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Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later

Marc Mihaly & Turner Smith*

The Supreme Court’s 2005 Kelo decision prompted much activity by the property rights movement, leading many states to reevaluate and alter the eminent domain powers granted to their agencies and subdivisions. Approximately forty states have enacted post-Kelo limiting legislation to curtail governments’ use of eminent domain. In some states, courts have also played a role in limiting situations in which states and municipalities can “take” private property. Although many states have changed their eminent domain laws since Kelo, the content of the amendments in many states has not effectively narrowed states’ eminent domain powers. This summary of eminent domain law five years after the Kelo decision delineates states’ responses to Kelo into four categories: “strong limitations,” which significantly limit states’ eminent domain powers; “intermediate limitations,” which impose some limits on eminent domain powers, but which have exceptions through which a state or local government can likely maneuver to maintain some of its power; “weak limitations,” under which states’ eminent domain powers remain largely unchanged; and “Status Quo Plus,” where states’ eminent domain power has either remained the same or become stronger since Kelo. Within each category, this summary details several notable examples, reviewing legislative and judicial responses. The following Part presents the federal responses to Kelo. Finally, this Article summarizes general trends in amendments of eminent domain law and briefly discusses possible explanations for these trends.

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INTRODUCTION

As one of us has written previously in this journal, redevelopment as practiced in the last few decades has demonstrated its great social utility, creating much of the recent additions to the nation’s small stock of affordable housing, and catalyzing public-private transformations of urban centers

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formerly characterized by extreme vacancy rates and uses such as decayed warehouses and parking lots. A broad coalition of national and local officials developed the redevelopment concept to address nearly a century of demonstrated inability of the unassisted free market to revitalize many urban centers.

Reformers created the redevelopment power as a response to this market failure—specifically, the private sector’s inability to assemble small lots in older city centers into larger parcels necessary for modern urban uses. The redevelopment exercise typically commences with a public planning process, but then contemplates an activist government implementation policy that is atypical of the usual role of the public sector: redevelopment agencies implement the public plan by encouraging the private owners to join forces in the effort, or, if such encouragement fails, by acquisition and re-aggregation of the parcels in question, followed by redevelopment consistent with the public plan. Because governments are generally unsuited for the creation of actual “vertical” development, where original owners do not elect to participate, redevelopment agencies frequently resell the assembled parcels to developers under contracts that require them essentially to act as quasi-public agents in carrying out the plan.

This ability to make development happen, rather than regulating how it is to happen, is both the great strength of redevelopment and the source of its historic abuse. The capacity to enforce change attracted developers and their allies in city government to projects that replaced vital, older mixed-income neighborhoods with monolithic commercial projects. Infamously, this wave of redevelopment became a tool for displacement of minority communities (thus earning “urban renewal” the sobriquet “negro removal”). This abuse spawned a movement: minority groups and neighborhood activists joined architects and developers with new-urbanist acolytes of Jane Jacobs to reform and democratize the process.

2. Id. at 1, 11. See also J. Terrence Farris, The Barriers to Using Urban Infill Development to Achieve Smart Growth, 12 Hous. POL’Y DEBATE 1, 10 (2001) (observing that city officials and developers focus redevelopment agendas on abandoned lots, dump sites, and parking lots).
3. Mihaly, supra note 1, at 1.
4. Id. at 26. See also Farris, supra note 2, at 13 (emphasizing that a major obstacle to development is assembling property because of the large quantity of transactions necessary to compile one large lot and the likelihood that individual property owners will be holdouts).
7. Id. at 19–20 (citing BERNARD J. FRIEDEN & LYNN B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28–29 (1997); Wendell E. Pritchett, The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 YALE L. & POL’Y REV. 1, 6 (2003); 12 THOMPSON ON REAL PROPERTY § 98.02(e) (Thomas ed. 2004); MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964)).
8. Id. at 20–22 (citing JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 177–206 (rev. ed. 2004)).
Many states enacted legislation to ensure transparency, eliminating cronyism in the process, and opening up agencies to local community groups and racial minorities. Redevelopment advocates integrated into federal and state legislation several reforms to ensure that eminent domain could only occur with the consent of affected local communities, that displaced tenants were fairly relocated, and that displaced owners received payment of just compensation that was true to, or in excess of, fair market value.9 Many governments avoided the use of condemnation of residential uses.10 However, the reform record is uneven, and charges of abuse of the power continued in some cases, reflecting the general problem of the dominance of economic elites and the pervasive influence of money in local politics more than specific attributes of the redevelopment process.11

