

TEXAS PUBLIC POLICY FOUNDATION

Private Property and Public Use *Restoring Constitutional Distinctions*

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By Bill Peacock
Center for Economic Freedom
Texas Public Policy Foundation

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Private Property Rights and Public Use

Restoring Constitutional Distinctions



Bill Peacock
Director, Center for Economic Freedom
Texas Public Policy Foundation

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Private Property and Public Use

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Executive Summary

In its *Kelo* decision, a narrow majority of the Supreme Court completed its evisceration of the U.S. Constitution's public use clause. As a result of this decision, every home, every church, and every small business is now up for grabs to the highest bidder. Today the mere *possibility* that private property might make more money when put to another use is reason enough for the government to take it away. The well-paid lobbyists of developers and municipalities will claim that the decision doesn't affect Texas, and that there's really no problem that needs fixing. They're wrong.

This decision and similar laws significantly weaken property rights and negatively effect the operation of the free market. Voluntary transactions are hindered, price signals are confused and the ability to profit from one's efforts is abridged—all of which lead to reduced productivity. Thus economic growth and prosperity are two of the casualties of today's attack on property rights. However, it is not just the injurious economic effects of the assault on property rights that should be of concern. We must also consider the harm done to our civil rights and freedoms.

Senate Bill 7, passed in the 2nd called session of the 79th Texas Legislature, was the starting point in the legislative effort to reform eminent domain abuse. But because there was little time to devote to eminent domain reform during the special sessions, more still needs to be done.

First, because of the fundamental importance of private property rights, they must be properly guarded by adopting a constitutional amendment that defines public use and limits exercise of eminent domain. Second, Texas should ban the taking of private property that conveys ownership or control of the property from one private person to another, except in very limited circumstances. Third, a condemnor should have to prove by clear and convincing evidence that the contemplated use of taken property is truly public and necessary. Finally, property that is not used for the purpose for which it was condemned should be offered back to the original owner at the price at which it was taken.

Texas has a historic opportunity to secure its place as the national leader in promoting the economic freedom of all of its citizens by adopting reforms that restore the centrality of private property rights that existed when our nation and our state were founded.

Background

In his book, *Property Rights in 21st-Century America*, Timothy Sandefur writes that “private property rights serve as a shield, protecting people against government-sponsored injustice.”¹

While few in the United States today are seriously advocating the complete abolition of private property, it is clear that private property rights are under attack. Eminent domain, inverse condemnation, licensing, regulations, and judicial fiat are just some of the weapons being used in this battle.

When economist Ludwig von Mises discussed the institution of private property, he began by saying, “Private ownership of the means of production is the fundamental institution of the market economy. It is the institution the presence of which characterizes the market economy as such. Where it is absent, there is no question of a market economy.”² Mises here intimately links the existence of private property and that of the market economy—one doesn’t exist without the other. He goes on:

Ownership means full control of the services that can be derived from a good.... However, nowadays there are tendencies to abolish the institution of private property by a change in the laws determining the scope of the actions which the proprietor is entitled to undertake with regard to the things which are his property. While retaining the term private property, these reforms aim at the substitution of public ownership for private ownership.³

This explains the effects of the assault on private property rights in the United States. The laws here that weaken, without abolishing, property rights still negatively effect the workings of the marketplace. Voluntary transactions are hindered, price signals are confused and the ability to profit from one’s efforts is abridged—all of which lead to reduced productivity. Thus economic growth and prosperity are two of the casualties of today’s attack on property rights.

These effects are seen clearly in the Pacific Research Institute’s U.S. Economic Freedom Index, which defines economic freedom as the right of individuals to pursue their interests through voluntary exchange of private property under a rule of law. The study finds that the impact of just state restrictions on private property rights—relative to the freest state Kansas—is an average reduction in per capita annual income of \$1,161, which, “over a 40-year working life at a conservative 3 percent interest rate, ... translates into \$87,541 that would have otherwise gone into the pocket of an average working American.”⁴

Mises intimately links the existence of private property and that of the market economy—one doesn’t exist without the other.

It is not just the injurious economic effects of the assault on property rights that should be of concern, however. One must also consider the harm done to our civil rights and freedoms. The authors of both the U.S. and Texas Constitutions recognized the fundamental right of private property ownership, and enshrined it in both documents to protect it from legislative caprice. However, they didn't foresee the assault from the modern-day activist judiciary that has claimed the sole right to decide what is and what is not constitutional—regardless of how the constitution in question might actually read.

In June 2005, when the U.S. Supreme Court announced its infamous *Kelo* decision, it provided the capstone to a series of federal and state court decisions that have essentially rewritten the Takings Clauses of the U.S. and Texas Constitutions. In essence, *Kelo* says that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion (for more on this, see the sidebar, “The Past and Future of Eminent Domain”).

At the time *Kelo* was delivered, the Texas Legislature was in the midst of a special session called by Texas Governor Rick Perry to respond to a court ruling that the Texas system of public school finance was unconstitutional. Though the primary business of the day was school finance, Gov. Perry and many members of the Legislature understood how *Kelo* had radically restricted private property rights. So the governor broadened the call of the session, allowing the Legislature to begin to address this issue.

Senate Bill 7, passed in the 2nd called session of the 79th Texas Legislature, was the starting point in the legislative effort to reform eminent domain abuse.⁵ Because there was little time to devote to eminent domain reform during the special sessions, even the strongest supporters of property rights acknowledged that the best plan was to pass some immediate, but limited, protections for private property rights in order to allow time for thorough study of this issue and address it more fully in 2007.

