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

**February 2008**

# 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.<sup>1</sup> *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 post-*Kelo* reform legislation to curb eminent domain.<sup>2</sup> The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history.<sup>3</sup>

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 property owners and that judicial intervention may be

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<sup>1</sup> *Kelo v. City of New London*, 505 U.S. 469 (2005).

<sup>2</sup> For the most complete and up to date listing of state post-*Kelo* legislative initiatives see <http://www.castlecoalition.org/legislation/states/index.asp> (visited Dec. 18, 2007) (hereinafter "Castle Coalition"). Other parts of the website also discuss proposed and enacted federal legislation.

<sup>3</sup> The closest competitor is *Furman v. Georgia*, 408 U.S. 238 (1972), which struck down all then-existing state death penalty laws. In response, some 35 states and the federal government had enacted new death penalty statutes intended to conform to *Furman's* requirements between 1972 and 1976. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 &n. 23 (1976) (noting that "at least 35 states" and the federal government had enacted new death penalty statutes in response to *Furman*, and listing the state laws in question).

unnecessary.<sup>4</sup> Posner concluded that the political reaction to *Kelo* is “evidence of [the decision’s] pragmatic soundness.”<sup>5</sup>

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 provides the first comprehensive analysis of the *Kelo* backlash to date,<sup>6</sup> and finds that the majority 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.” I do not attempt to assess either the validity of the *Kelo* decision or the desirability of economic development takings as a policy matter.<sup>7</sup> 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 backlash 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<sup>8</sup> on the

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<sup>4</sup> 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)

<sup>5</sup> Posner, *supra* note \_\_\_ at 98.

<sup>6</sup> 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). Noel Campbell, R. Todd Jewell, and Edward Lopez’s forthcoming analysis of post-*Kelo* reform takes into account only thirty-four state laws, and does not consider the federal response. See Noel D. Campbell, et al., *Pass a Law, Any Law, Fast! The States’ (Somewhat) Symbolic Response to the Kelo Backlash*, (Oct. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022385) (visited Jan. 12, 2008).

<sup>7</sup> I do address these issues at length in Somin, *Grasping Hand*, *supra* note \_\_\_\_.

<sup>8</sup> 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

left to Rush Limbaugh on the right.<sup>9</sup> Traditional models of democratic politics predict that such a broad political consensus is likely to result in swift and effective legislative action.<sup>10</sup>

Part II considers the state and federal political response to *Kelo*. Thirty-five state legislatures have enacted post-*Kelo* reform laws. However, twenty-one of these are largely symbolic in nature, 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 seven 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 of fifty states, as well as the federal government, have either enacted laws that are likely to be ineffective, or no reforms at all.<sup>11</sup>

However, I tentatively advance the theory that the ineffectiveness of much post-*Kelo* reform is largely due to widespread political ignorance. Survey data collected for this Article shows that the vast majority of citizens do not know whether their states have passed post-*Kelo* reform legislation and even fewer know whether that legislation is likely to be effective.

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<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.”).

<sup>9</sup> 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.”).

<sup>10</sup> 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).

<sup>11</sup> This figure does not include the state of Utah, which enacted effective eminent domain reform prior to *Kelo*.

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.<sup>12</sup> Most are often ignorant even of many basic facts about the political system.<sup>13</sup> 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.<sup>14</sup>

The publicity surrounding *Kelo* made much of the public at least somewhat aware of the problem of economic development takings. But it probably did not lead voters to closely scrutinize the details of 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. In Part III, I present survey data showing that the vast majority of Americans were indeed ignorant of the content of post-*Kelo* reform legislation in their states. In an August 2007 Saint Index survey, only 21% of respondents could correctly answer whether or not their state had passed eminent domain reform legislation since *Kelo*, and only 13% both knew whether their state had passed legislation and correctly indicated whether that legislation was likely to be effective.<sup>15</sup>

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.

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<sup>12</sup>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 Ideal*, 12 CRITICAL REV. 413, 413-19 (1998) (hereinafter “Somin, *Voter Ignorance and the Democratic Ideal*”). (same).

<sup>13</sup> Somin, *Voter Ignorance and the Democratic Ideal*, at 416-19.

<sup>14</sup> For a more detailed discussion, see Somin, *Voter Ignorance and the Democratic Ideal* at 435-38.

<sup>15</sup> The Saint Index Poll, August 2007, Center for Economic and Civic Opinion at University of Massachusetts/Lowell. The survey included 1000 respondents in a nationwide random sample.

## I. *KELO* AND ITS BACKLASH.

### A. The *Kelo* decision.<sup>16</sup>

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.<sup>17</sup> Unlike in leading 1954 case *Berman v. Parker*,<sup>18</sup> none of the properties in question were alleged to be “blighted or otherwise in poor condition.”<sup>19</sup> 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.”<sup>20</sup>

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 decision making on public use issues.<sup>21</sup> Justice Stevens’ majority opinion endorsed a “policy of deference to legislative judgment in this field.”<sup>22</sup> The Court rejected the property owners’ argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.<sup>23</sup> 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.<sup>24</sup> 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.”<sup>25</sup>

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

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<sup>16</sup> 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. 183, 224-33 (2007).

<sup>17</sup> *Kelo v. City of New London*, 545 U.S. 469, 474-77 (2005).

<sup>18</sup> 348 U.S. 26 (1954).

<sup>19</sup> *Kelo*, 545 U.S. at 475.

<sup>20</sup> *Id.* at 474.

<sup>21</sup> *Id.* at 478-85.

<sup>22</sup> *Id.* at 480.

<sup>23</sup> *Id.* 480-81.

<sup>24</sup> *Id.* at 487-88

<sup>25</sup> *Id.* at 488.

conceivable public purpose.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The fact that four (and possibly five) justices had serious misgivings about the Court’s ultra-deferential approach to public use issues is a major change from the unanimous endorsement of that very position in *Midkiff*. Although a major defeat for property owners, *Kelo* also represented a small 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.<sup>29</sup> In addition to expected denunciations from conservatives and libertarians,<sup>30</sup> *Kelo* was condemned by numerous liberal political leaders including former President Bill Clinton,<sup>31</sup> Democratic National Committee Chair Howard Dean (who blamed the decision on a “Republican-appointed Supreme Court”),<sup>32</sup> and prominent African-American politician and California Representative Maxine Waters.<sup>33</sup> The NAACP, the American Association of Retired Persons, and the liberal Southern Christian Leadership Conference had filed a joint

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<sup>26</sup> *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

<sup>27</sup> *Kelo*, 545 U.S. at 499-504 (O’Conner, J., dissenting); id. at 518-23 (Thomas, J., dissenting).

<sup>28</sup> Id. at 2670 (Kennedy, J., concurring).

<sup>29</sup> 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).

<sup>30</sup> 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.

<sup>31</sup> See Eric Kriss, *More Seek Curbs on Eminent Domain*, SYRACUSE POST-STANDARD, Jul. 31, 2005 at A16 (noting Clinton’s opposition to the ruling).

<sup>32</sup> 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, 2006) (quoting Dean as denouncing “a Republican appointed Supreme Court that decided they can take your house and put a Sheraton hotel in there”).

<sup>33</sup> 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”).

amicus brief in *Kelo* urging the Court to rule in favor of the property owners.<sup>34</sup> So too had the generally conservative Becket Fund for Religious Liberty.<sup>35</sup>

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*.<sup>36</sup> 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,<sup>37</sup> *Kelo* was opposed by 77% of men, 84% of women, 82% of whites, 72% of African-Americans, and 80% of Hispanics.<sup>38</sup> 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.”<sup>39</sup> A later 2006 Saint Index survey found that 71% of respondents support reform laws intended to ban “the taking of private property for private development” projects, and 43% supported such laws “strongly.”<sup>40</sup>

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<sup>34</sup> See *Kelo v. City of New London*, Amicus Br. of NAACP, AARP, & SCLC, 2004 WL 2811057.

<sup>35</sup> *Kelo v. City of New London*, Amicus Br. of Becket Fund for Religious Liberty, 2004 WL 2787141.

<sup>36</sup> See references to Table 1. The differences between the two surveys are likely due to a difference in question wording.

<sup>37</sup> 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)

<sup>38</sup> See Table 1.

<sup>39</sup> Saint Index, supra note \_\_\_\_\_.

<sup>40</sup> Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?* 101 NW. U. L. REV. 1931, 1940, tbl. 2 (2007).

**Table 1:  
National Public Opinion on *Kelo***

		<i>Zogby Survey</i> <sup>41</sup>		<i>Saint Index Survey 2005</i> <sup>42</sup>	
		% Agree	% Disagree	% Agree	% Disagree
	Total	2	95	18	81
<b>Gender</b>	Male	2	94	22	77
	Female	2	95	14	84
<b>Racial/Ethnic Group</b> <sup>43</sup>	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
<b>Party Affiliation</b>	Democrat	3	94	20	79
	Independent	<1	99	17	83
	Republican	3	92	14	85
<b>Ideology</b>	Liberal	-	-	22	77
	Moderate	-	-	18	81
	Conservative	-	-	17	82

<sup>41</sup> 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.