The record of the now-famous case of Kelo v. City of New London12 reveals a fairly typical, post-reform situation where cities bring to bear the redevelopment power. New London’s waterfront redevelopment presented a classic case of land use market failure: a potentially attractive area suffering from protracted economic stagnation.13 The area proposed for redevelopment had an 82 percent vacancy rate for nonresidential structures, of which 66 percent were in fair to poor condition.14 In these situations, banks will not lend, decay continues, and the area becomes unsafe.15 The City addressed the issue through iteration of a new plan for the area that included increased residential uses, parks that took advantage of the waterfront amenity, and light industrial uses.16 Early in the process the City found a pioneer project proponent, an essential private catalyst for such types of municipally-led revitalization efforts.17 While typical to most modern public-private redevelopment, New London’s plan distinguished itself in one respect: it required the taking of single-family residences.18 Although the project would substantially increase

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9. See generally STEVEN J. EAGLE, REGULATORY Takings § 13–9(b) (2d ed. 2001) (discussing state legislative acts to protect private property interests after the 1990s). See also Mihaly, supra note 1, at 22.

10. See C. TheodorE KOEBEL, CTR. FOR Hous. Res., VA. POLYTECHNIC INST. & STATE UNIV., Urban Redevelopment, Displacement and the Future of the American City 21–22 (1996) (concluding that the federal government has avoided funding redeveloping residential areas, focusing instead on redeveloping commercial areas because of the high political and social costs of residential displacement).


15. Mihaly, supra note 1, at 48.

16. Id. at 6–7.

17. Id.

18. Id. at 3, 6.
the total number of residential units in the area, the plan called for a park and ancillary retail-commercial uses on land then occupied by a few, small single-family residences, some rentals and some owner-occupied.19 Several of those owners resisted the effort, and the property rights movement took up their cause. The Supreme Court’s majority, concurring, and dissenting opinions resulted.

Justice Stevens’s majority opinion upheld the condemnation in a tepid opinion marked by reluctant reliance on precedent.20 Unlike the two proceeding cases upholding redevelopment efforts—Justice Douglas’s opinion in the Berman v. Parker and Justice O’Connor’s opinion in Hawaii v. Midkiff—Justice Stevens failed to describe the goals or processes of redevelopment, the procedural protections developed in modern times, and the dire exigencies that led to the creation of the redevelopment area in New London.21 The dissent excoriated redevelopment, looking at the process purely from the eyes of the displaced landowner, with no reference to the landowner’s ability to participate in the planning process or to receive what is habitually more than just compensation.22 Thus, while the case upheld the City’s exercise of eminent domain, the collected opinions communicated a vision of government gone amuck.

The intensity of the ensuing public outcry produced a welter of political, legislative, and judicial reactions.23 Federal and state legislators introduced efforts to curtail the power of eminent domain and, in many situations, to limit or eliminate the exercise of governmental authority for economic redevelopment purposes. Approximately forty states have enacted legislation to limit eminent domain authority since Kelo.24 In some states, courts have also limited situations in which states and municipalities can “take” private property.25 As is frequently the case, the near-uniform intensity of this reaction evolved into a complex picture that eludes easy characterization. Some states and localities effectively terminated the use of eminent domain for economic redevelopment purposes. While many such areas arguably did not need the power, or never used it, other states taking the same action had a history of redevelopment efforts. In other jurisdictions, legislators sought cover from popular anger in legislation that either implemented moderate, procedural

19.  Id.
22.  See Kelo, 545 U.S. at 494 (O’Connor, J., dissenting); id. at 506 (Thomas, J., dissenting).
limitations or included measures that facially limited eminent domain, but in fact allowed its use when necessary to prevent holdouts. As noted by Professor Erler, although many states have ostensibly limited eminent domain authority, much of the legislation "passed in the wake of Kelo was substantially cosmetic and will likely have little or no effect on economic development takings." 26 In many states, the actors who benefit from redevelopment—urban minorities, urban mayors, low-income housing advocates, and urban developers—successfully argued for the essential utility of the effort, blunting attempted limits on eminent domain entirely.

