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Eminent domain: The unintended consequences of Kelo

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EMINENT DOMAIN: THE UNINTENDED
CONSEQUENCES OF *KELO*

by

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ABSTRACT

Eminent Domain: The Unintended Consequences of Kelo

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In recent years, local governments in the United States have increasingly used eminent domain to promote economic development, raising concerns among property-right advocates over what those advocates view as unlawful, or what should be unlawful, takings of private property in order to benefit another private property owner. This philosophical and legal dispute reached a crisis point in the 2005 United States Supreme Court decision in *Kelo v. City of New London*. In that decision, the court narrowly upheld a Connecticut Supreme Court ruling granting the City of New London permission to redevelop land that had been seized from existing homeowners and transferred to another private party for economic development. The decision sparked an immediate public outcry and prompted forty-three states to consider some type of reform to protect property owners from similar actions by government.

This thesis examines the legal, policy, and ethical implications that the *Kelo* case has had in the United States and in Nevada. It reviews the principal academic literature and case law concerning eminent domain in the United States, up to and including the *Kelo* decision, then specifically focuses on

assessing the legal and policy responses of Nevada and other states to *Kelo*. It notes that while the post-*Kelo* reforms of some states have been highly effective, others have done little to safeguard property owners against *Kelo*-type takings. It briefly reviews the policy influence of Dewey and Locke in current approaches to eminent domain, and concludes that Nevada's post-*Kelo* approach is an effective model for limiting how eminent domain is used, while still achieving the obligations government has to protect its people.

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CHAPTER 1

INTRODUCTION

The *Kelo* Decision

In *Kelo v. City of New London*¹, the United States Supreme Court issued a ruling that has sent state legislators and voters running to protect property owners from what many see as unlawful, or what should be unlawful, takings of private property in order to benefit another private property owner. The case stemmed from attempts by the City of New London, Connecticut to redevelop land. The city, through a city-formed development corporation, sought to redevelop a waterfront area in order to revitalize the community and the economy.² The plan included taking homes from private property owners in order to develop a new waterfront park with a state park, new homes, small businesses such as restaurants and shows, and office space. A property adjacent to the site would house a new research facility that Pfizer Corporation committed to build.³ Property owners, including Susette Kelo, argued in part that the City of New London was taking private property for a non-public use and sought to stop the taking by arguing that the non-public use was a violation of the Fifth Amendment. In a 5-4 decision, the U.S. Supreme Court upheld the

¹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

² *Ibid.*, 473.

³ *Ibid.*

Connecticut Supreme Court's ruling granting the City of New London permission to redevelop the land.⁴

At its simplest, the court ruled that states could decide under what circumstances eminent domain could be used to take private property, even if states wanted to turn that property over to another private property owner for the purposes of economic development.⁵ The case once again raised the question of whether there is a difference between a public purpose and a public use. That distinction is hotly debated even though the *Kelo* case effectively said that there was not a distinction and that legislatures, not the judiciary, can decide under what circumstances eminent domain may be used.

The case has prompted forty-three states to consider anti-*Kelo* action in one form or another.⁶ Some of these reforms have been highly effective while others profess to protect property owners but do little to really safeguard against *Kelo*-type takings.⁷ This thesis examines the *Kelo* case and the legal, policy, and ethical implications that the case has in the United States, and more specifically here in Nevada.

The second chapter of this thesis will focus on the history of eminent domain and the legal cases that set precedent for the *Kelo* case. That history dates back to the seventeenth century in Europe and includes a long history in the United States as well. During colonial times, eminent domain was used for constructing

⁴ Ibid., 469.

⁵ Ibid., 469-470.

⁶ Castle Coalition, *50 State Report Card - Tracking Eminent Domain Reform Legislation Since Kelo* [report on-line] (Arlington, Virginia: Castle Coalition, 2007-2008, accessed 23 October 2009); available from http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57&Itemid=113; Internet.

⁷ Ibid., 2.

mills.⁸ The Fifth Amendment to the U.S. Constitution addresses eminent domain, though not as clearly as some would like. It states “nor shall private property be taken for public use, without just compensation.”⁹ Though the amendment addressed eminent domain specifically, it was not until the Fourteenth Amendment was passed that states had to afford the same protections as the federal government in terms of compensation.¹⁰ The chapter will also review the history of eminent domain in the United States through relevant case law in the twentieth century, specifically the three cases that are most commonly linked with the *Kelo* case: *Berman v. Parker* (1954), *Hawaii Housing Authority v. Midkiff* (1984), and what may be the most closely related situation, the case of *Poletown Neighborhood Council v. City of Detroit* (1981)¹¹. In that case, the Michigan Supreme Court affirmed the city’s right to use eminent domain for economic redevelopment because the state legislature had deemed that the type of plan described in the case “meets a public need and serves an essential public purpose. The Court’s role after such determination is made is limited.”¹² Though the *Poletown* case never went to the United States Supreme Court, the rationale

⁸ Charles Cohen, “Eminent Domain After *Kelo v. City of New London*: An Argument for Banning Economic Development Takings,” *Harvard Journal of Law & Public Policy* 29 (2006): 501.

⁹ U.S. Constitution, amend. 5.

¹⁰ Gregg Ivers, “Eminent Domain”, in *Encyclopedia of the Supreme Court of the United States* (2008), 103-104.

¹¹ “Alas, the land, which looked infinite to the early pioneers, was, in the end, finite. And the galvanizing cases eventually came in the form of *Berman v. Parker*, *Hawaii v. Midkiff*, and *Poletown Neighborhood Council v. Detroit*...” (Carla T. Main, “How Eminent Domain Ran Amok,” *Policy Review* 133, October-November 2005 [journal on-line]; available from <http://www.hoover.org/publications/policyreview/2920831.html>; Internet; accessed 23 October 2009). See also Cohen, “Eminent Domain After *Kelo*,” 494: “The famous modern U.S. Supreme Court decisions in the area, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, adopted a rational basis standard of review.... Usually included in the trio of public use cases granting extreme deference to the governmental taker is the Michigan Supreme Court’s recently overturned decision in *Poletown Neighborhood Council v. City of Detroit*...”

¹² *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 633.

and decisions in both cases are very similar and point to the expansive power of the legislature to take private property for something other than a traditional public use.

The third chapter of this thesis will focus on the reaction to the *Kelo* decision. *Kelo* has been the impetus for numerous state legislative actions and ballot initiatives designed to protect private property rights. Most states have considered some type of legislative action in reaction to the case, but the nature of the reforms has varied widely with some states restricting eminent domain uses to true public uses, while others approved reforms that did little to protect private property.¹³ This chapter will review what scholars Ilya Somin and Andrew P. Morris and the Castle Coalition, a self-described property rights advocacy group, view as effective and ineffective reforms, and will present examples of both types of reform efforts from various states. Chapter three will also provide an in-depth review of Nevada's reaction to the *Kelo* case. Nevada's efforts included a ballot initiative called PISTOL (the People's Initiative to Stop the Taking of Our Land) that eventually became a constitutional amendment, as well as legislative actions that sought to provide a compromise to some of the more stringent aspects to the ballot initiative.

The final chapter will provide an overview of the reform efforts that I advocate to balance the needs of government to provide for legitimate public services with property rights protections for Americans. This includes limiting eminent domain to public uses and prohibiting its use for public purposes. The chapter will also briefly review property rights through the writings of John Dewey and John

¹³ Castle Coalition, *50 State Report Card*.

Locke, two scholars with differing views of the individual and his or her relationship to government.

CHAPTER 2

HISTORY

Introduction

Kelo v. City of New London (2005) is one in a long list of eminent domain cases that have captured the attention of the courts and the public. Understanding the *Kelo* decision requires an understanding of the history of eminent domain and previous case law that led to the United States Supreme Court decision in 2005. References to the state or an agent of the state seizing property can be found as early as the seventeenth century and those early writings provided the framework for eminent domain's use in the early United States. This chapter briefly describes the history of eminent domain law from the seventeenth century to the present day, referencing the work of early scholars including Hugo Grotius and contemporary scholars including Charles Cohen, Errol Meidinger and Carla Main. Taken as a whole, the views of these scholars underscore the dynamic relationship that exists between legal views of state power over private property and the socioeconomic realities that may exist in a particular community at any given time. Particular reference is made to prominent American case law in the twentieth century, including discussions of the cases cited in the *Kelo* decision itself and the expanded use of eminent domain for economic development.

Early History

The *King's Prerogative in Saltpetre* case in the early 1600s provided the King of England with some ability to use what Hugo Grotius would later call "eminent domain."¹⁴ In the case, the King was given authority to enter a property and to take a natural resource on the land if that resource was needed for the defense of the kingdom. The case centered on the need for saltpeter, a mineral used in making gunpowder. The King was given authority to remove the saltpeter from a property but with some restrictions attached. Those restrictions limited the purpose for which the King could take the mineral, how often the King could enter private property for this purpose and how the mineral could be removed from the property.

The first restriction required that the taking must be used for the protection of the kingdom. Parliament found that "the taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm; and therefore is inseparably annexed to the Crown...."¹⁵ The fact that the mineral was found to be a factor in the defense of the kingdom meant that the King's right to the mineral outweighed the property owner's right. The law prohibited using the mineral for any other purpose; the case states that the right to the mineral could not be "converted to any other use than for the defence of the realm, for which purpose only the law gave to the King this prerogative."¹⁶ The second restriction urged restraint on the part of the King, saying that the King should not

¹⁴ Hugo Grotius coined the term "eminent domain" in *De Jure Belli Ac Pacis* (On the Law of War and Peace) nearly fifty years after *King's Prerogative in Saltpetre*.

¹⁵ The Case of the King's Prerogative in Saltpetre, 77 English Report 1294 (1604).

¹⁶ *Ibid.*

repeatedly dig for the mineral on the same land. The ruling said that the King or his agents “ought not to stay in one place, nor return before a long time is passed.”¹⁷ The third restriction limited how the mineral could be taken. The ruling gave the King the right to have his agents dig for the mineral, but they were required not to destroy the property; in fact, they were “bound to leave the inheritance of the subject in so good plight as they found it....”¹⁸ The King’s agents could not damage a home or any other buildings on the property nor could they dig up the floor of a home or a barn, which could be difficult and take a long time to repair. The King was limited in when this work could be performed, as well. The ruling called for the King or his agent to work when the owner was present and between sunrise and sunset.¹⁹ Interestingly, the ruling made arguments as to why the time-of-day restrictions on work were important and the argument was not one of mere convenience. Ending by sunset allowed the owner to secure the home for the night. The ruling called the home:

...the safest place for my refuge, safety and comfort, and of all my family; as well in sickness as in health, and it is my defence in the night and in the day, against felons, misdoers, and harmful animals; and it is very necessary for the weal public that the habitation of subjects be preserved and maintained.²⁰

In other words, the home was as vital to the defense of the family as the saltpeter was to the defense of the kingdom.

As already noted, the first use of the term “eminent domain” can be traced back to seventeenth-century scholar Hugo Grotius. In *On the Law of War and*

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., 1296.

²⁰ Ibid., 1294.

Peace, Grotius writes that private property, like other privileges, “can be taken... in two ways, either as a penalty, or by the force of eminent domain.”²¹ Eminent domain could be “exercised in its name by the one who holds supreme authority.”²² Though government holds the power of eminent domain, Grotius does place limitations on its use, saying that eminent domain may only be used for a “public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right.”²³ In Book Three of *On the Law of War and Peace*, Grotius outlines more specifically how and when eminent domain could be used, granting the authority to use eminent domain to an agent of the state:

The state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in case of direct need, which grants even to private citizens a measure of right over others’ property, but also for the sake of the public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield.²⁴

In other words, any greater good for the community as a whole is a justifiable reason for using eminent domain.

Eminent Domain in Early America

The uses described in the *King’s Prerogative* case and by Grotius are quite different from the forms that eminent domain took in early America. Both Charles Cohen and Errol Meidinger provide comprehensive overviews of the use of

²¹ Hugo Grotius, *On the Law of War and Peace, Book Three (De Jure Belli Ac Pacis Libre Tres)*, ed. James Brown Scott, transl. Francis W. Kelsey (London: Clarendon Press, 1925), 385.

