GEORGE MASON UNIVERSITY SCHOOL OF LAW

THE LIMITS OF BACKLASH: ASSESSING THE POLITICAL RESPONSE TO *KELO*

Ilya Somin, George Mason University School of Law

07-14

GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

Ilya Somin
Assistant Professor of Law
George Mason University School of Law
3301 Fairfax Dr.
Arlington, VA 22041
isomin@gmu.edu
Ph: 703-993-8069
Fax: 703-993-8202

The Limits of Backlash: Assessing the Political Response to *Kelo*

March 2007

THE LIMITS OF BACKLASH: ASSESSING THE POLITICAL RESPONSE TO *KELO*

Ilya Somin*

INTRODUCTION

The Supreme Court's decision in *Kelo v. City of New London* generated a massive political backlash from across the political spectrum.[1] *Kelo's* holding that the Public Use Clause allows the taking of private property for transfer to new private owners for the purpose of promoting "economic development" was denounced by many on both the right and the left. Over forty states have enacted or considered post-*Kelo* reform legislation to curb eminent domain.[2] Prominent scholars and jurists such as Judge Richard A. Posner and Chief Justice John Roberts (when questioned about *Kelo* at his Senate confirmation), have suggested that this political response demonstrates that legislative initiatives can protect to protect property owners and that judicial intervention may be unnecessary.[3] Posner concluded that the political reaction to *Kelo* is "evidence of [the decision's] pragmatic soundness."[4]

This Article challenges the validity of claims that the political backlash to *Kelo* will provide the same sort of protection for property owners as would a judicial ban on economic development takings. It

---

* Assistant Professor of Law, George Mason University School of Law; coauthor of amicus curiae brief on behalf of the Institute for Justice and the Mackinac Center for Public Policy in *County of Wayne v. Hathcock*; author of amicus curiae brief on behalf of Jane Jacobs in *Kelo v. City of New London.* For helpful suggestions and comments, I would like to thank Dana Berliner, Steve Eagle, Jim Ely, Richard Epstein, Bruce Kobayashi, Andrew Koppelman, Janice Nadler, Timothy Sandefur, and participants in the Northwestern University Law School Constitutional Law Colloquium and the George Mason University School of Law Levy Seminar. Baran Alpturk, Susan Courtwright-Rodriguez, and Kari DiPalma provided valuable research assistance. Susan Courtwright-Rodriguez also deserves credit for helping to put together several of the tables in the Article.

[1] *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

[2] For the most complete and up to date listing of state post-*Kelo* legislative initiatives see http://www.castlecoalition.org/leegislation/states/index.asp (visited Dec. 18, 2006) (hereinafter "Castle Coalition"). Other parts of the website also discuss proposed and enacted federal legislation.

[3] *See* Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 98 (2005) (claiming that "the strong adverse public and legislative reactions to the *Kelo* decision" is a justification of the decision). At his confirmation hearing before the Senate, then-Judge John Roberts commented that the legislative reaction to *Kelo* shows that "this body [Congress] and legislative bodies in the states are protectors of the people's rights as well" and "can protect them in situations where the court has determined, as it did 5-4 in Kelo, that they are not going to draw that line." Washington Post, *Transcript: Day Three of the Roberts Confirmation Hearings*, Sept. 14, 2005 (available at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/ar2005091401445.html) (visited Oct. 25, 2005)

[4] Posner, supra note ___ at 98.

provides the first comprehensive analysis of the *Kelo* backlash to date,[5] and finds that most of the newly enacted post-*Kelo* reform laws are likely to be ineffective. It also suggests a tentative explanation for the often ineffective nature of post-*Kelo* reform: widespread political ignorance that enables state and federal legislators to pass off primarily cosmetic laws as meaningful "reforms." In this article, I do not attempt to assess either the validity of the *Kelo* decision or the desirability of economic development takings as a policy matter.[6] Instead, I document the results of the *Kelo* backlash and provide a tentative explanation for the seeming paucity of effective reform laws.

Part I describes the *Kelo* decision and then documents widespread condemnation that it generated. Both state-level and national surveys show overwhelming public opposition to "economic development" takings – a consensus that cuts across gender, racial, ethnic, and partisan lines. The decision was also condemned by politicians and activists across the political spectrum ranging from Ralph Nader[7] on the left to Rush Limbaugh on the right.[8] Traditional models of democratic politics predict that such a broad political consensus is likely to result in swift and effective legislative action.[9]

Part II considers the state and federal political response to *Kelo.* Twenty-seven state legislatures have enacted post-*Kelo* reform laws. However, seventeen of these are largely symbolic in nature,

---

[5] The most complete earlier analysis is Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform,* 2006 MICH. ST. L. REV. 709. Sandefur's article is an excellent contribution to the literature, but was written too soon to take account of the ten referendum initiatives enacted in 2006, as well as several legislative reforms enacted after the summer of 2006. I also provide a very different explanation of the pattern of effective and ineffective reforms than Sandefur does, as well as providing extensive public opinion data. A forthcoming article by Janice Nadler, Shari Diamond and Matthew Patton analyzes public opinion on *Kelo*, but does not examine the legislation passed as a result, and does not explain the three anomalies discussed in Part III of this paper. See Janice Nadler, et al, *Government Takings of Private Property:* Kelo *and the Perfect Storm*, in Nathan Persily, et al., eds., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (forthcoming 2007).

[6] I do address these issues at length in Somin, supra note ____.

[7] Nader has been a longstanding critic of economic development takings. *See, e.g.*, Ralph Nader & Alan Hirsch, "Making Eminent Domain Humane," 49 VILL. L. REV. 207 (2004) (arguing that they should be banned in most cases). For his statement denouncing *Kelo*, *see* Ralph Nader, *Statement*, June 23, 2005, available at http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html (visited Dec. 21, 2006) (claiming that "The U.S. Supreme Court's decision in *Kelo v City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.").

[8] For Limbaugh's denunciation of *Kelo*, see Rush Limbaugh, *Liberals Like Stephen Breyer have Bastardized the Constitution*, Radio Transcript, Oct. 12, 2005, available at http://www.freerepublic.com/focus/f-news/1501453/posts (visited Dec. 20, 2006) (claiming that because of *Kelo*, "Government can kick the little guy out of his and her homes and sell those home to a big developer who's going to pay a higher tax base to the government. Well, that's not what the takings clause was about. It's not what it is about. It's just been bastardized, and it gets bastardized because you have justices on the court who will sit there and impose their personal policy preferences rather than try to get the original intent of the Constitution.").

[9] *See e.g.*, ROBERT S. ERIKSON, ET AL., STATEHOUSE DEMOCRACY: PUBLIC OPINION AND THE AMERICAN STATES (1994) (arguing that state public policy closely follows majority public opinion).

providing little or no protection for property owners. Several of the remainder were enacted by states that had little or no history of condemning property for economic development. Only five states that had previously engaged in significant numbers of economic development and blight condemnations have enacted post-*Kelo* legislative reforms with any real teeth. The limited reforms enacted by the federal government are likely to be no more effective than most of the state laws.

The major exceptions to the pattern of ineffective post-Kelo reforms are the ten states that recently enacted reforms by popular referendum. Six or seven of these provide meaningful new protection for property owners. Strikingly, citizen-initiated referendum initiatives have led to the passage of much stronger laws than those enacted through referenda initiated by state legislatures.

Part III advances a tentative explanation for the pattern of ineffective post-*Kelo* reform. While there is overwhelming public support for measures banning economic development takings, some thirty-five of fifty states, as well as the federal government, have either enacted laws that are likely to have little or no effect, or no reforms at all. A definitive answer requires more detailed research.

However, I tentatively advance the theory that the ineffectiveness of post-Kelo reform is largely due to widespread political ignorance. Most voters are "rationally ignorant" of public policy, having little incentive to acquire any substantial knowledge about the details of government actions. Studies have repeatedly shown that most citizens have very little knowledge of politics and public policy.[10] Most are often ignorant even of basic facts about the political system.[11] Such ignorance is a rational response to the insignificance of any one vote to electoral outcomes; if a voter's only reason to become informed is to ensure that she votes for the "best" candidate in order to ensure that individual's election to office, this turns out to be almost no incentive at all because the likelihood that any one vote will be decisive is infinitesimally small.[12]

The publicity surrounding *Kelo* made much of the public at least somewhat aware of the problem of economic development takings, it probably did not lead voters to closely scrutinize the details of

[10] *See* Ilya Somin *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290-1304 (2004) (hereinafter, "Somin, *Political Ignorance*"), (summarizing evidence of extensive voter ignorance); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 413-19 (1998) (hereinafter "Somin, *Voter Ignorance and the Democratic Ideal*"). (same).

[11] Somin, *Voter Ignorance and the Democratic Ideal*, at 416-19.

[12] For a more detailed discussion, see Somin, *Voter Ignorance and the Democratic Ideal* at 435-38.

proposed reform legislation. Few citizens have the time or inclination to delve into such matters and many are often ignorant of the very existence of even the most important legislative items.

The political ignorance hypothesis cannot definitively explain the outcomes of the *Kelo* backlash. However, it correctly predicts three important events: the sudden emergence of the backlash after *Kelo*, in spite of the fact that economic development takings were already permitted under existing precedent; the passage of "position-taking" laws by both state and federal legislators; and the fact that that post-*Kelo* laws enacted by popular referendum tended to be much stronger than those enacted by state legislatures. No other theory can easily account for all three of these seeming anomalies.

I. *KELO* AND ITS BACKLASH.

A. The *Kelo* decision.[13]

The *Kelo* case arose from the condemnation of ten residences and five other properties as part of a 2000 "development plan" in New London, Connecticut that sought to transfer the property to private developers for the stated purpose of promoting economic growth in the area.[14] Unlike in leading 1954 case *Berman v. Parker*,[15] none of the properties in question were alleged to be "blighted or otherwise in poor condition."[16] The condemnations were initiated pursuant to a plan prepared by the New London Development Corporation (NLDC), a "private nonprofit entity established . . . to assist the City in planning economic development."[17]

In a close 5-4 decision, the Supreme Court endorsed the New London takings, upheld the "economic development" rationale for condemnation, and advocated broad judicial deference to government decisionmaking on public use issues.[18] Justice Stevens' majority opinion endorsed a "policy of deference to legislative judgment in this field."[19] The Court rejected the property owners' argument

[13] For a more detailed discussion of *Kelo's* holding, from which this brief summary is drawn, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. (forthcoming 2007).
[14] *Kelo v. City of New London*, 125 S.Ct. 2655, 2658-60 (2005).
[15] 348 U.S. 26.
[16] *Kelo*, 125 S.Ct. at 2660.
[17] Id. at 2659.
[18] *Kelo*, 125 S.Ct. 2655, 2662-66 (2005).
[19] Id. at 2663.

that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.[20] It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.[21] On all these points, the *Kelo* majority emphasized that courts should not "second-guess the City's considered judgments about the efficacy of the development plan."[22]

Despite this result, *Kelo* may have represented a slight tightening of judicial scrutiny of public use issues relative to the earlier case of *Hawaii Housing Authority v. Midkiff*, which held that the public use requirement is satisfied so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[23] Moreover, it is important to recognize that four justices not only dissented but actually concluded that the economic development rationale should be categorically forbidden shows that the judicial landscape on public use has changed.[24] A fifth, Justice Kennedy, signed on to the majority opinion, but also wrote a concurrence emphasizing that heightened scrutiny of eminent domain decisions should be applied in cases where there is evidence that a condemnation was undertaken as a result of "impermissible favoritism" toward a private party.[25] The fact that four (and possibly five) justices had serious misgivings about the Court's ultradeferential approach to public use issues is a major change from the unanimous endorsement of that very position in *Midkiff.*

Although a defeat for property owners, *Kelo* also represented a doctrinal step forward for them.

