Article

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

Ilya Somin†

† Assistant Professor of Law, George Mason University School of Law; coauthor of amicus curiae brief on behalf of the Institute for Justice and the Mackinac Center for Public Policy in *County of Wayne v. Hathcock*; author of amicus curiae brief on behalf of Jane Jacobs in *Kelo v. City of New London*. For helpful suggestions and comments, I would like to thank Bruce Benson, Dana Berliner, Steve Eagle, James Ely, Richard Epstein, Bruce Kobayashi, Andrew Koppelman, Janice Nadler, Paul Cargiuolo, Timothy Sandefur, and participants in the Northwestern University Law School Constitutional Law Colloqium, the George Mason University School of Law Levy Seminar, the Boston University Law and Economics Seminar, the University of Pennsylvania Law School Ad Hoc workshop, and the Florida State University Conference on Takings. Baran Alpturk, Susan Courtwright-Rodriguez, Kari DiPalma, Brian Fields, Marisa Maleck, and Anthony Messuri provided valuable research assistance. Susan Courtwright-Rodriguez deserves additional credit for helping to put together several of the tables in the Article. I would like also to thank the Saint Consulting Group for allowing me to use the data from their 2005 and 2006 Saint Index surveys, and particularly for permitting me to insert two questions about post-*Kelo* reform into their August 2007 survey.

The Supreme Court's decision in *Kelo v. City of New London* generated a massive backlash from across the political spectrum.[1] *Kelo*'s holding that the Public Use Clause of the Fifth Amendment 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

1. Kelo v. City of New London, 545 U.S. 469 (2005).

right and the left. Forty-three states have enacted post-*Kelo* reform legislation to curb eminent domain.[2]

The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history. The closest competitor is *Furman v. Georgia*,[3] which struck down all then-existing state death penalty laws. In response, some thirty-five states and the federal government enacted new death penalty statutes intended to conform to *Furman*'s requirements between 1972 and 1976.[4] The Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge v. Department of Public Health* mandating same sex marriage under its state constitution[5] has led some thirty other states to enact constitutional amendments banning gay marriage between 2003 and 2008.[6] Yet neither *Furman* nor *Goodridge* generated a legislative backlash that extended to as many states as *Kelo*. Moreover, the anti-gay marriage amendments cannot be solely attributed to the backlash against *Goodridge*, since they were also spurred by litigation that eventually led to pro-gay marriage state court decisions in Connecticut and California.[7] Thus, a strong case can be made that *Kelo* has drawn a more extensive legislative reaction than any other single court decision in American history.[8]

2. For the most complete and up to date listing of state post-*Kelo* legislative initiatives, see The Castle Coalition: Citizens Fighting Eminent Domain Abuse, Enacted Legislation Since *Kelo*, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510 (last visited May 17, 2009) [hereinafter Castle Coalition]. Other parts of the website also discuss proposed and enacted federal legislation.

3. 408 U.S. 238, 256–67 (1972).

4. *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).

5. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

6. For a list of states enacting constitutional bans on same-sex marriage, see NAT'L CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS (2008), http://www.ncsl.org/programs/cyf/samesex.htm.

7. *See* In re Marriage Cases, 183 P.3d 384, 450–52 & n.70 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5; Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008).

8. I do not consider cases such as *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), *superseded by* U.S. CONST. amend. XVI, and *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI, which were eventually overruled by constitutional amendment. It is difficult to say whether one constitutional amendment can be considered a more sweeping reaction than numerous state and federal laws.

In light of the massive and unprecedented backlash *Kelo* generated, 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 the political response demonstrates that legislative initiatives can protect property owners and that judicial intervention may be unnecessary.[9] Posner concluded that the political reaction to *Kelo* is "evidence of [the decision's] pragmatic soundness."[10] Such arguments dovetail with the traditional view that rights supported by majority public opinion will be protected by democratic political processes and do not require additional protection through judicial review.[11] As James Madison famously wrote in *The Federalist No. 10*, "[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[12] Only "[w]hen a majority is included in a faction," he argued, does "the form of popular government" enable it to threaten "the rights of other citizens."[13]

This Article challenges the validity of claims that the political backlash to *Kelo* has provided the same level of protection for property owners as would a judicial ban on economic development takings. It is the first comprehensive analysis of the *Kelo* backlash to date,[14] and finds that the majority of the new-

9. *See* Richard A. Posner, *The Supreme Court, 2004 Term–Foreword: A Political Court*, 119 HARV. L. REV. 31, 98 (2005) (claiming that "the strong adverse public and legislative reactions to the *Kelo* decision" are 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." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 286 (2005).

10. Posner, *supra* note 9, at 98.

11. For perhaps the best-known modern statement of this argument, see JOHN HART ELY, DEMOCRACY AND DISTRUST 87–88 (1980) (arguing that judicial review should focus on protecting citizens' rights to participate in the political process and minority groups against oppression by the majority).

12. THE FEDERALIST NO. 10 (James Madison).

13. *Id.*

14. The most complete earlier published analysis is Timothy Sandefur, *The "Backlash" So Far: Will Americans 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

ly 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.[15] Instead, I document the results of the *Kelo* backlash and provide a provisional explanation for the paucity of effective reform laws. By extension, my analysis also calls into question the traditional view that judicial review is not needed to protect individual rights that enjoy strong majority support from the general public. At the same time, however, it is important to recognize that a number of states have enacted effective post-*Kelo* reform laws. The political response to *Kelo* was far from completely futile.

Part I describes the *Kelo* decision and then documents the widespread backlash 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[16] on the left to Rush Limbaugh

of the pattern of effective and ineffective reforms than Sandefur does, as well as providing extensive public-opinion data. An article by Janice Nadler, Shari Seidman Diamond, and Matthew M. 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*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286 (Nathaniel Persily et al. eds., 2008). Noel D. Campbell, R. Todd Jewell, and Edward J. López's analysis of post-*Kelo* reform takes into account only thirty-seven state laws, and does not consider the federal response. *See* Edward J. López et al., Pass a Law, Any Law, State Legislative Responses to the *Kelo* Backlash (June 17, 2008) (unpublished manuscript, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022385. Andrew Morriss's forthcoming article only considers reforms enacted by state legislatures, omitting both the federal response and state referendum initiatives. *See* Andrew Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo (Univ. of Ill. Law & Econ. Research Paper No. LE07-037), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113582.

15. I do address these issues in Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 190–210, 233–44 (2007) [hereinafter Somin, *Grasping Hand*].

16. 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 cas-

on the right.[17] Traditional models of democratic politics predict that such a broad political consensus is likely to result in effective legislative action.[18]

Part II considers the state and federal political response to *Kelo*. Thirty-six state legislatures have enacted post-*Kelo* reform laws. However, twenty-two 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 recently 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 eleven 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 potential explanation for the pattern of ineffective post-*Kelo* reform. While there is overwhelming public support for measures banning economic development takings, some thirty of the forty-nine states that had not enacted reforms before *Kelo*, [19] as well as the federal government, have

es). For his statement denouncing *Kelo*, see Ralph Nader, Statement, June 23, 2005, http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html (last visited May 17, 2009) ("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.").

17. For Limbaugh's denunciation of *Kelo*, see *Rush Limbaugh: Liberals Like Stephen Breyer Have Bastardized the Constitution* (Free Republic radio transcript Oct. 12, 2005), *available at* http://www.freerepublic.com/focus/f-news/1501453/posts ("Government can kick the little guy out of his and her homes and sell those home [sic] 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.").

18. *See, e.g.*, ROBERT S. ERIKSON ET AL., STATEHOUSE DEMOCRACY 78–82 (1993) (arguing that state public policy closely follows majority public opinion).

19. This figure does not include the state of Utah, which enacted effective eminent domain reform prior to *Kelo*. *See* discussion of the Utah law in note 85 and accompanying text.

enacted either ineffective reforms, or none at all. I tentatively suggest 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.

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.[20] Many are often ignorant even of many basic facts about the political system.[21] 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.[22]

The publicity surrounding *Kelo* made 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 measures. 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.[23]

20. *See* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–304 (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*] (same).

21. Somin, *Voter Ignorance*, *supra* note 20, at 416–19.

22. For a more detailed discussion, see *id.* at 435–38.

23. *See* CTR. FOR ECON. & CIVIC OPINION AT UNIV. OF MASS./LOWELL, THE SAINT INDEX POLL qstn. 9 (2007) (on file with author) [hereinafter 2007 SAINT INDEX]. The survey included 1000 respondents in a nationwide random sam-

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 *Kelo* backlash, 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. The political ignorance hypothesis therefore better accounts for the available evidence than the leading alternative explanation: that the enactment of effective post-*Kelo* reforms was stymied by interest group lobbying.

I. *KELO* AND ITS BACKLASH

A. THE *KELO* DECISION[24]

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.[25] None of the properties were alleged to be "blighted or otherwise in poor condition."[26] The condemnations were initiated pursuant to a plan prepared by the New London Development Corporation (NLDC), a "private non-profit entity established . . . to assist the City in planning economic development."[27]

In a 5-4 decision, the Supreme Court endorsed the New London takings, upheld the economic development rationale for condemnation, and mandated broad judicial deference to government decision making on public use issues.[28] Justice Stevens' majority opinion endorsed a "policy of deference to legislative judgments in this field."[29] The Court rejected the property

ple. *See also* CTR. FOR ECON. & CIVIC OPINION AT UNIV. OF MASS./LOWELL, THE SAINT INDEX POLL (2005) (on file with author) [hereinafter 2005 SAINT INDEX].

24. For a more detailed discussion of *Kelo*'s holding, from which this brief summary is drawn, see Somin, *Grasping Hand*, *supra* note 15, at 223–33.

25. Kelo v. City of New London, 545 U.S. 469, 473–77 (2005).

26. *Id.* at 475.

27. *Id.* at 473.

28. *Id.* at 478–85.

29. *Id.* at 480.

owners' argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.[30] 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.[31] 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."[32]

Despite this result, *Kelo* may have actually represented a slight tightening of judicial scrutiny relative to earlier cases such as *Hawaii Housing Authority v. Midkiff,* which held that the public use requirement is satisfied so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[33] Moreover, the fact 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.[34] A fifth, Justice Anthony 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.[35] 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.

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

30. *Id.* at 485–86.
31. *Id.* at 487–88.
32. *Id.* at 488.
33. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
34. *Kelo*, 545 U.S. at 499–505 (O'Conner, J., dissenting); *id.* at 519–23 (Thomas, J., dissenting).
35. *Id.* at 491 (Kennedy, J., concurring).

Kelo by a lopsided 365-33 vote.[36] In addition to expected denunciations from conservatives and libertarians,[37] *Kelo* was condemned by numerous liberal political leaders including former President Bill Clinton,[38] then-Democratic National Committee Chair Howard Dean,[39] and prominent African-American politician and California Representative Maxine Waters.[40] The NAACP, the AARP, the liberal Southern Christian Leadership Conference, and others had filed a joint amicus brief in *Kelo* urging the Court to rule in favor of the property owners.[41] So too had the generally conservative Becket Fund for Religious Liberty.[42]

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*.[43] As Table 1 demonstrates, opposition to the decision cut across racial, ethnic, partisan, and gender lines.[44] The data in the table comes from two 2005 polls on *Kelo*, one conducted by the Saint Index and one by Zogby. In the Saint Index survey, which has the better-worded question of the two national polls,[45] *Kelo* was opposed by 77% of men, 84% of wom-

36. H.R. Res. 340, 109th Cong. 2005; 151 CONG. REC. H5592–93 (daily ed. June 29, 2005) (enacted); Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1 (describing massive anti-*Kelo* backlash).

