

EMINENT DOMAIN AS TROJAN HORSE
How the Property Rights Movement Is Misusing *Kelo*
to Advance a Radical Agenda

By Jennifer Bradley & Timothy J. Dowling

Regardless of what you think of the Supreme Court’s ruling in *Kelo v. City of New London*¹, everyone can agree that the public reaction has been intense. Early polling data reflected immediate and widespread opposition. Editorial pages across the country denounced the decision. One U.S. Senator called the case the *Dred Scott* of the 21st century². In this chorus of dismay and disapproval, one comment stood out as unusually sunny and optimistic. In an interview with the *Economist* magazine, conservative strategist Grover Norquist hailed the *Kelo* decision as “manna from heaven” for the property rights movement.³ Norquist foresaw that, if the outrage from the decision was channeled in a particular way, the *Kelo* loss could turn out to be better than a win.

In this paper, we hope to explain how the property rights movement and other foes of government action have tried – and thus far largely failed – to use *Kelo* and eminent domain more broadly to advance their goals. The way that the *Kelo* decision has been used in public policy debates over the last two years suggests that people have a surprisingly sophisticated understanding of, and some appreciation for, the role of government in maintaining safe and healthy communities in which people and the environment can flourish.

I. The *Kelo* Context

¹ 545 U.S. 469 (2005)

² Allen, Mike and Babington, Charles. “House Votes to Undercut High Court On Property.” [The Washington Post](#). 1 July 2005: A01.

³ “Hands off our Homes; Property Rights and Eminent Domain.” [The Economist](#). 20 August, 2005.

Before there was Suzette Kelo of New London, Connecticut, there was Jane Jacobs of Greenwich Village, Manhattan. Jacobs' masterpiece, *The Death and Life of Great American Cities*, contains only a handful of references to eminent domain, but all of them are ferociously negative. For example, describing a large-scale redevelopment projects not unlike that planned for New London, Jacobs wrote,

“...[P]eople who get marked with the planners' hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed, and their proprietors ruined, with hardly a gesture at compensation. Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment, and despair that must be heard and seen to be believed.”⁴

The negative aura around eminent domain for redevelopment is decades old – in fact, just about as old as the practice of using eminent domain for redevelopment.

Jacobs was writing in 1961, just a few years after the Supreme Court decision in *Berman v. Parker* (1954)⁵, which allowed the use of eminent domain for blight removal, after which the properties would be transferred to other owners. In Jacobs' words, “The Supreme Court declared that society did have the right – through the medium of its legislatures – to make that kind of choice between private entrepreneurs and owners; it could take the property of the one to benefit the other, as a means of achieving objects

⁴ Jacobs, Jane. *The Death and Life of Great American Cities*. New York: Random House, 1961, pg 5.

⁵ 348 U.S. 26 (1954)

which, in the legislature's judgment, were for the public good."⁶ One might quibble with the details, but that is a reasonable summary of the law from 1954 to the present day.

The long-settled nature of the law and the unsettled feelings that many (most?) people have about eminent domain put defenders of government power in the Kelo case at a tremendous disadvantage in taking our case to the public. Foes of eminent domain presented Mrs. Kelo and her exceedingly hard-working, sympathetic co-plaintiffs. Defenders tried to respond with examples of good projects brought about by eminent domain, such as the Kansas City Speedway, a Nissan automobile assembly plant in Canton, Mississippi, Baltimore's Inner Harbor, and of course the new, family-friendly Times Square.⁷ But these examples were no match for the eminent domain horror stories.

Then defenders had little choice but to retreat behind the law. We said, roughly, "We are sorry about what is happening to Mrs. Kelo, but the law has allowed eminent domain for economic development purposes for years." We pointed to cases dating from around the turn of the 20th century, in which the Court upheld condemnations for irrigation ditches needed by private farmers and mining companies, and even for acquiring a right-of-way for a mining company's aerial bucket line.⁸ These examples might make lawyers and judges nod in agreement, but they are hardly the stuff of newspaper headlines. Our stories could not compete with those of the New Londoners

⁶ Jacobs, Jane. *The Death and Life of Great American Cities*. New York: Random House, 1961, pg 311