B. The Public Reaction.

Although *Kelo* was consistent with existing precedent, the decision was greeted with widespread outrage that cut across partisan, ideological, racial, and gender lines. The U.S. House of Representatives immediately passed a resolution denouncing *Kelo* by a lopsided 365-33 vote.[26] In addition to expected

[20] Id. 2666.
[21] Id. at 2667-68.
[22] Id. at 2668.
[23] *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).
[24] *Kelo*, 125 S.C. at 2674-77 (O'Conner, J., dissenting); id. at 2685-88 (Thomas, J., dissenting).
[25] Id. at 2670 (Kennedy, J., concurring).
[26] U.S. House of Representatives, H.R. 340 (enacted June 30, 2005); Adam Karlin, *A Backlash on Seizure of Property*, Christian Sci. Monitor, July 6, 2005, at 1 (describing massive anti-*Kelo* backlash).

denunciations from conservatives and libertarians,[27] *Kelo* was condemned by numerous liberal political leaders including former President Bill Clinton,[28] Democratic National Committee Chair Howard Dean (who blamed the decision on a "Republican-appointed Supreme Court"),[29] and prominent African-American politician and California Representative Maxine Waters.[30] The NAACP, the American Association of Retired Persons, and the liberal Southern Christian Leadership Conference had filed a joint amicus brief in *Kelo* urging the Court to rule in favor of the property owners,[31] as had the generally conservative Becket Fund for Religious Liberty.[32]

Public opinion mirrored the widespread condemnation of *Kelo* by political elites and activists. In two national surveys conducted in the fall of 2005, 81% and 95% of respondents were opposed to *Kelo*.[33] As Table 1 demonstrates, opposition to the decision cut across racial, ethnic, partisan, and gender lines. In the Saint Index survey, which has the better worded question of the two national polls,[34] *Kelo* was opposed by 77% of men, 84% of women, 82% of whites, 72% of African-Americans, and 80% of Hispanics.[35] The decision was also opposed by 79% of Democrats, 85% of Republicans, and 83% of independents. Moreover, public opposition to *Kelo* was deep as well as broad. In the Saint Index survey, 63% of respondents not only disagreed with the decision, but said they did so "strongly."[36]

---

[27] *See*, e.g., Rush Limbaugh's statement, cited in note_____. The New London property owners were represented by the Institute for Justice, a prominent libertarian public interest law firm.

[28] *See* Eric Kriss, *More Seek Curbs on Eminent Domain*, SYRACUSE POST-STANDARD, Jul. 31, 2005 at A16 (noting Clinton's opposition to the ruling).

[29] *See* KSL TV [Salt Lake City] *Howard Dean Comes to Utah to Discuss Politics*, Jul. 16, 2005, available at http://tv.ksl.com/index.php?nid=39&sid=219221(visited Dec. 5, 2005) (quoting Dean as denouncing "a Republican appointed Supreme Court that decided they can take your house and put a Sheraton hotel in there").

[30] *See* Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005 (quoting Waters denouncing *Kelo* as "the most un-American thing that can be done"). (Pg. #?)

[31] *See Kelo v. City of New London*, Amicus Br. of NAACP, AARP, & SCLC, 2004 WL 2811057. (Is it necessary to have Kelo twice above?)

[32] *Kelo v. City of New London*, Amicus Br. of Becket Fund for Religious Liberty, 2004 WL 2787141.

[33] See references to Table 1. The differences between the two surveys are likely due to a difference in question wording.

[34] The Zogby survey question asked respondents whether they supported "the recent Supreme Court ruling that allowed a city in Connecticut to take the private property of one citizen and give it to another citizen to use for *private development*?" American Farm Bureau Federation Survey, Oct. 29- Nov. 2, 2005, Zogby International (emphasis added). This wording ignores the fact that the legal rationale for *Kelo* is that the takings are intended to promote "public" development. By contrast, the Saint Index survey asked respondents whether they agreed with the Court's decision "that local governments can take homes, business and private property to make way for private economic development if officials believe it *would benefit the public*." The Saint Index Poll, Oct.-Nov. 2005, Center for Economic and Civic Opinion at University of Massachusetts/Lowell (emphasis added)

[35] See Table 1.

[36] Saint Index, supra note _____.

Table 1:
National Public Opinion on *Kelo*

		Zogby Survey[37]		*Saint Index Survey 2005*[38]	
		% Agree	% Disagree	% Agree	% Disagree
	Total	2	95	18	81
Gender	Male	2	94	22	77
	Female	2	95	14	84
Racial/Ethnic Group	White	2	94	17	82
	African American	0	97	28	72
	Asian	0	100	26	68
	Hispanic/Latino	2	98	18	80
	Native American	-	-	7	93
Party Affiliation	Democrat	3	94	20	79
	Independent	<1	99	17	83
	Republican	3	92	14	85
Ideology	Liberal	-	-	22	77
	Moderate	-	-	18	81
	Conservative	-	-	17	82

[37] American Farm Bureau Federation Survey, Oct. 29- Nov. 2, 2005, Zogby International. Question wording: "Do you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the recent Supreme Court ruling that allowed a city in Connecticut to take the private property of one citizen and give it to another citizen to use for private development?" The totals given here differ slightly from those published by Zogby because they correct a minor clerical error in Zogby's tabulation.

[38] The Saint Index Poll, Oct.-Nov. 2005, Center for Economic and Civic Opinion at University of Massachusetts/Lowell. Question wording: "The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?"

Table 2:
State-by-State Public Opinion on *Kelo*

State	% Agreeing with *Kelo*	% Disagreeing
Connecticut[39]	8	88
Florida[40]	12	88
Kansas[41]	7	92
New Hampshire[42]	4	93
Minnesota[43]	5	91
North Carolina[44]	7	91
Pennsylvania[45]	9	90

[39] Quinnipiac University Poll, July 19-25, 2005, Quinnipiac University Polling Institute, available at http://www.quinnipiac.edu/x11385.xml?ReleaseID=821. Question wording: "As you may know, the Court ruled that government can use eminent domain to buy a person's property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling? Do you agree/disagree strongly or somewhat?"

[40] Coalition for Property Rights Survey, Oct. 17-19, 2005, Mason Dixon Polling & Research Inc., available at http://www.rg4rb.org/surveyEmDom.html. Question wording: "In that Connecticut case, the U.S. Supreme Court ruled government can use the power of eminent domain to acquire a person's property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling? (Is that strongly agree/disagree or somewhat agree/disagree?)"

[41] Americans for Prosperity Survey, Jan. 2-5, 2006, Cole Hargrave Snodgrass and Associates, available at http://www.castlecoalition.org/pdf/polls/amcns-prosp-poll-KS.pdf. Question wording: "For years, governments have used the power of eminent domain to take control of private property and then using that property for schools, hospitals, roads, parks and other public services. Recently, the Kansas Supreme Court has expanded the government's ability to use eminent domain to include taking control of private property and transferring it not for public services, but to other private interests such as shopping centers or car lots. Do you favor or oppose the increased use of eminent domain to include taking private property and transferring ownership to other private interests? (After response, ask:) Would you say you strongly (favor / oppose) or only somewhat (favor / oppose)?"

[42] Granite State Poll, July 7-17, 2005, University of New Hampshire Survey Center, available at http://www.unh.edu/survey-center/sc072005.pdf#search=%22kelo%20poll%22. Question wording: "Recently, the Supreme Court ruled that towns and cities may take private land from people and make it available to businesses to develop under the principle of eminent domain. Some people favor this use of eminent domain because it allows for increased tax revenues from the new businesses and are an important part of economic redevelopment. Other people oppose this use of eminent domain because it reduces the value of private property and makes it easier for big businesses to take land. What about you? Do you think that towns and cities should be allowed to take private land from the owners and make it available to developers to develop or do you oppose this use of eminent domain?"

[43] Minnesota Auto Dealers Association Survey, Feb. 9-17, 2006, Decision Resources Ltd., available at http://www.castlecoalition.org/pdf/polls/Survey-for-Strib.pdf. Question wording: "What is your opinion – do you support allowing local government to use eminent domain to take private property for another private development project? Do you feel strongly this way?"

[44] John William Pope Civitas Institute Survey, Aug. 2005, Tel Opinion Research, available at http://www.jwpcivitasinstitute.org/keylinks/poll_august.html. Question wording: "The Supreme Court recently expanded the power of government to take private property for non-public use. Do you agree or disagree with this expansion of government's right to take private property?"

[45] Keystone Business Climate Survey, Apr. 2-25, 2006, Lincoln Institute of Public Opinion Research, Inc., available at http://www.lincolninstitute.org/polls.php. Question wording: "A recent U.S. Supreme Court decision upheld the

Tennessee[46]	8	86

Table 2 presents survey results for eight state level surveys, all of which are similar to the national results, with opposition to *Kelo* ranging from 86 to 92 percent of respondents. The state surveys each use different question wording, and therefore are not completely comparable to the national surveys or to each other. Nevertheless, the national and state by state survey results are consistent with each other, and paint a picture of widespread and overwhelming opposition to *Kelo* and economic development takings.

The broad anti-*Kelo* consensus among political leaders, activists, and the general public leads one to expect that the ruling would be followed by the enactment of legislation abolishing or at least strictly limiting economic development takings. Yet, as we shall see in Part II, such a result has not occurred in most states.

II. THE LEGISLATIVE RESPONSE.

With some important exceptions, the legislative response to *Kelo* has fallen well short of expectations. At both the state and federal level, most of the newly enacted laws are likely to impose few if any meaningful restrictions on economic development takings.

A. State Law.

In analyzing the state law reforms enacted in the wake of *Kelo*, it is important to recognize that there is a significant difference in quality between laws enacted by referendum and those adopted by state legislatures. The former are generally much stronger than the latter. Therefore, I analyze the two categories separately. The overall results of the analysis are summarized in Table 3. Table 4 describes the effectiveness and type of reform enacted in each state.

---

taking of private residential property by local municipalities to enable private developers to build higher tax-yielding structures on that land. Do you agree or disagree with this ruling?"

[46] Tennessee Poll, July 5-16, 2006, Social Science Research Institute at the University of Tennessee, Knoxville, available at http://web.utk.edu/~ssriweb/National_Issues.pdf. Question wording: "Sometimes the property taken through eminent domain is given to other private citizens for commercial development, rather than for public uses, such as road or schools. Would you say you favor or oppose this use of eminent domain?"

Table 3:
State Post-*Kelo* Reform Laws[47]

<table>
<tr><th colspan="3">Type of Law</th><th>Number of States</th></tr>
<tr><td rowspan="4">Effective</td><td colspan="2">Enacted by Legislature</td><td>9</td></tr>
<tr><td rowspan="2">Enacted by Referendum</td><td>Citizen-initiated</td><td>4</td></tr>
<tr><td>Legislature-initiated</td><td>2 or 3</td></tr>
<tr><td colspan="2">Both (Legislature-initiated)</td><td>2</td></tr>
<tr><td rowspan="4">Ineffective</td><td colspan="2">Enacted by Legislature</td><td>17</td></tr>
<tr><td rowspan="2">Enacted by Referendum</td><td>Citizen-initiated</td><td>0</td></tr>
<tr><td>Legislature-initiated</td><td>3 or 4</td></tr>
<tr><td colspan="2">Both</td><td>0</td></tr>
<tr><td colspan="3">No Post-Kelo Reforms Enacted</td><td>14[48]</td></tr>
</table>

[47] The total number of states listed adds up to more than fifty because a few states had effective legislative reforms followed by ineffective legislative referendum initiatives, and are thus counted in both of these categories.
[48] This figure does not include the state of Utah, which abolished both economic development and blight condemnations before *Kelo.* See note___.

Table 4:
Effectiveness of Reform by State

State	Effectiveness of Reform
Alabama	Effective (L)
Alaska	Ineffective (L)
Arizona	Effective (CR)
Arkansas	No Reform
California	Ineffective (L)
Colorado	Ineffective (L)
Connecticut	No Reform
Delaware	Ineffective (L)
Florida	Effective (L & LR)
Georgia	Effective (L & LR)
Hawaii	No Reform
Idaho	Effective (L)
Illinois	Ineffective (L)
Indiana	Effective (L)
Iowa	Ineffective (L)
Kansas	Effective (L)
Kentucky	Ineffective (L)
Louisiana	Effective (LR)
Maine	Ineffective (L)
Maryland	No Reform
Massachusetts	No Reform
Michigan	Effective (L & LR)
Minnesota	Effective (L)
Mississippi	No Reform
Missouri	Ineffective (L)
Montana	No Reform
Nebraska	Ineffective (L)
Nevada	Effective (CR)
New Hampshire	Effective (L & LR)
New Jersey	No Reform
New Mexico	No Reform
New York	No Reform
North Carolina	Ineffective (L)
North Dakota	Effective (CR)
Ohio	Ineffective (L)
Oklahoma	No Reform
Oregon	Effective (CR)
Pennsylvania	Effective (L)
Rhode Island	No Reform
South Carolina	Ineffective (LR)
South Dakota	Effective (L)
Tennessee	Ineffective (L)
Texas	Ineffective (L)
Utah	Effective (Enacted Prior to Kelo)
Vermont	Ineffective (L)
Virginia	No Reform
Washington	No Reform
West Virginia	Ineffective (L)
Wisconsin	Ineffective (L)
Wyoming	No Reform

L=Reform enacted by state legislature; CR=Reform enacted by citizen-initiated referendum; LR=Reform enacted by legislature-initiated referendum.

