



# ANALYSIS OF CALIFORNIA'S PROPOSITION 90: THE PROTECT OUR HOMES ACT

By Leonard C. Gilroy, AICP





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# Analysis of California's Proposition 90: The Protect Our Homes Act

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## Executive Summary

The protection of private property rights is a foundational principle underlying our constitutional system of government and market-based economy. Yet over the last several decades, property owners in California and across the nation have witnessed an accelerated erosion of their property rights in two fundamental ways.

First, the government's power to take private property through the use of eminent domain—initially intended to ensure that roads, infrastructure, and other legitimate public facilities were built—has gradually expanded to cover a wide variety of projects deemed to serve a public “benefit,” no matter how broadly or vaguely defined. For example, eminent domain has been widely used to transfer property from one private owner to another for economic development purposes, giving government the power to hand-pick winners and losers and undermining our free market economic system and citizens' private property rights.

Second, states and local governments have adopted an increasing variety of land use regulations aimed at preventing the spread of urban sprawl and minimizing the effects of growth and development on the environment and citizens' quality of life. Examples of such regulations include zoning ordinances, subdivision regulations, and open space preservation ordinances. Local governments in California have been particularly aggressive in expanding the regulatory state, adopting literally tens of thousands of ordinances and regulations governing the use of private property. However, these regulations can significantly limit the rights of landowners to use their land in the ways that were legally permissible and authorized when they purchased their property and can dramatically reduce the property's market value, imposing an economic hardship and significant loss of value upon the owner. Compounding the problem is that property owners are

only rarely compensated for the economic impacts associated with regulation, also known as “regulatory takings.”

Proposition 90—the proposed constitutional amendment on the November 2006 ballot known as the “Protect Our Homes Act”—attempts to address both of these threats to private property rights by restricting the use of eminent domain to a limited set of public uses and preventing governments from adopting unfettered new regulations that significantly reduce the value of private property without compensating the affected property owners. Clearly, many Californians are concerned about the security of their homes, businesses and property, as over 1 million citizens signed petitions to get Proposition 90 on the ballot.

Among its key provisions, Proposition 90:

- Specifies that eminent domain may only be used for “public use” and prevents the transfer of property from one private party to another private party, unless that private entity is performing a public use project.
- Places the burden on government to prove “public use” in all eminent domain actions.
- Allows the owners of condemned property to recover legal fees, moving expenses, and other costs they incur as a result of an eminent domain action.
- Requires government to compensate landowners for substantial economic losses to private property that may result from the adoption of new state and local government regulations and statutes, except when those actions are taken to protect public health and safety.
- Exempts, or “grandfathers,” all existing state and local government statutes and regulations from its provisions, leaving all existing land use and environmental regulations in place. This means that private land that had previously been rezoned as agricultural, environmentally sensitive, or other designations would retain those designations. The initiative also allows for reasonable amendments to these existing land use regulations as long as they pertain to the regulation they amend without violating the tenets of Proposition 90.
- Explicitly preserves government’s power to condemn property to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions, so long as actions are limited to the abatement of specific conditions on specific parcels.

Proposition 90 would rein in government’s expansive power to award certain private parties the lands that belong to another through the application of force. Under Proposition 90, government could no longer use eminent domain to advance any purpose that it deems worthy, and no longer would property owners lack basic protections that prevent them from getting a fair shake in eminent domain proceedings.

Further, Proposition 90 would prevent future regulatory takings abuse by requiring governments to compensate landowners for significant economic losses incurred due to the adoption of new regulations. For example, if a new regulation limiting the cutting of oak trees prevents a property owner from building on his land, the government would have to compensate him for the lost value

from using his land to build on. Simultaneously, it exempts all existing state and local regulations from this requirement, keeping the land use and environmental protections Californians currently enjoy fully intact. Proposition 90 would simply require government to pay for the public benefits it seeks to gain through new regulations, rather than forcing a minority of property owners to bear the burden of providing benefits enjoyed by the community-at-large.

Proposition 90 represents a momentous opportunity for Californians to take a strong stand against the abuse of private property rights by government. It would amend the state Constitution to establish reasonable and just property rights protections as a foundational framework for California law, effectively reiterating and clarifying the Founding Fathers' intent as established in the United States Constitution. Proposition 90 would also impose fiscal discipline on government, requiring it to adequately account for and weigh the costs and benefits of public action. Finally, it would help reinforce the notion that the fundamental purpose of government is to protect our rights, not selectively undermine them.

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## Part I

# Introduction

The protection of private property rights is a foundational principle underlying our constitutional system of government and market-based economy. In recognition of the fundamental interconnection between private property rights and individual liberties, the Founding Fathers embedded the following protection—commonly referred to as the Takings Clause—in the Fifth Amendment of the United States Constitution:

*"[N]or shall private property be taken for public use without just compensation."*

Yet over the last several decades, property owners in California and across the nation have witnessed an accelerated erosion of their property rights in two fundamental ways.

First, the government's power of eminent domain—which traditionally allowed for the condemnation ("taking") of private property for such "public uses" as roads, parks, and government buildings—has been increasingly used to transfer property from one private party to another for economic development and other nebulous "public purposes." In many instances, this involves the use of eminent domain to transfer private homes and businesses—sometimes even entire neighborhoods—to private developers to facilitate urban redevelopment programs, often for the sole purpose of generating increased municipal tax revenue.

In short, the fairly narrow set of "public uses" commonly understood to represent the valid justifications for the use of eminent domain has been transformed into a loosely defined array of purposes for which government can argue that the public receives some benefit, however intangible.

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A disproportionate share of the victims of eminent domain abuse are lower-income families, the elderly, and small businesses—the very populations least able to defend themselves. Condemning the properties of poorer residents and smaller businesses and turning them over to wealthier residents and bigger businesses in order to generate higher tax revenues is viewed by many as a blatant and egregious act of economic favoritism by government—a sort of Robin Hood in reverse.

Furthermore, governments often use the mere threat of eminent domain as a tactic to intimidate property owners to “voluntarily” sell their properties at below-market rates, and this threat can last for many years. Regarding threatened property owners, Dana Berliner of the Institute for Justice writes:

*They may not have planned to move; they may not want to move, but they may not be able to continue in limbo forever. Unless they have substantial funds, they will have trouble affording a lawyer to fight the condemnation if it ever happens...[s]o most people bow to what they believe is inevitable anyway. Nearly all eminent domain cases are settled because people simply cannot afford, or do not have the energy, to keep going. But even these threats represent the exercise of eminent domain just as much as the condemnations filed. A deal struck voluntarily is quite different than a deal struck with someone who says, “hand it over, or we’ll take it by force.”<sup>1</sup>*

Nowhere was the extent of government’s ability to abuse the eminent domain power more apparent than in the U.S. Supreme Court’s 2005 decision in the *Kelo vs. City of New London* case, which upheld government efforts to use the power of eminent domain to seize private property for economic development purposes. In that case, a group of 15 property owners, including lead plaintiff Susette Kelo, refused to sell their homes to the city of New London, Connecticut to facilitate an upscale redevelopment project, prompting the city to condemn these owners’ lots. The owners subsequently sued the city for misusing its eminent domain power, arguing that economic development did not qualify as a “public use.”

