RIGHTING PROPERTY WRONGS

Proposition 90 and California property rights

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INTRODUCTION:
A PROPERTY RIGHTS REBELLION

On the November 7, 2006 ballot, California voters will have a chance to vote on the Protect Our Homes Initiative, Proposition 90, which would include significant restrictions on the ability of governments to use eminent domain for economic development purposes and to pass regulations that limit property rights. Why did Prop. 90 get on the ballot, and do California property owners really need its protections?

The story starts last summer, with a U.S. Supreme Court decision in a Connecticut eminent domain case.

For the small but committed group of activists dedicated to eminent domain reforms, the U.S. Supreme Court's June 23, 2005 decision in *Kelo v. the City of New London* (Connecticut) seemed like the darkest day of their long battle. Property rights in the United States were vastly eroded after the high court, in a 5-to-4 ruling, declared that local governments can take property from individual owners and give it to other private owners. The justices ruled that it's not the court's job to "second-guess" cities, declaring that the Fifth Amendment's requirement that takings be for a "public use" had long been a dead letter. "[W]hile the city is not planning to open the condemned land … to use by the general public," the court ruled, "this court long ago rejected any literal requirement that condemned property be put into use for … the public."[1]

The eminent domain wars, which had gone on with little notice from the general public, seemed over. City governments, municipal organizations, bond dealers, and developers who benefit from eminent domain and redevelopment using eminent domain found relief in the ruling. It was business as usual—cities could use the power to transfer properties from Peter to Paul in order to improve their tax base, spur economic development, or clean up whatever cities deemed "blighted." The long slippery slope—a succession of court cases this century that extended government's ability to take over property—seemed to have hit its lowest point.

Yet something unexpected happened as the court tried to put the Fifth Amendment in the dustbin. The public got riled. Before *Kelo*, the energy for reform came largely from homeowners who had experienced the sting of eminent domain and from a relatively small number of libertarian-oriented public officials, such as Orange County Supervisor Chris Norby, who founded Municipal Officials for Redevelopment Reform (MORR).[2] After *Kelo*, a broad base of Americans and a wider base of officials took notice. At a 2006 MORR conference in Burbank, State Senator Tom McClintock, a conservative Republican and longtime advocate for eminent domain reform, compared property rights in America to a rotting porch. People walk by the porch every day and don't notice its crumbling foundation. Only after the rot causes the porch to collapse do people turn their heads. The *Kelo* decision, he argued, was the property rights equivalent of the porch's collapse. It's noteworthy that Senator McClintock's sentiments were forcefully echoed at the conference by U.S. Representative Maxine Waters, a Los Angeles Democrat whose political views otherwise have little in common with those of Senator McClintock.

Although Republican legislators have been far more apt to push reform than their Democratic counterparts, this situation revealed the degree to which

ordinary Americans, liberal and conservative, had become united on the issue. Polls showed 90 percent of Americans favoring reform.[3]

Suddenly, the arcane doctrine of eminent domain became well known and avidly discussed throughout the country. Within months, the groups that scored a victory at the high court were on the defensive. "My life hasn't been the same since June 23, 2005," California Redevelopment Association President John F. Shirey told the *New York Times* in February.[4] "I've had to spend practically full-time dealing with this issue and trying to get people to understand that the Supreme Court decision didn't change anything in California law." In the previous month, the *Times* had featured an article quoting developers' complaints under the headline: "Developers Can't Imagine a World Without Eminent Domain."[5]

Actually, many Americans took the court at its word, although the justices were probably surprised by what the public and state legislatures embraced. In the majority opinion in *Kelo*, the justices wrote: "We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline."[6]

And so states, localities, and even state courts reacted to *Kelo*. The Institute for Justice, which argued the case before the Supreme Court, reports that in the year following the decision, 30 states enacted legislation that reforms eminent domain.[7] Much of the legislation, unfortunately, will do little to combat abuse of eminent domain because the laws include a broad loophole that allows cities to take "blighted" property (more on this point later in this booklet).

The House passed legislation that prevents cities from using federal funds for projects that allow the use of eminent domain, but it has been bottled up in the Senate. President George W. Bush signed an executive order that forbids federal agencies from using eminent domain to transfer properties from one

private owner to another—a useful measure, but chiefly a symbolic one. Many localities are also taking up the issue. For instance, Orange County, California, overwhelmingly passed Measure A in the June 2006 primary, which forbids the county government (not the cities within the county) from using eminent domain for private uses.[8] In November, cities including Newport Beach will consider similar measures.[9] In the most significant court ruling since *Kelo*, a frequently divided Ohio Supreme Court ruled unanimously in August that the city of Norwood could not use eminent domain for economic development purposes. In a decision that reads like a point-by-point rebuttal to *Kelo*, the justices described private property as "an original and fundamental right, existing anterior to the formation of the government itself." The court affirmed that it is the role of the courts to review whether localities have abused fundamental rights in the taking of property. "[W]e have never found economic benefits alone to be a sufficient public use for a valid taking," it ruled. "We decline to do so now."[10]

Across the country, 11 states are considering eminent domain-related ballot initiatives in November. Several of these initiatives are largely the work of a group called Americans for Limited Government, funded by the New York-based developer and political activist Howie Rich. He contributed $1.5 million to gather signatures for the measure in California and another $1 million for the campaign, in addition to the broad base of small donors. "I think California often leads the nation," Rich told the *Capitol Weekly*. "It is the most populous state, and it is very important to us that property rights be restored there."[11]

Sensing the seismic shift in public sentiment with regard to eminent domain, the various organizations opposed to Prop. 90 have conceded that reform is needed. They have therefore focused their attention on the most controversial section of Prop. 90, which deals with regulatory takings.