<sup>42</sup> 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?”

<sup>43</sup> The figures for Asians, Hispanics, and Native Americans may be unreliable because of small sample sizes.

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

<i>State</i>	<i>% Agreeing with Kelo</i>	<i>% Disagreeing</i>
Connecticut <sup>44</sup>	8	88
Florida <sup>45</sup>	12	88
Kansas <sup>46</sup>	7	92
New Hampshire <sup>47</sup>	4	93
Minnesota <sup>48</sup>	5	91
North Carolina <sup>49</sup>	7	91
Pennsylvania <sup>50</sup>	9	90
Tennessee <sup>51</sup>	8	86

<sup>44</sup> 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?”

<sup>45</sup> 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?)”

<sup>46</sup> 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)?”

<sup>47</sup> 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?”

<sup>48</sup> 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?”

<sup>49</sup> John William Pope Civitas Institute Survey, Aug. 2005, Tel Opinion Research, available at [http://www.jwpcivitasinstitute.org/keylinks/poll\\_august.html](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?”

<sup>50</sup> 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 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?”

<sup>51</sup> 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](http://web.utk.edu/~ssriweb/National_Issues.pdf). Question wording: “Sometimes the property taken

Table 2 presents results for eight individual state surveys, all of which are similar to the national data, 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 collectively 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.

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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<sup>52</sup>**

Type of Law			Number of States
<b>Effective</b>	<b>Enacted by Legislature</b>		14
	<b>Enacted by Referendum</b>	Citizen-initiated	4
		Legislature-initiated	2 or 3
<b>Ineffective</b>	<b>Enacted by Legislature</b>		21
	<b>Enacted by Referendum</b>	Citizen-initiated	0
		Legislature-initiated	3 or 4
<b>No Post-<i>Kelo</i> Reforms Enacted</b>			7 <sup>53</sup>

<sup>52</sup> The total number of states listed adds up to more than forty-two because a few states had effective legislative reforms followed by ineffective legislative referendum initiatives, and are thus counted in both of these categories. The state of Florida had legislative and referendum initiative reforms that were both effective and is also counted twice. Nevada had an effective referendum initiative followed by an ineffective legislative reform.

<sup>53</sup> This figure does not include the state of Utah, which abolished both economic development and blight condemnations before *Kelo*. See note \_\_\_\_. I do include the state of Washington, despite the fact that it recently enacted a change in its eminent domain law unrelated to *Kelo*. See §II.A.1.b.vii, *infra*.

**Table 4:  
Effectiveness of Reform by State**

<i>State</i>	<i>Effectiveness of Reform</i> <sup>54</sup>
Alabama	Effective (L)
Alaska	Ineffective (L)
Arizona	Effective (CR)
Arkansas	No Reform
California	Ineffective (L)
Colorado	Ineffective (L)
Connecticut	Ineffective (L)
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	Ineffective (L)
Massachusetts	No Reform
Michigan	Effective (L & LR)
Minnesota	Effective (L)
Mississippi	No Reform
Missouri	Ineffective (L)
Montana	Ineffective (L)
Nebraska	Ineffective (L)
Nevada	Effective (L & CR)
New Hampshire	Effective (L & LR)
New Jersey	No Reform
New Mexico	Effective (L)
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	Enacted Prior to Kelo
Vermont	Ineffective (L)
Virginia	Effective (L)

<sup>54</sup> As of January 2008. “L” refers to legislation passed; “CR” refers to citizen initiated referenda passed; “LR” refers to legislative initiated referenda passed.

Washington	No Reform
West Virginia	Ineffective (L)
Wisconsin	Ineffective (L)
Wyoming	Effective (L)

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 seven 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*.<sup>55</sup> 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.<sup>56</sup> Many cases are unpublished, and many other condemnations go unreported in the press.<sup>57</sup> 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 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.<sup>58</sup> 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. Only seven of the twenty states with the most “threatened”

<sup>55</sup> 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.

<sup>56</sup>*Id.* at 100.

<sup>57</sup>*Id.* at 2.

<sup>58</sup> The tables with this data are in Appendix A.

condemnations have enacted effective reforms. The same is true of just seven of the twenty states with the most private-to-private condemnations relative to population size.<sup>59</sup>

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<sup>59</sup> See data compiled in Appendix A, Tables A1 and A2.

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

<i>State</i>	<i>No. of Takings</i> <sup>60</sup>	<i>Effectiveness of Reform</i> <sup>61</sup>
<b>Pennsylvania</b>	<b>2,517</b>	<b>Effective (L)</b>
California	223	Ineffective (L)
<b>Kansas</b>	<b>155</b>	<b>Effective (L)</b>
<b>Michigan</b>	<b>138</b>	<b>Effective (L &amp; LR)</b>
Maryland	127	Ineffective (L)
Ohio	90	Ineffective (L)
<b>Florida</b>	<b>67</b>	<b>Effective (L &amp; LR)</b>
<b>Virginia</b>	<b>58</b>	<b>Effective (L)</b>
New York	57	No Reform
New Jersey	51	No Reform
Connecticut	31	Ineffective (L)
Tennessee	29	Ineffective (L)
Colorado	23	Ineffective (L)
Oklahoma	23	No Reform
Missouri	18	Ineffective (L)
Rhode Island	12	No Reform
<b>Arizona</b>	<b>11</b>	<b>Effective (CR)</b>
Texas	11	Ineffective (L)
Washington	11	No Reform
<b>Minnesota</b>	<b>9</b>	<b>Effective (L)</b>
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 (L & 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	Effective (L)
Hawaii	-	No Reform
Montana	-	Ineffective (L)
New Hampshire	-	Effective (L & LR)
New Mexico	-	Effective (L)
Oregon	-	Effective (CR)

<sup>60</sup> Note: some takings affected more than one property.

<sup>61</sup> As of January 2008.

South Carolina	-	Ineffective (LR)
Utah	-	Enacted Prior to <i>Kelo</i>
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.<sup>62</sup> Michigan’s reform law, while quite strong,<sup>63</sup> came on the heels of a state supreme court decision that had already banned *Kelo*-style “economic development” takings.<sup>64</sup>

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.<sup>65</sup> It is therefore 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 January 2008, thirty-five state legislatures have enacted post-*Kelo* reforms. The state of Utah effectively banned economic development takings in a statute enacted several months before *Kelo*

<sup>62</sup> See discussion of the Pennsylvania law in § II.A.2, *infra*.

<sup>63</sup> See *id.*

<sup>64</sup> 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.

<sup>65</sup> See, for example, the discussion of the underestimation of the number of takings in Minnesota in § II.A.2, *infra*.

was decided by the Supreme Court.<sup>66</sup> However, twenty-one of the thirty-five new state laws provide little or no protection for property owners against economic development takings. Only fourteen 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 to 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.**

Sixteen 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.”<sup>67</sup> 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.”<sup>68</sup>

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<sup>66</sup> 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 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). In March 2007, Utah partially rescinded its ban on blight condemnations. See Utah H.B. 365 (signed into law Mar. 21, 2007) (permitting blight condemnations if approved by a supermajority of property owners in the affected area).

<sup>67</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>68</sup> *Id.* at 32.

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,<sup>69</sup> and downtown Las Vegas<sup>70</sup> are “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 three states permit condemnation for “blight” and most of these define the concept broadly.<sup>71</sup> For decades, courts have interpreted broad definitions of “blight” in ways that allow the condemnation of almost any property.<sup>72</sup> If virtually any property can be condemned as “blighted,” a ban on “economic development” takings would be essentially irrelevant.

Sixteen 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.” Ten 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.”**

Ten 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,<sup>73</sup> Colorado,<sup>74</sup> Missouri,<sup>75</sup> Montana,<sup>76</sup> Nebraska,<sup>77</sup> North Carolina,<sup>78</sup> Ohio,<sup>79</sup>

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<sup>69</sup>*In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

<sup>70</sup>*City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003).

<sup>71</sup>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, New Mexico, and Utah, as well as the tightening of the definition of blight by 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).

<sup>72</sup>See Luce, *supra* note \_\_\_\_; Gordon, *supra* note \_\_\_\_\_.

<sup>73</sup>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

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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.”).

<sup>74</sup> 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”).

<sup>75</sup> 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”). A recent Missouri Supreme Court decision has construed § 353.020 as requiring separate proof of “social liability” that goes beyond merely showing the existence of an “economic liability,” in the sense of an obstacle to future growth and reduction of tax revenue. See *Centene Plaza Redev. Corp. v. Mint Properties*, 225 S.W. 3d 431 (Mo. 2007). The decision notes, however, that proof of the existence of “social liability” might be demonstrated by providing evidence “concerning the public health, safety, and welfare,” which in this case was totally absent in the record. *Id.* at 433-35. In any event, Missouri local governments also have the power to condemn property based on the definition of blight in another statute that defines the concept as requiring proof of the existence of either an “economic” or a “social liability.” See 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”); See *State ex rel. Atkinson v. Planned Indus. Expansion Authority of St. Louis*, 517 S.W.2d 36, 41 (Mo. 1975) (noting that industrial development projects undertaken in accordance with this section include the power to acquire property through the use of “eminent domain”).

