

# 7

## MAKE PROPERTY RIGHTS MORE SECURE: LIMIT EMINENT DOMAIN

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Chapter 2 emphasized that market capitalism is the institutional structure that best promotes economic growth and prosperity. Economic policies help set the rules of the game, and the living standards of future West Virginians depend heavily on today's policymakers choosing good rules. This is especially important in the area of property rights. Yet under current West Virginia policies, property rights are highly vulnerable to infringement by government control in the form of excessive taxation, regulation, and takings for centrally planned economic development.

This chapter examines the important role of private property rights in a market system and the process by which secure property rights promote economic growth. We will first argue that long-term growth and prosperity are the benefits of secure property rights. We will then contrast pro-growth property policies with those policies that currently prevail in West Virginia. High taxes, excessive regulation, and loosely limited eminent domain powers are all tools of central planning and government control of the economy. Under these policies property rights are insecure, which distorts incentives for making good resource use decisions, discourages using assets as collateral for beneficial investments, and forfeits the dynamic benefits that emerge out of capitalism.

Finally, this chapter will suggest reforms. Taxes, regulation, and takings through eminent domain decrease the security of property rights; therefore, these government infringements should be limited. Enacting policies to cut taxes, eliminate excessive regulation, and place meaningful restrictions on the eminent domain powers, will help to **UNLEASH CAPITALISM** in West Virginia and lead to long-term economic growth and rising living standards in our state.

### **PRIVATE PROPERTY: THE FOUNDATION OF MARKET CAPITALISM**

The notion of private property can seem fairly straightforward, especially for people living in a mostly capitalist society such as the United States. One reason for its familiarity to us is that

private property is a bedrock principle of market capitalism. Think of a growing economy as an award-winning Broadway show. Private property is like the stage crew, constantly working behind the scenes to make sure the show runs smoothly. Private property, while perhaps underappreciated, is vital to ensuring that the economy will grow and prosperity will rise over time.

That said, it is useful to ask, what exactly is ‘private property?’ In other words, what does it mean for a person to claim that he or she ‘owns’ a resource? Scholars have grappled with this question since the days of antiquity, and the law has evolved so that ownership of a valuable resource—such as a piece of land—means that the owner is entitled to certain rights over that resource and that other people do not share in those rights. For example, an owner usually has the right to physically *possess* the owned property.<sup>1</sup> Also, private property rights generally entitle the owner to *use* the property in any way the owner sees fit. Owners also have the right to *alienate* (i.e., sell, divest, or transfer) their property to new owners, and to *exclude* non-owners from any or all of the above rights at their discretion. As was discussed in Chapter 2, well defined and enforced private property rights entail three economic aspects; owners have control rights, cash flow rights, and transferability rights.

Other definitions of property can be conceptualized by considering different combinations of the rights to possess, use, alienate, and exclude. Hernando de Soto, in his celebrated book, *The Other Path*, defines private property as a combination of rights “which confer on their holders inalienable and exclusive entitlement to them” (1989, 159). In general, we move away from *private* property when one or more of these rights are attenuated. For example, excessively high taxes (examined in Chapters 5 and 6) decrease rights to cash flow from property. Excessive zoning and other regulations (examined in Chapter 9) decrease control and transferability rights by interfering with the ability of owners to make decisions regarding the use of their property. Finally, posing the greatest threat, strong eminent domain powers (examined in this chapter) undermine the entire bundle of private property rights.

## THE BENEFITS OF WELL-DEFINED AND ENFORCED PRIVATE PROPERTY RIGHTS

Well-defined and enforced private property rights are the cornerstone of a capitalist economy. The positive economic effects of private property are widespread. Secure property rights promote specialization and exchange, provide incentives for conservation and preservation of resources, and promote technological innovation, entrepreneurship, capital accumulation, and investment. In essence, secure property rights underlie economic growth.<sup>2</sup>

Even though a system of private property allows individuals to make their own resource use decisions, based on their own personal goals, under a system of capitalism the price system encourages owners to discover and make exactly those decisions that create the

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<sup>1</sup> Possession is not always a right with private property. For example, ownership of common stock in a corporation does not entitle the owner to take possession of the company’s physical assets such as office furniture, computer servers, etc.

<sup>2</sup> The positive relationship between secure property rights and capital formation, investment, and economic growth has been well documented in the economics literature (Boettke 1994; Besley 1995; Knack and Keefer 1995; Mauro 1995; Acemoglu, Johnson, and Robinson 2001; Acemoglu, Johnson, and Robinson 2002, Kerekes and Williamson 2006).

most net benefits for society. This is Adam Smith's 'invisible hand principle' discussed in Chapter 3. According to Adam Smith's famous book, *The Wealth of Nations* (1998 [1776]), private property is the cornerstone of growth and prosperity because private property best supports the division of labor and free exchange that are the keys to market capitalism. Similarly, Hernando de Soto in *The Mystery of Capital*, explains the process by which secure, well-defined property rights promote economic development (de Soto 2000). He discusses several of the beneficial aspects of a system of secure property rights including their ability to help realize the economic potential of assets, integrate dispersed information into one system, make individuals accountable and assets fungible, network individuals, and protect transactions (de Soto 2000).<sup>3</sup>

Because the transfer between individuals of private property underpins exchange, private property rights also support a system of market prices that serve as signals to owners about the most profitable uses of resources. Through prices, people are able to discover the knowledge that puts a piece of property to its best use. This process of entrepreneurial discovery, and its importance in creating economic growth was discussed in Chapter 3. Prices also establish a system of profits and losses which provide incentives and enable individuals to make wise economic decisions (Mises 1920 [1935]). Hence, property rights are pivotal to a capitalism-based economy because of their ability to transmit a large amount of information through market prices (Hayek 1945; Hayek 1960).