Table 5 shows that the enactment of effective post-*Kelo* reform seems unrelated to the degree to which the state in question engaged in private-to-private condemnation previously. Only six of the twenty states with the greatest number of private-to-private takings in the five year period from 1998 to 2002 have enacted effective post-*Kelo* reforms.

The data in Table 5 is based on a study by the Institute for Justice, the libertarian public interest law firm that represented the property owners in *Kelo.*[49] The Institute for Justice figures are far from definitive. They likely underestimate the prevalence of condemnations for the benefit of private parties because they were compiled from news reports and court filings.[50] Many cases are unpublished, and many other condemnations go unreported in the press.[51] Many of the condemnations in the study involved the taking of multiple properties, sometimes hundreds at a time, while others only applied to a small amount of land. Finally, it is unfortunate that the IJ figures do not separate out economic development takings from other private-to-private condemnations. Nonetheless, they do give a rough indication of which states engage in private-to-private condemnations more than others. And it is noteworthy that states with a relatively large number of private-to-private takings are not more likely to have enacted effective post-*Kelo* reforms than others.

A similar picture emerges if we compare states with large numbers of "threatened" private-to-private condemnations to those with few, or if we analyze the data with respect to the frequency of actual or threatened condemnations relative to the size of the state's population.[52] In each case states with relatively large numbers of actual or threatened condemnations were not more likely to enact effective reforms than those with few or none.

---

[49] *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), *available at* http://www.castlecoalition.org/publications/report/index.html (visited February 13, 2007). Berliner was one of the two IJ lawyers who represented Susette Kelo and the other New London property owners.

[50] *Id.* at 100.

[51] *Id.* at 2.

[52] The tables with this data are in the Appendix.

Table 5:
Post-*Kelo* Reform in States Ranked by Number of Private-to-Private Condemnations, 1998-2002

State	No. of Takings[53]	Effectiveness of Reform[54]
Pennsylvania	**2,517**	**Effective (L)**
California	223	Ineffective (L)
Kansas	**155**	**Effective (L)**
Michigan	**138**	**Effective (L & LR)**
Maryland	127	No Reform
Ohio	90	Ineffective (L)
Florida	**67**	**Effective (L & LR)**
Virginia	58	No Reform
New York	57	No Reform
New Jersey	51	No Reform
Connecticut	31	No Reform
Tennessee	29	Ineffective (L)
Colorado	23	Ineffective (L)
Oklahoma	23	No Reform
Missouri	18	Ineffective (L)
Rhode Island	12	No Reform
Arizona	**11**	**Effective (CR)**
Texas	11	Ineffective (L)
Washington	11	No Reform
Minnesota	**9**	**Effective (L)**
Alabama	8	Effective (L)
Illinois	8	Ineffective (L)
Kentucky	7	Ineffective (L)
Louisiana	5	Effective (LR)
Massachusetts	5	No Reform
Indiana	4	Effective (L)
Iowa	4	Ineffective (L)
Mississippi	3	No Reform
Nevada	3	Effective (CR)
Maine	2	Ineffective (L)
Arkansas	1	No Reform
Nebraska	1	Ineffective (L)
North Carolina	1	Ineffective (L)
North Dakota	1	Effective (CR)
Alaska	0	Ineffective (L)
Delaware	0	Ineffective (L)
Georgia	0	Effective (L & LR)
Idaho	0	Effective (L)
South Dakota	0	Effective (L)
Wyoming	0	No Reform
Hawaii	-	No Reform
Montana	-	No Reform
New Hampshire	-	Effective (L & LR)
New Mexico	-	No Reform
Oregon	-	Effective (CR)
South Carolina	-	Ineffective (LR)

[53] Note: some takings affected more than one property.
[54] As of January 2007.

Utah	-	Enacted Prior to *Kelo*
Vermont	-	Ineffective (L)
West Virginia	-	Ineffective (L)
Wisconsin	-	Ineffective (L)

L=Reform enacted by state legislature; CR=Reform enacted by citizen-initiated referendum; LR=Reform enacted by legislature-initiated referendum.

To be sure, it is noteworthy that three of the four states with the largest number of takings - Pennsylvania, Kansas, and Michigan – have enacted effective reforms. However, the significance of this fact is diminished by the reality that Pennsylvania's reform law has a major loophole exempting those parts of the state where most condemnations occur.[55] Michigan's reform law, while quite strong,[56] comes on the heels of a state supreme court decision that had already banned *Kelo*-style "economic development" takings.[57] In addition, the Institute for Justice figures are only approximate and it is likely that they greatly underestimate the number of economic development condemnations in some states.[58] It is difficult to know whether Pennsylvania, Kansas, and Michigan really were three of the top four states in this category. Furthermore, it would be unwise to draw broad conclusions from just three cases, especially in light of the fact that nearly all the other states with large numbers of private-to-private takings in the Institute for Justice study either enacted ineffective reforms or none at all. For these reasons, the reforms in these states are not compelling evidence for the theory that the effectiveness of post-*Kelo* reform was driven by the extent to which the state in question made use of economic development condemnations prior to *Kelo.*

1. Reforms Enacted by State Legislatures.

As of December 2006, twenty-seven state legislatures have enacted post-*Kelo* reforms. The state of Utah effectively banned economic development takings in a statute enacted several months before *Kelo* was decided by the Supreme Court.[59] However, seventeen of the twenty-seven new state laws provide

[55] See discussion of the Pennsylvania law in § II.A.2, *infra*.
[56] See id.
[57] See *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). For an analysis of *Hathcock*, see Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use* 2004 MICH. ST. L. REV. 1005 (symposium on *County of Wayne v. Hathcock*). The new Michigan law does, however, go beyond *Hathcock* in limiting blight condemnations that might not have been prevented by the court decision. For analysis of the ambiguity of *Hathcock* on this score, see id. at 1033-39.
[58] See, for example, the discussion of the underestimation of the number of takings in Minnesota in § II.A.2, infra.
[59] *See* Utah Code § 17B-202-4 (amended Mar. 21, 2005 by Utah Sen. Bill 184) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); *see also* Henry

little or no protection for property owners against economic development takings. Only eleven state legislatures have enacted laws that either ban economic development takings or significantly restrict them. The seventeen ineffective state laws are of several types. By far the most common are laws that forbid takings for "economic development" but in fact allow them continue under another name, such as "blight" or "community development" condemnations. Other post-*Kelo* reforms lack teeth because they either forbid only those takings that are for "private" development (thus permitting localities to condemn under the standard theory that any such takings are really intended to promote "public" benefit) or are purely symbolic in nature.

a. Laws with broad exemptions for "blight" condemnations.

Thirteen states have enacted post-*Kelo* reform laws whose effect is largely negated by exemptions for "blight" condemnations under definitions of "blight" that make it possible to include almost any property in that category. This is by far the most common factor undermining the potential effectiveness of post-*Kelo* reform laws.

Early blight cases in the 1940s and 1950s upheld condemnations in areas that closely fit the layperson's intuitive notion of "blight": dilapidated, dangerous, or disease-ridden neighborhoods. For example, in *Berman v. Parker,* the well-known 1954 case in which the Supreme Court upheld the constitutionality of blight condemnations under the Federal Public Use Clause, the condemned neighborhood was characterized by "[m]iserable and disreputable housing conditions."[60] According to the Court, "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating."[61]

More recently, however, many states have expanded the concept of blight to encompass almost any area where economic development could potentially be increased. For example, recent state appellate court decisions have held that Times Square in New York City, [62] and downtown Las Vegas[63] are

---

Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV. NEWS, June 1, 2005, available at http://www.heartland.org/article.cfm?artID=17162 (visited Dec. 12, 2005) (describing the politics behind the Utah law).

[60]*Berman v. Parker*, 348 U.S. 26, 32 (1954).

[61]*Id.* at 32.

[62]*In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

"blighted," thereby justifying condemnations undertaken to acquire land for a new headquarters for the *New York Times* and parking lots for a consortium of local casinos respectively. All but two states permit condemnation for "blight" and most of these define the concept broadly.[64] For decades, courts have interpreted broad definitions of blight in ways that allow the condemnation of almost any property.[65] If virtually any property can be condemned as "blighted," a ban on "economic development" takings would be essentially irrelevant.

Fifteen post-*Kelo* reform laws continue this pattern, using definitions of blight that are either identical to those enshrined in preexisting law or very similar to them. These reform laws thereby undermine the effectiveness of their bans on private-to-private condemnations for "economic development." Nine of these followed a standard pattern of defining blight as any obstacle to "sound growth" or an "economic or social liability." Six have somewhat more idiosyncratic but comparably broad definitions of blight.

i. Defining blight to include any obstacle to "sound growth" or an "economic or social liability."

Nine state post-*Kelo* laws leave in place definitions of "blight" that include any area where there are obstacles to "sound growth" or conditions that constitute an "economic or social liability." These include reform laws in Alaska,[66] Colorado,[67] Missouri,[68] Nebraska,[69] North Carolina,[70] Ohio,[71] Texas,[72]

---

[63] *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003).

[64] *See generally* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROPERTY, PROBATE & TRUST J. 389 (2000) (describing definitions of blight used in various states). This article is slightly out of date because it does not account for the abolition of blight condemnations by Florida and Utah, as well as the tightening of the definition of blight by a few other states in the aftermath of *Kelo*. See discussion of the relevant laws in this Article. *See also* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 305-307 (2004) (describing very broad use of blight designations to facilitate condemnation).

[65] See Luce, supra note ____; Gordon, supra note _____.

[66] *See* Alaska H.B. 318 (Signed into law July 5, 2006) (exempting preexisting public uses declared in state law from a ban on economic development takings); Alaska Stat. § 18.55.950 (stating that "'blighted area' means an area, other than a slum area, that by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or improvements, tax or special assessment delinquency exceeding the fair value of the land, improper subdivision or obsolete platting, or the existence of conditions that endanger life or property by fire and other causes, or any combination of these factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its condition and use.").

[67] *See* Colorado H.B. 1411 (enacted into law June 6, 2006) (allowing condemnation for "eradication of blight"); Colo. Stat. § 31-25-103(2) (defining "blight" to include any condition that "substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare").

Vermont,[73] and West Virginia.[74] Obviously, any obstacle to economic development can easily be defined as impairing "sound growth," making this definition of blight broad enough to justify virtually any condemnation that could be justified under an economic development rationale. Similarly, an impediment to "economic development" can be considered an "economic or social liability." Several of the state laws listed above state that, in order to be blighted, an area that is an "economic or social liability" must also be "a menace to the public health, safety, morals, or welfare."[75] This additional condition is unlikely to be a significant constraint because almost any condition that impedes economic development could be considered a "menace" to public "welfare." For example, under Florida's pre-reform blight statute which used this exact wording, the Florida Supreme Court found that even undeveloped land could be

---

[68] *See* Mo. S.B. 1944, § 523.271.2 (signed into law July 13, 2006) (exempting blight condemnations from ban on "economic development" takings); Mo. Stat. § 100.310(2) (defining "blight" as "an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use").

[69] *See* Neb. L.B. 924 (enacted into law April 13, 2006) (exempting "blight" condemnations from ban on economic development takings); Neb. Stat. § 18-2103 (defining blight as any area in a condition that "substantially impairs or arrests the sound growth of the community, retards the provision of housing accommodations, or constitutes an economic or social liability" and has "deteriorating" structures).

[70] *See* N.C. H.B. 1965, § 2.1 (signed into law Aug. 10, 2006) (exempting blight condemnations from restrictions on economic development takings and stating that "'Blighted area' shall mean an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare.").

[71] *See* 2005 Ohio S.B. 167 § 1(exempting "blight" condemnations from temporary moratorium on economic development takings); Oh. Rev. Code § 303.26(E) (defining blight to include ""deterioration" of structures or where the site "substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[72] *See* Tex. S.B. 7B (enacted into law Sept. 1, 2005) (exempting "blight" condemnations from ban on economic development takings); Tex. Local Gov. Code § 374 (defining a blighted area as one that "because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare…or results in an economic or social liability to the municipality").

[73] *See* 2006 Vt. S.B. 246 (exempting blight condemnations from ban on economic development takings, and defining blight to include any planning or layout condition that "substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[74] *See* 2006 W.V. H.B. 4048 (enacted into Law April 2006) (exempting blight condemnation from ban and defining blight to include "an area that, for any number of factors such as deterioration or inadequate street layout, "substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[75] See statutes cited in nn_____ above.

considered "blighted" because its current state impedes future development.[76] The Supreme Court of Arizona has similarly described this language – which was present in Arizona's pre-*Kelo* blight statute, as an "extremely broad definition of . . . 'blighted area'" that gives condemning authorities "wide discretion in deciding what constitutes blight."[77] Significantly, searches on Westlaw and Lexis do not reveal any published state court opinions that interpret this language as a meaningful constraint on the scope of blight condemnations, or even use it to strike down an attempted blight taking of any kind.

ii. Other broad blight exemptions.