This booklet will look at the reasons reform is necessary, will deal specifically with the language in Prop. 90, and will address the objections—most weak, but one serious—that have been raised by the opponents of the initiative. It will become quickly apparent that Prop. 90 is a solid, albeit imperfect, vehicle for restoring rights that have been seriously eroded in California.

FIVE REASONS REFORM IS NEEDED

Reason #1:
Eminent domain abuse is rampant in California.

When the California Redevelopment Association's John Shirey told the *New York Times* that nothing has changed since the *Kelo* decision, he was strictly speaking correct. The Supreme Court did not find in the Constitution's penumbra some inherent "right" of governments to use eminent domain for economic development. It simply upheld the way things had been done for years. But even in California, which imposes a tougher standard on cities than Connecticut, the situation has been bleak for property owners. In other words, the status quo hasn't really changed, but the status quo is terrible for the state's property owners.

City governments have routinely used eminent domain throughout the state — not just to build highways, or even to clean up supposedly blighted neighborhoods, but to increase tax revenues for city government. That issue is ultimately what *Kelo* was all about. New London officials wanted to clear away a settled neighborhood of well-kept historic homes, many of which had been in the same families for generations, to make way for new commercial and residential developments that promised to bring a larger amount of money into the city's coffers. During oral arguments before the Supreme Court, an attorney for New London's quasi-public development corporation said that he believed it would be acceptable for the city to use eminent domain to replace a Motel 6 with a more upscale and economically beneficial Ritz-Carlton Hotel.[12]

Although some prominent eminent domain battles nationwide have been fought over slum clearance and urban renewal, in California these issues almost always surround tax generation. Cities feel pressed for cash, and one cent on every dollar of taxable sales goes to the city's discretionary budget. So the incentive for cities is to expand the amount of retail businesses and hotels in the community to pad their budgets. The power of eminent domain allows municipalities to help big-box stores, auto malls, hotel chains, and shopping center developers acquire the necessary tracts to create these lucrative, tax-generating projects. Obviously, cities that more aggressively pursue this tend to be more successful at luring such businesses.

Under California redevelopment law, city agencies can declare large sections of their city blighted. Once those areas are included in a redevelopment area, officials can float debt to fund improvements in the area, and begin collecting what is known as tax increment financing (TIF). TIF refers to the increase in property taxes that is realized after the area is categorized as such a zone. If an area, say, filled with mom-and-pop businesses, is cleared away to make room for a Costco, the increase in tax revenues is enormous. The new dollars go to pay off debt and improvements in the redevelopment area, and in turn, cities collect extensive sales tax revenues from the new shopping area. The routine nature of this calculus has for years escaped public attention. The bottom line: California cities have a huge economic incentive to clear away areas that generate a small amount of taxes and transfer the property to developers who promise to build projects with tax potential.

As a result, the Institute for Justice reports that among the states, California is one of the worst offenders in abusing eminent domain. Often, officials will argue that they only rarely invoke it. That may be true, but one might also argue that the mugger only rarely uses the gun he has aimed at his victim's head. The ability of cities to use eminent domain dramatically changes the terms of nego-

tiation, and forces many property owners to sell their property at unfavorable terms rather than fight city hall.

This writer became interested in the subject after noticing numerous instances of eminent domain in his newspaper coverage area of Orange County. In 2002, residents of a middle-class neighborhood of about 400 homes in Garden Grove received a letter from city officials letting them know that their neighborhood was going to be included in an expanded redevelopment area, where it would be subject to eminent domain.[13] Officials denied that they had any designs on the neighborhood, but a city worker leaked to a state senator the agency's map of the neighborhood with the words "theme park" stamped on it. It was clear that Garden Grove was planning to bulldoze the neighborhood to make way for a yet-to-be-finalized theme park. Garden Grove officials had for years been using eminent domain to clear away small shopping centers, apartment buildings, and individual businesses to make way for new subsidized hotels. The goal was to grab the crumbs from the nearby Disneyland resort area in Anaheim. With the hotels underperforming financially,[14] officials decided to create a new attraction to keep the hotels full. This was an overreach even by Garden Grove standards, and the City Council voted down the plan in the face of a storm of opposition. Still, the message was sent: the city can take your home for virtually any reason.

The same year, the city of Cypress voted to use eminent domain against the Cottonwood Christian Center.[15] This large evangelical congregation assembled a large series of empty lots in the north Orange County city, going through the trouble of negotiating owner-to-owner in order to create a site for its new church and campus. The church closely respected the existing zoning, which specifically allowed for church uses. But city officials, who had ignored the property for years, grew concerned that a church would develop one of the last developable tracts in the city. Council members and staff were upfront

about the problem: churches don't pay taxes, and this site would make an excellent tax-generating facility. So they condemned the land and voted to take it by force and give it to a developer who would build a shopping center anchored by the big-box retailer Costco. After the project was temporarily halted by a federal judge on the basis of the federal Religious Land Use and Institutionalized Persons Act,[16] the city agreed to negotiate a settlement with the church that made way for a church facility and a shopping center. Again, the message struck home: cities may take whatever property they want and give it to tax-generating businesses.