Information transmission is one of the most desirable aspects of a capitalist system because it allows the best use of resources which promotes economic growth. No central planner can harness all the information necessary to make production decisions to manage an economy. However, a free-market system founded on private property rights naturally supports a decentralized process of production and exchange that leads to efficient use of resources and economic growth.<sup>4</sup>

Through profits and losses, property rights provide individuals with incentives to make sound economic decisions. For instance, producers of goods and services that are in high demand will realize economic profits. However, when consumer demand falls, producers will face economic losses that encourage resources to flow elsewhere. In this manner, profits and losses give producers the incentive to provide goods and services that are most highly valued by consumers while finding low cost methods of production. These incentives are in place only if owners have control, cash flow, and transferability rights. Entrepreneurship and technological innovation are also motivated by economic profits as realized through the price system, which depends on well-defined and enforced private property rights.

In addition, property rights provide incentives for the preservation of property and the conservation of resources. Individuals are more likely to care for their property when they are fully responsible for their actions and are able to reap the gains from an increase in property value. Likewise, secure property rights provide incentives to conserve for the future and to protect natural resources. When property rights are transferable, the preservation of natural resources increases the value of an individual's land. The Sierra Club, for example, has a long history of purchasing land specifically for conservation and preservation, much of which they

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<sup>3</sup> For further analysis of property rights institutions and their historical evolution, see also Demsetz (1967), North and Thomas (1973), North (1981), Rosenberg and Birdzell (1986), and North and Weingast (1989).

<sup>4</sup> Douglass North (1990) shows that property rights facilitate the process of production and exchange by reducing transactions costs. He argues that this reduction in transactions costs leads to increased capital formation and economic growth.

donate to governments as state and national parks. Those who sell to the Sierra Club are motivated by price. And price is how the Sierra Club communicates knowledge of the land's conservation value. Producers also conserve resources by using as few inputs as possible, in order to minimize costs and increase profits.

Private property rights are critically important for sustained long-run economic growth because they increase the incentive for owners to make long-term capital investments. Secure property rights not only enable owners to use their property as collateral to secure loans to finance capital investment in land, buildings, machinery, or equipment, but also ensure the owner will be able to realize the gains from his or her investment. When the future return associated with a current capital investment has a chance of being expropriated, the incentive to make these capital investments simply isn't as strong. The incentives for making long-term capital investments are paramount for long-term growth. Hernando de Soto states:

Capital is the force that raises the productivity of labor and creates the wealth of nations. It is the lifeblood of the capitalist system, the foundation of progress, and the one thing the poor countries of the world cannot seem to produce for themselves. (2000, 5)

Secure property rights enable assets to be used as collateral to obtain credit and generate additional capital. Capital investment and accumulation stimulate production and increase labor productivity. As labor productivity increases, wages increase. And rising wages are followed by increased prosperity and rising living standards. In order for West Virginia to experience growth and prosperity, more capital investment is essential. This can be achieved by making property rights more secure so as to increase the incentive to invest in capital.

Economists have also recognized that private property is fundamental to guaranteeing equality and liberty in accord with the values of our society. In the words of Thomas Jefferson, which are engraved in the ceiling of the West Virginia Supreme Court: "The true foundation of republican government is the equal right of every citizen in his person and property and in their management."<sup>5</sup> The policies of a government should reflect these values, and secure rights to private property achieve that. Economist Murray Rothbard (1978) advocates what is known as the 'nonaggression axiom': that no man may invade, or expropriate, the property of another individual. An important implication of this view is that private property confers upon an individual the right to free exchange in the absence of government intervention. In fact, government expropriation of private property violates the 'natural right' theory of property in which an individual employs his own means to attain his rightfully chosen ends.<sup>6</sup> Private property is the institution that secures the fruits of one's labor, which enables individuals to produce goods and services for exchange to sustain life and to increase wealth.

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<sup>5</sup> The quoted passage is from an 1816 letter to Samuel Kercheval (Lipscomb and Bergh 1903, vol.15, p.36). The Court's web site features a description of the Court chambers that includes a photo in which the inscription is visible. Online at: <http://www.state.wv.us/wvsca/kidspage/courtroom.htm> (Cited January 16, 2007).

<sup>6</sup> This concept of property as the primary natural right was stressed by English philosopher John Locke in his famous 1690 book, the *Second Treatise on Government*. Ayn Rand (1964, 94) goes so far as to say that "without property rights, no other rights are possible". Rand illustrates that the right to life includes the right to sustain life and this necessitates the property right to the product of one's own effort.