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The Supreme Court sided with the city in the 5-4 *Kelo* decision, which effectively gave cities a green light to use eminent domain to seize private homes and businesses for the sole purpose of generating higher tax revenues through redevelopment. In a stinging dissent, Justice Sandra Day O’Connor wrote, “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”



### Eminent Domain Abuse in California

Eminent domain abuses like those suffered by Susette Kelo in Connecticut are not uncommon in California. The Washington D.C.-based Institute for Justice identified 23 different projects involving condemnation for private use in California between 1998 and 2002.<sup>2</sup> As part of these projects, cities and redevelopment agencies condemned at least 223 individual properties for the benefit of private parties and threatened at least another 635. California court records show 5,583 condemnations for all purposes statewide, however the real total is likely to be substantially higher, as this figure only covers those condemnations that were the subject of legal challenges.

After the public outcry over the U.S. Supreme Court's *Kelo vs. New London* decision, the Institute for Justice undertook a second study to quantify the surge in condemnations as states were beginning to consider eminent domain reforms. The report found that cities and redevelopment agencies in California condemned at least 50 individual properties for the benefit of private parties and threatened at least another 296 just in the first year after *Kelo*.<sup>3</sup>

Considering the combined sum of these totals, in six of the last eight years over 270 homes were condemned for the benefit of private parties in California, and over 900 were threatened for the same purpose. This illustrates the extent of eminent domain abuse in California, and it also gives lie to the claim that eminent domain is an infrequently used tool of last resort.

The *Kelo* decision generated tremendous media coverage and provoked a sense of outrage across wide swaths of the American populace. Since then, legislators in dozens of states have either passed or introduced legislation aimed at restricting the use of eminent domain for non-public uses, such as the promotion of economic development. Unfortunately, the California legislature has been unable to pass any meaningful eminent domain reform legislation; since the *Kelo* decision was rendered in June 2005, five separate measures—three constitutional amendments and two statutes—have been defeated, each in their first policy committee hearing.

### Examples of Eminent Domain Abuse in California

A few recent examples of eminent domain abuse in California serve to highlight the breadth of the problem. First, several cities have used eminent domain to redevelop entire neighborhoods in one fell swoop, erasing otherwise vibrant neighborhoods and the aspirations of the families and businesses within them in pursuit of increased tax revenue.

For example, the city of Brea used eminent domain to level its old downtown, relocating 250 homes and 41 businesses to facilitate a \$130 million redevelopment project, characterized by one author as "by no means a real downtown...more of an outdoor entertainment mall."<sup>4</sup> Similarly, officials in the city of Garden Grove—known for their aggressive use of eminent domain in redevelopment projects—floated a plan in 2002 to redevelop 264 acres of land

(including over 800 homes, mobile homes, and apartments) into a theme park. Luckily, this plan did not ultimately come to pass; overwhelming citizen outrage against the plan and the threat of large-scale condemnation prompted the city to substantially scale back its redevelopment proposal.

Churches are also victims of eminent domain abuse. In the 1990s, the Cottonwood Christian Center in the city of Cypress spent several years acquiring land parcels to assemble an 18-acre site, and it began seeking permits to build a large church complex on the purchased land. In 2002, city leaders voted to use eminent domain to seize the church's property to make way for a Costco retail center. After much litigation, the case was finally settled in 2004 when the church agreed to a land swap with the city to build on another piece of property in the same area.

Even large corporate property owners are not immune from eminent domain abuse. In May 2006, the city of Hercules, California decided to seize 17 acres of private property owned by Wal Mart to prevent it from developing a new store. In taking this action, not only has the city moved beyond regulating and dictating specific land uses; it has taken a step further by cherry-picking who owns and operates it, perpetuating the collectivization of land and property.

Yet, eminent domain abuse is not the only threat to private property rights. A second—and far larger—threat comes from the regulation of private property. States and local governments have adopted an increasing variety of land use regulations aimed at preventing the spread of urban sprawl and minimizing the effects of growth and development on the environment and citizens' quality of life. Examples of such regulations include zoning ordinances, subdivision regulations, and open space preservation ordinances, as well as mandatory land dedication requirements and wetland permitting programs. Local governments in California have been particularly aggressive in expanding the regulatory state, adopting literally tens of thousands of laws and regulations governing the use of private property.

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Notwithstanding the noble intentions of their designers, these regulations can significantly limit the rights of landowners to use their land in the ways that were entirely legal and permissible when they purchased their property and can dramatically reduce the property's market value, imposing an economic hardship and significant loss of value upon the owner. For example, property owners of parcels originally zoned residential lose virtually all value of their property should the government rezone their land as forest or wetland. Compounding the problem is that property owners are only rarely compensated for the economic impacts associated with regulation, also known as “regulatory takings.”

Though similar to eminent domain in concept, “regulatory takings” refers to a situation in which a government entity has effectively “taken” private property without just compensation through regulations that preclude uses clearly within the property rights of the owner. The difference is that eminent domain actions involve the change of property title, while in a regulatory takings situation, the title to the devalued land remains with the property owner.

### Regulating Away Property Values: The City of Brea

One of the more widely publicized recent examples of the potential for regulation to diminish private property values in the pursuit of public “benefits” comes from the city of Brea. In late August 2006, the city’s Planning Commission voted four to one to pass new rules downzoning private property on the open hillsides within Carbon Canyon without paying compensation to landowners. The city’s general plan currently allows the development of over 1,600 housing units in the area, but if passed by the City Council, the new regulations would only allow just over 100 houses (a reduction in development potential of over 93 percent).

Overnight, area landowners may see their property rights eviscerated. Leo Hayashi, who owns 300 acres in the canyon, stands to see the development potential of his land drop from over 300 units to 15. To add insult to injury, Mr. Hayashi would be required to pay for a new fire station and other infrastructure improvements even to build those few homes. Clearly, the combination of severe development restrictions and exorbitant infrastructure requirements would serve as an enormous barrier to development and would effectively give the city the benefit of open space for “free.”