37. *See, e.g.*, *Limbaugh*, *Liberals Like Stephen Breyer*, *supra* note 17. The New London property owners were represented by the Institute for Justice, a prominent libertarian public interest law firm. *See Kelo*, 545 U.S. at 471.

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

39. *See* KSL TV, *Howard Dean Speaks to Utah Democrats* (KSL television broadcast July 16, 2005), *available at* http://tv.ksl.com/index.php?nid=148&sid=6641 (quoting Dean as denouncing "a [R]epublican-appointed Supreme Court that decided they can take your house and put a Sheraton Hotel in there").

40. *See* Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005, at A1 (quoting Waters denouncing *Kelo* as "the most un-American thing that can be done").

41. *See* Brief for the National Ass'n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2004) (No. 04-108).

42. *See* Brief for the Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2004) (No. 04-108).

43. *See infra* tbl.1. The differences between the two surveys are likely due to a difference in question wording.

44. *See infra* tbl.1.

45. The Zogby survey question asked respondents whether they agreed

en, 82% of whites, 72% of African-Americans, and 80% of Hispanics.[46] 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 that they did so "strongly."[47] A 2006 Saint Index survey found that 71% of respondents supported reform laws intended to ban "the taking of private property for private development" projects, and 43% supported such laws "strongly."[48]

"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*?" ZOGBY INT'L, AMERICAN FARM BUREAU FEDERATION SURVEY 27 qstn. 28 (Nov. 2, 2005) [hereinafter ZOGBY INT'L] (emphasis added) (on file with author). 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 supported or opposed 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*." 2005 SAINT INDEX, *supra* note 23, qstn. 10. (emphasis added).

46. *See infra* tbl.1.

47. 2005 SAINT INDEX, *supra* note 23, qstn. 10.

48. *See* CTR. FOR ECON. & CIVIC OPINION AT UNIV. OF MASS./LOWELL, THE SAINT INDEX POLL qstn. 9 (2006) (on file with author) [hereinafter 2006 SAINT INDEX]; *see also* 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*

		Zogby Survey[49]		Saint Index Survey 2005[50]	
		% Agree	% Disagree	% Agree	% Disagree
	Total	2	95	18	81
Gender	Male	2	94	22	77
	Female	2	95	14	84
Racial/Ethnic Group[51]	White	2	94	17	82
	African-American	0	97	28	72
	Asian	0	100	26	68
	Hispanic/Latino	2	98	18	80
	Native American	-	-	7	93
Party Affiliation	Democrat	3	94	20	79
	Independent	<1	99	17	83
	Republican	3	92	14	85
Ideology	Liberal	-	-	22	77
	Moderate	-	-	18	81
	Conservative	-	-	17	82

49. ZOGBY INT'L, *supra* note 45, at 27 qstn. 28. 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?" *Id.* The totals given here differ slightly from those published by Zogby because they correct a minor clerical error in Zogby's tabulation.

50. 2005 SAINT INDEX, *supra* note 23, qstn. 10. 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?" *Id.*

51. The figures for Asians, Hispanics, and Native Americans may be unreliable because of small sample sizes. *See* ZOGBY INT'L, *supra* note 45, at 27 qstn. 28; 2005 SAINT INDEX, *supra* note 23 qstn. 10.

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

State	% Agreeing with Kelo	% Disagreeing
Connecticut[52]	8	88
Florida[53]	12	88
Kansas[54]	7	92

52. QUINNIPIAC UNIV. POLLING INST., QUINNIPIAC UNIVERSITY POLL: CONNECTICUT VOTERS SAY 11-1 STOP EMINENT DOMAIN, qstn. 33 (2005), http://www.quinnipiac.edu/x1296.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?" *Id.*

53. MASON DIXON POLLING & RESEARCH INC., FLORIDA VOTERS OPPOSE COURT DECISION ON EMINENT DOMAIN, STRONGLY SUPPORT STATE LAW TO PROTECT PROPERTY RIGHTS 5 (2005), 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?).

Id.

54. COLE HARGRAVE SNODGRASS & ASSOCS., A SURVEY OF 400 REGISTERED VOTERS IN KANSAS WITH A 200-SAMPLE SUBSET (2006), 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 use 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)?

Id. (survey question wording on file with author).

New Hampshire[55]	4	93
Minnesota[56]	5	91
North Carolina[57]	7	91
Pennsylvania[58]	9	90
Tennessee[59]	8	86

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 93 percent of respondents.[60] The state surveys each use different question wording and therefore are

55. UNIV. OF N.H. SURVEY CTR., THE GRANITE STATE POLL (2005), http://www.unh.edu/survey-center/news/pdf/gsp2005_summer_sc072005.pdf. 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?

Id.

56. DECISION RES. LTD., MINNESOTA AUTO DEALERS ASSOCIATION SURVEY (2006), http://www.castlecoalition.org/pdf/polls/Survey-for-Strib.pdf. Question wording: "What is your opinion–do you support allowing local governments to use eminent domain to take private property for another private development project? Do you feel strongly this way?" *Id.*

57. JOHN WILLIAM POPE CIVITAS INST., JOHN WILLIAM POPE CIVITAS INSTITUTE SURVEY (2005), 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?" *Id.*

58. LINCOLN INST. OF PUB. OPINION RESEARCH, INC., KEYSTONE BUSINESS CLIMATE SURVEY (2006), 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?" *Id.*

59. SOC. SCI. RESEARCH INST. AT THE UNIV. OF TENN., KNOXVILLE, TENNESSEE POLL 6 (2006), http://web.utk.edu/~ssriweb/National_Issues.pdf. Question wording: "Sometimes the property taken through eminent domain is given to other private citizens for commercial development, rather than for public uses, such as road or schools. Would you say you favor or oppose this use of eminent domain?" *Id.*

60. *See supra* tbl.2.

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 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. This Part considers the effectiveness of the state and federal legislative responses to *Kelo*. Legislative reforms are classified as "effective" so long as they provide property owners with at least some significant protection against economic-development condemnations beyond that available under preexisting law. Thus, even if the new law does not categorically ban economic-development takings, it is still considered "effective" if it forbids them in some range of cases. For example, the Pennsylvania law is classified as effective despite the fact that it excludes, for a period of five years, condemnations occurring in that state's most populous urban areas.[61] On the other hand, reform laws are classified as "ineffective" if they forbid economic-development condemnations but essentially allow them to continue under another name, as in the case of states with broad definitions of "blight" that allow virtually any property to be declared blighted and condemned.[62]

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 between laws enacted by referendum and those adopted by state legislatures: the former are generally much stronger

61. For a discussion of this law, see *infra* notes 198–201 and accompanying text.

62. For an analysis of these types of ineffective laws, see *infra* Part II.A.1.a.

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.

Table 3:
State Post-*Kelo* Reform Laws[63]

Type of Law			Number of States
Effective	Enacted by Legislature		14
	Enacted by Referendum	Citizen-initiated	4
		Legislature-initiated	2 or 3
Ineffective	Enacted by Legislature		22
	Enacted by Referendum	Citizen-initiated	1
		Legislature-initiated	3 or 4
No Post-*Kelo* Reforms Enacted			6[64]

Table 4:
Effectiveness of Reform by State

State	**Effectiveness of Reform**[65]
Alabama	Effective (L)
Alaska	Ineffective (L)
Arizona	Effective (CR)
Arkansas	No Reform
California	Ineffective (L)
Colorado	Ineffective (L)
Connecticut	Ineffective (L)

63. The total number of states listed adds up to more than forty-three because a few states had effective legislative reforms followed by ineffective legislative-referendum initiatives; such states are thus counted in both of those categories. The state of Florida enacted legislative and referendum initiative reforms that were both effective and is counted in both "effective" categories. Nevada had an effective referendum initiative followed by an ineffective legislative reform.

64. This figure does not include the state of Utah, which abolished both economic development and blight condemnations before *Kelo*. *See infra* note 81 and accompanying text. 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 infra* Part II.A.1.b.vii.

65. As of January 2008. "L" refers to passed state legislation; "CR" refers to passed citizen-initiated referenda; "LR" refers to passed legislature-initiated referenda.

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

Table 5 shows that the enactment of effective post-*Kelo* reform seems unrelated to the degree to which the state in

question had previously engaged in private-to-private condemnation. That is, only seven of the twenty states with the greatest number of private-to-private takings between 1998 and 2002 have enacted effective post-*Kelo* reforms.

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*.[66] 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.[67] Many cases are unpublished, and many other condemnations go unreported in the press.[68] Some 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.[69] Finally, the figures unfortunately do not separate 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 less likely to have enacted effective post-*Kelo* reforms than others.[70]

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.[71] 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 condemnations have enacted effective reforms.[72] The same is true of just seven of the twenty states with the

66. *See* DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf. Berliner was one of the two Institute for Justice lawyers who represented Susette Kelo and the other New London property owners. *See* Kelo v. City of New London, 545 U.S. 469, at 469 (2005).

67. *See* BERLINER, *supra* note 66, at 2.

68. *Id*.

69. *Id*. at 3.

70. *See infra* tbl.5.

71. *See infra* tbls.A1–A3.

72. *See infra* tbl.A1.

most private-to-private condemnations relative to population size.[73]

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

State	No. of Takings[74]	Effectiveness of Reform[75]
Pennsylvania	2,517	Effective (L)
California	223	Ineffective (L)
Kansas	155	Effective (L)
Michigan	138	Effective (L & LR)
Maryland	127	Ineffective (L)
Ohio	90	Ineffective (L)
Florida	67	Effective (L & LR)
Virginia	58	Effective (L)
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	Ineffective (L)
Arizona	11	Effective (CR)
Texas	11	Ineffective (L)
Washington	11	No Reform
Minnesota	9	Effective (L)
Alabama	8	Effective (L)
Illinois	8	Ineffective (L)
West Virginia	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)

73. *See infra* tbl.A2.
74. Some takings affected more than one property.
75. As of January, 2009.

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	0	No Reform
Montana	0	Ineffective (L)
New Hampshire	0	Effective (L & LR)
New Mexico	0	Effective (L)
Oregon	0	Effective (CR)
South Carolina	0	Ineffective (LR)
Utah	0	Enacted Prior to *Kelo*
Vermont	0	Ineffective (L)
Wisconsin	0	Ineffective (L)

To be sure, 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.[76] Michigan's reform law, while quite strong,[77] came on the heels of a state supreme court decision that had already banned *Kelo*-style economic development takings.[78]

In addition, the Institute for Justice figures are only approximate, and it is likely that they underestimate the number of economic-development condemnations in some states.[79] 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 ineffec-

76. *See infra* notes 192–196 and accompanying text.

77. *See infra* note 188 and accompanying text.

78. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 784 (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. The new Michigan law does, however, go beyond *Hathcock* in limiting blight condemnations that might not have been prevented by the court decision. *See id.* at 1033–39.

