



Taxation by Eminent Domain:
The imperative to amend the Texas Constitution
for the protection of homeowners and business

by

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The website maintained by the City of New London, Connecticut greets visitors with the following message:

“[M]uch of what makes New London a great place to live can be found in its neighborhoods. Whether they live in historic homes or modern apartments, families, young professionals and seniors define a sense of community across our city.”

New London City manager Richard M. Brown delivers that message with a silver tongue, however. Neighborhoods, homes, families, senior citizens, and apartments only make city life a great place if they cannot be replaced with something that will forward economic development. Young professionals, seniors, and families in New London (and now in any U.S. city, outside of nine specific states) can only appreciate their private property until the city politicians decide to raise revenue using the power of eminent domain.

Of the approximately 15 residents displaced in New London following the controversial *Kelo* decision is Wilhelmina Dery, a woman who has lived in the same house in which she was born 87 years ago. Her husband has lived with her in that house since they were married in 1965. As a consequence of *Kelo*, the notion that New London, or any city in most states, is a great place “because of its neighborhoods” is now as false a promise as that made to Native Americans by the federal government during the 19th Century.

Through *Kelo v. City of New London*, the Supreme Court has increased the power of government to seize personal property by expanding the permissible use of eminent domain to certain new forms of economic development: homes may be seized if the

consequence of the seizure might increase revenue to a unit of government. The decision raises, beyond all precedent, the state's interest above individuals' property rights.

In short, New London's development plan promised that the city would derive increased tax revenues and more jobs through the implementation of a plan that required the use of eminent domain to seize 15 homes. A 5-4 majority of the Supreme Court saw merit in the plan, allowing New London -- and government entities across America -- a new means by which to achieve the ends of economic development, even displacing families. While eminent domain is derived from the Fifth Amendment to the U.S. Constitution, any reasonable person can only conclude that the *Kelo* decision extended a governmental power that has the potential to radically alter the balance of power in the United States to the detriment of individuals and to the benefit of government.

SANCTITY OF PRIVATE PROPERTY

Even without *Kelo*, eminent domain -- even though acknowledged in the Bill of Rights -- is government power in its rawest. In a certain respect, eminent domain is an oddity, outside the spirit of the other rights bestowed upon and guaranteed to the American people by the Bill of Rights. Comparing the Takings Clause of the Fifth Amendment to the "freedom of religion" clause in the First Amendment or the "right to keep and bear arms" clause of the Second, leads one to wonder just what the Founders' intent was. Under no other doctrine -- and where no crime has been committed -- can government so directly limit or take away such an important individual liberty: the right to own property.

The right to hold private property is a well-documented principle of the Founding Fathers. William Blackstone, whose *Commentaries on the Laws of England* shaped much of the Declaration of Independence and the Constitution, wrote that "the law of the land... postpone[s] even public necessity to the sacred and inviolable rights of private property."¹ Thomas Jefferson stated: "all power is inherent in the people... they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of press."² Thomas Paine, in *Rights of Man*, cites property, along with liberty, security, and resistance of oppression, as chief among inherent individual rights³.

Before Thomas Paine, the *Declaration of Rights of Man and of the Citizen*, a 1789 document crucial to the French Revolution, states:

"Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity."⁴

The "Public Necessity" test is a more narrow and appropriate approach to government seizure of private property than is the Takings Clause, which has been consistently broadened by the Supreme Court into a public-benefit test now benefiting one private party over another.

Given the nature of the Bill of Rights, eminent domain could never have been meant to be a means by which government could wantonly seize homes. In fact, Justice Thomas explains the appropriate interpretation of the 5th Amendment: “The Takings Clause is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever.” The Fourth Amendment protects citizens against “unreasonable search and seizure,” and the Founders’ economic and intellectual ties to the agrarian life and property must also be considered. Indeed, property ownership was once used (wrongfully) as a criterion for voting rights. It would be directly contrast to the Founders’ principled belief in the sanctity of property to have also made property ownership so tenuous. *Kelo* can only represent a departure from long-standing practice rather than a current in the same stream, even if the Fifth Amendment is strictly constructed.