In an interview with the *Orange County Register*, Mr. Hayashi said, “The city tells me it has the power to do this without paying me because it is not taking the property outright...[b]ut practically they are taking it. There is no future. It’s an extreme inequity. I’ve been paying taxes on this land for 30 years. They should at least give me condemnation.”<sup>5</sup>

City officials have not hesitated to express their desire to prevent hillside development and “protect” open space, but resources were the main constraint. As the city’s general plan notes: “Without financial resources to purchase the properties worthy of permanent open-space status, the city must look to creative approaches.”<sup>6</sup> Instead of finding a true “creative” approach to achieving its goals that minimizes economic impacts on property owners, officials instead seem bent on adopting new rules that would render much of the land worthless. Thus landowners are forced to pay for the cash-strapped city’s land-use goals.

Regulatory takings can impose significant costs on some property owners, forcing them to bear the financial burden for what government has deemed to be a public benefit. For example, when a local government attempts to preserve a swath of open space within its boundaries by downzoning property (restricting the allowable use of the property) instead of simply purchasing it, then it has effectively required the downzoned property owners to bear the costs of providing a public benefit. Further, these owners still hold title to their land and must continue to pay property taxes on it,

despite the fact that they paid fair market value for the rights to use their property in ways that are no longer available to them.

It is unlikely that the Founding Fathers could have imagined the extent of the threat that regulation could pose to private property rights, as the government they designed was intended to be limited in its power over citizens. However, the rise of the Progressive era in the early 20<sup>th</sup> century ushered in a wave of public policy and court decisions that served to expand the reach of government and elevated majoritarian rule at the expense of democracy, individual civil liberties, and private property rights. No longer was government bound to its original mission of securing the rights of its citizens; it had become interventionist, arrogating to itself more and more power to redistribute wealth, influence economic outcomes, and pursue utopian social engineering programs. This incremental interventionism can be considered a “death by a thousand cuts” to private property rights. Today, the pervasiveness of eminent domain abuse and regulatory takings indicates that the old adage, “a man’s home is his castle,” is no longer the case; it could be more accurately restated as, “a man’s home is his castle unless government has a ‘better’ use for it.”

Proposition 90—the proposed constitutional amendment on the November 2006 ballot known as the “Protect Our Homes Act”—attempts to address both of these threats to private property rights. It would do so by restricting the use of eminent domain to a limited set of public uses and preventing governments from adopting new statutes and regulations that impose significant economic losses upon property owners, reducing the value of their property without compensating them. Clearly, many Californians are concerned about the security of their homes, businesses and property, as over 1 million citizens signed petitions to get Proposition 90 on the ballot.

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## Part 2

# Proposition 90 Overview

The California Secretary of State prepared the following ballot summary for Proposition 90:

*Bars state/local governments from condemning or damaging private property to promote other private projects, uses. Limits government's authority to adopt certain land use, housing, consumer, environmental, workplace laws/regulations. Fiscal Impact: Increased annual government costs to pay property owners for losses to their property associated with new laws and rules, and for property acquisitions. These costs are unknown, but potentially significant on a statewide basis.*

Proposition 90 would amend Section 19 of Article I of the California Constitution in several key ways:

- It specifies that eminent domain may only be used for “public use” and that private property may not be “taken or damaged” for private use.
- It narrows the definition of “public use”—distinguishing it from the more expansive view of “public purpose”—and places the burden on government to prove “public use” in all eminent domain actions. According to Proposition 90, the more narrow definition of “public use” would “[prohibit] takings expected to result in transfers to nongovernmental owners on economic development or tax revenue enhancement grounds, or for any other actual uses that are not public in fact, even though these uses may serve otherwise legitimate public purposes.”
- It clarifies that “public use” would preclude the use of eminent domain to transfer property ownership from one private party to another private party unless that transfer proceeds pursuant to a government assignment, contract or arrangement with a private entity whereby the private entity performs a public use project.
- It requires that taken or damaged property be valued at its highest and best use. Further, Proposition 90 defines “just compensation” as “the sum of money necessary to place the property owner in the same position monetarily [...] as if the property had never been taken.” Just compensation would include compounded interest, legal fees, and other costs and expenses incurred as a result of an eminent domain action.
- It modifies the existing definition of “damage” to private property to include government actions (including statutes, charter provisions, ordinances, resolutions, laws, rules, and

regulations) that result in “substantial economic loss” to private property, except when those actions (1) are taken to protect public health and safety; and (2) amend an existing regulation or statute, and that amendment both serves to promote the original policy of the statute or regulation and does not significantly broaden the scope of its application. Examples of such actions would include the downzoning of private property, the elimination of any access to private property, and limitations on the use of private air space.

- It explicitly preserves government’s power to condemn property to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions, so long as actions are limited to the abatement of specific conditions on specific parcels.

A broad coalition of labor, government, and environmental groups has lined up in opposition to Proposition 90, including the American Federation of State, County and Municipal Employees (AFL-CIO), American Planning Association (California Chapter), California Chamber of Commerce, California Democratic Party, California Farm Bureau, California Labor Federation (AFL-CIO), California State Association of Counties, Defenders of Wildlife, League of California Cities, and Sierra Club. Notably, many of these groups’ agendas have been substantially advanced by the seemingly unrestrained ability of government to impose regulations that place significant financial burdens on private property owners.

A large number of property rights advocates, taxpayer groups, and elected officials has lined up to support Proposition 90, including the California Black Chamber of Commerce, California Taxpayer Protection Committee, California Republican Party, Howard Jarvis Taxpayers Association, National Federation of Independent Business, National Tax Limitation Committee, and The People’s Advocate, as well as numerous local taxpayer associations and state and local elected officials.

## Part 3

# What Would Proposition 90 Do?

## A. Protect Private Property Owners from Eminent Domain Abuse

Proposition 90 would amend the California Constitution to narrowly define the legitimate uses of eminent domain and would give property owners several new protections to help ensure a fair outcome in eminent domain proceedings.

First, Proposition 90 places the burden on government to justify a legitimate “public use” (such as building roads and public facilities) in all eminent domain actions and narrows the definition of “public use” to preclude any taking that would involve a transfer of property from one private owner to another on the basis of economic development or tax revenue enhancement. This would effectively prevent the government from taking property from Private Citizen A and giving it to Private Citizen B (which could range from a private developer to a big box retailer), even if Citizen B’s use of the property would generate more tax revenue. In this way, Proposition 90 is designed to protect property owners in California from the type of abuse that Susette Kelo and others suffered in New London, Connecticut.

Though Proposition 90 would prohibit the condemnation of private property for a private use, it also allows a reasonable exception for cases in which a private entity is operating under a government contract or performing public use projects (such as running a private prison facility or constructing and operating a toll road).

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Currently, private property owners often bear most of these costs, and it is fundamentally unfair to force people out of their homes and expect them to bear the costs of a move that they did not voluntarily choose to make.