²² *Ibid.*, 797.

²³ *Ibid.*

²⁴ *Ibid.*, 807.

eminent domain during this period, when creating successful economies meant putting land to good use quickly. For example, Charles Cohen describes how eminent domain was used to provide access to public roads and to provide benefits to mill owners in order to encourage the construction of grist mills for the grinding of grains into flour and meals.²⁵ In the matter of roadways, Errol Meidinger describes how landowners who found they did not have access to public roads could cut a path across a neighboring landowner's property in order to gain access to the roadway – and how “New Jersey and Pennsylvania both reserved rights to take back for highway purposes six percent of all the lands they granted.”²⁶

In reviewing this early history of eminent domain, Cohen writes that because colonial grist mills were typically powered by water, Mill Acts were passed allowing mill owners to dam streams and rivers, often resulting in the flooding of upstream properties with little relief to the owners of those properties.²⁷ According to Cohen, in some communities where these acts were in place, a mill owner “was liable only for annual or permanent damages and enjoyed a privileged status compared with his common-law forebears, whose aggrieved upper riparian neighbors could resort to the remedies of self-help, punitive damages, and injunctive relief.”²⁸ Cohen further writes that the mills were considered public utilities in many cases because the public had access to them; consequently, the “public use” term that is used so often today also applied to the mills (though Cohen adds that some instances of using the

²⁵ Cohen, “Eminent Domain After Kelo,” 501.

²⁶ Errol E. Meidinger, “The Public Uses of Eminent Domain: History and Policy,” *Environmental Law* 11 (1980-1981): 14.

²⁷ Cohen, “Eminent Domain After Kelo,” 501.

²⁸ *Ibid.*

acts to benefit private mills are also recorded).²⁹ Cohen states that in an effort to promote development, some colonies even allowed land to be turned over to someone else if an owner failed to mine when a discovery had been made, or if a landowner failed to build a mill on a parcel or make other uses on a piece of land.³⁰

By the time the Bill of Rights was adopted, eminent domain was considered part of common law. The Bill of Rights did not grant authority for government to use eminent domain; rather it defined under what circumstances eminent domain could be used. The Fifth Amendment states that "...nor shall private property be taken for public use, without just compensation."³¹ That statement accepts the inherent nature of eminent domain and outlines the limitations for its use. The founders recognized that at times the government would need to take private property, even if the property owner was not a willing seller. The Fifth Amendment simply required the government to compensate a property owner for the property taken. As Meidinger writes:

Eminent domain was not high among the concerns of those debating the Bill of Rights. Indeed there is little evidence that it was a concern at all. Eminent domain was one prerogative the British had not been charged with abusing in the New World.³²

During this time, eminent domain was also used for what is today called traditional public uses, which include government functions such as the construction of government buildings.³³

²⁹ Ibid., 501-502.

³⁰ Ibid., 502.

³¹ U.S. Constitution, amend. 5.

³² Meidinger, "Public Uses," 17.

³³ Ibid., 18.

The Fifth Amendment did not guarantee protection in all eminent domain cases; the Supreme Court ruled that the Bill of Rights was not applicable to states.³⁴ The court weighed in on that question in the case of *Barron v. City of Baltimore* (1833).³⁵ The United States Supreme Court heard the case, which involved wharf owners in Baltimore whose property was damaged by the city's actions when the city redirected several streams that flowed to the wharf. In periods of heavy rain, the streams carried debris to the wharf, making it shallow and damaging the plaintiff's property because "the water was rendered so shallow that it ceased to be useful for vessels."³⁶ Plaintiff John Barron sued over the loss of value of the wharf, arguing that the Fifth Amendment applied in the case and that the City of Baltimore was then liable for compensating the wharf owners for the damage to the property. The court found that the Fifth Amendment applied to actions by the federal government, not to state or local governments.³⁷ Writing for the court, Chief Justice Marshall wrote that "the Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."³⁸ State governments were "framed by different persons and for different persons"; therefore, the permissions and limitations in the Bill of Rights do not apply to states. Justice Marshall continued, "...amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them

³⁴ Ivers, "Eminent Domain," 103-104.

³⁵ *Ibid.*, 104.

³⁶ *Barron v. Baltimore*, 32 U.S. 243 (1833).

³⁷ *Ibid.*

³⁸ *Ibid.*

to the state governments.”³⁹ If state constitutions did not provide the protection of certain rights, they did not exist.

That position held until the ratification of the Fourteenth Amendment in 1868 and a case involving railroads.⁴⁰ At that time, Cohen notes that eminent domain was often used to amass the land needed to build rail lines and other infrastructure projects such as bridges.⁴¹ Rail lines were commonly constructed by private companies and land was often taken by eminent domain and turned over to railroad companies because they “were what would today be called common carriers, obligated to provide service to any member of the public.”⁴² Interestingly, the case that would test the Fourteenth Amendment involved a government taking of land that belonged to a railroad company.

The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁴³

The case that tested that amendment involved a dispute with the Burlington & Quincy Railroad Company.⁴⁴ In *Chicago, Burlington & Quincy Railroad Company v. Chicago* the Illinois Supreme Court ruled that the Burlington and Quincy Railroad was not entitled to compensation when the City of Chicago placed a road across one of the company’s railroad tracks.⁴⁵ The United States Supreme

³⁹ Ibid.

⁴⁰ Ivers, “Eminent Domain,” 103-104.

⁴¹ Cohen, “Eminent Domain After Kelo,” 506.

⁴² Ibid.

⁴³ U.S. Constitution, amend. 14, sec. 1.

⁴⁴ Ivers, “Eminent Domain,” 103-104.

⁴⁵ Ibid.

Court ruled that under the Fourteenth Amendment, the state must compensate the railroad for the taking.⁴⁶

The Path to *Kelo*

Many early eminent domain cases were used to encourage productive use of the land and the associated resources. Carla Main writes that as land became scarce and as economies suffered, eminent domain was being used more often. New Deal economic policies were a part of the reason for the increased use of eminent domain because “before the New Deal, it hadn’t occurred to many local legislatures that they held the magic wand to revitalize their sagging waterfronts or depressed downtowns.”⁴⁷ Meidinger describes an evolution of eminent domain that occurred as the American economy shifted. “At every historical juncture the courts have had to decide whether to enforce takings with substantial new private development components. Their decisions form an interesting chapter in American political-economic history.”⁴⁸

While dozens of cases are relevant to the *Kelo* decision, three cases are often seen as paving the road to the Supreme Court’s 2005 decision in the case. The Supreme Court itself relied on *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984)⁴⁹ in deciding the *Kelo* case while Carla Main and Charles Cohen both point to those cases and the case of *Poletown Neighborhood Council v. Detroit* (1981) to show that eminent domain was not as

⁴⁶ Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

⁴⁷ Main, “How Eminent Domain Ran Amok.”

⁴⁸ Meidinger, “Public Uses,” 3.

⁴⁹ *Kelo v. City of New London*, 545 U.S. 469 (2005), 469.

clear cut as the Fifth Amendment made it sound.⁵⁰ In light of those recommendations, this section will look at those three cases, as well as a state case that overturned the *Poletown* case, *Wayne County v. Hathcock* (Mich. 2004).

In *Berman v. Parker* (1954), the United States Supreme Court considered a case that was similar to the *Kelo* case it would hear more than fifty years later. The high court affirmed a District Court ruling on eminent domain with a rationale that was similar to the *Kelo* ruling. The court upheld the legislative branch's authority to determine how eminent domain could be used. In the *Berman* case, the owner of a private business was forced into an eminent domain battle with Congress. Since Congress acts as the legislative branch for the District of Columbia, Congress approved the District of Columbia Redevelopment Act of 1945. In the Act, Congress determined that a portion of the District of Columbia was blighted and that the areas were "injurious to the public health, safety, morals, and welfare."⁵¹ Congress created a redevelopment agency to eliminate "all such injurious conditions by employing all means necessary and appropriate for the purpose."⁵² The redevelopment agency acted broadly to condemn homes and businesses in a section of Washington, D.C., that was particularly blighted. The Washington, D.C., Planning Commission created redevelopment plans for

⁵⁰ "Alas, the land, which looked infinite to the early pioneers, was, in the end, finite. And the galvanizing cases eventually came in the form of *Berman v. Parker*, *Hawaii v. Midkiff*, and *Poletown Neighborhood Council v. Detroit*..." (Main, "How Eminent Domain Ran Amok.") See also Cohen, "Eminent Domain After Kelo," 494: "The famous modern U.S. Supreme Court decisions in the area, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, adopted a rational basis standard of review.... Usually included in the trio of public use cases granting extreme deference to the governmental taker is the Michigan Supreme Court's recently overturned decision in *Poletown Neighborhood Council v. City of Detroit*...."

⁵¹ *Berman v. Parker*, 348 U.S. 26 (1954), 29.

⁵² *Ibid.*

the neighborhood. The case cited surveys from the Planning Commission showing that in 1950, “64.3% of the dwellings were beyond repair, 18.4% needed major repairs, (and) only 17.3% were satisfactory....”⁵³ The redevelopment plans included a blend of infrastructure improvements and public schools, and prescribed that at least one-third of the new housing units would be low-rent. The redevelopment agency assembled the land that was to be redeveloped, and at that point the agency transferred the portions that were to be used for public infrastructure such as roads and public uses such as schools. The remaining land was available to be sold or leased for redevelopment, with preference “to be given to private enterprise over public agencies in executing the redevelopment plan.”⁵⁴

The case was brought by property owners within the redevelopment area. They owned a department store and argued that their property was a commercial parcel, was not blighted, and therefore should not be taken and turned over to another private landowner for redevelopment.⁵⁵ They argued that the taking of a property that was not blighted violated the Fifth Amendment because the land was being taken with the intent of selling it to another private landowner. In essence, they were guilty by association. They were being forced out of their property not because it was blighted itself, but merely because it was in a blighted area.

Justice William Douglas wrote the Court’s opinion, which recognized the authority of Congress to act as the legislative branch for the District of Columbia

⁵³ Ibid., 31.

⁵⁴ Ibid.

⁵⁵ Ibid., 32.

and as such to develop standards for using eminent domain. He noted that, “subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive.”⁵⁶ Congress, acting as the legislative branch for Washington, D.C., has the responsibility for determining what a public purpose may be and “the means of executing the project are for Congress, and Congress alone, to determine once the public purpose has been established.”⁵⁷ The Court further stated that as long as the property owner is compensated for the taking, his or her rights have been upheld. The Court acknowledged the murkiness of the extent of the legislative branch, likening it to the sometimes undefined nature of police power:

Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it.⁵⁸

As Cohen noted, “that private enterprise would be used in redeveloping the area did not mean the public use requirement was violated.”⁵⁹ In other words, if the intent of the project was a public use or benefit, the method by which that intent was carried out was not an issue.

This slippery slope continued with other landmark eminent domain cases in the twentieth century. Main writes that “it seemed only a matter of time until the criteria for the use of eminent domain would expand beyond slum removal. If

⁵⁶ Ibid., 33.

⁵⁷ Ibid.

⁵⁸ Ibid. For additional perspective on how courts viewed property rights, see also William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) and James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1986).

⁵⁹ Cohen, “Eminent Domain After Kelo,” 512.

blight, why not beauty? If beauty, why not bounty?"⁶⁰ An unpleasant slide down that slope is what many would describe as occurring in the eminent domain cases that occurred after *Berman*. The *Hawaii Housing Authority v. Midkiff* (1984) case focused on the state's plans to diversify land ownership. When Hawaii was originally settled, land ownership was limited to the chiefs of each island.⁶¹ By the 1960s, land ownership had not diversified much. At that time, the state and federal governments owned forty-nine percent of the land in the state, and forty-seven percent of the land in the state was owned by just seventy-two landowners.⁶² The state embarked on a plan to diversify land ownership by requiring landowners under certain circumstances to sell land to those who had been leasing land if they wished to make the purchase. Landowners balked, arguing that they would face large tax burdens due to the forced sales. The state responded with the Land Reform Act of 1967, a plan to allow lessees to petition to have a residential property they were leasing "taken" by eminent domain and then sold to the lessee. The Act stated that lessees living on residential tracts of land of five acres or more could request to purchase the parcel that they leased. If twenty-five or half of lessees, whichever was less, requested to purchase parcels, the Hawaii Housing Authority (HHA) would consider condemning the property "...if HHA finds that these public purposes will be served."⁶³ The property owners and the lessees would negotiate the sales price and if they could not reach an agreement, a sales price would be determined through

⁶⁰ Main, "How Eminent Domain Ran Amok."