⁷ See, e.g. Brief of the National League of Cities, National Conference of State Legislatures, U.S. Conference of Mayors, Council of State Governments, National Association of Counties, International Municipal Lawyers Association, and International City/County Management Association as Amicus Curiae supporting respondents. 21 January 2005. <http://www.communityrights.org/PDFs/Briefs/Kelo.pdf>; Brief of Amicus Curiae Brooklyn United for Innovative Local Development (BUILD), Rev. Herbert Daughtry, and the New York City and Vicinity Carpenters Labor-Management Corporation, http://www.sou.edu/POLISCI/PAVLICH/kelo_new_london/BUILD_Res.html

⁸ Ibid.

who stood to lose so much that they valued. We had a useful string of precedents, which persuaded the Supreme Court, but certainly did not persuade the public.

When the 5-4 *Kelo* decision came down in June 2005, then, eminent domain had ambivalent or overwhelmed defenders and full-throated, outraged, and well-funded opponents. Even Justice John Paul Stevens distanced himself from the decision, which he wrote, saying in a speech to Las Vegas lawyers that, in *Kelo*, “the law compelled a result that I would have opposed if I were a legislator,” and that the result was “entirely divorced from my judgment concerning the wisdom of the program.”⁹

The Institute for Justice, the libertarian law firm that represented Mrs. Kelo and her neighbors as part of its long fight against eminent domain, launched a \$3 million campaign to change state and local condemnation laws just days after the *Kelo* decision came down. The Institute had some unusual allies in its effort: prominent liberals in Congress and major civil rights groups like the NAACP were disturbed by the decision, and were among those supporting sharp restrictions on the use of eminent domain at the federal level.

II. The *Kelo* Backlash

After the decision, there was a flurry of activity at the federal and state levels to stop many uses of eminent domain. Between June 2005 and June 2007, 42 state legislatures acted to tighten their eminent domain laws.¹⁰ Changes ranged from Florida’s

⁹ Greenhouse, Linda. “Justice Weighs Desire v. Duty (Duty Prevails).” *New York Times*. 25 August, 2005. <http://www.nytimes.com/2005/08/25/politics/25memo.html>.

¹⁰ Castle Coalition. “50 state Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*.” http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

law, which now forbids the use of eminent domain even to eliminate blight¹¹, to laws like that in Pennsylvania, which creates a stricter definition of blight but allows projects in Philadelphia and Pittsburgh to continue under the old blight standards for several more years,¹² to Delaware's law, which makes some good procedural changes to how property owners are notified.¹³ The unpopularity of the *Kelo* decision was translated into political will and legislative action at an astonishing speed. But the revulsion at the *Kelo* decision did not lead to overwhelming victories for property rights advocates. The Institute for Justice, which would like to see eminent domain used only when a public entity will hold title to the property (i.e. for a road, school, post office, military base) and never for blight remediation, gave only half of the states high marks for their reform efforts.¹⁴

Beyond the well-known legislative efforts to respond to *Kelo* at both the federal and state levels, there emerged a pernicious, parallel effort to exploit the negative reaction to *Kelo* to advance a different, far more radical agenda. The motivating argument was simple: there is no difference between a government condemning your property through eminent domain, and a government regulating your use of your property. This argument muddles two different lines of constitutional inquiry based on takings clause in the Constitution's fifth amendment, which states, "[N]or shall private property be taken for public use, without just compensation." The condemnations at issue in the *Kelo* case, like all condemnations, were clearly takings of private property,

¹¹ HB 1567. 2006:

http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1567er.doc&DocumentType=Bill&BillNumber=1567&Session=2006.

¹² SB 881. 2005 – 2006:

<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2005&sessInId=0&billBody=S&billTyp=B&billNbr=0881&pn=1180>.

¹³ SB 217. 2005: [http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+217/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+217/$file/legis.html?open)

¹⁴ Castle Coalition. "50 state Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*." http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

transfers of ownership from one person to another, and required just compensation. By contrast, regulations that leave property in the hands of the owner, but limit what she can do with it, rarely constitute takings.¹⁵

The first evidence of the effort to use *Kelo* as an engine to drive a broader anti-government agenda was the use of *Kelo* in the debate over the Endangered Species Act. In the fall of 2005, the property rights movement tried to use the *Kelo* decision to frame the debate over revisions to the Endangered Species Act, arguing that changes in the law are necessary to shore up property rights.¹⁶

A few days after the *Kelo* decision came down, a draft summary of an Endangered Species Act “reform” bill, written by Rep. Richard Pombo of California, was leaked to environmental groups. The early draft would have required the federal government to pay property owners when protections for endangered species would have reduced the value of a portion of their property by more than half. In other words, if an endangered species lived on one acre of a ten-acre ranch, and the value of that single acre fell by more than 50 percent, the owner would have a claim against the federal government. This standard was far more demanding, and regulation-squelching, than what the Constitution requires.