Six other states have similarly broad blight exemptions, albeit with different wording. Illinois' new law exempts blight condemnations from its ban on economic development takings and retains its preexisting definition of blight,[78] which defines a blighted area as one where "industrial, commercial, and residential buildings or improvements are detrimental to the public safety, health, or welfare because of a combination of 5 or more of the following factors." The list of factors include dilapidation; obsolescence; deterioration; below minimum code standards; illegal use of structures; excessive vacancies; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage and overcrowding of structures and community facilities; deleterious land use or layout; environmental clean-up; lack of community planning; or an assessed value that has decline three of the last five years.[79] The concept of "detriment" to "public welfare" is extremely broad and surely includes detriment to local economic welfare and development. The list of factors, of which five must be present, includes numerous conditions, such as deterioration, "deleterious land use or layout," lack of community planning, a declining assessed value, "excessive" land coverage, and obsolescence that exist to some degree in most communities. Thus, Illinois' law would forbid few if any economic development takings.

Kentucky's post-*Kelo* reform law likewise retains a very broad preexisting definition of blight.[80] The law allowed condemnation of property for "urban renewal and community development" in

[76] Panama City Beach Community Redev. Agency v. State, 831 So.2d 662, 668-69 (Fla. 2002).
[77] City of Phoenix v. Superior Ct., 671 P.2d 387, 391, 393 (Ariz. 1983).
[78] Ill. S.B. 3086 (signed into law July 28, 2006).
[79] 65 Ill. C. Stat. § 5/11-74.4-3.
[80] *See* 2006 Ky. H.B. 508 (signed into law Mar. 28, 2006).

"blighted" or "slum" areas.[81] An area can be considered "blighted" or a "slum" if there are flaws in the "size" or "usefulness" of property lots in the area, or if there are conditions "constitut[ing] a menace to the public health safety or welfare."[82]

Maine's reform statute also incorporates a broad definition of blight from prior legislation.[83] Prior Maine law defines "blight" as including areas in which properties suffer from "[d]ilapidation, deterioration, age or obsolescence."[84] For condemnations that further "urban renewal" projects, detriment to "public health, safety, morals or welfare" may lead to a blight designation;[85] condemnation for "community development" can occur in areas that are considered "blighted" under the same definition, except that threats to "morals" are not included.[86]

The new Tennessee law attempts to tighten the definition of blight, but ultimately leaves it very broad. Under the new statute:

> "Blighted areas" are areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community. "Welfare of the community" does not include solely a loss of property value to surrounding properties nor does it include the need for increased tax revenues.[87]

The inclusion of the term "welfare of the community" seems to leave the door open to most economic development takings; after all, economic development is generally considered a component of community "welfare." This conclusion is not much affected by the stipulation that "'welfare' . . . does not include solely a loss of property value to surrounding properties nor does it include the need for increased tax revenues."[88] Condemnations that promote "development" by increasing property values are still permitted so long as there is some other claim of even a small economic benefit, such as an increase in

[81] Kan. Rev. Stat. §§ 99.330-590, 99.370.
[82] Id. § 99.340.
[83] *See* 2005 Maine H.B. 1310 (signed into law Apr. 13, 2006) (exempting blight condemnations from ban on economic development condemnations).
[84] 30 Me. Stat. Ann. §§ 203, 205.
[85] Id. at § 203.
[86] Id. at § 205.
[87] Tenn. S.B. 3296, § 14(a) (signed into law June 6, 2006).
[88] Id.

employment, savings, or investment. Indeed, the provision of jobs and attraction of outside investors is a standard rationale for economic development condemnations.[89]

Finally, Iowa's and Wisconsin's post-*Kelo* laws are somewhat ambiguous cases, though tending toward a broad definition of blight.

The Iowa statute includes a less broad blight exemption but one that might still be extensive enough to allow a wide range of economic development takings. The Iowa statute permits condemnation of blighted areas, and defines blight as:

> [T]he presence of a substantial number of slum or deteriorated structures; insanitary or unsafe conditions; excessive and uncorrected deterioration of site or other improvements; tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; or the existence of conditions which endanger life or property by fire and other causes; or the existence of conditions which retard the provision of housing accommodations for low or moderate income families, or is a menace to the public health and safety in its present condition and use."[90]

Whether or not this is a broad definition of blight depends on the definition of such terms as "deteriorated structures" and "excessive and uncorrected deterioration of site." If the concept of "deterioration" is defined broadly, then virtually any area could be considered blighted, since all structures are gradually deteriorating over time. Since the one of the conditions justifying a blight designation is "the presence of a substantial number of slum *or* deteriorated structures,"[91] we might presume that the term "deteriorated" can be applied to structures that are not dilapidated enough to be considered "slum[s]." Otherwise, the inclusion of the term "deteriorated" would be superfluous. Thus, it is possible that courts will interpret the Iowa statute to permit a very broad definition of "blight" by virtue of the use of the term "deteriorated."

In addition, it is possible that a wide range of areas could be considered "blighted" by applying the statute's provision that an area is blighted if there are "conditions which retard the provision of housing accommodations for low or moderate income families."[92] Since the law does not state that the

---

[89] The best-known such case is that of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), where some 4000 where uprooted in order to provide a site for a new General Motors factory in Detroit that was expected to create 6000 new jobs. For discussion, *see* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use* 2004 MICH. ST. L. REV. 1005 (symposium on *County of Wayne v. Hathcock*).
[90] Iowa H.F. 2351 (enacted into law July 14, 2006).
[91] Id. (emphasis added).
[92] Id.

"retardation" must be of significant magnitude, it is possible that the existence of conditions that impair the provision of low and moderate income housing even slightly might be enough to justify a blight designation.

The Wisconsin statute is more restrictive than Iowa's. It too exempts blight condemnations from its ban on economic development takings and defines "blight" broadly. The definition includes:

> [A]ny property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is detrimental to the public health, safety, or welfare."[93]

However, the statute also exempts residential property from condemnation for blight alleviation unless it has 1) "been abandoned" or 2) has been "converted from a single dwelling unit to multiple dwelling units" and "the crime rate in [or near] the property is higher than in the remainder of the municipality."[94] Thus, the Wisconsin law provides considerable protection for single family homes, but allows nonresidential properties and many multi-family homes to be condemned under a broad definition of blight.

b. State laws that are ineffective for other reasons.[95]

While broad blight exemptions are by far the most common type of loophole in post-*Kelo* laws, several post-*Kelo* statutes are ineffective for other reasons. The most notable of these are those of California and Delaware. The Texas and Ohio laws, already briefly discussed above, also have major loopholes besides those created by their blight exemptions. I analyze each of these cases in turn.

i. California.

In September 2006, the California state legislature enacted a package of five post-*Kelo* eminent domain reform bills.[96] None of the five even comes close to forbidding condemnations for economic development.

---

[93] Wisc. A.B. 657, § 1 (signed into law Mar. 31, 2006).
[94] Id.
[95] The analysis of the Delaware, Ohio, and Texas laws is in large part derived from Somin, *Grasping Hand*, supra note _____.
[96] *See* Ca. S.B. 53, 1206, 1210, 1650, and 1809 (signed into law Sept. 29, 2006).

Four of the five new statutes create minor new procedural hurdles for local governments seeking to condemn property.[97] As eminent domain scholar and litigator Tim Sandefur has shown in a detailed analysis, none of the four impose restrictions that will significantly impede the exercise of eminent domain in California.[98]

Senate Bill 1206 attempts to narrow the definition of blight, but still leaves a definition broad enough to permit the condemnation of almost any property that local governments might want for economic development purposes. The bill requires that a blighted area have both at least one "physical condition" that "causes "blight" and one "economic" condition.[99] Both the list of qualifying physical conditions and the list of qualifying economic ones includes vague criteria that apply to almost any neighborhood. The list of "physical conditions" includes "conditions that prevent or substantially hinder the viable use or capacity of buildings or lots," and "[a]djacent or nearby incompatible land uses that prevent the development of those parcels or other portions of the project area."[100] Since "viable use" and "development" are left undefined, local officials will have broad discretion to designate areas as they see fit. The list of "economic conditions" is similar. Among other things, it includes "[d]epreciated or stagnant property values," abnormally high business vacancies," and "abnormally low lease rates."[101] Since almost any area occasionally experiences stagnation or decline in property values and a declining business climate, this list too puts no meaningful restrictions on blight designations. Moreover, it is important to remember that a blight condemnation requires just one "condition" from each list, further increasing official discretion.

ii. Delaware.

The Delaware bill is arguably the least effective of all the post-*Kelo* laws enacted so far. It does not restrict condemnations for economic development at all. The statute requires merely that the power of eminent domain only be exercised for "the purposes of a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings: (i) in a certified planning document,

[97] *See* Id. (except for S.B. 1206).
[98] *See* Tim Sandefur, *Gov. Schwarzenegger Signs Mealy-Mouthed Property Rights Protection,* Pacific Legal Foundation on Eminent Domain (Parts 1, 3, 4, and 5) available at http://eminentdomain.typepad.com/my_weblog/2006/09/gov_schwarzeneg.html (visited Jan. 2, 2006).
[99] Ca. S.B. 1206, § 3.
[100] Id.
[101] Id.

(ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency."[102] This bill does little more than restate current constitutional law, which already requires that condemnation be for a "recognized public use." Indeed, the *Kelo* majority notes that "'purely private taking[s]'" are constitutionally forbidden.[103] The real question, however, is what counts as a "recognized public use," and this issue is in no way addressed by the new Delaware law.

The requirement that the purpose of the condemnation be announced six months in advance provides a minor procedural protection for property owners, but one that can easily be circumvented simply by tucking away the required announcement in a "published report of the acquiring agency."[104]

iii. Ohio.

The main shortcoming of the Ohio law is its temporary nature. The new law mandated that "until December 31, 2006, no public body shall use eminent domain to take . . . private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person."[105]

Even within the short period of its effect, the law probably only had a very limited impact. While it forbade condemnations where "economic development" is the "primary purpose," nothing prevented such takings if the community could cite some other objective to which the development objective is an adjunct or complement.[106] Creative local governments could easily come up with such proposals. Furthermore, the Ohio law explicitly exempted "blighted" areas from its scope;[107] the definition of "blight" under Ohio law is broad enough to cover almost any area.[108] Finally, given the temporary nature of the legislation, a local government could get around it simply by postponing a given condemnation project for a few months.

---

[102] Del. Sen. Bill 217, § 1 (codified at 29 Del. Code § 9505(14)).
[103] *Kelo*, 125 S.Ct. at 2662 (quoting Midkiff, 467 U.S. at 245).
[104] 29 Del. Code § 9505(14).
[105] Oh. Gen. Assembly, Sen. Bill 167, § 2.
[106] Id. at § 2.
[107] Id..
[108] *See* Oh. Rev. Code § 303.26(E) (defining blight to include ""deterioration" of structures or where the site "substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

The Ohio legislation also established a "Legislative Task Force to Study Eminent Domain and its Use and Application in the State."[109] However, the twenty-five member commission was largely dominated by pro-eminent domain interests. Fourteen of the twenty-five members were required to be representatives of groups that tend to be supportive of broad eminent domain power. Only four were required to be members of groups likely to support strict limits on condemnation authority, and seven represented groups with mixed incentives.[110]

As was perhaps to be expected, the Commission's Final Report recommended only minor reforms in state law. For example, it recommended "tightening" the state's broad definition of "blight," but its proposed new definition is almost as broad as the old one.[111] In any event, the state is not required to act on the commission's recommendations in any way.

iv. Texas

Texas' post-*Kelo* legislation is likely to be almost completely ineffectual because of its major loopholes. It forbids condemnations if the taking:

> (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.[112]

Taken literally, the first criterion in the act might be used to forbid almost all condemnations, since even traditional public uses often "confer a private benefit on a particular private party through the use of the property."[113] Presumably, however, this prohibition is intended merely to forbid condemnations that create such a private benefit without also serving a public use. Otherwise, the state legislature would

---

[109] Oh. Gen. Assembly, Sen. Bill 167, § 3.
[110] For a detailed analysis of the commission's Composition, see Somin, *Grasping Hand*, supra note _____.
[111] See FINAL REPORT OF THE TASK FORCE TO STUDY EMINENT DOMAIN 12, Aug. 1, 2006 (on file with the author); The new definition of blight advocated by the Commission would allow the designation of an area as "blighted" so long as it was characterized by any two of seventeen different conditions. Id. Attachment 2. Many of these are vaguely defined and could apply to almost any property. For example, one of the seventeen conditions is "faulty lot layout in relation to size, adequacy accessibility, or usefulness." Id. Others include "excessive dwelling unit density" (without defining what counts as "excessive"), and "age and obsolescence" (also undefined). Like the old definition, the new one would still permit virtually any property to be designated as "blighted." For the old definition, see note _____.
[112] Tex. Sen. Bill No. 7 (signed into law Sept. 1, 2005) (codified at 10 Tex. Gov. Code §2206.001(b)).
[113] Id.

