Les than a month after voters in nine states approved ballot measures limiting the use of eminent domain, the conservative Cato Institute in Washington, D.C., conducted a symposium called “Property Rights on the March: Where From Here?” The fight is on, and we’re winning, was the message from the property rights crowd.

The spin went like this: Voters are fed up with the government dictating who owns property and how owners may use it.

But the view from particular states and cities is less clear. Voters in November did indeed approve eminent domain restrictions in nine states, but the new rules vary greatly from state to state. In the same election, voters in California, Washington, and Idaho rejected “regulatory takings” ballot measures that could have altered planning

**Round 3 for Eminent Domain**

An update on post-*Kelo* battles.

By Paul Shigley
practices more dramatically than the eminent domain measures did. Only Arizona voters approved a regulatory takings measure, one that also amended eminent domain laws. In several other states, courts blocked regulatory takings measures from even reaching the ballot.

"Clearly, there is a widespread public demand for reform of eminent domain. There is a desire to constrain eminent domain," says John Echeverria, executive director of the Georgetown University Environmental Law and Policy Institute. "One of the $64,000 questions is whether the eminent domain reform boom has spent itself. I just don't know the answer to that question."

Others see little reason to believe that momentum for eminent domain reform is waning, especially if voters are given a choice. Timothy Sandefur, an attorney with the Pacific Legal Foundation in Sacramento, calls November 7 "an amazing day."

"We’ve hoped to see reform from the courts, and some have refused to follow the Kelo theory," says Sandefur, author of the book Cornerstone of Liberty: Property Rights in 21st Century America. "But other courts have remained silent, and the voters have decided that they had to take reform into their own hands."

More ballot measures to come
In California, it appears certain that voters will see at least one more state ballot measure that attempts to bolster property rights claims in some fashion—and potentially limit planning options. The Howard Jarvis Taxpayers Association, an organization that has focused on reducing taxes since the 1970s, has filed with the state attorney general a proposed initiative that would prohibit use of eminent domain for the purpose of transferring property from one private entity to another. It would also strengthen regulatory takings law. If the attorney general approves, initiative supporters may begin collecting petition signatures. The Jarvis association hopes to reach the ballot in 2008.

"We don’t want private homes taken and handed over to private developers," says Jonathan Coupal, executive director of the Jarvis group. The fact that voters in so many other states approved eminent domain restrictions only strengthens the cause, he says, and reform "is coming one way or another."

Republican lawmakers in California have already introduced state constitutional amendments restricting eminent domain; if approved by the legislature, they would appear on the state ballot in 2008. Even the League of California Cities and California Redevelopment Association are considering filing their own eminent domain reform initiative, in part so that they can frame the issues in a different way.

The local government groups would like to preclude the use of eminent domain to take single-family homes, if only to remove that hammer from opponents’ tool box. In California, as in other Western states, property rights proponents combined eminent domain reform with far-reaching regulatory takings provisions into one ballot measure.

"After living through the campaign and seeing how the issues were put on the table, it certainly has given me and my board of directors pause," says Chris McKenzie, executive director of the League of California Cities. "The whole experience demonstrated to us over and over again that the public has a concern about eminent domain."

Next door in Nevada, voters will definitely see an eminent domain measure on the 2008 ballot. That is because constitutional amendments in that state require affirmative votes in consecutive general elections. Last November, voters provided initial approval for Question 2, which restricts the use of eminent domain for economic development purposes and makes a number of procedural changes that favor property owners.

In Arizona, there are preliminary discussions about a potential ballot measure that would overturn Proposition 207, which voters approved last November. The approved measure requires the government to compensate property owners whose property value is diminished by the enactment of new regulations, and prohibits the use of eminent domain for purposes of economic development.

"People are pretty unhappy with the pace of growth and the pace of development in Arizona," says Grady Gammage, a land-use lawyer and senior fellow at Arizona State University’s Morrison Institute for Public Policy. "I think people are going to be frustrated that this [Proposition 207] limits the planning tools available."

