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# Eminent Domain and High-Speed Rail in California: Sustaining Popular Support for Large-scale Transportation Infrastructure in the Aftermath of *Kelo v. City of New London*

**Abstract:** The Fifth Amendment limits government’s power to take private property to uses that are “public,” but the US Supreme Court has repeatedly declined to specify any limitation, preferring instead to defer to the judgment of political authorities on the validity of challenged takings. This paper explores a little noticed implication of judicial deference in relation to the controversy over California’s high-speed rail project: Absent independent audit of the planning process, even normally unobjectionable takings to establish transportation rights of way may appear inequitable, rally opposition, and fatally diminish the popular support required to sustain major infrastructure investments over many years.

**Keywords:** eminent domain; high-speed rail; property.

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## 1 Introduction

Public discussion of California’s high-speed rail project has so far highlighted questions about funding, routing, and profitability. As important as these issues are, however, none directly addresses the most urgent concern for the people most directly affected. Thousands of residents and businesses in California’s Central Valley will lose property, many against their will, and the growing sense that the project as a whole will never be completed strengthens opposition and makes completion even less likely.<sup>1</sup> The government’s ability to take private prop-

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<sup>1</sup> This study is limited to the issue of justifying takings to establish a right of way in the context of a segmented railroad project unlikely ever to be completed. It is agnostic on the many questions pertaining to the general feasibility of high-speed rail. For a taste of the disputes in the latter area compare the entry “Myths vs. Facts” on the Californians for High-Speed Rail blog (<http://www.ca4hsr.org/hsr-info-2/myths-vs-facts/>) with Joseph Vranich, et al. “The California High-Speed Rail Proposal: A Due Diligence Report” (<http://reason.org/news/show/the-california-high-speed-rail>).

erty from unwilling owners – the power of eminent domain – did not cause this problem, but it may well take the blame for it, and given the direction of political and jurisprudential developments in this area, the result may be tightened restraints on government and even greater impediments to efficient planning and execution of future large-scale transportation infrastructure projects.<sup>2</sup>

Eminent domain is not often controversial, as most would concede government must be able to take land when necessary to insure public safety or construct vital infrastructure. When conflicts do arise, they often involve properties condemned because they lie within an area deemed “blighted” and redevelopment is said to be impossible on a piecemeal basis. But even in the less controversial realm of transportation infrastructure development, the standard legal considerations under the Fifth Amendment – whether a particular parcel of land is “necessary,” whether the use to which the land will be put is “public,” or whether landowners have received “just” compensation for their loss – can sometimes seem inadequate.

For instance, while it is hard to imagine a more “public” use of formerly private land than the development of a highway or railroad, the strength of the conceptual linkage depends on an implicit assumption that the project is feasible. Yet, if obviously fatal flaws in the financial and operational planning appear far in advance of the first condemnation, a taking to clear the notional right-of-way might seem utterly unjustified. At the very least, it might seem appropriate for a court to weigh the certainty of private loss against the possibility of public gain *before* initiating condemnations. To date, however, the US Supreme Court has largely ignored such concerns and limited occasions for the judicious reconciliation of competing public and private interests.

The Court’s most recent review of a challenge to the use of eminent domain, *Kelo v. City of New London* (545 US 469 [2005]), did not address transportation infrastructure development, but its permissive interpretation of the Fifth Amendment’s “public use” limitation angered voters, stimulated many states to establish new limits on eminent domain, and now, in relation to California’s high-speed rail project, promises to increase the difficulty of sustaining popular support on which the success of major infrastructure projects depends.

To be clear, neither the power of eminent domain nor the *Kelo* decision directly caused public opinion to turn against high-speed rail in California, but both played an important, and as yet insufficiently appreciated role in the episode. Specifically, the negative publicity generated by *Kelo* elicited popular

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<sup>2</sup> The history of eminent domain in the US is one of periodic backlash to the perception of abuse of delegated powers by political leaders. For a review of the background and an attempt to model the phenomenon along rational choice lines, see Fleck and Hanssen (2010).

resistance to the very idea of eminent domain, even as the decision's green light on urban renewal projects seemed to validate a long growing culture of indifference to property rights on the part of politicians, planners, and commercial interests involved in public works projects. The combination of popular sensitivity to takings and elite indifference to property rights portends serious difficulty not only for high-speed rail, but for any similarly ambitious project in the future.

Although *Kelo's* effect on popular opinion is easily documented and widely analyzed, the effect on elites has so far passed unnoticed, perhaps because it is difficult to demonstrate directly.<sup>3</sup> No prominent politician, planner, or corporate officer is likely to announce an inveterate indifference to private property. All the same, the attitude is detectable in journalistic accounts of unrealistic approaches to cost and funding, monumental metaphors, and collectivist rhetorical strategies on the part of high-speed rail's supporters. Moreover, *Kelo's* indirect influence on elites helps to explain how, despite large and growing opposition in every region and demographic category in California, the project proceeds unabated while other state investments with powerful advocates and stable majority support are considered for cuts.

## 1.1 Eminent Domain in the US Before 2005

Eminent domain describes the power of the state to take private property, or rights in property, without the owner's consent. Although legal scholars and practitioners today often speak of the power as an inherent attribute of sovereignty (Wilder and Stigter 1989), its theoretical justification is ambiguous (Benson 2008: p. 424) and it never fully harmonized with the natural rights doctrine underlying America's revolutionary and constitutional foundations. Whereas natural law theorists view eminent domain as a logical corollary of the concept of sovereignty, others trace it to an implied reservation of right accompanying grants of land from an original conqueror, and still others discover its roots in the gradual, pragmatic development of Anglo-American case law (Schiano 1983: p. 173).