<sup>76</sup> See Mont. S.B. 41, §§7-15-4206(2), 7-15-4206(2)(a) (signed into law May 8, 2007) (Defining “Blighted area” as “an area that is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime; that substantially impairs or arrests the sound growth of the city or its environs; that retards the provision of housing accommodations; or that constitutes an economic or social liability or is detrimental or constitutes a menace to the public health, safety, welfare, and morals in its present condition and use by reason of “the substantial physical dilapidation; deterioration; age obsolescence, or defective construction, material, and arrangement of buildings or improvements, whether residential or nonresidential”); Mont. S.B. 363 (enacted into law May 16, 2007) (banning economic development condemnations, but retaining most of the broad definition of blight outlined in S.B. 41, § 7-15-4206(2)(a)).

<sup>77</sup> 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).

<sup>78</sup> 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, insanitary 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.”).

<sup>79</sup> 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”). This language is retained in Ohio’s more recent 2007 reform law. See 2007 Ohio Amended S.B. 7 (enacted into law July 10, 2007), § 1(A) (repeating this language). The new bill also requires that a “blighted parcel” meet at least two of 17 different conditions. *Id.*, §1(B). However, these include such vague and general criteria as “deterioration,” “age and obsolescence,” “faulty lot layout,” being “located in an area of defective or inadequate

Texas,<sup>80</sup> Vermont,<sup>81</sup> and West Virginia.<sup>82</sup> 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 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 require 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.”<sup>83</sup> 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 considered “blighted” because its current state impedes future development.<sup>84</sup> 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.”<sup>85</sup> 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. There are no published court decisions using it to strike down an attempted blight taking of any kind.<sup>86</sup>

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street layout,” and “overcrowding of buildings.” *Id.* Virtually any area is likely to meet two or more of these criteria.

<sup>80</sup> 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”).

<sup>81</sup> 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”).

<sup>82</sup> 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”).

<sup>83</sup> See statutes cited in nn \_\_\_\_\_ above.

<sup>84</sup> *Panama City Beach Community Redev. Agency v. State*, 831 So.2d 662, 668-69 (Fla. 2002).

<sup>85</sup> *City of Phoenix v. Superior Ct.*, 671 P.2d 387, 391, 393 (Ariz. 1983).

<sup>86</sup> As far as I am aware, there are also no unpublished decisions with such a holding.

## ii. Other broad blight exemptions.

Seven 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,"<sup>87</sup> 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."<sup>88</sup> 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.<sup>89</sup> 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.

The new Nevada statute bans all private-to-private condemnations,<sup>90</sup> but leaves open an exception for blight takings.<sup>91</sup> Current Nevada law defines "blight" very broadly, allowing an area to be declared blighted so long as it meets at least four of eleven factors.<sup>92</sup> The possible factors included at least six that are extremely broad and could apply to almost any area: "economic dislocation, deterioration or disuse," "subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development," "[t]he laying out of lots in disregard of the contours and other physical characteristics of the ground," "[t]he existence of inadequate streets, open spaces and utilities," "[a] growing or total lack of proper utilization of some parts of the area, resulting in a stagnant and unproductive condition of land," and "[a] loss of population and a reduction of proper use of some parts of the area, resulting in its further

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<sup>87</sup> Ill. S.B. 3086 (signed into law July 28, 2006).

<sup>88</sup> 65 Ill. C. Stat. § 5/11-74.4-3.

<sup>89</sup> Id.

<sup>90</sup> See Nev. Assembly Bill 102 (signed into law May 23, 2007) (forbidding private-to-private condemnations, but with exception for blight

<sup>91</sup> Id., at § 10.

<sup>92</sup> See Nev. Rev. State § 279.388 (defining "blighted area").

deterioration and added costs to the taxpayer.”<sup>93</sup> In 2003, the Nevada Supreme Court used this statute to declare downtown Las Vegas a blighted area, thereby justifying the condemnation of property for transfer to several casinos so that they could build new parking facilities for their customers.<sup>94</sup> However, the Nevada statute was enacted in the aftermath of a referendum that approved a state constitutional amendment that will eventually provide much stronger protection for property owners than permitted under the legislative statute.<sup>95</sup>

Kentucky’s post-*Kelo* reform law likewise retains a very broad preexisting definition of “blight.”<sup>96</sup> The law allowed condemnation of property for “urban renewal and community development” in “blighted” or “slum” areas.<sup>97</sup> 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.”<sup>98</sup>

Maine’s reform statute also incorporates a broad definition of “blight” from prior legislation.<sup>99</sup> Prior Maine law defines “blight” as including areas in which properties suffer from “[d]ilapidation, deterioration, age or obsolescence.”<sup>100</sup> For condemnations that further “urban renewal” projects, detriment to “public health, safety, morals or welfare” may lead to a blight designation;<sup>101</sup> condemnation for “community development” can occur in areas that are considered “blighted” under the same definition, except that threats to “morals” are not included.<sup>102</sup>

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

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<sup>93</sup> Id.

<sup>94</sup> *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003). However, it should be noted that the 2003 version of §279.388 required the presence of only one of the eleven factors to allow an area to be declared “blighted.” Id. at 6 n. 8.

<sup>95</sup> See discussion of Nevada’s referendum initiative in § II.A.3, *infra*.

<sup>96</sup> See 2006 Ky. H.B. 508 (signed into law Mar. 28, 2006).

<sup>97</sup> Kan. Rev. Stat. §§ 99.330-590, 99.370.

<sup>98</sup> Id. § 99.340.

<sup>99</sup> See 2005 Maine H.B. 1310 (signed into law Apr. 13, 2006) (exempting blight condemnations from ban on economic development condemnations).

<sup>100</sup> 30 Me. Stat. Ann. §§ 203, 205.

<sup>101</sup> Id. at § 203.

<sup>102</sup> Id. at § 205.

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.<sup>103</sup>

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."<sup>104</sup> 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 employment, savings, or investment. Indeed, the provision of jobs and attraction of outside investors is a standard rationale for economic development condemnations.<sup>105</sup>

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.<sup>106</sup>

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 because all structures gradually deteriorate over time. Since one of the conditions justifying a blight designation is

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<sup>103</sup> Tenn. S.B. 3296, § 14(a) (signed into law June 6, 2006).

<sup>104</sup> *Id.*

<sup>105</sup> 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 were 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*).

<sup>106</sup> Iowa H.F. 2351 (enacted into law July 14, 2006).

“the presence of a substantial number of slum *or* deteriorated structures,”<sup>107</sup> 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.”<sup>108</sup> Since the law does not state that the “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.<sup>109</sup>

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.”<sup>110</sup> 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.”

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<sup>107</sup> Id. (emphasis added).

<sup>108</sup> Id.

<sup>109</sup> Wisc. A.B. 657, § 1 (signed into law Mar. 31, 2006).

<sup>110</sup> Id.

## **b. State laws that are ineffective for other reasons.<sup>111</sup>**

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, Connecticut, Maryland, and Delaware. The Texas and Ohio laws, already briefly discussed above, also have major loopholes besides those created by their blight exemptions. Each of these cases is analyzed below. I also briefly consider Washington's new eminent domain law, even though the latter is not truly a response to *Kelo*.

### **i. California.**

In September 2006, the California state legislature enacted a package of five post-*Kelo* eminent domain reform bills.<sup>112</sup> None of the five even comes close to forbidding condemnations for economic development.

Four of the five new statutes create minor new procedural hurdles for local governments seeking to condemn property.<sup>113</sup> As eminent domain scholar and litigator Timothy Sandefur has shown in a detailed analysis, none of the four impose restrictions that will significantly impede the exercise of eminent domain in California.<sup>114</sup>

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.<sup>115</sup> 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

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<sup>111</sup> The analysis of the Delaware, Ohio, and Texas laws is in large part derived from Somin, *Grasping Hand*, supra note \_\_\_\_\_ at 245-52 .

<sup>112</sup> See Ca. S.B. 53, 1206, 1210, 1650, and 1809 (signed into law Sept. 29, 2006).

<sup>113</sup> See *Id.* (except for S.B. 1206).

<sup>114</sup> See Timothy 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](http://eminentdomain.typepad.com/my_weblog/2006/09/gov_schwarzeneg.html) (visited Jan. 2, 2006).

<sup>115</sup> Ca. S.B. 1206, § 3.

prevent the development of those parcels or other portions of the project area.”<sup>116</sup> 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.”<sup>117</sup> 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. Connecticut.

The new Connecticut law merely forbids the condemnation of property “for the primary purpose of increasing local tax revenue.”<sup>118</sup> This restriction does not prevent condemnations for either economic development or blight purposes. Connecticut law allows local governments to condemn property for both economic development purposes and to alleviate blight-like conditions.<sup>119</sup> Even the goal of increasing tax revenue can still be pursued so long as it is part of a more general plan for local “redevelopment.”<sup>120</sup> In practice, it is likely to be impossible to prove that a given property is being condemned primarily for the purpose of “increasing local tax revenue” as distinct from the goal of promoting economic development more generally. It is ironic that the state in which the *Kelo* case occurred has enacted one of the nation’s weakest post-*Kelo* reform laws, one that would not have prevented the condemnations challenged by Susette Kelo and her fellow New London property owners.

