

**A False Sense of Security:
The Potential for Eminent Domain Abuse in Washington**

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Executive Summary

In the 2005 *Kelo v. New London* decision, the U.S. Supreme Court ruled that the U.S. Constitution does not prevent state and local governments from seizing homes and small businesses and transferring them to private developers to build luxury condominiums and big-box stores. The opponents of eminent domain reform in Washington State say that *Kelo* does not apply here and that the Washington Constitution protects us from the kinds of abuse that occurred in *Kelo*. They are wrong. Unfortunately, Washington law is rife with opportunities for eminent domain abuse.

For example, here are three ways government officials may abuse eminent domain under current state law.

- Municipal officials in Washington are already attempting to declare as “blighted” perfectly fine neighborhoods for potential redevelopment.
- In Washington, the government may seize more property than it needs so long as there is some aspect of public use involved somewhere in the project. This allows a local government to become a real estate speculator with any portion of condemned property not devoted to public use.
- State and local officials may also use their eminent domain powers to deliberately target properties that are not upscale enough for their liking, even when these properties are not necessary to achieve a public use.

What’s more, condemnation determinations can take place at secret meetings where the sole notice to the property owner consists of a posting on an obscure government website. Until these aspects of Washington law are reformed, local governments can forcibly take property from citizens by abusing eminent domain as badly as New London officials did in *Kelo*.

I. Introduction

Private property is the foundation of a free society. Property rights give citizens the means to defend all their other rights from the encroachments of government or the incursions of others.

Property gives people the means to pursue their dreams and live their lives the way they choose. Private property also provides people with the ability to help others, through their time and voluntary giving. When government takes property through the abuse of its eminent domain power, it makes it harder for citizens to defend their rights, pursue their dreams or help others.

Governments may constitutionally acquire property to serve an essential public use, but officials should limit such seizures to an absolute minimum. Most people gain their property through hard work, long hours, patience, careful planning and voluntary negotiation rather than force. When government officials respect property, they respect the people who earned or created it.

On June 23, 2005, the U.S. Supreme Court issued its notorious decision in *Kelo v. City of New London, Connecticut*.¹ This decision held that the City of New London could condemn private property and transfer that property to other private entities in order to promote “economic development,” increase the city’s tax base, and meet the “diverse and always evolving needs of society.”² The decision effectively removed any federal impediment to eminent domain abuse. The public’s response to that decision was immediate, strong, and almost uniformly negative.³

Under both the U.S. and Washington constitutions, the government may only condemn property for a “public use.” Historically, public use meant things actually owned and used by the public – roads, courthouses, post offices, etc. Increasingly, particularly over the past 50 years, the definition of public use has been blurred by the courts to the point that the public use restriction has become no restriction at all.

Property is routinely transferred by force from one private person to another in order to build luxury condominiums and big-box stores. Between 1998 and 2002, the Institute for Justice found that there were more than 10,000 actual or threatened condemnations for private development across the country.⁴ After *Kelo* was decided, local governments across the United States went on an eminent domain abuse spree, even as much of the country reacted with revulsion to the Supreme Court’s decision.⁵

¹ *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

² *Id.* at 2662.

³ See *Testimony of Steven Anderson, Castle Coalition Coordinator, Institute for Justice, Before the House Subcommittee on Commerce, Trade and Consumer Protection*, 108th Cong. (2005) (available at <http://energycommerce.house.gov/108/hearings/10192005Hearing1637/Anderson.pdf>).

⁴ Dana Berliner, *Public Power, Private Gain* 2 (2003).

⁵ Dana Berliner, *Opening the Floodgates; Eminent Domain In the Post-Kelo World* 1 (2006) (noting that since the U.S. Supreme Court issued the *Kelo* decision, local governments threatened eminent domain or condemned at least 5,783 homes, businesses, churches and other properties so that they could be transferred to another private party).

Many people in Washington wondered what impact the *Kelo* decision could have here in Washington State. Some commentators argued that this decision was essentially meaningless in Washington, that we were not a *Kelo* state, and that our state constitution's protections adequately protect Washingtonians from the kind of abuse we saw in New London.⁶ These commentators are wrong.