Proponents of combination eminent domain and regulatory takings measures that were
Jim LeTourneux of Yamhill County, Oregon, worries that his tree farm will be threatened by development on a nearby property—something that could happen under the provisions of Oregon's Measure 37.

blocked from ballots in Missouri, Montana, and Oklahoma during 2006 are making preliminary moves in anticipation of the 2008 elections. In all three states, courts precluded the measures from the ballot for technical reasons, such as fraudulent signature gathering. Proponents hope to cure the defects and place their initiatives before the voters. These measures all spring from a campaign financed by New York real estate investor and libertarian crusader Howard Rich.

Elsewhere, however, the prospect for further ballot measures appears dimmer. In Florida, passage of a stringent eminent domain constitutional amendment last November could make the way more difficult for a follow-up measure that restricts land-use regulations, because the "eminent domain cloak" has been removed, says Nancy Stroud, AICP, a land-use attorney in Boca Raton. The Kelo backlash provided "an easy political win for the property rights folks," she says. But, as in Arizona, Florida voters have concerns about the rapid pace of growth, so that measures limiting government's ability to manage that growth might prove unpopular.

In Idaho, the overwhelming, three-to-one defeat of a measure that combined eminent domain and regulatory takings provisions has likely killed the chances for a new ballot measure for at least a few election cycles.

"So many communities are just overwhelmed (by growth)," says Deanna Smith, administrator of the group Idaho Smart Growth. "Right now, I don't see the majority of Idahoans as concerned about property rights issues and takings issues as about growth issues."

Kelo and its aftermath

The seeds of all this election activity were planted on a June day in 2005, when the U.S. Supreme Court voted 5–4 to uphold the use of eminent domain by the Connecticut city of New London to make room for a mixed use waterfront project. In Kelo v. City of New London, the Supreme Court essentially said that economic development was a "public purpose" for which the government had the authority to acquire people's property.

Many legal scholars, economic development proponents, and planners said the Supreme Court decision did little more than affirm practices that have been in place for decades. Others said the Kelo ruling meant little because their states already had restrictions that would prevent the sort of condemnation that the New London Development Corporation employed.

Nevertheless, the Kelo decision did not play well in the popular media, where the Supreme Court was portrayed as siding with the government and a rich developer to the detriment of home owners of modest means. Public opinion polls soon showed that more than three-quarters of Americans disagreed with the Kelo ruling, and even Supreme Court Justice John Paul Stevens, who wrote the Kelo decision, said during a speech a few months later that he might have reconsidered if he had foreseen the political firestorm touched off by the decision.

After years of making limited progress in the courts, property rights backers saw a political winner and seized on public sentiment. They pushed eminent domain reforms in nearly every state and in Congress. By the time state legislatures had concluded their 2006 sessions, 35 states had enacted some kind of eminent domain reform, most often aimed at limiting or prohibiting the use of eminent domain for economic purposes.

Property rights advocates complained that legislative reforms fell short in some states. Thus, there was a shift to direct democracy during the fall of 2006, and the passage of nine ballot measures that altered state eminent domain laws. Nine measures were on the ballot in November and one—in Louisiana—in late September. No eminent-domain-only ballot measure failed at the polls.

At the same time, groups with ties to Howard Rich sponsored ballot measures, mostly in Western and Plains states, that sought to overhaul both eminent domain and regulatory takings laws. These "Kelo-plus" initiatives sought compensation for property owners who were impacted by land-use regulations. In the end, the measures reached voters in only four states, and only the Arizona electorate provided approval.

What it all means

For planners active in redevelopment efforts, changes in everyday practices may be necessary. In Florida, for example, Amendment 8 prohibits the transfer of private property taken by eminent domain to another private entity unless three-fifths of both houses of the state legislature pass
a law allowing the transfer. The amendment, which passed in November, will impinge on local officials' ability to assemble properties for redevelopment projects, says Stroud.

"I think it's very significant for planners, especially planners who are involved in redevelopment issues," she says. "It's going to make everything harder."