EMINENT DOMAIN AS RAW GOVERNMENT POWER

Eminent domain is defined as:

the power of a governmental entity (federal, state, county or city government, school district, hospital district or other agencies) to take private real estate for public use, with or without the permission of the owner. The Fifth Amendment to the Constitution provides that "private property [may not] be taken for public use without just compensation."⁵

Two parts of this definition are important: the second word, “power,” and the phrase “with or without the permission of the owner.” If the power of government can be exercised with or without consent of the property owner, the potential for abuse is evident. Another definition of eminent domain underscores the sheer government power:

the right of the government to take property from a private owner for public use by virtue of the superior dominion of its sovereignty over all lands within its jurisdiction.⁶

“Superior dominion” and “sovereignty” speak loudly in that definition, especially since they form the very basis of the exercise of eminent domain.

The relevant portion of the Fifth Amendment to the Constitution reads: “...nor shall private property be taken for public use, without just compensation.” The critical concern is how “public use” is defined.

Keeping with the truer spirit of the Bill of Rights, “public use” had been more narrowly interpreted in Texas law than in *Kelo* and *Poletown*⁷. Texas courts have traditionally required two prerequisites in eminent domain challenges. First, the government body must prove that there is a public use under Texas law. Secondly, the government must prove that the exercise of eminent domain against property owners is necessary to advance or achieve the ostensible public use. This second idea is commonly referred to as the public necessity requirement⁸.

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Following the *Kelo* decision, however, the existing Texas and federal Public Use Clauses are insufficient. An 1888 text on eminent domain notes that the word “use,” essentially, “is from the Latin *utor*, which means ‘to use, make use of, avail one’s self of, employ, apply, enjoy, etc.’”⁹ When applied to a highway, or even a public utility, the “public use” is clear. However, the above definition of “use” means that there is no “public use” from the New London development plan. In fact, under that view of “use”, and more largely, “public use”, the exercise of eminent domain to complete the New London development plan (and many other applications of eminent domain) is unconstitutional. Eminent domain was used for roads, schools, hospitals, and rail lines (deemed, along with public utilities, as “common carriers”). These applications fall under the rubric of public use because they are open to every member of the public in one way or another. Justice Clarence Thomas, in his *Kelo* dissent, wrote that “[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has legal right to use, the property, as opposed to taking it for public purpose or necessity whatsoever.”

Years of precedent have watered down “public use” so that a less stringent standard of “public benefit” is applied. As Justice Thomas references it, the “public purposes interpretation of the Public Use Clause.” Under that interpretation, slum clearance and redevelopment, as well as the construction of prisons and schools, can occur on land seized from private owners by the government. The public “benefit” of those uses of eminent domain is still evident, although the literal public “use” may be weak, or even absent. It is the public-benefit interpretation of the Takings Clause that has been weakened further by the *Kelo* decision. Very narrow economic development interests are now considered a legitimate basis for seizure of property under a strained interpretation of public use, which gets American jurisprudence further from the intent of the Fifth Amendment.

Even Justice Stevens, writing for the majority, cites prior judicial interpretations of public use that dictate that property may not be taken from private-party A by the government to be sold or given to private-party B. Justice Stevens then unconvincingly argues that the facts of the *Kelo* case don’t amount to an A-to-B transfer. Pfizer Inc, a private company, will receive the land of approximately 15 individuals, private-property

owners, in order to build a research facility. Justice Stevens agrees with the City of New London that their development plan amounts to a public benefit.

However, compare the public benefit of a park and the public benefit from the development plan of the New London Development Corporation. A public park can be used by anyone, young or old, rich or poor, for any reasonable purpose: recreation, sporting, leisure, fitness, etc. The Pfizer research facility to be built in New London cannot be similarly accessed or used by any citizen. Any citizen of New London cannot walk into the Pfizer facilities and receive a benefit. The research conducted by Pfizer may lead to the development of new drugs, but those drugs must be purchased by consumers, to the financial benefit of Pfizer.