79. See, for example, *infra* Part II.A.2 for a discussion of the underestimation of the number of takings in Minnesota.

tive reforms or none at all.[80] 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 early 2009, thirty-six state legislatures have enacted post-*Kelo* reforms. The state of Utah effectively banned economic development takings in a statute enacted several months before *Kelo* was decided by the Supreme Court.[81] However, twenty-two of the thirty-six 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" benefits) 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 fit the layperson's intuitive notion of blight: dilapidated, dangerous, or disease-ridden neighborhoods. For example, in *Berman v. Parker,* the well-known 1954

80. *See supra* tbl.5.

81. *See* UTAH CODE ANN. § 17B-4-202 (2004) (current version at UTAH CODE ANN. § 17C-1-202 (2006)); *see also* Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, 8 ENV'T & CLIMATE NEWS, June 2005, at 1 (describing the politics behind the Utah law). In March 2006, Utah partially rescinded its ban on blight condemnations. *See* UTAH CODE ANN. § 17C-2-503 (amended 2007).

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."[82] 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."[83]

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,[84] and downtown Las Vegas[85] 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.[86] For decades, courts have interpreted broad definitions of blight in ways that allow the condemnation of almost any property; if virtually any property can be condemned as blighted, a ban on economic development takings would be essentially irrelevant.[87]

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

82. Berman v. Parker, 348 U.S. 26, 32 (1954).

83. *Id.*

84. *In re* W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 125–26 (N.Y. App. Div. 2002).

85. City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12–15 (Nev. 2003).

86. *See generally* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394–96 (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 infra* notes 175–178 and accompanying text for a discussion of the relevant laws; *see also* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight,* 31 FORDHAM URB. L.J. 305, 305–07 (2004) (describing very broad use of blight designations to facilitate condemnation).

87. *See* Gordon, *supra* note 86, at 320–23; Luce, *supra* note 86, at 397–400.

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,[88] Colorado,[89] Missouri,[90] Montana,[91] Nebraska,[92] North Carolina,[93]

88. ALASKA STAT. § 09.55.240(a)(2) (2008) (exempting preexisting public uses declared in state law from a ban on economic development takings); *Id.* § 18.55.950(2) ("'[B]lighted area' means an area, other than a slum area, that by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or improvements, tax or special assessment delinquency exceeding the fair value of the land, improper subdivision or obsolete platting, or the existence of conditions that endanger life or property by fire and other causes, or any combination of these factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its condition and use.").

89. COLO. REV. STAT. § 31-25-103(2) (2008) (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"); *Id.* § 38-1-101(2)(b) (allowing condemnation for the "eradication of blight").

90. MO. REV. STAT. § 100.310.2 (2008) (defining "blighted area" 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"); *Id.* § 353.020.2 (defining "blighted area" as "that portion of the city . . . that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes"); *id.* § 523.271.2 (exempting blight condemnations from ban on "economic development" takings). A recent Missouri Supreme Court decision has construed section 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 Prop., 225 S.W.3d 431, 433 (Mo. 2007). The decision notes, however, that proof of the existence of "social liability" might be demonstrated by providing evidence "concerning the

Ohio,[94] Texas,[95] Vermont,[96] and West Virginia.[97] Obviously, any

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* State *ex rel.* Atkinson v. Planned Indus. Expansion Auth., 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).

91. MONT. CODE. ANN. § 7-15-4206(2) (2007) ("'Blighted area' means 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: (a) the substantial physical dilapidation, deterioration, age obsolescence, or defective construction, material, and arrangement of buildings or improvements, whether residential or nonresidential."); *id.* § 70-30-102 (banning economic development condemnations, but retaining most of the broad definition of blight outlined in section 7-15-4206(2)(a)).

92. NEB. REV. STAT. § 18-2103 (2007) (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); *id.* § 76-701 (exempting "blight" condemnations from ban on economic development takings).

93. N.C. GEN. STAT. § 160A-503(2) (2007) ("'Blighted area' shall mean an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare."); *id.* § 160A-515 (exempting blight condemnations from restrictions on economic development takings).

94. OHIO REV. CODE ANN. §§ 1.08, 303.26(E) (LexisNexis 2008) ("'Blighted area' and 'slum' mean an area in which at least seventy per cent of the parcels are blighted parcels and those blighted parcels substantially impair or arrest the sound growth of the state or a political subdivision of the state, retard the provision of housing accommodations, constitute an economic or social liability, or are a menace to the public health, safety, morals, or welfare . . . ."). To qualify as a "blighted parcel," a parcel must meet at least two of seventeen vague and general conditions such as "deterioration," "age and obsolescence," "faulty lot layout," being "located in an area of defective or inadequate street layout," and "overcrowding of buildings." *Id.* § 108.(B)(2)(a-p). Virtually any area is likely to meet two or more of these criteria. *See also* S.B. 167, § 2(A), 126th Gen. Assem. (Ohio 2005) (exempting blight condemnations from temporary moratorium on economic development takings).

95. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon 2008) (exempting

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."[98] This additional condition is unlikely to be a significant constraint because almost any condition that impedes economic development could be considered a "menace to the 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" if its current state impedes future development.[99] 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."[100] Significantly, searches on Westlaw and Lexis do not reveal any published state court opinions that

condemnations "to eliminate an existing affirmative harm on society from slum or blighted areas" from the ban on economic development takings); TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005) ("'Blighted area' means an area that is not a slum area, but 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.").

96. VT. STAT. ANN. tit. 12, § 1040 (2008) (exempting blight condemnations from ban on economic development takings); *Id.* tit. 24, § 3201(3) (defining "blighted area" 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").

97. W. VA. CODE ANN. § 16-18-3 (LexisNexis 2006) (defining "blighted area" as an area which, due to a number of factors such as deterioration or inadequate street layout, "substantially impairs or arrests the sound growth of the community, 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 present condition and use"); *Id.* § 16-18-6 (exempting blight condemnation from ban on redevelopment takings).

98. *See supra* notes 88–97.

99. Panama City Beach Cmty. Redev. Agency v. State, 831 So. 2d 662, 668–69 (Fla. 2002).

100. City of Phoenix v. Superior Ct., 671 P.2d 387, 391–93 (Ariz. 1983).

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.[101]

ii. Other Broad Blight Exemptions

Eight 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,[102] which defined 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."[103] 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 declined three of the last five years.[104] The concept of "detriment" to "public welfare" is extremely broad and surely includes detriment to local economic welfare and development. The list of factors 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.[105] Thus, the Illinois law would forbid few if any economic development takings.

The new Nevada statute bans all private-to-private condemnations,[106] but leaves open an exception for blight takings.[107] Current Nevada law defines blight very broadly, allowing an area to be declared blighted so long as it meets at least

101. As far as I am aware, there are no unpublished decisions with such a holding.

102. S.B. 3086, 94th Gen. Assem., § 1-1-5 (Ill. 2006).

103. 65 ILL. COMP. STAT. 5/11-74.4-3(a)(1) (2006).

104. *Id.*

105. The statute does require that at least five of the listed factors be present. *Id.* However, this is little obstacle to obtaining a blight declaration because so many are conditions that exist in almost any area.

106. NEV. REV. STAT. § 37.010(1)(q) (2007).

107. *Id.*

four of eleven factors.[108] The possible factors include 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 deterioration and added costs to the taxpayer . . . ."[109] 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.[110] 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.[111]

Kentucky's post-*Kelo* reform law likewise retains a very broad preexisting definition of blight.[112] The law allows condemnation of property for "urban renewal and community development" in "blighted" or "slum" areas.[113] 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 and welfare."[114]

Maine's reform statute also incorporates a broad definition of blight from prior legislation.[115] Prior Maine law defined

108. *Id.* § 279.388.

109. *Id.*

110. 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 section 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.

111. See *infra* Part II.A.3 for a discussion of Nevada's referendum initiative.

112. *See* KY. REV. STAT. ANN. § 99.340(2) (LexisNexis 2004).

113. *Id.* § 99.370(6).

114. *Id.* § 99.340.

115. ME. REV. STAT. ANN. tit. 30-A, § 5101 (1964); see also *id.* tit. 1, § 816 (2008) (exempting blight condemnations from ban on economic development condemnations).

blight as including areas in which properties suffer from "[d]ilapidation, deterioration, age or obsolescence."[116] For condemnations that further "urban renewal" projects, detriment to "public health, safety, morals or welfare" may lead to a blight designation.[117] Condemnation for "community development" can occur in areas that are considered blighted under the same definition, except that threats to "morals" are not included.[118]

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

> "Blighted areas" are areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community. Welfare of the community does not include solely a loss of property value to surrounding properties nor does it include the need for increased tax revenues.[119]

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 "'[w]elfare 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."[120] 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.[121]

Rhode Island's reform law is the last post-*Kelo* law enacted to date.[122] It mandates that "[n]o entity subject to the provi-

116. ME. REV. STAT. ANN. tit. 30-A, § 5101 (1964).

117. *Id.* § 5102.

118. *Id.* § 5201.

119. TENN. CODE ANN. § 13-20-201(a) (2008).

120. *Id.*

121. The best-known case is *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by 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. *Id.* n.15 (Fitzgerald, J., dissenting). For discussion, see generally Somin, *supra* note 78.

122. R.I. GEN. LAWS § 42-64.12-1 (Supp. 2008).

sions of the chapter shall exercise eminent powers to acquire any property for economic development purposes unless it has explicit authority to do so and unless it conforms to the provisions of this section."[123] The requirement of having "explicit authority" is not a meaningful constraint because state law already gives virtually all local government the power to condemn property in "arrested blighted areas," "deteriorated blighted areas," and "slum blighted areas."[124] All three of these concepts are defined extremely broadly.[125] The new Rhode Isl-

123. *Id.* § 42-64.12-7.

124. *Id.* § 45-31-6 (1999).

125. *Id.* § 45-31-8. An "arrested blighted area" is defined as:

> [A]ny area which, by reason of the existence of physical conditions including, but not by way of limitation, the existence of unsuitable soil conditions, the existence of dumping or other insanitary or unsafe conditions, the existence of ledge or rock, the necessity of unduly expensive excavation, fill or grading, or the necessity of undertaking unduly expensive measures for the drainage of the area or for the prevention of flooding or for making the area appropriate for sound development, or by reason of obsolete, inappropriate, or otherwise faulty platting or subdivision, deterioration of site improvements, inadequacy of utilities, diversity of ownership of plots, or tax delinquencies, or by reason of any combination of any of the foregoing conditions, is unduly costly to develop soundly through the ordinary operations of private enterprise and impairs the sound growth of the community.

Id. § 45-31-8(2). A "deteriorated blighted area" is:

> [A]ny area in which there exist buildings or improvements, either used or intended to be used for living, commercial, industrial, or other purposes, or any combination of these uses, which by reason of:
>
> (i) Dilapidation, deterioration, age, or obsolescence;
>
> (ii) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities;
>
> (iii) High density of population and overcrowding,
>
> (iv) Defective design or unsanitary or unsafe character or conditions of physical construction;
>
> (v) Defective or inadequate street and lot layout; and
>
> (vi) Mixed character, shifting, or deterioration of uses to which they are put, or any combination of these factors and characteristics, are conducive to the further deterioration and decline of the area to the point where it may become a slum blighted area as defined in subdivision (18), and are detrimental to the public health, safety, morals, and welfare of the inhabitants of the community and of the state generally. A deteriorated blighted area need not be restricted to, or consist entirely of, lands, buildings, or improvements which of themselves are detrimental or inimical to the public health, safety, morals, or welfare, but may consist of an area in which these conditions exist and injuriously affect the entire area.