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<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Conn. S.B. 167, § 1(b)(1) (enacted June 25, 2007).

<sup>119</sup> See generally Conn. Gen. Stat. § 8-125(2) (allowing use of eminent domain within “redevelopment areas” that can be declared in any “area within the state that is deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community”). The concept of “deteriorating” area is defined extremely broadly. Id. at §8-125(7) (providing list of numerous conditions only one of which has to be met for an area to qualify as “deteriorating”; even this list is not exhaustive, since the statute says that possible conditions qualifying an area as “deteriorating” are “not limited” to those enumerated). See also, *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (noting that Connecticut law permitted condemnation of the New London properties despite the fact that they were not “blighted” and were only sought for purposes of promoting economic growth in the area.

<sup>120</sup> See Conn. Gen. Stat. §§ 8-125-33 (outlining procedures for condemning property in “redevelopment areas”).

### iii. 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, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.”<sup>121</sup> 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.<sup>122</sup> 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.”<sup>123</sup>

### iv. Maryland.

Maryland’s new law does not forbid condemnations for either economic development or blight. Instead, it merely requires a condemnation to occur within four years of its authorization.<sup>124</sup> This restriction is unlikely to impede economic development takings. Not only is the four year period quite long, but reauthorization is likely to be easily obtained under the state’s extremely broad definition of “blighted” and “slum” areas, both of which are eligible for condemnation under Maryland law.<sup>125</sup>

### v. 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

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<sup>121</sup> Del. Sen. Bill 217, § 1 (codified at 29 Del. Code § 9505(14)).

<sup>122</sup> *Kelo*, 545 U.S. at 477 (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 241, 245 (1984)).

<sup>123</sup> 29 Del. Code § 9505(14).

<sup>124</sup> See Md. S.B. 3, §12-105.1 (signed into law May 8, 2007).

<sup>125</sup> See Md. Const., Art. III, § 61 (allowing use of eminent domain in “slum or blighted areas” and defining these terms as follows: “The term ‘slum area’ shall mean any area where dwellings predominate which, by reason of depreciation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitary facilities, or any combination of these factors, are detrimental to the public safety, health or morals. The term ‘blighted area’ shall mean an area in which a majority of buildings have declined in productivity by reason of obsolescence, depreciation or other causes to an extent they no longer justify fundamental repairs and adequate maintenance”).

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.”<sup>126</sup>

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.<sup>127</sup> Creative local governments could easily come up with such proposals. Furthermore, the Ohio law explicitly exempted “blighted” areas from its scope;<sup>128</sup> the definition of “blight” under Ohio law is broad enough to cover almost any area.<sup>129</sup> 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.

The Ohio legislation also established a “Legislative Task Force to Study Eminent Domain and its Use and Application in the State.”<sup>130</sup> 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.<sup>131</sup>

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.<sup>132</sup> In July 2007, the Ohio state legislature

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<sup>126</sup> Oh. Gen. Assembly, Sen. Bill 167, § 2.

<sup>127</sup> Id. at § 2.

<sup>128</sup> Id..

<sup>129</sup> 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”).

<sup>130</sup> Oh. Gen. Assembly, Sen. Bill 167, § 3.

<sup>131</sup> For a detailed analysis of the commission’s Composition, see Somin, *Grasping Hand*, supra note \_\_\_\_\_ at 249.

<sup>132</sup> 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,

enacted a new reform law that adopted the definition of “blight” recommended by the Commission.<sup>133</sup>

That definition, however, provides little if any more protection for property owners than the old one.<sup>134</sup>

#### vi. 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.<sup>135</sup>

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.”<sup>136</sup> 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 not be able to protect “community development” and “urban renewal” takings, which surely confer “private benefits” for “particular” persons.<sup>137</sup>

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.”<sup>138</sup>

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.”<sup>139</sup> 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

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the new one would still permit virtually any property to be designated as “blighted.” For the old definition, see note

<sup>133</sup> See Oh. Amended S.B. 7 (signed into law July 10, 2007).

<sup>134</sup> See analysis in note \_\_\_\_\_ above.

<sup>135</sup> Tex. Sen. Bill No. 7 (signed into law Sept. 1, 2005) (codified at 10 Tex. Gov. Code §2206.001(b)).

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> *Kelo*, 545 U.S. at 478.

<sup>139</sup> 10 Tex. Gov. Code § 2206.001(b)(3).

development and growth.”<sup>140</sup> It is surely reasonable to suppose that “sound community development and growth” includes economic “development and growth.”<sup>141</sup>

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.<sup>142</sup> 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.”<sup>143</sup> 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.”<sup>144</sup> This broad standard can also be used to defend a wide range of condemnations for various private 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.<sup>145</sup>

#### **vii. Washington.**

The state of Washington’s recent eminent domain law is not a true response to *Kelo*.<sup>146</sup> It does not even pretend to restrict economic development takings or cut back on the definition of “public use” in any other way. Instead, the new statute seems to be a response to a 2006 Washington Supreme Court decision which held that property owners are not entitled to personal notice of public meetings called to consider the necessity of initiating eminent domain proceedings against them.<sup>147</sup> Because the new law was neither

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<sup>140</sup> Tex. Local Gov. Code §373.005(b)(1)(A).

<sup>141</sup> Id.

<sup>142</sup> Id. at § 2206.001(e).

<sup>143</sup> 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).

<sup>144</sup> Tex. Local Gov. Code §373.005(b)(1)(A).

<sup>145</sup> 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.

<sup>146</sup> See Wash. S.H.B. 1458 (signed into law Apr. 4, 2007).

<sup>147</sup> See *Central Puget Sound Regional Trans. Auth. v. Miller*, 128 P. 3d 588 (Wash. 2006). This decision was cited as the reason for the passage of the new Washington law by the state’s Senate Committee on the Judiciary. See Senate

a response to *Kelo* nor an attempt to narrow the definition of public use, I do not classify it as a post-*Kelo* reform. Changing this classification would not alter the quantitative data discussed in Part III,<sup>148</sup> nor would it alter the overall conclusions of this article. If the law were to be viewed as a post-*Kelo* reform, it would be classified as adding little or nothing to the protections Washington property owners already enjoyed before *Kelo*. The state supreme court banned economic development takings in 1959,<sup>149</sup> and Washington already had a narrow definition of “blight.”<sup>150</sup>

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

Fourteen state legislatures have enacted laws that either abolish or significantly constrain economic development takings. The most sweeping of these laws are Florida’s and New Mexico’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.<sup>151</sup> Florida and New Mexico therefore became the second and third states to abolish blight condemnations, following in the footsteps of Utah, which did so prior to *Kelo*.<sup>152</sup> Unlike Utah and New Mexico, which made little use of economic development and blight takings even before the enactment of its new law,<sup>153</sup> Florida has an extensive record of dubious economic development and blight condemnations.<sup>154</sup> Due to its broad scope and

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Bill Report, S.H.B. 1458, Mar. 21, 2007, available at <http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bill%20Reports/Senate/1458-S.SBR.pdf> (visited Jan. 28, 2008).

<sup>148</sup> If I classified Washington state as having passed either an effective or ineffective reform law, that would not alter the political ignorance findings discussed in Part III because there are too few Washington respondents in the sample to make a statistically significant difference.

<sup>149</sup> See *Hogue v. Port of Seattle*, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property so that agency could “devote it to what it considers a higher and better economic use”).

<sup>150</sup> See REV. CODE OF WASH. § 35.80A.010 (West). (defining blight narrowly for purposes of condemnation).

<sup>151</sup> See Fla. H.B. 1567 (signed into law May 11, 2006); N.M. H.B. 393 (signed into law Apr. 3, 2007). The New Mexico bill does still permit the condemnation of property that is characterized by “obsolete or impractical planning and platting” and “(a) was platted prior to 1971;(b) has remained vacant and unimproved; and (c) threatens the health, safety and welfare of persons or property due to erosion, flooding and inadequate drainage.” N.M. H.B.393, § 3-18-10(B)(3).

<sup>152</sup> See § \_\_\_ infra, and note \_\_\_. However, Utah partially rescinded its ban on blight condemnations in a more recent bill. See Utah H.B. 365 (signed into law Mar. 21, 2007) (permitting blight condemnations if approved by a supermajority of property owners in the affected area).

<sup>153</sup> 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. New Mexico did not have any private to private condemnations during the 1998-2002 period. Id. at 143.

<sup>154</sup> Id. at 52-58.

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.”<sup>155</sup> 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 influential interests.<sup>156</sup> 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.<sup>157</sup> Blight condemnations are limited to cases where the property in question is “unsafe for occupation by humans under the building codes.”<sup>158</sup>

Eight 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,<sup>159</sup> Georgia,<sup>160</sup> Idaho,<sup>161</sup> Indiana,<sup>162</sup> Michigan,<sup>163</sup> New Hampshire,<sup>164</sup> Virginia,<sup>165</sup> and Wyoming statutes.<sup>166</sup> In

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<sup>155</sup> 2006 S.D. H.B. 1080 (signed into law Feb. 27, 2006).

