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Who really owns your house?

Supreme Court takes the wrecking ball to property rights and leaves repairs to Congress

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The U.S. Supreme Court recently decided two very important property rights cases that have generated a great deal of renewed interest in the protections afforded by the Constitution to private property.

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These cases, *San Remo Hotel v. San Francisco* and *Kelo v. City of New London* are far different in scope. *San Remo* concerns the ability of a property owner to bring federal takings claims directly to federal court and *Kelo* focuses on the extent of the government's power of eminent domain.

It's safe to say that the heightened media attention on the *Kelo* decision in particular has spurred recent activity by members of Congress to propose legislation in response to the Supreme Court's decision.

In *Kelo*, the Supreme Court ruled that economic development constitutes a "public use" under the Fifth Amendment. This means that the government can take pri-



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private property for the purpose of "upgrading" it, subject to just compensation, a remedy that has been somewhat elusive and whose definition or calculation differs from state to state.

For example, a local government might determine that a shopping center would yield greater economic benefits than an existing housing development — or church or private country club, which might be tax exempt.

The local government may now condemn any property that it wishes, so long as it is seen as a better deal for them — for instance paying higher taxes. The Supreme Court has made it crystal clear that it will henceforth defer to the judgment local governments in these matters.

The old rule, at least what was commonly thought to be the rule, was that there needed to be a public "use" involved, like a park or school of new street with some carve out for urban blight situations.

Well, it would now seem that anything goes and that there is no limit on local government "taking" the property and then giving it over to private developers, so long as the locals feel that is a good thing for them to do.

In *San Remo*, the Supreme Court upheld a lower court decision that essentially prevents property owners from having their federal Fifth Amendment takings cases heard in federal court. Specifically, *San Remo* upheld the lower court's decision to strike down prior precedent, which had offered property owners their only real opportunity to have a Fifth Amendment takings claim heard in federal court.

The *San Remo* ruling has its roots in a 1985 Supreme Court decision, *Williamson County v. Hamilton Bank*, which required property owners to seek just compensation through the highest state court before filing suit in federal court.

However, the *San Remo* decision confirms that after a takings case is litigated in state court, federal courts are precluded from further addressing the matter.

It is ironic that by following the path laid down in *Williamson County*, the property owner is now unable to bring a federal takings claim in federal court due to *San Remo*. The Supreme Court has now effectively barred access to

federal courts for claimants with federal constitutional takings claims.

This is an incomprehensible turn of events and represents a clear erosion of private property rights. Many constitutional scholars are shaking their heads in disbelief and simply can't understand why a federal land-use related claim can't be heard in a federal court.

Suffice it to say, the supporters of property rights are enraged by these decisions and will be looking to Congress for a fix. That could take several forms, but the easiest and most helpful, in the *San Remo* context, would be a simple amendment to the federal statutes governing the jurisdiction of the federal courts, to allow any action or claim based upon such a federal constitutional violation to be brought directly in federal court.

This would be an effective overruling of *Williamson County* and it would moot *San Remo*.

As far as *Kelo* is concerned, a fair and reasonable way to deal with the problem that has been created by the Court's bowing to unfettered deference of local governments, and to not throw the baby out with the bath water by banning all private to private redevelopment/condemnation schemes, would be to apply a higher level of scrutiny and an individualized analysis to each instance where a there is to be a public benefit, rather than a public use involved.

This closer scrutiny is particularly relevant where the ultimate plan is a private to private transfer. In this man-

ner, judicial deference to local governmental decisions would not be a blind one. Instead, the record would have to clearly justify the "taking" as the best or perhaps even last option for local government.

The blight exception should not be tinkered with, since it has proved to be workable and targeted residential redevelopment of run down and depressed areas has been shown over time to be clearly beneficial.

A bigger and more daunting task would be for Congress to legislate standard minimums for the way "just compensation" must be calculated and to set strict time limits on the way states handle these claims and make payments.

Presently, people often wait years for full just compensation. In New York City a decade is not unusual. In other locales, compensation is also long in coming and often far less than just.

Remember, the U.S. Constitution clearly allows for the "taking" of private property, so long as the taking is for a clear public use and just compensation is paid. Both elements are necessary for the thoughtful and judicious use of eminent domain, particularly the necessity of ensuring that compensation to the individual is both just and swiftly made.

If the government complies with these Constitutional requirements, and if a higher level of individualized scrutiny into the process is used, the public can be reassured that there will be no misuse of the power of eminent domain.