Id. § 45-31-8(6). Finally, a "slum blighted area" is:

> [A]ny area in which there is a predominance of buildings or improvements, either used or intended to be used for living, commercial, industrial, or other purposes, or any combination of these uses, which

and reform law explicitly reaffirms the power of local redevelopment agencies to condemn property under these blight statutes.[126] Indeed, the new law may actually increase the power of redevelopment agencies to condemn property, because it allows them to take any property for the purposes of "correcting conditions adversely affecting public health, safety, morals, or welfare," and this authorization is "not limited to" areas that have been declared blighted.[127]

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

---

> by reason of:
>
> (i) dilapidation, deterioration, age, or obsolescence;
>
> (ii) inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities;
>
> (iii) high density of population and overcrowding;
>
> (iv) defective design or unsanitary or unsafe character or condition of physical construction;
>
> (v) defective or inadequate street and lot layout; and
>
> (vi) mixed character or shifting of uses to which they are put, or any combination of these factors and characteristics, are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime; injuriously affect the entire area and constitute a menace to the public health, safety, morals, and welfare of the inhabitants of the community and of the state generally. A slum blighted area need not be restricted to, or consist entirely of, lands, buildings, or improvements which of themselves are detrimental or inimical to the public health, safety, morals, or welfare, but may consist of an area in which these conditions predominate and injuriously affect the entire area.

Id. § 45-31-8(18).

126. *Id.* § 42-64.12-6(d) (Supp. 2008) (noting the power to condemn property in order to "[e]liminat[e] an identifiable public harm and/or correct[] conditions adversely affecting public health, safety, morals, or welfare, including, but not limited to, the elimination and prevention of blighted and substandard areas, as defined by chapter 45-31").

127. *Id.*

> moderate income families, or is a menace to the public health and safety in its present condition and use.[128]

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 "the presence of a substantial number of slum *or* deteriorated structures,"[129] 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."[130] 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.[131]

However, the statute also exempts residential property consisting of a single dwelling unit from condemnation for blight alleviation unless it has: 1) "been abandoned" or 2) "the

128. IOWA CODE § 6A.22 (2008).
129. *Id.* (emphasis added).
130. *Id.*
131. WIS. STAT. § 32.03(6)(a) (2007–08).

crime rate in [or near] the property is at least 3 times the crime rate in the remainder of the municipality."[132] Thus, the Wisconsin law provides considerable protection for single-family homes, but allows nonresidential properties and many multi-family homes to be condemned under a broad definition of blight.

b. State Laws that Are Ineffective for Other Reasons[133]

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 situations 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.[134] None of the five even comes close to forbidding condemnations for economic development. Four of the five laws create minor new procedural hurdles for local governments seeking to condemn property.[135] As eminent domain scholar and litigator Timothy Sandefur has shown in a detailed analysis, none of the laws impose restrictions that will significantly impede the exercise of eminent domain in California.[136]

Senate Bill 1206 attempts to narrow the definition of blight, but still leaves it broad enough to permit the condemnation of almost any property that local governments might want to take 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.[137] Both lists of

132. *Id.*

133. The analysis of the Delaware, Ohio, and Texas laws is in large part derived from Somin, *Grasping Hand, supra* note 15, at 245–52.

134. *See* S.53, 1206, 1210, 1650, 1809, 2006 Leg. (Cal. 2006).

135. *See* S.53, 1210, 1650, 1809, 2006 Leg. (Cal. 2006).

136. *See* Timothy Sandefur, PLF on Eminent Domain, *Gov. Schwarzenegger Signs Mealy-Mouthed Property Rights Protection*, Sept. 29, 2006, http://eminentdomain.typepad.com/my_weblog/2006/09/gov_schwarzeneg.html.

137. S.1206 § 2(b)(2) (requiring that blighted areas meet physical and eco-

qualifying conditions include vague criteria that could apply to almost any neighborhood. The list of "physical conditions" includes "conditions that prevent or substantially hinder the viable use or capacity of buildings or lots," and "[a]djacent or nearby incompatible land uses that prevent the development of those parcels or other portions of the project area."[138] 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," "[a]bnormally high business vacancies," and "abnormally low lease rates."[139] 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."[140] 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.[141] 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."[142] In practice, it is likely impossible to prove

nomic conditions defined in section 3).

138. *Id.* § 3.

139. *Id.*

140. CONN. GEN. STAT. § 8-193(b)(1) (2009).

141. *See generally id.* § 8-124 (allowing use of eminent domain by redevelopment agencies); *id.* § 8-125(2) (stating that "redevelopment areas" 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.* § 8-125(7) (providing a list of numerous conditions only one of which must 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 only because they were located in the development area.

142. *See* CONN. GEN. STAT. §§ 8-125 to -133 (2009) (outlining procedures for condemning property in "redevelopment areas").

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 originated 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.

iii. Delaware

The Delaware bill is arguably the least effective of all the post-*Kelo* laws enacted so far.[143] 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: (a) In a certified planning document; (b) At a public hearing held specifically to address the acquisition; or (c) In a published report of the acquiring agency."[144] This bill does little more than restate current constitutional law, which already requires that condemnation be for a "recognized public use."[145] Indeed, the *Kelo* majority notes that "'purely private taking[s]'" are constitutionally forbidden.[146] 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."[147]

143. Just as this article went to press, the Delaware state legislature enacted a new reform law that seems to provide much stronger protection for property owners against blight and economic development takings. *See* Del. Sen. Bill 7 (codified at DEL. CODE ANN. tit. 29, § 9501A) (signed into law Apr. 9, 2009), *available at* http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/SB+7?Opendocument. Unfortunately time constraints make it impossible to analyze the new law here.

144. DEL. CODE ANN. tit. 29 § 9505(15) (Supp. 2008).

145. *See Kelo*, 545 U.S. at 472.

146. *Id.* at 477 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 241, 245 (1984)).

147. DEL. CODE. ANN. tit. 39 § 9505(15).

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.[148] 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.[149]

v. Ohio

The main shortcoming of the Ohio law is its temporary nature. The new law mandated that:

> [U]ntil December 31, 2006, no public body shall use eminent domain to take . . . private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person."[150]

Even within the short period of its effect, the law probably only had a very limited impact. While it forbade condemnations where economic development was the "primary purpose," nothing prevented such takings if the community could cite some other objective to which the development objective was an adjunct or complement.[151] Creative local governments could easily come up with such proposals. Furthermore, the Ohio law explicitly exempted blighted areas from its scope;[152] the definition of blight under Ohio law is broad enough to cover almost any

148. *See* MD. CODE ANN. REAL PROP. § 12-105.1(a) (West 2007).

149. *See* MD. CONST. art. III, § 61. The Maryland Constitution allows the use of eminent domain in "slum or blighted areas" and defines 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.

150. An Act to Establish a Moratorium on Eminent Domain, S.B. 167 § 2, Oh. Gen. Assem. (Oh. 2005) (codified at OHIO REV. CODE ANN. § 1426 (LexisNexis 2005 Bulletin #5)).

151. *Id.*

152. *Id.*

area.[153] 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."[154] 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.[155] 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.[156] In July 2007, the Ohio state legislature enacted a new reform law that adopted the definition of blight recommended by the Commission.[157] That definition, however, provides little if any new protection for property owners.[158]

vi. Texas

Texas' post-*Kelo* legislation is likely to be almost completely ineffectual because of its major loopholes. It forbids condem-

153. *See* OHIO REV. CODE ANN. § 303.26(E) (LexisNexis 2003) (defining blight to include deteriorating 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").

154. An Act to Establish a Moratorium on Eminent Domain, S.B. 167 § 3, Oh. Gen. Assem. (Oh. 2005) (codified at OHIO REV. CODE ANN. 1426 (LexisNexis 2005 Bulletin #5)).

155. For a detailed analysis of the Commission's composition, see Somin, *Grasping Hand*, *supra* note 15, at 249.

156. *See* FINAL REPORT OF THE TASK FORCE TO STUDY EMINENT DOMAIN 12, Aug. 1, 2006 (on file with 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 "[f]aulty lot layout in relation to size, adequacy, accessibility, or usefulness." *Id.* Others include "[e]xcessive dwelling unit density" (without defining what constitutes "excessive"), and "[a]ge and obsolescence" (also undefined). *Id.* Like the old definition, the new one would still permit virtually any property to be designated as "blighted." For the old definition, see *supra* note 153.

157. *See* OHIO REV. CODE ANN. §§ 1.08, 303.26 (LexisNexis 2008).

158. *See supra* note 156.

nations 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 . . . .[159]

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."[160] 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.[161]

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."[162]

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."[163] Virtually any project that promotes economic development can also be plausibly characterized as advancing "community development." It is difficult to see how the two concepts can be meaningfully distinguished in real world situations. Indeed, Texas law defines "community development" to permit condemnation of any property that is "inappropriately developed from the standpoint of sound community development and growth."[164] It is surely reasonable to suppose that "sound community development and growth" includes economic "development and growth."[165]

159. TEX. GOV'T CODE ANN. § 2206.001(b) (Vernon 2008).
160. *Id.*
161. *Id.*
162. Kelo v. City of New London, 545 U.S. 469, 478 (2005).
163. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernons 2008).
164. TEX. LOC. GOV'T CODE ANN. § 373.005(b)(1)(A) (Vernons 2005).
165. *Id.*

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.[166] 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."[167] 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."[168] 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 elements of the Texas law are swallowed up by the "community development" exception.[169]

vii. Washington

The state of Washington's recent eminent domain law[170] is not a true response to *Kelo*. 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.[171] Because

166. § 2206.001(e).

167. *See id.* § 2206.001(b)(3) (referencing other Texas laws allowing takings for community development or improving blighted areas). These statutes are listed as the only broad exceptions to the bill's ban on takings "for economic development purposes." *Id.* § 2206.001(b).

168. § 373.005(b)(1)(A).

169. Sandefur is more optimistic about these two provisions, calling them "significant improvements." Sandefur, *supra* note 14, at 734. He does not, however, consider the possibility that they can be circumvented by means of the "community development" exception.

170. *See* Act of Apr. 17, 2007, ch. 68, 2007 Wash. Sess. Laws 268 (codified in scattered sections of REV. CODE WASH. ch.8 (2007)).

171. *See* Cent. Puget Sound Reg'l Transp. Auth. v. Miller, 128 P.3d 588 (Wash. 2006). The state's Senate Committee on the Judiciary cited this deci-

the new law was neither 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 noticeably alter the quantitative data discussed in Part III,[172] 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,[173] and Washington already had a narrow definition of blight.[174]

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 abolish condemnations for economic development, but also ban all blight condemnations, even those that occur in areas that would meet a strict definition of the term.[175] 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*.[176] Unlike Utah

sion as the reason for passing the new Washington law. *See* S. REPORT, Substitute H.B. 1458, 60th Leg. (Wash. 2007), *available at* http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bill%20Reports/Senate/1458-S.SBR.pdf.

172. 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.

173. *See* Hogue v. Port of Seattle, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property so that an agency could "devote it to what it consider[ed] a higher and better economic use").

174. *See* WASH. REV. CODE § 35.80A.010 (2008) (defining blight narrowly for purposes of condemnation).