<sup>156</sup> For arguments that this is a major problem with economic development and blight condemnations, see Somin, *Grasping Hand* at 190-205, 264-71.

<sup>157</sup> Kan. S.B. 323, §§1-2. (signed into law May 18, 2006).

<sup>158</sup> *Id.*, § 2(a).

<sup>159</sup> 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).

<sup>160</sup> 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).

<sup>161</sup> 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.

<sup>162</sup> 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”).

<sup>163</sup> 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,”

the case of Nevada, the new legislation was enacted only in the aftermath of a referendum initiative that would ban both economic development and blight condemnations entirely.

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 power of eminent domain to take private property in order to use it for private commercial enterprise,”<sup>167</sup> and imposes a restrictive definition of “blight.”<sup>168</sup> 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.<sup>169</sup> These two cities, by far the state’s largest urban areas, are also the sites of many of the

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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. My tentative judgment is that this loophole is not broad enough to completely negate the impact of the new statute.

<sup>164</sup> 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”).

<sup>165</sup> See Va. H.B. 2954, § 1-237.1(A) (signed into law Apr. 4, 2007) (permitting condemnation of private property only if “(i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners”). The new law also narrows the definition of “blight” to include only “property that endangers the public health or safety in its condition at the time of the filing of the petition for condemnation and is (i) a public nuisance or (ii) an individual commercial, industrial, or residential structure or improvement that is beyond repair or unfit for human occupancy or use.” *Id.* at § 1-237.1(B).

<sup>166</sup> Wyo. House Bill No. 124, § 1-26-801(c) (signed into law Feb. 28, 2007) (requiring that “As used in and for purposes of this section only, ‘public purpose’ means the possession, occupation and enjoyment of the land by a public entity. ‘Public purpose’ shall not include the taking of private property by a public entity for the purpose of transferring the property to another private individual or private entity except in the case of condemnation for the purpose of protecting the public health and safety”). Technically, this law seems to forbid blight condemnations. However, the provision permitting condemnations for the purpose protecting “public health and safety” is functionally equivalent to allowing condemnation under an extremely narrow definition of blight.

<sup>167</sup> 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).

<sup>168</sup> *Id.* at § 205.

<sup>169</sup> 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).

state's most extensive private-to-private takings.<sup>170</sup> Although the provision exempting the two cities is set to expire on December 31, 2012,<sup>171</sup> 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,"<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> Thus, the new law will impact only a small fraction of those cities that actually engage in the practices it seeks to curb. Like the Pennsylvania exemptions, the Minnesota ones are time-limited, scheduled to expire in five years.<sup>175</sup> But they too could be extended if the public furor over *Kelo* subsides over time.

Even many of the fourteen 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

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<sup>170</sup> See BERLINER, *supra* note \_\_\_\_ at 173, 179-81 (describing major condemnation projects in the two cities).

<sup>171</sup> H.B. No. 2054, ch. 2, § 203(4).

<sup>172</sup> 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).

<sup>173</sup> *Id.* at § 22.

<sup>174</sup> 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.

<sup>175</sup> Minn. S.F. 2750, § 22.

of resorting to private-to-private condemnations;<sup>176</sup> thus, they forbid practices that local governments rarely engaged in. Overall, only seven 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.<sup>177</sup> All ten passed by large margins ranging from 55% to 86% of the vote.<sup>178</sup> 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. It is crucial to recognize that referenda initiated by citizen groups were far more likely to lead to effective laws than those enacted by state legislatures. Indeed, only one state – Louisiana – passed a legislature-initiated referendum that provided significantly greater protection for property owners than that available under preexisting statutory law enacted through the ordinary legislative process.

Three states – Arizona,<sup>179</sup> Louisiana,<sup>180</sup> and Oregon<sup>181</sup> – enacted referendum initiatives that essentially followed the standard formula of combining a ban on economic development takings with a

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<sup>176</sup> 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).

<sup>177</sup> 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](http://www.ncsl.org/statevote/prop_rights_06.htm) (visited Nov. 20, 2006) (hereinafter “NCSL”).

<sup>178</sup> *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](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.

<sup>179</sup> 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.”).

<sup>180</sup> 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).

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.<sup>182</sup>

Florida’s referendum initiative could not add much in the way of substantive protections to the state’s legislatively enacted post-*Kelo* law, already the strongest in the country.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.”<sup>186</sup> As already discussed, this wording is largely useless because it does not foreclose the argument that the transfer of property to a private party will promote “public development” that benefits the community as a whole, not just “private” individuals.<sup>187</sup>

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

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<sup>181</sup> 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).

<sup>182</sup> 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.”).

<sup>183</sup> See nn. \_\_\_\_\_ and accompanying text.

<sup>184</sup> Fla. Const. Amend. VIII (enacted Nov. 7, 2006).

<sup>185</sup> Ga. Amendment 1 (enacted Nov. 7, 2006).

<sup>186</sup> N.H. Question 1 (enacted Nov. 7, 2006).

<sup>187</sup> See \_\_\_\_ infra.

economic development, unless the condemnation is for public use.”<sup>188</sup> 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.<sup>189</sup> 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.”<sup>190</sup> 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.”<sup>191</sup> However, it did not change the state’s previously 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.<sup>192</sup> If *Hathcock* is held to limit broad blight designations, then the new constitutional 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 its own right. At this point, however, the status of the Michigan referendum initiative is largely moot because Michigan’s legislative reform had already

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<sup>188</sup> S.C. Const. Amend. 5, § 13(2) (Enacted Nov. 7, 2006).

<sup>189</sup> See *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development)

<sup>190</sup> S.C. Amend. 5, § 13(B).

<sup>191</sup> Mich. Proposal 06-04, § Art. X, § 2.

<sup>192</sup> 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 \_\_\_\_.

narrowed the definition of “blight.”<sup>193</sup> Thus, the Michigan constitutional amendment enacted by referendum reinforces the accomplishments of the previous statutory reform; but it might not have been effective as a stand-alone law.

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.<sup>194</sup> 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,<sup>195</sup> and the same was true of the ambiguous Michigan case.<sup>196</sup> 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.<sup>197</sup> Since early 2006,<sup>198</sup> the PRPA was bottled up in the Senate and the 109th Congress ended without its being enacted into law. As of this writing, it is not yet clear whether the PRPA will be enacted in the new Democratic Congress. In May 2007, it passed the Agriculture Committee of the House of Representatives; however, it has not yet been voted on by the full House as of January 2008.<sup>199</sup> Despite its failure to achieve passage so far, I consider it

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<sup>193</sup> See note \_\_\_\_.

<sup>194</sup> The four are Arizona, Nevada, North Dakota and Oregon. See NCSL, *supra* note \_\_\_\_.

<sup>195</sup> The three were Georgia, New Hampshire, and South Carolina. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> U.S. House of Representatives, 109 H.R. 4128 (enacted Nov. 3, 2005).

<sup>198</sup> 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).

<sup>199</sup> The PRPA has been renamed as the “Strengthening the Ownership of Private Property Act of 2007.” Text available at [http://thomas.loc.gov/home/gpoxmlc110/h926\\_ih.xml](http://thomas.loc.gov/home/gpoxmlc110/h926_ih.xml) (visited Jan. 11, 2008). On June 5, 2007 it was referred to the House Subcommittee on Healthy Families and Communities. No further action has been taken as of this writing. See Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00926:@@L&summ2=m&> (visited Jan. 12, 2008).

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 “exercis[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 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.”<sup>200</sup> Violators are punished by the loss of all “Federal economic development funds for a period of 2 fiscal years.”<sup>201</sup> 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.”<sup>202</sup>

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,”<sup>203</sup> 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.”<sup>204</sup> 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.”<sup>205</sup> A recent Congressional Research Service analysis concludes that the PRPA ultimately would delegate the task of identifying the relevant programs

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<sup>200</sup> Id. § 2(a).

<sup>201</sup> Id. § 2(b).

<sup>202</sup> 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).

<sup>203</sup> 109 H.R. 4218 § 2(b).

<sup>204</sup> Id. § 8(2).

<sup>205</sup> Id.

to the Attorney General.<sup>206</sup> 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.

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.”<sup>207</sup> This amount includes 3.5 billion dollars in “homeland security” grants and over 3 billion dollars in “emergency preparedness and response,”<sup>208</sup> 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.<sup>209</sup>

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.”<sup>210</sup> 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

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<sup>206</sup> 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. 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.

<sup>207</sup> 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.

<sup>208</sup> *Id.* at 125, tbl. 8-4.

<sup>209</sup> The figure is arrived at by dividing 7.4 billion by 416.5 billion.

<sup>210</sup> 109 H.R. 4128, § 2(c).

PRPA as a defense.<sup>211</sup> 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.

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.”<sup>212</sup>

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.”<sup>213</sup> 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,<sup>214</sup> 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.<sup>215</sup>

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<sup>211</sup> This may not be an unlikely occurrence, given that many property owners targeted for condemnation are likely to be poor and legally unsophisticated.

<sup>212</sup> P.L. 109-115, § 726. The full text of the Amendment is reprinted in Meltz, *supra* note \_\_\_\_\_ at 12.