While the Washington Constitution does contain clear and unambiguous protections for private property, these protections have been gutted by our state's judges. Many state laws provide the government with procedural cover with which to carry out eminent domain abuse. Although eminent domain abuse in this state has neither been as egregious or commonplace as it has in some other states, it has still occurred and it has done so under the very constitution and state laws municipalities, developers and their lobbyists and attorneys assure us prevent this type of abuse.⁷

What Washington citizens have now is a false sense of security, not real protections from losing their property through eminent domain abuse. The Washington Supreme Court has demonstrated that it is not interested in enforcing the Constitution as it is written. Local governments realize that our courts have no stomach for keeping them within constitutional limits, so they continue to erode our right to be secure in our homes and businesses. It is clear that to protect homes and small businesses in Washington, solutions must come from either the Legislature or the people themselves.

II. Courts and the Legislature Have Gutted Constitutional Protections for Home and Small Business Owners

The power of eminent domain is awesome, so awesome that in the early days of this country, a U.S. Supreme Court justice described it as “the despotic power.”⁸ Quite simply, it is the power to remove residents from their long-time homes and destroy small family businesses. It is a power that must be used sparingly. In order to protect property owners, the Fifth Amendment to the U.S. Constitution provides: “[N]or shall private property be taken for public use, without just compensation.”

Article I, section 16 of the Washington Constitution goes much further. It explicitly declares that:

“Private property shall not be taken for private use”

⁶ See, e.g., Hugh Spitzer, “State’s constitution, high court shields us from improper condemnation of property,” *The Tacoma News Tribune*, March 19, 2006, at Insight 1; Alan D. Copsey, *The Effect of Kelo v. City of New London in Washington State: Much Ado About Almost Nothing*, *Envtl. & Land Use Law* 3 (Nov. 2005); Sharon E. Cates, *Supreme Court Affirms Economic Redevelopment as “Public Use”*: *Kelo v. City of New London*, *Foster Pepper & Schefelman News* 4, 6 (Fall 2005) (available at http://www.foster.com/pdf/FPN_Fall2005.pdf).

⁷ Berliner, *supra* note iv, at 207-10 (discussing condemnations for private gain in Washington State).

⁸ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 307 (C.C.D.Pa. 1795).

It further declares that:

“the question of whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.”

Read together, these provisions plainly indicate that the nation’s Founders and this state’s constitutional drafters were not only wary of eminent domain, but also clearly committed to protecting private property rights.

Unfortunately, the ability to transfer property from one private owner to another under the Fifth Amendment was given ultimate endorsement in June 2005 by the Supreme Court in *Kelo*. As a result of this decision, every home, every church and every small business has lost the protection of the U.S. Constitution. According to a narrow five-four majority of the Court, the mere *possibility* that private property may be more profitable as something else is reason enough for the government to take it away. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights – an entire portion of the Federal Constitution has been erased. Under *Kelo*, economic development is the only justification a local government needs in order to take its citizens’ property.

There is one thing the Court did get right in *Kelo*, however – the justices recognized that states are free to enact their own property rights protections. States can also make sure the law that currently exists actually provides home and small business owners with the security that they can hold on to their property. Unfortunately, the courts have eroded the protections for property in the Washington Constitution. Decisions such as *Miller v. Tacoma*,⁹ *Hogue v. Port of Seattle*,¹⁰ *State ex. rel. Washington State Convention and Trade Center v. Evans*,¹¹ and recent decisions concerning the Seattle Monorail,¹² Sound Transit,¹³ and the City of Burien¹⁴ have reduced the Washington Constitution’s protections.

The Revised Code of Washington also contains numerous statutory opportunities to neutralize what protections the Washington Constitution does continue to provide. Without legislative reform, either by our elected officials or by the people themselves, Washingtonians remain at risk for eminent domain abuse.

⁹ *Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963).

¹⁰ *Hogue v. Port of Seattle*, 54 Wn.2d 799, 341 P.2d 171 (1959).

¹¹ *State ex. rel. Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998).

¹² *In re Petition of the Seattle Popular Monorail Authority*, 155 Wn.2d 612, 121 P.3d 1166 (2005).

¹³ *Cent. Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006).

¹⁴ *City of Burien v. Strobel Family Invs.*, 2006 Wash. App. LEXIS 1136 (June 12, 2006).

III. Opportunities for Eminent Domain Abuse in Washington

A. Blight: Anything the Government Says It Is

1. Washington's Blight Laws

In *Miller v. City of Tacoma*, the Washington Supreme Court held that condemning “blighted areas” for redevelopment and transfer to private entities does not violate the prohibition against private takings in Article I, section 16.