To be sure, no sovereign state was ever prevented from exercising its powers out of concern for the ambiguity of their source, but eminent domain's theoretical uncertainty created political problems for government in the US, which

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<sup>3</sup> *Kelo's* effect on popular opinion can be inferred from a number of empirical studies of the state legislative responses, including Lopez et al. (2009), and Somin (2009). No comparable studies show the effect on elites, although several articles by Flyvbjerg (2002) and Flyvbjerg et al. (2009), accounting for parallel inaccuracies in estimations of the costs and benefits of large-scale transportation projects around the world, suggest the possibility that planners' personal interests significantly influence their forecasts.

those unrestrained by written constitutions, independent judiciaries, and public opinion would never encounter. In particular, the language of the Takings Clause of the US Constitution's Fifth Amendment – “nor shall private property be taken for public use without just compensation” – sustained a popular expectation that in most cases private interests are paramount, and takings are permissible only when the public interest is clear and not capable of accommodation in any other way. If government often ignored such expectations, until the middle of the last century, it did so not on the basis of countervailing legal doctrine, but on an informal understanding that population was sparse, land abundant, and the development of infrastructure universally desired.

Thus colonial governments used eminent domain to obtain rights-of-way for various private as well as public purposes, including roads, drainage, and water-powered mills (Paul 1987: pp. 72–73), but the power was generally not found among those explicitly granted to government. Until the late nineteenth century, even the Fifth Amendment, which may seem to imply a federal power of eminent domain, could not be interpreted in that manner without overturning basic assumptions about property and government shared by the authors of the Constitution and the Bill of Rights. Specifically, if property originated with individual labor and governments were created only to secure it, there could be no pre-existing power on the part of government to take it.

Despite such inconsistencies, by the twentieth century, the US Supreme Court not only inferred a federal power of eminent domain, it also influenced state applications of the power by interpreting “private property,” “public use,” and “just compensation.” What constitutes “private property” and whether compensation for its taking by government will qualify as “just” are questions beyond the scope of this study. The Court's understanding of “public use,” however, is directly relevant, as it explains why the reaction to *Kelo* was so intensely negative and why takings which have little or no connection to the circumstances described in that case might be cast in the same unflattering light.

In principle, the phrase, “public use,” is a limitation on the power of eminent domain. Government cannot simply transfer property from one private party to another, for such an act would run “contrary to the great first principles of the social compact” (*Calder v. Bull*, 3 US 386, 389 [1798]). In practice, as mentioned above, the limitation often gave way to the needs of a growing population. In the early twentieth century, when the Supreme Court first began to address the scope of the Fifth Amendment's public use limitation, it could have adopted either of two views on the issue that emerged in state courts (Sharp and Haider-Markel 2008).<sup>4</sup> One tended to

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<sup>4</sup> On the divergence between state courts and the US Supreme Court's preference for the looser interpretation, see the dissent by Justice Thomas in *Kelo v. City of New London* 545 US 469 (2005).

limit public use to “use by the public.” The other interpreted the phrase as equivalent to “public purpose,” or “public benefit.” By the 1950s, the Court was moving in the direction of the latter, more permissive interpretation, and in connection with the demise of economic substantive due process review after 1937 was also generally refusing to scrutinize legislative determinations that particular takings were in fact beneficial.<sup>5</sup> The Court’s holding in *Berman v. Parker* (348 US 26 [1954]) marks the culmination of this development and lays the foundation for *Kelo*.

*Berman* concerned the constitutionality of a federal law granting the District of Columbia the power to condemn properties in blighted areas and assemble them for resale to private developers. In a unanimous decision, the Supreme Court held that slum clearance was a purpose falling within the traditional category of the legislature’s “police power” to adopt reasonable measures for securing the health, safety, and welfare of local residents. Individual owners could not be permitted to stand in the way of a large-scale integrated redevelopment plan, even if their properties were perfectly healthy.

In effect, the *Berman* decision elided the Takings Clause standard of “public use” – ambiguous and often overlooked, to be sure, but in principle *limiting* – with the much looser and crucially *enabling* standard of “public benefit” (Paul 1987: p. 95). Though unobjectionable in the context of police powers, when applied to the topic of eminent domain, public benefit proved to be a distressingly open-ended standard. On *Berman*’s argument, any degree of public utility, no matter how tangential to the character of the property at issue, could justify governmental taking.<sup>6</sup>

If any doubts remained as to the limiting capacity of “public use,” the Court put them to rest – at least for legal practitioners – in another unanimous decision, *Hawaii Housing Authority v. Midkiff* (467 US 229 [1984]). To remedy the problem of excessively concentrated land ownership the Hawaii State Legislature devised a scheme to condemn leased property at the lessee’s request and make it available for purchase at fair market value. Landowners objected, but despite the rule against transfer of private property for private benefit, the state won its case. *Midkiff* made explicit what *Berman* had merely implied: whenever the exercise

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<sup>5</sup> On the convergence of the Court’s loose interpretation of the Fifth Amendment’s public use limitation and its post-1937 hostility to arguments grounded on constitutional protections for private property see Lopez and Totah (2007), p. 403.

<sup>6</sup> For instance, a very broad conception of public use enabled the California Supreme Court to rule that the city of Oakland could use eminent domain to prevent a private business moving to Los Angeles (*City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 73 [1982]). More recently, the county of San Bernardino considered a proposal to use eminent domain to condemn underwater mortgages and then resell them at fair market value to the occupants (Frankel 2012). The mortgage industry and investors in mortgage-backed securities were understandably opposed, but the plan might have succeeded if not for a lack of popular support (Lazo 2013).

of eminent domain is “rationally related” to a “conceivable public purpose” the Takings Clause will not prevent it.

Yet what appears reasonable to jurists can seem utterly illegitimate to many Americans, especially if the wealth and power relationships between the litigants are reversed. In *Midkiff*, a state took private property from a few wealthy landowners to benefit many poor renters. In *Kelo v. City of New London*, a city took viable middle class residential properties for the benefit of a well-heeled developer and a powerful corporation.

## 1.2 From *Kelo v. City of New London* to California’s High Speed Rail

As categorical as they seemed, the *Berman* and *Midkiff* rulings did little to quell controversy over the application of eminent domain in urban renewal projects. By the 1980s, a grass-roots movement of small property owners and entrepreneurs, funded by business lobby groups and informed by libertarian legal scholarship (Epstein 1985), began litigating against regulatory and wholesale takings (Sharp and Haider-Markel 2008: p. 557). From the point of view of this property rights movement, the image of Susette Kelo and her neighbors, about to be driven from their well-kept homes for the benefit of a private developer in New London, Connecticut, made the case against judicial deference to government on questions of public use better than any legal argument ever could.