175. *See* Act of May 11, 2006, ch. 2006–11, 2006 Fla. Laws 214 (codified in scattered sections of FLA. STAT.); Act of Apr. 3, 2007, 2007 N.M. Laws 3873, ch. 330 (codified in scattered sections of N.M. STAT.). 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." Act of Apr. 3, 2007, 2007 N.M. Laws 3873, ch. 330, § 3-18-10(B)(3) (codified in scattered sections of N.M. STAT.).

176. *See supra* note 81. However, Utah partially rescinded its ban on blight condemnations in a more recent bill. *See* Act of Mar. 21, 2007, ch. 379, 2007 Utah Laws 2326 (codified in scattered sections of UTAH CODE ANN. § 17C) (permitting blight condemnations if approved by a supermajority of property

and New Mexico, which made little use of economic development and blight takings even before the enactment of their new laws,[177] Florida has an extensive record of dubious economic development and blight condemnations.[178] Due to its broad scope and enactment 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."[179] This forbids economic development takings, and also greatly reduces the political incentive to engage in blight condemnations, since local governments can no longer use such takings to transfer property to politically influential interests.[180] Kansas's new law is similar to South Dakota's insofar as it bans nearly all private-to-private condemnations.[181] 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.[182] Blight condemnations are limited to cases where the property in question is "unsafe for occupation by humans under the building codes."[183]

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

owners in the affected area).

177. A report prepared by the Institute for Justice (IJ) does not list a single private-to-private condemnation in Utah during the entire five-year period from 1998 to 2002. BERLINER, *supra* note 66, at 196. 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.

178. *Id.* at 52–58.

179. S.D. CODIFIED LAWS § 11-7-22.1(1) (Supp. 2008).

180. For arguments that this is a major problem with economic development and blight condemnations, see Somin, *Grasping Hand*, *supra* note 15, at 190–205, 264–71.

181. *See* Act of May 18, 2006, ch. 192, 2006 Kan. Sess. Laws 1345, §§ 1–2 (codified at KAN. STAT. ANN. §§ 26-501a, 26-501b (Supp. 2008)).

182. KAN. STAT. ANN. § 26-501a(b) (Supp. 2008).

183. *Id.* § 26-501b(e).

areas that fit the intuitive definition of the term. This formula was successfully used in the Alabama,[184] Georgia,[185] Idaho,[186] Indiana,[187] Michigan,[188] New Hampshire,[189] Virginia,[190] and

184. *See* ALA. CODE § 24-2-2(c) (2008) (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); *id.* § 11-47-170(b) (forbidding condemnations that "transfer" nonblighted property to private parties).

185. *See* GEO. CODE ANN. § 22-1-1(1), (10) (Supp. 2008) (forbidding economic development takings, and defining blight to include primarily risks to health, the environment, and safety, while excluding "esthetic" considerations).

186. *See* IDAHO CODE ANN. § 7-701A(2)(b) (Supp. 2008) (forbidding condemnations "[f]or 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 risk of harm" to public safety, health, morals, or welfare). The burden of proof for showing that blight exists is on the government. *See id.* 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 risk of harm" to public "morals" or "welfare," concepts that could be defined broadly enough to include most economic development takings. *Id.* § 7-701A(2)(b)(ii).

187. *See* IND. CODE § 32-24-4.5-7 (Supp. 2008) (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 is "otherwise dangerous").

188. *See* MICH. COMP. LAWS § 213.23(1), (3), (8) (Supp. 2008) (banning condemnations for "general economic development" and limiting the definition of "blight" to property that is a "public nuisance," an "attractive nuisance," poses a threat to public safety, such as a fire hazard, or is abandoned). The law does have a potential loophole insofar 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.* § 213.23(8)(g). 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.

189. *See* N.H. REV. STAT. ANN. § 205:3-b (Supp. 2008) (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").

190. *See* VA. CODE ANN. § 1-219.1 (2008) (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 pub-

Wyoming[191] statutes. In 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,"[192] and imposes a restrictive definition of blight.[193] 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.[194] These two cities, by far the state's largest urban areas, are also the sites of many of the state's most extensive private-to-private takings.[195] Although the provision exempting the two cities is set to expire on December 31, 2012,[196] it is possible that legisla-

lic 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.* § 1-219.1(B).

191. *See* WYO. STAT. ANN. § 1-26-801(c) (2007) ("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 of protecting "public health and safety" is functionally equivalent to allowing condemnation under an extremely narrow definition of blight.

192. 26 PA CONS. STAT. § 204(a) (Supp. 2008).

193. *See id.* § 205(b), (c).

194. *See id.* § 203(4) (excluding areas designated as blighted within "a city of the first or second class," which under law turns out to be Pittsburgh and Philadelphia).

195. *See* BERLINER, *supra* note 66, at 173, 179–81 (describing major condemnation projects in the two cities).

196. *See* § 203(4).

tors will be able to extend the deadline, once the public furor over *Kelo* has subsided.

Minnesota's 2006 law was similar. It too banned economic development takings and restricted the definition of blight,[197] while creating some major geographic exemptions. In this case, the exemptions included 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.[198] A survey by the pro-*Kelo* League of Minnesota Cities found that twenty-seven of the thirty-four 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 was exempt from the state's 2006 post-*Kelo* reform law.[199] Thus, the new law impacted only a small fraction of those cities that actually engage in the practices it sought to curb. Like Pennsylvania's exemptions, Minnesota's were time-limited, scheduled to expire in five years.[200] However, the Minnesota exemptions were superseded by a new law enacted in early 2009, just as this article went to press.[201]

197. *See* MINN. STAT. § 117.025 (2008) (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).

198. *Id.* § 117.011 (2008) (setting out exceptions for tax increment financing districts), *repealed by* MINN. STAT. § 117.012 (West 2009 Electronic Update).

199. *See* LEAGUE OF MINNESOTA CITIES, RESEARCH ON CITIES' USE OF EMINENT DOMAIN (2005) (on file with author); *see also* Eric Willette, *LMC Study Finds Cities Use Eminent Domain Judiciously*, LEAGUE OF MINN. CITIES BULLETIN, Nov. 30, 2005, at 1. The LMC study claims that these cities use eminent domain only rarely and judiciously. *Id.* However, it also notes that the thirty-four cities engaged in an average of twelve 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 infra* tbl.A3. 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, some seven tenths of a percent of the Minnesota population may have lost property or been displaced by economic development condemnations.

200. *See* MINN. STAT. § 117.011 (2008).

201. *See* MINN. STAT. § 117.012 (West 2009 Electronic Update) (repealing exemptions in the 2006 law).

Even many of the fourteen state laws that do succeed in abolishing or curbing economic development takings have serious limitations. As already noted, the Pennsylvania law i seriously weakened by geographic exemptions that exclude the state's largest urban areas. The reforms enacted by Alabama, Georgia, and South Dakota were adopted by states that had little or no recent history of resorting to private-to-private condemnations;[202] thus, they forbid practices in which their local governments rarely engaged. Overall, only seven states that had previously engaged in significant amounts of economic development and blight condemnation adopted legislative post-*Kelo* reform measures with 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.[203] All ten passed by large margins ranging from 55% to 86% of the vote.[204] 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.[205] Finally, South Carolina vot-

202. *See* BERLINER, *supra* note 66, 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 between 1998 and 2002); *id.* at 189 (same as to South Dakota).

203. For a complete list and other details, see Nat'l Conference of State Legislatures, *Property Rights Issues on the 2006 Ballot*, Nov. 12, 2006, http://www.ncsl.org/statevote/prop_rights_06.htm (last visitedMay 17, 2009) [hereinafter NCSL].

204. *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 Crack-up*, LIBERTY, Feb. 2007, *available at* http://liberty unbound.com/archive/2007_02/sandefur-california.html (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. *See* NCSL, *supra* note 203.

205. *See* Ga. Amendment 1 (enacted on Nov. 7, 2006 and amending GA. CONST. art. IX, § 2); N.H. Question 1 (enacted on Nov. 7, 2006 and amending N.H. CONST. art. 12-a).

ers adopted a largely ineffective reform law. [206] 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.[207]

Three states—Arizona,[208] Louisiana,[209] and Oregon[210]—enacted referendum initiatives that essentially followed the standard formula of combining a ban on economic development takings with a restrictive definition of blight. Nevada and North Dakota's initiatives went one step beyond this and amended their respective state constitutions to ban virtually all condemnations that transfer property to a private owner.[211] The Nevada law did not take effect until it was approved by the voters a second time in November 2008.[212]

Florida's referendum initiative could not add much in the way of substantive protections to the state's legislatively

206. S.C. Amendment 5 (amending S.C. CONST. art. I, § 13).

207. La. Amendment 5 (amending LA. CONST. art. I, § 4(B), art. VI, § 21(A) and adding art. VI, § 21(D)).

208. *See* Ariz. Proposition 207 (enacted Nov. 7, 2006) (codified at ARIZ. REV. STAT. ANN. §§ 12-1131 to -1138) (forbidding condemnations for "economic development" and limiting blight-like condemnations to cases where there is "a direct threat to public health or safety caused by the property in its current condition").

209. La. Amendment 5 (enacted Sept. 30, 2006) (amending LA. CONST. art. I, § 4(B), art. VI, § 21(A) and adding art. VI, § 21(D)) (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).

210. Or. Measure 39 (enacted Nov. 7, 2006) (codified at OR. REV. STAT. § 35.015) (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).

211. *See* Nev. Ballot Question 2 (enacted Nov. 7, 2006, reenacted on Nov. 4 2008) (amending NEV. CONST. art. I, § 22) (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 (amending N.D. CONST. art. I, § 16) (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").

212. *See* Nev. Ballot Question 2 (enacted Nov. 7, 2006, reenacted on Nov. 4, 2008) (amending NEV. CONST. art. I, § 22).

enacted post-*Kelo* law, already the strongest in the country.[213] 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.[214] 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.[215] New Hampshire's referendum initiative also comes in the wake of a strong legislative proposal and adds nothing to it.[216] 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."[217] 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.[218]

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 must not be condemned by eminent domain for any purpose or benefit, including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use."[219] 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

213. *See supra* notes 177–178 and accompanying text.

214. Fla. Amendment 8 (enacted Nov. 7, 2006) (amending FLA. CONST. art. X, § 6).

215. Ga. Amendment 1 (enacted Nov. 7, 2006) (amending GA. CONST. art. IX, § 2).

216. N.H. Question 1 (enacted Nov. 7, 2006) (amending N.H. CONST. art. 12-a).

217. *Id.*

218. See the discussion of the similar flaw in the wording of President Bush's 2006 executive order on *Kelo* in *infra* Part II.B.3.

219. S.C. Amendment 5 (enacted Nov. 7, 2006) (amending S.C. CONST. art. I, § 13(A)).

development is not a public use under the state constitution.[220] The new constitutional amendment adds nothing to this 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 constituting 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."[221] 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.

The state of California enacted an ineffective referendum initiative, Proposition 99, in June 2008.[222] This initiative was put on the ballot by the California League of Cities and other pro-condemnation groups for the purpose of forestalling the more restrictive Proposition 98 (sponsored by property rights advocates).[223] Proposition 99 protects only owner-occupied residences against condemnations with the purpose of transferring property to "private persons" if the owner has lived in the home for at least one year.[224] Renters, who make up 42% of California households, are left unprotected.[225] The same is true of businesses and homeowners who have lived in their residences for less than one year.[226]

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

221. S.C. Amendment 5 (amending S.C. CONST. art. I, § 13(B)).

222. *See* Cal. Proposition 99 (enacted June 3, 2008) (amending CAL. CONST. art. I, § 19).