When most people think of blighted areas, they think of neighborhoods afflicted with objective, concrete problems so serious that the property itself negatively impacts the safety or health of the surrounding community. Included in this would be properties that were dilapidated, unsanitary, unsafe, vermin-infested, hazardous, vacant or abandoned. However, Washington law does not limit the definition of “blighted areas” to only threats to public health or safety. Indeed, the definition of “blighted areas” is so broad under current law that practically every neighborhood in Washington could be considered a “blighted area.” From Seattle’s posh Capitol Hill to Spokane’s middle-class neighborhoods, any group of homes can be targeted for acquisition by local governments.

Washington’s Community Renewal Law, Title 81 of Chapter 35, states that the exercise of the eminent domain power under that chapter is for a “public use” and grants to municipalities the power of condemnation for “community renewal of blighted areas.” RCW 35.81.080.

Under Washington’s Community Renewal Law, any property that constitutes “an economic ... liability” may be condemned and transferred to a private developer.¹⁵ This standard combined with the purpose of the Community Renewal Law, which is the elimination of areas that “contribut[e] little to the tax income of the state and its municipalities,”¹⁶ creates the exact conditions that New London officials used to justify their taking of private homes in *Kelo*. Put another way, under Washington law, the Fort Trumbull neighborhood of New London was blighted because it constituted an economic liability and contributed little to the tax income of the state and its municipalities. Thus, the taking in *Kelo* can easily be duplicated in Washington State, although it must occur under the auspices of the Community Renewal Law.

The “economic liability” standard is not the only vehicle for eminent domain abuse provided by the Community Renewal Law. “Blighted area” is defined in state law (Revised Code of Washington 35.81.015(2)) to mean an area that is afflicted with a range of “problems,” many of which are outside the control of residents. Many innocuous things constitute legal blight. For instance, property is blighted if there is “diversity of ownership.” That is, if you own your home and your neighbor owns her home, your property is blighted. Under this definition, cities and towns such as Mercer Island, Clyde Hill, and Medina are all blighted under state law.

¹⁵ Revised Code of Washington 35.81.015(2).

¹⁶ Revised Code of Washington 35.81.005.

Other things constituting blight include “excessive land coverage,” defective title, the “existence of persistent or high levels of unemployment,” or anything that “substantially impairs or arrests the sound growth of the municipality or its environs.” This last catch-all brings pretty much any property not covered by the previous definitions into the scope of the Community Renewal Law.

Property that “substantially impairs or arrests the sound growth of the municipality” will almost always be determined by government consultants. Given municipalities’ fondness for using “blight removal” as a reason to take citizens’ land for redevelopment, the Community Renewal Law provides a handy vehicle for them to avoid the restrictions in the Washington Constitution.

Moreover, this threat does not apply to just single properties. When the government designates an area “blighted,” it can condemn all the properties in that area, even homes that are in perfectly fine condition. Thus, one blighted house in an otherwise successful neighborhood can bring a blight designation on all the houses in that neighborhood.¹⁷

2. Washington Municipalities are Increasingly Invoking the Community Renewal Law

The critics of eminent domain reform nonetheless argue that, *regardless of what the Community Renewal Law actually says*, homeowners and small businesspeople in Washington have nothing to fear from bogus declarations of blight by municipalities. One prominent commentator recently stated that, “so-called ‘blight’ such as inappropriate uses of land or buildings, excessive land coverage or uses that impair or arrest growth, would be ‘insufficient to support a constitutional ‘public use.’”¹⁸

Unfortunately, Washington’s local governments do not agree. Recently, local governments have designated or threatened to designate as blighted perfectly fine working-class neighborhoods for exactly the reasons listed by reform opponents as being constitutionally insufficient to support a finding of blight. Since the Legislature failed to reform Washington law last session, municipalities have been busy either blighting or threatening to blight neighborhoods in the following Washington cities:

¹⁷ In *Miller v. City of Tacoma*, Mr. Miller argued that his property should not be included in the area designated “blighted” because it was not substandard. The Washington Supreme Court rejected Miller’s argument, noting “Experience has shown and the facts of this case indicate that the area must be treated as a unit and that a particular building either within or near the blighted area may have to be included to accomplish the purposes of the act. It is not necessary that every building in such an area be in a blighted condition before the whole area may be condemned.” *Miller*, 61 Wn.2d at 392 (quotation marks omitted).