This Article delineates these legislative and judicial developments in the category of strong, intermediate, and weak limitations on the eminent domain power, and finally looks at states where the power remained unchanged or in fact enhanced ("Status Quo Plus"). This summary also includes "grades" assigned to states' limitations on eminent domain power by the Castle Coalition, a project for the Institute for Justice that opposes use of eminent domain. The methodology and accuracy of the Coalition's "grades" have come under criticism, justifiably so in our view, but the rankings are interesting and we include them for the convenience of the reader. 27 Finally this Article briefly summarizes efforts to explain the variety of reactions and draws conclusions of its own.

I. STRONG LIMITATIONS

The property rights movement gained significant traction after Kelo, leading some states to tighten their eminent domain laws to eliminate economic development as a viable "public use" and to limit "blight" condemnations under state takings clauses. By some accounts, "fourteen state legislatures have enacted laws that either ban economic development takings or significantly restrict them." 28 States with the strongest eminent domain limitations eliminated or narrowed "blight" exemptions and incorporated restrictions on use of eminent domain power for economic development into their state constitutions. Florida, South Dakota, and Michigan are examples of states that have adopted strong limitations on eminent domain power since 2005 through a combination of legislative and judicial measures. 29

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28. See Erler, supra note 26 at 13 (citing Somin, supra note 24, at 2120) (internal quotation marks omitted).
29. THE CASTLE COAL., supra note 24.
A. Florida (Constitutional and Legislative Limitations)

Chapters 73 and 163 of the Florida General Statutes and article 10, section 6 of the Florida Constitution contain the state’s eminent domain authority. House Bill 1567, signed into law in 2006 and codified at sections 73 and 163 of the Florida General Statutes, incorporates proposals of a Florida legislative commission organized after Kelo to study eminent domain. Section 73.013 narrows transfer of land by eminent domain to private parties, allowing such transfers only in the case of common carriers, utilities, infrastructure provision, or leases of otherwise public space. The law allows transfer to private parties “without restriction” within ten years of the original transfer if the land acquired no longer serves the purpose for which it was condemned and the condemning authority has given the original owner the opportunity to buy back the property for the original price. If ten years have elapsed since the acquisition of the property, the government may freely convey the land to a private party. Section 73.014 also limits the use of eminent domain to abate a public nuisance or cure blight or slum conditions, requiring that a government determine that an individual property poses a danger to public health or safety before exercising eminent domain. The statute further specifies that the use of eminent domain for the abatement or clearance of such conditions “does not satisfy the public purpose requirement of [the Florida Constitution].” Further, section 163 clarifies that “the prevention or elimination of a slum area or blighted area as defined in this part and the preservation or enhancement of the tax base are not public uses or purposes for which private property may be taken by eminent domain and do not satisfy the public purpose requirement of the Florida Constitution.” Florida also passed a constitutional amendment (House Joint Resolution 1569) in 2006 that requires a three-fifths majority in both legislative houses to grant exceptions to the general prohibition against taking private property for private use. These efforts “mark . . . probably the most restrictive legislation passed by any state.” Florida received an “A” on the Castle Coalition’s 50 State Report Card.

30. FLA. STAT. chs. 73, 163 (2010).
32. FLA. STAT. § 73.013 (2010).
33. Id. §§ 73.013(1)(a)-(e).
34. Id. §§ 73.013(1)(f), (2)(b).
35. Id. §§ 73.013 (1)(g), (2)(a).
36. Id. § 73.014.
37. Id. §§ 73.014(1), (2).
38. Id. § 163.335.
39. FLA. CONST. art. X, § 6(c); H.R.J. Res. 1569, 19th Leg., Reg. Sess. (Fla. 2006).
41. THE CASTLE COAL., supra note 24.
B. South Dakota (Legislative and Judicial Limitations)

The South Dakota Legislature narrowed eminent domain power through House Bill 1080, signed into law in February 2006 and codified at South Dakota Codified Laws section 11-7-22. The bill outlaws the use of eminent domain to “take” private property “[f]or transfer to any private person, nongovernmental entity, or other public-private business entity.” The legislation also prohibits condemnation “primarily for enhancement of tax revenues.” After seven years, if condemned land is no longer used for the public purpose for which it was seized, the government must give the original owner the opportunity to repurchase the property at its current fair market value.