not be able to protect "community development" and "urban renewal" takings, which surely confer "private benefits" for "particular" persons.[114]

The legislation's ban on pretextual takings merely reiterates current law. *Kelo* itself states that government is "no[t] . . . allowed to take property under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit."[115]

The ban on takings for "economic development" purposes is largely vitiated by exemption for condemnations where "economic development is a secondary purpose resulting from municipal community development."[116] Virtually any "economic development" can be plausibly characterized as also advancing "community development." It is difficult to see how the two concepts can be meaningfully distinguished in real world situations. Indeed, Texas law defines "community development" to permit condemnation of any property that is "inappropriately developed from the standpoint of sound community development and growth."[117] It is surely reasonable to suppose that "sound community development and growth" includes economic "development and growth."[118]

The Texas legislation does contain two potentially effective elements. First, it eliminates judicial deference to governmental determinations that a challenged condemnation is for a legitimate public use.[119] This shifts the burden of proof in public use cases to the condemning authority. Second, it seems to forbid private-to-private condemnations under statutes other than those allowing the use of eminent domain for blight alleviation and "community development."[120] However, as noted above, Texas' definition of "community development" is so broad that it can be used to justify almost any condemnation even under a nondeferential approach to judicial review. Judges are unlikely to find that very many takings run afoul of the community development statute's authorization of condemnation of property that is "inappropriately developed from the standpoint of sound community development and growth."[121] This broad standard can also be used to defend a wide range of condemnations for various private

[114] Id.
[115] *Kelo*, 125 S.Ct. at 2662.
[116] 10 Tex. Gov. Code § 2206.001(b)(3).
[117] Tex. Local Gov. Code §373.005(b)(1)(A).
[118] Id.
[119] Id. at § 2206.001(e).
[120] These latter two statutes are listed as the only broad exceptions to the bill's ban on takings "for economic development purposes." 10 Tex. Gov. Code §2206.001(b).
[121] Tex. Local Gov. Code §373.005(b)(1)(A).

development projects even without specific legislative authorization other than the community development law itself. Ultimately, the potentially effective new rules in the Texas law are swallowed up by the "community development" exception.[122]

2. Legislatively enacted laws that provide substantially increased protection for property owners.

Eleven state legislatures have enacted laws that either abolish or significantly constrain economic development takings. The most sweeping of these laws is Florida's, which not only abolished condemnations for economic development, but also banned all blight condemnations, even those that occur in areas that would meet a strict definition of the term.[123] Florida has therefore become the second state to abolish blight condemnations, following in the footsteps of Utah, which did so prior to *Kelo.*[124] Unlike Utah, which made little use of economic development and blight takings even before the enactment of its new law,[125] Florida has an extensive record of dubious economic development and blight condemnations.[126] Due to its broad scope and location in a large state that previously made extensive use of private-to-private takings, the new Florida law is probably the most important post-*Kelo* legislative victory for property rights activists.

South Dakota's new law is only slightly less sweeping than Florida's. It continues to permit blight condemnations, but does not allow *any* takings – including those in blighted areas – that "transfer property to any private person, nongovernmental entity, or other public-private business entity."[127] This forbids economic development takings, and also greatly reduces the political incentive to engage in blight condemnations, since local governments can no longer use them to transfer property to politically

---

[122] Sandefur is more optimistic about these two provisions, calling them "significant improvements." Sandefur, supra note ___ at 734. He does not, however, consider the possibility that they can be circumvented by means of the "community development" exception.
[123] See Fla. H.B. 1567 (signed into law May 11, 2006).
[124] See § ___ infra, and note ___
[125] A report prepared Institute for Justice, the libertarian public interest law firm that represented the property owners in *Kelo* does not list a single private-to-private condemnation in Utah during the entire five year period from 1998 to 2002. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 196 (2003), *available at* http://www.castlecoalition.org/publications/report/index.html (visited February 13, 2007). The IJ Report concluded (two years before the enactment of the 2005 reform law) that "Utah has done fairly well in avoiding the use of eminent domain for private parties." Id.
[126] Id. at 52-58.
[127] 2006 S.D. H.B. 1080 (signed into law Feb. 27, 2006).

influential interests.[128] Kansas' new law is similar to South Dakota's in so far as it bans nearly all private-to-private condemnations. It forbids condemnations "for the purpose of selling, leasing or otherwise transferring such property to any private entity" except in cases where needed for public utilities or where there is defective title.[129] Blight condemnations are limited to cases where the property in question is "unsafe for occupation by humans under the building codes."[130]

Six state reform laws couple a ban on economic development condemnations with restrictions on the definition of blight that, roughly speaking, restrict blight condemnations to areas that fit the intuitive layperson's definition of the term. This formula was successfully used in the Alabama,[131] Georgia,[132] Idaho,[133] Indiana,[134] Michigan,[135] and New Hampshire[136] statutes.

Two state laws – Pennsylvania and Minnesota – forbid economic development takings and restrict the definition of blight, but significantly undermine their effectiveness by exempting large parts of the state from the law's coverage. The Pennsylvania law forbids "the exercise by any condemnor of the

---

[128] For arguments that this is a major problem with economic development and blight condemnations, see Somin, *Grasping Hand.*

[129] Kan. S.B. 323, §§1-2. (signed into law May 18, 2006).

[130] Id., § 2(a).

[131] *See* Alabama H.B. 654 (signed into law Apr. 25, 2006) (limiting definition of blight to a relatively narrow range of situations, such as property that is "unfit for human habitation," poses a public health risk, or has major tax delinquencies); Ala. Code § 11-47-170(b). (forbidding condemnations that "transfer" nonblighted property to private parties).

[132] *See* Geo. H.B. 1313 (signed into law Apr. 4, 2006) (forbidding economic development takings, and defining blight to include primarily risks to health, the environment, and safety, while excluding "esthetic" considerations).

[133] *See* Id. H.B. 555 (signed into law Mar. 21, 2006) (forbidding condemnations "For the purpose of promoting or effectuating economic development" and for the acquisition of nonblighted property, and defining blight as a condition that poses physical risks to the occupants of a building, spreads disease or crime, or poses "an actual threat of harm" to public safety, health, morals, or welfare). The burden of proof for showing that blight exists is imposed on the government. Nonetheless, there is some room for potential slippage in the Idaho law because of the possibility that property could be condemned merely for posing an "actual threat of harm" to public "morals" or "welfare," concepts that could be defined broadly enough to include most economic development takings.

[134] *See* Ind. H.B. 1010 (signed into law Mar. 24, 2006) (forbidding most private to private condemnations and defining blight as an area that "constitutes a public nuisance," is unfit for habitation, does not meet the building code, is a fire hazard, or "otherwise dangerous").

[135] See Mich. H.B. 5060, § 3 (signed into law Sept. 20, 2006) (banning condemnations for "general economic development" and limiting definition of "blight" to property that is a "public nuisance," an "attractive nuisance," poses a threat to public safety, such as a fire hazard, or is abandoned. The law does have a potential loophole in so far as it permits the condemnation of property as "blighted" if "it is not maintained in accordance with applicable local housing or property maintenance codes or ordinances." Id. at § 3(8)(a)(vii). This could allow local governments to manipulate the content of local property codes in such a way as to make it impossible for all or most property owners to fully comply, thus potentially opening the door to sweeping condemnation authority for economic development purposes.

[136] N.H. S.B. 287, §205-3-b (signed into law June 23, 2006) (defining public use as "exclusively" limited to government ownership, public utilities and common carriers, and blight-like condemnations needed to "remove structures beyond repair, public nuisances, structures unfit for human habitation or use, and abandoned property when such structures or property constitute a menace to health and safety").

power of eminent domain to take private property in order to use it for private commercial enterprise,"[137] and imposes a restrictive definition of blight.[138] However, the scope of this provision is undermined by the effective exclusion of Philadelphia and Pittsburgh, as well as some other areas, from its coverage.[139] These two cities, by far the state's largest urban areas, are also the sites of many of the state's most extensive private-to-private takings.[140] Although the provision exempting the two cities is set to expire on December 31, 2012,[141] by that time it is possible that legislators will be able to extend the deadline, once the public furor over *Kelo* has subsided.

Minnesota's law is similar. It too bans economic development takings and restricts the definition of blight, [142] while creating some major geographic exemptions. In this case, the exemptions include land located in some 2000 Tax Increment Financing Districts, including much of the territory of the Twin Cities of Minneapolis and St. Paul, where a high proportion of the state's condemnations take place.[143] A recent survey by the pro-*Kelo* League of Minnesota Cities found that 27 of the 34 Minnesota cities that had used private-to-private takings for economic development purposes between 1999 and 2005 are located in the Twin Cities area, which is exempt from the new post-*Kelo* reform law.[144] Thus, the new law will impact only a small fraction of those cities that actually engage in the practices it seeks to curb.

---

[137] Penn. House Bill No. 2054, ch. 2, § 204(a), (enacted May 4, 2006), available at http://www.legis.state.pa.us/WU01/LI/BI/BT/2005/0/HB2054P3333.HTM (visited Feb. 3, 2006).
[138] Id. at § 205.
[139] See id. at. § 203(4-) (excluding areas designated as blighted within "a city of the First or Second Class," which under Pennsylvania law turn out to be Pittsburgh and Philadelphia).
[140] See BERLINER, supra note ____ at 173, 179-81 (describing major condemnation projects in the two cities).
[141] H.B. No. 2054, ch. 2, § 203(4).
[142] See Minn. S.F. 2750 (signed into law May 19, 2006) (defining "public use" to mean exclusively direct public use or mitigation of blight or a public nuisance and *not* "the public benefits of economic development" and defining a "blighted area" as an urban area where more than half of the buildings are "structurally substandard" in the sense of having two or more building code violations).
[143] Id. at § 22.
[144] League of Minnesota Cities, *Research on Cities' Use of Eminent Domain*, Jan. 9, 2006, at 2, available at http://www.lmnc.org/pdfs/EminentDomain/ResearchOnEminentDomain.pdf (visited Jan. 25, 2007). The LMC study claims that these cities use eminent domain only rarely and judiciously. However, it also notes that the 34 cities engaged in an average of 12 economic development takings per year, many of them involving "multiple parcels" of land. Id. This yields a total of over 400 economic development takings per year in the state of Minnesota, a fairly large number for a state with a population of only 5.1 million. See Table A3, infra. If each of these takings impacted about twelve people (a conservative estimate in view of the fact that many involved multiple parcels), then about 5000 Minnesotans lose property to economic development takings per year, for a total of 35,000 during the seven year period studied by the LMC. Between 1999 and 2005, economic development takings, some 0.7% of the Minnesota population may have lost property or been displaced by economic development condemnations.

Like the Pennsylvania exemptions, the Minnesota ones are time-limited, scheduled to expire in five years.[145] But they too could be extended if the public furor over *Kelo* subsides over time.

Overall, even many of the eleven state laws that do succeed in abolishing or curbing economic development takings have serious limitations. As already noted, the Minnesota and Pennsylvania laws are seriously weakened by geographic exemptions that exclude most of their largest urban areas. The laws enacted by Alabama, Georgia, and South Dakota were adopted by states that had little or no recent history of resorting to private-to-private condemnations;[146] thus, they forbid practices that local governments rarely engaged in. Overall, only six states that had previously engaged in significant amounts of economic development and blight condemnations adopted legislative post-*Kelo* reform measures with any real teeth.

3. Reforms enacted by popular referendum.

In sharp contrast to legislatively enacted post-*Kelo* reforms, those adopted by popular referendum are, on average, much stronger. In 2006, ten states adopted post-*Kelo* reforms by popular referendum.[147] All ten passed by large margins ranging from 55% to 86% of the vote.[148] Of these, at least six and possibly seven provided significantly stronger protection for property owners than was available under existing law. Two other states – Georgia and New Hampshire – passed initiatives that added little or nothing to post-*Kelo* reforms already enacted by the state legislature. Finally, South Carolina voters adopted a largely ineffective reform law.

---

[145] Minn. S.F. 2750, § 22.

[146] See BERLINER, supra note ___ at, 10-11 (noting that Alabama "has mostly refrained from abusing the power of eminent domain in recent years" and had only one documented private-to-private condemnation in 2002); id. at 59 (noting that Georgia is "one of a handful of states with no reported instances" of such condemnations during the same period); id. at 189 (same as to South Dakota).