<sup>213</sup> *Id.*

<sup>214</sup> See *Kelo*, 545 U.S. 469, 488 (2005) (holding that courts should not “second-guess [a] City’s considered judgments about the efficacy of its development plan”).

<sup>215</sup> P.L. 109-115, § 726 (enacted into law Nov. 30, 2005).

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.<sup>216</sup>

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.<sup>217</sup>

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

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<sup>216</sup> Id.

<sup>217</sup> 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).

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). The justices reached this conclusion despite considerable evidence that the takings were instigated by the Pfizer Corporation, which at the time hoped to benefit from them. 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.<sup>218</sup>

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. Survey data developed for this article show that the overwhelming majority of citizens know little or nothing about post-*Kelo* reform laws in their states. This widespread ignorance may well account for the ineffectiveness of many of the new laws. It also helps account for several other aspects of the *Kelo* backlash, including its timing and the relatively greater effectiveness of laws enacted by referenda relative to those adopted through the legislative process.

#### **A. Public ignorance and Post-*Kelo* reform laws.**

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<sup>218</sup> For a detailed discussion of these aspects of *Kelo*, see Somin, *Grasping Hand*, at 235-40.

## 1. The Saint Index survey data.

As noted earlier,<sup>219</sup> 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 knowledgeable 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.<sup>220</sup>

Recent survey data compiled at my request by the Saint Consulting Group, a firm that sponsors surveys on land use policy, confirm the hypothesis that most Americans have little or no knowledge of post-*Kelo* reform. The data compiled in Table 6, are based on an August 2007 Saint Index national survey. They show that political ignorance about post-*Kelo* reform is widespread. Only 13% of respondents could both correctly answer whether or not their states had enacted eminent domain reform laws since 2005, and correctly answer a follow-up question about whether or not those laws were likely to be effective in preventing condemnations for economic development.<sup>221</sup> Only 21% could even correctly answer the first question in the sequence: whether or not their state had enacted eminent domain reform since *Kelo* was decided in 2005.<sup>222</sup>

It is also important to recognize that 6% of respondents believed that their states had enacted post-*Kelo* reforms that were likely to be “effective” in reducing economic development takings even though the state in fact had not. This is not a large number in absolute terms, but it still represents more than one-third of the 17% of respondents who expressed any opinion at all about the effectiveness of their state’s reforms.<sup>223</sup> An additional 2% wrongly believed that their states’ reform laws were ineffective even though the opposite was in fact true. Even among the small minority of Americans who paid close

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<sup>219</sup> See \_\_\_\_ infra.

<sup>220</sup> 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 \_\_\_\_.

<sup>221</sup> For the exact wording of the two questions involved, see Appendix B.

<sup>222</sup> Data calculated from Saint Index 2007, Question 9. See Appendix B for question wording.

<sup>223</sup> Data calculated Saint Index 2007, Question 10. See Appendix B for question wording.

enough attention to post-*Kelo* reform legislation to have an opinion about its effectiveness, there was a high degree of ignorance.<sup>224</sup>

Table 6 indicates that ignorance about state post-*Kelo* reform cut across gender, racial, and political lines. Some 85% of men and 90% of women are ignorant about the condition of post-*Kelo* reform, as were 82% of African-Americans, 89% of whites, and similar overwhelming majorities of liberals and conservatives, Democrats and Republicans, and other groups. It is difficult to avoid the conclusion that most Americans were ignorant about the mere existence or lack thereof of post-*Kelo* reform in their states, and even fewer could tell whether the reform was effective or not.

The Saint Index data may even understate the amount of ignorance about post-*Kelo* reform. Some respondents may have gotten the right answers by guessing. In order to get a correct answer, respondents living in the eight states that have not passed any post-*Kelo* reform needed only to get one binary question and had a 50% chance of getting the right answer through random guessing; those living in the 42 states that have passed reform laws needed to get two such questions correct, and thus had a 25% chance of doing so through random guessing.<sup>225</sup> Past research shows that many survey respondents will guess in order to avoid admitting ignorance about the subject matter of a poll question, and that may have happened in this case as well.<sup>226</sup> An additional factor biasing the knowledge levels found in the Saint Index survey upwards is the fact that the pollsters only surveyed Americans over the age of 21. Political knowledge is generally correlated with age,<sup>227</sup> and young adults (people aged 18-29) have the highest incidence of ignorance of any age group.<sup>228</sup> The exclusion of 18-20 year olds from the sample reduces the representation of this group in the aggregate data.

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<sup>224</sup> Only 17% of respondents expressed any opinion at all about the effectiveness of post-*Kelo* reform in their states. Data calculated from Id.

<sup>225</sup> Question 10 on the Saint Index survey has four possible answers in addition to “don’t know.” However, as described in Appendix B, in each case I coded two different answers as “correct” for purposes of Table 6. Respondents living in states that had passed effective laws could get a “correct” answer by choosing either A or B, while those in states with ineffective reforms could pick either C or D.

<sup>226</sup> For the classic survey result showing that many respondents will express opinions even about completely fictitious legislation invented by researchers rather than admit ignorance, see Stanley Payne’s famous finding that 70% of respondents expressed opinions regarding the nonexistent “Metallic Metals Act.” STANLEY PAYNE, *THE ART OF ASKING QUESTIONS* 18 (1951).

<sup>227</sup> See DELLI CARPINI & KEETER, *supra* note \_\_\_\_\_ at 70; Somin, *Countermajoritarian Difficulty*, at 1327.

<sup>228</sup> See MARTIN P. WATTENBERG, *IS VOTING FOR YOUNG PEOPLE?* 79-90 (2007) (summarizing evidence indicating that the young have the lowest levels of political information of any age group).

**Table 6:  
Public Knowledge of State Post-Kelo Reform**

	<i>Group</i>	<i>% Unaware of the Condition of Post-Kelo Reform in their State</i> <sup>229</sup>
	<b>Total</b>	<b>87</b>
<b>Gender</b>	Male	85
	Female	90
<b>Racial/Ethnic<sup>230</sup> Group</b>	White	89
	African American	82
	Asian	75
	Hispanic/Latino	100
	Native American	75
<b>Party Affiliation</b>	Democrat	89
	Independent	83
	Republican	89
<b>Ideology</b>	Liberal	88
	Moderate	90
	Conservative	87

<sup>229</sup> Calculated from answers to Saint Index August 2007 survey, questions 9 and 10. The Saint Index Poll, August 2007. For question wording, see Appendix B. I counted as “correct” those respondents who both 1) knew whether or not their states had passed post-Kelo eminent domain reform laws and 2) correctly answered the question about whether or not those laws were effective. Respondents from the eight states that had not enacted any post-Kelo laws at all were counted as giving correct answers to both questions if they correctly answered the first question by stating that their states had not adopted any reforms. Totals have been rounded off to the nearest whole number. The State of Utah presented a difficult methodological dilemma because it had banned economic development takings prior to *Kelo*. In the results in Table 5, it is coded as having “effective” reforms and respondents who gave that answer were credited with a “correct” response. Coding the Utah results the other way does not significantly alter the overall results because of the extremely low number of Utah respondents in the sample.

<sup>230</sup> The results for Hispanics, Asians, and Native Americans may be unreliable because based on very small sample sizes of 24, 12, and 12 respondents respectively.

The fact that most citizens are ignorant about post-*Kelo* reform is not surprising to researchers. 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 controversial USA Patriot Act.<sup>231</sup> What may be somewhat surprising – especially to nonexpert observers - is that ignorance is so widespread despite the immense public outcry that the issue has generated.

**2. Possible alternative explanations of the data consistent with the claim that voters were adequately informed.**

There are several possible objections to my theory that the Saint Index data prove the existence of widespread ignorance about post-*Kelo* reform that undermine the ability of voters to force through the sorts of policies favored by overwhelming majorities. I consider four such potential objections here and tentatively conclude that none of them withstand close scrutiny.

**a. The possibility of respondent forgetting.**

Because post-*Kelo* reforms were enacted over a two-year period between the time *Kelo* was decided in June 2005 and the time the Saint Index data was collected in August 2007, it is conceivable that voters were well-informed of the contents of their state's legislation at the time but later forgot that knowledge. To test that hypothesis, I checked to see whether respondents from Connecticut, Maryland, Montana, Nevada, New Mexico, Ohio, Virginia, and Wyoming, the eight states whose post-*Kelo* laws were enacted in 2007 had greater knowledge than those in states where reform legislation passed in 2005 and 2006. Two of these states, Nevada and Ohio passed their second post-*Kelo* reform laws during this time period. The eight states in question all enacted eminent domain reform laws between February 28 and July 10, 2007, just a few months or weeks before the Saint Index survey was conducted from August 1 to August 10, 2007.<sup>232</sup> The data show that the 122 respondents from those eight states had almost

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<sup>231</sup> Ilya Somin, *Political Ignorance is No Bliss*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, Tbl. 1.