¹⁸ Spitzer, *supra* note vi (quoting *Miller v. City of Tacoma*, 61 Wn.2d at 386). However, in *Miller v. City of Tacoma*, the court specifically said that it was not deciding whether standards such as inappropriate use of land, excessive land coverage, and uses that impair or arrest economic growth in the municipality were sufficient to constitute “public use”: “We find it neither necessary nor proper to pass upon these considerations . . .” *Miller v. City of Tacoma*, 61 Wn.2d at 386 (emphasis added). Instead, the court in *Miller v. Tacoma* found that other, less ephemeral, standards supported a finding of “blight” in that case. *Id.* The supreme court noted only that the “impairment of growth” standard “may also be suspect as insufficient to support a constitutional ‘public use.’” *Id.* (emphasis added).

Auburn: On September 18, 2006, the City of Auburn designated a large chunk of the city's beautiful downtown as blighted and adopted a Community Renewal Plan. Despite assurances from the mayor that the City will not forcibly displace anyone, the Plan includes a Residential Displacement Plan that leaves open the possibility of the City's use of eminent domain.¹⁹ The City blighted block after block for "inappropriate use of land or buildings," "excessive land coverage," and "obsolete platting or ownership patterns." The City's Manager of the Department of Planning and Community Development explained that blight "means anything that impairs or arrests sound growth."²⁰

South Seattle: Seattle's Southeast District Council and the City of Seattle are currently considering using the Community Renewal Law in Seattle's Rainier Valley, the heart of the city's vibrant minority community. The City has proposed to declare the highly diverse, multi-ethnic community blighted and then implement various "community renewal projects" in the area. The earliest slated projects include the construction of "Town Center" and "urban village" developments with private residential and commercial uses around the sites of two planned Sound Transit stations.

Seattle has acknowledged that it would need to "assemble property" for the projects and that it might use eminent domain to do so.²¹ The conditions listed by the City in its draft blight study as justifying use of the Community Renewal Law include above average rates of unemployment, poverty and crime.²² The City's draft blight study makes clear that the City views the economic and employment status of its residents as a potential justification to condemn homes and businesses and force relocation. The City's failure to control crime in the area may also be sufficient to deprive the area's residents of their homes and businesses.

Renton: Through the spring and summer of 2006, residents of Renton's working class Highlands neighborhood fought a long battle to keep their homes and businesses from being declared blighted by the City. A low-income, ethnically-diverse neighborhood close to the Boeing and Paccar plants, the Highlands became part of Mayor Kathy Koelker's vision for the "next generation's new single-family housing."²³ The City Attorney listed one of the reasons why the

¹⁹ Auburn, Wa., Ordinance 6049 (September 18, 2006).

²⁰ Mike Archbold, *Downtown renewal plan approved: Auburn council members heard from public, voted unanimously for plan*, King County Journal, Sept. 20, 2006, at <http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060920/NEWS/609200314&SearchID=7326096464990> 9 (retrieved October 25, 2006).

²¹ Southeast Neighborhood Investment Initiative (SNII) Planning Group, *DRAFT Southeast Seattle Community Renewal Plan* (Sept. 11, 2006) (on file with the Institute for Justice Washington Chapter).

²² City of Seattle, Office of Policy & Management, *Southeast Seattle Determination of Blight Study*, at 13 (October 2006) (on file with the Institute for Justice Washington Chapter).

²³ Quoted in Dean A. Radford, *Highlands face a blight future*, King County Journal, February 27, 2006, at <http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060227/ARC/602270306&SearchID=73260965744629> (retrieved October 25, 2006).

Highlands would be blighted—the homes there were worth less than homes in other parts of Renton.²⁴ Residents and members of the City Council fought back against the Mayor.²⁵ After a long and painful process, the residents of the Highlands convinced the Council to kill the Mayor’s plan, meaning their homes are safe for the time being.²⁶

These examples demonstrate that local governments are increasingly using the Community Renewal Law to blight or threaten to blight working-class neighborhoods with the idea of tearing down the homes and transferring the property to developers to build “urban villages.” “It can’t happen here” is becoming “it is happening right now.”

3. Fixing Washington’s Community Renewal Law

If, as the critics of reform claim, numerous sections of the Community Renewal Law cannot be constitutionally applied, these provisions should be removed immediately from the Revised Code of Washington. Both municipalities and property owners should have a clear understanding of what municipalities may and may not do. Nonetheless, in last year’s Legislative Session, municipalities resisted making any alterations to the state’s eminent domain laws, suggesting that local governments believe that these provisions give them important tools with which to achieve their urban “visions.”