SB 7 included several key provisions, including the following that:

- Prohibited the use of eminent domain when the taking “confers a private benefit on a particular private party through the use of the property”—Sec. 2206.001(b)(1), Government Code.
- Prohibited the use of eminent domain when it is for “economic development” purposes—Sec. 2206.001(b)(3), Government Code.
- Under limited circumstances, removed the deference given to an entity exercising eminent domain when it makes a determination of the legality of its taking—Sec. 2206.001(e), Government Code.
- Subjected the information pertaining to the exercise of eminent domain by a private entity to the state’s open records law—Sec. 552.0037, Government Code.

It is not just the injurious economic effects of the assault on property rights that should be of concern. One must also consider the harm done to our civil rights and freedoms.

The Past and Future of Eminent Domain

The use of eminent domain for private development has become a nationwide problem, and the Supreme Court's *Kelo* decision is already encouraging further abuse.

Eminent domain, called the "despotic power" by the Supreme Court in the early days of this country, is the power to kick citizens out of their homes and seize their small businesses against their will. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use, without just compensation."

Historically, with a few very limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which has been a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker* in 1954. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Fifth Amendment and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The *Kelo* case completed the court's evisceration of the public use clause. As a result of this decision, every home, every church and every small business is now up for grabs to the highest bidder. Accord-

ing to a narrow majority of the Court, the mere possibility that private property might make more money when put to another use is reason enough for the government to take it away. The well-paid lobbyists of developers and municipalities will claim that the decision doesn't affect Texas, and that there's really no problem that needs fixing. They're wrong. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights—it erases the public use requirement for eminent domain. Under *Kelo*, purely hypothetical economic development is the only justification necessary to condemn property.

Eminent domain will continue to adversely affect those who have relatively little influence in politics, most typically the poor, minorities and the elderly. It remains a benefit for those with more money and better connections. Eminent domain is routinely abused to transfer property from one person to another in order to build luxury condominiums and big-box stores. Americans are fed up with this abuse.

The use of eminent domain for private development has become widespread. The Institute for Justice documented more than 10,000 properties either taken or threatened with condemnation for private development in the five-year period between 1998 through 2002. Because this number was reached by counting properties listed in news articles and court cases, it grossly underestimates the actual number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found only 31 in our study of newspaper articles and court filings, while the true number recorded by the state was 543. Now that the Supreme Court has actually sanctioned this sort of abuse in *Kelo*, the floodgates to even more abuse have been thrown open. Home and business owners have every reason to be very, very worried.

—Clark Neily, excerpted from *Restoring Justice: Protecting Private Property Rights from Eminent Domain Abuse*, Texas Public Policy Foundation (May 2006).

While all of these provisions bring a greater degree of protection to property rights in Texas, more could have been done but for the constraints imposed by the debate over school finance. Considering this, perhaps the most important provision of SB 7 was that which created a joint interim committee “to study the use of the power of eminent domain.”⁶ By doing this, the Legislature sought to keep the reform of eminent domain laws a legislative priority up to and including the 80th Texas Legislature.

This has certainly been the case. The lieutenant governor and the house speaker included eminent domain in their interim charges, standing committees in both houses have held public hearings on the issue, the Texas Conservative Coalition, a group of Texas lawmakers, has convened a task force, and the joint interim committee is holding its hearings this fall. Additionally, private sector organizations—both state and national—have engaged this topic, indicating that there will be significant public and legislative momentum heading into 2007.

The Current State of Eminent Domain Protection in Texas

The interim has provided an opportunity to study how best to limit eminent domain abuse. The brief period of time that has elapsed since the passage of SB 7 and the fact that some of its provisions apply only to eminent domain actions initiated after its effective date means that there are few cases being litigated under the new law. So in order to fully understand what further protections should be enacted, an in-depth analysis of the current state of the law and current eminent domain activities is needed.

Senate Bill 7

Since the substantive provisions of SB 7 were the Legislature’s starting point in this process, further analysis of them serves as a blueprint for the development of additional protections that could be adopted by the Legislature next year.

Private Benefits

Texas law now contains a clear prohibition on the use of eminent domain when the taking “confers a private benefit on a particular private party.” While this is good, the problem is that the U.S. Supreme Court found that no such private benefit existed even in the taking of Susette Kelo’s house. The Court said that because the “intended use of this land ... had been given ‘reasonable attention’ during the planning process” by the City of New London, the taking and transfer of the homes of Kelo and others conferred no private benefit on the private recipient, but instead met the “public purpose” test of the Court. In other words, as long as a government entity has a plan—any plan—in place that claims to show a public benefit for a taking, there is no private benefit. And the fact the Texas Supreme Court has said “this Court has adopted a rather liberal view as to what is or is not a public use” does not hold out great hope that Texas courts would rule any differently.⁷

The Legislature sought to keep the reform of eminent domain laws a legislative priority up to and including the 80th Texas Legislature.

Economic Development

Another way that the Texas Legislature acted to reign in *Kelo*-style takings was to prohibit takings for economic development purposes. As with the previously discussed provision, this was designed to stop the transfer of private land from one private owner to another, with the emphasis in this case being on curtailing attempts by local governments to enhance their tax revenues.