## GOVERNMENT THREATS TO THE SECURITY OF PRIVATE PROPERTY

Excessive taxation, regulation, and strong eminent domain powers make property rights less secure, increasing owner uncertainty. Greater uncertainty decreases the willingness to undertake capital investment and accumulation thereby reducing the productivity of labor and depressing wages. Greater uncertainty also curtails transactions transferring property to new owners who discover more valuable uses. Ultimately, economic growth stagnates. When government undermines private property rights, the economy suffers and this thwarts prosperity for West Virginia's future.

Government intervention through taxation and regulation hinder capital investment and create a hostile business environment. Taxes weaken property rights by restricting the cash flow rights associated with property. By reducing profits, taxes reduce the incentive of individuals to increase skills and abilities so as to better produce goods and services. Regulations (including price and wage controls) restrict control rights, interfere with how individuals use their property, and increase the cost of doing business. As was discussed in Chapter 2, West Virginia ranks 50<sup>th</sup> in the *Economic Freedom of North America Index*,<sup>7</sup> 47<sup>th</sup> in the Tax Foundation's *State Business Tax Climate Index*,<sup>8</sup> and 41<sup>st</sup> in the Milken Institute's *Cost-of-Doing Business Index*.<sup>9</sup> In addition to taxation and regulation, perhaps the greatest threat to private property is the eminent domain powers of government. When the government intervenes with strong eminent domain powers, private property rights are weakened and the economy forfeits the dynamic benefits of market capitalism.

Prior to our discussion of the uses of eminent domain, it is important to understand that under capitalism there is a clear channel through which property currently owned by one individual can be purchased by a new owner. Potential buyers can simply negotiate a purchase price with a current property owner, as happens routinely in residential and commercial real estate transaction. Because the new owner must pay a price agreeable to the buyer there is a strong incentive to only transfer property when it increases the value and wealth created by the property. The value the current owner receives from the property will determine the price at which they are willing to sell. If the new use is more valuable than the current use, the potential buyer will be in a position to offer the current owner a higher price for the property than the price at which the current owner is willing to sell, and a transaction will occur. Thus, whenever the new use of the property creates more value than the current use, a mutually beneficial exchange can and will occur in the private marketplace. Importantly, the fact that the potential buyer had to negotiate a *mutually agreeable* price with the current owner ensures that the potential buyer must pay the true cost of taking the property's use value away from the current owner.

However, when government is willing to use its power of eminent domain to transfer private property from one individual to another, the potential buyer now has the ability to use government power to take the property from the current owner at a price lower than the current owner was willing to accept in private negotiation. After all, if the price wasn't lower when the property was taken through eminent domain, the potential buyer would have simply purchased the property in the private marketplace from the current owner. Using eminent domain to take property from an owner is simply a way for the potential buyer to acquire

<sup>7</sup> Karabegovic and McMahan (2006). Online at: <http://www.freetheworld.com>

<sup>8</sup> Dubay and Atkins (2006). Online at: <http://www.taxfoundation.org/>

<sup>9</sup> Milken Institute (2005). Online at <http://www.milkeninstitute.org/>

some of the property's current value without having to compensate or pay the current owner. This is problematic for several reasons, but most importantly it: (1) diminishes the incentive for current owners to make capital investments that increase the value of their property, (2) results in substantial resources being devoted to lobbying in attempts to get the government to use eminent domain powers to transfer property, and resources being devoted by current owners to defend their property against being seized ('unproductive entrepreneurship' in the terminology of Chapter 3), and (3) no longer assures that the transfer of ownership rights will result in more value and wealth created because the potential buyer does not have to leverage his or her future income stream (which reflects the value of the property's new use to society) to compensate the current owner for their lost value (which reflects the value of the property's current use to society).

## EMINENT DOMAIN ABUSE

The rest of this chapter will focus on the problems associated with strong eminent domain powers and how to curtail these powers to achieve a more secure system of property rights. Eminent domain is direct expropriation of property by government and is an infringement on the rights normally defined by private property. Governments do not have unlimited power to use eminent domain; the Fifth Amendment to the United States Constitution states "nor shall private property be taken for public use, without just compensation."<sup>10</sup> Thus, takings must be for the public use, and governments must at least pay some compensation to property owners.

Traditionally, 'public use' has only encompassed property takings for government provision of infrastructure, like railroads and highways, and to erect government buildings such as public schools and courthouses. However, the term 'public use' has evolved over the past century to mean 'public purpose,' and today state and local governments frequently use eminent domain to benefit private parties when they entail some 'public purpose' such as enhancing the tax base or creating job growth. In effect, the current interpretation allows property to be taken from individual *A* and transferred to individual *B*, so long as individual *B* can claim the transfer also achieves one of these public purposes. Interpreted in this manner, eminent domain has become permissible for purposes such as taking private property for redevelopment or to increase tax revenues.

In 2005, the U.S. Supreme Court handed down the notorious *Kelo v. City of New London* decision. In this well-known case, the city condemned the homes of numerous Connecticut residents near Fort Trumbull State Park. This property was taken by eminent domain for the purpose of redevelopment. Specifically, the city's redevelopment plan included a privately owned hotel and shopping center, as well as research, office, and retail space to accompany a new facility constructed by the pharmaceutical company Pfizer. The Court sided with the city, and the implication of this decision is that it is legal to use eminent domain to transfer private property from one set of individuals to another, not for public use, but for *private* benefit.

