The U.S. Sup. Ct's Holding in Kelo v. City of New London is a Threat to Property Rights and Market Driven Land Use Decision Making in any Jurisdiction inclined to follow its flawed rationale[1]

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Two obvious points should be stated at the outset: First, U. S. Supreme Court holdings are certainly not binding anywhere beyond the United States' territorial borders; but second, such holdings are read by governments in Europe and many other parts of the world, and may well be followed, particularly if they give legitimacy to the authoritarian instincts of those governments in settings where private property rights and governmental powers are in conflict. Given the fact that such conflicts exist in many parts of the world, Kelo may well do more harm abroad than it manages to do within the United States.

The reaction to Kelo within the U.S. has been widespread and immediate– there was a national alarm and outrage that individual property rights could be negated so easily, sacrificed to large corporate interests favored by governments whenever a particular government in the name of "economic development" chose to do so. What has emerged in state after state, and in countless municipal governments within states, is a legislative repudiation of the Supreme Court's

[1] I regret not being able to attend the conference to present a more elaborate version of these remarks, and respond to questions, in person. Necessary surgery makes that impossible. My views are set out more fully in a recently published law review article, Kelo v. City of New London– Wrongly Decided And A Missed Opportunity For Principled Line Drawing With Respect To Eminent Domain Takings, 58 Me. L. Rev. 17 (2006).

reasoning.[2] This process has not yet run its full course, and to be accurate, not all of this legislation is well-conceived or well-drafted. But the intent is clear– Kelo may well impose a rule of law that will for a time govern federal eminent domain takings, but state and local governments within the United States by and large want to limit governmental powers to take private property. They do not want the concept of private property to become an illusion. They realize that the concept of private property, the right of individuals within a free market to hold and use their property as they see fit (with very few governmental intrusions on these decision making processes) has been, and remains, the strength of the society. In sum, it is not the short-term economic whims of government, but individuals who are secure in their property that produces innovation, economic growth, wealth, and long-term national well-being. Kelo undermines these truisms, and ignores 200 years of experience in the United States. It is in the process of being repudiated in the United States, and it ought not to be followed abroad.

It is also worth noting that beyond the United States the shoring up of private property rights is almost without exception the precursor to modern economic development, wealth accumulation, the growth of per capita incomes, national wealth, etc. It doesn't seem to matter whether property rights are couched in Lockean "social contract" theories or more benign "social function" theories of property, the facts speak for themselves. In western Europe (reaching back more than a century), in eastern Europe (more recently), in Asian countries (Japan, South Korea, and more recently in China), in common law countries scattered around the world (Canada, India, Australia, New Zealand), in Mexico, Brazil, and Argentina (the leading south American economies), in countless other settings– the firming up of property rights unleashes individual

[2] For an overview of state and local legislative responses to Kelo one can use Google to examine the work of the Institute for Justice, and the National Conference of State Legislatures, two national organizations that have both led and documented the widening variety of such responses.

initiative and whole economies; the absence or the shrinking of property rights seems to stultify economic growth, individual and national well-being. Look at Cuba and North Korea; contrast a myriad of African nations with what is happening in South Africa; contrast the more repressive regimes in eastern Europe and Asia with those that have expanded property rights and the rule of law.

No one is suggesting that Kelo in a stroke will produce dire consequences, but it must be seen as a step in the wrong direction– too much power is reposed in government; the case shrinks private property rights; it cuts off individual market driven choices and decisions with respect to the use of ones property. The potential risks of even small steps in this direction have been recognized by the highest courts in any number of states. These pronouncements are better models than the reasoning of Kelo. For example, Maine's highest court more than a century ago recognized that:

> "Capital is the result of foresight, intelligence, and frugality.... It is the fruit of saving. Men only save when protected in the enjoyment of their accumulations. When not so protected, one of the strongest motives to save ceases, and with the cessation of the motive, the accumulation of capital ceases. When the government is despotic, when private right is disregarded, when there is no security for and no protection of property, men will cease to accumulate, for they will not save to be robbed."[3]

Barely two years later the same court faced with another intrusion on property rights noted:

> "What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer... such portions of one's estate as they may deem expedient? ... The barbarous nations of Asia have neither industry nor capital, the result of saving, for the reason that property is without protection."[4]

More recently, Michigan's highest court, overruling its own earlier reasoning in Poletown

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[3] Opinion of the Justices, 58 Me. 590, 597 (1871).

[4] Allen v. Inhabitants of Jay, 60 Me. 124, 133-134 (1872).

Neighborhood Council v. City of Detroit,[5] (a Kelo-like case of the past, now rejected) noted:

"*Poletown's* [and Kelo's] "economic benefit" rationale would validate

[5] 304 NW 2d 455 (Mich 1981).

practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to a better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, megastore or the like."[6]

In short, Michigan's highest court will no longer allow government to indiscriminately use its power of eminent domain to assist larger private property owners to swallow up smaller private property owners. Where does such a course of conduct end? Historically, such conduct was not possible in Michigan or any other state. Poletown was an aberration that put all Michigan property rights, individual land owner decision making, wealth accumulation, at risk; it is an aberration that has now been ended. Kelo too is an aberration– an aberration of potentially larger scope; it purports to delineate the federal government's power of eminent domain; it may be followed by other nations. One can only hope that's its flawed reasoning (as briefly outlined above) will also, in time, be repudiated.

[6] County of Wayne v. Hathcock, 684 NW 2d 764 (Mich 2004).