The difficulty with this provision is twofold. First, the term “economic development” is legally imprecise and its use caused great consternation among most entities with the power of eminent domain, which claimed that the term could interfere with legitimate uses of eminent domain such as road building and port expansions. In order to address these concerns, the Legislature added a host of exceptions, including:

- transportation projects, including, but not limited to, railroads, airports, or public roads or highways;
- water supply, wastewater, flood control, and drainage projects;
- public buildings, hospitals, and parks;
- the provision of utility services;
- the new Dallas Cowboys football stadium;
- underground storage operations;
- waste disposal projects;
- libraries, museums, or related facilities and any infrastructure related to the facilities;
- port authorities, navigation districts, and any other conservation or reclamation districts that act as ports;
- common carriers; and
- energy transporters.

While many of these exceptions are legitimate public uses, the wide scope of the list provides too many opportunities for abuse. For instance, the Texas Supreme Court has in the past allowed a port to condemn private property for *commercial* warehouse space on the theory that the warehouses were necessary for the success of the related port project.⁸ The port authority exception in SB 7 would allow such non-public uses to continue.

Second, SB 7 included additional exceptions on the ban of eminent domain for the purpose of economic development when it come to blight. Specifically, it said that economic development takings are acceptable if “the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.”

In Texas today, governments have the power to condemn not just blighted properties but any property in an area that has been designated as blighted.

While it may be possible to make a case for the use of eminent domain to eliminate severe blight from specific properties, current Texas law would allow governments using this exception to go much further. The term “areas” is the key. In Texas today governments have the power to condemn not just blighted properties but any property in an area that has been designated as blighted—a designation that can be applied to far too many properties that do not provide the tax revenue, jobs and atmosphere that certain local leaders and elected officials might desire.

This is the case in El Paso, which recently unveiled a redevelopment plan for downtown with its stated goal “to become a leading American city.” Under SB 7’s slum and blight exception, properties such as the Pablo Bay apartments, Starr Western Wear, and apartments in the historic Segundo Barrio could be condemned—despite the fact that these buildings currently provide affordable housing and space for thriving businesses.

Presumption

In order for a government to condemn private property in Texas, the taking must be for a public use and there must be a public necessity for taking the particular piece of property. The presumption provision in SB 7 attempts to address a significant problem in this area. Current Texas jurisprudence requires the courts to offer great deference to governmental determinations of public use and necessity. Therefore, as long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court.

In one case where a property owner attempted to make such a challenge, a Texas appeals court said that the “condemnor’s discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. ... Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion.”⁹ Because of this standard, courts do not often review the facts underlying a determination of public necessity. And while the threshold for challenging a determination of public use is not quite as high, property owners still have a very difficult time overcoming the presumption given to the government’s determination in this matter. At times the facts hardly matter.

...the problem is that the U.S. Supreme Court found that no such private benefit existed even in the taking of Susette Kelo’s house.

Case Studies

All but one of the case studies in this section involve takings initiated before the passage of SB 7. However, as it will be seen, they highlight areas of eminent domain abuse that were not fully addressed in SB 7 and thus are in need of correction in 2007.



Two years after being acquired by the City of Rowlett, the Raney homestead still sits vacant. *Photo by Ben Williams.*

Larry W. Raney v. the City of Rowlett, Texas

Larry Raney and his family owned a home on nine acres of land adjacent to Rowlett City Hall. Bought by Raney's father in 1929, three generations of the family had lived on the property—ending with his two daughters in 2003. Mr. Raney purchased his brother's portion of the property after his father passed away, becoming the exclusive owner of the family estate. Mr. Raney had no intention of selling the family's property; however the City of Rowlett had different plans.

On March 21, 2003 the City of Rowlett gave notice of its intention to use Rowlett's property at 3908 Main Street for "municipal purposes" by filing a written petition "seeking judgment for eminent domain" with the Dallas County District Clerk. The exact nature of the municipal purposes was uncertain, and remains so to this day. Family members were told the centrally located land was necessary for "possible expansion of city park land." Adding to the uncertain nature of the use of the property the current Rowlett Master Plan specifies that one half of the property is zoned for park and the other half for single family homes.

In early April 2004, the Third County Court of Dallas found "all legal prerequisites for an eminent domain proceeding under Texas state law had been duly satisfied." Following advice from the family attorney, Mr. Raney ceased fighting for his family's land. Rowlett continued with the condemnation of the property. The settlement resulted in an "agreed final judgment" and mandatory selling of the property. Since then the Raney family home has been bulldozed, and the land remains a vacant lot without any development of the park or other municipal uses. —by Ben Williams, Research Intern, Texas Public Policy Foundation

Harry Whittington v. the City of Austin

Harry Whittington and his family owned a city block near the Austin Convention Center. On August 9, 2001, the Austin City Council passed a resolution that the Whittington's property "should be acquired for a public use" via eminent domain. However, the City's resolution was silent regarding what exactly that public use should be.

The City later said that it wanted to use the land for the purpose of building a parking garage for the Austin Convention Center and chilling plant. However, the city had previously planned a convention center parking facility in

The Raney family home has been bulldozed, and the land remains a vacant lot without any development of the park or other municipal uses.

conjunction with the adjacent Hilton Hotel project. It was only when the City agreed to let the developer not build the parking garage that the City proposed using Whittington's land for this purpose. Additionally, the City admitted in deposition testimony that it could have met all of its projected convention center parking needs at much less cost by non-renewing contract parking leases in the City's existing parking garage at Second and Brazos. The idea for the chilling plant use came even later.