Business owners in downtown Brea weren't so lucky. The city, in the mid-1990s, cleared away long-standing restaurants and shops to make way for a highly subsidized new "downtown." The new downtown Huntington Beach was built on land cleared away by eminent domain. Old downtown Anaheim was impressive in its day, before the city's redevelopment agency leveled much of it in the late 1970s. Most of these urban renewal plans were never brought to fruition, leaving a mostly vacant area of parking lots and drab government and office buildings. Such stories have been repeated throughout the state, in communities as diverse as Los Angeles, San Jose, Claremont, San Diego, and Fresno. Sometimes the projects are ambitious and attract much attention and opposition; at other times they are small and barely rate newspaper coverage. Sometimes, as the examples above show, the projects are stopped by the courts or by political opposition, but the power of the government to transfer property to select developers remains strong. Home owners, apartment owners, and small businesses know that they can be forced off their land so that cities can improve their tax base. The *Kelo* decision reminded people that this is not only wrong, but that something needs to be done to restore constitutional protections.

Reason #2:

The U.S. Constitution's Fifth Amendment, allowing takings only for public uses, after due process has been given and after just compensation has been paid, has been undermined by the courts.

The U.S. Constitution's Fifth Amendment states that no person "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." These days, throughout the country, private property is taken without normal standards of due process — a fair trial, proper notice, the opportunity to be represented by an attorney. It is often transferred to other private parties with decidedly non-public uses in mind, such as constructing shopping centers. Owners are rarely made whole financially after the taking, given that cities rarely pay "goodwill" — the value of the location, reputation, and other non-property-related aspects of a business — and property owners in every state except Florida must pay their own legal fees when they challenge a taking or challenge the amount of "just compensation" offered by the government. It is standard practice for cities to provide lowball offers to the victims of eminent domain, knowing how difficult and costly it is for the property owners to fight back.

This situation did not come about overnight. Some key legal decisions have brought property rights to this pass.

In 1896, the U.S. Supreme Court decided in *Missouri Pacific Railway v. State of Nebraska* that the Elmwood, Nebraska, transportation board violated the Constitution when it used eminent domain on behalf of a farmers'

cooperative.[17] The railroads at that time owned the grain elevators at railroad stations. Farmers argued that the railroads were overcharging and sought eminent domain to take property near the station so that the cooperative could operate its own elevator. The railroads were indeed a regulated monopoly, but the court nevertheless took the traditional Fifth Amendment view that it is not proper to take private property and give it to other private parties.

By 1923, however, the slope slipped a bit. In *Rindge Co. v. Los Angeles County,* the U.S. Supreme Court was asked whether it was constitutional for the county to build a road through what is now Malibu — even though the transparent purpose of the road was to give the public access to the lovely oceanfront property owned by the Rindge Company.[18] The road did not connect to anything, yet the court ruled that a road is an acceptable public use, and that even though the county had not given the property owners a hearing or advance notice, it had the proper authority to take private property for such uses.

The most significant eminent domain case came in 1954, in *Berman v. Parker,* a U.S. Supreme Court case that provided the foundation for the *Kelo* decision.[19] In Berman, the owner of a department store that was condemned as part of a broader, blighted area in Washington, D.C., sought to stop eminent domain proceedings because his particular property was not run-down. The notoriously liberal Warren court ruled that virtually anything goes, ruling: "If those who govern the District of Columbia decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

In 1984, in *Hawaii Housing Authority v. Midkiff,* the Supreme Court approved a Hawaiian law that allowed tenants to petition the government to take over ownership of the properties they are renting.[20] The court agreed

that promoting broader property ownership in a state where a few land owners controlled most of the land was constitutional — a sly shift from the Fifth Amendment's public "use" to the more malleable public "benefit."

Three years earlier, the Michigan Supreme Court, in its infamous Poletown decision, gave the city of Detroit free rein to knock down an entire neighborhood so that General Motors could build a Cadillac assembly plant.[21] In a foreshadowing of *Kelo*, that court ruled that the Poletown neighborhood could be destroyed, even though it was not blighted, because the economic vitality of the Detroit region depended on the new plant. That only applied to Michigan, but courts and legislatures nationwide heard the message: cities have the broadest latitude to use eminent domain. That point was reiterated in *Kelo*.

Given that the courts have allowed the Fifth Amendment's eminent domain protections to be obliterated, the most reasonable course of action for reformers is to add precise protections to the state constitutions, which is exactly what Prop. 90 is designed to accomplish.

Reason #3:
Blight requirements offer no serious protection for property owners.

"Don't worry," say groups such as the League of California Cities and the California Redevelopment Association. "California is not Connecticut. In this state, cities and other condemning agencies must find blight before using eminent domain." This is, perhaps, the weakest argument one will find in this debate. It is true that blight must be declared in California and most other

states, but the term is used so loosely that cities have a free hand in declaring what blight is. Furthermore, once such a designation is made, the property is considered "blighted" for decades, even after the area is rebuilt.

In California, the rural resort community of Mammoth Lakes declared its downtown blighted due to excessive urbanization. The city of Diamond Bar declared an area blighted based mainly on the chipping paint found on a few buildings.[22] Those two cases were so extreme that they were overturned in court, but it is costly to challenge a blight finding, and cities can usually call the shots. Vacant desert land can be deemed blighted because it is underutilized, as can a neighborhood with lower-than-average incomes — implying that half of the state could be classed under the designation. State Senator Tom McClintock jokes that under current definitions even the White House could be declared blighted.

In one case in Lancaster, California, the city declared a 99 Cents Only Store blighted so that the property could be transferred to its next-door neighbor, Costco.[23] This case was overturned by a federal judge, who noted the unreasonable nature of the designation. Both buildings were built by the same developer at the same time and were deemed to be among the finest retail establishments in the city. Yet one was declared blighted and one wasn't. This revealed the ugly truth: Blight is a legal fiction used by cities to create redevelopment areas. Sometimes the blight findings — by consultants who always manage to find the blight that their customers (the cities) are looking for — are used to justify a taking, and at other times they are used to justify the creation of a redevelopment area for the sake of supplementing taxes. For instance, almost the entire cities of Westminster and Stanton have been declared blighted and part of a redevelopment area, the goal being to snatch property taxes that would otherwise go to the county.