Yet a five-member majority of the US Supreme Court was not sufficiently swayed by the homeowners’ plight to overturn the precedents on constitutionally permissible takings. Although there was no question of blight or excessively concentrated land ownership in New London, Justice Stevens’ majority opinion upheld the economic development justification, and argued that a heightened standard of review would necessarily impose a “significant impediment” to the success of any comprehensive redevelopment scheme. The Court was simply not in a position “to second-guess the City’s considered judgments about the efficacy of its development plan.”<sup>7</sup> Still, nothing in the opinion prevented a state from rewriting its laws to restrict the use of eminent domain in the future.<sup>8</sup>

<sup>7</sup> *Kelo v. City of New London*, 545 US 469, 488 (2005).

<sup>8</sup> Justice O’Connor, author of the unanimous decision in *Midkiff*, wrote a sharp dissent in *Kelo*. From the government’s point of view, she argued, residential property would always be less lucrative than commercial development, so no home was safe. In a separate dissent, Justice Thomas called the actual legacy of the Court’s public purpose standard “an unhappy one” for racial minorities, as public projects following the *Berman* case destroyed minority communities in several American cities.

Reaction to the *Kelo* decision was swift, loud, and almost entirely negative. In the immediate aftermath, hostile commentators foretold the end of private property in the US (Lopez and Totah 2007: p. 398), and one member of the *Kelo* majority faced the threat of a retaliatory eminent domain action against his home.<sup>9</sup> As emotions cooled, however, it became clear that the decision had only clarified the law and shifted the burden of limiting eminent domain from the Court to the states. After *Kelo*, 44 states adopted some sort of eminent domain reform law.<sup>10</sup> Although commentators dispute the efficacy of many of the post-*Kelo* laws (Lopez et al. 2009; Somin 2009), there is no question the case touched a nerve in American politics, and while the repercussions may be fading nationally, in California, the state government's financial difficulties have kept the issue in the news.<sup>11</sup>

To replace lost revenue following the recession of 2008 Sacramento dissolved the state's municipal redevelopment agencies (RDAs), which were the governmental entities most directly identified with *Kelo*-style takings.<sup>12</sup> Dissolution of the RDAs, which took effect in early 2012, triggered confusion regarding the fate of properties acquired since 2007 but left un(re)developed. State law may require that such properties be offered to their original owners before they can be made available to the general public (Nemat 2012), but however the successor agencies resolve the issue, the controversy fixes a spotlight on governmental takings and confirms a negative narrative developing independently in reaction to high-speed

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**9** Residents of Weare, New Hampshire, the hometown of Justice David Souter, proposed taking his property and replacing the house with a "Lost Liberty Hotel." Local voters overwhelmingly rejected the plan in 2006.

**10** The Castle Coalition, a property rights advocacy group, provides a useful summary of the reform measures adopted by the states at <http://www.castlecoalition.org/about/component/content/57?task=view>. The most recent reform occurred in Mississippi in 2011. There, voters overwhelmingly approved a ballot measure forbidding the transfer of property between private parties for 10 years following condemnation.

**11** See Marie Baca's report, "Eminent domain battles rage on despite Prop. 99," at *California Watch*, January 27, 2011, available at: <http://mariecbaca.com/2011/01/27/california-watch-eminent-domain-battles/>. See also Alison Frankel, "Eminent domain, MBS and the US Constitution: a one-sided fight?" July 11, 2012, available at <http://www.reuters.com/article/2012/07/11/us-sanbernardino-bankruptcy-eminent-idUSBRE86A1EM20120711>

**12** Since 1945, California's RDAs controlled property tax "increment revenues" from "project areas" local authorities deemed blighted. Such funds could not be used for any purpose other than urban renewal. Use of RDAs expanded substantially following limitations on local property taxes in the 1970s and 1980s. By 2008, RDAs claimed 12% of the value of California property taxes. For details, see the Legislative Analyst's Office report, "The 2012–2013 Budget: Unwinding Redevelopment," available at [http://www.lao.ca.gov/analysis/2012/general\\_govt/unwinding-redevelopment-021712.aspx](http://www.lao.ca.gov/analysis/2012/general_govt/unwinding-redevelopment-021712.aspx).



rail (Gazzar 2012; Shaw 2012). A recent *Press-Enterprise* (San Bernardino area) editorial, criticizing efforts to replace the defunct RDAs with infrastructure financing districts, captures the populist mood. “One of the worst aspects of redevelopment,” the author claims, was that local governments could create RDAs, and then borrow and spend money, without voters having any say. The proposed replacement would likewise “cut voters out of a say in this new quasi-redevelopment process, while relying once again on lawsuits to police abuses.”<sup>13</sup>

A similar sensitivity towards governmental high-handedness in relation to private property characterizes the popular response to preparations for construction of high-speed rail in the Central Valley. In February, 2012, leaders of the California High-Speed Rail Authority (the Authority) met with Fresno County transportation officials, civic leaders, and local property owners in an effort “to rebuild the agency’s credibility” in the Central Valley.<sup>14</sup> Dan Richard, Chairman of the Authority, admitted to being “extremely unhappy” with how farmers and business people along the potential alignments had been approached. The Authority’s conduct in preparing for construction along the 130-mile route from Chowchilla to Bakersfield had “not been right or fair or just,” he observed, but then expressed the hope that “if we come to [owners] with the philosophy of making them whole as opposed to jerking them around...that the [acquisition] process will go more smoothly.”<sup>15</sup>

At the same meeting announcing the Authority’s effort to “make things right,” a local farmer expressed his frustration: “It’s a good thing they’re communicating better, but if that means they want to understand our concerns but they’re still going to devastate us, then all we have is an understanding devastator.” The gap between Richard’s measured optimism and the farmer’s deep distrust reflects something of a national trend. In recent years, several major public works projects, unrelated except in regard to size, reliance on eminent domain, and perceived impact on rural life, have encountered significant opposition from local residents and have rearranged the usual political alliances.<sup>16</sup>

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**13** “Editorial: California should reject plan to revive redevelopment,” *Press-Enterprise*, Available online at <http://www.pe.com/opinion/editorials-headlines/20121216-editorial-california-should-reject-plan-to-revive-redevelopment.ece> (accessed December 16, 2012).