⁶¹ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁶² *Ibid.*

⁶³ *Ibid.*

arbitration. The fact that the properties would be taken through eminent domain would lessen the tax burden for the land owners. In 1978, talks between lessees and property owners broke down, and the property owners sued over the policy.

The Court heard arguments in 1984 and sided with the Hawaii Housing Authority, finding that “there is no uncertain question of state law...the Act unambiguously provides that ‘the use of the power...to condemn...is for a public use and purpose.’”⁶⁴ The Court relied heavily on the *Berman v. Parker* case in its decision, drawing once again on the argument that the power to use eminent domain for a public use was difficult to clearly define and that it was the legislature’s responsibility to define what public use means.⁶⁵ The Hawaii Legislature found that the concentration of land ownership created an oligopoly and the Court acknowledged that “regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.”⁶⁶ The regulation of oligopolies made the taking a public use, not a taking of private property to confer to another private party. The Court further argued that “the Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals, but to attack certain perceived evils of concentrated property ownership in Hawaii – a legitimate public purpose.”⁶⁷

A landmark state case in Michigan bears a strong resemblance to the *Kelo* case. The case of *Poletown Neighborhood Council v. City of Detroit* (1981) began in the late 1970s. The City of Detroit and the State of Michigan were both

⁶⁴ Ibid.

⁶⁵ Cohen, “Eminent Domain After Kelo,” 513.

⁶⁶ Ibid. (Cohen, quoting the Midkiff case.)

⁶⁷ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

facing high unemployment: 14.2 percent in the state and 18 percent in Detroit.⁶⁸ The automobile industry had been Detroit's lifeblood and it was failing miserably. The industry was struggling to build automobiles that could compete with foreign companies and needed a new assembly plant to do so. General Motors was shutting down two assembly plants in Detroit and was willing to construct a new one if a suitable piece of land could be found. Fearing 6,150 job losses if the plant was not built and wanting the \$500 million plant to be built as well as the \$15 million in tax revenue that it would create,⁶⁹ the City helped to identify potential locations for the new plant based on General Motors' specifications for a site "450 to 500 acres in size with access to long-haul railroad lines and a freeway system with railroad marshalling yards within the plant site."⁷⁰ General Motors also stipulated that the parcel must be available by May 1, 1981, in order to have the new plant built by 1983. Only one of the nine locations that the City identified was found suitable: the 465-acre site in the Poletown neighborhood.

Unlike other eminent domain cases, the *Poletown* neighborhood did not involve cases of blight. The City used the need to deal with high unemployment as the reason for the taking. The Economic Development Corporations Act to states:

There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and that it is accordingly necessary to assist and retain local industries and commercial enterprises to strengthen and revitalize the economy of this state and its municipalities.⁷¹

⁶⁸ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 648.

⁶⁹ Cohen, "Eminent Domain After Kelo," 514.

⁷⁰ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 653.

⁷¹ *Ibid.*, 631.

If taking a neighborhood would help to reduce unemployment, the Act gave the municipalities the right to take it. The City offered moving assistance, low-interest (for the time) mortgages, and “hired a professional gerontologist to help assess the impact of the move on the elderly, who make up about half of those to be displaced.”⁷² The only reason the neighborhood was seized was because a major employer in the state promised to make better use of it.

The case was heard by the Michigan Supreme Court in March of 1981. At the heart of the case was the question of whether eminent domain was used for a public use or a private use. The Poletown residents argued that General Motors would benefit the most from the taking, not the public. The Court determined that the legislature had the authority to determine what constituted a public use and that the legislature had determined that this type of economic development “...meets a public need and serves an essential public purpose... The Court’s role after such a determination is made is limited.”⁷³ That rationale is essentially the same as that applied by the United States Supreme Court in the *Berman v. Parker* case previously discussed.⁷⁴ Interestingly, the Court then went on to state that although the legislature had determined that economic development was important and therefore, the use of eminent domain was allowed, the public benefit also needed to be evident:

If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.... Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature. We hold this project is

⁷² James Kelly, “The Last Days of Poletown,” *Time Magazine*, 30 March 1981.

⁷³ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 633.

⁷⁴ Cohen, “Eminent Domain After Kelo,” 512.

warranted on the basis that its significance for the people of Detroit and the state has been demonstrated.⁷⁵

The Poletown residents wanted the court “to distinguish between the terms ‘use’ and ‘purpose’, asserting they are not synonymous and have been distinguished in the law of eminent domain.”⁷⁶ The Court found that the terms public use and public purpose were indeed synonymous and that in previous cases, courts had found that “‘public use changes with changing conditions of society’ and that ‘the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.’”⁷⁷ This request for distinct definitions of public use versus public purpose “will be examined more in depth in later chapters of this thesis.

The *Poletown* case in 1981 held until 2004 when the Michigan Supreme Court ruled on the case of *County of Wayne v. Hathcock*, another economic development case in Michigan. Wayne County invested \$2 billion to renovate the Metropolitan Airport, including the construction of a new runway.⁷⁸ That new runway raised concerns over noise in the surrounding areas, so the county purchased, through voluntary sales, roughly 500 acres of land.⁷⁹ The county then developed a plan to construct a 1,300-acre business park, hotel, and conference center near the airport. The project was called the Pinnacle Project⁸⁰, and the County added 500 additional acres to the original 500 purchased. It still needed 300 additional acres and opted to use eminent domain

⁷⁵ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 635.

⁷⁶ *Ibid.*, 630.

⁷⁷ *Ibid.*, 631.

⁷⁸ *County of Wayne v. Hathcock*, 685 N.W. 2d 765 (Mich. 2004), 5.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, 6.

to acquire much of that land. By the time the lawsuit was filed, the County had acquired all but nineteen of the parcels needed for the project.⁸¹ Wayne County anticipated the project would produce 30,000 jobs and \$350 million in tax revenue.⁸² The nineteen property owners filed suit, questioning the constitutionality of eminent domain for this purpose. The Court of Appeals upheld the taking due to the Michigan Supreme Court's decision in the *Poletown* case, but acknowledged that the *Poletown* case might be decided differently today from how it had been decided in the 1980s.⁸³ The Michigan Supreme Court heard the case to answer the questions of whether the county was authorized to use eminent domain, whether the economic development was indeed a "public purpose" based on the *Poletown* decision, and whether that decision complied with the state constitution.⁸⁴

The Michigan Supreme Court found that Wayne County was a "public corporation" based on the Michigan constitution and was authorized to use eminent domain based on Michigan statute MCL 213.23.⁸⁵ That statute granted Wayne County, as a public corporation, the authority "to take private property necessary for a public improvement or for the purposes within the scope of its powers for the use or benefit of the public...."⁸⁶ Since the county could use eminent domain, the next question the court had to answer was whether the county overstepped its bounds by using eminent domain for the purpose of

⁸¹ Ibid., 7.
⁸² Ibid., 6.
⁸³ Ibid., 9.
⁸⁴ Ibid.
⁸⁵ Ibid., 11.
⁸⁶ Ibid.

amassing property for the 1,300-acre Pinnacle Project. The court ruled that taking in the *Wayne* case was unconstitutional based in part on the rationale of Justice Ryan, who drafted the dissenting opinion in the *Poletown* case.⁸⁷ Justice Ryan outlined a litmus test of sorts to be applied if public agencies were to use eminent domain that involved transferring property to a private firm. The test is based on the legal precedence prior to 1963, when Michigan's current constitution was ratified.⁸⁸ The test listed three questions and if the answer to any of the questions was affirmative, the taking could be considered a public use.⁸⁹ The questions centered on three factors: the need for the property, accountability for the use of the property and the public concern for properties that were in states of disrepair.⁹⁰

The first question of public necessity stemmed from Justice Ryan's description of eminent domain over the course of history in Michigan. He wrote that historical use "of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving."⁹¹ This would include previous uses such as to amass land for railroad tracks or roadway projects. The second question surrounded accountability: if a private company would benefit from the taking, would there be "some measure of government control over the operation

⁸⁷ Ibid., 32.

⁸⁸ Ibid. See also Cohen, "Eminent Domain After Kelo," 515.

⁸⁹ Ibid., 33.

⁹⁰ Ibid., 33-35. See also Cohen, "Eminent Domain After Kelo," 516.

⁹¹ Ibid., 33.

of the enterprise after it has passed into private hands”⁹² to ensure that the public interest continued to be served? Justice Ryan again relied on case law dating to the use of eminent domain for the construction of the national railroad system, noting that railroad companies were subject to regulations imposed by the federal government.⁹³ He also argued that the “general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it.”⁹⁴ The third question Justice Ryan outlined was whether there was a matter of public concern, such as blight, that would be addressed by the taking.⁹⁵ Here he noted that if the “determination of the specific land to be condemned is made without reference to the private interests of the corporation,”⁹⁶ the taking may be justified. If the answer to any of those questions was in the affirmative, the court in the *Wayne* case could determine that there was a public use involved. If not, the taking would not be considered justified.⁹⁷ The Michigan Supreme Court found in the *Wayne* case that the county’s use of eminent domain to acquire property for the Pinnacle Project did not pass the litmus test outlined in Justice Ryan’s dissenting opinion.⁹⁸ The project did not meet the criteria for a project that could be completed only with land that the government could amass. The project did not include sufficient safeguard to ensure that the public maintained access or a say in how the

⁹² Ibid.

⁹³ Ibid.

⁹⁴ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 679.

⁹⁵ Ibid., 681.

⁹⁶ Ibid.

⁹⁷ Cohen, “Eminent Domain After Kelo,” 515.

⁹⁸ Ibid., 516.

property would be used in the future, nor were there concerns over blight or other significant public interests in the properties that were being taken; therefore, the takings in this case were unconstitutional.⁹⁹ The ruling in that case essentially reversed the *Poletown* case by placing limitations on how eminent domain cases could be handled.¹⁰⁰ Those limitations were judicially imposed, though, not based on limitations set by the state legislature.

The battle over eminent domain would reach a fevered pitch in 2005, when the United States Supreme Court again revisited the issue in the case of *Kelo v. City of New London*. The case began in 2000 when the City of New London, Connecticut, sought to improve the local economy through a redevelopment plan. The city was struggling with the loss of a naval center in the Fort Trumbull area. Unemployment was high and the population in the community was dwindling.¹⁰¹ The city hoped to revitalize the area with the construction of a new state park, a development deal with the pharmaceutical company Pfizer, and a redeveloped waterfront area that included a retail area and residential properties.¹⁰² The City of New London purchased most of the land needed for the project. Nine property owners holding fifteen properties sued to fight the development deal, including Susette Kelo.¹⁰³ Kelo and the other property owners argued that the use of eminent domain for the redevelopment project violated the Fifth Amendment. A New London Superior Court ruled that the takings were justifiable and the case was appealed to the Connecticut Supreme Court. That court also ruled that the

⁹⁹ County of Wayne v. Hathcock, 685 N.W. 2d 765 (Mich. 2004), 4-5.

¹⁰⁰ Cohen, "Eminent Domain After Kelo," 516.

¹⁰¹ Kelo v. City of New London, 545 U.S. 469 (2005), 473.

¹⁰² Ibid.