Rep. Pombo had long been an outspoken opponent of the Endangered Species Act, and his draft bill was savaged by environmentalists. But it was also attacked by his usual property-rights allies, full of righteous fire after *Kelo*. They were furious that the compensation standards did not go far enough. One said the bill “should be renamed

¹⁵ See, for example, *Lingle v. Chevron* 544 U.S. 528 (2005).

¹⁶ See, for example, “The Tyranny of the ESA and the Threat of *Kelo* 2” by Tom DeWeese of the American Policy Center, “Americans have clearly seen, through the recent Supreme Court ruling in *Kelo v. New London*, that local governments can now take private property for any scheme they can devise. However, the precedent for such cavalier disregard for property rights comes directly from the ESA.”

Kelo 2.” A letter signed by 80 property rights and conservative activists, including Paul Weyrich and Phyllis Schlafly, sternly invoked the *Kelo* decision, saying “Such blatant disregard for property rights and the Fifth Amendment sent shockwaves throughout the nation. As you know, property rights abuse in this country is nothing new. For over three decades, the Endangered Species Act has run roughshod over the Fifth Amendment and individual property rights.”¹⁷ The 50 percent compensation provision, they said, was “wholly insufficient” and a “weak acknowledgement of property rights.”

The final version of The Threatened and Endangered Species Recovery Act (TESRA) enabled an owner to receive 100% of the fair market value of “foregone uses” of her property which would harm endangered species. In other words, taxpayers would have had to compensate an owner for not doing something that would break the law. The bill flew from its initial introduction to passage by a 229 to 193 vote in the House in just ten days in September 2005.

But property-rights rage did not provide enough fuel for the bill’s final passage. It died in a Senate committee. Rep. Pombo, who had spent more than a decade trying to undo the Endangered Species Act, lost his reelection bid in 2006.

Meanwhile, on the other side of the country, there emerged an array of regulatory takings measures, disguised as *Kelo* reform initiatives. These proposals purported to protect homeowners and small businesses against condemnation, but they also included well-hidden provisions that would undermine zoning laws, environmental safeguards, and other widely supported community protections.

The radical nature of these regulatory takings provisions is best revealed by comparing them to existing takings jurisprudence. Under longstanding Supreme Court

¹⁷ <http://www.nationalcenter.org/PomboESACoalitionLetterB.PDF>.

case law, a land use measure or other regulation constitutes a compensable taking under the Fifth Amendment only if it severely reduces market value and unreasonably interferes with the owner's legitimate expectations. The court has rejected takings challenges to zoning laws and other land use controls that reduced land value by 70 to 90 percent where the prohibited use posed a severe threat to public health or welfare.¹⁸

The recent regulatory taking initiatives, in their most extreme incarnations, would radically expand takings liability by requiring taxpayers to compensate landowners for virtually any loss in value caused by land use restrictions, no matter how compelling the public health or welfare justification for the challenged government action. If no compensation is available, the regulation must be waived or invalidated.

The property rights movement has been dramatically unsuccessful in selling these proposals straight up in the marketplace of ideas. The U.S. Congress refused to approve them despite several attempts in the 1990s, and state legislatures have largely rejected them.

So, when manna from heaven arrived in the ungainly form of the *Kelo* opinion, property rights advocates adopted a new strategy, sometimes called "*Kelo*-plus." They used ballot measures, often with bumper-sticker ballot titles with broad appeal like "Save Our Homes" or "Property Fairness," which included provisions limiting the use of eminent domain, but also added extreme regulatory takings measures. They promoted the proposals as necessary post *Kelo* eminent domain reform measures while downplaying the regulatory takings provisions, and without explaining the difference

¹⁸ See, for example, *Penn Central Transp. Co. v. City of New York*, 438 US 104, 131 (1978) (citing *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365 (no taking despite a 75 percent value loss) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite a 92.5 percent value loss); *Concrete Pipe & Prods. Inc. v. Constr. Laborers Pension Trust*, 508 U.S.602, 645 (1993) (no taking despite a 46 percent value loss).

between eminent domain and regulatory takings. The goal was to exploit public concern over condemnation to advance the far more extreme regulatory takings agenda.