Newer shopping centers, 1980s-era subdivisions — if there's a will, there's a way. The Cottonwood Christian Center property discussed above was declared blighted, even though the church's plans called for a multimillion-dollar, architect-designed campus. But as it relates to eminent domain, cities invoke blight too freely. Californians, therefore, need firmer protections.

Reason #4:

Governments routinely take property by regulation, and try to get away without paying any compensation.

A "regulatory taking" is an even more noxious and common form of governmental property-rights abuse,in which the government does not itself take control of the property, but regulates away a significant amount of its value. Agencies that do this say they owe no compensation to the property owners as long as the owners retain title and some use of the property. The courts have generally sided with the government.

The best-known recent California case involved the Tahoe Regional Planning Agency, which imposed two moratoria, a total of 32 months, on development near Lake Tahoe. The U.S. Supreme Court ruled that, because the moratoria were temporary, no taking had taken place and no compensation was due. The property owners argued that the moratoria were part of a 20-year battle during which the agency had tried one means after another to keep the owners from building single-family homes on ordinary, properly zoned building lots. The result was that individuals were deprived of the value of their property over a significant portion of their lives.

Ruling in *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency,* the court majority declared that this did not constitute a taking because the agency did not take "the parcel as a whole."[24] In his dissent, Justice Clarence Thomas argued that a) partial takings do deserve compensation, and b) in this specific case, a full-fledged taking of the property's value had taken place. "No one seriously doubts that the land use regulations at issue rendered petitioners' land unsusceptible of *any* economically beneficial use," he wrote.

As governments face increasing restrictions on their ability to use eminent domain, this writer fears that they will increasingly look for other ways to take property. In the city of Brea, for instance, officials have been forthright in admitting that they want to set aside undeveloped hillsides, scattered with nearly tapped-out oil wells and a small number of rural homes, as permanent open space. This conforms to the New Urbanist vision embraced by the current city government. Officials there, ironically enough, used eminent domain to create a new downtown, and are "upzoning" areas in the central part of town to encourage higher housing densities.[25] On the outskirts of town, the city wants to keep the hillsides largely free of development — and officials are being urged to do so by members of a group called "Hills for Everybody," a powerful local lobby headed by a woman who lives in the hills and wants them to remain as they are.

The city's general plan had long allowed the development of more than 2,000 housing units on hillside areas within city limits (officials are using other means to stop development on the hills outside the city but within its "sphere of influence"). In 2001, city officials "downzoned" that number by 30 percent, meaning that owners, at the stroke of a pen, were now only allowed to build 1,685 units and receive nothing in compensation from the city. Now, with a council majority even more committed to hillside preservation, officials are trying to pass another downzoning plan.

"Now officials want to allow only a total of 103 houses on the land," it was noted in this writer's *Orange County Register* column.[26] "Three owners would be particularly hard hit, losing 95 percent of the development potential of their property. Those owners would be allowed to build 29 houses on 814 acres — an absurd limit of one house per 28 acres." Furthermore, the owners would have to pay for such a large amount of infrastructure that it would render the land useless from a development standpoint. The city has invoked the steepness of the hillsides to justify this potential taking (and a later city-sponsored engineering report suggested a slightly higher number of developable units on the site), but the real rationale can be found in the city's new general plan: "Without financial resources to purchase the properties worthy of permanent open-space status, the city must look to creative approaches."

Without legal restrictions on such creative schemes, expect more governments to use their regulatory power to take what they don't want to buy.

Reason #5:
The status quo undermines freedom, erodes the market economy, and transfers wealth from poor and middle-class people to wealthy, well-connected developers.

Too many of the arguments over eminent domain and property rights center on the issues of concern to governments and their backers: how best to "protect" the environment, how to give cities maximum flexibility in accomplishing their goals, how to provide higher tax revenues, and so forth. It's easy to forget what the Ohio Supreme Court recognized in its recent *Norwood v. Horney* decision (quoting *Bank of Toledo, 1 Ohio St. at 632*): "Government is the necessary

burden imposed on man as the only means of securing the protection of his rights. And this protection — the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property."[27]

The idea may sound shocking to many Californians, but the proper goal of government is not to create more tax revenue, ensure a better life for government workers, revive downtowns, or even clear out slums. The proper purpose of government is to protect its citizens' fundamental rights, property being one of them. And, property rights came before government — they are natural, fundamental rights "anterior to the formation of the government itself."

To allow rampant abuse of property rights, through improper uses of eminent domain or uncompensated regulatory takings, is to erode individual freedom — the ability of American citizens to pursue their lives in their own way.

Of secondary but still vital importance, the erosion of property rights harms the market economy by making property decisions subject to unpredictability and unnecessary political considerations. For instance, a front-page article in the *Los Angeles Times* compared the North Hollywood area, with its enormous redevelopment agency and power of eminent domain, against a demographically identical area in the city of Los Angeles.[28] The area without "redevelopment" grew at a far quicker rate than the area controlled by a redevelopment agency. This should come as no surprise. When people own property and have secure rights in that property, they can make long-range plans and decisions. They can invest with an eye to ten or fifteen years into the future. When private property can be taken at any time on the whim of a government official — as is the case any time a property falls within a redevelopment area — the owner cannot plan and becomes far more reluctant to make investments. This writer has talked to many property owners who have been caught in similar straits and were reluctant to embark on improvements given the political vagaries of redevelopment.

