

MAKE EMINENT DOMAIN FAIR FOR ALL

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LAST JUNE, in *Kelo v. United States*, the Supreme Court ruled that cities can exercise the power of eminent domain to promote private economic development, even though the Constitution prohibits the government from taking private property except for a "public use." Although the decision is legally sound, it has provoked outrage, and Massachusetts legislators have joined the fray by introducing a bill to curtail eminent domain. The proposed legislation, however, would create worse problems than it solved.

People are rightly concerned that *Kelo* will give cities license to take private homes just to make wealthy developers even wealthier. But the House bill does not respond to that fear. Instead, it identifies certain places "a substandard, decadent, or blighted open area" as the only ones in which the power can be used. It may be that this new requirement given its vagueness will prove toothless. But if the bill is meant to have bite, it appears to provide protection for those living in middle-class and wealthy neighborhoods while placing no additional limits on the use of eminent domain in poor neighborhoods. In other words, the legislation seems to suggest a simple, unjust rule: If you want to treat people unfairly, make sure it's poor people. That does not mean that the right solution would be to ban eminent domain for economic development across the board. Eminent domain is a vitally important tool. It is a power that can be abused, as the painful experience in Boston's West End reminds us. But Boston is also a place where eminent domain has been used creatively. Consider the experience of the **Dudley Street Neighborhood Initiative**, which has enabled a low-income community in Roxbury to reclaim its future. The community confronted a serious problem. Absentee owners held decaying properties that stood in the way of redevelopment plans. The **initiative** lobbied the city to give it the power of eminent domain. The result of this public/private partnership has been a widely acknowledged improvement in the neighborhood.

But holdouts like the absentee owners in Roxbury can be found in upscale neighborhoods, too. New light-rail projects, waterfront redevelopment plans, and even efforts to promote affordable housing in the suburbs could all be stymied by a flat ban on the use of eminent domain for private development.

If the Legislature were serious about addressing the concerns *Kelo* raises, it would not pit rich against poor by excluding some prosperous areas from the reach of eminent domain. It would provide real protection for all Massachusetts homeowners while still enabling the government to trump holdouts. If a project would be beneficial to the public as a whole, homeowners in well-to-do neighborhoods should have no more rights to stop it than homeowners in poor ones. At the same time, if a project is a giveaway to a well-connected developer, poor communities should not bear the cost while rich ones receive protection.

State court judges have emphasized in the past that, to comply with the Massachusetts Constitution's own requirement that eminent domain be for a public use, the government must demonstrate that eminent domain will really benefit the public. New legislation could respond to that by:

Requiring, as Justice Anthony M. Kennedy suggested in his *Kelo* concurrence, that any exercise of eminent domain for economic development have a primarily public purpose rather than a merely incidental one.

Requiring the government to demonstrate the public benefit through a full-scale financial analysis that could be challenged in court.

Requiring that eminent domain not be used for a solely fiscal purpose and that it instead must be part of a comprehensive land use plan.

Requiring that the affected neighborhood have adequate participation in the planning process, a right that would be backed up by state-provided technical assistance upon the neighborhood's request.

Requiring that the state demonstrate good-faith dealing with the owners of the property targeted for taking prior to exercising the eminent domain power.

These changes would not give new rights to those who live in comfortable neighborhoods while giving nothing to those who do not. Protecting private property is important. But so, too, is ensuring equal treatment. By forgetting that principle, the proposed legislation fails in its effort to address a difficult constitutional problem the balance between private right and public need.