Last year, *Kelo*-plus measures were placed on the ballot in six states: Arizona, California, Idaho, Missouri, Montana, and Nevada. Several out-of-state libertarians poured millions of dollars into these campaigns, most notably New York real estate mogul Howie Rich¹⁹, who provided almost two million dollars in support. One libertarian think tank, the Reason Foundation, reportedly published a guidebook explaining how to exploit public concern over *Kelo* to promote regulatory takings measures.

The campaigns were a failure, for the most part. Although voters across the country approved several pure *Kelo*-reform measures in the November 2006 elections, they resoundingly rejected most of the *Kelo*-plus initiatives. In Idaho, a state generally sympathetic to property rights, three-fourths of the voters rejected the *Kelo*-plus measure on the ballot. A majority of Californians nixed that State's "Protect Our Homes" *Kelo*-plus initiative due to broad opposition not only from local officials and environmental groups, but also from business groups, farmers, realtors, religious organizations, and many others. Court decisions invalidated the regulatory takings provisions in Missouri, Montana, and Nevada due to widespread signature fraud and other irregularities. Washington state voters also rejected a pure regulatory takings ballot initiative that did not include *Kelo*-related measures.

In October 2007, voters in Mat-Su Borough, Alaska, overwhelmingly rejected a regulatory takings ordinance. This local initiative would have required compensation for landowners whenever new county land use controls reduce the value of land.

¹⁹ Ring, Ray. "Taking Liberties" High Country News. 24 July 2006: Pg. 8 Vol. 38 No. 13.

Arizona is the only State in which a *Kelo*-plus measure has been approved. This measure is relatively limited in scope because the compensation provisions are prospective only and thus apply only to new government actions. Nevertheless, Arizonans already are starting to complain about the problems the initiative is creating for historic preservation, smart growth efforts, and other projects designed to promote public welfare.²⁰

Notwithstanding the long string of ballot box debacles, the property rights movement is once again pushing regulatory takings measures for approval at the ballot box. In California, the Howard Jarvis Taxpayers Association announced in July that it is gathering signatures for a new takings initiative for the June 2008 ballot. The California Property Owners and Farmland Protection Act is being sold to voters as a “fix” to eminent domain issues raised in *Kelo*. But its ambiguous language could allow property owners to sue whenever a public agency “uses” private property for environmental services such as the water filtering attributes of a wetland, or the environmental benefits of a stream buffer zone. It also may allow owners to argue that environmental regulations have illegally reduced their property value and created a ceiling for the sale price of the property (which would be unlawful under the section of the measure that bans rent control). In sum, the measure could convert any environmental or land use law into the equivalent of an outright condemnation.²¹

Fighting this California measure will be extremely complicated. Last year’s Proposition 90, which would have explicitly required payment whenever land use

²⁰ Berry, Jana, “Property Rights v. Public Improvements: Any Changes Now Face Complex Process,” Arizona Republic, 05 July, 2007 <http://www.azcentral.com/community/tempe/articles/0705prop207.html>

²¹ The language of the measure is available at http://ag.ca.gov/cms_pdfs/initiatives/i684_2007-05-03_07-0015_Initiative.pdf

regulations reduced property values, even by the tiniest amount, received 48 percent of the vote. What kept it from passing was a sharply focused and successful campaign to convince voters that the measure's regulatory takings provisions would destroy what voters most valued about the California landscape.

The backers of this new measure are selling it as a pure eminent domain proposal, without the regulatory takings provisions that were fatal to Proposition 90. But, either intentionally or because of bad drafting, the measure is not just about eminent domain and its potential abuses. It could have the same destructive consequences as Proposition 90. Pro-regulation forces will have to get this message out to voters so they know exactly what it is they are voting on.