South Dakota courts have further limited the state’s eminent domain power relative to that allowed by Kelo. In Benson v. State, the Supreme Court of South Dakota reiterated the principle that article VI, section 13 of South Dakota Constitution “provides its landowners more protection against a taking of their property than the United States Constitution.” The court contrasted its interpretation of the South Dakota Constitution with that of the Federal Constitution proffered by the Kelo Court. Specifically, the court has reaffirmed its “use by the public test,” which “requires that there be a ‘use or right of use on the part of the public or some limited portion of it.’” Overall, South Dakota significantly limited its eminent domain power after Kelo. South Dakota received an “A” on the Castle Coalition’s 50 State Report Card.

C. Michigan (Constitutional and Legislative Limitations)

Before Kelo, in County of Wayne v. Hathcock, the Michigan Supreme Court held that “a generalized economic benefit” is not a constitutionally permissible excuse for the use of eminent domain to transfer property between private parties. The Hathcock court explained three exceptions to the ban on takings for transfer between private parties: where there is “public necessity of the extreme sort,” when the private party to whom the government transfers land “remains accountable to the public in its use of that property,” and when the selection of land to be condemned is itself “based on public concern,” which includes condemnation for removal of blight. In Kelo itself, Justice Stevens referred to Hathcock as an example of how states were permitted to

43. S.D. Codified Laws § 11-7-22.1.
44. Id.
45. Id. § 11-7-22.2.
46. 710 N.W.2d 131, 146 (S.D. 2006).
47. Id. (citing Ill. Cent. R.R. v. E. Sioux Falls Quarry Co., 144 N.W. 724, 728 (S.D. 1913)).
50. Id. at 783; See also Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981).
adopt eminent domain “requirements that are stricter than the federal baseline.”51

After Kelo, in 2006, the Michigan Legislature passed an amendment to the state constitution to further limit the eminent domain power. The amendment, introduced as Senate Joint Resolution E and codified at article 10, section 2 of the Michigan Constitution, prohibits “the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”52 The amendment also narrowed the state’s blight exemption so that, in the case of a taking for the eradication of blight, “the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.”53 The Michigan Legislature also modified procedures for condemnation and calculation of compensation through the Uniform Compensation Procedures Act.54 This Act raised the statutory cap for individuals’ moving expenses, provided attorney’s fees for low-income individuals in the event of an unsuccessful condemnation challenge, and clarified the process for surrendering property.55 The Act also incorporates House Bills 5820 and 5821, which outline procedures for determining and delivering compensation.56 Further, in the same session, the legislature adopted Senate Bill 693, which narrowly defines the public uses for which private property may be condemned.57 As noted by one academic observer, Michigan’s eminent domain limitations “surely rank . . . as one of the most effective reactions to Kelo.”58 Michigan received an “A-” on the Castle Coalition’s 50 State Report Card.59

D. Castle Coalition “Grades” of Other Strong Limitations

North Dakota (A), New Mexico (A-), Alabama (B+), Arizona (B+), Delaware (B+), Georgia (B+), Nevada (B+), New Hampshire (B+), Oregon (B+), South Carolina (B+), Virginia (B+).

II. INTERMEDIATE LIMITATIONS

In many states, changes in eminent domain law after Kelo did not so substantially curtail the governments’ power of eminent domain. Among other tactics, these states used constitutional and legislative amendments and judicial mandates to prohibit takings for private use, to allow landowners the right to

53. Id.
55. Id.
58. Erler, supra note 26, at 11.
repurchase after condemnation, to limit or eliminate blight exemptions, or to ban condemnation for solely economic development purposes. A variety of exceptions exist in these new limitations on eminent domain law; for example, ambiguity of key terms, exemptions for large urban areas, surmountable limitations on blight exemptions, and subsequent amendment of eminent domain restrictions and prohibitions to strengthen governments' eminent domain power all hedge against post-\textit{Kelo} restrictions. Louisiana, Minnesota and Utah are examples of states that substantially altered their eminent domain law but left devices which allow municipalities and other entities to exercise eminent domain power much like that asserted in \textit{Kelo}.

