

Capital Campus Massachusetts

Eminent Domain: What Should Massachusetts Do?

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The Need for Reform

- **Kelo**
 - Not an aberration
- **Problems**
- **Market Alternatives**
- **Kelo Backlash**
- **Models to Follow**
- **A Greater Challenge**



Kelo v. New London

- 2005 Supreme Court 5-4 decision
- Transfer from Susette Kelo to another private owner
 - For “public purpose” of increasing the tax base
 - New private owner not even identified



Kelo Is Not Unusual

- **Berman v. Parker (1954)**
 - “Blighted areas” in Washington D.C.
 - Department store
 - Not structurally unsound or dangerous
 - “Just Compensation”
- **Poletown Neighborhood v. Detroit (1981)**
 - 1,000 homes and 600 businesses
 - Transferred to GM
 - Jobs, income, and tax revenue



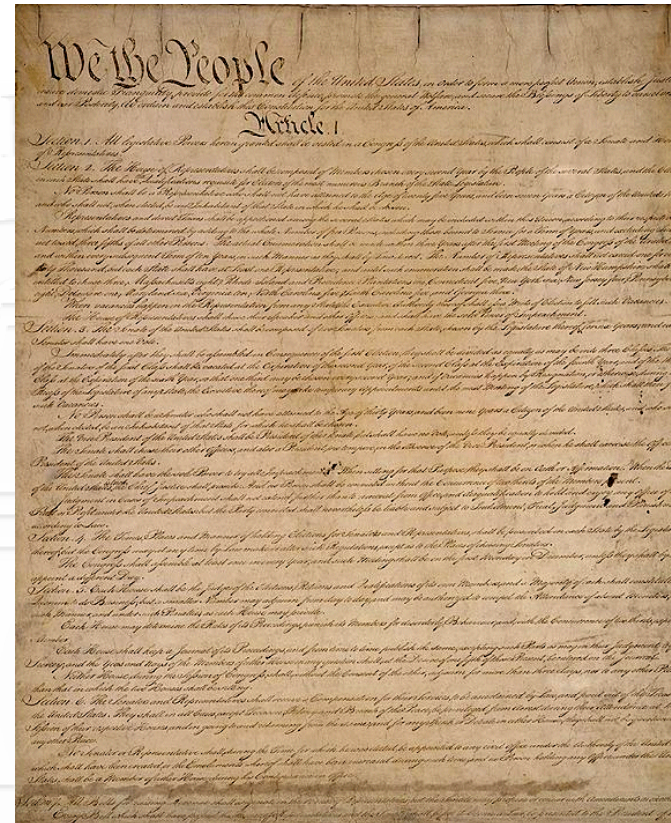
Abuse Across the U.S.

- **5,783 new eminent domain uses in the year following Kelo**
 - 10,282 in the five years prior
- **“Blighted”**
 - Los Angeles, Hollywood and Vine businesses
 - Lack of parking
 - Long Branch N.J., ocean front homes
- **Against the “big guy” too**
 - Hercules and Wal-Mart



Property Rights

- Public backlash
- What governments are supposed to do



Identifying Beneficiaries

- **Other residents?**
 - How spent
 - Incentives
 - Services
 - Development?
- **New owners**
 - Market value
 - Outsiders
- **Government officials**



Promoting Development?

- **Rockville Mall (1972)**
 - Vacancy, government occupancy, demolition
- **St. Louis Pruitt Housing (1956)**
 - Crime, vandals, demolition
- **Private development makes mistakes too**
 - But they hurt themselves not others
 - Error correction process

“Just Compensation”

- **Fair Market Value**
 - Under compensates
- **Underpaying**
 - New assembled value
- **Overpaying**
 - Holdouts and litigation



Long-Run: Weakened Property Rights

- **Redevelopment market process**
 - **Buying before an area “turns”**
 - Killing rewards but still penalizing losses
- **Incentive for upkeep**
- **Real estate is a long term investment**
 - **Need for security**
- **Overwhelming evidence on property rights and prosperity**