A roll-back of a regulatory takings provision is on the ballot in Oregon. In 2004, before the Kelo decision, Oregonians adopted Measure 37 at the ballot box. Measure 37 requires compensation whenever specified government actions cause *any* loss in property value. Major land developers, mining corporations, forest companies, and others have filed nearly seven thousand claims covering more than 750,000 acres and seeking over \$19 billion dollars in compensation. Because State and local officials lack funds to pay the claims, the challenged regulations are usually waived, posing a severe threat to public health and welfare, the environment, and Oregon's landmark planning program and urban growth boundaries.

According to recent polls, Oregonians now oppose Measure 37 by almost a 2-1 margin. One Oregon resident who voted for Measure 37 and filed a small claim for two additional homes on his land was flabbergasted to learn that his neighbor asked the government to allow more than 100 homes on adjacent property. He told reporters he has

“not talked to one person who thought they were voting for this type of development.”²²

An elderly couple saw a \$1.3 million offer for their farm withdrawn when the county waived zoning restrictions to allow development of a nearby commercial gravel pit.²³

Billboard companies have filed claims so they can place their signs wherever they want, without regard to the natural beauty Oregonians have worked so hard to preserve.²⁴

Due to the widespread dissatisfaction with Measure 37, the Oregon legislature passed a bill to amend it in June, and in November Oregon voters will be asked to ratify this fix, known as Measure 49. The amendment would make Measure 37 largely prospective, generally limiting the compensation requirement to new land use controls. It eliminates claims based on commercial and industrial uses, while preserving claims for residential development, farming, and forestry. It also allows for some small-scale residential development on farmland that previously would have been prohibited.

Measure 49 suggests that people dislike government controls on land use until those land use controls are lifted – and then people want to have them put back in place, at least in a modified form. That this is taking place post-*Kelo* is exceedingly interesting. It shows that the unqualified message that government is bad and abusive cannot withstand actual experience. In many cases, Oregonians are learning, government regulations are what protect people from abuse. (The fact that Oregonians passed an eminent domain only ballot measure in 2006 also keeps the issues of eminent domain and land use appropriately separate.)

²² Oppenheimer, Laura. “Measure 37, Part 2, favors homebuilding over commerce.” 13 July 2007: D02.

²³ Arnoldy, Ben. “Topping 2006 ballots: eminent domain.” Christian Science Monitor. 5 October 2006: 1.

²⁴ Kitch, Mary. “The riddle of the rimrock.” The Sunday Oregonian (Portland, Oregon). 14 October 2007: F01.

Given the aggressive financial backing from out-of-state libertarians to date, we can expect more regulatory takings proposals in the States, both the stand-alone versions and the more deceptive *Kelo*-plus kind, in coming months.

III. After *Kelo*

There is a difference, long recognized in American law, between a regulation and expropriation. No amount of clever analogizing by property rights extremists can elide that basic distinction. We have a right to own property, but not an unlimited, absolute right to do whatever we want with it. Our exercise of our property rights has a tremendous effect on our neighbors' property and their rights. Courts recognize this complicated intertwining and weigh a regulation's impact on individual owners against the law's importance to the community. The property rights movement, by contrast, ignores it. By likening reasonable regulations that protect the environment, the rights of other landowners, and the community to the unpopular *Kelo* condemnations, property rights extremists intend to continue their decades-long project of delegitimizing government regulation of property, and government in general. The *Kelo* case was used to fuel a fight, not just over eminent domain, but over the legitimacy of government's ability to balance the rights of individuals and communities.

But, so far, people seem to recognize the legitimacy and value of much government action. The Endangered Species Act "reform" bill failed, and its sponsor – one of Congress' most ardent property rights activists – lost his seat in the House. The *Kelo*-plus ballot initiatives have failed in every state but one, and the newest ballot effort in California depends on people not recognizing that regulatory takings are in fact included in the measure. This is not a reason for complacency – one might argue that

complacency about eminent domain blinded many advocates of land use regulation to the threat of the *Kelo* case and put us on this precarious, defensive path in the first place.

This is, instead, a reason for hope. People appreciate the role of government in supporting and protecting the security of their land, homes, and communities. They are able to distinguish between condemnation and regulation. People see value in the work that smart growth and urban redevelopment advocates do. We have been able to block large parts of the anti-government agenda, even when it is fueled by the electric unpopularity of *Kelo*. We should be able to do so in the future with continued diligence, tremendous hard work, and ceaseless efforts to connect government with the preservation and creation of what people value.

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