Finally, the result of the *Kelo* decision is not random. Property rights protect the weak and powerless even more than the rich and powerful who, after all, can also wield political influence. Observers of eminent domain do not find instances of wealthy land barons, hotel owners, and developers losing their property. On the contrary, the victims are typically poor and middle-class. Often, it is minority neighborhoods that are declared blighted. In the 1950s and 1960s, civil rights activists aptly referred to urban renewal plans as "Negro removal."[29] Little has changed, except that in California the victims are often recent immigrants who don't always have the wherewithal to fight back. No wonder Prop. 90 is supported by Aubry Stone, president and CEO of the California Black Chamber of Commerce. In a September 15 letter to the group's membership, Stone wrote: "The history of eminent domain — both in California and across the nation — is littered with abuses targeting communities of color."[30]

Justice Sandra Day O'Connor, in her stinging dissent to *Kelo*, summed up that point: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process.... Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."[31]

FIVE KEY WAYS THAT PROP. 90 OFFERS MEANINGFUL PROTECTIONS

Reform#1:

Limits eminent domain to public use, and defines public use in the traditional, constitutional manner.

The slow erosion of the term "public use," in favor of the virtually meaningless "public benefit," or "public purpose," has been sanctioned by the courts, so it is best fixed with clear constitutional language, such as that provided in Prop. 90: "Private property may be taken or damaged only for a stated public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. Private property may not be taken or damaged for private use."[32]

The initiative clearly outlaws the taking or damage of private property for "private use." Then, the initiative — based closely on language from legislation proposed by state Senator Tom McClintock to reform eminent domain — enunciates what public use means. That enunciation is in keeping with what the nation's Founders had in mind. In the statement of purpose, the initiative explains: "The power of eminent domain available to government in California shall be limited to projects of public use. Examples of public use projects include, but are not limited to, road construction, the creation of public parks, the creation of public facilities, land-use planning, property zoning, and actions to preserve the public health and safety."[33]

The initiative carves out an exemption, in cases where, say, a private contractor builds a tollway on behalf of a government agency: "Public use projects that the government assigns, contracts, or otherwise arranges for private entities to perform shall retain the power of eminent domain. Examples of public use projects that private entities perform include, but are not limited to, the construction and

operation of private toll roads and privately owned prison facilities."[34] And the initiative adds this definition of "public use": " 'Public use' shall have a distinct and more narrow meaning than the term 'public purpose'; its limiting effect prohibits takings expected to result in transfers to nongovernmental owners on economic development grounds, or for any other actual uses that are not public in fact, even though these uses may serve otherwise legitimate public purposes."[35]

Sometimes cities will take property through eminent domain for a public use, and then, after a period of time, sell it to a private developer. As long as that is not the government's initial intent, that situation is now considered legal. The initiative adds an important protection here. First, it requires that "property taken by eminent domain shall be owned and occupied by the condemnor, or another governmental agency utilizing the property for the stated public use by agreement with the condemnor, or may be leased to entities that are regulated by the Public Utilities Commission or any other entity that the government assigns, contracts, or arranges with to perform a public use project."[36]

But if the property taken by eminent domain "ceases to be used for the stated public use, the former owner of the property or a beneficiary or an heir … shall have the right to reacquire the property for the fair market value of the property before the property may be otherwise sold or transferred."[37]

Reform #2:
Tightens up the current definition of blight, which gives governments too much leeway in condemning property.

As discussed earlier, blight can mean whatever government agencies so choose. Many of the state legislative fixes for the eminent domain problem following the

Kelo decision leave an exemption that allows government to condemn blighted properties. Because the definition is so broad, the result is that governments need only go through a couple of hoops before taking the property, one being the production of a study detailing the purported blight.

Under the California Community Redevelopment Law, blight includes a wide range of factors. Some of the definitions deal with what most people would consider blight, such as deteriorated conditions, but others allow officials broad latitude. One blight standard is an area with irregularly shaped lots under multiple ownership that is "underutilized." So if a variety of owners have small warehouses in an area where a developer wants to locate a new shopping mall, the city can use that description to justify eminent domain. Other blight definitions under state law include "stagnant property values," "outdated and inefficient building configuration," "high business vacancies," "incompatible adjacent or nearby uses of land parcels," "lack of neighborhood businesses to serve residents," and so forth.[38] Clearly, that's a broad standard.

Some property rights advocates have complained that Prop. 90 does not adequately address the problem of blight. A cursory reading can lead to that conclusion, given that the only place that blight is mentioned is one paragraph of the actual amendment language: "Nothing in this section shall prohibit the use of condemnation powers to abate nuisances such as blight, obscenity, pornography, hazardous substances, or environmental conditions, provided those condemnations are limited to abatement of specific conditions on specific parcels."[39]

That language at first sounds as if it still allows condemnations for blighted property, i.e., business as usual. But there are two important caveats. First, this section defines blight as a specific nuisance, giving it at least arguably, a more specific new definition in the state's legal code. Constitutional language supercedes statute, so the nuisance definition would be the one that the courts

would presumably rely upon. Furthermore, the last sentence in the paragraph dealing with blight is significant: "provided those condemnations are limited to abatement of specific conditions on specific parcels."

Those who are critical of this initiative because it does not sufficiently deal with blight should reassess their position. Even in the worst-case scenario — i.e., that the current broad blight definition remains in effect after the initiative's passage — cities would have a nearly impossible task using eminent domain to redevelop large areas. They would have to condemn one property at a time based on the specific conditions on the specific parcels, rather than on the conditions of the neighborhood or the area in general. That would bring the current process to a grinding halt, whereby cities declare as blighted ever-expanding areas as a way to trap new property tax dollars. Each property would now require a separate study. After Prop. 90, cities could still use eminent domain against a terribly decrepit house but not against an entire neighborhood, unless they went through the more costly process of condemning one property at a time.