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Next, Proposition 90 would require governments to value the properties that they take through eminent domain at their highest and best use, not at a level commensurate with the current use. This is a fair and common sense provision that, for example, would prevent government from paying a homeowner at the level appropriate for residential use when it fully intends to use the

property for a higher-intensity, higher-value use. This would require eminent domain transactions to more closely mirror a transaction in the private market in which a private company can directly negotiate with an existing homeowner to purchase his property; the current owner is rightly able to value his property (and set his asking price) based on the future intended use of the property, not what it may currently be worth as a home.

Proposition 90 also allows the owners of condemned properties to be compensated for the full range of costs that they incur as a result of the condemnation—such as legal fees and moving costs—not only the compensation for the land that was taken. Currently, private property owners often bear most of these costs, and it is fundamentally unfair to force people out of their homes and expect them to bear the costs of a move that they did not voluntarily choose to make. Nor is it fair to expect a property owner to bear the costs of hiring an attorney to help him fight a condemnation action or challenge the valuation of his property in a situation in which he did not voluntarily choose to sell it in the first place. This is a small price to pay to protect a basic liberty, particularly in low-income neighborhoods where eminent domain actions are most common.

Further, Proposition 90 would give property owners involved in an eminent domain action the right to view all government appraisals of their property and to have disputes over compensation resolved through a jury trial, with attorney costs paid by government. Currently, a property owner's ability to challenge an eminent domain action is limited by that owner's ability to mount a legal challenge, which disproportionately disenfranchises minorities, the elderly, and small businesses, who also happen to be frequent targets of eminent domain and the victims of the current system. Faced with the time and financial constraints involved in an eminent domain challenge, they are often forced to accept the offer that government gives them and try to relocate somewhere else with this amount. The protections that Proposition 90 would afford to property owners would help to ensure a more equitable outcome than is available under the current system.

Also, Proposition 90 preserves government's power to condemn property to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions, but it restricts such action to addressing specific conditions on specific parcels of land. Currently, governments are allowed to condemn properties in blighted *areas*, regardless of whether or not individual properties within that area are actually blighted or not. The apparent rationale behind this type of action is a stretch of logic: that well-maintained properties can be considered as "blight" if there's even a remote possibility that they could become blighted in the future. Proposition 90 would take this dubious "crystal ball" away from government and require it to address blight and other nuisances on a case-by-case, property-by-property basis.

Viewed together, the changes that Proposition 90 would introduce to the eminent domain process would rein in the government's expansive power to assure desired land use outcomes through the application of force. Under Proposition 90, government would no longer have the ability to use eminent domain to advance any purpose that it deems worthy, and no longer would property owners lack basic protections that prevent them from getting a fair shake in eminent domain proceedings.



## B. Protect Private Property Owners from Regulatory Takings

By expanding the existing definition of “damage” to private property in the California Constitution, Proposition 90 aims to provide landowners relief from regulatory takings—the de facto “taking” of private property via restrictions on the ability of property owners to use their land in ways previously legal to them at the time they purchased their property. In other words, regulatory takings occur when government changes the rules of the game, adopting regulations that prevent landowners from realizing the economic potential of their property investment for which they actually paid, and for which they were legally entitled, when they purchased their property.

For example, many cities and counties in California have attempted to protect agricultural land and open space outside of developed areas through a variety of regulatory means, including the adoption of urban growth boundaries and open space ordinances. Typically, the local government achieves this goal by preventing the subdivision of private property and/or severely restricting the intensity of development (“downzoning”) allowed to take place on it. By taking these actions, government has used regulation to restrict landowners’ property rights, effectively “taking” the property (or a portion thereof) for the public’s benefit without just compensation—even though the very same government previously granted a specific “bundle” of property rights to the owner, and the value of that bundle of rights was factored into the actual cost paid by the owner. Further, this type of regulation often decreases the value of this property since owners would then have far fewer uses of their property available to them. Hence, regulatory takings can properly be viewed as a situation in which private landowners are forced, through regulation, to bear the burden of providing a public good.

Many property rights advocates argue that this type of regulatory action has the same practical outcome as the use of eminent domain: while the government doesn’t actually take title to the property, it takes away the owner’s ability to use his land, to provide a public benefit for the community-at-large. The difference is that the landowner impacted by a regulatory taking does not usually receive compensation (unless the regulation deprives the owner of virtually all beneficial use of the property), while the owner of property taken via eminent domain does.

Property rights activists contend that this situation is unfair: if government takes actions that devalue private property, and the public health and safety is not at issue, then it should compensate landowners for their losses.

Property rights activists contend that this situation is unfair: if government takes actions that devalue private property, and the public health and safety is not at issue, then it should compensate landowners for their losses. In other words, landowners pay a fair market value for their property based on a set of rights and expectations regarding the actual uses of that property that are available to them (i.e., zoning), and if government later adopts regulations that limit these very same rights and uses of that property and significantly lower its value, then landowners deserve compensation.

Proposition 90 includes a provision to address this situation: the measure’s regulatory takings component would require governments to compensate landowners for “substantial economic

losses” that occur due to the imposition of government regulations. It is important to note that the extent of protection from regulatory takings that Proposition 90 would provide is limited in scope, only applying to new regulations adopted by state and local governments that would result in a “substantial economic loss” to property owners. Further, Proposition 90 exempts new laws and regulations if they are enacted: (1) to protect public health and safety, (2) under a declared state of emergency, or (3) as part of rate regulation by the California Public Utilities Commission.

Existing regulations would be also exempt from Proposition 90, as would future modifications to existing regulations that promote the original policy of the regulation and do not significantly broaden the scope of its application.

In a sense, Proposition 90 would essentially “freeze” existing property rights in place and require government to compensate landowners for any significant economic harm that might result from the implementation of new regulations.

### **C. Provide a Check on Government Power**

Proposition 90 would provide a better balance between private and public interests by ensuring that state and local governments adequately weigh the costs and benefits of public action. Without an adequate check on government power, there is little incentive for government to consider all the costs and benefits of its actions. Hence, Proposition 90 represents a mechanism that helps to balance property rights and governmental action in the public interest and creates a new incentive structure that governments face when contemplating new regulation.

Proposition 90 gives elected officials a strong incentive to be more selective about the regulations they consider for adoption and to pursue alternative methods of achieving policy goals that would have lower impacts on property rights, such as incentive-based or voluntary programs. If state or local government ultimately decides that the benefits of a proposed regulation would outweigh the costs, then policymakers will have to account for these costs and evaluate trade-offs between competing priorities in their budgets. Rather than rely on a minority of property owners to bear the costs of action deemed to benefit the public-at-large, governments would have to use public money for such purposes to ensure that everyone pays his fair share.