Moreover, if these provisions cannot be constitutionally applied and they remain on the books, the best that can be said for the arguments of the critics of reform is that they provide a defense to an unconstitutional taking. This can be cold comfort for those facing a mandatory eminent domain proceeding, given that historically eminent domain has been applied against those that do not have the economic or political means to oppose condemnation.²⁷ Thus, for the poor, the elderly, and racial and ethnic minorities, reassurances that they may ultimately prevail in court against a municipality and its phalanx of high-priced attorneys after years of litigation are probably less than comforting.

Until Washington's Community Renewal Law is substantially revised to cover only concrete, objective harms, reassurances are meaningless, especially in light of the increasing use of the Law by municipalities. Under the Community Renewal Law, working-class neighborhoods may find themselves designated as “blighted areas” because city hall believes that they are impairing the “sound growth of the municipality.” Just ask the residents of Auburn, the

²⁴ Ibid.

²⁵ Jamie Swift, “Highlands residents fight against city’s plans: Some fear Renton will use eminent domain to make them leave,” *King County Journal*, June 24, 2006, at <http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060624/NEWS/606240321&SearchID=73260966110248> (retrieved October 25, 2006).

²⁶ Dean A. Radford, “Renton will not condemn Highlands property: City Council follows mayor’s recommendation,” *King County Journal*, July 19, 2006, at <http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060719/NEWS/607190316&SearchID=73260966110248> (retrieved October 25, 2006).

²⁷ See *The Kelo Decision: Investigating Takings of Homes and other Private Property: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2005) (statement of Hilary Shelton, Director, NAACP Wash. Bureau) (noting that condemnation for blight has traditionally been applied against those without the political or economic means to fight back).

Rainier Valley, and the Renton Highlands. Revision of this incredibly broad statute should be a priority for policymakers wishing to protect homes and small businesses in Washington.

B. The “Necessity” Determination: Extreme Deference Leads To Extreme Abuse

1. Washington Law Allows the Government to Take More Land Than it Needs for Legitimate Public Uses

In the *Monorail* decision, the Washington Supreme Court held that the Seattle Monorail, or any other governmental entity in Washington, could take more property than is necessary for an identified public use and transfer any remainder property to private entities so long as the project contains some aspect of public use in it.

The Court also ruled that municipal officials can seize property when they do not have any identified use for property, public or private, because that is not a “private” taking, just a speculative one. In essence, the *Monorail* decision permits the government to transfer private property to private entities so long as the government can manufacture a fig leaf of public use or possible public use to give it constitutional cover.

The *Monorail* decision is not only constitutionally unsound, it is terrible public policy. It gives municipalities an incentive to condemn more property than is needed on the chance that it may get to play real estate speculator with any property left over from the legitimate public use. It also gives the government incentive to condemn as much land as possible as *early* as possible in a project, again to maximize the chance that it may have leftover property to sell or to use to reward politically connected supporters. The *Monorail* decision should be fixed if for no other reason than to remove these perverse incentives.

To fix the problems created by the *Monorail* decision, the Legislature would need to address the treatment of “necessity” in Washington law. For a condemnation to be valid under Washington law, the government must prove that: 1) the use is public; 2) the public interest requires it, and; 3) the property appropriated is necessary for that purpose.²⁸ The determination of “necessity” essentially means the selection and extent of the property to be condemned and this decision is left almost entirely to the discretion of the government. Courts will not overturn a determination of necessity unless the property owner can demonstrate fraud or constructive fraud in the necessity determination—thus, courts almost never overturn a necessity determination.

This gives municipalities free rein to condemn more land than is necessary for longer than is necessary or to simply reshuffle properties in a project to achieve the desired result without actually committing a private taking—instead of putting a hotel on someone’s house, the government puts the road serving the hotel there and puts the hotel across the street. It provides clever planners with all the tools they need to avoid the prohibitions of Article I, section 16.

²⁸ *King County v. Theilman*, 59 Wn.2d 586, 593, 369 P.2d 503 (1962).

2. Washington Law Allows the Government to Condemn Land That is Not Upscale Enough

To see the potential for abuse inherent in the overly deferential “necessity” standard, one need only look to the City of Burien in its efforts to condemn property owned by seven sisters in the City’s downtown. The Strobel family’s ordeal began when Burien decided to build a new development—upscale condos, shops, restaurants and offices – around the property the sisters inherited from their parents, who passed away in 1998. For nearly two decades, their parents had leased the property to Meal Makers, a diner-style restaurant popular with Burien locals, particularly seniors. The sisters, who hold the property in trust as Strobel Family Investments, maintained the lease with Meal Makers.²⁹

Burien decided the Meal Makers building wasn’t upscale enough for the Town Square development, however, so the City condemned it. Because the area had not been declared “blighted,” simply condemning the property and turning it directly over to the City’s Los Angeles-based developer would have been politically unpopular and an illegal “private taking” forbidden by the Washington Constitution, even to the most deferential jurist. So Burien came up with a scheme. It would plan a road—an ostensibly public use for which eminent domain is authorized—right through the Meal Makers building.