Reform #3:

Promotes due process by providing a jury trial before the taking and requiring governments to provide government appraisal information to property owners.

Oftentimes, property owners learn about a taking after it's too late to do anything about it, other than fight for a better appraisal. Redevelopment law includes strict timetables, and if, for instance, a property owner doesn't challenge a blight finding within the set period of time, that owner loses the right to challenge the finding. Property owners often delay getting an attorney until it's too late to challenge

eminent domain. In many cases, governments fail to give adequate legal notice to the property owner until it is too late to fight the taking. In one sadly typical case involving a New York church, the courts ruled that the condemning agency is not required to provide notice of condemnation to owners.[40]

Prop. 90 includes a clever fix. "In all eminent domain actions, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government and shall be entitled, at the property owner's election, to a separate and distinct determination by a superior court jury, as to whether the taking is actually for a public use."[41]

So before the government takes the property, the owner can challenge not only the level of compensation being paid, but the fundamental basis of the taking: whether it is for a legitimate public use. And that determination will be made by a jury. Furthermore, the owners must be provided with all copies of government appraisals. If Prop. 90 passes, owners will have a better chance to get their day in court.

Reform #4:

Promotes just compensation by requiring valuation to be done at the highest and best use and requiring that property owners are made whole.

The U.S. Constitution requires the payment of "just compensation," and the courts have generally interpreted that as "fair market value." The problem, of course, is that it is impossible to find a just price when one party doesn't want to sell the property to someone else. Inevitably, the "fair market" price leaves the seller in an unfair position. If you wanted to sell your house at the fair-market

value, you would immediately list it with a real estate agent. To persuade you to sell your house, in a neighborhood you like, with neighbors you know and schools you trust, a buyer would have to offer you a premium. Some people get nearly irreplaceable value from their property, explains Dana Berliner of the Institute for Justice, which litigated the *Kelo* decision before the U.S. Supreme Court.[42] She points to the example of a visually impaired person who lives in the Lakewood, Ohio, neighborhood that was targeted for demolition by city officials there. The thought of moving and learning new bus routes would be daunting to a blind person, who would no doubt require a far higher payment to make it worthwhile to do so. That's how things should work in a market economy. The right to say "no" is the ultimate form of freedom. Prop. 90 doesn't fix that situation, but it does reduce the instances in which a property owner would have to sell to the government, restricting them to legitimate public purposes, and it would force government to pay more to property owners than is currently required under state law.

Prop. 90 requires the payment of "fair market value," and provides for a jury trial to settle such matters. The initiative also states: "In all eminent domain actions, just compensation shall be defined as that sum or money necessary to place the property owner in the same position monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred."[43] Then it explains: "In all eminent domain actions, fair market value shall be defined as the highest price the property would bring on the open market."[44]

California's nonpartisan Legislative Analyst's Office (LAO) explains it this way: "The measure appears to increase the amount of money government must pay when it takes property. Under the measure, for example, government would be required to pay more than a property's fair market value if a greater

sum were necessary to place the property owner 'in the same position monetarily' as if the property had never been taken. The measure also appears to make property owners eligible for reimbursement for a wider range of costs and expenses associated with the property taking than is currently the case."[45]

Opponents of the measure argue that this provision will "drive up the cost of infrastructure projects like school, traffic relief, and flood control."[46] The LAO agrees that the measure "would increase somewhat the amount that government must pay owners to take their property."[47] The actual amounts of additional costs to government are unknown, but this provision is perfectly reasonable. Property owners are rarely made whole by the process. They must pick up their attorney's costs when they go to court to secure a higher payment for their property. Cities routinely use hardball legal tactics to take properties at the lowest possible price. This writer has seen instances where cities have offered pennies on the dollar. Ultimately, the courts will require payments that are closer to market rates, but the property owner must then pay the legal fees, so the owner is rarely left in the same financial position as before the taking.

Yes, Prop. 90 will increase the cost to government to acquire properties by force. It's only reasonable, however, that if a government acquires property for the public good, that the costs should be spread among the public — not borne mainly by one or a handful of individual property owners. In an analogy similar to the one used by Senator McClintock, if a property is valued at $500,000 and an agency only pays the owner of the property $400,000, the cost of the acquisition is still one-half million a dollars — it's just that the individual has had to pay $100,000 in costs. Prop. 90 attempts to rectify this situation. If the "public" needs a property, then the "public" needs to pay the market costs of buying it.

Here's another provision, albeit a controversial one: "If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the

government. If private property is taken for any proprietary governmental purpose, then the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken."[48] The initiative also ensures that individuals are not liable to the government for legal fees.

If government takes a developable tract to set aside as open space, the owner needs to be compensated for the land as a developable tract, not as open space. The flip side is also reasonable: If a government wants to take a property for a higher use, the owner also should be compensated based on that higher use. In economic development, in particular, cities engage in what is called "growth capture" — they wait until an area is on the upswing, declare it blighted, and use eminent domain to take the property. They then compensate the owner based on the existing land use, and transfer it to a commercial developer who will then realize a huge profit to develop the land in a new way (i.e., transforming it from a neighborhood of small houses to high-rise condominiums). Prop. 90 eliminates the use of eminent domain to benefit developers, but the same principle should hold true with government uses. On a practical note, in imposing some additional costs and burdens on governments that want to use their taking power, the initiative might make them more careful about taking private property. Even though the Constitution allows government to take property for courthouses, schools, and other genuinely public uses, that doesn't make all such takings wise. The tool of eminent domain encourages governments to use it as a first choice rather than a last resort. Again, these restrictions will add some costs to government land acquisitions. But if the cost is genuinely for the public, then it ought to be borne by the public, not by a handful of individuals.