It is important to understand the *Kelo* decision as part of a long political and legal history that has slowly eroded property rights. In late nineteenth century takings cases, the Supreme Court began to put greater focus on whether condemnation procedures were fair and

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<sup>10</sup> U.S. Const. amend V.

democratic, and put less emphasis on whether individual property rights were being infringed. In a real sense, the Court began to create ways for elected bodies to legally take property, so long as doing so was intended to promote the public purpose. As Justice Stevens writes for the *Kelo* majority, “when this Court began applying the [public use test of the] Fifth Amendment to the States at the close of the 19<sup>th</sup> century, it embraced the broader and more natural interpretation of public use as ‘public purpose’.”<sup>11</sup>

In other early cases, the Court ruled that takings for infrastructure such as roads, utilities, and common carriers satisfied the public use clause. Most people now think of these as ‘traditional’ uses for eminent domain, which usually do not involve more than incidental transfer of property from one private party to another.

Only later did the Court begin to recognize transfers between private parties for the purpose of economic development. Among the first of several reinterpretations of the public use clause occurred in 1954 in the landmark Supreme Court decision of *Berman v. Parker*. The Court upheld the District of Columbia’s plan to raze entire struggling neighborhoods, then transfer parts of the land to private parties and begin anew. Later, in *Hawaii Housing v. Midkiff* (1984), the Court allowed the state to redistribute properties from a small number of landowners to a large group of tenants in order to avert the “social and economic evils of a land oligopoly.”<sup>12</sup> Standing alongside these as another landmark takings case, the Michigan Supreme Court, in *Poletown Neighborhood Council v. Detroit* (1981), allowed Detroit to condemn a residential neighborhood to be transferred to General Motors. The Court reasoned reducing unemployment and “revitaliz[ing] the economic base of the community” served the public purpose. This decision was later reversed in *County of Wayne v. Hathcock* (2004).

The common thread running through these cases, and *Kelo*, is an ever-expanding definition of ‘public use.’ In *Berman* and *Midkiff*, the Court determined that the ideals of urban renewal and economic competition serve the public purpose. This was essentially the same meaning brought before the *Kelo* Court. As the Stevens opinion states: “Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.”<sup>13</sup> In this light, it is understandable why some legal observers saw *Kelo* as a straightforward affirmation of precedent (SCOTUSblog 2005).

But *Kelo* did more than ‘merely’ uphold precedent and leave eminent domain powers intact. In fact, the 2005 decision *politicized* eminent domain in two important ways. First, under *Kelo* governments are not required to show that the expected economic benefits of a taking are realistic. What’s important is that the government crafts an ‘integrated’ or ‘comprehensive’ development plan (i.e., one that is not designed to benefit ‘identifiable individuals’) through a process that is open, fair and democratic. As the Stevens opinion puts it, we should not “second-guess the City’s considered judgments about the efficacy of its development plan.”<sup>14</sup> In other words, the Court leaves it up to majorities of city councils and legislatures to say what is in the public interest. Second, the Court reminds readers that “nothing in our opinion precludes any State from placing further restrictions on its exercise of takings power.”<sup>15</sup> The Court leaves enforcement of individual rights to the federal system of

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<sup>11</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005) at 9.

<sup>12</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) at 241-2.

<sup>13</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005) at 14.

<sup>14</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005) at 13.

<sup>15</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005) at 19.

governments. In short, economic development takings are valid if they are filtered through a democratic process, and the enactment of constraints on eminent domain takings are up to state legislatures, governors, and their courts.

The West Virginia Supreme Court has not been a sufficient brake on *Kelo* style transfers. The most egregious abuses of eminent domain have occurred in Charleston and Wheeling. In Charleston, the state's top eminent domain abuser is the Charleston Urban Renewal Authority (CURA). Since the 1960s, CURA has seized 523 properties for 47 projects, 28 of which were private projects (Berliner 2006). In the mid 1990s, CURA again condemned property in downtown Charleston to sell to private developers. This time the property owner fought back. The Courtland Company, which operated a commercial parking lot on this property, challenged the taking on the argument that the property itself was not blighted. However, this property was located within a redevelopment area that CURA had declared blighted. In *CURA v. Courtland* (1998), the West Virginia Supreme Court ruled in favor of CURA, and this precedent stands today in West Virginia.

In Wheeling, the legislature designated the downtown area as a National Heritage Area in October 2000 when it passed the Wheeling National Heritage Act (WNHAA).<sup>16</sup> This act created the Wheeling National Heritage Area Corporation (WNHAC) to manage and redevelop the area.<sup>17</sup> In 2002, The WHNAC proposed to convert 90 percent of downtown Wheeling into a 'Victorian-themed outlet mall.' This plan would have condemned properties and transferred them from their present owners to private retail businesses chosen by City officials (Berliner 2003). Fortunately, the West Virginia Supreme Court ruled the financing of the plan unconstitutional in May 2003.<sup>18</sup>

In addition to these examples, a case involving a family farm and Snowshoe Mountain provides another illustration of eminent domain abuse in West Virginia. For eight generations, the Sharp family has owned a farm in Pocahontas County, near Slatyfork, WV (Nabors 2006). This area is also home to Snowshoe Mountain ski resort. Due to expansion, Snowshoe claims it needs the Sharp farm to build a larger sewage treatment facility. Although Governor Joe Manchin has offered Snowshoe nearby public land for \$1 on which to build a treatment plant, Snowshoe and local government remain focused on seizing the Sharp Farm, citing higher project costs (HuntingtonNews.net 2006).