[147] For a complete list and other details, see National Council of State Legislatures, *Property Rights Issues on the 2006 Ballot*, Nov. 12, 2006, available at http://www.ncsl.org/statevote/prop_rights_06.htm (visited Nov. 20, 2006) (hereinafter "NCSL").

[148] Id. Only two post-Kelo ballot initiatives were defeated – one in Idaho and one in California. Id. Both lost primarily because they were tied to controversial measures limiting "regulatory takings." *See, e.g.*, Timothy Sandefur, *The California Crackup*, Liberty (Feb. 2007), available at http://libertyunbound.com/archive/2007_02/sandefur-california.html) (visited Jan. 3, 2006) (attributing the defeat of California's Proposition 90 primarily to the shortcomings of the regulatory takings element of the proposal and strategic errors of its supporters). No stand-alone post-*Kelo* public use referendum initiative was defeated anywhere in the country.

Three states - Arizona,[149] Louisiana,[150] and Oregon[151] – enacted referendum initiatives that essentially followed the standard formula of combining a ban on economic development takings with a restrictive definition of blight. Nevada and North Dakota's initiatives went one step beyond this and would amend their state constitutions to ban virtually all condemnations that transfer property to a private owner; the Nevada law will not take effect until ratified by the voters a second time in 2008.[152]

Florida's referendum initiative could not add much in the way of substantive protections to that state's legislatively enacted post-*Kelo* law, already the strongest in the country. [153] However, Constitutional Amendment 8 did alter the state constitution to provide an important procedural protection: no new law allowing "the transfer of private property taken by eminent domain to a natural person or private entity" can be passed without a three-fifths supermajority in the state legislature.[154] This could be an important safeguard for property owners against the erosion of public use protections by future state legislatures, after public attention has shifted away from eminent domain issues.

Georgia's new law adds little to that state's strong legislatively enacted post-*Kelo* statute, requiring only that any new private-to-private takings be approved by local elected officials.[155] New Hampshire's referendum initiative also comes in the wake of a strong legislative proposal and adds nothing to it. Indeed, absent the earlier legislation, it would provide no real protection at all, since it only forbids condemnations "for the purpose of private development or other private use of the property."[156] As already discussed, this wording is largely useless because it does not foreclose the argument that the

[149] See Ariz. Proposition 207 (enacted Nov. 7, 2006) (forbidding condemnations for "economic development" and limiting blight-like condemnations to cases where there is "a direct threat to the public health or safety caused by the current condition of the property.").
[150] La. Const. Amend. 5 (enacted Sept. 30, 2006) (forbidding condemnations for "economic development" and tax revenue purposes; and confining blight condemnations to cases where there is a threat to public health or safety).
[151] Ore. Measure 39 (enacted Nov. 7, 2006) (forbidding most private-to-private condemnations and limiting blight-like condemnations to cases where they are needed to eliminate dangers to public health or safety).
[152] *See* Nev. Ballot Question 2 (enacted Nov. 7, 2006) (forbidding the "direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party"); N.D. Measure 2 (enacted Nov. 7, 2006) (mandating that "public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.") .
[153] See nn. _____ and accompanying text.
[154] Fla. Const. Amend. VIII (enacted Nov. 7, 2006).
[155] Ga. Amendment 1 (enacted Nov. 7, 2006).
[156] N.H. Question 1 (enacted Nov. 7, 2006).

transfer of property to a private party will promote "public development" that benefits the community as a whole, not just "private" individuals.[157]

South Carolina's referendum seems to forbid takings for economic development. However, the wording may actually permit such takings, since it states that "[p]rivate property shall not be condemned by eminent domain for any purpose or benefit, including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use."[158] This, however, leaves open the question of whether "economic development" is in fact a "public use" – the very issue addressed by *Kelo* with respect to the federal Constitution. Current South Carolina case law already holds that economic development is not a public use under the state constitution.[159] However, the new constitutional amendment adds nothing to the case law and leaves open the possibility that future court decisions will be able to reverse it in the absence of a clear textual statement in the state constitution to the contrary. The South Carolina amendment also narrows the definition of blight to "property that constitutes a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors."[160] However, this provision also has a potential loophole, since "deleterious land use" and "health of the community" could both be interpreted broadly to include the community's "economic health" and "deleterious" land uses that undermine it. At best, the amendment modestly increases the protection provided by current law.

Finally, the new Michigan amendment is an ambiguous case. The amendment forbids condemnation of property "for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."[161] However, it does not change the state's broad definition of blight. At this time, it is not clear whether or not the landmark 2004 state Supreme Court decision in *County of Wayne v. Hathcock* is interpreted to constrain condemnation of property under very broad blight designations.[162] If *Hathcock* is held to limit broad blight designations, then the new constitutional

---

[157] See ____ infra.
[158] S.C. Const. Amend. 5, § 13(2) (Enacted Nov. 7, 2006).
[159] *See Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development)
[160] S.C. Amend. 5, § 13(B).
[161] Mich. Proposal 06-04, § Art. X, § 2.
[162] *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 779-86 (Mich. 2004); the status of blight condemnations in under *Hathcock* is analyzed in Somin, *Overcoming Poletown*, supra note _____.

amendment would have the modest but real advantage of providing explicit textual foundations for *Hathcock's* holding and reducing the chance of its reversal or erosion by future courts. If, on the other hand, *Hathcock* is interpreted to permit even very broad definitions of blight, then the Michigan referendum initiative will be largely ineffective.

In analyzing the ten post-*Kelo* referendum initiatives, it is important to note that four of the six clearly effective laws were enacted by means of initiative processes that allow activists to place a measure on the ballot without prior approval by the state legislature.[163] One of the other two (Florida) was sent to the voters by a legislature that had already enacted the nation's strongest post-*Kelo* reform law; only the Louisiana state legislature forwarded to the voters a referendum initiative without first enacting a strong legislative reform of its own. By contrast, all three largely ineffective initiatives required preapproval by state legislatures,[164] and the same was true of the ambiguous Michigan case.[165] Thus, the true contrast is not so much that between legislative reform and referendum initiatives, but that between referenda enacted without the need for approval by the state legislature and every other type of reform that does involve state legislators.

B. Federal Law.

1. The Private Property Rights Protection Act.

On November 3, 2005, the U.S. House of Representatives passed the Private Property Rights Protection Act of 2005 ("PRPA") by an overwhelming 376-38 margin.[166] Since early 2006,[167] the PRPA was bottled up in the Senate and the 109th Congress ended without its being enacted into law. As of this writing, the PRPA has not been taken up by the new Democratic Congress. Despite its failure to achieve passage so far, I consider it here because it is arguably the most important federal effort to provide increased protection for property owners in the aftermath of *Kelo.*

The Act would block state and local governments from "exercise[ing] [their] power of eminent domain or allow[ing] the exercise of such power by any person or entity to which such power has been

[163] The four are Arizona, Nevada, North Dakota and Oregon. See NCSL, supra note _____.
[164] The three were Georgia, New Hampshire, and South Carolina. Id.
[165] Id.
[166] U.S. House of Representatives, 109 H.R. 4128 (enacted Nov. 3, 2005).
[167] *See* Scott Bullock, *The Specter of Condemnation,* WALL STREET J., June 24, 2006 (explaining how the PRPA was held up by Senator Arlen Specter, then Chairman of the Senate Judiciary Committee).

delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so."[168] Violators are punished by the loss of all "Federal economic development funds for a period of 2 fiscal years."[169] Condemnation for "economic development" is broadly defined to include any taking that transfers property "from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health."[170]

If adopted relatively intact by the Senate, the House bill might appear to create significant incentives to deter state and local governments from pursuing economic development takings. But any such appearance is deceptive because of the small amount of federal funds that offending state and local governments stand to lose.

States and localities that run afoul of the PRPA risk losing only "federal economic development funds,"[171] defined as "any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of economies of States or political subdivisions of States."[172] The precise definition of "economic development funds" remains unclear, as it is difficult to tell precisely which federal programs are "designed to improve or increase the size of economies of States or political subdivisions of States."[173] A recent Congressional Research Service analysis concludes that the PRPA ultimately would delegate the task of identifying the relevant programs to the Attorney General.[174] It is hard to say whether the Bush administration or its successors would be willing to antagonize state and local governments by defining "economic development funds" broadly.

---

[168] Id. § 2(a).
[169] Id. § 2(b).
[170] Id. § 8(1). The Act goes on to establish several exemptions, but these are relatively narrow. See id. at §8(1)(A-G) (exempting condemnations that transfer property to public ownership and several other traditional public uses).
[171] 109 H.R. 4218 § 2(b).
[172] Id. § 8(2).
[173] Id.
[174] Robert Meltz, *Condemnation of Private Property for Economic Development: Legal Comments on the House-Passed Bill (H.R. 4128) and Bond Amendment,* Congressional Research Service Report for Congress, Dec. 22, 2005, at 4. The report bases this conclusion on Section 5(a)(2) of the PRPA, which requires the Attorney General to compile a list of economic development grants, but does not explicitly state that the list should be used as a guide for determining which funds to cut off in the event of PRPA violations. Id. at 4 & n.7. Section 11 of the Act does require that Act "be construed in favor of a broad protection of private property rights." 109 H.R. 4128, § 11.

For present purposes, I count any grants to state and local governments that are designated as "development" programs in federal budget. The fiscal year 2005 federal budget defines only about 13.9 billion dollars of the annual total of the estimated 416.5 billion dollars in federal grants to states as designated for purposes of "community and regional development."[175] This amount includes 3.5 billion dollars in "homeland security" grants and over 3 billion dollars in "emergency preparedness and response,"[176] funds that are unlikely to be categorized as "economic development" grants. Thus, it would seem that PRPA applies to at most just 7.4 billion dollars in federal grants to state and local governments, a mere 1.8% of all federal grants to states and localities.[177]

In some areas, of course, economic development grants might constitute an atypically large share of the local budget. So there are likely to be some parts of the country where PRPA has real bite. However, this effect is likely to be diminished by the ease with which offending localities can escape the sanction of loss of funding.

State or local authorities that run afoul of PRPA can avoid *all* loss of federal funds so long as they "return . . . all property the taking of which was found by a court of competent jurisdiction to have constituted a violation of the act" and replace or repair property damaged or destroyed "as a result of such violation."[178] Thus, condemning authorities have an incentive to roll the dice on economic development takings projects in the hope that defendants will not contest the condemnation or will fail to raise the PRPA as a defense.[179] At worst, the offending government can simply give up the project, leaving itself and whatever private interests it sought to benefit not much worse off than they were to begin with. So long as it returns the condemned property, any such government stands to lose only the time and effort expended in litigation and the funds necessary to repair or pay for any property that has been damaged or destroyed.

However, it is unclear whether this requirement will bind the Attorney General in his determination of the range of programs covered by the Act's funding cutoff.

[175] UNITED STATES GOVERNMENT BUDGET FISCAL YEAR 2005, ANALYTICAL PERSPECTIVES 123-30, tbl. 8-4 (2005). I have used the estimated figures for the 2005 fiscal year.

[176] Id. at 125, tbl. 8-4.

[177] The figure is arrived at by dividing 7.4 billion by 416.5 billion.

[178] 109 H.R. 4128, § 2(c).

[179] This may not be an unlikely occurrence, given that many property owners targeted for condemnation are likely to be poor and legally unsophisticated.

While the PRPA may have some beneficial effects in deterring economic development condemnations in communities with an unusually high level of dependence on federal economic development funds, its impact if enacted is likely to be quite limited.

2. The Bond Amendment.

The Bond Amendment was enacted into law on November 30, 2005, as an amendment to the Transportation, Housing and Urban Development, District of Columbia, and Independent Agencies Appropriations Act. It forbids the use of funds allocated in the Act to "support" the use of eminent domain for "economic development that primarily benefits private entities."[180]

For three interrelated reasons, the Bond Amendment is likely to have very little impact on the use of eminent domain by state and local governments. First, the Amendment forbids only those economic development takings that "primarily benefit . . . private entities."[181] This restriction makes it possible for the condemning jurisdiction to argue that the primary benefit of the development will go to the public. Under *Kelo's* extremely lenient standards for evaluating government claims that takings create public benefits,[182] it is unlikely that such an argument will often fail in federal court.