Florida has a number of very old cities, and some of them are crowded with dilapidated buildings on tiny lots. In addition, the state is crisscrossed with antiquated subdivisions drawn up during the first half of the 20th century that do not come close to meeting today's standards. Often, eminent domain is the only way to assemble usable plots of land in these downtowns or antiquated subdivisions, Stroud explains.

"It's very difficult to simply negotiate the sale of a lot. Sometimes you can't find the owner, there are multiple owners, or there is one holdout who is holding up the whole deal," Stroud says. Ultimately, redevelopment projects in Florida either will cost taxpayers more money and take longer to accomplish, or they will be abandoned, she adds.

By contrast, a measure approved by voters in New Hampshire did little more than reinforce the status quo, according to Ben Frost, the state's legislative liaison to APA's New England chapter. A 1985 New Hampshire Supreme Court decision (Merrill v. Manchester and Manchester Housing Authority) had already been interpreted to prevent condemnations for economic development purposes in non-blighted areas. A few months before the election, state lawmakers changed the term "public purpose" in eminent domain statutes to "public use" to ensure that eminent domain is not used for economic development. In Kelo, the Supreme Court found that economic development in New London was a public purpose.

Approved by New Hampshire voters last November, Question I essentially placed in the state constitution similar protections for property owners. "In the end, I can't really say that much will change in New Hampshire," says Frost, who works for the group New Hampshire Housing. "As always, though, time will tell."

Planners in Idaho and California took heart in voters' rejection of Kelo-plus measures, while planners in Washington were happy to see voters reject a regulatory takings measure—fashioned after Oregon's Measure 37—that would have threatened the state's growth management policies. In all three of those states, advocates of good planning lined up support from the business community to defeat ballot measures that might have held some appeal for business and development interests.

In Idaho, for example, environmentalists and smart growth proponents convinced the powerful Idaho Association of Commerce and Industry that the Howard Rich-sponsored Proposition 2 would undermine development regulations on which everyone relies, and would impinge on the local control that Idaho residents dearly value.

"We worked very hard to have certain specific types of messengers," explains Smith, of Idaho Smart Growth. "We had a lot of farmers and ranchers in the front. We also used a lot of business leaders."

The election result was satisfying, says Patricia Nilsson, AICP, manager of comprehensive planning for the city of Boise. "There seemed to be some support for the system we have now," she says.

In Washington, as in Idaho, a number of respected elected officials of both parties declared their opposition to a property rights ballot measure. That was also true in California, where Gov. Arnold Schwarzenegger won reelection in a landslide—while helping to defeat the Kelo-plus Proposition 90.

John Shirey, who heads the California Redevelopment Association, says he and others who battled Proposition 90 are trying to keep together the campaign coalition, which included most major business and development groups in the state.

"We still think we need to do some eminent domain reform," says Shirey. "As to what form that's going to take, I don't know yet."

State by state
The eminent domain rules differ in every state. Here is what voters approved last November:

**Arizona**: Billed as the "Keep What You Own" initiative, Proposition 207 was the only Kelo-plus initiative to pass last November. The measure requires the government to compensate property owners whose property value is diminished by the enactment of new regulations. Proposition 207 also prohibits the use of eminent domain for the purposes of economic development, increased tax revenues, or job creation. While the eminent domain provisions of Proposition 207 are fairly clear, the regulatory takings language is somewhat ambiguous.

"It really calls into question what laws a municipality may pass," says Alan Stephenson, a planning supervisor for the city of Phoenix and vice president of legislative affairs for the Arizona Planning Association. "That's one of those things that is going to have to be interpreted by the courts over time."

The immediate upshot is that cities are requiring landowners who submit project applications to sign waivers saying the landowners will not pursue a Proposition 207 takings claim as a result of the city's project review process.

Unlike Oregon's two-year-old Measure 37, Arizona's Proposition 207 is not retroactive. The government is liable only for the effects of new regulations. So another upshot is extreme caution regarding rezoning and local general plan updates.

**Florida**: Amendment 8 is a straightforward constitutional amendment that prohibits the transfer of property taken via eminent domain to a "natural person or private entity" unless three-fifths of the state legislature approves.