The City was initially successful in its condemnation of the land—the trial judge awarded it a summary judgment—and built a parking garage on the property. However, the Whittingtons' have successfully appealed the summary judgment, and are awaiting a full trial scheduled to begin April 9, 2007. In a separate case, a court has found that the city failed to properly condemn an alley running through the property. The ultimate ownership of the property and parking garage is still up in the air.

*Frank Newsom v. Malcomson Road
Utility District*

Frank Newsom owned a northern and a southern tract of undeveloped land outside the Malcomson Road Utility District's (District) boundaries. A drainage ditch lay along the eastern boundary of Newsom's northern tract. A corporate landowner that wished to develop its nearby tract into a residential subdivision tried to purchase 2.6178 acres along the eastern edge of Newsom's northern tract to expand the drainage ditch, which the Harris County Flood Control District (HCFCD) required for development of the subdivision. Similarly, a different owner of nearby property tried to purchase 2.58 acres of Newsom's property to build a retention pond that HCFCD required for development of the second subdivision. The second owner wanted to use Newsom's property in order to be able to build more houses on the property that he already owned. The District supported the purchase because it would increase the District's tax base.

Newsom rejected both of the offers. The developers asked the District to condemn the portions of Newsom's land that they had tried to purchase. The District proceeded to file separate condemnation proceedings in county court for each piece of property.

While Newsom was initially successful in opposing the condemnations in district court, the appeals court ruled that the takings were for a public use, despite the fact that the drainage projects were required for the permitting of specific developments, and were designed to be of a size to accommodate the runoff only from those projects. In making its determination, the court relied on the fact that the ditch and the pond could both receive runoff from other uphill properties. And even though the retention pond in the second instance could have been built on property already owned by the developer,



After initially losing his land to the City of Austin, Harry Whittington might wind up with his own parking garage.
Photo by Bill Peacock.

The developers asked the District to condemn the portions of Newsom's land that they had tried to purchase. The District proceeded to file separate condemnation proceedings in county court for each piece of property.

the appeals court left open the possibility that the takings constituted a public necessity. The court said that the “condemnor’s discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion.” Because of this standard, courts often do not review the facts underlying a determination of public necessity. Newsom has appealed to the Supreme Court.

Downtown Property Owners and Residents v. the City of El Paso

The City of El Paso recently unveiled a redevelopment plan for downtown. With its stated goal “to become a leading American city,” this is the Texas version of similar plans across the country, including the one in New London. It portrays a vibrant, renewed downtown El Paso as “the destination for new residential housing, shopping, night-life, families and visitors [and] a culturally important place with an area dedicated specifically for U.S./Mexico art.”

The city of El Paso is moving forward with a redevelopment plan that will almost certainly include the use of eminent domain for taking non-blighted properties—specifically to hand them over to private developers.

In order to make room for the “new” El Paso, the plan relies heavily on amassing an inventory of tracts of various sizes—which today are filled with housing and businesses—that can be used to attract developers and retailers to the area, especially in the designated Redevelopment District. To “facilitate and accelerate the implementation of the Plan,” the City will adopt a Tax Increment Reinvestment Zone (TIRZ) and “a real estate investment, management and operating company will be created, in the form of a Real Estate Investment Trust (REIT) to acquire downtown real estate assets ... either through outright purchases of property or contributions by landlords.”¹⁰

A TIRZ is created under the Tax Increment Financing Act, Chap. 311 of the Texas Tax Code. Under Chap. 311, a city can use the power of eminent domain to acquire property to carry out the plan developed in conjunction with the TIRZ. Of course, SB 7 prohibits a city from using eminent domain for economic development purposes even through a TIRZ (except for one exemption). The problem is that Texas courts have held that the clearing of slum and blighted areas is per se a public use, both under the Texas Urban Renewal Law¹¹ and the Tax Increment Financing Act,¹² even if the specific property itself is not blighted.

Such properties in El Paso might include the Pablo Bay apartments, where the first novel of the Mexican Revolution was published in 1915. Or the buildings containing Starr Western Wear and the Juarez Boot store. Or apartment buildings in the historic Segundo Barrio. These buildings are all in the demolition zone, and would be eligible for condemnation even though they currently provide affordable housing and space for thriving businesses.

Analysis

Looking at the legal issues surrounding SB 7 and these current situations, it is possible to draw some conclusions about the state of eminent domain protection in Texas and evaluate what additional steps need to be taken.

The most fundamental issue that needs to be addressed is the excessive breadth of activities that still might be considered a public use in Texas. The skewed interpretation by courts of what constitutes a public versus private benefit renders SB 7's prohibition on the use of eminent domain to confer a private benefit almost useless. The exemptions to the ban on using eminent domain for economic development purposes provides numerous loopholes that would accommodate private uses, including the forced transfer of land from one private owner to another.

This is most apparent with regard to the blight exception, as seen by the fact that the City of El Paso is moving forward with a redevelopment plan that will almost certainly include the use of eminent domain for taking non-blighted properties—specifically to hand them over to private developers. Though the Newsom case has not been ultimately decided, the expansive meaning of public use is easily seen in the distinct possibility that the courts will allow a developer to use Newsom's property to build a retention pond primarily to increase the developer's profit from his own land.

Both the Newsom and Whittington cases highlight the extremely high bar that property owners must overcome when challenging a governmental entity's determination of public use or necessity. Particularly in the case of public necessity where a government entity's discretion is "nearly absolute." Absent fraud or a similarly egregious offense, a property owner has little chance of getting a court to review the facts underlying the determination. While the provision in SB 7 addressing this issue is a good start, it is so narrowly tailored that it is likely to have little impact in most cases where a property owner seeks to question the determinations by the condemnor.