Other, more traditional applications of Public Use include the construction of reservoirs, flood control, schools, and highways. All of those either are directly accessible and open to all members of the public, free of additional charge, or directly benefit all members of the public. The same cannot be said of the Pfizer research facility and the overall development plan of New London. The primary beneficiaries of this use of eminent domain are Pfizer and the political leaders of New London, who achieve their narrow interest of increased government revenues. The public “benefit” is ethereal, while 15 property owners lose.

The effect of the expanded definition of public use, with its twisted notion of economic development, is a gross expansion of government power. There are many ways to define and measure economic development, but the Stevens opinion gives weight to increasing tax revenue as a justifiable rationale for the use of eminent domain.

Despite the notion that the Takings Clause is a limitation on government action, not an authorization to act, eminent domain has become a common, legitimate function of government.

LIMITS TO ECONOMIC DEVELOPMENT

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Linked to the slippage in the definition of what properly constitutes “public use,” the boundaries of “economic development” have become equally expansive and less meaningful. To his own satisfaction, Justice Stevens sees the link between government and economic development as follows: “Promoting economic development is a traditional and long accepted governmental function...”

Economic development should mean sound macroeconomic policy. Low, transparent taxes, adherence to the rule of law, predictable interpretation of regulatory requirements, access to speedy determinations in civil trials, and property rights (including intellectual), are all profoundly meaningful to economic growth. Economic development, as a sound governmental policy, also extends to certifiable proof that the public education system

works, that the workforce is mobile and not constrained through labor restrictions preferred by unions, that crime is low, and, perhaps most importantly, that there is an efficient and ever-improving system of transportation that links deep-water ports to rail lines to airports to roads.

Unfortunately, other forms of economic development, such as those touted by Justice Stevens, are typically feeble and without long-term or widespread benefit. While the Texas Film Commission would be hard-pressed to substantiate that its existence has led film producers to work in Texas, even worse examples are the “special item support” programs in Article III of the Appropriations Act.

In the 2006-2007 State Budget, the Legislature directed \$574,611,596 to universities for “special item support”. Items included as “special” are museums, certain research centers, and economic development centers. For example, the University of Texas at El Paso will receive \$1,588,783 over the biennium to operate a “Texas Center for Economic and Enterprise Development.” Twelve Small Business Development Centers, a joint effort between the state and federal governments, receive \$16,269,904 of those special items funds, but Texas Economic Development notes that there are 56 full-assistance centers across the state.

The fact that these centers operate without performance measures or real accountability is troubling. Worse, however, is that wasteful programs such as those noted above for ostensible “economic development” purposes are precisely the types of programs that help justify dangerous forms of government economic development using of eminent domain. The misappropriation of taxpayer dollars is a serious problem that deserves examination, thought, and remedy. However, this new form of economic development is worse because it amounts to property transfers from private party A to private party B, not unlike taking tax dollars out of the pockets of one worker to create a job for another at a state university -- a civil servant. When funding an economic-development center, the government is transferring tax dollars from citizens to government administrators. When exercising eminent domain to increase tax revenues or create jobs, the government is depriving specific people of their rights.

FORMS OF ECONOMIC DEVELOPMENT JUSTIFIED UNDER PUBLIC USE

Economic development must certainly mean something more than government grants to universities and something less desultory than taking one person’s property and giving it to another. Under a more sensible view of the Takings Clause, economic development has a broader, more useful purpose. For instance, a port such as the Port of Houston is necessary to economic development in the truest sense because it has a far-reaching economic impact. The existence of the Port allows goods to be received and shipped between Houston and the world. The state as a whole benefits from the existence and continued operation of the Port while also enhancing the economic strength of the entire nation. A port is a more fitting exercise of eminent domain.