**14** The California State Legislature created the High Speed Rail Authority in 1996 to evaluate potential routes between Los Angeles and San Francisco, develop a financial plan, and arrange for acquisition of a right-of-way and construction of the system. For details, see California Public Utilities Code, SB 1420.

**15** Tim Sheehan (2012) “New rail leaders hope to ‘make things right,’” *The Fresno Bee*, February 14, 2012.

**16** A TalkingPointsMemo.com blog entry from early 2012 describes opposition to the Keystone Pipeline uniting “Occupiers, Tea Partiers, environmentalists, [and] individualists,” against takings made possible by the *Kelo* case. Several demonstrators explain their unaccustomed activism

Americans may disagree vehemently over the wisdom of public projects such as the National Interest Electric Transmission Corridors, the Keystone Pipeline, or high-speed rail, but they find common ground in opposition to the government's reliance on eminent domain. As the first phase of construction draws near, erstwhile ideological opponents are unified by the perception that government and private industry are colluding to force individuals from their property.<sup>17</sup> Thus, no matter how remote the connection in legal terms between the sort of economic redevelopment at issue in New London and the takings required by large-scale infrastructure projects, the *Kelo* case functions as a lightning rod, attracting and concentrating often inchoate anxieties that citizens have lost control of their political destiny. California's high-speed rail project models the phenomenon described here in at least three ways.

### 1.2.1 Inaccurate Cost and Time-to-Completion Estimates

Cost projections for the project have risen sharply during the planning process (Cox and Vranich 2008: p. 42). In November, 2008, when state voters were asked to approve \$9.95 billion in general obligation bonds, the estimated cost for construction of the main line between San Francisco and Los Angeles was \$32 billion, with an additional \$12 billion required to complete spurs to San Diego and Sacramento. The Authority's 2009 business plan raised the outer limit to build the main line alone to \$42 billion. By 2011, another revised plan projected costs of between \$98 billion and \$118 billion. As the price tag doubled and then tripled, and the projected completion date of the San Francisco to Los Angeles link was delayed by more than a decade, public support diminished. By late 2011, activists and politicians opposed to the project were calling for a new referendum to

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by reference to the private construction company's threatened resort to eminent domain (Beutler 2012). Along the same lines, Kenneth Thomas, writing for DailyKos.com, observes "unusual political coalitions fighting private-to-private eminent domain." No one wants to lose their home, he explains, "but they are especially incensed if they are losing their homes to enrich a company or private developer" (Thomas 2011).

<sup>17</sup> In a two-part story on the threat to rural life posed by eminent domain and the National Interest Electric Transmission Corridors, *Live Better Magazine* interviewed several property owners opposed to a planned corridor in Virginia. In addition to environmental and aesthetic objections, the owners expressed profound resentment that eminent domain should be placed at the disposal of for-profit electric utilities. The articles are available online at [http://livebettermagazine.com/eng/magazine/article\\_detail.lasso?id=26](http://livebettermagazine.com/eng/magazine/article_detail.lasso?id=26) and [http://livebettermagazine.com/eng/magazine/article\\_detail.lasso?id=44&-session=user\\_pref:42F947780cde614821xsioq68753](http://livebettermagazine.com/eng/magazine/article_detail.lasso?id=44&-session=user_pref:42F947780cde614821xsioq68753)

halt the sale of bonds.<sup>18</sup> While it is tempting to dismiss these developments as the result of inadequate foresight or bad luck, there may be more to the story than meets the eye.

The authors of a study of cost escalation in 258 transportation infrastructure projects around the world conclude that “strategic misrepresentation” rather than miscalculation best explains why costs are “highly and systematically underestimated” (Flyvbjerg 2002: p. 290). Much of the blame for what appears to be an international phenomenon rests on conflicts of interest that inevitably arise when government agencies are deeply involved in promoting the very projects they are required to plan and supervise. News reports from 2012 suggest the Authority was not immune to the ethical problem:

Documents filed this week show the California High-Speed Rail Authority last year paid \$161,103 to one of the country’s biggest public relations firms to lobby the state’s politicians as they consider spending \$2.7 billion to launch the polarizing bullet train project... High-speed rail officials defended the spending as a “vital need” when their staff was too small. But both Democratic and Republican lawmakers and even die-hard bullet train backers decried the lobbying as a wasteful and unethical use of taxpayer funds, saying it essentially amounts to the state spending money to lobby itself.<sup>19</sup>

Beyond the negative ethical implications, however, the Authority’s joint mission to plan and promote high-speed rail fostered opponents’ impression of bureaucratic appointees running amok. Indeed, according to the nonpartisan Legislative Analyst’s Office (LAO), the Authority’s lack of electoral accountability practically insured that planning would proceed “without sufficient regard to other state considerations, such as fiscal concerns” (Thronson 2011: p. 10). Supporting evidence for the LAO’s conclusion appeared in 2012, when the *Los Angeles Times* revealed that 2 years earlier the Authority had passed over a proposal by the corporation responsible for France’s successful high-speed rail system to open the project to competitive bids by foreign firms.<sup>20</sup> In the view of an American employee of the French company, it was as if the Authority was “trying to design and build a Boeing 747 instead of going out and buying one.”<sup>21</sup>

The rejected proposal would have limited costs by building the system on the west side of California’s Central Valley, along the I-5 corridor, where existing

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**18** The Authority’s final 2012 revision reduced projected costs to \$68 billion, but at the sacrifice of earlier promises of speed and affordability.

**19** Mike Rosenberg “High-speed rail tapped state funds for unusual lobbying contract,” *Silicon Valley Mercury News*, February 3, 2012.