¹⁰³ Ibid., 475.

takings were justified under state statute, which states “that the taking of land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”¹⁰⁴ The United States Supreme Court agreed to hear the case to weigh the question of whether “economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”¹⁰⁵

The case was heard in February of 2005. Justice Stevens wrote the opinion, which found that the City of New London’s use of eminent domain for economic development did not infringe on the Fifth Amendment based on previous case law, including *Berman* and *Midkiff*. The City of New London’s “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to (the Court’s) deference.”¹⁰⁶ The court ruled that the use of economic development in this case is a public purpose because “promoting economic development is a traditional and long accepted function of government.”¹⁰⁷ Citing the *Berman* and *Midkiff* cases, Justice Stevens acknowledged the public purposes in those cases, including blight in *Berman* and barriers to land ownership that resulted in an oligopoly in the *Midkiff* case: “Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.”¹⁰⁸ Again citing *Midkiff*, Justice Stevens also wrote that it is not for the court to decide if there is “reasonable certainty” that the economic benefits promised will actually be realized because “when the legislature’s purpose is legitimate and its means are

¹⁰⁴ Ibid., 476.

¹⁰⁵ Ibid., 477.

¹⁰⁶ Ibid., 483.

¹⁰⁷ Ibid., 484-485.

¹⁰⁸ Ibid., 487-488.

not irrational,” the courts should not delve into the issue of how certain the legislature is of the outcome.¹⁰⁹

When the *Kelo* case was being argued, attorneys for Susette Kelo and the other petitioners argued that the taking in the case essentially allowed seizing any property from one owner and transferring it to another “for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.” The court refused to consider the hypothetical situation. Justice Stevens wrote that:

A one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases positioned by petitioners can be confronted if and when they arise.¹¹⁰

The decision of the United States Supreme Court in the *Kelo* case was one of the simplest rulings in eminent domain case law, but its implications have been far reaching. It allows any state to adopt economic development as an acceptable reason to take private property, regardless of the condition of the current property, the current use of the property, or the future use of the property. It offers no protection for property owners that the property will not be turned over to another private landowner, and it does not provide any opportunity for the current property owner to benefit from the economic redevelopment by being part of it.

The case also set the stage for a series of reforms meant to protect private property owners in a myriad of ways. Those reforms have included legislative

¹⁰⁹ Ibid., 488.

¹¹⁰ Ibid., 487.

restrictions on economic development as well as voter-approved ballot initiatives that restrict eminent domain. Many of those efforts included limitations on government's actions and expanded rights for property owners. Many of those reforms have themselves complicated eminent domain. Those reforms and their implications will be reviewed in the next chapter.

CHAPTER 3

REACTION TO THE *KELO* DECISION

Introduction

The majority of states have adopted some sort of reform in the four years since the *Kelo v. City of New London* (2005) decision. The types of reforms vary from wholesale revisions of how eminent domain is used, especially in the areas of economic development and blight, to cosmetic reforms that may do little to change anything about the way eminent domain cases are handled. This chapter will review what scholars suggest constitute positive and negative reform efforts, which types of reform various states have enacted, and will provide an in depth review of Nevada's reform efforts.

Ilya Somin and Andrew Morris both provide a scheme for sifting through the good and the bad eminent domain reform. For Somin, effective responses to *Kelo* are those that strengthen protections from eminent domain in cases of economic development;¹¹¹ conversely, ineffective reforms are those that are disguised as real reform but do little to protect from abuses in cases of blight.¹¹² She found that the majority of the newly enacted post-*Kelo* reform laws are likely to be ineffective."¹¹³ Similarly, Andrew P. Morriss provides a scheme for

¹¹¹ Ilya Somin, "The Limits of Backlash: Assessing the Political Response to *Kelo*," *Minnesota Law Review* 93, no. 6 (2009): 2114.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 2103-2104.

categorizing eminent domain reform.¹¹⁴ Like Somin, Morriss reviews many of the state responses to *Kelo* and categorizes them as substantive or symbolic reforms in the area of economic development. For Morriss, substantive reforms are those that limit the use of eminent domain for economic redevelopment or blight; he also stipulates that the best reforms are those that guarantee the protections in the state constitution.¹¹⁵

Both Somin and Morriss rely on a “50 State Report Card” issued by the Castle Coalition,¹¹⁶ a project of the property rights advocacy group called the Institute for Justice, which bills itself as the “nation’s only libertarian public interest law firm.”¹¹⁷ The report card grades each state’s response to *Kelo* in light of the types of reform enacted in the years since the *Kelo* decision. This chapter will review the ways that Somin, Morriss, and the Castle Coalition define positive and negative reforms. It will also examine which states received high marks for reforms and which states failed to enact adequate reform in light of Somin’s, Morriss’, and the Castle Coalition’s definitions of good and bad reform. It will also provide an in-depth review of Nevada’s response to the *Kelo* decision. In comparison with other states, Nevada scored fairly well for its efforts to protect property rights, including in the area of economic development. Reform efforts have included a ballot initiative known as the People’s Initiative to Stop the Taking of Our Land (PISTOL), two bills that were approved in the state

¹¹⁴ Andrew P. Morriss, “Symbol or Substance? An Empirical Assessment of State Responses to *Kelo*,” *Illinois Law and Economics Research Paper Series*, no. LE07-037 (March 2008).

¹¹⁵ *Ibid.*, 9-10.

¹¹⁶ Castle Coalition, *50 State Report Card*.

¹¹⁷ Institute for Justice, *Institute Profile: Who We Are* [article on-line] (Arlington, Virginia: Institute for Justice, accessed 23 October 2009); available from http://www.ij.org/index.php?option=com_content&task=view&id=566&Itemid=192; Internet.

legislature, and significant public debate about the types of reforms that were needed.

Defining Eminent Domain Reform

The Castle Coalition correctly argues that positive reform efforts should define what true public uses are, prohibit eminent domain for economic development, and narrow the definition of blight so that the designation cannot be used as a disguise for economic development takings.¹¹⁸ The report weighs the effectiveness of each state's efforts on the basis of one question: "How hard is it now for the government to take a person's home or business and give it to someone else for private gain?"¹¹⁹

The Coalition favors limiting eminent domain to traditional public uses such as roadways, government buildings, or schools, uses that put the government in control of the property, and favors a ban on any action that turns property seized through eminent domain over to a private owner.¹²⁰ The Coalition also advocates having courts provide a check on the government's ability to use eminent domain for public uses, suggesting that the government entity taking the property should have to prove to the court that the property will be put to a public use.¹²¹ Reform is especially needed, the group argues, in how governments define blight. Historically blight was used to deal with truly dilapidated or abandoned properties but many governments now use blight designations as a

¹¹⁸ Castle Coalition, *50 State Report Card*, 4.

¹¹⁹ *Ibid.*, 3-4.

¹²⁰ *Ibid.*, 4.

¹²¹ *Ibid.*

way “to circumvent the public use requirement” in eminent domain law.¹²² Its use “has become so expansive that tax-hungry governments now have the ability to take away perfectly fine middle- and working-class neighborhoods and give them to land-hungry private developers who promise increased tax revenue and jobs.”¹²³

Like the Castle Coalition, Ilya Somin advocates an outright ban of eminent domain to transfer ownership to private interests for the purpose of stimulating economic development.¹²⁴ Her rationale is simple: transferring property from a property owner that pays little or no taxes to one with a higher tax rate can be too enticing for some governments to pass up and there are no checks in place to ensure that abuse does not occur. She writes, “while the economic development rationale may not be literally limitless, it is certainly close to it.”¹²⁵ Another danger is that there is no requirement that the new property owners must live up to the economic claims made when the condemnation occurs and “the lack of a binding obligation creates incentives for public officials to rely on exaggerated claims of economic benefit that neither they nor the new owners have any obligation to live up to.”¹²⁶ She also argues that blight designations are dangerous because they are ambiguous. In the middle of the twentieth century, blight “fit the layperson’s intuitive notion of blight: dilapidated, dangerous, or disease-ridden neighborhoods.”¹²⁷ Today, that definition is not so clear and blight can mean

¹²² Ibid., 3.

¹²³ Ibid.

¹²⁴ Ilya Somin, “Controlling the Grasping Hand: Economic Development Takings After *Kelo*,” *Supreme Court Economic Review* 15 (2007): 190.

¹²⁵ Ibid., 192.

¹²⁶ Ibid.

¹²⁷ Somin, “The Limits of Backlash,” 2120.

nearly anything that a government entity wants it to mean.¹²⁸ The issue of blight is central to Somin's judgment of what constitutes true economic domain reform post-*Kelo*. She argues that state responses to *Kelo* fell into two categories: effective and ineffective reforms. Effective reforms are those that limit a government's ability to use eminent domain for economic development while ineffective reforms are those that claim to protect against the use of eminent domain for those purposes "but essentially allow them to continue under another name," such as blight.¹²⁹ Somin also argues that the effectiveness of the reform is dependent on how that reform was initiated; "citizen-initiated referendum initiatives have led to the passage of much stronger laws than those enacted through referenda initiated by state legislature."¹³⁰

Of the forty-three states that approved some sort of reform, Somin categorizes 20 or 21 of the reforms as effective, 26 or 27 of the reforms as ineffective.¹³¹ Somin highlights strong public opinion poll results that show support for eminent domain reform, yet most of the reforms passed were classified by Somin as ineffective. Her argument is that the public was fooled into thinking that legislatures were creating meaningful reform when in reality most of what was approved was ineffective. She then makes a startling argument that judicial involvement is needed to fix the weak legislation that many states approved because the public is politically ignorant:

¹²⁸ Ibid., 2121.

¹²⁹ Ibid., 2114.

¹³⁰ Ibid., 2105.

¹³¹ Ibid., 2115. Somin does not clarify the reason for the lack of specificity in the number of effective/ineffective state reforms.

If public ignorance could prevent the political process from providing effective protection for individual rights in such a high-profile case, it might also fall short in other cases where rights supported by majority opinion are at stake. Judicial review is not just a check on the tyranny of the majority. Sometimes, it may also be needed to protect us against the consequences of the majority's political ignorance.¹³²

Somin's argument seems to disregard the fact that the United States Supreme Court decision in *Kelo* found that the responsibility for making eminent domain policy rests with the legislature, not with the judiciary. Somin's departure from Court's recommendations in the *Kelo* case will be discussed at greater length in the next chapter of this thesis.

Similarly, Andrew Morriss argues for limitations on eminent domain for economic development "to eliminate the abuse without preventing the relatively noncontroversial 'good' uses of eminent domain...."¹³³ Distilling a lengthier list of eminent domain reform criteria from other authors,¹³⁴ Morriss defines substantive reform efforts as those that place "restrictions on the use of eminent domain for economic development, [place] restrictions on the use of blight designations as a justification for eminent domain, and [adopt] constitutional, rather than merely statutory, restrictions on eminent domain."¹³⁵

States Respond to *Kelo*

Like Somin and Morriss, the Castle Coalition report also graded eminent domain reform efforts on how well those efforts limited a state's use of eminent

¹³² Ibid., 2171.

¹³³ Morriss, "Symbol or Substance," 10.

¹³⁴ Morriss condenses a list of 18 forms found in Edward J. Lopez, R. Todd Jewell, and Noel D. Campbell, "Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash," *Review of Law & Economics* 5, no. 1 (2009): 132.

¹³⁵ Morriss, "Symbol or Substance," 10.

domain for economic development and blight. According to the Coalition, twenty-one states passed what the Castle Coalition calls meaningful reform, fifteen passed reforms that did not pass the Coalition's muster, and a few states did not pass any reform measures at all.¹³⁶ The Report Card provides a thumbnail overview of the reform, or lack thereof, adopted in each state. The report examined the states' reforms through the lens of a single question: "How hard is it now for the government to take a person's home or business and give it to someone else for private gain?"¹³⁷ That statement is perhaps the simplest way to review the post- *Kelo* reform. The Coalition's Report Card gave four states A or A- grades for the reforms passed while fifteen states received a grade of D+, D or D- for reform efforts. (Eight states failed to pass any sort of reform, marked with an F grade.)¹³⁸ In this section, I will review some of the policies that scored high marks in the Coalition's report, some of the policies that were approved but considered ineffective, and some of the policies that failed to pass.

Of the states that achieved high marks from the Castle Coalition, those efforts approved in Florida and Michigan stood out as particularly effective because of their efforts to limit eminent domain for economic development and blight. Those states enacted both legislative and constitutional reforms. Florida's efforts earned the state an A grade from the Coalition, which stated that "the Florida Legislature proved that it understood the public outcry caused by the Supreme Court's abandonment of property rights."¹³⁹ Florida's legislative efforts included

¹³⁶ Castle Coalition, *50 State Report Card*.