Also, by combining eminent domain reform with the prevention of future regulatory takings that cause significant economic losses to property owners, Proposition 90 would preclude severe cases of property rights abuse. Consider the following scenario: a city in California could currently downzone an area to the point where affected properties are left with little economic value or potential. If that city were to then adopt a redevelopment plan for that area, or decide to transfer the property to a private corporation to construct a new office park, for example, it could conceivably use eminent domain to force landowners to sell their properties at the lower values (effectively buying them at a tremendous discount) and turn them over to a private entity for a new use that would generate higher tax revenue. Most Californians would agree that this type of action would be unfair, unconstitutional, and un-American, and Proposition 90 would prevent this sort of egregious infringement upon the rights of private property owners.

Finally, Proposition 90 would update property rights law to provide a new balance between private property rights and the exercise of government power, a rebalancing long overdue after a century's shift towards interventionist, progressive policymaking and the unwillingness of the judiciary to check this majoritarian tendency.

#### **D. Facilitate Needed Housing Production**

Proposition 90 would check the growth of the complex web of state and local regulation that has produced significant unintended consequences, one of the most visible being California's affordable housing crisis. California's affordable housing shortage threatens the state's economic health and has placed the American Dream of homeownership out of reach for hundreds of thousands of families. One of the root causes of California's housing crisis is the myriad of state and local land-use regulations that make it difficult for new housing to be approved and built. The severe mismatch between supply and demand has helped to drive up housing costs statewide and has led to an estimated shortage of between 600,000 to 1 million housing units.

One example of the interplay between highly restrictive land use regulation and housing construction comes from Ventura County. Between 1995 and 2000, Ventura County voters passed a series of growth-control measures (the "Save Openspace and Agricultural Resources," or SOAR, initiative) that imposed urban growth boundaries around all cities in the county and required voter approval for conversion of agricultural, open space, or rural land to urban use. During the political campaign supporting the SOAR initiatives, proponents argued that the county, based on its current comprehensive plan, had the capacity to accommodate more than 60,000 new housing units before SOAR would expire in 2020. The existence of a suitable planned capacity was a key argument, because opposition to the ballot initiative centered on whether Ventura County could adequately plan for and accommodate new housing in sufficient quantities to meet future demand.

Yet, a 2001 Reason Foundation study found that the county was approving development at densities far below those allowed by zoning.<sup>7</sup> The authors concluded that the county is unlikely to be able to meet future housing demand, and that a crisis in housing supply will occur prior to SOAR's expiration in 2020, creating conditions that are likely to lead to further housing-price escalation and increased political manipulation of the housing market. Unless SOAR is changed or invalidated, the county and its cities are unlikely to meet estimated future demand for additional new housing, and tight housing market effects will increase over time.

As the Ventura County example demonstrates, regulations are standing in the way of getting housing built for the people who need it most. While Proposition 90 would leave the existing regulatory regime intact, it would provide a strong incentive for government to forego the adoption of new regulations that would reduce the amount and density of housing currently allowed to be built under existing zoning and land use regulations.

## Part 4

# Addressing Criticisms of Proposition 90

Given the widespread public support for eminent domain reform, the groups opposed to Proposition 90 have largely focused their criticisms on the regulatory takings component of Proposition 90. These criticisms generally consist of exaggerated (or false) claims about Proposition 90, failing to accurately portray the measure’s provisions and how it would likely work in practice.

## A. Criticisms Related to Proposition 90’s Regulatory Takings Component

### 1. Claim: Proposition 90 Would Undermine Growth Management and Environmental Protection

Proposition 90 is prospective in nature, and it would *only* apply to *future* government actions. The complete body of state and local growth management rules, zoning ordinances, environmental regulations, and other laws currently in place would not be affected or jeopardized in any way by Proposition 90’s passage. Even future amendments of existing laws are exempt from Proposition 90 claims, provided that the amendments do not significantly broaden the scope of the original law. The text of Proposition 90 is unambiguous on these points:

*Other than eminent domain powers, the provisions added to this section shall not apply to any statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment that results in substantial economic loss to private property. Any statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment that is amended after the date of enactment shall continue to be exempt from the provisions added to this section provided that the amendment both serves to promote the original policy of the statute, charter provision, ordinance, resolution, law, rule or regulation and does not significantly broaden the scope of application of the statute, charter provision, ordinance, resolution, law, rule or regulation being amended. [...] The question of whether an amendment significantly broadens the scope of application is subject to judicial review.*  
[emphasis mine]

Given this fact, opponent claims that Proposition 90 would restrict government’s ability to pass and enforce basic land use laws and regulations are patently false; these “basic” laws have been on

the books for decades and have grown substantially in scope since their original passage. Similarly, the claim that Proposition 90 would prevent government “from acting to protect [California’s] wildlife, open space, coastline, farmland and other important resources” is unfounded.<sup>8</sup> California has been a leader in environmental protection for many decades, often exporting policy models to other states and even the federal government. Proposition 90 would not affect the environmental laws and protections that Californians currently enjoy.

As an illustrative example, the regulation of California’s coastline falls under the jurisdiction of the California Coastal Commission (CCC), which reviews and approves local land use plans and policies in the 15 counties and 59 cities located in the coastal zone. Since Proposition 90 would clearly not affect these approved plans and policies (or even reasonable future modifications of them), nor the CCC’s overall mandate, opponent claims that the measure would somehow degrade coastal protections are disingenuous and false.

Similarly, opponent claims that Proposition 90 would make pollution a property right—forcing taxpayers to pay to stop pollution—ring equally hollow. Proposition 90 would not affect any of the pollution laws currently in effect in California, nor any reasonable modification thereof. Further, Proposition 90 exempts future regulations adopted to further the interests of public health and safety, so it would not constrain state or local governments from enacting new pollution laws.

Proposition 90 is clearly designed to protect the existing rights of property owners and prevent government from changing the rules of the game in ways that infringe upon the existing rights of landowners. In this way, Proposition 90 would serve as a check on the future growth of the regulatory state, which many Californians would likely argue is long overdue given the widespread adoption of strong growth management and environmental controls across the state over the last several decades. Some might even claim that Proposition 90 does not go far enough, as it would not offer relief to those property owners whose rights have already been eroded through decades of expanding regulation.

It is also important to note that nothing in Proposition 90 would prevent state or local governments from enacting new regulations affecting the use of private property. It merely introduces a strong incentive for government to consider the potential impacts of any new regulation on private property rights and adequately weigh the costs and benefits associated with public action. As the state Legislative Analyst’s Office summary of Proposition 90 notes, the measure would likely prompt state and local governments to “modify their policymaking practices to try to avoid the costs of compensating property owners for losses.”<sup>9</sup> After considering the likely costs, governments may opt not to pursue new regulations, or they may instead choose to pursue alternative approaches to achieving their policy goals, such as:

- voluntary, incentive-based programs in cooperation with willing property owners;
- regulations of a more limited scope with insubstantial impacts on property rights;
- crafting regulations with a more direct link to purposes exempt under Proposition 90 (such as public health and safety).