\textbf{A. Louisiana (Constitutional Limitations)}

Louisiana amended its constitution in September 2006 through Senate Bill No. 1.\textsuperscript{60} Part of the amendment, codified in article I, section 4 of the Louisiana Constitution, prohibits the taking of private property for private use and prevents localities from condemning private property merely to generate taxes or jobs.\textsuperscript{61} The amendment also limits the blight exemption to condemnation for the sole purpose of removing "a threat to public health or safety caused by the existing use or disuse of the property."\textsuperscript{62} Another portion of the amendment, codified in article 6, section 21 of the Louisiana Constitution, provides that a locality may not condemn residential properties for an industrial park or a public port facility.\textsuperscript{63} During the same session, the legislature passed a second constitutional amendment, adopted as House Bill 707 and codified in article I, section 4(H)(1) of the Louisiana Constitution, which provides a right of first refusal to the original property owners if the government no longer needs the condemned property for its original public use.\textsuperscript{64} Despite these constitutional changes, the eminent domain power is not effectively eliminated, as localities can still use the power for many traditional uses; indeed, Louisiana law still includes a utility and infrastructure provision and a blight exemption (though a limited one), and property can nonetheless be taken as long as the government does so without consideration of economic development and revenue generation. Consequently, Louisiana received merely a "B" on the Castle Coalition's 50 State Report Card.\textsuperscript{65}

\textsuperscript{60} S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).
\textsuperscript{61} LA. CONST. art. I, § 4(B).
\textsuperscript{62} LA. CONST. art. I, § 4(B)(2)(c).
\textsuperscript{63} LA. CONST. art. VI, § 21.
\textsuperscript{65} THE CASTLE COAL., supra note 24.
B. Minnesota (Legislative and Judicial Limitations)

Article I, section 13 of the Minnesota Constitution and section 117.012 of the Minnesota Statutes contain Minnesota's eminent domain authority. In May 2006, almost a year after Kelo, the governor of Minnesota signed Senate File 2750 (House File 2846) to limit eminent domain authority. The law prohibits municipalities from using eminent domain to transfer property from one owner to another for private commercial development, specifying that "[t]he public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose." However, a government may condemn non-blighted properties if they are in an area where a majority of properties are blighted and no feasible alternative solution exists to remediate the blighted properties. The bill also includes a right-of-first-refusal provision, requiring a government to offer the property back to its original owners for the original sale price if it finds the land no longer serves a public use.

While these provisions ostensibly limit localities' eminent domain power, they have substantial exceptions. First, the requirement that the benefits of economic development cannot constitute a public use "by themselves" indicates that a locality could take a property for economic development if it presented any additional reason listed in the statute. It does not prohibit economic development benefits from being among an authority's reasons for condemnation.

Recently, in Eagan Economic Development Authority v. U-Haul Co. of Minnesota, the Supreme Court of Minnesota addressed the legality of a quick-take condemnation by the Eagan Economic Development Authority ("EDA"). The Minnesota Court of Appeals had found that the EDA had illegally taken the respondents' land prior to executing a binding development agreement with a third party. The Minnesota Supreme Court reversed, holding that the applicable Redevelopment Plan was binding on the EDA and did not require the condemning authority to have a formal development agreement before condemning private property. This case is some indication that the Minnesota Supreme Court may give deference to governments' use of eminent domain. Thus, although Minnesota changed its eminent domain law in response to Kelo, it has done so to a less significant degree than the states with

68. MINN. STAT. § 117.025(11).
69. MINN. STAT. § 117.027.
70. MINN. STAT. § 117.226; S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006).
71. 787 N.W.2d 523 (Minn. 2010).
72. Id. at 525; Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn., 765 N.W.2d 403, 404-05 (Minn. Ct. App. 2009).
73. Eagan, 787 N.W.2d at 523.
“strong limitations” relative to its pre-Kelo analogue. Minnesota received a “B-” on the Castle Coalition’s 50 State Report Card.74