<sup>232</sup> See dates for the enactment of the six states' laws in nn.\_\_\_\_\_, infra, in Part II.

exactly the same knowledge levels as those in the rest of the country. Twenty-six percent of respondents in the eight 2007 states knew whether or not their states had passed post-*Kelo* reform laws, a figure only slightly higher than the 20 percent rate compiled by respondents from the other 44 states.<sup>233</sup> Similarly, 12 percent of respondents in these eight states could correctly answer both the question about the existence of reform laws and that about their effectiveness; the figure for the other 44 states was 13 percent.<sup>234</sup> While some forgetting could have taken place even in the few weeks between the passage of the 2007 laws and the time of the Saint Index survey, one would still expect that respondents in the eight states would be less likely to forget than those in states that had enacted their reforms earlier. The lack of any statistical differences between the two sets of respondents suggests that forgetting is not a major factor in accounting for the widespread ignorance revealed in the 2007 Saint Index data. Other data also show that those voters who do acquire political knowledge tend to retain it for many years.<sup>235</sup>

**b. The “issue public” hypothesis.**

Public ignorance about post-*Kelo* reform might also be less bleak than I suggest if those who cared about the issue strongly were mostly well-informed about it. This scenario would be consistent with the “issue public” hypothesis advanced by political scientists, which holds that citizens are likely to be well-informed about a small number of issues that they care about intensely even if they remain ignorant about most others.<sup>236</sup> However, survey data show that the percentage of the public who care intensely about eminent domain reform is much greater than the mere 13% who know enough about it to be able to determine whether their states have passed effective post-*Kelo* laws or not. As discussed in Part I, 63% of respondents in a 2005 Saint Index survey said that they “strongly” opposed the *Kelo* decision.<sup>237</sup> A 2006 Saint Index poll question showed that 43% “strongly” support reforms intended to ban economic

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<sup>233</sup> Data calculated from Saint Index 2007, Question 9. Standard tests showed that the difference between the 26% and 20% figures is not statistically significant; the relevant data is available from the author.

<sup>234</sup> Data calculated from id., Questions 9 and 10.

<sup>235</sup> See Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing The New Deal Experience*, 45 WM. & MARY. L. REV. 595, 639-40 (2003) (discussing relevant evidence on retention of political knowledge); M. Kent Jennings, *Political Knowledge Over Time and Across Generations*, 60 PUB. OPINION Q. 228, 243-45 (1996) (same).

<sup>236</sup> For discussion and criticism of this theory, See Somin, *Voter Ignorance and the Democratic Ideal*, supra note \_\_\_\_\_ at 427-29. For a recent defense of the theory, see VINCENT L. HUTCHINGS, PUBLIC OPINION AND DEMOCRATIC ACCOUNTABILITY: HOW CITIZENS LEARN ABOUT POLITICS (2003).

<sup>237</sup> See nn\_\_\_\_ and accompanying text.

development takings.<sup>238</sup> Even the smaller of these two figures is still almost four times greater than the percentage of respondents who knew whether or not their states had passed effective reforms as of the time of the August 2007 Saint Index survey.

Political ignorance greatly reduces the number of voters who could potentially use the level of post-*Kelo* reform in their state as a basis for electoral decisions. In other words, it greatly diminishes the size of the potential “issue public.” Even if the 13% who gave accurate answers on the survey all feel strongly about the issue and make effective use of that knowledge in deciding which candidates to support in state and local elections, that still leaves several times that number of citizens who also feel strongly about banning economic development takings but lack the necessary knowledge to reward political leaders who support effective reform and punish those who oppose it.

### **c. The “miracle of aggregation.”**

A third potentially benign interpretation of widespread ignorance of post-*Kelo* reform is the “miracle of aggregation.”<sup>239</sup> Even if many or most voters are ignorant about a particular issue, that may be irrelevant to political outcomes if their errors are randomly distributed. In that situation, ignorance-driven votes for Candidate or policy A would be offset by a similar number of “mistaken” votes for alternative B, and electoral outcomes would be determined by the (potentially very small) minority of well-informed citizens.

With respect to post-*Kelo* reform, there are two serious problems with this scenario. First, even random error is likely to have an important impact on policy. Second, the errors are not in fact randomly distributed, but are skewed toward overestimation of the effectiveness of post-*Kelo* reform laws.

Even if errors really are randomly distributed, the existence of widespread ignorance still greatly diminishes the number of voters who can take account of post-*Kelo* reform in choosing candidates. It likely eliminates at least 70% of those voters who “strongly” support a ban on economic development

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<sup>238</sup> See Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?* 101 NW. U. L. REV. 1931, 1940, tbl. 2 (2007).

<sup>239</sup> For defenses of this theory, see e.g., DONALD WITTMAN, *THE MYTH OF DEMOCRATIC THEORY* (1995); and Philip Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369 (John A. Ferejohn & James Kuklinski eds., Univ. of Ill. Press 1990).

takings.<sup>240</sup> This greatly reduces the potential pressure on officeholders to comply with overwhelming popular sentiment. If, for example, 10% of the 43% of Americans who say they strongly support effective post-*Kelo* reform would be willing to vote on the issue if they were informed about it, ignorance will have reduced the number willing to change their vote based on the issue from 4.3% of the adult population to a maximum of 1.3%.<sup>241</sup> And even that figure unrealistically assumes that the 13% with accurate knowledge of post-*Kelo* reform in their states were all drawn from among the 43% who care “strongly” about banning economic development takings.

It is also important to recognize that respondent mistakes about post-*Kelo* reform are not randomly distributed. It is far more common for voters to believe that their state has passed effective reform even if it has not than for them to believe that it has not done so in cases where it actually has. As discussed above,<sup>242</sup> some 6% of the 2007 Saint Index survey respondents wrongly believe that their state passed effective reform, whereas only 2% mistakenly believe that their state has failed to enact effective reform, even though it has. The 6% figure may not seem high in and of itself. But it constitutes more than one third of all those respondents (17%) who had any opinion on the effectiveness of post-*Kelo* reform in their states at all. Unfortunately, it is impossible to use the 2007 Saint Index data to determine whether these 17% were disproportionately drawn from the subset of respondents most interested in post-*Kelo* reform issues. However, it is plausible that they were. If so, it is possible that the 6% of respondents who mistakenly believe that their state has passed effective post-*Kelo* reform constitute a substantial percentage of those who would otherwise use the issue as a criterion for voting. Their ignorance deprived them of the opportunity to use their votes to reward politicians who support effective reform and punish those who oppose it.

#### **d. Opinion leaders as sources of information.**

Finally, 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

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<sup>240</sup> See nn. \_\_\_\_\_ and accompanying text.

<sup>241</sup> For the 43% figure, see n. \_\_\_\_ and accompanying text. The 1.3% figure is calculated by taking 10% of the 13% who could correctly identify the state of post-*Kelo* reform in their state.

<sup>242</sup> See nn. \_\_\_\_\_ and accompanying text.

better informed than ordinary citizens.<sup>243</sup> However, as I have argued at greater length elsewhere,<sup>244</sup> 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.<sup>245</sup> In addition, the failure of the opinion leader “information shortcut” to alleviate ignorance on less complex and more important issues<sup>246</sup> than post-*Kelo* reform suggests that it will be of only limited utility in this case. Most important of all, the widespread ignorance revealed in the Saint Index survey shows that most citizens either did not acquire relevant information from opinion leaders or obtained information that turned out to be misleading about the true effectiveness of reform laws in their states.

## **B. Political ignorance as an explanation for the anomalies of the backlash.**

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.

### **1. Explaining 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.<sup>247</sup> 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

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<sup>243</sup> For the argument that reliance on opinion leaders can alleviate the problem of political ignorance, see, e.g. ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998).

<sup>244</sup> See, e.g., Ilya Somin, *Resolving the Democratic Dilemma?*, 16 *YALE J. ON REG.* 401, 410–11 (1999)

<sup>245</sup> See LUPA & MCCUBBINS, *supra* note \_\_\_\_ (arguing that voters often choose opinion leaders based on ideological affinity).

<sup>246</sup> For a more detailed discussion, see Somin, *Voter Ignorance*, at 424-27.

<sup>247</sup> 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).

lamented that *Kelo* had led to “a hue and cry about how bad things are in California, yet *Kelo* changed nothing.”<sup>248</sup> 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 could be condemned merely to promote “economic development” by other private parties. This sudden realization led to 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.<sup>249</sup> 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*.

## **2. 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. The Saint Index survey showed that almost 80% of Americans do not even know whether their state has passed a reform law at all.

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.<sup>250</sup> 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,<sup>251</sup> 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.

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<sup>248</sup> 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.

<sup>249</sup> See § I.B, *infra*.

<sup>250</sup> 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).

<sup>251</sup> For the concept of position-taking legislation, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

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.”<sup>252</sup> 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.”<sup>253</sup> 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.”<sup>254</sup> Eventually, California did enact some reforms, but only ones that are almost completely ineffective.<sup>255</sup> 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.”<sup>256</sup>

As of the time of this writing the California League of Cities, an organization composed of local governments with an interest in preserving their eminent domain authority, has also sought to exploit political ignorance about post-*Kelo* reform. The CLC has succeeded in placing an essentially meaningless eminent domain “reform” referendum initiative on the state’s 2008 ballot as a way of pre-empting a potential stronger referendum initiative sponsored by property rights advocates. The CLC initiative cleverly includes a provision stating that it would supersede any other eminent domain referendum enacted on the same day, so long as the latter gets fewer votes than the CLC proposal.<sup>257</sup>

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<sup>252</sup> Dan Walters, *Eminent Domain Bills Are Stalled – Except One for Casino Tribe*, SACRAMENTO BEE, Sept. 16, 2005, at A3.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See § II.A.1.b.i, *infra*.