If West Virginia is going to achieve pro-growth policies, we need to take it into our own hands to impose meaningful restraints on eminent domain abuse. Property owners need the security to ensure their property improvements will be protected, not condemned from beneath them and handed off to another private owner. Otherwise, fewer property improvements and investments will take place, and economic growth will be slowed. In order to truly serve the public purpose, West Virginia needs to enact its own restrictions on the use of eminent domain takings to better protect the property rights of our citizens.

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<sup>16</sup>Wheeling National Heritage Area Act (WNHAA), Pub. L. No. 106-291, § 157, 114 Stat. 922, 963 (2000).

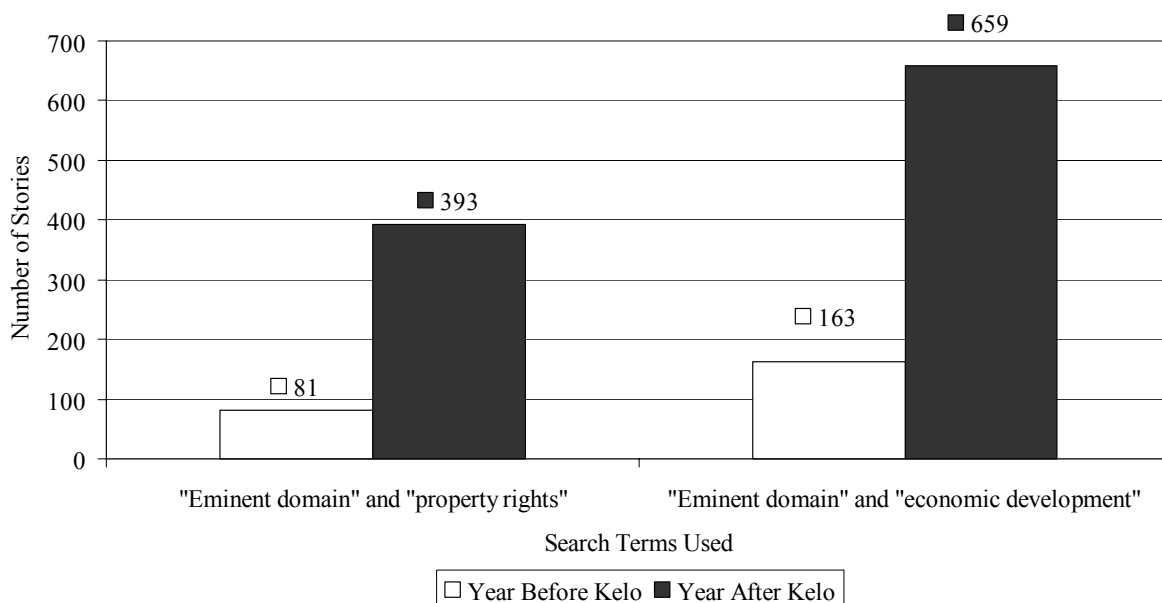
<sup>17</sup> Wheeling National Heritage Area Act (WNHAA), Pub. L. No. 106-291, § 157, (d)(2)(B), 114 Stat. 922, 964 (2000).

<sup>18</sup> *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 580 S.E.2d 869 (2003).

## THE *KELO* BACKLASH

The *Kelo* decision struck a moral chord with the American people, who awoke to the threat that any home *could* now be taken much more easily. Suddenly redevelopment agencies throughout the country captured the attention of the media, politicians, and citizen groups. As Figure 7.1 shows, major newspaper coverage of eminent domain issues increased nearly fivefold in the year following *Kelo*. Opinion polls showed that the American public at large was strongly opposed to the ruling, disagreeing with the Court by over 90 percent in several online polls. In a nationwide poll, 68 percent of registered voters supported legislative restraints on eminent domain.<sup>19</sup> Dozens of grassroots organizations sprung up, and individuals whose properties were condemned told their stories on web sites and blogs.

Figure 7.1: Major Newspaper Coverage of Eminent Domain



Source: Authors' calculations based on Lexis/Nexis search of major U.S. papers for "eminent domain" in headline or lead paragraph and the second term in full text.

People were quick to deploy their opinions into the political sphere, gathering signatures, writing elected officials, and funding pro-property rights groups. By November 2006, voters would decide on ballot initiatives in 12 states, and approve measures in nine. State legislators turned quickly into the wind as well. Bills were passed in 30 states and enacted in 28 of those.<sup>20</sup> West Virginia is among these 28. But like in many other states, the changes to eminent domain law did not go far enough to meaningfully protect property rights.