Given the likely difficulties in generating new revenue sources to fund landowner compensation for actions where the public health and safety are not at issue, elected officials will have an incentive to be more selective about the regulations they consider for adoption. If state or local government ultimately decides that the benefits of a proposed regulation would outweigh the costs, then policymakers will have to make appropriate decisions on budget priorities to make room for any related new costs. Instead of expecting private property owners to bear the costs of action deemed to benefit the public-at-large, Proposition 90 would ensure that governments would have to use public money for such purposes to ensure that everyone pays his fair share. However, the instances where government would actually be required to provide compensation would be limited to only those circumstances where the law or regulation resulted in actual “significant economic loss” to the property owner and the action was not taken to protect public health and safety.

## ***2. Claim: “Proposition 90 is a Taxpayer Trap”***

Opponents claim that Proposition 90’s regulatory takings provision is a hidden tax increase that would cost taxpayers billions. To buttress their assertion, opponents claim that California voters should take heed from Oregon’s experience with Measure 37, a ballot initiative passed in 2004 designed to provide relief to property owners impacted by regulatory takings. Since Measure 37’s passage, opponents argue, Oregon landowners have filed over 2,000 claims seeking more than \$5 billion in payments from the state and local governments.

However, that statement omits several crucial facts:

- Measure 37 was a retroactive measure and allowed landowners to file regulatory takings claims based on regulations currently in place and which have been in place for decades. Proposition 90 is fundamentally different in that it would *only* apply prospectively to *future* regulations. Laws and regulations currently in effect in California would not be affected by Proposition 90; no landowner would be allowed to challenge any existing regulation, nor any amendment or modification of an existing regulation that does not broaden the scope its application.
- Very few of those claims in Oregon have actually been paid by state and local governments. Instead, governments have largely opted to waive the application of the challenged regulation—Measure 37 allowed waivers as an alternative remedy to monetary compensation—on those properties deemed to have valid compensation claims, essentially reinstating the property rights that landowners had taken from them via regulation.
- Oregon’s 33-year old centralized, statewide growth management system is highly prescriptive and far more invasive and extensive than local land use regulation in California (though some California cities have adopted specific policy tools commonly used throughout Oregon, such as urban growth boundaries).

Unlike Measure 37, Proposition 90 does not explicitly allow regulatory waivers as an alternative remedy to compensation, though local governments can essentially achieve the same effect through

the issuance of variances, conditional use permits, and similar mechanisms that would restore those property rights to landowners that would otherwise be taken via the imposition of a new land use regulation.

The idea that Proposition 90 is a hidden tax increase is equally false. Since the measure does not impose any new taxes, opponents are apparently making a dubious logical leap based on two faulty assumptions:

- *Assumption 1: Government would continue to pass new regulations that require compensation:* If governments do not impose any new regulations that impose a significant economic loss upon property owners and that do not protect public health and safety, then costs to government will be minimal. As mentioned above, Proposition 90 creates the incentive for fiscal discipline, as it will require governments to carefully assess both the costs and benefits associated with any proposed regulation and how any related compensation to property owners would rank among the many competing priorities in the budgeting process.
- *Assumption 2: New regulations would require raising taxes:* First, Proposition 90 gives government a strong incentive to pursue alternative methods of achieving its policy goals that have low impacts on property rights (and thus low potential for compensation claims), such as incentive-based programs or voluntary programs with willing landowners. Government always has the option to waive the regulation for affected private parties, rather than regulate away land use rights. And with no authority to take private land for private purposes by eminent domain, government would have incentives to acquire land for public use fairly and equitably via just compensation or find another way to serve public need. Further, to the extent that governments may opt to pursue regulation that would induce compensable impacts, it is likely that, given widespread citizen opposition to higher taxes, elected officials would view increased taxes as a last resort and instead pursue cost-cutting and program prioritization strategies—such as the elimination of duplicative or wasteful existing programs, performance-based budgeting, and the contracting out of government services—to redirect funds toward compensation.

By requiring the significant economic costs associated with regulation to be valued, Proposition 90 would facilitate more efficient decision-making, as policymakers would be better able to compare social costs and benefits of public action. Further, it would promote transparency, as the full costs of government action—currently hidden—would become visible and explicit.

It is important to note that under Proposition 90, any costs incurred by governments as a result of new regulation would be costs incurred by choice. It would no longer be acceptable to require individual property owners—not the public-at-large—to bear the costs of providing the public benefits associated with land use regulation. In this way, Proposition 90 would simply ensure that any future costs imposed by regulation would be distributed in a fair and equitable manner that respects the American tradition of strong private property rights.

### *3. Claim: “Proposition 90 Would Result in Frivolous Lawsuits and Red Tape”*

Proposition 90 opponents claim that the measure’s passage would lead to thousands of frivolous lawsuits and create new layers of bureaucracy and red tape. Opponents assert that virtually any speculative landowner or business looking for a windfall could file a Proposition 90 lawsuit, claiming even the most minor new law has impacted the value of his property.

This assertion is both deceptive and highly speculative, given that the courts, and possibly the legislature, would ultimately interpret the meaning of Proposition 90 and determine the scope of implementation if the measure passes in November. There is simply no valid basis for the claim that Proposition 90 would result in lawsuits since its meaning and scope cannot be determined prior to passage. For example, the definition of “substantial economic loss” would likely be an early subject of either court interpretation or legislative action that would delineate the parameters of Proposition 90. If the courts or the legislature were to interpret a “substantial” loss due to regulation as greater than a 30 percent reduction in fair market value, for example, compensation would be due in far fewer instances—and to a far more limited extent—than if that threshold were set at a lower value, say 10 percent.

Further, it is important to note that if voters pass Proposition 90 in November, there would be *no* possibility of immediate lawsuits since Proposition 90 is a prospective measure and would only apply to *new* laws and regulations enacted after its adoption, not to any laws and regulations currently in effect. Proposition 90 would only come into play in the event that a government entity passes regulations in the future that do not protect public health and safety and would result in “substantial economic loss” for private property owners.

As is appropriate for a constitutional amendment, Proposition 90 simply formalizes the general principle of protecting property from regulatory takings and does not specify the parameters of implementation, though in Section 4 it expressly authorizes the legislature to do so:

*The Legislature may adopt laws to further the purposes of this section and aid in its implementation.*

Thus, passage of Proposition 90 would allow the legislature to craft legislation that outlines a specific implementation framework. For example, it could establish a process for submitting and processing any future regulatory takings claims, effectively placing implementation in the administrative realm rather than subjecting potential claims to legal action as a default. However, prior to Proposition 90’s passage it is impossible to speculate about the form or character of any possible subsequent legislative action, particularly given that the California legislature was unable to pass meaningful eminent domain reform legislation in the wake of the U.S. Supreme Court’s *Kelo* ruling in June 2005, as more than 20 other state legislatures have done.