“Need” for Eminent Domain

- **Hold Out Problems**
 - In the limit
 - Incentive to ever undertake development
- **Deal with Blight?**



Dealing With Holdouts

- **Real estate holding companies**
 - No announcement of plans
- **Contingent offers**
 - Bonuses if all assembled
- **These can work on very large scale projects**



Disney World

47 square miles of contiguous property



Kelo Backlash

- **News explosion**
 - 4 times as many stories
- **Business response**
 - BB&T
- **Amusing**
 - Lost Liberty Hotel
- **Legislative**

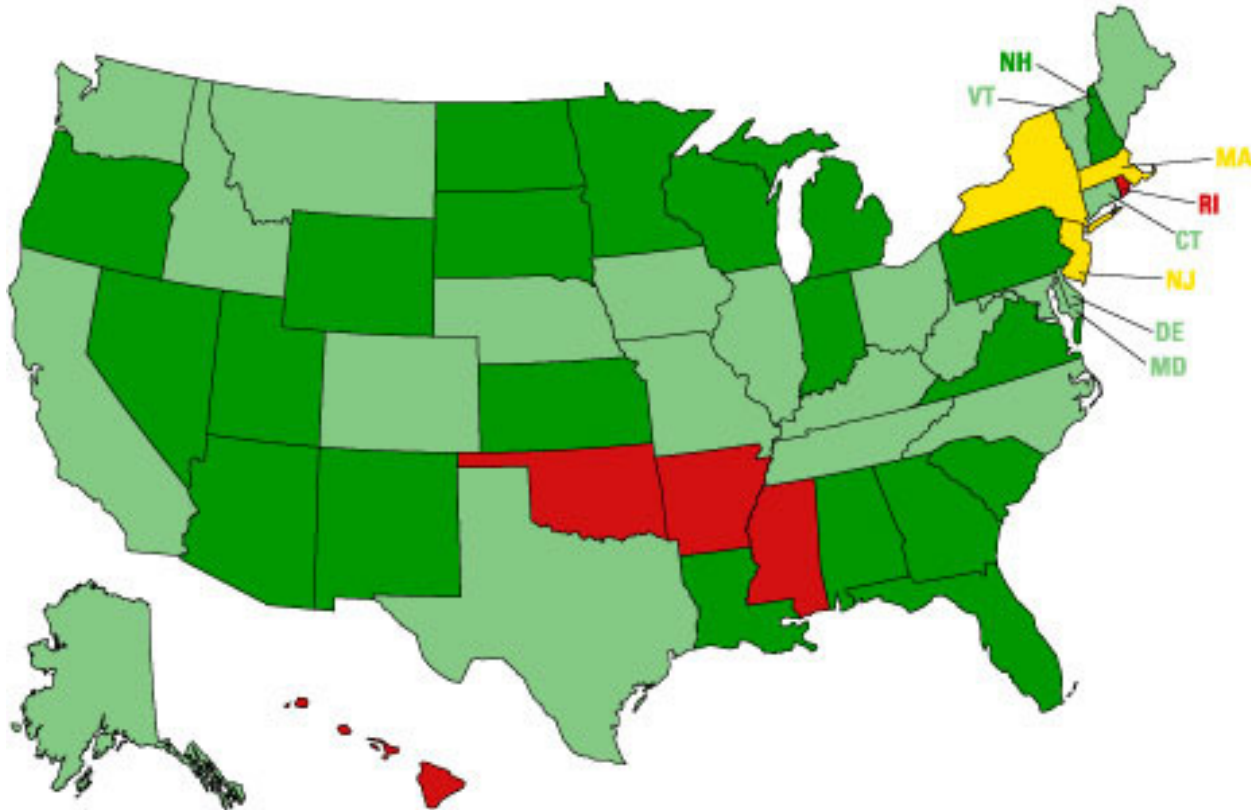
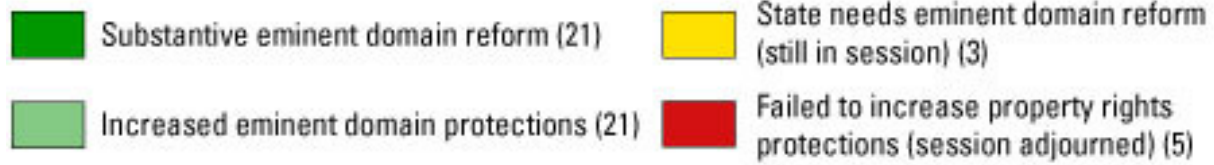