223. *See* Ilya Somin, *Prop. 99's False Promise of Reform*, L.A. TIMES, May 19, 2008, at A15. Proposition 99 includes a provision that would negate any conflicting eminent domain reform passed the same day, so long as Proposition 99 got more votes than its competitor. Cal. Proposition 99, § 9 (enacted on June 3, 2008). *See also* Samantha Young, *Voters Reject Prop. 98, Endorse Prop. 99*, LONG BEACH PRESS-TELEGRAM, June 4, 2008 (noting that the California League of Cities placed Proposition 99 on the ballot and spent eleven million dollars on promoting it and working to defeat Proposition 98).

224. *See* Cal. Proposition 99 § 2, (enacted June 3, 2008) (amending CAL. CONST. art. I, § 19(b), (e)(3)) (exempting from protection owner-occupied residences where the owner has resided for less than one year).

225. Somin, *supra* note 223.

226. *See id.*

Even the new protection for homeowners is likely to be ineffective, because the measure allows the condemnation of owner-occupied homes if they are "incidental" to a "public work or improvement" project.[227] This means that homes could still be taken for transfer to private developers if the proposed project allocated some space for a "public" facility such as a community center or library. Proposition 99 also allows government officials to claim that their true purpose is promoting economic or community development rather than conveyance of the property to a private person, which is only a means to an end. This, of course, is precisely the argument accepted by the Supreme Court in *Kelo*, when it held that the transfer of the condemned property to a private party was constitutionally permissible because it was undertaken for the "public purpose" of promoting development;[228] *Kelo* already forbids "pretextual" takings adopted for the sole purpose of benefiting a private party,[229] a protection that is likely to be ineffectual because condemning authorities can virtually always claim that they intended to benefit the general public as well.[230] In sum, Proposition 99 only applies to a subset of properties. And even with respect to them, it gives owners little protection beyond that already afforded by *Kelo* itself.

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."[231] However, it did not change the state's previously broad definition of "blight." At this time, it is

227. *See* Cal. Proposition 99 (enacted June 3, 2008) (amending CAL. CONST. art. I, § 19(e)(5)) (exempting takings of homes that are "incidental" to a variety of "public work[s] or improvement[s]"). The text of this section reads:

> "Public work or improvement" means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure; projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the public work or improvement.

228. Kelo v. City of New London, 545 U.S. 469, 478–85 (2005).

229. *Id.* at 478 (stating that the "mere pretext" of a public benefit is not enough to justify a taking if the "actual purpose was to bestow a private benefit").

230. *See* Somin, *Grasping Hand*, *supra* note 15, at 235–40.

231. Mich. Ballot Proposal 06-04 (enacted Nov. 7, 2006) (amending MICH. CONST. art. X, § 2).

not clear whether or not the landmark 2004 state supreme court decision in *County of Wayne v. Hathcock* will be interpreted to constrain condemnation of property under very broad blight designations.[232] 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 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 has already narrowed the definition of blight.[233] Thus, the Michigan constitutional amendment enacted by referendum reinforces the accomplishments of the previous statutory reform, but might not have been effective as a standalone law.

In analyzing the 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.[234] 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.[235] By contrast, all three largely ineffective initiatives required preapproval by state legislatures,[236] and the same was true of the ambiguous Michigan case.[237] The contrast is not so much between legislative reform and referendum initiatives, but between referenda enacted without the need for approval by the state legislature and every other type of reform that does involve state legislators.

232. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 779–86 (Mich. 2004). The status of blight condemnations under *Hathcock* is analyzed in Somin, *supra* note 78.

233. *See supra* note 188.

234. The four are Arizona, Nevada, North Dakota, and Oregon. *See* NCSL, *supra* note 203.

235. *See* NCSL, *supra* note 203.

236. The three were Georgia, New Hampshire, and South Carolina. *Id.*

237. *Id.*

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 to 38 margin.[238] Since early 2006, the PRPA has been bottled up in the Senate[239] and the 109th Congress ended without the Act being passed into law. In May 2007, under the new Democratic Congress, the Act passed the Agriculture Committee of the House of Representatives; however, as of November 2008, it has not yet been voted on by the full House.[240] To date, there is no indication as to whether the PRPA will be taken up by the new administration and Congress that were elected in November 2008. Despite its failure to achieve passage so far, I consider it here because it is arguably the most important federal effort to provide increased protection for property owners in the aftermath of *Kelo*.

The Act would block state and local governments from "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."[241] Violators are punished by the loss of all "[f]ederal economic development funds for a period of two fiscal years."[242] 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 in-

238. H.R. 4128, 109th Cong. (2005) (enacted).

239. *See* Scott Bullock, *The Specter of Condemnation*, WALL ST. J., June 24, 2006 (explaining how the PRPA was held up by Senator Arlen Specter, then Chairman of the Senate Judiciary Committee).

240. 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 (last visited Mar. 13, 2009). On June 5, 2007, the legislation was referred to the House Subcommittee on Healthy Families and Communities. No further action has been taken as of this writing. *See* LIBRARY OF CONGRESS–THOMAS, H.R. 926, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00926:@@@L&summ2=m& (last visited Mar. 13, 2009).

241. H.R. 4128, 109th Cong. § 2(a) (2005).

242. *Id.* § 2(b).

crease tax revenue, tax base, employment, or general economic health."[243]

Tthe 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 would risk losing only "federal economic development funds,"[244] 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."[245] 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 the economies of States or political subdivisions of States."[246] A Congressional Research Service analysis concluded that the PRPA ultimately would delegate the task of identifying the relevant programs to the Attorney General.[247] It is hard to say whether the incoming Obama Administration 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 the federal budget. The 2005 federal budget defined 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 pur-

243. *Id.* § 8(1). The Act goes on to establish several exemptions, but these are relatively narrow. *See id.* § 8(1)(A)–(G) (exempting condemnations that transfer property to public ownership and several other traditional public uses).

244. *Id.* § 2(b).

245. *Id.* § 8(2).

246. *Id.*

247. ROBERT MELTZ, CONG. RESEARCH SERV., CONDEMNATION OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT: LEGAL COMMENTS ON THE HOUSE-PASSED BILL (H.R. 4128) AND BOND AMENDMENT 4 (2005). 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 (citing H.R. 4128, 109th Cong. § 5(a)(2) (2005)). Section 11 of the Act does require that the Act "be construed in favor of a broad protection of private property rights." 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.

poses of "community and regional development."[248] This amount includes 3.5 billion dollars "for homeland security," "Departmental Management," and over 3 billion dollars for "Emergency Preparedness and Response"[249]— funds that are unlikely to be categorized as economic development grants. Thus, it would seem that PRPA applies at most to 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.

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 real 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."[250] Condemning authorities thus have an incentive to roll the dice on economic development takings projects in the hope that defendants will not contest the condemnation or will fail to raise the PRPA as a defense.[251] 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.

248. BUDGET OF THE UNITED STATES GOVERNMENT 125 tbl.8-4, 126, 130 (F.Y. 2005) (estimated figures for the 2005 fiscal year).

249. *Id.* at 125 tbl.8-4.

250. H.R. 4128, § 2(c).

251. This may not be an unlikely occurrence, given that many property owners targeted for condemnation are likely to be poor and legally unsophisticated. Somin, *Grasping Hand*, *supra* note 15, at 254 n.373.

2. The Bond Amendment

The Bond Amendment was enacted on November 30, 2005, as an amendment to the 2006 appropriation bill for the Transportation, Treasury, and Housing and Urban Development departments, the Judiciary, the District of Columbia, and various independent agencies.[252] 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."[253]

For three interrelated reasons, the Bond Amendment is likely to have 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."[254] 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,[255] 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 an immediate threat to public health and safety . . . or brownfield[s].[256]

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"[257] might open up the door to at least some private economic development projects.

252. Act of Nov. 30, 2005, Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494–95 (2005).

253. *Id.* at 2495.

254. *Id.*

255. *See* Kelo v. City of New London, 545 U.S. 469, 488 (2005) (stating that courts should not "second-guess [a] City's considered judgments about the efficacy of its development plan").

256. § 726, 119 Stat. at 2495, *reprinted in* MELTZ, *supra* note 247, at 12 (replacing the language "an immediate threat to public health and safety" with "blight").

257. *Id.*

Finally, the Bond Amendment's impact is likely to be small because very few projects that do not fall within one of its 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."[258] There are few if any eminent domain projects previously funded by federal transportation or housing grants that the bill actually forbids.

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.[259] 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.[260]

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."[261]

Unfortunately, this language validates virtually any economic development condemnation that the federal government might want to pursue. Officials can (and do) always claim that the goal of a taking is to benefit "the general public" and not "merely" the new owners.[262] This is not a new pattern, but one that bedeviled takings litigation before *Kelo*; indeed, the New London authorities made such claims in *Kelo* itself and they were accepted by all nine Supreme Court Justices, including

258. *Id.*
259. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006).
260. *Id.*
261. *Id.*
262. *See* Somin, *Grasping Hand*, *supra* note 15, at 246.

the four dissenters,[263] as well as by the Connecticut Supreme Court[264] (including *its* three dissenters).[265] 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.[266] Nonetheless, the courts accepted New London's claims that its officials acted in good faith, since they could have intended to benefit the public as well as Pfizer.[267]

Even had President Bush's order been worded more strongly, 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 weakness of much post-*Kelo* legislation is in large part due to widespread public ignorance. Survey data produced for this Article show that the overwhelming majority of citizens know little or nothing about post-*Kelo* reform laws in their states.[268] 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 greater effectiveness of laws enacted by referenda relative to those adopted through the legislative process.[269] The political ignorance hypothesis accounts for the pattern of reform laws better than the leading alterna-

263. *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 484–85 (2005); *id.* at 501 (O'Connor, J., dissenting).

264. Kelo v. City of New London, 843 A.2d 500, 535 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

265. *Id.* at 595–96.

266. *Kelo*, 545 U.S. at 473–75.

267. *See* Somin, *Grasping Hand*, *supra* note 15, at 235–40.

268. *See infra* tbl.6.

269. *See supra* Part II.A.3.

tive theory, which holds that the relative paucity of effective reform laws is the result of interest group lobbying.[270]

A. PUBLIC IGNORANCE AND POST-*KELO* REFORM LAWS: THE SAINT INDEX SURVEY DATA

As noted earlier, 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. [271] 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.[272]

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 6are based on an August 2007 Saint Index national survey. [273] Because the state of Rhode Island enacted its post-*Kelo* law in 2008, it is coded as not having passed any law for purposes of my analysis of the Saint Index data, which was collected in August 2007. Dropping Rhode Island respondents from the analysis has no statistically significant impact on the results.

The Saint Index results demonstrate 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 between 2005 and the date of the survey, and correctly answer a follow-up question about whether or not those laws were likely to be effective in preventing condemnations for economic development.[274] Only 21% could even correctly answer the first ques-

270. *See, e.g.*, Sandefur, *supra* note 14, at 769–72 (arguing that interest-group opposition accounts for the failures of the *Kelo* backlash).

271. *See supra* text accompanying note 20.

272. 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); Somin, *Political Ignorance*, *supra* note 20.

273. *See infra* tbl.6.