¹³⁷ *Ibid.*, 3-4.

¹³⁸ *Ibid.*, Table of Contents and State Grades pages.

¹³⁹ *Ibid.*, 13.

the approval of House Bill 1567, which stripped the state's ability to use eminent domain for blight removal and severely limited the state's ability to turn land seized through eminent domain over to a private party.¹⁴⁰ The bill requires that a government entity that takes private property through eminent domain hold on to the property for a period of at least ten years.¹⁴¹ Turning it over to a private entity is prohibited except in circumstances where the private party will use it for a roadway (including toll roads), public utility, or other type of public infrastructure.¹⁴² The bill also includes a caveat that allows the property to be sold to a private party within ten years if "the condemning authority or government entity holding title to the property documents that the property is no longer needed for the use or purpose for which it was acquired" and it gives the property owner at the time of the eminent domain action first right of refusal to purchase the property at the price he or she received for the taking.¹⁴³ The legislation's common-sense approach also allows the public entity building a facility to lease "an incidental part of a public property or a public facility for the purpose of providing goods or services to the public."¹⁴⁴ That provision allows an airport to lease a portion of a facility to an airline or to a restaurant to provide services within the facility. The bill also allows for so-called friendly condemnation cases, in which a property owner allows his / her property to be

¹⁴⁰ Ibid.; and Florida House of Representatives, *HB 1567 - An Act Relating to Eminent Domain* (2006) [available from http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=_h1567er.doc&DocumentType=Bill&BillNumber=1567&Session=2006].

¹⁴¹ Ibid.; and Florida Statutes 73, Eminent Domain (2009).

¹⁴² Florida House of Representatives, *HB 1567*, 3-4.

¹⁴³ Ibid., 4-5.

¹⁴⁴ Ibid., 4.

taken by eminent domain.¹⁴⁵ The friendly condemnation provides tax benefits to the property owner that he or she would not enjoy if they simply sold the property.

Somin, Morriss, and the Castle Coalition all emphasize the need to limit or prohibit the use of eminent domain for blight. Florida House Bill 1567 specifically states that a government entity “may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions.”¹⁴⁶ The state or other government entity can deal with slum, blight, or public nuisance issues through other powers, but not by using eminent domain.¹⁴⁷ Florida further strengthened reform in 2006 with the legislature and Florida voters approved a constitutional amendment that requires a supermajority vote in both houses of the state legislature in order to grant any exceptions to the rules that prohibit the transfer of property taken via eminent domain to another private property owner.¹⁴⁸ The amendment was approved by 69 percent of the voters.¹⁴⁹ The Castle Coalition praised Florida’s efforts, saying that the state “has gone from being among the worst offenders to offering some of the best protection in the nation....”¹⁵⁰

Similarly, Michigan enacted legislation and constitutional reforms in the areas of blight and economic development, scoring an A- from the Castle Coalition

¹⁴⁵ Ibid., 6.

¹⁴⁶ Ibid., 7.

¹⁴⁷ Ibid.

¹⁴⁸ Castle Coalition, *50 State Report Card*, 13.

¹⁴⁹ Florida Department of State, Division of Elections, 2006 Eminent Domain Constitutional Amendment; official results available from [https://doe.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/7/2006&DATAMODE=.](https://doe.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/7/2006&DATAMODE=)

¹⁵⁰ Castle Coalition, *50 State Report Card*, 13.

report.¹⁵¹ Eight legislative acts and a constitutional amendment were approved between 2005 and 2007.¹⁵² Michigan's reform in the area of blight is found in Senate Joint Resolution E, approved by the Michigan Legislature in 2005 and overwhelmingly approved by voters in 2006.¹⁵³ The resolution "changed the so-called blight law within the state, requiring blight to be determined on a parcel by parcel basis."¹⁵⁴ It also clarifies 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."¹⁵⁵ (Two bills in the legislature also clarified this language.)¹⁵⁶ Furthermore, it forces governments to pay a premium for property taken through eminent domain. The amendment requires that governments pay at least 125 percent of "fair market value, in addition to any other reimbursement allowed by law" for residences that are taken.¹⁵⁷ That provision can be seen as an insurance policy of sorts for residential property owners, with the premium price allowing property owners to be made whole, so to speak, for the taking. A similar provision exists in Nevada's reform efforts. Michigan's legislative efforts included six other bills that dealt with various other eminent domain related issues, including allowing for the reimbursement of attorneys fees in some aspects of eminent domain cases and increasing the

¹⁵¹ Ibid., 26.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ State of Michigan, *Senate Joint Resolution E* (2005); available from

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

¹⁵⁶ Castle Coalition, *50 State Report Card*, 26.

¹⁵⁷ State of Michigan, *Senate Joint Resolution E*, 1.

allowable moving expenses for those displaced by eminent domain proceedings.¹⁵⁸

Again, the Castle Coalition’s test for good or bad reform rests on the answer to a single question, “how hard is it now for the government to take a person’s home or business and give it to someone else for private gain?”¹⁵⁹ Most of the states that rated poorly in the Castle Coalition report did so because the reform efforts did little to change eminent domain law to make it more difficult for government to take private property from one owner and turn it over to another private party. “True eminent domain reform,” the Castle Coalition argues, “should start with states narrowing their laws’ definitions of public use.”¹⁶⁰ States that failed to do so, including Connecticut and California, received low marks for their reforms.

Connecticut, “the state that gave us the *Kelo* case,”¹⁶¹ received a D rating on the Report Card. Following the *Kelo* decision, Connecticut’s state legislature approved Senate Bill 167, a bill that updated, albeit ineffectively according to the Castle Coalition, the state’s eminent domain law. The bill requires a two-thirds majority vote of the governing body taking the property, requires a public hearing when properties are to be taken,¹⁶² and “purports to stop condemnations ‘primarily’ for increased tax revenues.”¹⁶³

¹⁵⁸ Castle Coalition, *50 State Report Card*, 26.

¹⁵⁹ *Ibid.*, 4.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, 11.

¹⁶² State of Connecticut, *Substitute Senate Bill 167 - An Act Revising the Process for the Taking of Real Property by Municipalities for Redevelopment and Economic Development* (2007); available from <http://www.cga.ct.gov/2007/ACT/PA/2007PA-00141-R00SB-00167-PA.htm>.

¹⁶³ Castle Coalition, *50 State Report Card*, 11.

¹⁶³ State of Connecticut, *Substitute Senate Bill 167*.

The Castle Coalition criticized Connecticut's reform because it "offers no substantive property rights protections..."¹⁶⁴ The legislature's reform states that "no real property may be acquired by eminent domain...for the primary purpose of increasing local tax revenue."¹⁶⁵ The Castle Coalition criticizes this thin version of reform, stating that the bill "offers no substantive property rights protections"¹⁶⁶ because the state can still proceed with economic development projects if: the "cities are determined to see a project approved, they can easily assert an alternative 'primary purpose.'" The bill does require a board attempting to take a property either to vote separately on each parcel to be taken or to list all properties that are to be taken by eminent domain prior to a vote.¹⁶⁷ While the bill states that the board must ensure "that the current use of the real property cannot be feasibly integrated into the overall development plan,"¹⁶⁸ it fails to define what "feasibly integrated" means. Would a small boutique store still be taken if it didn't fit into the plans for a new mega-mall filled with big-name retailers? The failure to define what "feasibly integrated" means gives too much latitude to a state with a history of using eminent domain for economic development. On a positive note, the bill does require that if the entity that took the property fails to use the property for a public use, it must offer to sell it back to the original owner or his / her heirs, that the property owner or the heirs have six months to make a decision on the purchase, and that the price tag for the

¹⁶⁴ Castle Coalition, *50 State Report Card*, 11.

¹⁶⁵ State of Connecticut, *Substitute Senate Bill 167*.

¹⁶⁶ Castle Coalition, *50 State Report Card*, 11.

¹⁶⁷ State of Connecticut, *Substitute Senate Bill 167*, sec. 1 (3) (A).

¹⁶⁸ *Ibid.*, sec. 1 (3) (A) (II).

property be what the government entity paid for it or fair market value, whichever is less.¹⁶⁹

California also earned a miserable grade of D- for its reform. The state legislature approved several bills in 2006, but a ballot question that would have enacted further reform failed. According to the Castle Coalition, the bills “create[d] a few procedural hoops for condemning authorities to jump through,” but did little to truly reform eminent domain law.¹⁷⁰ The bills included requirements for greater public disclosure of redevelopment plans, time limits for how long a government entity can hold on to a property seized by eminent domain without using it, and additional limitations on how government entities can grant themselves extensions for using property taken by eminent domain. Senate Bill 1809 requires that government entities adopting redevelopment plans file those plans with the county recorder within 60 days of adoption. The bill also requires that those plans clearly state which properties are to be taken by eminent domain and that any redevelopment plans already approved must be amended with the properties that will be taken.¹⁷¹ Another bill enacted by the California Legislature, Senate Bill 1210, requires that government pay for an appraisal of the property owner’s choosing.¹⁷² Two bills deal with the time that a government has to use a property taken by eminent domain. Senate Bill 1650 requires that a government entity use a property taken within ten years but allows

¹⁶⁹ Ibid., sec. 1 (4) (c) (I).

¹⁷⁰ Castle Coalition, *50 State Report Card*, 9.

¹⁷¹ State of California, *Senate Bill 1809 - An Act to Amend the Health and Safety Code Relating to Redevelopment* (2006); available from http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1801-1850/sb_1809_bill_20060821_enrolled.pdf.

¹⁷² State of California, *Senate Bill 1210 - An Act to Amend the Code of Civil Procedure Relating to Eminent Domain* (2006); available from http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1201-1250/sb_1210_bill_20060906_enrolled.pdf.

government to grant itself an extension with a supermajority vote,¹⁷³ while Senate Bill 1210 requires that government show that blight remains in a redevelopment in order to extend redevelopment plans past the original window.¹⁷⁴ Blight was also the subject of Senate Bill 1206. The problem with the law is that it does not limit the use of eminent domain for blight to properties that are blighted themselves; rather it defines blight in the following way:

A blighted area is one that contains both of the following:

(1) An area that is predominantly urbanized... and is an area in which the combination of conditions... is so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community that cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment.¹⁷⁵

The second requirement for blight is that the area – not a specific property – meets the definition of blight. California code defines blight in many of the traditional ways, with descriptions of parcels and the facilities on them as chronically dilapidated to the point that they create health or safety hazards, but also includes vague definitions as an area that “may also be characterized by the existence of inadequate public improvements or inadequate water or sewer utilities”¹⁷⁶ and areas with too many liquor stores or high crime rates. Since the law does not require a blight designation for specific properties, it is ripe for abuse. Any property that happens to be a blighted area may be taken.

¹⁷³ State of California, *Senate Bill 1650 - An Act to Amend the Code of Civil Procedure Relating to Eminent Domain* (2006); available from http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1601-1650/sb_1650_bill_20060831_enrolled.pdf.

¹⁷⁴ State of California, *Senate Bill 1210*.

¹⁷⁵ State of California, *Senate Bill 1206 - An Act to Amend the Health and Safety Code Relating to Redevelopment* (2006): 8. Available from http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1201-1250/sb_1206_bill_20060830_enrolled.pdf.

¹⁷⁶ *Ibid.*, 8.