Property rights proponents see approval of Amendment 8 as a major victory because it prohibits use of eminent domain to eliminate blight. They contend that public officials in
Florida have abused the blight provision to pursue whatever projects they wish. "Florida," the Pacific Legal Institute's Sandefur said after the election, "has chosen a course of respecting people's right to keep and use the land that they have honestly bought and paid for."

Georgia: HR 1306 prohibits the use of eminent domain by a local, unelected housing or development authority unless the elected governing authority approves. The measure also restricts use of eminent domain for redevelopment purposes to the elimination of harm, and provides that all use of eminent domain by counties or municipalities is limited by general law.

Michigan: Proposal 06-4 essentially codifies a 2004 Michigan Supreme Court ruling on eminent domain and imposes procedural changes.

There will continue to be some ballot activity on eminent domain, but at a lower level than last year, and there will be a little activity on regulatory takings.

In County of Wayne v. Hatchcock, the state's high court ruled that the state constitution permits the transfer of property taken by eminent domain to a new private owner in only three circumstances—when a recalcitrant property owner is holding out, when the new private owner remains "accountable" to the public, or when a "public concern" such as blight exists.

Procedurally, Proposal 06-4 requires that when a person's principal residence is taken by the government, the government must pay at least 125 percent of fair market value. Additionally, when a property is taken to eliminate blight, the government must provide "clear and convincing evidence" to support the taking, a higher standard of proof than usual.

Nevada: Question 2 amends the state constitution to say, "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." The measure would appear to prohibit even leases of portions of public projects for which eminent domain was used.

North Dakota: Initiated Constitutional Measure 2 prohibits the use of eminent domain for the purpose of transferring property to a new private owner, unless the owner is a utility or common carrier. The specific exception differentiates Initiated Measure 2 from Nevada's Question 2.

Oregon: While ballot measures in North Dakota and New Hampshire were straightforward, Oregon's Measure 39 was far more complex. The Oregon initiative prohibits the use of eminent domain to acquire a "residence, business establishment, farm or forest operation" if the government intends to convey the property to another private party. But there are exceptions.

The government could take property that is a danger to the health and safety of the community, or condemn property for utility and transportation projects. Additionally, the government could sell off timber, crops, and gravel from condemned property. And the government could lease or sell non-possessory interests in a condemned property for the purpose of financing the acquisition. This last exception appears to be a concession to public-private redevelopment projects.

Procedurally, Measure 39 permits courts to determine, independent of a public body's findings, whether the condemnation is legal. And the initiative makes the government liable for a landowner's attorneys fees if the amount of compensation awarded by the court is greater than the government's initial offer.

South Carolina: Constitutional Amendment 5 essentially restates existing case law, which prohibits the use of eminent domain for economic purposes. But the measure does permit the general assembly to allow condemnation for a private purpose to remedy blight. The state constitutional amendment also deleted provisions in state law permitting housing and redevelopment authorities in nine counties to exercise eminent domain for redevelopment.

Roger Pilon, vice president for legal affairs at the Cato Institute, says that property rights supporters are finding that they can sway voters more easily than they can convince judges.

Thus, in the states that provide for initiative and referendum, property rights advocates will pursue more ballot measures focusing on both eminent domain and regulatory takings, says Pilon, an adjunct professor of government at Georgetown University. The eminent domain arguments are easily presented because taking something from one person to give it to another "is just plain wrong," he says, and the takings arguments aren't difficult to explain, either.

But John Echeverria, the Georgetown law professor, contends that voters do not see the regulatory takings issue the same way they view eminent domain. After property owners, developers, and speculators submitted claims for billions of dollars based on Oregon's Measure 37, people in that state are wondering if they made a mistake at the ballot box in 2004, Echeverria notes.

"There will continue to be some ballot activity on eminent domain, but at a lower level than last year, and there will be a little activity on regulatory takings," Echeverria predicts. "I think the Kelo-plus agenda largely failed."

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Resources


American Planning Association 15