Another problem with eminent domain law in Texas is that once a property has been condemned, it can be used for just about any purpose—the condemnor is not required to use it for the purpose it was taken. There is a provision in Texas law[†] that allows for the repurchase of property if the public use for which it is taken is cancelled. However, that provision applies for only 10 years after the taking, and the property must be purchased back at the current market value at the time the use was cancelled, not the price paid to the former land owner.

The Raney case highlights this problem. Though the property was taken by the city of Rowlett over two years ago for "possible expansion of city park land," it is being put to use today only as a vacant lot and is partially zoned for new residential development. This is also an issue in the Whittington case. At the outset,

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[†] Subchapter E, Chapter 21, Property Code

it appears the only thing that the city of Austin knew for sure was that it wanted the property because of its proximity to the convention center. Only after the condemnation process was under way were specific uses of the property identified. Yet a district court had no hesitancy about allowing the city to proceed.

Recommendations

The fundamental importance of private property rights led the constitutional writers to enshrine protections for property owners against eminent domain abuse in both the state and federal constitutions. Since that time, both state and federal courts have radically changed the meaning of public use. Today, private property can be taken for the private use of another, as long as there is some documented public purpose or benefit associated with the taking.

Because of the importance of this issue, both constitutional and statutory reform is needed to restore the use of eminent domain to its historical foundations. The following recommendations are designed to provide examples of how this can be accomplished.

In order to limit the power of eminent domain use in Texas, the constitution needs to be amended to 1) define public use and 2) remove the presumption enjoyed by governmental entities in determination of public use and necessity.

Eminent Domain and the Texas Constitution

The question, for what purposes may the power of eminent domain be exercised, really needs to be looked at by the Texas Legislature. The *Kelo* decision was symptomatic of two growing problems. The first is that the courts, and not our elected bodies, are deciding more and more on acceptable uses of the power of eminent domain. The second problem is that the exercise of eminent domain has expanded from providing for public use to providing a public benefit. There's a massive difference between these two things. A public use entails something that, to put it simply, the public may use. A public benefit involves something where the public may be better off, but would not necessarily have use of the condemned land. We need to identify a strict, simple definition of public use and put that definition in the Texas Constitution. I also think that we should amend the Constitution to specify that political subdivisions may condemn private property only if it is for a public use.

Beyond the question of public use, I think there are many other applications of eminent domain that need to be reconsidered. For example, I think that the language authorizing entities to condemn private property for slum and blight is too broad. For example, I heard that in some other state, a city tried to condemn a whole neighborhood on grounds that it was blighted because the homes generally had one bathroom and two bedrooms. We can't let situations like this happen in Texas. We should work to close this slum and blight loophole.

—Rep. Bill Callegari, chairman of the Texas Conservative Coalition Research Institute's Property Rights and Land Use Taskforce

Constitutional Amendment

The Texas version of the Takings Clause is contained in the Article I, Section 17 of the Texas Constitution. Because of the fundamental importance of private property rights—all of the freedoms we have in the United States are grounded in this, they cannot be properly guarded without a constitutional amendment. In order to limit the power of eminent domain use in Texas, the constitution needs to be amended to 1) define public use and 2) remove the presumption enjoyed by governmental entities in determinations of public use and necessity. An example of language that would accomplish this is as follows:

Except as herein provided, public use means that the state, a political subdivision of the state or the citizens of the state as a whole must possess, occupy and enjoy any taken, damaged or destroyed property. Eminent domain may only be used to take private property for transfer or lease to private entities for the provision of common carrier services or systems, or where the property constitutes a public nuisance and presently threatens public health and safety. Whenever an attempt is made to take, damage or destroy property for a use alleged to be public, the condemnor must prove by clear and convincing evidence that the contemplated use is truly public and necessary, and it shall be a judicial question, determined as such without regard to any legislative assertion that the use is public and necessary.

Public use means that the state, a political subdivision of the state or the citizens of the state as a whole must possess, occupy and enjoy any taken, damaged or destroyed property.

Statutory Changes

A definition of public use is also needed in statute. In part, this is because the statutory definition by nature can be more comprehensive than the one in the Texas Constitution. The following is an example of a statutory definition of public use:

DEFINITION OF PUBLIC USE. (a) Public use means that the state, a political subdivision of the state or the citizens of the state as a whole must possess, occupy and enjoy any taken, damaged or destroyed property.

(b) Eminent domain may be used to take private property for conveying ownership or control of the property to a natural person or private entity only as described in Sec. xxxxx (refers to next section).

Of course, if Texas law is going to allow the transfer of private property taken by eminent domain from one person to another, this allowance must be very narrowly tailored to prevent abuse. The following is language designed to strictly limit the transfer of private property from one owner to another:

LIMITATION ON EMINENT DOMAIN BY GOVERNMENTAL ENTITIES OR PRIVATE PARTIES. (a) This section applies to the use of eminent domain under the laws of this state, including a local or special law, by any governmental or private entity, including:

(1) a state agency, including an institution of higher education as defined by Section 61.003, Education Code; (2) a political subdivision of this state; or (3) a corporation created by a governmental entity to act on behalf of the entity.