Lastly, any attempt to draw a parallel between the results of Oregon’s Measure 37 (i.e., over 2,000 regulatory takings claims since passage) is inherently invalid because, as discussed in the previous



section, Measure 37 was designed to be a retroactive measure, so any landowner impacted by existing regulations was able to begin filing regulatory takings claims immediately after passage. Measure 37 is fundamentally different from Proposition 90, which was designed as a prospective-only measure that would only apply to future regulations. In addition, Measure 37 claims are not lawsuits; Measure 37 established an administrative process for filing and deciding the outcome of claims. The vast majority of claims in Oregon have been settled administratively with agreement between landowners and government on the outcome. The outcome of only a small fraction of claims (approximately 70 currently, or less than 1 percent of the total) have led to subsequent lawsuits in which landowners disputed the outcome of their claims.

#### ***4. Claim: “Proposition 90 Will Dampen Affordable Housing Production”***

Proposition 90 opponents have claimed that Proposition 90 will hamper affordable housing production by preventing local governments from passing regulations requiring developers to set aside a percentage of their developments for affordable housing—known as inclusionary zoning (IZ)—without paying developers for the loss of more profitable housing they could have built without the requirement.

It is important to note that since Proposition 90 is prospective in its application, it would not apply to any existing laws, ordinances, and regulations, including existing IZ programs. Furthermore, a 2002 First District Court of Appeals decision in *Homebuilders of Northern California v. City of Napa* upheld the City of Napa's IZ program against a takings challenge and suggests that a carefully crafted, new IZ ordinance would likely pass constitutional muster if:

- Developers are given alternatives to the mandated construction of below-market rate units, such as land dedication, off-site construction or in-lieu payments.
- The ordinance provides concessions and incentives to developers in exchange for the inclusionary requirement—including expedited processing, the waiver of development standards, loans and grants, and density bonuses—to help balance the regulatory burden.
- The ordinance provides standards and procedures for reducing, waiving or mitigating the inclusionary requirements if developers can demonstrate that there is no reasonable relationship (or "nexus") between the development's impact and the inclusionary requirement.
- The ordinance demonstrates that its provisions are reasonably related to a legitimate government interest in affordable housing production and that the ordinance would substantially advance that interest.<sup>10</sup>

The incentives provided in an IZ ordinance are potentially of great importance to Proposition 90, particularly as they relate to its “substantial economic loss” provision. Many IZ programs provide a density bonus to developers in exchange for setting aside a portion of their units for below-market rate housing, allowing them to build at a higher density than the underlying zoning would typically allow. In other words, if the zoning would allow 100 units to be built on a specific parcel, for example, then a density bonus under the IZ law could allow them to increase that to 110. The extra

10 units in this example would be the “bonus.” The intention here is to provide an incentive mechanism that allows developers to recoup what they lose from having to sell the affordable units below market rate.<sup>11</sup>

So in essence, the density bonus can serve as a built-in, de facto “compensation” mechanism and is essentially a trade-off: developers get an increased property right (the right to build extra units over what’s allowed under current zoning) in exchange for the loss of the right to sell all of the units at market rate. Hence, cities would likely argue that the passage of a new IZ ordinance that included the density bonus option, as well as the other exemptions and waiver provisions mentioned above, would not result in a “substantial economic loss” under Proposition 90.

There are some California cities whose IZ ordinances only provide a density bonus option if developers exceed the affordable housing requirements (i.e., make more affordable units than required). However, since these policies are already on the books, they would be exempt under Proposition 90.

#### ***5. Claim: “Proposition 90 Would End Existing Consumer, Tenant, and Labor Protections”***

Similar to the arguments made about land use and environmental regulations, Proposition 90 opponents have also made outrageous claims that the measure would force governments to repeal other types of regulation that impact private property, such as limits on condo conversion, rent control, workers compensation and minimum wage laws.<sup>12</sup> But again, these claims are false: Proposition 90 would not affect any law, ordinance, or regulation currently on the books at either the state or local level.

#### ***6. Claim: “Proposition 90 is a Bait-and-Switch”***

Proposition 90 opponents have characterized the measure as a “Trojan horse”—an eminent domain measure containing “hidden provisions” related to regulatory takings. Were Proposition 90 called the “Eminent Domain Reform Act” as opposed to the “Protect Our Homes Act,” the Trojan horse claim might have merit. But the intent behind the “Protect Our Homes Act” is simple and clear: landowners should be constitutionally protected from threats to their property rights, whether those threats arise from eminent domain abuse or overzealous regulators. Eminent domain reform and protection from regulatory takings are complementary issues and two sides of the same coin: both efforts aim to stem the egregious infringement of property rights. In this way, Proposition 90 is an attempt to protect Californians from the most prevalent sources of property rights degradation in one comprehensive package.

Perhaps the most obvious example of this fact may be found in Oregon, but not in a manner touted by opponents of Proposition 90. As has been widely discussed, Oregon voters enacted Measure 37 in 2004. Nonetheless, in the aftermath of the U.S. Supreme Court’s *Kelo* decision, and the continued use of eminent domain by local governments to take property from one private owner

and give it to another for a “public purpose,” Oregon voters have qualified Measure 59 for the November 2006 ballot to ban this practice. More than anything else, this subsequent action by Oregon voters demonstrates the need for both eminent domain and regulatory takings reform to ensure the protection of private property rights.

## **B. Criticisms Related to Proposition 90’s Eminent Domain Component**

### ***1. Claim: “Proposition 90 Will Drive Up the Costs of Infrastructure and Public Works Projects”***

Proposition 90 opponents claim that it would inflate the cost of infrastructure and public works projects like new roads, flood control, and school construction. This claim is based on the provisions in the measure that require compensation in eminent domain proceedings to be based on the highest and best use of affected properties, as well as the inclusion of legal fees and moving expenses into the compensation equation. Further, opponents characterize these changes as “unreasonable.”

If these changes are “unreasonable,” one would have to assume that opponents somehow find it reasonable to evict people and businesses from their properties for what are often “lowball” property valuations and to force them to cover their own moving expenses and legal fees, despite the fact that it was not their choice to relocate in the first place. While Proposition 90 could potentially increase the costs associated with the use of eminent domain in isolated circumstances, it would only do so to correct the unjust situation in which governments routinely acquire property through eminent domain at a discount by undervaluing private property and then forcing impacted property owners to pay a host of eminent domain-related costs that should be rightfully borne by the public sector.

