40445.html](http://www.freewnewmexican.com/news/40445.html).

19. 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 (available at [www.in.gov/legislative/interim/committee/2005/committees/iced.html](http://www.in.gov/legislative/interim/committee/2005/committees/iced.html)).

20. For a description and evaluation of Measure 37, see Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237 (2006); and with Carrie A. Richter, *A Taste of Ashes—The MacPherson*

*Decision and the Future of Oregon's Planning Program*, 58 PLANNING & ENVTL. LAW 4 (2006).

21. Arizona, California, Idaho, Montana, Nevada, and Washington.

22. See, e.g., Editorial, *Eminent Good Sense*, N.Y. TIMES, April 9, 2006, Section 14L1, Page 17; Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, January 18, 2006.



In states that shackle government regulatory powers with Measure 37-like legislation, voters will soon learn whether exemptions from land use regulation—or payment of compensation—to property owners who claim harm is a viable public policy.

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tion 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. By the time you read this, voters in other states may have already approved November ballot measures that impose compensation/exception requirements on government regulation. But even those outcomes may prove to be a blessing in disguise. It will allow the public, 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. Similarly, in states that shackle government regulatory powers with Measure 37-like legislation, voters will soon learn whether exemptions from land use regulation—or payment of compensation—to property owners who claim harm is a viable public policy. In short, by giving a green light to states to experiment with different approaches to reforming eminent domain (and in some instances even regulatory taking principles)—an approach famously dubbed "the laboratory of the states" by Supreme Court Justice Louis Brandeis<sup>23</sup>—the legislative and judicial reactions to *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.

23. "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a

laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



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APA 6th ed.

Weinstein, A. C. (2006). Eminent domain: Judicial and legislative responses to kelo. Planning Environmental Law, 58(11), 3-10.

Chicago 7th ed.

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McGill Guide 9th ed.

Alan C Weinstein, "Eminent Domain: Judicial and Legislative Responses to Kelo" (2006) 58:11 Planning & Environmental L 3.

MLA 8th ed.

Weinstein, Alan C. "Eminent Domain: Judicial and Legislative Responses to Kelo." Planning & Environmental Law, vol. 58, no. 11, November 2006, p. 3-10. HeinOnline.

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