Efforts that would have helped California to fare better in the Castle Coalition's report failed. A ballot initiative nearly identical to the one approved in Nevada failed in California. (Nevada's reform efforts, including the ballot initiative, will be discussed next in this chapter.) California's "The Protect Our Homes Act" (Proposition 90) included nine provisions that were also included in the original version of the Nevada ballot initiative. The nine provisions included a prohibition of transferring property taken by eminent domain from one private owner to another, defining fair market value and damage to property, and requirements that property owners have access to appraisals that the government or its designee conducts on the property. The initiative also sought to differentiate the terms "public use" and "public purpose," a distinction that seems increasingly important as governments turn to redevelopment. The ballot initiative failed 47.5 percent to 52.5 percent.¹⁷⁷

Nevada's Response to *Kelo*

Nevada's reaction to the *Kelo* decision was swift. In 2005, attorney Kermit Waters and former District Court Judge Don Chairez launched a ballot initiative to overhaul Nevada's eminent domain law.¹⁷⁸ The initiative was known as the People's Initiative to Stop the Taking of Our Land (PISTOL) and it included a

¹⁷⁷ Patrick Hoge, "Eminent Domain: Supporters Plan to Try Again, Maybe in 2008," *San Francisco Chronicle*, 9 November 2006, sec. A, p. 20. An electronic version is available from <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/11/09/MNG1LM960R1.DTL&type=printable>.

¹⁷⁸ Kermit Waters and Don Chairez, *Initiative Petition - Nevada Property Owners' Bill of Rights* (2005). The petition was filed with the Nevada Secretary of State on 20 September 2005 and is available from <http://sos.state.nv.us/elections/initiatives/pdf/2006/PropertyOwnersRights.pdf>.

“Property Owners Bill of Rights.”¹⁷⁹ Waters is an outspoken attorney who has been involved in several eminent domain cases, while Chairez had ruled for property owners in a well-known eminent domain case in Nevada. That case involved property owners whose property was taken via eminent domain for the construction of a parking garage at the Fremont Street Experience, a private venture that was part of the City of Las Vegas’ redevelopment plans.¹⁸⁰ The original PISTOL initiative included three provisions that speak more generally to property rights: one that states that “all property rights are hereby declared to be fundamental constitutional rights and each and every right provided herein shall be self executing.”¹⁸¹ Another provision defines government to include “any public or private entity that has the power of eminent domain,” and the final provision states that if any part of the initiative is removed, the remaining sections will stand.¹⁸² The bulk of the initiative, the remaining eleven provisions, seeks to protect property owners. Those eleven provisions can be divided into four general categories of protections: limitations on the notion of public use; further definitions of just compensation; strict requirements on the judicial branch’s involvement in eminent domain cases; and limitations on the amount of time a government has to use the land taken via eminent domain.

On the subject of public use, the Property Owners Bill of Rights states that public use does not “include the direct or indirect transfer of any interest in

¹⁷⁹ Las Vegas Sun Editorial Board, “When Government Makes Your House No Longer a Home,” *Las Vegas Sun*, 20 August 2006; available from <http://www.lasvegassun.com/news/2006/aug/20/when-government-makes-your-house-no-longer-a-home/>.

¹⁸⁰ *Ibid.*

¹⁸¹ Waters and Chairez, *Initiative Petition*, sec. 1.

¹⁸² *Ibid.*, sec. 13 and 14.

property taken in an eminent domain proceeding from one private party to another private party.”¹⁸³ That would limit many of the economic development takings in cases such as *Kelo* and the redevelopment case that Judge Don Chairez decided. The PISTOL initiative also declares that the “burden to prove a public use” rests with the government entity initiating the taking.¹⁸⁴

Six of the eleven provisions in the initiative deal in some way with the issue of just compensation, including defining just compensation “as that sum of money, necessary to place the property owner back in the same position, monetarily... as if the property had never been taken.”¹⁸⁵ That includes expenses the property owner incurs due to the forced move. A property must be “valued at its highest and best use,” and “in all eminent domain actions where fair market value is applied, it shall be defined as the highest price the property would bring on the open market.”¹⁸⁶ To ensure that property owners are aware of the appraised value of the homes, the initiative allows them to hire their own appraisers to provide an estimated value and requires that the government turn over all appraisals on the property. The remaining just compensation protections allow a property owner to sue for any government action that diminishes property value, such as zoning decisions, and protects the property owner from having to pay any legal fees to the government as a result of fighting the taking.¹⁸⁷

The third reform category dealt with the judicial branch’s involvement in eminent domain cases in Nevada. One provision limited the judges that could

¹⁸³ Ibid., sec. 2.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid., sec. 6.

¹⁸⁶ Ibid., sec. 5 and 7.

¹⁸⁷ Ibid., sec. 8 and 12.

hear eminent domain cases to those who had been elected, while the second judicial provision gave property owners the opportunity to “preempt one judge at the district court level and one justice at each appellate court level.”¹⁸⁸ The initiative also nullified any judicial opinion that was not issued in writing.¹⁸⁹ The fifth categorical protection is in the area of timeliness of projects, requiring that the government use the land taken via eminent domain within five years or the property owner has the right to purchase the land at the price he / she sold it to the government.¹⁹⁰

Some of the provisions in the original version of PISTOL were not on the version that voters approved in 2006 and 2008. A challenge filed by a number of government entities, the Las Vegas Chamber of Commerce, Associated General Contractors, Southern Nevada Homebuilders Association, and private individuals led to the Nevada Supreme Court’s removing several provisions from the original PISTOL initiative. The court ruled that the initiative addressed multiple subjects, a violation of Nevada’s single-subject rule. The rule, spelled out in Nevada Revised Statutes 295.009, requires that ballot initiatives be limited to a single subject.¹⁹¹ The court ruled that the single-subject rule did not violate the Nevada Constitution, nor did it limit free speech.¹⁹² Rather, it “facilitates the initiative process by preventing petition drafters from circulating confusing petitions that address multiple subjects.”¹⁹³ The court removed five provisions that it said

¹⁸⁸ Ibid., sec. 10.

¹⁸⁹ Ibid., sec. 3.

¹⁹⁰ Ibid., sec. 11.

¹⁹¹ Nevadans for Prop. Rights v. Sec’y of State, 122 Nev. Adv. Op. No. 79, Supreme Court of the State of Nevada, No. 47825 (2006), 6.

¹⁹² Ibid.

¹⁹³ Ibid.

violated the single-subject rule. Those provisions included a section that states property rights are “fundamental constitutional rights.”¹⁹⁴ The court ruled that “this section is about making all property rights fundamental rights, and thereby creating a broad new class of fundamental rights....it does not deal with the subject of eminent domain.” Section eight, which states that property owners can be compensated for any zoning decision or requiring the move of a driveway, was also stricken. The court found that the provision also violated the single-subject rule because it dealt with zoning and a number of other government actions, not just eminent domain.¹⁹⁵ Sections three, nine and ten were also removed from the initiative before voters went to the polls. Those provisions had to do with the judicial portion of the initiative. Section three prohibited unpublished decisions in eminent domain cases, section nine limited which judges could hear eminent domain cases, and section ten gave property owners direct control over any hearing process by giving them the ability to reject one judge at the district court and at each appellate level.¹⁹⁶ The court ruled that “these provisions concern the day-to-day operations of Nevada’s court system and therefore direct decisions that have been delegated to the judiciary... They do not propose policy but instead are distinctly administrative; consequently, they must be stricken.”¹⁹⁷

¹⁹⁴ Waters and Chairez, *Initiative Petition*, sec. 1.

¹⁹⁵ Nevadans for Prop. Rights v. Sec’y of State, 122 Nev. Adv. Op. No. 79, Supreme Court of the State of Nevada, No. 47825 (2006), 37.

¹⁹⁶ Waters and Chairez, *Initiative Petition*, sec. 3, 9 and 10.

¹⁹⁷ Nevadans for Prop. Rights v. Sec’y of State, 122 Nev. Adv. Op. No. 79, Supreme Court of the State of Nevada, No. 47825 (2006), 66-67.

The remaining nine sections stood in their original form and went before Nevada voters in November 2006. Some members of Nevada's construction industry, the Las Vegas Chamber of Commerce, and even some well-respected elected officials came out against the PISTOL initiative, even in its new form. Bruce Woodbury, a Clark County commissioner and chairman of the Regional Transportation Commission of Southern Nevada, argued that portions of the Property Owners Bill of Rights would still increase the cost of legitimate government uses for eminent domain, such as roadway projects, and that the requirement that government must use the property within five years was unrealistic due to the complexities of some large projects, such as the 215 Beltway.¹⁹⁸ Woodbury and others suggested that many property owners would argue for highest and best use prices based on the owner's preferred zoning for his or her property, rather than on how the property was actually zoned. Those increased costs could break the banks of governments already struggling to keep up with demands for goods and services.¹⁹⁹ Despite those concerns, the PISTOL initiative was overwhelmingly approved statewide by Nevada voters with a vote of nearly two to one, or 63.11 percent in favor to 36.89 percent opposed.²⁰⁰ Local results were similar in Clark County where the vote was 65.70 percent for

¹⁹⁸ Las Vegas Sun Editorial Board, "PISTOL Still Pointed at Many Projects," *Las Vegas Sun*, 12 September 2006; available from <http://www.lasvegassun.com/news/2006/sep/12/pistol-still-pointed-at-many-projects/>.

¹⁹⁹ Steve Kanigher, "Pistol Aimed at Growth," *Las Vegas Sun*, 16 September 2006; available from <http://www.lasvegassun.com/news/2006/sep/16/pistol-aimed-at-growth/>.

²⁰⁰ Nevada Secretary of State, *2006 Official Statewide General Election Results*, available from <http://sos.state.nv.us/elections/results/2006StateWideGeneral/ElectionSummary.asp>.

and 34.30 percent against.²⁰¹ The initiative would need to be approved again by voters in 2008 in order to become law.

Before the PISTOL question again went before voters, the Nevada Legislature, which had not met since the *Kelo* decision, also took up the subject of eminent domain in the 2007 session. Assembly Bill 102, Senate Bill 85 and Assembly Joint Resolution 3 were heard during that session. All three bills kept most of the PISTOL initiative protections intact while addressing the concerns that Commissioner Bruce Woodbury and others had with some of the provisions. The compromise bills clarified several provisions, including: extending the time government had to use the property from five years to fifteen years; allowing property to be taken by eminent domain for redevelopment, but only if the land will be used for a public use such as an airport; it also allowed government to use eminent domain for a public use but also something as simple as a private concession (such as a coffee shop) in the new facility; and it required that a property be valued at its current use or the use that the government entity plans for the property, whichever is higher.²⁰² Assemblyman Joe Hardy testified that “the goal is to have the agreement made between Commissioner Woodbury, Kermitt Waters, Don Chairez and many other players and partners” represented in those bills.²⁰³ He further stated that Assembly Bill 102 was intended to be effective upon passage, meaning that property owners did not have to wait for

²⁰¹ Ibid.

²⁰² State of Nevada, *Assembly Bill 102 - An Act Relating to Eminent Domain* (2007); available from http://www.leg.state.nv.us/74th/Bills/AB/AB102_EN.pdf.

²⁰³ Testimony of Nevada State Assemblyman Joe Hardy, Nevada Senate Committee on the Judiciary, 24 April 2007; available from <http://www.leg.state.nv.us/74th/Minutes/Senate/JUD/Final/1058.pdf>.

PISTOL to be approved a second time to be afforded protection. Assembly Joint Resolution 3, which was identical to Assembly Bill 102, was intended to be a long-term constitutional fix on the subject. The resolution was approved, but would have to be approved by the legislature a second time (in 2009), approved by the governor and then put to a vote of the people in 2010 to be effective.²⁰⁴

Voters approved PISTOL again in 2008, in the same version that they approved in 2006. Support was slightly lower than the 2006 level, with 60.81 percent of voters in favor of the reform and 39.19 percent against. Now that PISTOL has been approved twice, it is now law and supersedes Assembly Bill 102. This version does not contain the legislative compromises achieved in 2007. The legislature approved that compromise bill, in the form of Assembly Joint Resolution 3, in 2009. Voters will face this compromise version in the form of another ballot question in 2010. If voters approve it, this revised version, what Assemblyman Joe Hardy called “PISTOL-plus,”²⁰⁵ will supersede PISTOL and the compromise version will become law.

Ilya Somin and Andrew P. Morriss both argue for reforms that prohibit or severely limit the use of eminent domain for the purposes of blight and economic development. Somin argues that effective reform efforts do not need to be an outright cure for all that ails eminent domain policy; reform that makes strides to improve the protections afforded to property owners makes the grade.²⁰⁶

Nevada’s post-*Kelo* reform efforts, and the efforts in states such as Florida and Michigan, shows that reform is possible without the judicial interference that

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Somin, “The Limits of Backlash,” 2114.