Additionally, the location of a port, unlike certain questionable projects (e.g., stadiums) justified under the rubric of “public use,” are constrained by geography and engineering. It really doesn’t matter where Houston’s Reliant Stadium is located; however, it is absolutely necessary to construct, deepen, and widen the Port of Houston in a very specific location.

The Port of Houston, the Erie Canal, and the St. Lawrence Seaway are precisely the types of projects the leaders of a new nation had in mind as they attempted to move from an agrarian nation to compete with international trading leaders and world economic powers such as the Dutch, British, and French. The imperative to have large, numerous, and safe water passages from the interior of the American continent to its ports along the eastern seaboard -- to expedite transport of American goods to Europe, for example -- was paramount for the young nation to grow. That remains true today.

Under the *Kelo* construct, increased tax revenue is now synonymous with economic development.

Fundamentally, however, the Port of Houston creates jobs without playing favorites. It is vital to the economy without the state picking winners and losers, as if appointed judges and city politicians have a better sense of what types of companies ought to be given preference in the marketplace. A myriad of companies may access the Port of Houston: it is a public use with a public benefit. Only Pfizer directly benefits under the *Kelo* construct: there is no public use and no public benefit.

As it is, the New London Development Corporation (NLDC) offers other incentives to businesses, including government-sanctioned loans, tax credits, and special zoning designations. These tools should be sufficient for any government to attract, retain, and expand businesses without also seizing homes for the benefit of a single company. Yet, in this case, only Pfizer directly benefited from the government’s superior dominion of its sovereignty over all lands.

Under the *Kelo* construct, increased tax revenue is now synonymous with economic development. Increasing tax revenue, in and of itself, is not a paramount economic goal. Economic development, if successful, can achieve that end. But that is not the primary or even secondary objective of economic development. The first is to build or maintain a robust economy for the direct benefit of the labor force residing in a geographic area. The second is to create a spillover effect. For example, the new Toyota facility drawn to San Antonio partly because of a Texas Enterprise Fund grant will create jobs in other industries such as car washes, dry cleaners, and gardening simply because of the increased population and increased jobs in the area. A new auto plant generates revenue; more dry cleaners generate revenue. Only by acting in the interests of the common good can political economic-development plans benefit the labor force in general and, perhaps, reduce the ranks of the unemployed. Whether the plan increases revenue is inconsequential to the common good, and the intent of the Takings Clause.

TAXATION BY EMINENT DOMAIN

While there must be clear limits to government-sponsored economic development, *Kelo* taints legitimate economic development because the city leaders needed (wanted) more revenue and used eminent domain to achieve that end even though there are other, accepted means by which to raise revenue. If a crucial city service such as police protection needs additional funding, the city could have raised an existing tax rate. A new tax could be levied. A bond could be issued. All of those measures would be transparent to the public, though subject to the approval of voters. In the event of a real shortfall that would have hampered the completion of a necessary city service (e.g., wastewater treatment or garbage collection), the public would likely agree to an increase in taxes. Instead, the Supreme Court has granted the power of taxation by eminent domain. The 15 homeowners displaced by New London pay (or have paid) taxes: a state income tax, state and local sales taxes, and property taxes. But those revenues were insufficient as far as city leaders were concerned, and justified seizing their property.

Property taxes are assessed by the value of the property and any improvements made to that property. The City of New London decided that certain individuals' property should be improved -- not to their benefit, as it would be through the addition of nearby parkland or better roads, for example -- but to the government's benefit. With the New London Development Plan, the value of that property increases, which boosts city tax revenue. Although the majority opinion in *Kelo* cites the economic woes of New London, the case for increased tax revenue is never made or questioned. Without clear justification of the need for higher revenue and the lack of supportable evidence that the revenue could not have been raised by other means, it must be assumed that the revenue simply fills the government coffers to increase the prestige of local politicians. Taxation by eminent domain became a dishonest, opaque power given to government by a 5-4 majority of the U.S. Supreme Court.

“Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” – Justice O’Connor

Dissents by Justice O’Connor and Justice Thomas champion a less powerful role of government and note the other problems inherent in the majority opinion. Justice O’Connor, in defense of individual rights, writes: “...who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” Armed with a development plan and claims that the plan will lead to increased tax revenue and/or new jobs, a city can now shift private property from one owner to another just as Justice O’Connor insinuates.

Unfortunately, if a citizen attempted to maximize the use of his property, as New London is maximizing the use of previously private property of 15 individuals, he would fail due to government regulation. A home in a residential neighborhood could have many uses.

The property owner could add a pool in the back and charge a fee to those who wish to use it, or utilize his garage to make car repair, change oil, and sell tires. The government wouldn't allow that in a residential area, though. Government regulations (government power) prevent the maximization of private property use. However, if a government determines that property can be put to better use, either to drive up tax revenues or create jobs, the government can punish the homeowner's under-realized property use. The notion of private property is all but dead with the combination of zoning laws and eminent domain for taxation under the guise of economic development.

Justice Thomas takes that point even further: "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities." The *Kelo* dissents note that eminent domain used for economic development is bound to form a strong union between government and those with the money to influence government. That union, Justice Thomas notes, will come at the detriment to the poor and the politically weak.

In *Robin Hood in Reverse: The Case Against Economic Development Takings*, Ilya Somin, professor at the George Mason University School of Law, argues: "[Economic development] takings are usually the product of collusion between large and powerful interests and government officials against comparatively powerless local residents. They generally produce far more costs than benefits."¹⁰ That collusion is facilitated by the Supreme Court decision in *Kelo*, to the detriment of the property owner. The *Kelo* decision follows not only a slowly and incrementally expanded definition of the Public Use Clause, but can also be attributed to increased government attempts to promote economic development under new and very costly pretexts.

Another important question arises from this decision. Once the City of New London finalizes its development plan, after using eminent domain to clear out private property owners, it will have given Pfizer a specific benefit. If New London later declines to exercise eminent domain at the request of another private entity that can make a case for increased tax revenue and increased jobs, can that private entity sue the city to compel eminent domain? We know this much: individuals are given due process in the courts to prevent the exercise of eminent domain. Now that eminent domain may be utilized to directly benefit private party B at the detriment to private party A, it follows logically that a business could sue the city for deprived opportunities.

THE SLIDE TOWARD SOCIALISM

The *Kelo* decision is a step toward the abolition of private property.

As previously noted, Justice Thomas states that “[t]he Takings Clause is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever.” Judicial precedent has led to years of slowly watered-down interpretations of the Takings Clause, however, until we arrive at the *Kelo* decision, a gross expansion of government power.

The Takings Clause requires “just compensation” to the individuals whose property is taken. That has been interpreted, however, to mean that the government determines a value of the property (what a buyer might pay in the market for the property). That value does not include legal costs, moving costs, or any punitive damages to ease the pain of forced relocation. Justice Thomas argues the compensation received: “So-called ‘urban renewal’ programs provide some compensation for the properties they take, but no compensation is possible for the *subjective value* of these lands to the individuals displaced.” (Emphasis added)

Intellectually, the *Kelo* decision is a first cousin to socialism: private property becomes collective property when an economic interest or obscure government interest can be argued. Socialist theorists argue that in allowing the government to seize one person’s property following a government determination that the property can be better used to increase government revenue, the Supreme Court puts the needs of the state ahead of the rights of individuals.

Justice Robert Young, Jr. of the Michigan Supreme Court, prior to the *Kelo* decision, notes the slippery slope that can begin with expanded definitions of public use:

“[The] ‘economic benefit’ rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, ‘megastore,’ or the like.”¹¹

Justice Stevens’ argument that private property can be seized for other private purposes that will benefit the government is a central tenet of socialism: as Karl Marx, the socialist philosopher, stated, “[t]he theory of Communists may be summed up in a single sentence: abolition of private property.”¹² The *Kelo* decision is a step toward the abolition of private property.