(b) Notwithstanding any other provision of law, a governmental or private entity may not take private property through the use of eminent domain if the taking conveys ownership or control of the property to a natural person or private entity, except if the property:

(1) is acquired: (A) for common carrier services or systems as described in Section 111.002, Natural Resources Code, and Section B(3)(b), Article 2.01, Texas Business Corporation Act; (B) for a purpose authorized by Chapter 181, Utilities Code; (C) for underground storage operations subject to Chapter 91, Natural Resources Code; (D) for a waste disposal project; or (E) as authorized under Sec. 203.052, Transportation Code; or

(2) constitutes a public nuisance or attractive nuisance because of physical condition, use or occupancy and presently threatens public health and safety.

Whenever an attempt is made to take, damage or destroy property for a use alleged to be public, the condemnor should have to prove by clear and convincing evidence that the contemplated use is truly public and necessary.

Texas statute should also be amended to eliminate the presumption regarding determinations of public use and necessity afforded to governmental entities by case law. In an area that is so fundamental to our freedoms as property rights, it is the government, not the property owner, that should face the burden of proving that eminent domain is being employed for a public use that constitutes a public necessity. Model language to accomplish this is as follows:

DETERMINATION OF PUBLIC USE AND NECESSITY. (a) Whenever an attempt is made to take, damage or destroy property for a use alleged to be public, the condemnor must prove by clear and convincing evidence that the contemplated use is truly public and necessary, and it shall be a judicial question, determined as such without regard to any legislative assertion that the use is public and necessary.

Additionally, except for property acquired as a public right-of-way for the purpose of building a road, all property should be offered for sale to the original owner of the land if it is not used for the purpose it was acquired for within five years:

REPURCHASE OF REAL PROPERTY FROM GOVERNMENTAL ENTITY. (a) Except as provided in Subsection (b), any real property that is not used for the public use for which it was taken within five years of acquisition shall be offered for sale to the previous owner or owners from whom the property was condemned, or to such owner's or owners' heirs, successors, or assigns, at the lesser of: (1) the price which was paid for the property, less such amount, if any, as the person or persons from whom the property was condemned shall show by good and sufficient documentation to be the amount of income, capital gains and transaction taxes actually paid in connection therewith; or (2) the current fair market value.

(b) This subchapter does not apply to a right-of-way under the jurisdiction of: (1) a county; (2) a municipality; or (3) the Texas Department of Transportation.

(c) If the offer for sale of the real property to the previous owner or owners under this section is not accepted, then the real property acquired by eminent domain may be put to another public use or offered for sale to another natural person or private entity.

Conclusion

In too many states around the nation, opposition has led to the watering down or outright rejection of eminent domain reform. Opponents of reform, like the Texas Municipal League, claim that *Kelo* “simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a ‘public use’ as a road, bridge, or water tower.”¹³

But judicial interpretations of the Fifth Amendment that allow for economic development takings are relatively recent. It is inconceivable that the Founding Fathers would have thought that the Fifth Amendment would have allowed the City of Freeport to take the property of Western Seafood and give it to their neighbor to build a private marina. Yet that is exactly what the City is trying to do.

It is not just businesses that are impacted by this trend. Larry Raney lost the family homestead that had housed three generations of his family. Susette Kelo finally got to keep her home, but only after it was picked up and moved to another location. Many longtime residents of downtown El Paso may soon be separated from their long-time neighbors and forced to find homes elsewhere.

Texas now has a historic opportunity to cement its place as the leader in promoting the economic freedom of all of its citizens by adopting reforms that restore the centrality of private property rights that existed when our nation and our state were founded.



Susette Kelo finally got to keep her home, but only after her property was condemned and the house relocated. *Photo by Isaac Reese, 2004 ©Institute for Justice.*

Texas has become a national leader in many issues affecting public policy—telecommunications and electric deregulation and tort reform top the list. And it has always been a leader in protecting private property rights. Texas now has a historic opportunity to secure its place as the leader in promoting the economic freedom of all of its citizens by adopting reforms that restore the centrality of private property rights that existed when our nation and our state were founded.★

Bill Peacock is the director of the Center for Economic Freedom at the Texas Public Policy Foundation.

The Center for Economic Freedom was established to champion economic freedom in Texas by providing policymakers with reliable information and practical, market-based alternatives to state regulation of transactions between business, employees, and consumers.

Contact Bill Peacock at: bpeacock@texaspolicy.com.

The City of Hurst and Eminent Domain

The City of Hurst agreed to let its largest taxpayer, a real estate company, expand its North East Mall and thus increase the city's sales and property tax revenues. There happened to be 127 homes in the way, but that wasn't a problem. The city agreed to condemn the homes if the owners did not sell. Under the threat of eminent domain, almost all of the homeowners sold their property. Ten condemnees refused to sell and took the city to court. The Lopez, Duval, Prohs and Laue families had each owned their homes for approximately 30 years. Some of the other families had been there for more than a decade.

A Texas trial judge refused to stay the condemnations while the suit was ongoing, so the residents

lost their homes. Of the 10 couples that challenged the city, three spouses died and four others suffered heart attacks during the dispute. During litigation, the owners discovered evidence that the land surveyor who designed the roads for the mall expansion had been told to change the course of one access road so that it would run through the houses of the eight owners challenging the condemnations. However, as litigation often does, the case moved slowly, and the exhausted owners finally settled in June 2000. Until the time of settlement, however, they had received no compensation at all for the loss of their homes or disruption to their lives.

—Clark Neily, excerpted from *Restoring Justice: Protecting Private Property Rights from Eminent Domain Abuse*, Texas Public Policy Foundation (May 2006).