**20** Dan Weikel and Ralph Vartabedian, “High-speed rail officials rebuffed proposal from French railway,” *Los Angeles Times*, July 9, 2012.

**21** *Ibid.*

state-owned rights of way and utility easements might have reduced conflicts with property owners, shortened the construction schedule, and lessened travel time. Limiting cost, however, was not the Authority's primary concern. The *Times* quotes Richard Katz, a former board member, humorously contrasting the non-voting cows in Coalinga, on the Valley's west side, with politicians from cities further to the east who had played a key role in initiating and securing start-up funds for the high-speed rail project (Weikel and Vartabedian 2012).

Yet, the political considerations to which Katz alludes now seem unusually detached from electoral support. Even as Governor Brown insists on moving forward with the high-speed rail project, a Field Poll from late 2011 finds that two out of three Californians want the legislature to call for a new vote and, given the chance, would reject the bond measure 59%–31%.<sup>22</sup> A USC Dornsife/*Los Angeles Times* poll from June 2012 confirms the earlier findings, and shows majority disapproval across every region, ethnicity, income bracket, and party affiliation.<sup>23</sup> Although organized labor and Democrats were among the strongest early supporters of high-speed rail, 56% of union households and 47% (versus 43%) of Democrats are now opposed.

Significantly, the Authority anticipated resistance when the project reached densely populated regions near the coastal cities. Construction was to begin in the Central Valley largely to avoid the legal delays commonly encountered when public projects are opposed by relatively wealthy, easily mobilized, environmentally conscious urbanites. But in assuming less resistance to construction among residents of the predominantly rural Central Valley, high-speed rail planners failed to consider lingering hostility to eminent domain stemming from the *Kelo* decision. While *Kelo* did not address the right of way takings required by California's high-speed rail project, it raised public awareness of eminent domain and caused something like an allergic reaction in a society which even today thinks of private property as a natural right.<sup>24</sup>

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<sup>22</sup> Among respondents, 10% were undecided. The poll sampled 515 registered voters November 15–27, 2011. Complete results are available online at <http://www.field.com/fieldpollonline/subscribers/Rls2400.pdf>.

<sup>23</sup> The poll sampled 1002 registered voters May 17–21, 2012. Results are available online at [http://gqrr.com/articles/2749/7227\\_052112\\_usc\\_la\\_times\\_fq\\_Saturday.pdf](http://gqrr.com/articles/2749/7227_052112_usc_la_times_fq_Saturday.pdf)

<sup>24</sup> Timothy Sandefur, staff attorney at the Pacific Legal Foundation, a libertarian public interest law firm, aptly describes the conflicting outlooks: "[T]oday, the nation's intellectual elite – and particularly judges – have rejected the traditional principles underlying property rights. They see property as simply a privilege the government can alter or rearrange at will ... [h]ence the clash between today's lawmakers – who want maximum power to manipulate property – and permanent constitutional principles designed to protect each individual's right to pursue happiness" (Sandefur 2009). Competing views on property sometimes obscure underlying financial interests, as illustrated by San Bernardino's recent consideration of a plan to condemn underwater

A news report from late 2011 is illuminating. The story focuses on the fate of Bakersfield High School, a local landmark dating from 1893, which sits too close to the proposed route to continue operating as a school. When civic leaders first discussed routing options with the Authority a decade ago, they imagined a centrally located depot with nearby residential development. Today, they confront plans for a 5000-car parking garage, an elevated track dividing the city, and intolerable noise levels. “Now that we know what the impacts are,” one city planner admitted, “maybe we should have considered a bypass outside of town.” Bakersfield’s complaints, it appears, are not unique:

Across the length of the Central Valley, the bullet train as drawn would destroy churches, schools, private homes, shelters for low-income people ... and much else as it cuts through the richest agricultural belt in the nation and through some of the most depressed cities in California. Although the potential for such disruption was understood in general terms when the project began 15 years ago, the reality is only now beginning to sink in.<sup>25</sup>

The Authority’s tactical reluctance to release details about the route until very late in the planning process may have delayed negative reactions, but the language residents used to express their frustration shows the irritating effect of *Kelo*-inspired property rights activism since 2005:<sup>26</sup>

“Some people will say they screwed a bunch of farmers in Kings County. So who cares?” said Frank Oliveira, a farmer. “The answer is they will screw you too when it comes to your neighborhood (Vartabedian 2005).”

The anger here has less to do with inept planning than with unaccountable assertions of power; that is, the Authority’s clumsiness in route choice and public relations merely intensifies an existing impression that the balance between public and private interests implied in the Takings Clause is dangerously askew and

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mortgages. Ostensibly helping currently beleaguered homeowners, the plan would have raised interest rates, tightened the market for future borrowers (Lazo 2013), and channeled billions in profits to private backers if the measure had been adopted nationally (Yoon 2012).

**25** Ralph Vartabedian, “California bullet train: The high price of speed,” *Los Angeles Times*, October 22, 2011.

**26** For a review of instances of “eminent domain abuse” across California and an account of “success stories” of resistance to governmental takings, see “California Scheming: What Every Californian Should Know About Eminent Domain Abuse,” a Castle Coalition report from 2008 available at <http://www.castlecoalition.org/about/570?task=view>. Additional examples of property rights activism can be found on websites associated with the Institute for Justice (<http://www.ij.org/>), the Pacific Legal Foundation (<http://www.pacificlegal.org/cases/property-rights>), and the California Alliance to Protect Private Property Rights (<http://www.calpropertyrights.com/>).

threatens to deplete citizens' control over government. In the same report from Bakersfield, state Senator Joe Simitian, a Democrat from Palo Alto and chair of the Senate transportation subcommittee, observes that a massively disruptive project such as high-speed rail requires extraordinary dexterity, but the Authority "has been anything but artful" and "big chunks of the state do not believe they are being listened to (Vartabedian 2005)."