As researchers have shown, several of these state laws are riddled with loopholes that local governments can 'drive bulldozers through' (Sandefur 2006; Lopez and Totah 2007). Most of these laws begin with language that implies they will ban the kinds of takings that incited the *Kelo* backlash. But according to recent economics research (Campbell and Lopez

<sup>19</sup> Poll results from various web sites including *msnbc.com*, *cnn.com*, *chronicle.augusta.com*, *haptonroads.com*, and *bradenton.com*. See Economist (2005) and Andres (2005) for the 90% and 68% results, respectively.

<sup>20</sup> Governors vetoed bills in Arizona, Iowa, and New Mexico. The Iowa state legislature overrode the veto.

2007), almost half the enacted changes were diluted by broadly defined exemptions for blight or urban renewal, and vague definitions of public health and safety. The state of Vermont provides a good for example. The first section of their new statute reads as follows:

Notwithstanding any other provision of law, no governmental or private entity may take private property through the use of eminent domain if the taking is primarily for purposes of economic development, unless the property is taken pursuant to chapter 85 of Title 24 (urban renewal).<sup>21</sup>

There are at least two inviting loopholes in this seemingly simple language. First, the word “primarily” leaves a variety of scenarios open to *Kelo*-style transfers. The condemning government might need only tack on a traditional public purpose (e.g., a public park) to a redevelopment plan to get around this restriction. Other states created a similar loophole with less subtlety, like Missouri’s new law which bans takings that are “solely for economic development.” With the courts interpreting public use so broadly, any government official with a modicum of creativity could tweak the development plan to pass the test. Supreme Court Justice Antonin Scalia has said that in “practically every case” only a “stupid staff” would fail to muster such a rationale.<sup>22</sup>

Only a minority of the states’ new eminent domain laws have actual bite when it comes to restricting eminent domain. The majority are all bark, and no bite. Sadly, West Virginia’s statutory response is something of a poster child for reforms that have little bite.

## A CRITIQUE OF WEST VIRGINIA’S RESPONSE

The West Virginia Legislature wasted no time in responding to the *Kelo* decision. On January 11, 2006, the first day of its session, the House of Delegates introduced two bills that would limit eminent domain. A week later, two more bills were introduced. The Senate, while slower to respond, also introduced two bills within the first few weeks of the 2006 session.

Only House Bill 4048 passed and eventually became law. Compared to the bill that was originally introduced, the final bill as enacted represents a much weaker limitation on eminent domain abuse. The original HB 4048 lists a baker’s dozen “public uses for which private property may be taken or damaged,” and limits eminent domain powers as follows:

- (n) Notwithstanding any other provision of law, eminent domain may not be used to condemn property for:
- (1) Private retail, office, commercial, industrial or residential development, or for enhancement of tax revenue; or
  - (2) To purchase property for a purpose that results in a transfer in fee of the property to a person, nongovernmental entity, corporation or other business entity to fulfill the purpose of the use of eminent domain.<sup>23</sup>

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<sup>21</sup> Vermont General Assembly, S.246, April 14, 2006, Sec. 1. 12 V.S.A. § 1040.

<sup>22</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 1025-6, note 12 (1992).

<sup>23</sup> West Virginia Legislature, 78<sup>th</sup> Legislature, 1<sup>st</sup> Session, House Bill 4048, Originating in the Committee on the Judiciary, January 18, 2006. Online: [http://www.legis.state.wv.us/Bill\\_Text\\_HTML/2006\\_SESSIONS/RS/Bills/hb4048%20intr.htm](http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/RS/Bills/hb4048%20intr.htm) (Cited January 16, 2007).

The proposed bill then gives a right of first purchase opportunity to property owners whose property is taken but not used for the stated public purpose.

In contrast, the bill as enacted contains neither of the above provisions. After passing the House 97-0 on January 19, 2006, HB 4048 was sent to the Senate where the bill was filtered through three separate committees and heavily amended. On March 9, the bill passed the Senate by a 34-0 vote. In its final version, the bill is nearly three times longer than its introduced version and takes a dramatic shift in how eminent domain powers are limited. Rather than prohibiting takings for private purposes as in its original version, the enacted version allows takings so long as the property is blighted and the condemning authority has followed an approved redevelopment plan—making the new law remarkably similar to the *Kelo* majority opinion, and essentially nullifying the restrictions set forth in the legislation as it was originally proposed. The ‘public uses’ for taking private property are left intact. Missing are the provisions that ban takings for private transfers and give property owners right of first repurchase.<sup>24</sup> The Governor signed HB 4048 on April 5, 2006, and it was enrolled into the Code of West Virginia on April 17, 2006.

Like so many of the other states’ new laws, West Virginia’s restrictions on eminent domain offer numerous exemptions and loopholes. Blight is a common exemption that severely weakens eminent domain restrictions. This is especially true where ‘blight’ is broadly defined. For example, while the new law does take steps to protect non-blighted properties located in blighted areas, the statutory definitions of blight are so all-encompassing as to effectively nullify these protections. From the Code of West Virginia, as amended in 2006 by HB 4048:

(c) “Blighted area” means an area, other than a slum area, which by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site improvement, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of the community, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.