The City Manager told his staff to “make damn sure” the road went through the building.³⁰ The staff complied, developing a plan that appeared to run the road over the Strobel family’s property.³¹ When a subsequent survey revealed that the road would impact only a small corner of the property,³² the staff developed yet another site plan that put the road right through the building.³³ The City then condemned the Strobel family’s property.³⁴

A King County Superior Court judge noted that the road “could have been easily accomplished without [a]ffecting the Meal Makers restaurant or the Strobel property.”³⁵ He described the City’s condemnation decision as “you won’t sell and you don’t fit our vision, so we’re going to put a street right through your property and condemn it.”³⁶ He further suggested that the City’s condemnation might be “oppressive” and an “abuse of power.”³⁷ Nevertheless, the judge concluded he must allow the condemnation given the incredibly deferential standard

²⁹ Stuart Eskenazi, “Home-away-from-home v. development,” *The Seattle Times*, April 16, 2005, at http://seattletimes.nwsourc.com/html/localnews/2002243254_mealmakers16m.html?syndication=rss (retrieved November 1, 2006).

³⁰ Deposition of Larry Fetter, at 33, 36 (August 2, 2005) (on file with Institute for Justice Washington Chapter).

³¹ Burien Resolution 201 (October 18, 2004).

³² Declaration of David Wright, at 3 & Ex. B (July 7, 2005) (on file with Institute for Justice Washington Chapter); *see also* Deposition of Gary Long, at 76 (July 7, 2005) (on file with Institute for Justice Washington Chapter).

³³ Declaration of David Wright, at 3 & Ex. C (July 7, 2005); e-mail from Stephen Clark to David Cline (Nov. 9, 2004) (on file with Institute for Justice Washington Chapter); Burien Resolution 208 (Jan. 24, 2005).

³⁴ Burien Ordinance 426 (February 7, 2005).

³⁵ King County Superior Court, Verbatim Report of Proceedings, at 35 (August 5, 2005) (on file with Institute for Justice Washington Chapter).

³⁶ *Ibid.*, 37.

³⁷ *Ibid.*

Washington courts apply in reviewing “necessity.” As the judge put it, he was bound to uphold the condemnation unless there was proof of fraud.³⁸ The Court of Appeals affirmed.³⁹

The Strobels petitioned for review to the Washington Supreme Court, who denied their petition on December 5, 2006.

The court’s failure to correct this abuse makes it imperative that the Legislature can take steps to ensure that any property taken by the government is necessary to accomplish the public use associated with the project and that courts should not completely defer to the government’s determination of necessity. Washington’s citizens should not be deprived of their property simply because the government thinks it is not upscale enough. The standard found in early Washington cases addressing “necessity”—that a property will not be found to be necessary for a public use if the government’s inclusion of that property in the project constitutes “bad faith,” “oppression,” or “an abuse of . . . power” should be codified by the Legislature.⁴⁰ This will provide some protection from excessive condemnations while permitting the state and municipalities sufficient latitude and flexibility to structure legitimate public use projects.

3. Washington Law Permits “Necessity” Determinations to be Made Essentially in Secret

The Washington Supreme Court has indicated that, absent evidence of fraud, it will not make any substantive review of a municipality’s “necessity” determination, meaning that the only input a property owner has regarding whether his or her property is “necessary” for a public project is in the legislative phase.⁴¹ However, the Washington Supreme Court has also made clear that these determinations can be made essentially in secret, with notice provided only in difficult-to-find areas of governmental websites—assuming, of course, that one has access to a computer.

In *Sound Transit v. Miller*, the Washington Supreme Court held that Internet notice concerning the legislative determination of the necessity of an exercise of eminent domain satisfies statutory notice requirements because the Internet provides relatively unlimited low-cost capacity for communications of all kinds.⁴² This conclusion rests upon a mistaken factual assumption: that the Internet is easily accessible by all members of society. The Washington court’s decision assumed there is no “digital divide” between rich and poor, ethnic majorities and minorities, young and old.