274. For the exact wording of the two questions involved, see *infra* app. B.

tion in the sequence: whether or not their state had enacted eminent domain reform since *Kelo* was decided in 2005.[275]

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.[276] 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 enough attention to post-*Kelo* reform legislation to have an opinion about its effectiveness, there was a high degree of ignorance.[277]

Table 6 indicates that ignorance about state post-*Kelo* reform cuts across gender, racial, and political lines. Some 85% of men and 90% of women were 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 are ignorant about the existence or lack thereof of post-*Kelo* reform in their states, and even fewer can 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 forty-two 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.[278] Past research shows that many survey respondents

275. 2007 SAINT INDEX, *supra* note 23, qstn. 9; *see infra* app. B (question wording).

276. 2007 SAINT INDEX, *supra* note 23, qstn. 10; *see infra* app. B (question wording).

277. Only 17% of respondents expressed any opinion at all about the effectiveness of post-*Kelo* reform in their states. 2007 SAINT INDEX, *supra* note 23, qstn. 10.

278. Question 10 on the Saint Index survey has four possible answers in addition to "don't know." *See infra* app. B. However, as described in Appendix

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.[279] 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,[280] and young adults (people aged 18–29) have the highest incidence of ignorance of any age group.[281] The exclusion of 18–20 year olds from the sample reduces the representation of this group in the aggregate data.

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.

279. 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).

280. *See* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 157 (1996). *But see* Somin, *Political Ignorance*, *supra* note 20, at 1327 (demonstrating only slight correlation between political knowledge and age when controlling for fifteen other variables).

281. *See* MARTIN P. WATTENBERG, IS VOTING FOR YOUNG PEOPLE? 79–91 (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[282]

	Group	% Unaware of the Condition of Post-Kelo Reform in their State
	Total	87
Gender	Male	85
	Female	90
Racial/Ethnic[283] Group	White	89
	African American	82
	Asian	75
	Hispanic/Latino	100
	Native American	75
Party Affiliation	Democrat	89
	Independent	83
	Republican	89
Ideology	Liberal	88
	Moderate	90
	Conservative	87

The fact that most citizens are ignorant about post-*Kelo* reform not surprising to researchers. Large majorities know

282. 2007 SAINT INDEX, *supra* note 23, qstns. 9& 10; *see infra* app. B (question wording). 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 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, *supra*, 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.

283. The results for Hispanics, Asians, and Native Americans may be unreliable because they are based on very small sample sizes of twenty-four, twelve, and twelve respondents respectively. 2007 SAINT INDEX, *supra* note 23.

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.[284] What may be somewhat surprising—especially to nonexpert observers—is that public ignorance is so widespread despite the immense outcry that the issue has generated.

B. POSSIBLE ALTERNATIVE EXPLANATIONS OF THE SAINT INDEX 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 undermines 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.

1. 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 whether the 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 respondents in states where reform legislation passed in 2005 and 2006.[285] 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,[286] just a few months or weeks before the Saint Index survey was conducted, from August 1 to August 10, 2007. The data show that

284. Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, at 6 tbl.1.

285. 2007 SAINT INDEX, *supra* note 23.

286. *See supra* notes 91 (Montana), 94 (Ohio), 106 (Nevada), 142 (Connecticut), 148 (Maryland), 175 (New Mexico), 190 (Virginia), 191 (Wyoming).

the 122 respondents from those eight states had almost exactly the same knowledge levels as those in the rest of the country.[287] 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% rate compiled by respondents from the other forty-two states.[288] Similarly, 12% of respondents in these eight states could correctly answer both the question about the existence of reform laws and the question about their effectiveness; the figure for the other forty four states was 13%.[289] 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.[290]

2. The "Issue Public" Hypothesis

Public ignorance about post-*Kelo* reform might also be less bleak than the data suggests 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 some 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.[291] However, survey data show that the percentage of the public who care intensely about eminent domain

287. 2007 SAINT INDEX, *supra* note 23.

288. *Id.* qstn. 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.

289. *Id.* qstns. 9& 10.

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

291. For a recent defense of the theory, see generally VINCENT L. HUTCHINGS, PUBLIC OPINION AND DEMOCRATIC ACCOUNTABILITY (2003). For discussion and criticism of this theory, see Somin, *Voter Ignorance*, *supra* note 20, at 427–29.

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.[292] As discussed in Part I, 63% of respondents in a 2005 Saint Index survey said that they "strongly" opposed the *Kelo* decision.[293] A 2006 Saint Index poll question showed that 43% "strongly" support reforms intended to ban economic development takings.[294] Even the smaller of these two figures is still more than three 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.[295]

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.

3. The "Miracle of Aggregation"

A third potentially benign interpretation of widespread ignorance of post-*Kelo* reform is the "miracle of aggregation."[296] 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.

292. 2007 SAINT INDEX, *supra* note 23.

293. *See supra* Part I.

294. *See* 2006 SAINT INDEX, *supra* note 48; *see also* Somin, *supra* note 48, at 1940.

295. 2007 SAINT INDEX, *supra* note 23.

296. *See, e.g.*, Philip E. Converse, *Popular Representation and the Distribution of Information*, *in* INFORMATION AND DEMOCRATIC PROCESSES 369, 381–83 (John A. Ferejohn & James Kuklinski eds., 1990) (describing the "miracle of aggregation" theory); *see also* DONALD A. WITTMAN, THE MYTH OF DEMOCRATIC FAILURE (1995).

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.[297]

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 takings.[298] 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%.[299] 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,[300] some 6% of the 2007 Saint Index survey respondents wrongly believed that their state passed effective reform, whereas only 2% mistakenly believed that their state had failed to enact effective reform, even though it had. 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 believed

297. 2007 SAINT INDEX, *supra* note 23.

298. *Id.*

299. *See* 2006 SAINT INDEX, *supra* note 48 (43% figure). The 1.3% figure is calculated by taking 10% of the 13% who could correctly identify the status of post-*Kelo* reform in their state. 2007 SAINT INDEX, *supra* note 23.

300. *See supra* note 276 and accompanying text.

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.

4. 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 better informed than ordinary citizens.[301] However, as I have discussed at greater length elsewhere, reliance on opinion leaders itself requires considerable knowledge, including the knowledge needed to select opinion leaders to follow who appear to be both knowledgeable and trustworthy. [302] 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.[303] In addition, the failure of the opinion leader "information shortcut" to alleviate ignorance on less complex and more important issues than post-*Kelo* reform[304] 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.[305]

C. 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

301. See, for example, ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 206–08 (1998), for the argument that reliance on opinion leaders can alleviate the problem of political ignorance.

302. *See, e.g.*, Ilya Somin, Book Note, *Resolving the Democratic Dilemma?*, 16 YALE J. ON REG. 401, 408–11 (1999).

303. *See* LUPIA & MCCUBBINS, *supra* note 301, at 206 (arguing that voters often choose opinion leaders based on common interest or trust).

304. See Somin, *Voter Ignorance, supra* note 20, at 424–26, for a more detailed discussion.

305. *See supra* Part III.A.

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 against the decision was excessive in light of the fact that the case made little change in existing law.[306] 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 California redevelopment agencies lamented that *Kelo* led to "a hue and cry about how bad things are in California, yet *Kelo* changed nothing."[307] But the reaction is understandable once we recognize that—for most people—*Kelo* was 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.[308] 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.[309] It is likely that, prior to *Kelo,* most of the public did not even realize that economic development condemnations existed. The public ignorance hypothesis is arguably the only explanation 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

306. *Cf. supra* Part I.A–B (explaining how *Kelo* made little change in existing doctrine).

307. *See* Michael Gardner, *Lawmakers Rethink Land-Seizure Laws*, SAN DIEGO UNION-TRIBUNE, Aug. 17, 2005, at A1 (quoting John Shirey's statement about *Kelo*).

308. *Cf. supra* Part I.B (discussing public condemnation of the *Kelo* decision).

309. *See infra* Part I.B.

highly publicized Supreme Court decision apparently increased awareness 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 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.[310]

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.[311] 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,[312] while in reality having little effect. In this way, they can simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development condemnations.

This strategy seems to have been at the root of the failure of post-*Kelo* reform efforts in California. In that state, legislative reform efforts were initially sidetracked by the introduction of weak proposals that gave lawmakers "a chance . . . to side with the anti-eminent domain sentiment without doing any real damage to redevelopment agencies."[313] 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."[314] As one Sacramento reporter put 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."[315] Eventually, California did enact some reforms, but only ones

310. 2007 SAINT INDEX, *supra* note 23, qstn. 9.

311. *See*, *e.g.*, Somin, *supra* note 284, at 6 tbl.1 (providing survey data that the majority of citizens are unaware of basic facts of several of the most important pieces of legislation adopted by Congress in the 2003–04 term).

312. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61–73, 114–15, 121–25 (1974), for a discussion of the concept of position-taking legislation.

313. Dan Walters, *Eminent Domain Bills Are Stalled–Except One for Casino Tribe,* SACRAMENTO BEE, Sept. 16, 2005, at A3.

314. *Id.*

315. *Id.*

that are almost completely ineffective.[316] A leading advocate for eminent domain reform in Nevada believes that, in his state as well, legislators sought to "look good while not upsetting anyone."[317]

The California League of Cities ("CLC"), an organization composed of local governments with an interest in preserving their eminent domain authority, also sought to exploit political ignorance about post-*Kelo* reform. The CLC succeeded in placing an essentially meaningless eminent domain reform referendum initiative—Proposition 99—on the state's 2008 ballot as a way of preempting a stronger referendum initiative sponsored by property rights advocates.[318] As discussed above, Proposition 99 cleverly included a provision stating that it would supersede any other eminent domain referendum enacted on the same day, so long as the latter gotfewer votes than the CLC proposal.[319]

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.

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. Four of the five citizen-initiated referenda passed since *Kelo* provide strong protection for property owners against economic development takings.[320] By contrast, only fourteen of thirty six state legislative initiatives are comparably effective, as are only two or three of six legislature-initiated referenda.[321] Reforms initiated by Congress and the President at the federal level are also largely cosmetic in nature.[322]

316. *See supra* Part II.A.1.b.i.

317. Interview with Steven Miller, Vice President for Policy, Nev. Policy Research Inst. (Mar. 14, 2007) (on file with author). Nevada eventually passed effective eminent domain reform by referendum. *See supra* Part II.A.3; *see also supra* text accompanying note 115.

318. *See* discussion of Proposition 99 *supra* Part II.A.3.

319. *See* discussion of Proposition 99 *supra* Part II.A.3.

320. *See supra* tbl.3.

321. *See supra* tbl.3.

322. *Cf.* Part I.B (noting the widespread political opposition resulted in lit-

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.[323] Unlike state legislators, the property rights activists who wrote the citizen-initiated anti-*Kelo* ballot initiatives had no need to appease powerful pro-condemnation interest groups in order to improve reelection chances, and they also had 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; they have a real chance of influencing policy outcomes through their actions. Obviously, property rights activists can and do 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 have a significant say.

California's Proposition 99, the one citizen-initiated referendum measure that does not provide meaningful protection to property owners, is the exception that proves the rule. Proposition 99 was not drafted by property rights activists, but rather by local governments and other interest groups seeking to protect broad eminent domain authority by forestalling a rival

tle meaningful legislative reform).