C. Utah (Legislative Limitations)

Article I, section 22 of the Utah Constitution and sections 78B-5-6 and 17C-2-3 to -6 of the Utah Code constitute the primary eminent domain authorities in Utah.75 In 2005, as Kelo made its way up to the Supreme Court, Utah restricted its eminent domain authority by removing the blight exception for urban renewal projects, a provision that was repealed only one year later.76 Since Kelo, the state has passed numerous procedural measures to limit use of eminent domain. Senate Bill 196 revises Utah’s redevelopment agency provisions, creating special taxing entities and procedural requirements for urban redevelopment and economic development takings.77 In March 2007, the state adopted House Bill 365.78 This law allows local governments to take private property for blight, allows condemnation if approved by two-thirds of the condemning agency’s board, and imposes some procedural and notice requirements on condemning authorities.79 In 2008, the Utah Legislature adopted House Bill 78, codified in relevant part in section 78B-6-520 to 78B-6-521 of the Utah Code.80 These sections provide a right to repurchase if the condemning authority sells the condemned property and creates a cause of action whereby condemnees can “set aside condemnation for failure to commence or complete construction within reasonable time.”81 The 2008 Utah Legislature also adopted the Private Property Protection Act, codified at section 63-90-1 of the Utah Code.82 This Act requires state agencies to adopt guidelines to help them identify constitutional takings issues, to prepare assessments when the agencies have identified projects with constitutional takings issues, and to minimize the risk of takings wherever possible.83 Yet another bill adopted in 2008, House Bill 78, contains detailed pre-condemnation notice requirements.84 In March 2009, the Utah Legislature adopted Senate Bill 83, codified at section 78B-6-520.3 of the Utah Code, which provides property owners a right to repurchase taken property if the condemning authority puts the property to a use other than the use for which it

74. The Castle Coal., supra note 24.
76. § 17B-4-601 (repealed 2006).
77. S.B. 196, 56th Leg., Gen. Sess. (Utah 2006); § 17C-2-102.
78. H.B. 365, 57th Leg., Gen. Sess. (Utah 2007); § 17C-2-601.
79. § 17C-2-601.
80. H.B. 78, 57th Leg., Gen. Sess. (Utah 2008); §§ 78B-6-520–78B-6-521.
81. § 78B-6-521.
83. See §§ 63L-3-10–63L-3-202.
was originally taken.\textsuperscript{85} Current Utah law, however, still allows broad eminent
domain power to take land "for all public uses authorized by the federal
government."\textsuperscript{86} As evidenced here, Utah has given a lot of attention to its
eminent domain laws, but these mostly procedural laws may not seriously
curtail the power. Utah received a "B" on the Castle Coalition's \textit{50 State Report Card}.\textsuperscript{87}

\textbf{D. Castle Coalition "Grades" of Other Intermediate Limitations}

Indiana (B), Kansas (B), Wyoming (B), Iowa (B-), Pennsylvania (B-).\textsuperscript{88}

\textbf{III. WEAK LIMITATIONS}

Other states reacted to \textit{Kelo} with legislative and judicial limitations that
contain substantial exceptions and other devices so that the efforts effect
minimal change to the state of their eminent domain laws. Such reactions often
facially appear to restrict the eminent domain power. However, in the volume
and complexity of their mandates lie substantial holes in apparent bans and
restrictions, such as temporary application; broad blight exemptions; exceptions
for projects wherein governments can point to a primary purpose other than
economic development; exceptions for community development and urban
renewal projects; and exceptions when a project is adopted by majority vote of
the appropriate governing body, among others. States with minimal post-\textit{Kelo}
limitations include Ohio, Texas, and Washington.

\textbf{A. Ohio (Legislative and Judicial Limitations)}

The state of the law in Ohio currently does contain significant limitations
on the use of eminent domain for economic development. In 2006, the Ohio
Supreme Court handed down a unanimous decision in favor of private property
owners in \textit{City of Norwood v. Horney}.\textsuperscript{89} The court said that "although
economic factors may be considered in determining whether private property
may be appropriated, the fact that the appropriation would provide an economic
benefit to the government and community, standing alone, does not satisfy the
public-use requirement of section 19, article I of the Ohio Constitution."\textsuperscript{90} The
court also interprets the Ohio Constitution to require that courts apply