### 1.2.2 Impractical Segmentation

To the extent planners and politicians supporting high-speed rail anticipated opposition to the use of eminent domain, they lived up to Justice O'Connor's expectations in her *Kelo* dissent. They assumed resistance would be concentrated in the more developed, populated, and affluent regions of the state and wrote Prop 1A to prioritize construction in the segment requiring the smallest expenditure of bond money as a percentage of the overall cost of construction. Moreover, most of the \$3 billion in federal funds awarded to California for high-speed rail came from the 2009 stimulus package and was contingent on the Authority's willingness to begin construction in the Central Valley.

Prioritizing construction in the Valley and leveraging federal stimulus dollars made sense as a way to build momentum for the project and bring much needed capital investment to a chronically underdeveloped region of the state, but in the post-*Kelo* environment it looked like yet another example of wealthy, well-connected interests, unchecked by judicial oversight, placing the entire risk of the project's failure on the least powerful region of the state. It is striking that construction industry lobbyists and labor unions contributed over 80% of the funding for the original 2008 ballot measure. Yet even more telling, the breakdown of financial support by geographic location shows Sacramento and Washington, DC, in the top two spots, New York in fourth place, and no Central Valley municipality within the top fifteen.<sup>27</sup> Given the enormous stakes involved in Prop 1A, its funding pattern was not unusual. All the same, it magnified the appearance that powerful non-local interests were manipulating the political process at the expense of local landowners.

By May, 2011, an LAO Report showed that the initial section of the high-speed line in the Central Valley "would have insufficient ridership and revenues to stand on its own" (Thronson 2011: p. 3). More than a year later, a federal Government

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<sup>27</sup> The financial information comes from a report on the 2008 election prepared by the National Institute on Money in State Politics. Details can be found online at <http://www.followthemoney.org/database/StateGlance/committee.phtml?c=3409>.

Accountability Office (GAO) study found that only \$11 billion of the total projected cost of \$68 billion was secured by the state. While \$42 billion, or 61% of the project's total cost, was projected to come from the federal government, the GAO noted that the federal source (the Department of Transportation's High Speed Intercity Passenger Rail Program) had received no funding for 2 years and its future was uncertain. Meanwhile, private investment, projected to supply 19% of the total, would be available, if at all, only after completion of the initial operating segment from Merced to Los Angeles (Fleming 2012: pp. 10–11).

Uncertainty regarding the project's funding suggested another disturbing parallel with *Kelo*. Pfizer, the multinational corporation whose interest catalyzed New London's development plans, decided to relocate in 2009. By then, the city had spent tens of millions of dollars bulldozing viable private residences without realizing new tax revenues or creating new jobs. The silver lining in the well-publicized episode, at least for property rights advocates, was that it raised voters' skepticism regarding lavish benefits promised in exchange for condemned property. The *Kelo* majority may have been insufficiently suspicious of New London's redevelopment plan, but from now on politicians who support takings for purportedly public uses which turn out to be not only private, but entirely illusory would be punished at the polls.

The *Kelo* majority's deferential stance was justified in part on the argument that voters are better suited than judges to control elected officials' determinations of public use, but in this regard, Californians' experience with high-speed rail has been even more frustrating. The original ballot measure carefully matched claimed benefits with phrases conveying fiscal restraint. Prop 1A limited the amount of bond money that could be devoted to pre-construction and administrative expenses, and required half the cost of construction to be covered by other public and private funding sources. Even more significant, the Authority was required to submit detailed funding plans prior to requesting appropriations for capital costs, and an independent peer review group was to judge the accuracy and appropriateness of the Authority's forecasts and plans.<sup>28</sup>

Yet none of the fiscal responsibility measures included in the proposition could redirect or stop the project, a problem best illustrated by the experience of the Peer Review Group (PRG), which released a report in January of 2012 advising the legislature not to appropriate bond proceeds until the Authority resolved funding and feasibility problems.<sup>29</sup> Chief among these was the insistence on

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<sup>28</sup> The original language of the 2008 ballot measure, entitled "Safe, Reliable High-Speed Passenger Train – State of California," is available online at <http://www.smartvoter.org/2008/11/04/ca/state/prop/1A/>.

<sup>29</sup> See "Peer Review Group's Comments on the 2010 California High Speed Rail Authority Funding Plan," available online at <http://www.cahsrprg.com/documents.html>.

beginning construction in the Central Valley, on the ground that “it would be cheaper and less subject to environmental opposition and would permit an initial high-speed test and demonstration track.” In reality, the PRG determined, the initial construction segment would not constitute true high-speed rail and thus, aside from failing to meet the requirements of the enabling legislation, would simply duplicate existing Amtrack service and have “no independent utility.”

In the PRG’s view, the true purpose of the Central Valley segment was only to “serve as a vehicle for the use of Federal money that has specific deadlines,” and even on the optimistic assumption that the initial segment could be constructed with available funding, an additional \$25–\$30 billion would be required to achieve a fully operational high-speed line. Unlike the interstate highway system and airports throughout the US, there was no dedicated funding source supporting construction and maintenance of high-speed rail, and private entities were unlikely to invest absent a guarantee of profitability.<sup>30</sup> Without such funding, the PRG predicted, construction would be suspended for many years and the cost of building the initial segment would not be justified by its minimal utility.

Despite this damaging assessment, the Governor’s office promptly responded – via twitter – that the report’s concerns “are not new or compelling enough” to justify a change of course.<sup>31</sup> The California Labor Federation agreed, adding that the “jobs crisis” and the “urgency to upgrade our failing transportation infrastructure” made any further delay imprudent and irresponsible.<sup>32</sup> Thus, without denying the basic problem with segmentation and funding, high-speed rail supporters in and out of government simply shifted their perspective. The shift is well-expressed by Robert Cruikshank, a former leader of Californians for High Speed Rail, whose response to the PRG’s report highlights another unintended consequence of the Supreme Court’s deferential stance on public use:<sup>33</sup>

There’s no doubt that the lack of secured, full funding is a problem. The question is how does one resolve it? Do you assume that the federal government will never spend another dime on high speed rail again and call it a day? Or do you press onward and build what you can, working to change Congress’ mind while also hoping that the initial construction can itself act as a spur to win more funding?