Somin advocates. The *Kelo* decision stated that the authority to limit eminent domain at the state level rests with the states themselves. Nevada, Florida and Georgia have shown that reform efforts at the legislative and constitutional levels can be effective.

CHAPTER 4

REFINING EMINENT DOMAIN REFORM

Introduction

Chapters two and three of this thesis focused on the history of eminent domain and how states reacted when the United States Supreme Court gave them a great deal of leeway to determine how eminent domain can be used. States responded in several ways, some adopting major policy changes in how they handle eminent domain and some making no changes at all.²⁰⁷ In some cases, a desire to respond quickly to protect against a *Kelo*-like taking resulted in reform efforts that had unintended consequences of hampering government's ability to do its job. That was the case here in Nevada. The early version of the PISTOL initiative discussed in chapter three contained tough reforms that would have hampered government's ability to use eminent domain for legitimate public uses, not the "public purposes" vilified by so many.

The varying nature of the states' post-*Kelo* reforms reflects the imperfect nature of governance and varying views of individual property rights. In this chapter, I will review the ethics of property rights based on the writings of John Dewey and John Locke and will provide suggestions for improving eminent domain policies to balance the rights of citizens with the responsibilities of government. The ideal reform effort is similar to the eventual compromise bill approved here in Nevada. It includes separately defining public uses from

²⁰⁷ Castle Coalition, *50 State Report Card*, 2.

“public purposes;” prohibiting the use of eminent domain for economic development and blight as Somin, Morriss, and the Castle Coalition have recommended; and providing other tools that respect property rights and help states or municipalities deal with economically distressed properties.

Ethics of Property Ownership

While eminent domain has a long history of use in the United States, property rights also have a strong history in America. John Dewey and John Locke provide interesting points of view on government and the relationship with those it governs, on individuals and their relationship with society, and on property rights. Both Dewey and Locke address the rights of the individual in context to society with differing results.²⁰⁸

Dewey’s writings are credited with shaping some of the United States Supreme Court cases in the early twentieth century that gave the legislative branch broad leeway in eminent domain cases, allowing for an increasingly wider view of public purpose.²⁰⁹ In describing the shifting views of eminent domain over time, both Ivers and Timothy Sandefur point to Dewey as an important reason for the broad leeway that the courts have given in eminent domain cases that involve “public purposes” and not just public uses. In describing the impact of the Progressive Era on society, Sandefur notes that the individual was secondary to society and that John Dewey’s influence during that time is a large reason why. He writes, “John Dewey, foremost champion of this concept,

²⁰⁸ David Fott, *John Dewey - American’s Philosopher of Democracy* (Lanham: Rowman & Littlefield Publishers, Inc. 1998), 36.

²⁰⁹ Ivers, “Eminent Domain,” 105.

denounced ‘the notion that there are two different “spheres” of action and of rightful claims; that of political society and that of the individual, and that in the interest of the latter the former must be as contracted as possible.’”²¹⁰ That view, along with the notion that society, not the individual, is of utmost importance, is supported in David Fott’s book on John Dewey. David Fott describes Dewey’s views of the individual in relation to society and how that view shifted over time. Fott writes that Dewey “refuses to consider the individual except in relation to society, and (usually) society except in terms of the individuals who constitute it.” Fott, referring to Dewey’s writings on education, quotes Dewey’s *A Common Faith*, written in 1897. There Dewey writes that:

Society is a society of individuals and the individual is always a social individual. He has no existence by himself. He lives in, for, and by society, just as society has no existence excepting in and through the individuals who constitute it.²¹¹

Ivers writes that Dewey’s view was that “rights and privileges did not reveal themselves in natural or preordained fashion. They were identified by the members of those societies with political power and protected by law.”²¹² Through that lens, public purposes would be seen as acceptable reasons to take private property. The good of the greater community would outweigh the specific right of the individual to protect what is his or hers.

Dewey’s views, Fott writes, are distinctly different from those of John Locke’s view of the individual:

²¹⁰ Timothy Sandefur, “Public Use: Returning to the Sources,” *Pacific Legal Foundation Economic Liberties Project*, 4 February 2005 [database on-line]; available from <http://ssrn.com/abstract=656004> or doi:10.2139/ssrn.656004; Internet; accessed 19 November 2009.

²¹¹ Fott, *John Dewey*, 35.

²¹² Ivers, “Eminent Domain,” 105.

Locke begins with individual freedom and derives the qualified unity of civil society from that freedom; Dewey wants to respect individual rights but also to understand them in a social context of complete unity or integration....²¹³

Locke's views on property rights are found in his *Second Treatise of Government*. In chapter five, titled *On Property*, Locke defines the nature of property and man's relationship to it.²¹⁴ He begins with the idea that the land, and the fruits of it, are given to man to use for sustenance.²¹⁵ Gathering or growing food or killing animals for food makes those fruits of the land the property of the man who exerted that effort. The land where those items grew can, too, become man's property in the following way:

...subduing or cultivating the earth, and having dominion, we see are joined together. The one gave title to the other. So that God, by commanding to subdue, gave authority so far to *appropriate*: and the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions.²¹⁶

Locke further states that ownership has a limit. Man can claim ownership of the land as long as he is not taking from another who has already made use of the land and as long as there is still land available for others to cultivate.²¹⁷

Additionally, Locke warns against wanting land that belongs to someone else when there was still land available for use. He reiterates that land that belongs to one man should not be taken by another simply because he wants it. God

²¹³ Fott, *John Dewey*, 37. Fott notes that Dewey's views did change in later years. Referencing an article Dewey wrote in 1939, Fott quotes Dewey as writing "individuals who prize their own liberties and who prize the liberties of other individuals, individuals who are democratic in thought and action, are the sole final warrant for the existence and endurance of democratic institutions...." (Fott, *John Dewey*, 36.)

²¹⁴ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, Inc., 1980), 18-30.

²¹⁵ *Ibid.*, 18.

²¹⁶ *Ibid.*, 22.

²¹⁷ *Ibid.*, 21.

provided land for “the use of the industrious and rational, (and *labour* was to be *his title* to it;) not to the fancy or covetousness of the quarrelsome and contentious.”²¹⁸

Dewey’s and Locke’s views of the individual and their relationship to property and other individuals offer differing schools of thought on property rights and eminent domain. In many eminent domain cases such as *Poletown* and the *Kelo* case itself, specific parcels of land were sought because of a prime location, and government thought that the would-be landowners would be more profitable than the previous land owners. In Locke’s view of property, those types of takings should never be made. The mere fact that another private individual wants the land is not sufficient reason for taking it.

Defining How Eminent Domain Should Be Used

Since the Supreme Court’s decision in the *Kelo* case gives deference to the legislature to define the purposes under which eminent domain can be used, one’s views of property rights will have an impact on the type of eminent domain reform needed, or whether any is needed at all. There are those, like the legislators who want broad-based power to use eminent domain for economic development and blight, who must believe that those uses are acceptable. I side with Locke in the area of property rights, focusing on the individual’s right to protect what is his or hers and limiting society’s ability to infringe on those rights. Given that the court has granted legislatures broad latitude to use eminent

²¹⁸ Ibid., 21-22.

domain as they see fit, reform must begin with legislatures policing themselves as to how they use the power they have been granted.

The homeowners in the *Poletown* case asked the Michigan Supreme Court to differentiate between the terms public use and public purpose and the court declined to separate them, “persuaded (that) the terms have been used interchangeably in Michigan...”²¹⁹ Likewise, the United States Supreme Court said that the terms could be used interchangeably,²²⁰ but as the previous chapters have shown, there is a difference between a true public use and a more nebulous public purpose. True public uses, for constructing roads, schools and public utilities, are not the issue since “few contest the power of government to condemn or assume the physical control of private property under the takings clause” for those types of uses.²²¹ Public roads benefit all who move throughout a community. Public schools, available to all children in a community, educate future generations, and education is generally recognized as a responsibility of government. Public utilities, even those privately owned but franchised to provide key services such as providing water, electricity or natural gas, are generally recognized as important community services controlled by the government.

The issue that generates the concern is when government also uses eminent domain for public purposes such as economic development. With public purpose cases, the benefit to the community may be difficult to see (especially from the

²¹⁹ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), 630.

²²⁰ *Berman v. Parker*, 348 U.S. 26 (1954), 33.

²²¹ Ivers, “Eminent Domain,” 105.

point of view of the property owner whose land is being taken) or may not materialize at all. Economic development serves a broad public purpose: it can spur job growth, provide additional tax revenues and reduce or eliminate “blighted” conditions, but those ancillary benefits come at the expense of the rights of private property owners. But as Ilya Somin discussed, economic development plans are just that – plans. They do not require that the government or a private entity live up to the promises made or the jobs forecasted.²²² The newly created shopping center or manufacturing plant rests in the hands of private landowners who can do with it what they please. Unlike a school, roadway or airport, there are not always tangible or achievable public benefits to an economic development plan. Shopping centers can fail, factories can go out of business (or in the case of General Motors, continue to struggle for decades after the *Poletown* case), and private property owners have been stripped of their property and the community no more enriched for it. Somin also notes that it is not good enough to require companies to live up to the job creation numbers they forecast. She notes that doing so can cause further economic decline if those numbers do not make good financial sense. This reason “provides a strong argument against permitting economic development takings in the first place.”²²³ For that reason, economic development should not be considered a public use and eminent domain should not be used for public purposes.

²²² Somin, “Controlling the Grasping Hand,” 192.

²²³ *Ibid.*

Similarly, blight is often used as a rationale for eminent domain takings. Communities certainly have a vested interest in dealing with blight, but eminent domain does not have to be the tool used to deal with it. As Somin noted, blight used to be defined as extreme neglect that resulted in a property becoming a danger to the community, but the term is often used today to describe simple disrepair or an aging property.²²⁴ Unsafe buildings and unsanitary conditions create dangerous situations, but eminent domain need not be the tool used to deal with those types of properties. Lumping law-abiding property owners in with property owners who are violating the law is government simply declaring guilt by association. That is what occurred in the *Berman v. Parker* case when the owners of the department store were simply guilty of operating a business in a neighborhood that included many blighted properties and forced to give up their properties as a result.²²⁵

Ideal Reform Efforts Defined

While governance is never perfect, it is possible to strike the right balance of property rights protection and government's ability to carry out its responsibilities. If legislatures do police their use of eminent domain, what would that type of policy look like? Economic development can still be achieved, blight can still be dealt with, and renewal of neighborhoods is possible. The following section outlines what that ideal reform looks like. The outline I present for ideal reform is based on a combination of the recommendations Somin and Morriss make for

²²⁴ Somin, "The Limits of Backlash," 2120.

²²⁵ *Berman v. Parker*, 348 U.S. 26 (1954), 32.

prohibiting the use of eminent domain for economic development and blight, as well as a review of the best of Nevada's compromise bill, Assembly Bill 102.

Governments that want to encourage redevelopment in a particular neighborhood can offer tax incentives to willing sellers and willing buyers as part of a redevelopment plan. In some states, property owners willing to sell their parcels within an economically depressed area can do so through "friendly condemnation" type policies. Typically, these plans allow property owners to sell parcels to the government entity and to receive tax benefits for doing so. This transaction should be voluntary, not an eminent domain taking. If a government declares a specific area ripe for redevelopment, a property owner can receive tax breaks for selling property within that zone. Governments can and often do offer tax benefits to companies that purchase land and build in areas where government is encouraging redevelopment. Businesses amass the parcels they want but receive tax incentives from government to entice them to invest in these areas. These incentives typically last for a predetermined amount of time, eventually yielding to a normal tax structure once the area has rebounded or within a specified period of time.

In cases of blight, government has many tools available to deal with truly blighted properties – those that meet the traditional idea of blight as Somin described – without resorting to taking land from law-abiding property owners and selling it to someone else. Communities can deal with true cases of blight through health and building codes with escalating penalties for violating those codes. Escalating penalties, to the point of a government's taking over a

property because it is unsafe, can deal with individual properties that are blighted without impacting property owners who happen to have a home or business that is located near a blighted property. A blight designation should never be applied to any property that merely happens to be located in an economically depressed area. The law does not allow guilt by association in criminal cases, nor should it do so in the area of property rights.