Second, the Bond Amendment completely exempts condemnations for "mass transit, railroad, airport, seaport, or highway projects, as well as utility projects which benefit or serve the general public . . . other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of blight . . . or brownfields."[183] While many of these exceptions are unproblematic because they fall within the traditional public use categories of facilities owned by the government or available for use by the general public as a matter of legal right, the listing of "utility projects which benefit . . . the general public" might open up the door to at least some private economic development projects.[184]

---

[180] P.L. 109-115, § 726. The full text of the Amendment is reprinted in Meltz, *supra* note _____ at 12.
[181] Id.
[182] *See Kelo*, 125 S.Ct. 2655, 2668 (2005) (holding that courts should not "second-guess [a] City's considered judgments about the efficacy of its development plan").
[183] P.L. 109-115, § 726 (enacted into law Nov. 30, 2005).
[184] Id.

Finally, an additional reason why the Bond Amendment's impact is likely to be small is that very few projects that do not fall within one of the Amendment's many exceptions are likely to be funded by federal transportation and housing grants in any event. The law completely excludes from coverage "mass transit" and "highway projects" and also excludes "the removal of blight" (which would presumably allow the use of eminent domain to build new housing in poor neighborhoods). There are few if any eminent domain projects previously funded by federal transportation or housing grants that the bill would actually forbid.

3. President Bush's June 23, 2006 Executive Order.

On June 23, 2006, the one year anniversary of the *Kelo* decision, President George W. Bush issued an executive order that purported to bar federal involvement in *Kelo*-style takings. On the surface, the order seems to forbid federal agencies from undertaking economic development condemnations. But its wording undercuts this goal. The key part of the order reads:

> It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.[185]

Read carefully, the order does not in fact bar condemnations that transfer property to other private parties for economic development. Instead, it permits them to continue so long as they are "for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

Unfortunately, this language validates virtually any economic development condemnation that the feds might want to pursue. Officials can (and do) always claim that the goal of a taking is to benefit "the general public" and not "merely" the new owners. This is not a new pattern, but one that bedeviled takings litigation long before *Kelo*. Indeed, the New London authorities made such claims in *Kelo* itself and they were accepted by all nine Supreme Court justices, including the four dissenters, as well as by the Connecticut Supreme Court (including *its* three dissenters). This despite considerable evidence that the takings were instigated by the Pfizer Corporation, which at the time hoped to benefit from them.

[185] President George W. Bush, *Executive Order: Protecting the Property Rights of the American People*, June 23, 2006, available at http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html (visited June 23, 2006).

Nonetheless, the courts accepted New London's claims that its officials acted in good faith, since they could have been intending to benefit the public as well as Pfizer. [186]

Even had President Bush's order been better worded, its impact would have been limited. The vast majority of economic development condemnations are undertaken by state and local governments, not by federal agencies. Nonetheless, it is noteworthy that the Bush Administration apparently chose to issue an executive order that is almost certain to have no effect even in the rare instances where the federal government does involve itself in *Kelo*-like takings.

III. EXPLAINING THE PATTERN.

Why, in the face of the massive public backlash against *Kelo,* has there been so much ineffective legislation? At this early date, it is difficult to provide a definitive answer. However, I would tentatively suggest that the weaknesses of much post-*Kelo* legislation are in large part due to widespread public ignorance of the details of government policy.

As noted earlier,[187] the majority of voters are "rationally ignorant" about most aspects of public policy because there is so little chance that an increase in any one voter's knowledge would have a significant impact on policy outcomes. No matter how knowledgable a voter becomes, the chance that his or her better-informed vote will actually swing an electoral outcome is infinitesimally small. There is, therefore, very little incentive for most citizens to acquire information about politics and public policy, at least so long as their only reason to do so is to become better-informed voters.[188]

We cannot know with any certainty how much knowledge most voters have about eminent domain policy, because there have not been any representative surveys on the subject. However, large majorities know little or nothing about far more important policies. For example, polls conducted around the time of the 2004 election showed that 70% of Americans did not know that Congress had recently enacted a massive prescription drug bill, and 58% admitted that they knew little or nothing about the

[186] For a detailed discussion of these aspects of *Kelo*, see Somin, *Grasping Hand*.
[187] *See* ____ infra.
[188] For a more detailed discussion of the theory of rational ignorance, see Ilya Somin, *Knowledge about Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255 (2006) (symposium on political knowledge); and Somin, *Political Ignorance*, supra note ____.

controversial USA Patriot Act.[189] It is likely that ignorance of the details of eminent domain law - including post-*Kelo* reform - is widespread as well.

It is possible that voters could learn about the effectiveness or lack thereof of post-*Kelo* laws by relying on the statements of interest groups and other "opinion leaders" who have incentives to be better informed than ordinary citizens.[190] However, as I have argued at greater length elsewhere,[191] reliance on opinion leaders itself requires considerable knowledge, including the knowledge needed to select opinion leaders to follow who are both knowledgeable and reliable. Moreover, the ways in which the *Kelo* issue cuts across traditional party and ideological lines makes it more difficult for voters to identify opinion leaders to follow based on traditional political cues, such as partisan or ideological affiliation.[192] Finally, the failure of the opinion leader "information shortcut" to alleviate ignorance on less complex and more important issues[193] than post-*Kelo* reform suggests that it will be of only limited utility in this case. Nonetheless, it is impossible to draw a definitive conclusion on this point in the absence of survey data on citizen knowledge of their states' post-*Kelo* reform law.

The political ignorance hypothesis gains traction from the fact that it can account for three otherwise anomalous aspects of the *Kelo* controversy: the massive backlash against a decision that largely reaffirmed existing case law that had previously excited little public controversy; the paucity of effective reform measures despite widespread public opposition to economic development takings; and the striking divergence between citizen-initiated referendum initiatives and all other types of post-*Kelo* reform measures.

---

[189] Ilya Somin, *Political Ignorance is No Bliss*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, Tbl. 1.
[190] For the argument that reliance on opinion leaders can alleviate the problem of political ignorance, see, e.g. ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998).
[191] See, e.g., Ilya Somin, *Resolving the Democratic Dilemma?*, 16 YALE J. ON REG. 401, 410–11 (1999)
[192] See LUPIA & MCCUBBINS, supra note ___ (arguing that voters often choose opinion leaders based on ideological affinity).
[193] For a more detailed discussion, see Somin, *Voter Ignorance*, at _____.

A. The timing of the *Kelo* backlash.

Some *Kelo* defenders complain that the backlash to the decision was grossly excessive in light of the fact that the case made little change in existing law.[194] After all, eminent domain was not a prominent national issue before *Kelo,* even though existing constitutional doctrine permitted economic development takings under the federal constitution. A spokesman for the California Redevelopment Association lamented that *Kelo* had led to "a hue and cry about how bad things are in California, yet *Kelo* changed nothing."[195] But the reaction is understandable once we recognize that, – for most of the public – *Kelo* was probably the first inkling they ever had that private property – including homes – could be condemned merely to promote "economic development" by other private parties. This sudden realization led to understandable outrage and a desire for change. Public ignorance helps explain why economic development takings could become so common despite the fact that the vast majority of citizens oppose condemnation of private property for such purposes.[196] It is likely that, prior to *Kelo,* most of the public did not even realize that economic development condemnations exist. The public ignorance hypothesis is the only explanation I know of for the suddenness of the *Kelo* backlash. It also helps explain why there was relatively little public pressure to reform eminent domain law before *Kelo.*

B. Explaining the paucity of effective reform laws.

Public ignorance is also the best available explanation for the seeming scarcity of effective post-*Kelo* reform laws. The highly publicized Supreme Court decision apparently increased awareness of the problem of eminent domain abuse, perhaps as a result of extensive press coverage. But while the publicity surrounding *Kelo* made much of the public at least somewhat aware of the issue of economic development takings, it probably did not lead voters to closely scrutinize the details of proposed reform legislation.

---

[194] See, e.g., Michael A. Heller & Roderick M. Hills, Jr., *LADs and the Art of Land Assembly*, Aug. 25, 2005, at 1 (unpublished paper on file with author) (complaining that the reaction to *Kelo* was excessive in light of the fact that it merely reaffirmed existing law and told state legislatures "that they may do what they see fit"); cf. § I.A, *infra* (explaining how *Kelo* made little change in existing doctrine).

[195] Quoted in Michael Gardner, *Lawmakers Rethink Land-Seizure Laws: High Court Ruling Leads to Groundswell in State, Proposed Moratorium*, SAN DIEGO UNION-TRIBUNE, Aug. 17, 2005, at A1.

[196] *See* § I.B, infra.

Few citizens have the time or inclination to delve into such matters and many are often ignorant of the very existence of even the most important legislative items.[197] Thus, it would not be difficult for state legislators to seek to satisfy voter demands by supporting "position-taking" legislation that purported to curb eminent domain,[198] while in reality having little effect. In this way, they can simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development condemnations.

This strategy seems to have been at the root of the failure of post-*Kelo* reform efforts in California. In that state, legislative reform efforts were initially sidetracked by the introduction of weak proposals that gave legislators "a chance . . . to side with anti-eminent domain sentiment without doing any real damage to redevelopment agencies."[199] At a later stage in the political battle, the Democratic majority in the state legislature tabled even these modest reforms by claiming that they were being blocked by the Republican minority, despite the fact that "the stalled bills required only simple majority votes and thus needed no Republicans to go along."[200] As one Sacramento political reporter puts it, the entire process may have been "just a feint to pretend to do something about eminent domain without actually doing anything to upset the apple cart."[201] Eventually, California did enact some reforms, but only ones that are almost completely ineffective.[202] A leading advocate for eminent domain reform in Nevada also believes that, in his state as well, legislators sought to "look good while not upsetting anyone."[203]

Such maneuvers would be difficult to bring off if the public paid close attention to pending legislation. But they can be quite effective in the presence of widespread political ignorance. Unfortunately, public ignorance of the details of eminent domain policy is unlikely to be easily remedied.

---

[197] *See*, e.g., Somin, *supra* note ___ at Tbl. 1 (providing data that the majority of citizens are unaware of the very existence of several of the most important pieces of legislation adopted by Congress in recent years).
[198] For the concept of position-taking legislation, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).
[199] Dan Walters, *Eminent Domain Bills Are Stalled – Except One for Casino Tribe*, SACRAMENTO BEE, Sept. 16, 2005, at A3.
[200] Id.
[201] Id.
[202] See § II.A.1.b.i, *infra*.
[203] Interview with Steven Miller, Nevada Policy Research Institute, Mar. 14, 2007.

A possible alternative explanation for the scarcity of effective reform laws is the political power of developers and other organized interest groups that benefit from the transfer of property condemned as a result of economic development and blight condemnations.[204] There is little question that this factor does play a role. Developers, local government planning officials, and other interest groups have indeed spearheaded opposition to post-*Kelo* reform.[205] In Texas, for example, advocates of strong eminent domain reform concluded that lobbying by developers and local governments played a key role in ensuring that that state passed an essentially toothless reform law.[206] However, the mere existence of interest group opposition does not explain why state legislators would choose to satisfy a few small interest groups while going against the preferences of the vast majority of the electorate.[207]

It is possible that the pro-condemnation interest groups simply have more intense preferences about the issue than most of the opponents in the general public, and are therefore more likely to cast their votes based on politicians' stances on the issue. However, 63% of the respondents in the 2005 Saint Index survey said that they not only opposed *Kelo,* but felt "strongly" about it.[208] If even a fraction of that 63% were willing to let post-*Kelo* reform influence their voting decisions, they would probably constitute a much larger voting bloc than all the pro-*Kelo* developers and government officials put together.

For this reason, it is likely that, to the extent that interest group opposition was able to stymie effective post-*Kelo* reform and force the passage of merely cosmetic legislation, this result occurred only because most ordinary voters are unaware of what is happening. Political ignorance is the handmaiden of interest group power in the political process, at least in this field.

C. Explaining the relative success of citizen-initiated referendum initiatives.

As we have already seen, there is a great difference between the effectiveness of citizen-initiated referendum initiatives, and all other types of post-*Kelo* reforms. All four of the latter provide significant protection for property owners against economic development takings. By contrast, only 11 of 28 state

[204] *See*, e.g., Sandefur, supra note _____ at 769-72 (arguing that interest group opposition accounts for the failure of the Kelo backlash).
[205] Id.
[206] Interview with Brooke Rollins, Texas Public Policy Foundation, Mar. 17, 2007.
[207] *See* survey data cited in §I.B.
[208] *See* note ___, infra.

legislative initiatives are comparably effective, and only two of six legislature-initiated referenda.[209] Reforms initiated by Congress and the President at the federal level are also largely cosmetic in nature.[210]

The likely explanation for this striking pattern is consistent with the political ignorance hypothesis. Citizen-initiated referendum proposals are usually drafted by activists rather than by elected officials and their staffs. This was the case with all four of the post-*Kelo* citizen-initiated referenda enacted in 2006.[211] Unlike state legislators, the property rights activists who wrote the citizen-initiated anti-*Kelo* ballot initiatives have no need to appease powerful pro-condemnation interest groups in order to improve reelection chances. And they usually have little reason to promote reforms that fail to produce real changes in policy. Unlike ordinary citizens, committed activists in a position to draft referendum proposals and get them on the ballot have strong incentives to acquire detailed information about eminent domain law, since they have a real chance of influencing policy outcomes through their actions.