<sup>256</sup> Interview with Steven Miller, Nevada Policy Research Institute, Mar. 14, 2007. Nevada eventually passed effective eminent domain reform by referendum. See nn. \_\_\_\_\_ and accompanying text.

<sup>257</sup> For the text of the CLC initiative, see [http://ag.ca.gov/cms\\_pdfs/initiatives/2007-05-14\\_07-0018\\_Initiative.pdf](http://ag.ca.gov/cms_pdfs/initiatives/2007-05-14_07-0018_Initiative.pdf) (visited Jan. 15, 2008). The provision negating other eminent domain reform laws passed the same is Section 9. For discussion of the reasons why the CLC initiative would not actually provide any meaningful protection for property owners, see Ilya Somin, *The California League of Cities’ Deceptive Eminent Domain “Reform” Referendum Initiative*, Volokh Conspiracy, Apr. 1, 2007, available at <http://volokh.com/posts/1175462916.shtml> (visited Jan. 17, 2008).

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.

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.<sup>258</sup> 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.<sup>259</sup> 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.<sup>260</sup>

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.<sup>261</sup> 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;<sup>262</sup> more recent survey data shows that 43% of Americans "strongly" support reform legislation banning economic development takings.<sup>263</sup> 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

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<sup>258</sup> See, e.g., Sandefur, *supra* note \_\_\_\_\_ at 769-72 (arguing that interest group opposition accounts for the failures of the *Kelo* backlash).

<sup>259</sup> *Id.*

<sup>260</sup> Interview with Brooke Rollins, Texas Public Policy Foundation, Mar. 17, 2007.

<sup>261</sup> See survey data cited in §I.B.

<sup>262</sup> See note \_\_\_\_, *infra*.

<sup>263</sup> See Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor*, *supra* note \_\_\_\_\_ at 1940, tbl. 2.

interest group power in the political process. Absent widespread ignorance, interest groups at odds with the majority of the general public would find it more difficult to block eminent domain reform.

### **3. 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 14 of 35 state legislative initiatives are comparably effective, and only two or three of six legislature-initiated referenda.<sup>264</sup> Reforms initiated by Congress and the President at the federal level are also largely cosmetic in nature.<sup>265</sup>

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.<sup>266</sup> 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.

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<sup>264</sup> Data compiled from Table 3, *infra*.

<sup>265</sup> See § I.B, *infra*.

<sup>266</sup> 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](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).

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.

### **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. It is also supported by recent Saint Index survey data documenting widespread public ignorance of post-*Kelo* reform.

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.

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 A: Additional Tables

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

<i>State</i>	<i>Number of Threatened Takings</i> <sup>267</sup>	<i>Effectiveness of Reform</i> <sup>268</sup>
<b>Florida</b>	<b>2,055</b>	<b>Effective (L &amp; LR)</b>
Maryland	1,110	Ineffective (L)
California	635	Ineffective (L)
New Jersey	589	No Reform
Missouri	437	Ineffective (L)
Ohio	331	Ineffective (L)
<b>Michigan</b>	<b>173</b>	<b>Effective (L &amp; LR)</b>
Utah	167	Enacted Prior to <i>Kelo</i>
Kentucky	161	Ineffective (L)
Texas	118	Ineffective (L)
Colorado	114	Ineffective (L)
<b>Pennsylvania</b>	<b>108</b>	<b>Effective (L)</b>
New York	89	No Reform
<b>Minnesota</b>	<b>83</b>	<b>Effective (L)</b>
Rhode Island	65	No Reform
Connecticut	61	Ineffective (L)
<b>Indiana</b>	<b>51</b>	<b>Effective (L)</b>
Arkansas	40	No Reform
Tennessee	37	Ineffective (L)
<b>Virginia</b>	<b>27</b>	<b>Effective (L)</b>
<b>Nevada</b>	<b>15</b>	<b>Effective (L &amp; CR)</b>
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	Effective (L)

<sup>267</sup> The data on known eminent domain condemnations by state between from 1998-2002 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).

<sup>268</sup> As of January 2008.

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	Ineffective (L)
New Hampshire	0	Effective (L & LR)
New Mexico	0	Effective (L)
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**

<i>State</i>	<i>Population</i> <sup>269</sup>	<i>Takings /1M people</i> <sup>270</sup>	<i>Effectiveness of Reform</i> <sup>271</sup>
<b>Pennsylvania</b>	<b>12,429,616</b>	<b>202.5</b>	<b>Effective (L)</b>
<b>Kansas</b>	<b>2,744,687</b>	<b>56.5</b>	<b>Effective (L)</b>
Maryland	5,600,388	22.7	Ineffective (L)
<b>Michigan</b>	<b>10,120,860</b>	<b>13.6</b>	<b>Effective (L &amp; LR)</b>
Rhode Island	1,076,189	11.2	No Reform
Connecticut	3,510,297	8.8	Ineffective (L)
Ohio	11,464,042	7.9	Ineffective (L)
<b>Virginia</b>	<b>7,567,465</b>	<b>7.7</b>	<b>Effective (L)</b>
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)
<b>Florida</b>	<b>17,789,864</b>	<b>3.8</b>	<b>Effective (L &amp; LR)</b>
Missouri	5,800,310	3.1	Ineffective (L)
New York	19,254,630	3	No Reform
Arizona	5,939,292	1.9	Effective (CR)
<b>Minnesota</b>	<b>5,132,799</b>	<b>1.8</b>	<b>Effective (L)</b>
<b>Alabama</b>	<b>4,557,808</b>	<b>1.8</b>	<b>Effective (L)</b>
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 (L & 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	Effective (L)
Hawaii	1,275,194	0	No Reform
Montana	935,670	0	Ineffective (L)
New Hampshire	1,309,940	0	Effective (L & LR)

<sup>269</sup> 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)

<sup>270</sup> Some takings affected more than one property.

<sup>271</sup> As of January 2008.

New Mexico	1,928,384	0	Effective (L)
Oregon	3,641,056	0	Effective (CR)
South Carolina	4,255,083	0	Ineffective (LR)
Utah	2,469,585	0	Enacted Prior to <i>Kelo</i>
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**

<i>State</i>	<i>Population</i> <sup>272</sup>	<i>Threatened Takings /1M people</i> <sup>273</sup>	<i>Effectiveness of Reform</i> <sup>274</sup>
Maryland	5,600,388	198.2	Ineffective (L)
<b>Florida</b>	<b>17,789,864</b>	<b>115.5</b>	<b>Effective (L &amp; LR)</b>
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	Ineffective (L)
<b>Michigan</b>	<b>10,120,860</b>	<b>17.1</b>	<b>Effective (L &amp; LR)</b>
<b>Minnesota</b>	<b>5,132,799</b>	<b>16.2</b>	<b>Effective (L)</b>
Arkansas	2,779,154	14.4	No Reform
<b>Pennsylvania</b>	<b>12,429,616</b>	<b>8.7</b>	<b>Effective (L)</b>
<b>Indiana</b>	<b>6,271,973</b>	<b>8.1</b>	<b>Effective (L)</b>
West Virginia	1,816,856	6.6	Ineffective (L)
Nebraska	1,758,787	6.3	Ineffective (L)
<b>Nevada</b>	<b>2,414,807</b>	<b>6.2</b>	<b>Effective (L &amp; CR)</b>
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	Effective (L)
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	Effective (L)
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	-	Ineffective (L)

<sup>272</sup> 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)

<sup>273</sup> Some takings affected more than one property.

<sup>274</sup> As of January 2008.

New Hampshire	1,309,940	-	Effective (L & LR)
New Mexico	1,928,384	-	Effective (L)
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
<b>Wisconsin</b>	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.

## **Appendix B:**

### **2007 Saint Index Survey Questions on Post-*Kelo* Reform**

**Question 9.**

In 2005, the US Supreme Court ruled that the government could take private property by eminent domain to give it to another private owner to promote economic development. Since that ruling, some states have passed new laws that restrict the government's power to take private property. Do you happen to know if your state is one of those that has passed such a law?

- A. Yes, my state has enacted at least one such law
- B. No, it has not enacted any laws like that
- C. Don't know

**Question 10** (asked only of those who chose answer A on Question 9).

Do you think that the new laws in your state will be effective in preventing the condemnation of private property for economic development?

- A. Very effective
- B. Somewhat effective
- C. Mostly ineffective
- D. Completely ineffective
- E. Don't know

Note: For purposes of Table 6, I counted the first two answers as “effective” and the second two as “ineffective” and marked “don't know” as automatically mistaken. Respondents in states that had passed ineffective reforms were given credit for “correct” answers if they picked either C or D. Those in states with effective laws similarly counted as “correct” if they chose either A or B.