³⁸ Ibid, 35.

³⁹ *City of Burien v. Strobel Family Invs.*, 2006 Wash. App. LEXIS 1136 (June 12, 2006).

⁴⁰ *State ex rel. Postal Tel.-Cable Co. v. Super. Ct. of Grant County*, 64 Wash. 189, 194, 116 P. 855 (1911).

⁴¹ Sound Transit argued before the Washington Supreme Court that because public use was assumed in that case, the trial court, in the public use and necessity hearing, did not need to hear any evidence offered by the Millers regarding the necessity of the taking. App. Br. at 4. After the court’s decision in *Sound Transit v. Miller*, municipal governments will presumably continue to argue that, if there is some aspect of public use in a project, the property owner should not have an opportunity to present any defense to the government’s condemnation.

⁴² *Sound Transit v. Miller*, 156 Wn.2d at 415-16.

Studies conclusively demonstrate that the poor, minorities, and elderly have considerably less access to the Internet than other segments of society.⁴³ Research makes equally clear that these same segments of society are the most likely to be targeted by eminent domain.⁴⁴ Thus, *Sound Transit v. Miller* allows government to employ a form of notice that largely excludes the very communities with the greatest interest in necessity determinations.⁴⁵

The courts have so far indicated that they prefer to abdicate their responsibility to review whether a particular property is “necessary” to achieve a public use. In such circumstances, effective notice of this legislative determination becomes essential to the open workings of government – otherwise, condemnation becomes a secret decision, secretly arrived at. Policymakers must ensure that the people most affected by legislative declarations of necessity actually receive some notice that their property may be condemned.

⁴³ For instance, the U.S. Census Bureau reported that in 2003, a 62 percent gap in Internet access existed between households with \$100,000 or more in family income and those with less than \$25,000. Jennifer Cheeseman Day et al., U.S. Census Bureau, *Computer and Internet Use in the United States: 2003 2* (2005). The problem largely stems from the fact that the poor, the elderly, and racial and ethnic minorities are far less likely to have computers in their homes. In fact, the Bureau found that while 62 percent of Americans had computers in the household, certain groups lagged well behind the rest of the populace:

35 percent of households with householders aged 65 and older, about 45 percent of households with Black or Hispanic householders, and 28 percent of households with householders who had less than a high school education had a computer. In addition, 41 percent of one-person households and 46 percent of nonfamily households owned a computer.

Id. at 3 (citation and footnotes omitted). High-income households, on the other hand, were much more likely to have computer and Internet access than the general public. *Id.* In Washington specifically, Internet access and computer use is not as ubiquitous as the Washington Supreme Court suggested: 60-65 percent of households have Internet access and 69-74 percent have a computer – hardly omnipresence. *Id.* at 5. Moreover, a report prepared by the City of Seattle Department of Information Technology noted that only half of the City’s senior citizens were current computer users. Elizabeth Moore et al., City of Seattle Dep’t of Information Technology, *City of Seattle Information Technology Residential Survey Final Report* 49 (2004). The report concludes:

Seattle still has a significant digital divide. Older Seattleites or those with less income or education are less likely to be current or comfortable technology users . . . Lower levels of connectivity are also evident among African American respondents, but the gap is not as pervasive as with the seniors and those with less income or education. The top two reasons for not having a computer at home are cost and lack of interest.

Id. at 87.

⁴⁴ Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 6 (2003).

⁴⁵ Indeed, even assuming one has access to the Internet, the court assumed an amazing amount of sophistication regarding accessing information there. For instance, a resident of Seattle faces potential condemnation from (at least) the United States Government (the Army Corps of Engineers, the Bonneville Power Administration), Washington State, King County, Sound Transit, the City of Seattle, Seattle City Light (for electric service), Puget Sound Energy, Inc. (for gas service), and, until recently, the Seattle Monorail. Half the senior citizens in the City do not have access to any of these entities’ websites. The other half are expected to figure out within which jurisdictions they live, monitor the websites for those jurisdictions, and find the information concerning condemnation on the websites – a level of sophistication beyond the ken of even the most devoted government website enthusiast.

C. Washington Law Permits the Government to Declare a “Public Use”

In *Hogue*, an otherwise good decision, the Washington Supreme Court first held that legislative declarations of public use are entitled to “great weight” by the court. This is in direct contrast to the explicit command of the Washington Constitution: “the question of whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.” The words of the Washington Constitution are plain and unambiguous – “without regard to any legislative assertion” does not, and cannot, mean “legislative assertions are entitled to great weight.” But the court nevertheless thinks it does.