LEGISLATIVE RECOURSE

The *Kelo* decision is a travesty of jurisprudence that falls on the lap of five Supreme Court Justices and New London city officials, whose leaders sold one of their most sacred natural rights for increased tax revenue. As a consequence, it has become necessary to amend the Texas and U.S. Constitutions to narrowly define the Takings Clause to protect the inviolable property rights of individuals, and to constrain the use of raw government power against the citizens of the United States. Fortunately, *Kelo* defers to state legislators. “States are within their rights to pass additional laws restricting condemnations if residents are overly burdened,” Justice Stevens noted. (At least Justice Stevens still has some vague recollection of what the 10th Amendment implies for states’ rights).

The Institute for Justice reports that as of September 2004, nine state supreme courts have ruled that property is safe from condemnation to increase tax revenue¹³. One of those states, Michigan, has recently narrowed the definition of public use and set forth criteria for the use of eminent domain towards economic development ends.

The Michigan Supreme Court, in 2004, ruled that private property may only be seized and given to another private party under three, stringent circumstances (*County of Wayne v. Hathcock*)¹⁴. First, private property may be seized by eminent domain for “instrumentalities of commerce”, which includes highways, railroads, utilities and ports. Secondly, eminent domain may be exercised to the benefit of a private party when the public retains a measure of control over the property, as in a Michigan case in which eminent domain was used to construct a gas pipeline; by regulation, the public maintained some control over the property. Finally, private property may be transferred to another private entity when the seizure itself (not necessarily the subsequent use of the property), is in the public interest. This final application is manifested in slum clearances that were alleged necessary for the public health and safety. Justice Robert P. Young, Jr. of the Michigan Supreme Court, and the majority for which he writes, notes that:

“[T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.”

Although the three constitutional applications of private-benefit eminent domain can and should be argued, the Michigan high court should be lauded for defining and limiting the use of eminent domain.

The Texas Supreme Court, however, is not one of the nine state high courts to protect private property. Our Code and Constitution require amendments. Now that cities are empowered by the *Kelo* decision, a Constitutional amendment takes high priority. Senator Robert Deuell and Representative Frank Corte, Jr., have filed legislation (SJR 10

and HJR 19, 79th First Called Session) to constrain eminent domain. Additionally, Senator Kyle Janek has filed a similar amendment (SJR 9, 79th First Called Session).

The Texas Takings Clause found in Article I, Section 17 of the Texas Constitution is just as vague as the federal Takings Clause:

“No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made.”

While there must be enhanced protection of property rights, all three proposals, as drafted, share a fundamental flaw: they limit the use of eminent domain for economic development, with potentially adverse consequences for the Texas economy.

SJR 10 precludes political subdivisions from using eminent domain primarily for economic development. The resolution reads:

A political subdivision of this state may not take private property through the use of the power of eminent domain if a primary purpose of the taking is for economic development.

SJR 9, filed by Senator Kyle Janek, adds one line to the Texas Takings Clause:

“Public use does not include economic development.”

RECOMMENDATIONS FOR ACTION

The issue at stake in *Kelo* is not economic development but what constitutes “public use,” and “just [or adequate] compensation” for the taking. The fact that New London had an economic development plan that led to the ruling at issue is secondary to the lack of concrete definitions of public use and adequate compensation in the Texas Constitution.

The terms “public use” and “adequate compensation” require more-refined definitions.

Because ports exist primarily for economic purposes, an unintended consequence of the proposals might be to limit the ability of Texas ports, including airports, to expand. The amendment might also impact transportation. For example, the Office of the Governor issued a press release on January 28, 2002 regarding Governor Perry’s “Trans-Texas Corridor” plan. Among its justifications is to “significantly improve opportunities for economic development and job creation in Texas.” As it stands, Trans-Texas Corridor conceivably could be stopped if SJR 9 passes; it could certainly be challenged if SJR 10/HJR 19 were to pass as drafted.