Endnotes

- ¹Timothy Sandefur, *Property Rights in 21st Century America*, Cato Institute (2006) 15-16.
- ²Ludwig von Mises, *Human Action: A Treatise on Economics*, the Ludwig von Mises Institute (1998) 678.
- ³*Ibid.*, 678-79.
- ⁴Ying Huang, et. al., *U.S. Economic Freedom Index: 2004 Report*, Pacific Research Institute (2004) 57.
- ⁵Senate Bill 7 by Sen. Kyle Janek, 79th Texas Legislature, 2nd Called Session.
- ⁶*Ibid.*, 7-8.
- ⁷*Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 309 S.W.2d 828, 833 (1958).
- ⁸*Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137, 142 (Tex.Civ.App.—San Antonio 1954, writ ref'd n.r.e.).
- ⁹*Malcomson Road Utility District v. Newsom* 171 S.W.3d 257 (Tex.App.—Houston [1st Dist.] 2005, pet. Granted).
- ¹⁰El Paso Downtown Web Site, <http://www.epdowntownplan.com/Index.aspx?Section=About&Page=ImplementationPlan>.
- ¹¹*Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959).
- ¹²*Hardwicke v. City of Lubbock*, 150 S.W.3d 708 (Tex.App.-Amarillo 2004, no pet.).
- ¹³Texas Municipal League, TML Online, <http://www.tml.org> (July 1, 2005).

Appendix: Eminent Domain Legislation Passed by Other States

Texas was one of the first states to pass legislation in response to the U.S. Supreme Court's *Kelo* decision. Since the decision, 30 other states have also passed some type of legislation relating to eminent domain. There have been changes to statutes as well as five constitutional amendments—all of which will be going to the voters for approval in November.

The Institute for Justice, a non-profit civil liberties law firm that argued Susette Kelo's case before the Supreme Court, examined the actions of the 31 states. They determined that 14 of the states passed legislation with restrictions on private development and substantive blight reform—the states that passed constitutional amendments all belonged in this category. The other sixteen states—which included Texas—increased eminent domain protections to some extent but still had more work to do.

The following is a summary of the legislation passed in the 14 states that passed the most significant reforms. The Institute for Justice's online summary can be found at <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf>.

Alabama: SB 68

<http://tinyurl.com/eywws>

- Effective date: August 3, 2005
- Key provisions
 - Prohibits the use of eminent domain for:
 - the purposes of private retail, office, commercial, industrial, or residential development;
 - primarily the enhancement of tax revenue; and
 - the transfer of property to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.
 - The prohibition does not apply to a municipality or other public entity that exercises eminent domain based on a finding of blight in an area covered by any redevelopment plan or urban renewal plan.
 - Requires that a property acquired through eminent domain, which is not used for its intended purpose or another public use, must be offered for sale to the original owner(s) at the price at which it was taken, less any income or transaction taxes which the owner paid on the original transaction.

Florida: HB 1569-constitutional amendment, HB 1567

[http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1569er.doc&DocumentType=Bill&BillNumber=1569&Session=2006)

[FileName=_h1569er.doc&DocumentType=Bill&BillNumber=1569&Session=2006](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1569er.doc&DocumentType=Bill&BillNumber=1569&Session=2006)

- Effective date: Constitutional amendment to be presented to voters in November; May 11, 2006 for HB 1567
- Key provisions
 - Constitutional amendment (if passed) requires a three-fifths majority to adopt exceptions to the state constitutional prohibition on eminent domain for private use.
 - Prohibits the condemnation of private property to prevent or eliminate slum or blight conditions or to abate or eliminate public nuisances; requiring instead municipalities to use their police powers to address properties that pose a danger to public health or safety.

- Bans the transfer of seized private property to private parties for a period of 10 years following the condemnation.

Georgia: HB 1313

http://www.legis.state.ga.us/legis/2005_06/fulltext/hb1313.htm

- Effective date: March 4, 2006
- Key provisions
 - Defines public use, public utility and blight.
 - Makes the determination of public use a matter of law to be determined by the court and places the burden of proof on the condemnor.
 - Allows a previous owner to repurchase (or receive additional compensation for) land that has not been put to a public use within five years of condemnation.
 - Requires a legitimate blight designation for the purpose of exercising eminent domain.

Indiana: HB 1010

<http://www.in.gov/legislative/bills/2006/HE/HE1010.1.html>

- Effective date: March 24, 2006
- Key provisions
 - Defines public use as:
 - possession, occupation and enjoyment of a parcel of real property by the general public or a public agency for the provision of fundamental services, including highways, bridges, ports, airports, parks, intermodal facilities and certified technology parks);
 - leasing of the above facilities by a public agency which retains ownership by written lease with a right of forfeiture; and
 - use of a parcel of real property to create or operate a public utility, an energy utility or a pipeline company.
 - Prohibits the transfer of property acquired by eminent domain to a private person unless the property is blighted and the acquisition is expected to accomplish more than only increasing the property tax base.
 - Provides that if a condemnor fails to: (1) take possession of property the condemnor acquired through the use of eminent domain; and (2) adapt the property for the purpose for which it was acquired; not later than six years after the payment of the award or judgment for damages occurs, the condemnor forfeits all rights in the property as if the procedure to take the property had not begun.
 - Requires condemnor to acquire property within two to six years of initial offer.
 - Allows property owner to recover litigation costs up to \$25,000 if the property owner is awarded greater compensation at trial than was offered in the condemnor's last settlement offer.