323. The Arizona initiative was undertaken by an activist group known as the Arizona Home Owners' Protection Effort. *See* Arizona Secretary of State, *Proposition 207*, *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm. The Nevada law was put on the ballot by the People's Initiative to Stop the Taking of Our Land ("PISTOL"), along with other individuals. *See* Nevadans for the Protection of Prop. Rights, Inc. v. Heller, 141 P.3d 1235, 1238–39 (Nev. 2006) (listing the respondents to the initiative petition of "Nevada Property Owners' Bill of Rights," which sought to amend the Nevada Constitution with respect to eminent domain). In North Dakota, the ballot initiative was sponsored by a group known as Citizens to Restrict Eminent Domain) (C-RED). *See* NAT'L INST. ON MONEY IN STATE POLITICS, 2006 BALLOT MEASURE OVERVIEW 37, 48 (2007), *available at* http://www.policyarchive.org/bitstream/handle/10207/5780/2007110512006BallotReport_Overview.pdf?sequence-1 (demonstrating that C-RED raised all of the contributions in support of Measure 2, which prohibits government takings of private property for economic development). 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 author). Oregonians in Action is a property rights activist group. *See* Oregonians in Action, Background Information, http://www.oia.org/index.php/about-us (last visited Mar. 13, 2009).

ballot measure that would have provided stronger protection for property owners.[324] Proposition 99 passed easily, getting some 63% of the vote;[325] although we do not have any definitive data, it is likely that California voters could not tell the difference between a referendum measure that provided meaningful new protection for property owners and one that did not. The sponsors of Proposition 99 achieved their goal of defeating the rival Proposition 98, though the defeat of the latter was at least in large part the result of its inclusion of a phase out of rent control.[326]

The Proposition 99 experience supports my conjecture that citizen-initiated referenda provide effective protection because of the identity and purposes of their drafters. When the drafters are property rights activists seeking to ban *Kelo*-style takings, citizen-initiated referenda result in strong limitations on eminent domain. When initiatives are drafted by pro-condemnation interest groups such as the California League of Cities, they will most likely provide only cosmetic reforms. Either way, rationally ignorant voters are likely to support them.

D. INTEREST GROUP POWER AS AN ALTERNATIVE EXPLANATION

The most obvious 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.[327] 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.[328] 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.[329]

However, the interest group explanation has three crucial shortcomings relative to the political ignorance hypothesis. It

324. *See supra* note 222 and accompanying text.

325. *See* Young, *supra* note 223.

326. *See id.* (noting role of rent-control phase out in stimulating opposition to Proposition 98).

327. *See*, e.g., Sandefur, *supra* note 14, at 768–72 (arguing that interest-group opposition and local government complicity accounts for the failures of the *Kelo* backlash).

328. *Id.*

329. Interview with Brooke Rollins, President & CEO, Tex. Pub. Policy Found. (Mar. 17, 2007) (on file with author).

cannot explain why the *Kelo* backlash arose when it did; it cannot fully explain how a small coalition of interest groups could overcome overwhelming and strongly-felt majority public opinion; and, it cannot explain why states would pass ineffective reform laws, as opposed to simply doing nothing.

As discussed above, the *Kelo* backlash arose in 2005 despite the fact that Kelo made little change in existing Supreme Court takings doctrine.[330] Interest group theory cannot explain this fact. After all, pro-property rights interest groups sought to restrain takings even before *Kelo.* Supporters of broad eminent domain power were satisfied with the status quo both before and afterwards. By contrast, the theory of rational political ignorance can readily account for the timing of the backlash.

Second, 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.[331] 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;[332] more recent survey data shows that 43% of Americans "strongly support" reform legislation banning economic development takings.[333] If just a fraction of the 63%—or even the 43%—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 example, if 10% of those who felt "strongly" about the issue were willing to switch their votes as a result, they would constitute a voting bloc of about 4 to 6% of the electorate—more than enough to change the outcome of a close election. Presumably, that would give candidates strong incentives to support effective bans on economic development takings.

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

330. *See supra* Part I.A–B; *see also* Part III.B.1.
331. *See supra* Part I.B.
332. *See supra* text accompanying note 47.
333. *See* Somin, *supra* note 48, at 1940 tbl.2.

what is happening. Political ignorance is the handmaiden of interest group power in the political process. Interest group power did play a role in the enactment of ineffective post-*Kelo* reforms. Without it, legislators would have little to lose from the enactment of stronger reform measures. But the legislators are able to satisfy interest group demands only because of public ignorance. Absent widespread ignorance, interest groups at odds with the majority of the general public would find it far more difficult to block eminent domain reform.

Finally, interest group power cannot explain why some twenty-four states passed ineffective post-*Kelo* reform laws instead of simply doing nothing. After all, pro-condemnation interest groups would have been satisfied with the continuation of the pre-*Kelo* status quo, which in these states already allowed the condemnation of property for almost any reason. Why waste valuable legislative time and attention on legislation that merely perpetuates the status quo? Interest group power alone cannot account for this. By contrast, political ignorance theory has a simple and compelling explanation for the enactment of ineffective reform laws: they could be used to persuade rationally ignorant voters that the something had been doneto solve the problem of economic development takings even if the new legislation would have little or no real impact.[334]

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 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

334. *See supra* Part III.B.2.

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 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 despite the fact that their states engaged in extensive private to private condemnations previously. As yet, we have no clear explanation of why these states differed from most others. Detailed examination of their legislative processes might give us greater insight.

The partial failure of the *Kelo* backlash also highlights an important limitation of claims that judicial review is not needed to protect individual rights that enjoy the backing of majority public opinion.[335] Despite broad and strongly felt public opposition to *Kelo* and economic development takings, both the federal government and the majority of states failed to enact effective reform legislation banning them. If public ignorance could prevent the political process from providing effective protection for individual rights in such a high-profile case, it might also fall short in other cases where rights supported by majority opinion are at stake. Judicial review is not just a check on the tyranny of the majority. Sometimes, it may also be needed to protect us against the consequences of the majority's political ignorance.

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.

335. *See supra* notes 10–12 and accompanying text.

APPENDIX A: ADDITIONAL TABLES

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

State	Number of Threatened Takings[336]	Effectiveness of Reform[337]
Florida	2,055	Effective (L & LR)
Maryland	1,110	Ineffective (L)
California	635	Ineffective (L)
New Jersey	589	No Reform
Missouri	437	Ineffective (L)
Ohio	331	Ineffective (L)
Michigan	173	Effective (L & LR)
Utah	167	Enacted Prior to *Kelo*
Kentucky	161	Ineffective (L)
Texas	118	Ineffective (L)
Colorado	114	Ineffective (L)
Pennsylvania	108	Effective (L)
New York	89	No Reform
Minnesota	83	Effective (L)
Rhode Island	65	Ineffective (L)
Connecticut	61	Ineffective (L)
Indiana	51	Effective (L)
Arkansas	40	No Reform
Tennessee	37	Ineffective (L)
Virginia	27	Effective (L)
Nevada	15	Effective (L & CR)
Vermont	15	Ineffective (L)
West Virginia	12	Ineffective (L)
Wisconsin	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)

336. *See* BERLINER, *supra* note 66. This data on known eminent domain condemnations by state includes developments from 1998 to 2002. *Id.* at 8–9.

337. As determined in January 2008.

South Dakota	0	Effective (L)
Wyoming	0	Effective (L)
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

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

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

State	2005 Population[338]	Takings[339]/ 1M people	Effectiveness of Reform[340]
Pennsylvania	12,429,616	202.5	Effective (L)
Kansas	2,744,687	56.5	Effective (L)
Maryland	5,600,388	22.7	Ineffective (L)
Michigan	10,120,860	13.6	Effective (L & LR)
Rhode Island	1,076,189	11.2	Ineffective (L)
Connecticut	3,510,297	8.8	Ineffective (L)
Ohio	11,464,042	7.9	Ineffective (L)
Virginia	7,567,465	7.7	Effective (L)
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)
West Virginia	1,816,856	4.4	Ineffective (L)
Florida	17,789,864	3.8	Effective (L & LR)
Missouri	5,800,310	3.1	Ineffective (L)
New York	19,254,630	3	No Reform
Arizona	5,939,292	1.9	Effective (CR)
Minnesota	5,132,799	1.8	Effective (L)
Alabama	4,557,808	1.8	Effective (L)
Washington	6,287,759	1.7	No Reform
Kentucky	4,173,405	1.7	Ineffective (L)
North Dakota	636,677	1.6	Effective (CR)
Maine	1,321,505	1.5	Ineffective (L)
Iowa	2,966,334	1.3	Ineffective (L)
Nevada	2,414,807	1.2	Effective (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)

338. *See* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005 (2005), *available at* http://www.census.gov/popest/states/NST-ann-est2005.html.

339. Some takings affected more than one property. *See* BERLINER, *supra* note 66 (reporting filed condemnations per state).

340. As determined in January 2008.

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)
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 *Kelo*
Vermont	623,050	0	Ineffective (L)
Wisconsin	5,536,201	0	Ineffective (L)

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

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

State	2005 Population[341]	Threatened Takings[342] /1M people	Effectiveness of Reform[343]
Maryland	5,600,388	198.2	Ineffective (L)
Florida	17,789,864	115.5	Effective (L & LR)
Missouri	5,800,310	75.3	Ineffective (L)
Utah	2,469,585	67.6	Enacted Prior to Kelo
New Jersey	8,717,925	67.6	No Reform
Rhode Island	1,076,189	60.4	Ineffective (L)
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)
Michigan	10,120,860	17.1	Effective (L & LR)
Minnesota	5,132,799	16.2	Effective (L)
Arkansas	2,779,154	14.4	No Reform
Pennsylvania	12,429,616	8.7	Effective (L)
Indiana	6,271,973	8.1	Effective (L)
West Virginia	1,816,856	6.6	Ineffective (L)
Nebraska	1,758,787	6.3	Ineffective (L)
Nevada	2,414,807	6.2	Effective (L &CR)
Tennessee	5,962,959	6.2	Ineffective (L)
Texas	22,859,968	5.2	Ineffective (L)
New York	19,254,630	4.6	No Reform
Hawaii	1,275,194	3.9	No Reform
Virginia	7,567,465	3.6	Effective (L)
Kansas	2,744,687	2.6	Effective (L)
Wisconsin	5,536,201	2.2	Ineffective (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	Ineffective (L)
Georgia	9,072,576	0	Effective (L &

341. *See* U.S. CENSUS BUREAU, *supra* note 338.

342. Some takings affected more than one property. *See* BERLINER, *supra* note 66.

343. As determined in January 2008.

			LR)
Idaho	1,429,096	0	Effective (L)
South Dakota	775,933	0	Effective (L)
Wyoming	509,294	0	Effective (L)
Alabama	4,557,808	0	Effective (L)
Alaska	663,661	0	Ineffective (L)
Iowa	2,966,334	0	Ineffective (L)
Louisiana	4,523,628	0	Effective (LR)
Maine	1,321,505	0	Ineffective (L)
Mississippi	2,921,088	0	No Reform
Montana	935,670	0	Ineffective (L)
New Hampshire	1,309,940	0	Effective (L & LR)
New Mexico	1,928,384	0	Effective (L)
North Carolina	8,683,242	0	Ineffective (L)
North Dakota	636,677	0	Effective (CR)
Oklahoma	3,547,884	0	No Reform
Washington	6,287,759	0	No Reform

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[344]

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.

344. *See* 2007 SAINT INDEX, *supra* note 23, qstns. 9 & 10.