(d) “Blighted property” means a tract or parcel of land that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air or sanitation, high density of population and overcrowding, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any

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<sup>24</sup> West Virginia Legislature, 78<sup>th</sup> Legislature, 1<sup>st</sup> Session, House Bill 4048, Enrolled March 11, 2006. Online: [http://www.legis.state.wv.us/Bill\\_Text\\_HTML/2006\\_SESSIONS/RS/BILLS/hb4048%20enr.htm](http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/RS/BILLS/hb4048%20enr.htm) (Cited January 16, 2007).

combination of such factors, is detrimental to the public health, safety or welfare.<sup>25</sup>

A government or agency that wants to condemn a property for economic development can surely meet at least *one* of the listed criteria. It strains credulity to imagine otherwise. Such an expansive definition fails to pass Scalia's "stupid staff" test. Unfortunately, West Virginia's new law does little if anything to enact stronger protections than offered by the *Kelo* Court, leaving property owners in West Virginia as vulnerable and uncertain as any in the country.

## THE NEED FOR MARKET-BASED REFORM

Under *Kelo* the Supreme Court has said it will give broad deference to state and local governments to determine what is defined as 'public use,' leaving property rights extremely poorly secured in West Virginia. The Court has instead politicized the protection of property rights, and it is now up to West Virginia to place our own boundaries on the use of eminent domain. People across the state and country overwhelmingly support stronger property rights than *Kelo* affords. If we do nothing, our institutions will remain at odds with policies that are proven to increase economic growth, which is the only way to build a better standard of living for West Virginians. As discussed in Chapter 2, pro-growth policies are underpinned by well-defined and enforced private ownership rights. Fundamental are private property rights to land, one of our most important and valuable assets. Enacting meaningful restrictions on eminent domain would reduce government control of land-use decisions.

There are important and needed ways for West Virginia to reform its policies to instill greater security of private property rights. First, the state legislature can revisit the relevant section of the Code of West Virginia, and instill a more straightforward set of restrictions on eminent domain powers. By far the best solution would be to enact a categorical ban on takings for economic development purposes. This would eliminate a significant tool of government central planning, leaving the market process freer to generate long-term growth and prosperity. South Dakota is a very good example for West Virginia to follow. Their new eminent domain law, which was enacted just weeks prior to West Virginia's, reads in its entirety:

Section 1. No county, municipality, or housing and redevelopment commission, as provided for in chapter 11-7, may acquire private property by use of eminent domain: (1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue.

Section 2. No county, municipality, or housing and redevelopment commission, as provided for in chapter 11-7, may transfer any fee interest in property acquired by the use or threat of eminent domain within seven years of acquisition to any private person, nongovernmental entity, or public-private

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<sup>25</sup> Code of West Virginia, 1931, Chapter 16, Article 18, Section 16-8-3 as amended by H.B. 4048, March 11, 2006.

business entity without first offering to sell such fee interest back to the person who originally owned the property, or such person's heirs or assigns, at current fair market value, whether the property has been improved or has remained unimproved during the interval, or at the original transfer value, whichever is less.<sup>26</sup>

Notice the conspicuously absent list of exemptions and loopholes. Such a law would be a strong signal to property owners that their investments and improvements in property would be secure from eminent domain abuse. Similarly New Mexico's legislature passed the following bill, which reads in its entirety:

The state or a local public body shall not condemn private property if the taking is to promote private or commercial development and title to the property is transferred to another private entity within five years following condemnation of the property.<sup>27</sup>

Unfortunately, New Mexico Governor Bill Richardson vetoed the bill, and New Mexico property owners are still vulnerable to *Kelo*-style takings. Governor Richardson apparently heard the calls of critics who argued that a categorical ban would preclude traditionally accepted uses for eminent domain. In fact, this was the stated reason for Governor Richardson's veto. Rather than throwing out the baby with the bathwater, these critics advocate specific procedural and economic restrictions such as: requiring governments to pay greater than fair market value; imposing waiting periods for transferring condemned property to private parties; more advance notice to property owners; and a more open and inclusive process of planning economic development. In an extensive new study, legal scholar Ilya Somin analyzes the details of such proposals and concludes:

Unfortunately, these approaches, while not wholly without merit, are unlikely to be as effective as a categorical ban. In some situations, they may even make the situation worse than it would be in their absence (2006, 30).

Short of an outright ban, policymakers can still achieve meaningful restrictions on eminent domain for economic development. For starters, the legislature can codify narrower definitions of 'public use' and 'blight.' Following the language of preeminent nineteenth century legal scholar Thomas M. Cooley, for example, the Reason Foundation suggests enacting the following definition for public use.

The term "public use" shall only mean the possession, occupation, and enjoyment of the land by the general public, or by public agencies; or the use of land for the creation or functioning of public utilities or common carriers such as a railroad, utility, or tollroad; the acquisition of property to cure a concrete harmful effect of the current use of the land, including the removal of

<sup>26</sup> "An act to restrict the use of eminent domain..." South Dakota Legislature, February 27, 2006. Online at: <http://legis.state.sd.us/sessions/2006/bills/HB1080enr.htm> (Cited January 11, 2007).