These methods are certainly not as easy as eminent domain. Property owners can refuse to sell, but they have a right to do so in cases where there are attempts to take land for something other than a true public use. Public purposes have value, but they ought not to trump a property owner's rights to continue to lawfully use his or her property. Since the Supreme Court's decision affirms government's power to do just that, it is incumbent upon legislatures to limit themselves.

CHAPTER 5

CONCLUSION

Kelo Postscript

The latest turn of events in the *Kelo* case illustrates why scholars such as Ilya Somin advocate banning the use of eminent domain for economic development. In November 2009, Pfizer announced that it was moving from the plant that was at the heart of the *Kelo* case. Pfizer will move 1,400 jobs from New London to another Connecticut town.²²⁶ The move will “leave behind the city’s biggest office complex and an adjacent swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built.”²²⁷ The location where Susette Kelo and the other petitioners in the *Kelo* case once lived is now reportedly a debris-filled lot.²²⁸ The Associated Press reports that the permit granting a developer the right to develop the land has lapsed.²²⁹ The reason for the move is not clear, though Pfizer recently merged with pharmaceutical company Wyeth and a company spokesperson has been quoted as saying “We had a lot of real estate that we had to make strategic decisions about.”²³⁰ The recession may also have played a role. Irrespective of

²²⁶ Patrick McGeehan, “Pfizer to Leave City That Won Land-Use Case,” *New York Times*, 13 November 2009; available from http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html?_r=2&hpw. Accessed 13 November 2009.

²²⁷ *Ibid.*

²²⁸ Katie Nelson, “Eminent Domain Land Sits Undeveloped,” *Associated Press*, 25 September, 2009; available from http://www.wtnh.com/dpp/news/new_london_cty/news_ap_new_london_ eminent_domain_land_sits_undeveloped_200909250600. Accessed 20 November 2009.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

the reason, the move devastates the redevelopment plans and means that the homes taken as part of the redevelopment effort were taken in vain.

Pfizer's move and the fact that the economic development plan has failed to materialize a decade after it began support Ilya Somin's arguments that economic development plans are too uncertain to allow eminent domain to be used for such a purpose. As Somin stated, economic development plans do not always materialize and remove too much of the control from government and the public and place too much faith in commercial enterprise.²³¹ The use of eminent domain for public uses such as schools and infrastructure projects allows the government to retain at least some measure of control over the property and, in the case of public facilities, retains some public access to the land. That is not the case with public purposes such as economic development. Control or public access are important in cases where a citizen's property rights are being compromised to benefit a community. If there is no clear public control or public access, the property rights of private citizens should not be compromised.

Nevada's eminent domain compromise bill²³² comes very close to striking the right balance and provides a good starting point for outlining the best type of eminent domain policy. The bill, drafted in the state legislature with the involvement of the backers of the PISTOL initiative, was a better result than the PISTOL initiative itself. The bill deftly balances the needs of government and the public. It allows the use of eminent domain for public uses such as roads, schools, or other true public facilities. The bill also prohibits the use of eminent

²³¹ Somin, "Controlling the Grasping Hand," 192.

²³² State of Nevada, *Assembly Bill 102 - An Act Relating to Eminent Domain* (2007); available from http://www.leg.state.nv.us/74th/Bills/AB/AB102_EN.pdf.

domain for economic development that involves purely private uses but allows economic development that involves a public use, such as an airport.²³³ I support that distinction since the ultimate use is a public one, not one that turns the property over to a private developer and takes the future of the property out of the hands of the public. Likewise, it allows for private sector involvement where appropriate (such as leasing ticketing gates at an airport to airlines so that the airport can function). The bill still allows eminent domain to be used for blight, which I disagree with, but does afford some protection that the property owner must have an opportunity to buy back the property, safeguarding property owners' rights. The bill also puts a reasonable time limit on government to make use of the property. Government entities may have to spend years acquiring property for major projects such as a freeway or an airport, and the Nevada bill gives government fifteen years to do that.²³⁴

Put simply, the power of "eminent domain can be used to distribute and redistribute material benefits."²³⁵ As Somin, Morriss, and the Castle Coalition argued, if government has the ability to decide to take land, even for a price, no property is safe. Any homeowner or business owner is at risk. As Main wrote, the slippery slope of eminent domain is dangerous. It allows states to quickly move from using eminent domain for blight to using it for any reason it decides is legitimate. Referring to Justice Douglas's opinion in the *Berman* case that limiting the use of eminent domain was difficult to do, she writes that "it seemed only a matter of time until the criteria for the use of eminent domain would

²³³ Ibid., sec. 7.

²³⁴ Ibid., sec. 12.

²³⁵ Meidinger, "Public Uses," 3.

expand beyond slum removal. If blight, why not beauty? If beauty, why not bounty?”²³⁶

As Errol Meidinger noted, the uses of eminent domain have evolved with changes in the American economy.²³⁷ In the cases of Mill Acts, private property was taken to construct mills that were sometimes, though not always, open to the public.²³⁸ In the nineteenth century, eminent domain was used to expand the railroad across America.²³⁹ That does not differ much from the use of eminent domain for economic development today. With some American cities struggling with economically depressed neighborhoods, high unemployment, and declining tax revenues, eminent domain was one of the tools used in the twentieth century to redevelop and revitalize cities. The court gave legislatures a broad brush to use in eminent domain cases.

That broad power also allows legislatures to limit themselves. The United States Supreme Court’s ruling is consistent with the United States’ federalist system of governance. States have power to determine how property is used and when that property can be taken. As the Castle Coalition stated in its report, “states are free to enact legislation that restricts the power of eminent domain.”²⁴⁰ The fact that the legislature has that power does not mean that it need be abused. Legislatures can limit how eminent domain is used and still achieve the objectives government has to protect its people.

²³⁶ Main, “How Eminent Domain Ran Amok.”

²³⁷ Meidinger, “Public Uses,” 3.

²³⁸ Cohen, “Eminent Domain After Kelo,” 501-502.

²³⁹ *Ibid.*, 506.

²⁴⁰ Castle Coalition, *50 State Report Card*, 4.

Nevada's reform efforts illustrate the strength of the United States system of government and the checks and balances in that system. The Court acknowledged that the legislature has the responsibility to decide under which circumstances eminent domain can be used. Citizens were involved through the initiative process, approving a ballot measure to reform eminent domain. The state legislature stepped in to adjust some of the provisions that went too far in hampering government's ability to use eminent domain for legitimate public uses and the result is a balanced, though imperfect, eminent domain policy. As Nevada has shown, those reform efforts can be accomplished. Other states should follow suit.

SELECTED BIBLIOGRAPHY

Books, Papers and Articles

- Castle Coalition. *50 State Report Card - Tracking Eminent Domain Reform Legislation Since Kelo*. Arlington, Virginia: Castle Coalition, 2007-2008. Report on-line. Available from www.castlecoalition.org; Internet.
- Cohen, Charles. "Eminent Domain After *Kelo v. City of New London*: An Argument for Banning Economic Development Takings." *Harvard Journal of Law & Public Policy* 29 (2006): 491-568.
- Fott, David. *John Dewey : America's Philosopher of Democracy*. Lanham: Rowman & Littlefield Publishers, 1998.
- Grotius, Hugo. *De Jure Belli Ac Pacis* (On the Law of War and Peace). London: Clarendon Press, 1925.
- Hoge, Patrick. "Eminent Domain: Supporters Plan to Try Again, Maybe in 2008." *San Francisco Chronicle* (9 November 2006).
- Hurst, James Willard. *Law and the Conditions of Freedom in the Nineteenth Century United States*. Madison: University of Wisconsin Press, 1986.
- Institute for Justice. "Who We Are." Arlington, Virginia: Institute for Justice, 2009. Article on-line. Available from www.ij.org; Internet.
- Ivers, Gregg. "Eminent Domain." Article in *Encyclopedia of the Supreme Court of the United States*. Farmington Hills: Macmillan/Gale, 2008.
- Kanigher, Steve. "Pistol Aimed at Growth." *Las Vegas Sun* (16 September 2006).
- Kelly, James. "The Last Days of Poletown." *Time Magazine* (30 March 1981).
- Las Vegas Sun Editorial Board. "PISTOL Still Pointed at Many Projects." *Las Vegas Sun* (12 September 2006).
- Las Vegas Sun Editorial Board. "When Government Makes Your House No Longer a Home." *Las Vegas Sun* (20 August 2006).
- Locke, John. *Second Treatise of Government*. Indianapolis: Hackett Publishing Company, 1980.

- Lopez, Edward J., R. Todd Jewell, and Noel D. Campbell. "Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash." *Review of Law & Economics* 5, no. 1 (2009): 101-135.
- Main, Carla T. "How Eminent Domain Ran Amok." *Policy Review* 133 (2005): 3-24.
- McGeehan, Patrick. "Pfizer to Leave City That Won Land-Use Case." *New York Times* (13 November 2009).
- Meidinger, Errol E. "The Public Uses of Eminent Domain: History and Policy." *Environmental Law* 11 (1980): 1-66.
- Morriss, Andrew P. "Symbol or Substance? An Empirical Assessment of State Responses to Kelo." *Illinois Law and Economics Research Paper Series*, no. LE07-037 (March 2008).
- Nelson, Katie. "Eminent Domain Land Sits Undeveloped." *Associated Press* (25 September 2009).
- Novak, William J. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 1996.
- Sandefur, Timothy. *Public Use: Returning to the Sources*. Pacific Legal Foundation Economic Liberties Project (2005).
- Somin, Ilya. "Controlling the Grasping Hand: Economic Development Takings After Kelo." *Supreme Court Economic Review* 15 (2007): 183-271.
- Somin, Ilya. "The Limits of Backlash: Assessing the Political Response to Kelo." *Minnesota Law Review* 93, no. 6 (2009): 2100-2178.

Legal Cases

- Barron v. Baltimore, 32 U.S. 243 (1833).
- Berman v. Parker, 348 U.S. 26 (1954).
- Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).
- County of Wayne v. Hathcock, 685 N.W. 2d 765 (Mich. 2004).
- Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
- Kelo v. City of New London, 545 U.S. 469 (2005).

Nevadans for Prop. Rights v. Sec'y of State, 122 Nev. Adv. Op. No. 79, Supreme Court of the State of Nevada, No. 47825 (2006).

Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W. 2d 455 (1981).

The Case of the King's Prerogative in Saltpetre, 77 English Report (1604).

State Legislative Materials

Hardy, Joe. *Testimony to the Nevada Senate Committee on the Judiciary*. April 24, 2007.

State of California. *Senate Bill 1206 - An Act to Amend the Health and Safety Code Relating to Redevelopment* (2006).

State of California. *Senate Bill 1210 - An Act to Amend the Code of Civil Procedure Relating to Eminent Domain* (2006).

State of California. *Senate Bill 1650 - An Act to Amend the Code of Civil Procedure Relating to Eminent Domain* (2006).

State of California. *Senate Bill 1809 - An Act to Amend the Health and Safety Code Relating to Redevelopment* (2006).

State of Connecticut. *Substitute Senate Bill 167 - An Act Revising the Process for the Taking of Real Property by Municipalities for Redevelopment and Economic Development* (2007).

State of Florida. *2006 Eminent Domain Constitutional Amendment Results*. Data on-line. Available from www.doe.dos.state.fl.us.

State of Florida. *Eminent Domain*. Florida Statutes 73 (2009).

State of Florida. *House Bill 1567 - An Act Relating to Eminent Domain* (2006).

State of Michigan. *Senate Joint Resolution E* (2005).

State of Nevada. *2006 Official Statewide General Election Results*. Data on-line. Available from www.sos.state.nv.us.

State of Nevada. *Assembly Bill 102 - An Act Relating to Eminent Domain* (2007).

Waters, Kermitt, and Don Chairez. *Initiative Petition - Nevada Property Owners' Bill of Rights* (2005).

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