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**30** See “Investors Might Wait to Back Rail Project Until Trains are Running,” *Los Angeles Times*, October 17, 2011. See also, *California High Speed Rail Program Draft 2012 Business Plan*, 8–26 to 8–38.

**31** See <http://twitter.com/johnmyers/status/154351064496357376>.

**32** See [http://www.calaborfed.org/index.php/site/page/high-speed\\_rail\\_peer\\_review\\_panel\\_misses\\_mark/](http://www.calaborfed.org/index.php/site/page/high-speed_rail_peer_review_panel_misses_mark/)

**33** See <http://www.cahsrblog.com/2012/01/peer-review-group-wants-to-delay-hsr-bond-funds-gov-brown-disagrees/>



Refusing to address the crippling future costs of a policy when the benefits are immediately available is a familiar feature of contemporary American political life.<sup>34</sup> In relation to property rights and the law of eminent domain, however, this common phenomenon raises a problem even greater than what disturbed the dissenters in *Kelo*. In that case, a permissive interpretation of public use left the impression that local government could sell the power of eminent domain to the highest bidder. It hardly mattered that that impression was overblown. If what is at issue is the public's willingness to support large projects relying on eminent domain, then even inaccurate perceptions are relevant, and for projects as large, lengthy, and disruptive as CAHSR, the perception must remain favorable or funding will evaporate.

To the extent government and influential private interests are seen at the outset to be ignoring a fatal lack of funding, eminent domain begins to look to project opponents and sympathetic bystanders less like a necessary tool to secure the public interest and more like an anti-democratic trump card; a weapon in the hands of politicians and planners who would defy public opinion and take private property not for public use as conventionally understood, but for a hostage against the possibility that future governments will refuse to complete segments of a larger project for which so many have been made to sacrifice so much.

### 1.2.3 Replacing Limiting “Public Use” with Empowering “Public Purpose”

Finally, the confusion of “public use” with “public purpose” as the limiting standard in Fifth Amendment challenges to eminent domain, together with the Court's general reluctance since the late 1930s to defend economic liberty interests against governmental regulation, influenced the debate over high-speed rail indirectly by fostering a culture of indifference to property rights on the part of politicians, planners, and commercial interests involved in public works projects. This culture explains, at least in part, why officials responsible for planning and developing CAHSR stumbled so badly in their efforts.

On the one hand, the assumption that private property would pose little or no obstacle to public works, especially in rural regions of the state, must have minimized the prospect of construction delays and cost overruns due to obstructive

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<sup>34</sup> For a shocking example from California, see the account of an Orange County school board approving the sale of capital appreciation bonds to defray current construction expenses in “The Bank the School and the 38-year Loan” (Petersen 2013). The 2011 sale raised \$22 million, one thirteenth of the final repayment amount of \$280 million.

litigation.<sup>35</sup> On the other hand, the sense that public use was no longer a flexible limitation on the taking of private property, but a call to imagine its sublimation to more noble social purposes would have diminished the significance of negative expert opinion on the relative costs and benefits of the project. If one is determined to take property in order to reinvent California – as the Court’s view of public use implicitly approves – any negative cost-benefit analysis can be dismissed as taking too little notice of the changes in tastes, habits, and living conditions a truly visionary project will produce.

Here, it must be acknowledged, the analysis is necessarily somewhat speculative. No one involved with major public works projects is likely to admit being wholly indifferent to the property rights of individuals. Scholars who study the related problem of inaccurate cost-benefit analyses in transportation infrastructure development recognize that, even where the incentives (e.g., winning project approval) are obvious, deliberate deception is difficult to prove (Wachs 1982: p. 567; Flyvbjerg et al. 2009: pp. 351–353). How much harder must it be, then, to show that a general attitude towards property, rather than a special benefit to be gained, significantly influenced those who planned and promoted high-speed rail?

In this case, however, there is a way to show the relevant influence without engaging in a thorough cross-examination of all the major players. Proponents of high-speed rail in government and the private sector defend the project using monumental metaphors and collectivist rhetorical strategies which can be highly revealing. For instance, they often ask why California, with one of the world’s largest economies, cannot duplicate existing systems in Spain, China, and France, as if supporting high-speed rail is a patriotic duty. Then too, they claim, if massive projects such as the Panama Canal and the transcontinental railroad were constructed in difficult circumstances why should anyone think high-speed rail is now beyond reach?<sup>36</sup> To such supporters, opponents are not simply reasonable people who evaluate the costs and timing differently, but “NIMBYs,” “fearful men,” and “declinists.”<sup>37</sup> At the farthest reaches of such rhetoric the *Los Angeles Times* editorial board cites the perseverance of an ancient Egyptian pharaoh

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<sup>35</sup> For details on the number and kind of properties to be acquired, see a report in the *Orange County Register*, “High-speed rail’s coming battle: Powerful land owners” (Joseph 2012). On delays caused by unanticipated difficulties in acquiring the right of way, see a report in the *Los Angeles Times*, “California Still Hasn’t Bought Land for Bullet Train Route” (Vartabedian 2013).

<sup>36</sup> The claims come from a public presentation described by Spencer Michels in “California grapples with high-speed rail debate,” *PBS Newshour: The Rundown, a Blog of News and Insight*, March 1, 2012.

<sup>37</sup> The epithets from the governor are quoted by Mike Rosenberg, in “Governor Brown signs California high-speed rail bill, call critics ‘NIMBYs,’ ‘fearful men,’” *Mercury News*, July 18, 2012.

in building the pyramids to justify the newspaper's continuing support for the project despite admittedly serious problems.<sup>38</sup>

Setting aside the question whether such historical or international comparisons are valid, it seems safe to conclude on the basis of the rhetoric that current support for the project rests on something other than straightforward calculations of near-term utility. Yet, however great the future economic and environmental benefits of high-speed rail may be, in California's current political circumstances of high unemployment, municipal bankruptcies, and governmental requests for tax increases, refusal to change course is an oddity demanding explanation. The situation becomes even stranger when it appears that estimated travel times and ticket prices for this extraordinarily expensive system are now only marginally better than existing alternative modes of transportation.<sup>39</sup>

Even as other state ventures with powerful advocates and stable popular support are considered for cuts, high-speed rail remains largely unscathed, seemingly impervious to majority opposition in every region and within every demographic category.<sup>40</sup> Could it be that the very prospect of using eminent domain is what protects the project from cancellation? As unlikely as this outcome will seem, it may be an unanticipated consequence of the Supreme Court's inversion of the concept of public use. For a project involving the taking of property empowers visionary planners and politicians in a way more common budgetary struggles between competing interests never can. The interests must be counted on to defend their budgetary turf. Given the Court's interpretation of the Takings Clause, however, a disparate collection of individual owners will seem a less probable, less formidable, and finally less worthy source of resistance to futuristic projects. Elitism in the planning of public works did not originate with *Kelo*, but the case amplified a troubling note of condescension previously inaudible to the general public.

