

**The Texas Land War
by Timothy Sandefur**

a review of

Bulldozed: "Kelo," Eminent Domain, And The American Lust for Land

by Carla T. Main

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Everyday Americans, too benevolent for their own good, were floored by the Supreme Court's decision in *Kelo v. New London*, which authorized government to seize their homes and businesses and transfer the land to private developers to "stimulate" the local economy, or for any other purpose the bureaucrats think worthwhile. Most had never given much thought to eminent domain before, and those that had probably thought the Constitution meant what it said: that property could only be taken for "public use," and not for private use. But two generations of legal sophistry have eroded constitutional protections for property rights to the point that government officials now have virtually limitless authority to redistribute the property that was earned and owned and cherished by their constituents, to other owners that they consider more worthy.

Lawyers and economists can examine *Kelo* from all sorts of sophisticated angles, disputing the framers' original intent or the economic efficiency of using eminent domain for redevelopment. But the sharp edge of this debate penetrates to the heart of American communities, and it is there that Carla Main has chosen to focus. Main's book describes the awful consequences of redevelopment in Freeport, Texas, where the city fathers decided to build a tourist marina on property owned by Western Seafood, a business owned for three generations by the family of Wright Gore Sr. (For full disclosure, I filed a friend of the court brief supporting the Gores in the Fifth Circuit U.S. Court of Appeals.) The ambitions of the city council, backed by their power to condemn land and to string out legal proceedings for years at taxpayers' expense, gradually turned this blue-collar community into a battleground of bitterness and reprisal — the predictable consequence of coveting your neighbor's land. As Main puts it, "small-town grudges and loyalties ... take on new dimensions when people who have known one another for a lifetime hold the power to take each other's property away and give it to someone else. Slightings and jealousies, class differences, rumors and gossip that may have seemed petty in the past suddenly take on life-or-death proportions."

The basic purpose of property rights is well expressed in the old saying that "good fences make good neighbors": mutual respect (the foundation of democracy) begins by recognizing the boundaries of private choice for each individual, and those boundaries are set first and foremost by property rights. They are what ensure that we may speak our opinions without fear of retaliation; that we may print what we like on presses that we own and put up campaign signs in our own front yards; that we may make choices about our own lifestyles and leave others to make their own; that we may dispute and argue, but return in the evening to our respective homes, safe from recrimination; that we may labor for a living, and enjoy our earnings and plan our futures and leave a legacy to our families and friends.

When the "good fences" are torn down — when ownership is rendered a matter of political favor — when property becomes a privilege that the government may bestow upon those with the most influence — then the true essence of community is destroyed, and in its place

comes a sort of quiet civil war, where the future of one's livelihood hinges not on merit, but on the decisions of politicians armed with the state's coercive power. Those decisions are made, of course, on political, rather than moral or economic considerations, and the consequences are not only hostile, nasty and petty, but incalculably wasteful as well. In addition to the damage it inflicted on the community, the fathers of the working-class city of Freeport pledged the town to ruinous debt in order to woo the millionaire developer who promised to remake the city.

But as Main points out, bureaucrats "don't have to answer to shareholders or boards, or otherwise account (in the short term) for horrendous fiscal stupidity." Instead, for some 70 years, their actions have been shielded from judicial review by the "rational basis test," which governs property rights cases and which grants them "well-nigh conclusive" authority to do what they like with other people's land.

That test was concocted by the Progressive intellectuals of the early 20th century, who abandoned the founders' beliefs in natural rights and limited government and embraced instead the idea that rights are privileges, given — and revocable — by government. Individuals existed to serve society, and were given these privileges only for that purpose. The Progressives were the first to use the word "blight" to refer to under-performing neighborhoods, and they decided that government's role should not be limited to defending our rights, as the founders believed, but that it should shape society to fit the leaders' "vision." This meant eradicating undesirable neighborhoods (and evicting "undesirable" neighbors) and replacing them with new buildings and new (usually wealthier) residents. This is why, as Main puts it, "we have come to a point where owning private property is seen somehow to imply a duty to produce wealth and value to the community." Those who do not will be replaced "because they are not paying as much as a hypothetical strip-mall developer could pay."

The Progressive theory reached its ascendancy in the 1930s when the New Deal Court adopted the rational basis test to uphold massive new schemes for wealth redistribution. Twenty years later, it was applied to eminent domain in *Berman v. Parker*. By the time *Kelo* came around, Justice Stevens found it unnecessary even to substantiate his claim that "promoting economic development is a traditional and long accepted function of government" for which the state may redistribute property at will. That assumption is built into the Progressive vision of government.

It is unfortunate that Main does not delve into the Progressive origins of eminent domain abuse. In a chapter on the 19th century case *West River Bridge v. Dix*, she suggests that the overly broad interpretation of "public use" is a legacy of the antebellum era, but while it has roots in that age, it is actually descended from the ideology of judges like Louis Brandeis, who declared that "rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society." "Remoulded" was a handy euphemism for "violated," and his attitude now predominates in the legal world, thanks to the New Deal Court. Though Main expresses some puzzlement that "the liberal majority" in *Kelo* gave their blessing to such an extreme instance of corporate welfare, the outcome was really not surprising: Those justices long ago abandoned respect for private property. To rule for Susette Kelo might have shaken the foundations of the redistributive state.

One problem with Progressivism is that it assumed that government can allocate property more justly than the market. Yet the power to redistribute wealth and opportunity will invariably fall into the hands of politically sophisticated lobbyists who stand to make a buck by exploiting that power. This is why wealthy, white neighborhoods are rarely condemned, while blue-collar or

minority towns frequently are. And this is why redevelopment transforms towns like Freeport, not into scientifically organized engines of prosperity, but into brazen scrambles for other people's land. When Wright Gore's grandson tried to inform Freeport residents of the city's condemnation plans, the mayor personally distributed fliers calling Gore a liar and cleverly spinning the facts to fool voters into thinking that the city had not pledged \$6 million in loan guarantees to the tycoon planning the marina. Later, when a citizen tried to explain to the city council that the mayor's acts were illegal, the mayor had her thrown out. Other residents had signs protesting the development torn down by city officials or mysteriously stolen in thefts that police never investigated.

The details get nastier as Main's dramatic account continues. In the background lurk the ghosts of old Southern power structures, where class, intimidation and polite silence matter more than reason and individual rights.

"Freeport," writes Main, "is no better and no worse than any other town. Just under the surface in every town and city lies a complex web of relationships, often more complicated than anyone imagines." In a healthy society, that network is based on respect for each others' autonomy — respect that allows people of vastly different backgrounds to get along in peace. But when political influence can deprive them of that autonomy by taking away the property that they and their family members have treasured for generations — of the homes they grew up in, or the businesses into which they have poured their sweat and tears — the basis of healthy community is ripped apart, and society becomes a chaotic flux of suspicion and recrimination. Carla Main has provided us with a powerful and moving illustration of how tearing down the "good fences" that private property rights establish can turn "good neighbors" into enemies and good neighborhoods into dark and forlorn places.

Timothy Sandefur is a senior staff attorney at the Pacific Legal Foundation and author of *Cornerstone of Liberty: Property Rights in 21st Century America*.