Unfortunately, this latitude has been abused because the government is confident that the courts will grant declarations of public use, no matter how spurious, “great weight.” For instance, RCW 8.08.020 provides, with emphasis added, that “[a]ny condemnation, appropriation or disposition [by a county] shall be deemed and held to be for a county purpose and public use ... when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof.” Basically any condemnation undertaken by a county is therefore a public use and this formless declaration is entitled to “great weight” by the courts.

Even if the State Supreme Court gives it permission to do so, the Legislature should decline the invitation to ignore the Washington Constitution. Title 8 of the Revised Code of Washington would need to be reviewed to expressly declare that legislative declarations of public use by the state or any local government are not to be considered or given any weight by the courts.

IV. Eminent Domain Reform is Overwhelmingly Supported by Voters

In the November 2006 election, voters across the country overwhelmingly approved ballot measures restricting governments from taking private property and giving it to private entities. Voters in South Carolina, Florida, Georgia, Michigan, New Hampshire, and North Dakota all approved constitutional amendments restricting eminent domain. Louisiana’s voters approved a similar measure in September’s primary. Nevada’s voters preliminarily approved a constitutional amendment sharply restricting eminent domain as well, which will reappear on the 2008 ballot for final approval. Oregon passed a citizen’s initiative that provides stronger statutory protections to property owners. Arizona’s voters overwhelmingly passed an initiative that significantly restricts the definitions of “public use” and “blight” despite the fact that the initiative also contained a controversial “regulatory takings” provision similar to Washington’s failed Initiative 933.

All of these measures passed by wide margins, with “yes” votes ranging from 55% in Louisiana to around 85% in South Carolina, Georgia, and New Hampshire. These provisions passed in “red” states, like Georgia and South Carolina, and “blue” states like Oregon and New Hampshire. While the country was otherwise often bitterly split on candidates and issues, this was one issue upon which voters overwhelmingly agreed. Where the public could vote on pure

eminent domain reform, they marched to the polls and demanded that the government protect their homes and businesses from abuse.⁴⁶

Washington was not immune from this *Kelo* wave. While voters across the state were rejecting Initiative 933 (which again, dealt not with eminent domain, but rather with regulatory takings), Pierce County voters overwhelmingly approved amending Pierce County’s charter to forbid the county government from condemning property for economic development. Pierce County’s amendment also reined in the judiciary’s deference to the County’s “necessity” determination. Despite opposition from the Pierce County Executive, the amendment passed 70% to 30%.⁴⁷

The people of this country have made their views known. Pierce County’s experience shows that voters in this state are also greatly concerned that their property remains safe from eminent domain abuse. This is an issue that cuts across the political spectrum, uniting Democrats and Republicans, urban and rural, conservatives and liberals.

V. Conclusion

Constitutional rights are only as strong as the courts that protect them. Our State Supreme Court is not protecting the homes and small businesses of Washington residents from government abuse. Without action, Washingtonians face a growing threat of eminent domain abuse. While much of the debate regarding eminent domain concerns abstract concepts of private property and public use, we should recall that eminent domain abuse does not harm property; it harms people.

Washington has the opportunity to join the dozens of other states working to protect the rights of its citizens by truly reforming eminent domain laws. It has a chance to reinvigorate the protections that have shielded Washington citizens from these abuses since the state’s founding in 1889. It has a chance to ensure that the people of this state do not suffer the same fate as those across the country who have been subject to eminent domain abuse.

In the past, Washington has led the country in protecting the rights of its citizens. It is now lagging behind. It is time once more for Washington to reclaim its heritage as part of the vanguard of reform.

⁴⁶ All election results are available at the Castle Coalition website, www.castlecoalition.org/legislation/ballot-measures/index.html. Voters in California and Idaho rejected efforts to ban eminent domain abuse that were wedded to restrictions on “regulatory” takings.

⁴⁷ www.co.pierce.wa.us/pc/abtus/ourorg/aud/elections/misc/currentresults.htm.

About the Author



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He is a graduate of Bard College and the University of Wisconsin – Madison Law School, where he was an articles editor of the *Wisconsin Law Review*.

IJ-WA represented the Strobel sisters in their appeal to the Washington Supreme Court and submitted an amicus curiae brief in support of the property owners in the *Monorail* case. The national office of the Institute for Justice represented Susette Kelo in her challenge to New London’s attempt to condemn her land.

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