More than a decade ago, Martin Wachs, a leading specialist on transportation planning, decried the contradictory self-definition dogging his fellow planners:

On the one hand, we long to be visionaries, imagining and creating the future as a creative product of our idealism. On the other hand, we see ourselves as technocrats, asserting that the future is the inevitable consequence of interacting trends . . . . Uncertain of which

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**38** "Keep California's bullet train on track: Despite recent negative reviews by experts, in the long term the rail project still makes sense." *Los Angeles Times*, January 7, 2012.

**39** In its revised 2012 business plan, the Authority estimates travel time between San Francisco and Los Angeles at 2:38 (at an average speed of 170 mph) and ticket prices of about \$80. Airfare for the same trip is currently around \$140 and travel time is about 1:10.

**40** A detailed review of cuts to the California budget in 2011 is available at <http://projects.nytimes.com/california-budget/Education>

metaphor defines us best, we vacillate, and as a result we sometimes engage in duplicitous behavior (Wachs 2001: p. 371).

From this perspective, the *Kelo* decision represents a lost opportunity. By refusing to scrutinize state and local authorities' determinations of public use – especially in cases where the proposed use is highly unlikely to materialize – the Court deprived individual property owners of a tool with which to prod policy-makers towards greater collaboration in planning the future of transportation. Moreover, as argued above, it enabled precisely the sort of dubious forecast-based planning that played a central role in the New London fiasco. These effects could only have increased hostility to a project already so large and disruptive that any additional resistance might prove fatal.

## 2 Conclusion

There is no question that the state of California can use the power of eminent domain to consolidate a right of way and begin constructing high-speed rail in the Central Valley, but a review of the development of the law in this area sheds considerable light on the project's difficulties and suggests how such problems might be avoided in the future. For present purposes, the question whether a bullet train is useful, feasible, or necessary for California is beside the point. Supporters of the project ought to be no less concerned than detractors if an essentially unlimited power to take private property causes planners to ignore potential pitfalls and voters to turn against such large-scale ventures in midstream.

Absent the prospect of independent review, it is hardly surprising that a board charged with planning and building a massive infrastructure project will make extraordinary claims to win a single electoral contest, or indeed use public money to lobby public officials to shore up political support when the project falters. Nor is it surprising that widespread criticism of the Supreme Court's decision to uphold condemnations in the context of economic revitalization raises sympathy for anyone who resists eminent domain, no matter how distant in technical terms a right-of-way is from a blight removal program. Such sympathy can only strengthen an opposition movement for which every new revelation as to the costs, completion dates, and segmentation of a project confirms suspicions that planners were unconcerned with public opinion, beholden to special interests, and willing to say anything to avoid acknowledging critical changes in circumstances.

Like any tool, eminent domain is neither good nor bad in itself. But when called upon by government in the US, the power to take private property inevitably

touches a nerve. Unlike the vast majority of socioeconomic regulations the Court has refused to scrutinize since 1937, applications of eminent domain are almost always deeply personal (Wilder and Stigter 1989: p. 64). Inasmuch as Americans continue to view their property as the product of their labor, the proof of their worth, and the comfort of their old age, even a vicarious condemnation is likely to induce sympathetic outrage and political mobilization, particularly after *Kelo*.

Although *Kelo* did not change the law of eminent domain, it showed quite starkly how existing interpretations of public use could produce a reverse-Robin Hood effect in which most of the burden of an economic improvement scheme rested on the poor and powerless, while most of the benefit accrued to the wealthy and powerful. This is exactly what enabled property rights and anti-tax advocacy groups to recast the issue as a threat to liberty rather than a convenient means of insuring economic progress (Niedt and Weir 2007). An unpopular case thus became a powerful stimulus to reform, but in California, where the controversial project is bigger and the economic circumstances in many respects worse, the backlash may well be greater.

Why a backlash, rather than a sober recognition that big, complex projects inevitably encounter unforeseen obstacles? Consider the circumstances: First, the large scope of the project justified segmentation. Next, the absence of a dedicated public funding source led planners to think in terms of public-private partnerships to share the project's costs and risks. But the assumption that construction would encounter the least resistance in the Central Valley combined with the time constraints placed on spending federal stimulus dollars insured the project would begin with the segment least likely to generate the profits required to attract private investment. Planners, however, were counting on private investment to achieve the goals advertised when they first sought public approval for nearly \$10 billion of new public debt. In the absence of private investment, the Central Valley segment is unlikely to be extended or to achieve speeds and utility greater than what conventional rail lines already provide. A redundant rail line may qualify as a public use of private property under the current legal standard, but it will strike many Americans as waste and abuse far greater in scale and continuing cost than New London's bulldozed homes and empty lots.

Assuming the Supreme Court does not reverse course on public use and high-speed rail never enjoys the dedicated funding granted interstate highways, avoiding the mutually reinforcing effects of irritating political legerdemain and popular resistance to takings would seem to require a radical change in outlook on the part of project planners and promoters. The days when it was possible to conceal the true cost or duration of a project, or to divide and order its progress in such a way as to reward supporters, avoid politically savvy opponents, and pressure future legislators to see the project through are long gone. Honesty and

transparency should be hallmarks of the planning process, not just for their own sake, but because the truth will out, and when it does, sticker shock and scandal will derail even the fastest trains.

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