An additional problem with the wording of SJR 10 is that because it uses the terms “primary purpose,” nefarious politicians would claim that their project is not “primarily” for economic development. It would be tempting for local political leaders to claim that a taking is for a “public use” while really being to enhance tourism, such as the case in Freeport, Texas.

The terms “public use” and “adequate compensation” require more-refined definitions. A short list of what would qualify for “public use” under a takings clause might include: schools, streets, highways, parks, water reservoirs, flood control, harbors, ports, bridges, railroads, and airports. Any list more expansive than the previous example leads down the slippery slope of “public benefit.”

Additionally, “just (or adequate) compensation” should be more broadly defined to discourage units of government from making frivolous decisions about condemnations for a public use. Takings have become too easy and too affordable. It should be very expensive, for a government to take private property if property rights are to be protected. If prudence is not an inherent virtue of politics, the Texas Constitution might help impart it. Therefore, “adequate” as a basis for compensation is woefully inadequate. Justice Thomas hints at potential problems when he notes that compensation does not include the subjective value of the property. Mandating 1.5 times “fair market value” might actually arrest the growing and dangerous encroachment on private property rights by requiring units of government to thoroughly examine whether the need is real to take private property for a pet project.

CONCLUSION

In *Kelo*, the Supreme Court shirked its duty to uphold an “inviolable and sacred” right. Government power to take private property against the will of the owners is greatly expanded under this decision, and for all the wrong reasons. There are times when a government may face a real need to increase its tax revenues; but that increase should not come forcibly and not at the expense of politically weak individuals.

Justice Joseph Story (on the Bench from 1812 to 1845), notes that duty in *Commentaries on the Constitution* (1833): “personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.” Although the Court in *Kelo* acted counter to Justice Story’s ideal role, all hope is not lost for private property rights.

An amendment to the Constitution should to be presented to the voters on the November, 2005 ballot. Then the voters can decide whether they want to preserve their constitutional right to private property or bow under the weight of taxation by eminent domain.

In displacing 15 property owners, the City of New London chose higher tax revenue over liberty. The Texas Legislature has an opportunity to make a decisive statement that tax revenue is never paramount to the protection of a constitutional right.

The Texas Conservative Coalition Research Institute (TCCRI) is committed to shaping public policy through a principled approach to government.

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¹ William Blackstone, *Commentaries on the Laws of England* 134-135 (1765)

² Thomas Jefferson to John Cartwright, 1824

³ Thomas Paine, *Rights of Man*

⁴ *Declaration of Rights of Man and of the Citizen*, Approved by the National Assembly of France, August 26, 1789

⁵ <http://dictionary.law.com/default2.asp?typed=eminent+domain&type=1>

⁶ <http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=a4/a41b5398389c6e7833ed4a6369dfe8f9>

⁷ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 410 Mich. 616 (1981)

⁸ See, for example, *Bevley v. Temngasco Gas Gathering Co.*, 638 S.W.2d 118, 120 (Tex. App.—Corpus Christi 1982)

⁹ J. Lewis, *Law of Eminent Domain* §165, p. 224, n. 4 (1888)

¹⁰ Ilya Somin, *Robin Hood in Reverse: The Case against Economic Development Takings*, February 22, 2005; Cato Institute

¹¹ Justice Robert P. Young, Jr., *County of Wayne v. Hathcock*, 684 NW2d 765 (Mich. 2004)

¹² Karl Marx and Frederick Engels, *Manifesto of the Communist Party*, 1848

¹³ Institute for Justice, September 17, 2004;

http://www.ij.org/pdf_folder/private_property/national_ED_map.pdf

¹⁴ Justice Robert P. Young, Jr., *County of Wayne v. Hathcock*, 684 NW2d 765, (Mich. 2004)