Reform #5:

Requires the government to pay compensation for property damage, except for health and safety reasons.

This "regulatory takings" section is the most controversial part of the initiative, even among supporters of eminent domain reform. Reformers argue that including this language in Prop. 90 will arouse tougher opposition, such as from environmental and pro-rent-control organizations. That's a political question that will be rendered moot fairly soon. Certainly, people with the same goals will share different views on strategies for achieving them. It is true, though, that the measure's opponents have made this element of the initiative their target, which is no surprise. Even though many of the groups on the "no" side have shown no previous concern about eminent domain abuse, and have indeed successfully fought all five proposed eminent domain fixes that have come before the Legislature following the *Kelo* decision, their campaign now acknowledges the need for eminent domain reform. Now, they say, the regulatory taking provision is their main sticking point.

The key passage from the initiative: "Except when taken to protect public health and safety, 'damage' to private property includes government actions that result in substantial economic loss to private property. Examples of substantial loss include, but are not limited to, the down zoning of private property, the elimination of any access to private property, and limitations on the use of private air space. 'Government action' shall mean any statute, charter provision, ordinance, resolution, law, rule, or regulation."[49]

As the LAO explains, "Under current law and court rulings, government usually is required to compensate property owners for losses resulting from laws

or rules if government's action deprives the owners of virtually all beneficial use of the property."[50] The key words are "virtually all beneficial use." The owner of hillside properties in Brea mentioned earlier in this booklet has been told by the city that it can downzone his property — from one house per acre to one house per 28 acres — without paying any compensation because he will still be allowed to build *something* on it. So much of the value of land in California is based on the entitlement. If someone pays $3 million an acre for multi-family residential land (the going price in parts of Orange County) and the government then downzones it so that most of the land can only be used as open space with a handful of houses, the value might plummet to $300,000 an acre. The person who bought the land will face an enormous economic loss, but the courts rule that no compensation must be paid.

Prop. 90 would change that. As the LAO again explains, "This measure specifies that government must pay property owners if a new law or rule imposes 'substantial economic losses' on the owners."[51] The word "substantial" is crucial. It is vague, and the initiative does not specify what substantial means, but it would prevent lawsuits from being filed for minor damages. Most likely, according to the LAO, state and local governments will pass fewer regulations, "reduce the scope" of the regulations they do pass, "give property owners incentives to voluntarily carry out public objectives," and link any new rules to health or safety requirements.[52] Who could object to such a sensible outcome? In some cases, governments will be forced to pay for takings, but this goes back to a point made earlier in this booklet: If the regulation truly is for the public good, then the cost of that good ought to be spread out to the public that benefits from it, not concentrated on a handful of individual property owners.

Prop. 90 opponents argue that property owners who, for instance, own a small shopping center will use it to sue government to force officials to grant

them the right to build anything they want on that property. They say that home owners will sue their city under Prop. 90 if the council does not approve their plans to "mansionize" their home. These claims are not at all credible. Prop. 90 does not eliminate current regulations. It does not give new development rights to property owners. The bundle of rights you buy with your property is the bundle of rights you get to keep. That's the idea. If you buy land zoned at one house per acre, that's now your guarantee: land valued at one house per acre. If a city downzones it to one house per 10 acres, then you have the right to compensation for the difference between the value of the land under the zoning when you bought it and the value of the land after the council changed the zoning.

The language often is compared to language passed in Oregon in 2004 under Measure 37.[53] Oregon passed a wide-ranging land-use plan in the 1970s that deprived many owners of the rightful use of their property. Measure 37 was retroactive, giving original property owners and their heirs the opportunity to make claims for compensation based on the original downzoning of their property. Critics of the regulatory takings provision of Prop. 90 argue that California will now have to deal with hundreds of claims, as have Oregon officials. But Oregon's law is retroactive, whereas California's would be prospective. *There would be no instant backlog of lawsuits, because Prop. 90 only affects future regulations.* Making a claim in Oregon is not the same as filing a lawsuit. That law created a mechanism to right past wrongs, and created a claims system to do so. Opponents of Prop. 90 are confusing claims with lawsuits and misleading voters into thinking that California's initiative is retroactive.

CONCLUSION: ADDRESSING THE CRITICS

Prop. 90 has sparked intense debate, as would any initiative that actually plans to change the status quo. The Protect Our Homes Initiative would dramatically limit the uses of eminent domain by governments by allowing them to use this police power only for genuine public uses. It also tightens up the definition of blight. Prop. 90 would require higher payments of "just compensation" even in legitimate public uses. It would give property owners an opportunity to contest the taking in a jury trial before the property is taken. And it would require governments to pay compensation for downzoning and other regulatory takings.

Given the post-*Kelo* public sentiment, few critics want to go on record as opposing eminent domain reform. So critics have focused on regulatory takings and on perceived technical flaws of the initiative. Here's one example: The initiative states that "Unpublished eminent domain judicial opinions or orders shall be null and void." The language was apparently a reaction to an unpublished eminent domain case in Nevada. The idea of including similar language also was raised at the Legislature's Joint Committee of Redevelopment and Eminent Domain Reform on November 17, 2005, where Pasadena attorney Chris Sutton made that suggestion.[54] Critics say this is confusing. Yet, in many areas of law, the issue of unpublished opinions is controversial. For instance, the Rose Bird court decided cases outside precedent and depublished orders as a way to avoid scrutiny. This provision keeps eminent domain opinions in full view, where they can be readily quoted and scrutinized. Critics of Prop. 90 also argue that some of its language is vague. That is no doubt true, although the five-page initiative is remarkably intelligible to average voters, in a way that many voluminous initiatives are not. All initiatives in California ultimately get hashed out in the courts. There's no way around this, so this complaint strikes this writer as a minor quibble.