The current eminent domain rules are inherently unfair: government has tremendous power to force a bargain on its own terms since property owners have little to no bargaining power and limited constitutional protections to ensure just outcomes. Put simply, the current system legitimizes government bullying. Proposition 90 would institute much-needed constitutional protections to level the playing field, ensure that government is responsible for covering the true costs of eminent domain, and afford property owners the opportunity to receive fair and just outcomes when they are forced from their homes and businesses.

### ***2. Claim: “Proposition 90 Would Stymie Urban Redevelopment Efforts”***

The claim that Proposition 90 would stymie urban redevelopment and revitalization efforts is based in the false belief that the *only* way to achieve these goals is through the use of eminent domain to assemble enough contiguous land parcels to ensure project viability. In a 2005 Reason Foundation study on eminent domain and economic development, authors Samuel Staley and John Blair counter that,

*Some states—North Carolina and New Hampshire for example—rarely use eminent domain to achieve their economic development objectives. Most redevelopment projects are implemented in phases, and few projects depend on all properties being acquired in order for them to be successful. Cities should work with developers to accommodate property rights protections rather than provide ways for them to circumvent them. In the long run, this will create a business climate more supportive of property rights, greater investment certainty, and a more cohesive community than allowing livelihoods and residents to be subjected to the whims of political expediency and majority politics.*<sup>13</sup>

Citizens and policymakers need to realize that eminent domain is by no means the only tool in the redevelopment toolbox. Staley and Blair highlight several alternative strategies, including:

- Employing tax rates, tax abatements, and tax incentives to promote certain types of development;
- Reforming zoning codes to allow faster and streamlined project approvals;
- Using incentive-based zoning to encourage private sector development of specific types of projects;
- Landscaping and streetscaping; and
- Offering loans, grants, and direct subsidies to developers and builders.

The city of Anaheim provides an excellent example of a successful urban redevelopment effort that protects property rights by eschewing eminent domain, and instead using a combination of deregulation and incentives to achieve redevelopment goals. In its effort to revitalize the Platinum Triangle area, comprised largely of one-story warehouses near Angel Stadium, the city created an overlay zone that allowed a wide variety of land uses. According to author and *Orange County Register* editor Steven Greenhut, “[b]ecause current owners could now sell to a wider range of buyers, the Platinum Triangle is booming, with billions in private investment, millions of square feet of office, restaurant and retail space, and more than a dozen new high-rises in the works.”<sup>14</sup> In addition to land use deregulation, the council waived home renovation fees, temporarily waived business start-up fees, passed a tax amnesty, and eliminated business taxes for home-based businesses.

Reflecting on this successful revitalization effort, Anaheim Mayor Curt Pringle commented that, “[t]oo often, I hear my colleagues in local government . . . say that Kelo-type eminent domain and redevelopment policies are their only tools to revitalize cities [. . .] I have a simple message . . . Visit the Platinum Triangle.”<sup>15</sup>

***3. Claim: “Proposition 90 Would Restrict Government’s Ability to Regulate Unsavory Businesses and Eradicate Blight”***

Opponents claim that Proposition 90 would restrict local government’s ability to regulate businesses like adult bookstores, strip clubs, and liquor stores and would stifle attempts to eradicate slums and blight. They extend this argument with a subtle inference that Proposition 90 would decrease public safety by obstructing efforts to address the conditions that foster crime. This claim has absolutely no basis in fact, as any voter who reads the text of Proposition 90 would certainly discover.

Proposition 90 contains the following provision:

*Nothing in this section shall prohibit the use of condemnation powers to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions, provided those condemnations are limited to abatement of specific conditions on specific parcels.*

As is clear from this provision, the only limitation on the use of eminent domain to address blight, pornography, and other nuisances is that condemnation must be used to address these issues on a property-by-property basis. This would prevent governments from “throwing the baby out with the bathwater” by condemning entire neighborhoods, even those with well-maintained properties, when only particular parcels could be considered blighted or nuisances.

## Part 5

# Conclusion

Over the last several decades, American property owners of all stripes—homeowners, business owners, churches, and others—have experienced a steady erosion of their property rights caused by an unrestrained and unaccountable government. Government has increasingly taken the view that property rights are merely *privileges* that can be taken from property owners at will to advance any public purpose, no matter how vague or dubious.

One can only wonder what sort of indignation America’s Founding Fathers would express upon contemplating the extent to which modern governments have strayed from our constitutional heritage. Their shared concept of the fundamental importance of property rights—that property rights were in fact the foundation of human rights and dignity—was clearly expressed by John Adams in a letter to Thomas Jefferson in 1814:

*The moment the idea is admitted into society that property is not as sacred as the laws of God; and there is not a force of law and public justice to protect it, anarchy and tyranny commence.*

To these men, and to modern day advocates of freedom and liberty, the notion that a government could steal property from a private citizen and give it to a corporation to build a high-end commercial development—or bulldoze an entire neighborhood along with the hopes and aspirations of its former residents to promote a speculative revitalization project—would qualify as tyranny of government over its subjects. Similarly, the notion that government can achieve a “free” public benefit simply by regulating away a property owner’s ability to use his or her land without compensation—leading to incalculable financial losses—would seem equally abhorrent.

Proposition 90 represents a momentous opportunity for Californians to take a strong stand against the abuse of private property rights by government. It would amend the state Constitution to establish reasonable and just property rights protections as a foundational framework for California law, effectively reiterating and clarifying the Founding Fathers’ intent as established in the United States Constitution. Proposition 90 would also impose fiscal discipline on government, requiring it to adequately account for and weigh the costs and benefits of public action. Finally, it would help reinforce the notion that the purpose of government is to protect our rights, not selectively undermine them.

## About the Author

**L**eonard C. Gilroy, AICP, is a policy analyst at Reason Foundation, a nonprofit think tank advancing free minds and free markets. Gilroy, a certified planner (AICP), researches housing, urban growth, privatization, and government reform issues. He is the managing editor of the world's most respected newsletter on privatization, *Privatization Watch*, and is the editor of the widely read *Annual Privatization Report*, which examines trends and chronicles the experiences of local, state, and federal governments in bringing competition to public services. His articles have been featured in such leading publications as *The Wall Street Journal*, *Washington Times* and *Rocky Mountain News*. He received his bachelor's and master's degrees in urban and regional planning from Virginia Tech.

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affordable housing policy. This research demonstrated that in both the Bay Area and Southern California, implementation of IZ has produced several unintended consequences: it's driven up the costs of market-rate housing, put a damper on new housing construction, and resulted in few new affordable units being built (compared to the need estimated by the state).

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## CALIFORNIA GENERAL ELECTION



*Reason*

Reason Foundation  
3415 S. Sepulveda Blvd., Suite 400  
Los Angeles, CA 90034  
310/391-2245  
310/391-4395 (fax)  
[www.reason.org](http://www.reason.org)