Obviously, property rights activists can and do attempt to influence legislatively enacted reforms as well. However, in this scenario, anything they propose is likely to be filtered through the legislative process, where organized interest groups will inevitably get a strong say.

The political ignorance hypothesis does not completely explain the pattern we have observed. For example, it does not account for the fact that a few state legislatures, notably Florida, enacted strong reforms. However, it is more consistent with the available evidence than any alternative theory proposed so far. Certainly, it is better supported than either the argument that interest groups have successfully stymied reform or the theory that elected officials will have little choice but to yield to the broad consensus of public opinion. Further research will be necessary to fully test the political ignorance hypothesis and compare it to rival theories.

---

[209] Data compiled from Table 3, infra.

[210] *See* § I.B, infra.

[211] The Arizona initiative was undertaken by an activist group known as the Arizona Homeowners' Protection Effort. See Arizona Secretary of State, *Proposition 207*, available at http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm (visited Jan. 30, 2007); The Nevada law was put on the ballot by the People's Initiative to Stop the Taking of our Land ("PISTOL"), headed by former state judge Don Chairez, a longtime property rights advocate. See PISTOL, *Property Bill of Rights*, available at http://www.propertybillofrights.com/your_rights.html (visited Jan. 30, 2007). In North Dakota, the ballot initiative was drawn up by a group known as Citizens to Restrict Eminent Domain) ("C-RED"). See C-RED website, available at http://c-red.org/ (visited Jan. 30, 2007). In Oregon, the post-*Kelo* initiative was filed by the Oregonians in Action Political Action Committee. *See* Measure Argument for State Voters' Pamphlet for Measure 39 (on file with the author). Oregonians in Action is a property rights activist group. *See* Oregonians in Action website, available at http://www.oia.org/ (visited Jan. 30, 2007).

CONCLUSION.

So far, the *Kelo* backlash has yielded far less effective reform than many expected. This result is striking in light of the overwhelming public opposition to the decision. Critics of *Kelo* will lament the result, while defenders may be heartened by it. Both can agree that the anti-*Kelo* backlash has not turned out to be a complete substitute for strong judicial enforcement of public use limits on eminent domain.

The evidence also supports the tentative conclusion that the relative paucity of effective reform is in large part a result of widespread political ignorance. This hypothesis is the only one proposed so far that can account for the conjunction of three anomalies: the sudden and massive public outrage against *Kelo,* despite the fact that the decision made few changes in existing law; the scarcity of effective reforms, despite deep and broad public opposition to economic development takings; and the striking divergence between citizen-initiated referenda and all post-*Kelo* laws enacted by other means.

There is also much room for future research. For example, scholars should make a systematic effort to explain why a few state legislatures, notably Florida, enacted very strong post-*Kelo* reforms. It would also be useful to directly measure public knowledge of eminent domain policy and post-*Kelo* reform laws.

The political response to *Kelo* is a striking example of public backlash against an unpopular judicial decision. It also shows that backlash politics has its limits.

APPENDIX

Table A1:
Post-*Kelo* Reform in States Ranked by Number of "Threatened" Private-to-Private Condemnations

State	Number of Threatened Takings[212]	Effectiveness of Reform[213]
Florida	**2,055**	**Effective (L & LR)**
Maryland	1,110	No Reform
California	635	Ineffective (L)
New Jersey	589	No Reform
Missouri	437	Ineffective (L)
Ohio	331	Ineffective (L)
Michigan	**173**	**Effective (L & LR)**
Utah	167	Enacted Prior to *Kelo*
Kentucky	161	Ineffective (L)
Texas	118	Ineffective (L)
Colorado	114	Ineffective (L)
Pennsylvania	**108**	**Effective (L)**
New York	89	No Reform
Minnesota	**83**	**Effective (L)**
Rhode Island	65	No Reform
Connecticut	61	No Reform
Indiana	**51**	**Effective (L)**
Arkansas	40	No Reform
Tennessee	37	Ineffective (L)
Virginia	27	No Reform
Nevada	**15**	**Effective (CR)**
Vermont	15	Ineffective (L)
West Virginia	12	Ineffective (L)
Nebraska	11	Ineffective (L)
Arizona	10	Effective (CR)
Illinois	9	Ineffective (L)
Kansas	7	Effective (L)
South Carolina	7	Ineffective (LR)
Hawaii	5	No Reform
Massachusetts	4	No Reform
Oregon	2	Effective (CR)
Delaware	0	Ineffective (L)
Georgia	0	Effective (L & LR)
Idaho	0	Effective (L)
South Dakota	0	Effective (L)
Wyoming	0	No Reform

[212] The data on known eminent domain condemnations by state between from 1998-2003 is derived from Dana Berliner's study, *Public Power, Private Gain: A Five Year, State-by-State Report Examining the Abuse of Eminent Domain*, 196 (2003), *available at* http://www.castlecoalition.org/publications/report/index.html (last visited January 18, 2007).

[213] As of January 2007.

Alabama	0	Effective (L)
Alaska	0	Ineffective (L)
Iowa	0	Ineffective (L)
Louisiana	0	Effective (LR)
Maine	0	Ineffective (L)
Mississippi	0	No Reform
Montana	0	No Reform
New Hampshire	0	Effective (L & LR)
New Mexico	0	No Reform
North Carolina	0	Ineffective (L)
North Dakota	0	Effective (CR)
Oklahoma	0	No Reform
Washington	0	No Reform
Wisconsin	0	Ineffective (L)

L=Reform enacted by state legislature; CR=Reform enacted by citizen-initiated referendum; LR=Reform enacted by legislature-initiated referendum.

Table A2:
Post-*Kelo* Reform in States Ranked by Number of Private-to-Private Condemnations Per 1 Million people

State	Population[214]	Takings /1M people[215]	Effectiveness of Reform[216]
Pennsylvania	**12,429,616**	**202.5**	**Effective (L)**
Kansas	**2,744,687**	**56.5**	**Effective (L)**
Maryland	5,600,388	22.7	No Reform
Michigan	**10,120,860**	**13.6**	**Effective (L &LR)**
Rhode Island	1,076,189	11.2	No Reform
Connecticut	3,510,297	8.8	No Reform
Ohio	11,464,042	7.9	Ineffective (L)
Virginia	7,567,465	7.7	No Reform
Oklahoma	3,547,884	6.5	No Reform
California	36,132,147	6.2	Ineffective (L)
New Jersey	8,717,925	5.9	No Reform
Tennessee	5,962,959	4.9	Ineffective (L)
Colorado	4,665,177	4.9	Ineffective (L)
Florida	**17,789,864**	**3.8**	**Effective (L & LR)**
Missouri	5,800,310	3.1	Ineffective (L)
New York	19,254,630	3	No Reform
Arizona	5,939,292	1.9	Effective (CR)
Minnesota	**5,132,799**	**1.8**	**Effective (L)**
Alabama	**4,557,808**	**1.8**	**Effective (L)**
Washington	6,287,759	1.7	No Reform
Kentucky	4,173,405	1.7	Ineffective (L)
North Dakota	636,677	1.6	Effective (CR)
Maine	1,321,505	1.5	Ineffective (L)
Iowa	2,966,334	1.3	Ineffective (L)
Nevada	2,414,807	1.2	Effective (CR)
Louisiana	4,523,628	1.1	Effective (LR)
Mississippi	2,921,088	1	No Reform
Massachusetts	6,398,743	0.8	No Reform
Illinois	12,763,371	0.6	Ineffective (L)
Indiana	6,271,973	0.6	Effective (L)
Nebraska	1,758,787	0.6	Ineffective (L)
Texas	22,859,968	0.5	Ineffective (L)
Arkansas	2,779,154	0.4	No Reform
North Carolina	8,683,242	0.1	Ineffective (L)
Alaska	663,661	0	Ineffective (L)
Delaware	843,524	0	Ineffective (L)
Georgia	9,072,576	0	Effective (L & LR)
Idaho	1,429,096	0	Effective (L)
South Dakota	775,933	0	Effective (L)
Wyoming	509,294	0	No Reform
Hawaii	1,275,194	0	No Reform
Montana	935,670	0	No Reform
New Hampshire	1,309,940	0	Effective (L & LR)

[214] *See U.S. Census Bureau: State and County QuickFacts.* Data derived from Population Estimates for 2005, *available at* http://www.census.gov/ (last visited January 18, 2007)
[215] Some takings affected more than one property.
[216] As of January 2007.

New Mexico	1,928,384	0	No Reform
Oregon	3,641,056	0	Effective (CR)
South Carolina	4,255,083	0	Ineffective (LR)
Utah	2,469,585	0	Enacted Prior to *Kelo*
Vermont	623,050	0	Ineffective (L)
West Virginia	1,816,856	0	Ineffective (L)
Wisconsin	5,536,201	0	Ineffective (L)

L=Reform enacted by state legislature; CR=Reform enacted by citizen-initiated referendum; LR=Reform enacted by legislature-initiated referendum.

Table A3:
Post-*Kelo* Reform in States Ranked by Number of Threatened Private-to-Private Condemnations Per 1 Million People

State	Population[217]	Threatened Takings /1M people[218]	Effectiveness of Reform[219]
Maryland	5,600,388	198.2	No Reform
Florida	**17,789,864**	**115.5**	**Effective (L & LR)**
Missouri	5,800,310	75.3	Ineffective (L)
Utah	2,469,585	67.6	Enacted Prior to Kelo
New Jersey	8,717,925	67.6	No Reform
Rhode Island	1,076,189	60.4	No Reform
Kentucky	4,173,405	38.6	Ineffective (L)
Ohio	11,464,042	28.9	Ineffective (L)
Colorado	4,665,177	24.4	Ineffective (L)
Vermont	623,050	24.1	Ineffective (L)
California	36,132,147	17.6	Ineffective (L)
Connecticut	3,510,297	17.4	No Reform
Michigan	**10,120,860**	**17.1**	**Effective (L & LR)**
Minnesota	**5,132,799**	**16.2**	**Effective (L)**
Arkansas	2,779,154	14.4	No Reform
Pennsylvania	**12,429,616**	**8.7**	**Effective (L)**
Indiana	**6,271,973**	**8.1**	**Effective (L)**
West Virginia	1,816,856	6.6	Ineffective (L)
Nebraska	1,758,787	6.3	Ineffective (L)
Nevada	**2,414,807**	**6.2**	**Effective (CR)**
Tennessee	5,962,959	6.2	Ineffective (L)
Texas	22,859,968	5.2	Ineffective (L)
New York	19,254,630	4.6	No Reform
Hawaii	1,275,194	3.9	No Reform
Virginia	7,567,465	3.6	No Reform
Kansas	2,744,687	2.6	Effective (L)
Arizona	5,939,292	1.7	Effective (CR)
South Carolina	4,255,083	1.6	Ineffective (LR)
Illinois	12,763,371	0.7	Ineffective (L)
Massachusetts	6,398,743	0.6	No Reform
Oregon	3,641,056	0.5	Effective (CR)
Delaware	843,524	0.0	Ineffective (L)
Georgia	9,072,576	0.0	Effective (L & LR)
Idaho	1,429,096	0.0	Effective (L)
South Dakota	775,933	0.0	Effective (L)
Wyoming	509,294	0.0	No Reform
Alabama	4,557,808	-	Effective (L)
Alaska	663,661	-	Ineffective (L)
Iowa	2,966,334	-	Ineffective (L)
Louisiana	4,523,628	-	Effective (LR)
Maine	1,321,505	-	Ineffective (L)
Mississippi	2,921,088	-	No Reform
Montana	935,670	-	No Reform

[217] *See U.S. Census Bureau: State and County QuickFacts.* Data derived from Population Estimates for 2005, *available at* http://www.census.gov/ (last visited January 18, 2007)

[218] Some takings affected more than one property.

[219] As of January 2007.

New Hampshire	1,309,940	-	Effective (L & LR)
New Mexico	1,928,384	-	No Reform
North Carolina	8,683,242	-	Ineffective (L)
North Dakota	636,677	-	Effective (CR)
Oklahoma	3,547,884	-	No Reform
Washington	6,287,759	-	No Reform
Wisconsin	5,536,201	-	Ineffective (L)

L=Reform enacted by state legislature; CR=Reform enacted by citizen-initiated referendum; LR=Reform enacted by legislature-initiated referendum.