New Legal Reforms

- **Kelo ruling explicitly recognized that states could adopt additional limitations on eminent domain**
- **41 states have passed some kind of reform in response to Kelo**
- **Many of these are largely symbolic**
 - **38% favor loopholes, exemptions and vague definitions of public use and blight over meaningful reform (Lopez 2007)**
- **Castle Coalition 50 State Report Card**



Eminent Domain Legislation Status Since *Kelo*



Source: Castle Coalition www.CastleCoalition.org

Updated: July 9, 2007

5 Alabama	.B+	30 Montana	.D
6 Alaska	.D	31 Nebraska	.D+
7 Arizona	.B+	32 Nevada	.B+
8 Arkansas	.F	33 New Hampshire	.B+
9 California	.D-	34 New Jersey	.F
10 Colorado	.C	35 New Mexico	.A-
11 Connecticut	.D	36 New York	.F
12 Delaware	.D-	37 North Carolina	.C-
13 Florida	.A	38 North Dakota	.A
14 Georgia	.B+	39 Ohio	.D
15 Hawaii	.F	40 Oklahoma	.F
16 Idaho	.D+	41 Oregon	.B+
17 Illinois	.D+	42 Pennsylvania	.B-
18 Indiana	.B	43 Rhode Island	.F
19 Iowa	.B-	44 South Carolina	.B+
20 Kansas	.B	45 South Dakota	.A
21 Kentucky	.D+	46 Tennessee	.D-
22 Louisiana	.B	47 Texas	.C-
23 Maine	.D+	48 Utah	.B
24 Maryland	.D	49 Vermont	.D-
25 Massachusetts	.F	50 Virginia	.B+
26 Michigan	.A-	51 Washington	.C-
27 Minnesota	.B-	52 West Virginia	.C-
28 Mississippi	.F	53 Wisconsin	.C+
29 Missouri	.D	54 Wyoming	.B



Misguided Reforms

- **2005 Boston Globe (Frug and Barron)**
 - **Primary public purpose vs. incidental**
 - **Not solely fiscal purpose, part of a comprehensive plan**
 - **Demonstrate full-scale financial analysis**
 - **Neighborhood participation in planning process**
 - **Requiring “good faith” dealing prior to taking**



South Dakota

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 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.**



New Hampshire

- **“Public use shall not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities.”**
- **Still leaves ability to use for blight**
 - **Property by property basis**
 - **“Menace to health and safety.”**
- **Also a constitutional amendment:**
 - **“No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”**



Massachusetts

- **Law should be broad and clearly prohibit eminent domain for all private transfer**
- **Follow South Dakota**
- **No exemptions and loopholes**



What about Public Purpose

- **All of the same problems apply**
 - Just compensation
 - Stability of property rights
 - Promoting development?
- **Roads can be built without it**
 - Dulles Toll Road
- **Holdout problem is because of other policies**
- **What to do?**
 - Radical (and right)
 - Marginal



Conclusion

- **Kelo decision leaves property rights insecure and harms development**
- **Massachusetts is behind the curve**
- **Legislation needs to be meaningful**
- **Eminent Domain has no place in a modern liberal society**
 - **It should be curtailed as much as possible**
 - **Ideally, eliminated altogether**