Kansas: SB 323

<http://www.kslegislature.org/bills/2006/323.pdf>

- Effective date: May 18, 2006
- Key provisions
 - Transferring of private property to a private entity is authorized in limited situations, including those involving the Department of Transportation, any privately-owned common carrier, defects of title, or the express authorization by the legislature.
 - Requires that blight designations be made for only unsafe property and must be made on a parcel-by-parcel basis.

Louisiana: SB 1-constitutional amendment

<http://www.legis.state.la.us/billdata/streamdocument.asp?did=407125>

- Effective date: Constitutional amendment was approved by voters on September 30
- Key provisions
 - Defines public purpose.
 - Limits the ability of the state to take or damage property for the predominate use of, or transfer of ownership to, any private person or entity.
 - Prohibits economic development, enhancement of tax revenue, or any incidental benefit to the public from being considered when determining the public purpose of a taking.

Michigan: SJR E-constitutional amendment; SB 693

<http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf>

- Effective date: Constitutional amendment to be presented to voters in November
- Key provisions
 - Amendment requires that a person whose principle residence is taken for a public use be compensated no less than 125 percent of its market value.
 - Amendment states that public use does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.
 - Amendment requires the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the standard is clear and convincing evidence.
 - Statute lists attributes of public use when a property is transferred to a private party and significantly tightens the definition of blight.

Minnesota: SF 2750

<http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2750.5.html&session=ls84>

- Effective date: May 19, 2006
- Key provisions
 - Prohibits the use of eminent domain to transfer property from one owner to another for private commercial development.
 - Requires that blighted properties be an actual danger to public health and safety to be condemned for private development.
 - Contains new standards dealing with compensation for loss of a going concern and establishes minimum compensation in cases where an owner must relocate.
 - Provides exemptions to some cities and taxing districts for up to five years.

New Hampshire: CACR 30-constitutional amendment; SB 287

<http://www.gencourt.state.nh.us/legislation/2006/CACR0030.html>

- Effective dates: Constitutional amendment to be presented to voters in November; January 1, 2007
- Key provisions
 - Amendment prohibits the use of eminent domain if a property is to be transferred to another person for the purpose of private development or other private use of the property.
 - Statute defines public use and provides a tighter definition of blight.

Pennsylvania: SB 881

<http://www.legis.state.pa.us/WU01/LI/BI/BT/2005/0/SB0881P1738.HTM>

- Effective date: May 4, 2006
- Key provisions
 - Prohibits the condemnation of private property for private commercial development.
 - Significantly tightens the definition of blight in the State's eminent domain laws, though it makes exceptions for existing blight designations in Pittsburgh, Philadelphia, and Delaware County.

South Carolina: S1031-constitutional amendment

http://www.scstatehouse.net/sess116_2005-2006/bills/1031.htm

- Effective date: Constitutional amendment to be presented to voters in November
- Key provisions
 - Does not allow private property to be condemned by eminent domain for any purpose or benefit including economic development, unless the condemnation is for public use.
 - Requires a legitimate blight designation, and eliminates more expansive powers of certain cities, for the purpose of exercising eminent domain.

South Dakota: HB 1080

<http://legis.state.sd.us/sessions/2006/bills/HB1080enr.htm>

- Effective date: February 17, 2006
- Key provisions
 - Prohibits a county, municipality, or housing and redevelopment commission from acquiring private property by use of eminent domain:
 - for transfer to any private person, nongovernmental entity, or other public-private business entity, or
 - primarily for enhancement of tax revenue.
 - Prohibits a county, municipality, or housing and redevelopment commission from transferring to a private entity, NGO or public-private business entity, within seven years of acquisition, any fee interest in a property acquired by eminent domain without first offering the property back to the party from whom it was taken at the lesser of current fair market value or the original transfer value.

Utah: SB 184; SB 117

<http://www.le.state.ut.us/~2005/bills/sbillenr/sb0184.pdf>

- Effective dates: March 21 2005; March 21, 2006
- Key provisions
 - Removed the power of eminent domain from redevelopment agencies.
 - Requires a taking of property by a political subdivision to be approved by the governing body of the political subdivision and that written notice be given to property owners of each public meeting to approve a taking.
 - Prohibits the use of eminent domain for trails, paths, or other ways for walking, hiking, bicycling, equestrian use, or other recreational uses, except for bicycle paths and sidewalks adjacent to paved roads.

Wisconsin: AB 657

<http://www.legis.state.wi.us/2005/data/AB-657.pdf>

- Effective date: April 1, 2006
- Key provisions
 - Prohibits the use of eminent domain to condemn property if the condemnor intends to convey or lease the acquired property to a private entity, unless the property is blighted.
 - Defines blight and requires that the condemnor make a written finding that a property is blighted.

About This Report

In its *Kelo* decision, a narrow majority of the Supreme Court completed its evisceration of the public use clause of the U.S. Constitution. As a result of this decision, every home, every church and every small business is now up for grabs to the highest bidder. Senate Bill 7, passed in the 2nd called session of the 79th Texas Legislature, was the starting point in the legislative effort to reform eminent domain abuse. But because there was little time to devote to eminent domain reform during the special sessions, more still needs to be done.

Because the Supreme Court left room for state legislature's to adopt stricter limitations on eminent domain, Texas has a historic opportunity to cement its place as the national leader in promoting the economic freedom of all its citizens.

This report examines the background of the *Kelo* decision, looks at the current state of eminent domain protections—or lack thereof—in Texas, and makes recommendations about what must be done to restore the centrality of private property rights that existed when our nation and our state were founded.

