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**'KELO V. NEW LONDON'**  
**States to the rescue**

Amitai Etzioni  
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States are moving to limit the damage done to justice by *Kelo v. New London*. In this case, the U.S. Supreme Court, by a 5-4 majority, vastly expanded the concept of eminent domain. It ruled in favor of what correctly has been called a "Reverse Robin Hood." The court ruling has benefited a group of businesses and local government interests in the New London, Conn., area including the New London Development Corp., drug giant Pfizer Inc. and private real estate developers. They were allowed to force local residents in Fort Trumbull, a modest but unblighted community, to sell their houses and land. On these properties Pfizer will build a \$300 million research facility, and the surrounding parcels of land will be developed into upscale residences along with a marina, hotel and conference center.

In the past, acts based on the Fifth Amendment were allowed if there was a strong public interest (e.g., there was no way to build a railroad unless a private property owner made way) or significant blight reduction. For example, the little town of North Bonneville, Wash., about 35 miles from Portland, Ore., was razed and rebuilt a mile west in the 1970s when a second powerhouse was added to Bonneville Dam. However, allowing tax revenue and job growth to supersede private property rights vastly extends the range of homes and land to which eminent domain can be applied.

In a sharply worded dissent, Justice Clarence Thomas quipped, "[T]hough citizens are safe from the government in their homes, the homes themselves are not." Justice Sandra Day O'Connor wrote, "[N]othing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton." "If there's real blight, dilapidated houses, juvenile delinquency, health problems, hazardous waste then [a city] can do it," said Hugh Spitzer, a constitutional law professor at the University of Washington. But "it can't just do it because they think it would be neater or better for the economy."

**Recent state actions**

The good news? The high court made it clear that states may impose more restrictive laws governing condemnations. Indeed states are moving to tighten their laws to prevent revenue-driven abuses of eminent domain. An Encinitas, Calif., councilman proposes that any transfer of private property to other private owners must pass a two-thirds vote in a regular election. Connecticut legislators are pushing a bill to bar the use of eminent domain for economic development. The Washington state legislature voted, 231-189, to deny funds from the U.S. departments of Transportation, Treasury and Housing and Urban Development to local or state governments using eminent domain to force the sale of property for a for-profit enterprise.

As a scholar who dedicated the last 15 years to communitarian public philosophy, I have frequently argued that individual rights have been unduly expanded, often at the cost of the common good. I joined Harvard law professor Mary Glendon to point critically at the explosive growth of entitlements and the trivialization of rights. For example, some feminists claimed that they had a right to use the men's room even if there was no line at the women's room. And an employee of Macy's claimed that he has a right to play Santa Claus. I could not find such rights in the Constitution, or for that matter, any other place. In addition, I devoted a whole book to the limits of privacy, and I am among those who hold that Sept. 11, 2001, changed what constitutes a "reasonable" search.

However, when we move to reset the balance between individual rights and the common good, we

inevitably step on the slippery slope that we face whenever we reset legal doctrines, religious Dos and Don'ts and moral taboos. We hence need to be careful that we not open the floodgates to gross violations of individual rights-that we not end up on our backside on the lowest end of the slope.

Some civil libertarians are so concerned about this danger that they would rather not set foot on the slope at all, and prefer to remain frozen in whatever position they find themselves. However, adjustments are often needed. The secret is to set clear markers for the new place on the slope beyond which we will not slide, a new definition of what is reasonable, a specific new point of balance between rights and the common good.

Viewed in this way, the main problem with the new court decision is that it did open the floodgates, yet did not set a new marker. If one can force people to sell their homes and land for tax revenue and job enhancement, no private property is secure. This, it goes without saying, is not the American way. One must hope that the Supreme Court will "clarify" its position in the near future, and that meanwhile the states will come to the rescue. They may allow for more room for acts based on the Fifth Amendment but need to find a much narrower way to define which forfeitures have now become acceptable.

*Amitai Etzioni, an NLJ columnist, is the author of How Patriotic Is the Patriot Act? (Routledge 2004) and The New Golden Rule (Basic Books 1998). He is a University Professor at The George Washington University.*

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