All initiatives also get heated debate over the size of contributions from out of state. For instance, opponents of Prop. 90 attack it for getting prime funding from a wealthy out-of-state businessman, Howie Rich. In response, supporters note that Prop. 90 has more than 6,000 individual contributors, whereas many of the "no" campaign's contributions come from developers who directly profit from redevelopment projects. Voters can make their own judgments on which scenario is more unseemly — out-of-state contributions from someone who shares the philosophical goals of the initiative and understands that changes in California often have a ripple effect nationwide, or in-state contributors who benefit financially from rampant abuse of eminent domain.

The "no" campaign's effort to depict the measure as an attack on environmental laws is specious. Current environmental laws are not affected. Regulations based on health and safety concerns, and those which do not involve takings without compensation, would not be affected. Presumably, there are ways to protect the environment without taking people's property. The "no" campaign also argues that its passage will "jeopardize funds for police, fire, and other critical local services."[55] This is a stretch. The argument is that eminent domain is used for redevelopment, and redevelopment helps boost city budgets, which then prop up public safety spending. One could more easily argue that current redevelopment policies redirect funds from traditional public services such as schools and public safety and divert those dollars toward redevelopment agencies, which use the money to subsidize some of the nation's wealthiest developers.

The "no" campaign also uses the "local control" argument, claiming that "Prop. 90 will undermine the ability of local communities and even local voters to decide what types of projects get built in their neighborhoods, the businesses that locate in a neighborhood, and how a community decides to grow."[56] Prop. 90 only affects the ability of governments to engage in takings. The initiative will not affect typical and legitimate planning. It is prospective, and not retroactive, so no current regulations would be affected. Locals would still have control over land-use and regulation, but they would no longer be allowed to abuse the Fifth Amendment. That would be an enormous improvement.

The "no" side has gained resonance with the possibility that Prop. 90 will trigger a flurry of frivolous lawsuits to deal with regulatory takings. For instance, enterprising trial attorneys have gamed California's legal system to target small businesses with shakedown lawsuits, and it would be no surprise for them to find ways to exploit a new initiative that provides the public with grounds to sue. Even some conservatives, such as Senate Minority Leader Dick Ackerman, argue that Prop. 90 may "open a Pandora's box of new lawsuits."[57]

While this concern is legitimate, and the "no" side's scenarios seem plausible, this writer believes the problem to be overstated. For starters, any health or safety regulation — the most legitimate form of government regulation — is exempt from the regulatory takings provision of the initiative. Don't forget that the loss must be substantial. The word "substantial" is not defined, so the Legislature will need to follow up with technical legislation. The initiative allows technical changes to be made at the lowest possible standard — by a simple majority vote. Almost every constitutional amendment is followed by clarifying legislation, so this is not an unusual situation. One other crucial point: There is an enormous difference between laws that encourage attorneys to sue private companies to achieve large windfalls, and ones such as Prop. 90 that empower individuals to seek redress from their government after the government passes laws that deprive them of private property.

The courts *should* give scrutiny to more property-rights related matters. Yes, court review means lawsuits, but so what? That is how individuals protect their rights in this country. Lawsuit abuse is a serious problem — but not those lawsuits designed to protect the public from the government. Other areas of the legal system, specifically the tort system, are the problem, and those problems have nothing to do with the matter addressed by Prop. 90. The majority in the *Kelo* decision ruled that it is not the court's business to second-guess legislative decisions. In the Ohio Supreme Court's decision, the justices ruled to the contrary: "Given the individual's fundamental rights in Ohio, the courts' role in reviewing eminent domain appropriations, though limited, is important in all cases."[58] Throughout the century, the courts have refused to do their job in overseeing government takings, giving undue deference to the legislative bodies that make those decisions. Justice Clarence Thomas, in his dissent in *Kelo*, found that situation absurd. He argued that courts routinely review how local governments treat the civil rights of their citizens, yet have refused to review how those govern-

ments have treated individual property rights. Prop. 90 pushes back in the direction envisioned by the Ohio court — toward stricter court scrutiny of takings.

At this writing, governments can take anyone's property and give it to someone else provided that someone else promises a new use that will bring in a higher amount of taxes than those paid by the current owner. Property owners lose a great deal of money in the process, given that governments do not need to make them financially whole. Often owners don't even get a chance to exert their due-process rights. They aren't involved until the taking has been approved by the city council. Even worse, governments can obliterate nearly the entire value of an individual's property by passing new regulations — and those governments don't need to pay a cent in compensation. There's no question that a significant fix is needed. Given that the state Legislature rejected all serious reform attempts this session (although five minor eminent domain bills were signed by the governor), a good case can be made that the initiative process is the only way to achieve reform.

Although the initiative is vague in some places, any minor flaws can easily be corrected with clarifying legislation. Critics also raise issues about the single-subject rule for state initiatives — yet the courts will surely look at whether the regulatory-takings portion of the initiative is a separate subject or, more likely, another aspect of the same subject of government takings.

Prop. 90's opponents are focusing on supposed technical flaws, but the real reason for their angst is clear: the bond dealers, developers, government organizations, and environmental groups that are fighting the initiative know that it will make their lives more difficult and less profitable as they pursue plans that trample on constitutional property-rights protections. Prop. 90 will go a long way toward righting some terrible property wrongs, and toward rebuilding rights that have been severely eroded in California.

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