<sup>27</sup> New Mexico State Legislature, "An Act Relating to Economic Development; Restricting the use of Eminent Domain When Economic Development," H.B. 746 (Rep. Richard Cheney, sponsor)

public nuisances, structures that are beyond repair or that are unfit for human habitation or use, and the acquisition of abandoned property. The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a public use. (2007, 1)

Similar definitions for ‘public use’ have been enacted in Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, and Minnesota. Georgia has also enacted a narrower definition of ‘blight’ than its previous law. Going further, Florida has banned eminent domain takings even for eliminating blight.

But again, an outright ban on takings for economic development, without exemptions or loopholes, would be the best and strongest signal to property owners that their investments and improvements in property would be secure from eminent domain. A proposed amendment to the West Virginia State Constitution was introduced on January 23, 2007. If ratified, section nine, article three would include the following:

(b) Notwithstanding any other provision of law, the State of West Virginia, or any of its departments, divisions, agencies, commissions, corporations, boards, authorities, or other entities, or any municipality or county, or any agency, corporation, district, board, or other entity organized by or under the control of any municipality or county in the state and vested by law to any extent whatsoever with the power of eminent domain, may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity. Nothing in this amendment shall limit the exercise of eminent domain by or for the benefit of public utilities or other entities engaged in the generation, transmission, or distribution of telephone, gas, petroleum products, electricity, water, sewer, or other utility products; or services by or for the benefit of any airport authority for airport-related activities. Nothing in this amendment shall be interpreted to prohibit the state or a municipal or county governing body from exercising the power of eminent domain for the purpose of constructing, maintaining, or operating streets, roads or railroads.

(c) Property condemned pursuant to the power of eminent domain in this state, if not ever used for the purpose or purposes for which it was condemned, that is subsequently determined to be sold, shall be first offered for sale to the person or persons from whom the property was condemned, or his or her known or ascertainable heirs or assigns, at the price which was paid for the property, less such amount, if any, as the person or persons from whom the property was condemned shall show by good and sufficient documentation to be the amount of income and transaction taxes, if any, actually paid in connection therewith, and if the offer shall not be accepted within ninety days

from the date it is made, the property may be sold to any other person, but only at public sale after legal notice is given.<sup>28</sup>

The proposed amendment would enact a categorical ban on takings for private transfer and economic development purposes. This amendment reserves the use of eminent domain for ‘traditional’ uses. In addition, it also includes a clause giving property owners the right of first repurchase. The proposed constitutional amendment places a more permanent restriction on the use of eminent domain than mere legislation. In contrast to legislation with loopholes and exemptions, this amendment could not be changed easily by future legislatures, and thus places the bounds of eminent domain use in the hands of voters. An amendment limiting eminent domain would greatly increase the security of private property rights in West Virginia; therefore, policy makers should push through such an amendment.

A parallel line of reform can be pursued by local governments, which should pass resolutions upholding the importance of securing rights to private property and barring the use of eminent domain takings for economic development purposes.

Finally, the West Virginia Supreme Court of Appeals should overturn its ruling in *Charleston Urban Renewal Authority v. The Courtland Co.* (1998). Within the past two years, high courts in Michigan and Ohio have overturned their previous rulings to impose a narrower scope for economic development takings. By doing the same, the West Virginia high court can achieve an improved environment for property rights.

Leaving our statutes and precedents as they currently exist, with broad powers given to condemning authorities through accommodating exemptions and loopholes, does effectively nothing to curtail eminent domain abuse in West Virginia.

## CONCLUSION

This chapter has examined the importance of secure and well-defined property rights in a market system. We have shown that private property is vital to ensure future economic growth and prosperity in West Virginia. As presented in this chapter, private property rights entitle the owner to: 1) *use* the property as the owner sees fit, 2) *alienate* (i.e., sell) their property to new owners, and 3) *exclude* non-owners from the above rights. As discussed in Chapter 2, when private property rights are well defined and enforced, owners have control, cash flow, and transferability rights.

The benefits of secure property rights include the promotion of specialization and exchange, incentives for conservation and preservation of resources, technological innovation, entrepreneurship, capital accumulation, and investment. Private property leads to an efficient allocation of resources by supporting exchange and a system of prices that convey information. Private property is necessary for economic growth and to achieve prosperity. Government infringement through taxation, regulation, and strong eminent domain powers make private property rights less secure in West Virginia. These policies distort incentives, discourage the use of assets as collateral, and forfeit the benefits of capitalism.

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<sup>28</sup> House Joint Resolution No. 13. January 23, 2007. Online at: [http://www.legis.state.wvu.us/Bill\\_Text\\_HTML/2007\\_SESSIONS/RS/Bills/hjr13%20intr.htm](http://www.legis.state.wvu.us/Bill_Text_HTML/2007_SESSIONS/RS/Bills/hjr13%20intr.htm) (Cited January 30, 2007).

The remainder of this chapter discussed the problems associated with strong eminent domain powers and how to limit these powers for a more secure system of property rights. To restrict eminent domain for economic development, the West Virginia state legislature could codify narrow definitions for ‘public use’ and ‘blight.’ Alternatively, to best restrict eminent domain abuse and to restore a pro-growth property rights environment in the state, the state legislature should enact a categorical ban on takings for economic development purposes. When government intervention is curtailed and private property rights are made more secure, the foundations for *UNLEASHING CAPITALISM* will be present in West Virginia. Economic growth and prosperity for all West Virginians will be the result.

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