\begin{itemize}
\item \textsuperscript{85} S.B. 83, 58th Leg., Gen. Sess. (Utah 2009); § 78B-6-520.3.
\item \textsuperscript{86} § 78B-6-501.1.
\item \textsuperscript{87} \textit{THE CASTLE COAL.}, \textit{supra} note 24.
\item \textsuperscript{88} \textit{Id.} In \textit{Middletown Township v. Lands of Stone}, the Supreme Court of Pennsylvania held that
recreational use was not the true purpose behind a municipality’s condemnation of a farm. 939 A.2d 331
(Pa. 2007). In so holding, the court explained that in Pennsylvania, “a taking will be seen as having a
public purpose only where the public is to be the primary and paramount beneficiary of its exercise.” \textit{Id.}
at 337.
\item \textsuperscript{89} 853 N.E.2d 1115 (Ohio 2006).
\item \textsuperscript{90} \textit{Id.} at 1123.
\end{itemize}
"heightened scrutiny" in eminent domain cases.\textsuperscript{91} The court said that the town ordinance at issue contained a "standardless standard," as it allowed condemnation in a "deteriorating area," defined to include areas that "may deteriorate in the future."\textsuperscript{92} The court found that "a municipality has no authority to appropriate private property for only a contemplated or speculative use in the future."\textsuperscript{93} While the court also held that the ordinance at issue was a violation of due process, its holding that the ordinance was a violation of the Ohio Constitution's public-use clause re-characterized the eminent domain power in Ohio to restrict economic development takings and to redefine the level of scrutiny applied in eminent domain cases.\textsuperscript{94} However, these changes may have little effect in reducing takings similar to\textit{Kelo} in that a municipality is ostensibly only barred from using economic benefit as the sole justification for the taking; municipalities can possibly assert a combination of reasons that likely satisfy the\textit{Norwood} standard, despite the application of heightened scrutiny.

Apart from this judicial limitation, Ohio has seen little substantive change in its eminent domain law. After\textit{Kelo}, the Ohio General Assembly (GA) issued a moratorium on condemnation of private property for the primary purpose of economic development in non-blighted areas, declaring that

until December 31, 2006, no public body shall use eminent domain to take . . . private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in the ownership of that property being vested in another private person.\textsuperscript{95}

This temporary law did not effect substantial change as it maintained a broad blight exemption, and most governments could point to a primary purpose other than economic development for any proposed condemnation.\textsuperscript{96} The GA also commissioned a "Legislative Task Force to Study Eminent Domain and its Use and Application in the State."\textsuperscript{97} In 2007, based on the recommendations of the Task Force, the GA passed Senate Bill 7, which provides notice and compensation procedures for property owners when their property is under threat of condemnation. Ohio still maintains an expansive blight exemption, allowing condemnation if the affected property meets any two of seventeen different conditions, including "[f]aulty lot layout in relation to size, adequacy, accessibility, or usefulness;" "[e]xcessive dwelling unit density;" and "[a]ge and obsolescence."\textsuperscript{98} To qualify for an exemption, the proposed condemnation

\begin{itemize}
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id. at 1145.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} See 853 N.E.2d 1115.
  \item \textsuperscript{95} An Act to Establish, until December 31, 2006, a Moratorium on Eminent Domain, S.B. 167 § 2, Ohio Gen. Assem. (Ohio 2005).
  \item \textsuperscript{96} Somin, supra note 24, at 2134–35.
  \item \textsuperscript{97} S.B. 167 § 2, Ohio Gen. Assembly (Ohio 2005). OHIO REV. CODE ANN. § 1426.
  \item \textsuperscript{98} OHIO REV. CODE ANN. §§ 1.08, 303.26.
\end{itemize}
must affect an area in which seventy percent of properties are found blighted. Ohio received a “D” on the Castle Coalition’s 50 State Report Card.99

B. Texas (Legislative, Judicial and Constitutional Limitations)

In September 2005, the Texas Legislature passed Senate Bill 7, which prohibits condemnation if the taking confers a private benefit on a particular private party through the use of the property; is for a public use that is merely a pretext to confer a private benefit on a particular private party; or 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. . . .100

The third criterion’s explicit exception for municipal community development and urban renewal in the face of blight indicates that the Texas Legislature did not intend a literal meaning of the first criterion’s ban on conferral of private benefits, but rather meant “to forbid condemnations that create such a private benefit without also serving a public use.”101 Also, Texas did not change its blight definition, which includes an area that because of dangerous conditions “adversely affects . . . the public health, safety, morals, or welfare . . . or results in an economic or social liability to the municipality.”102 The “community development” exemption is quite broad, as it covers development of property “inappropriately developed from the standpoint of sound community development and growth.”103 This exemption further extends to activities conducted to eliminate “slums and areas affected by blight,” prevent “blighting influences,” eliminate “conditions detrimental to the public health, safety, and welfare,” and to serve multiple other purposes.104 Moreover, the second criterion simply reiterates eminent domain law as understood by the Kelo Court. Finally, the third criterion contains a large exemption in its ultimate clause, as most projects can be said to promote community development.

Texas courts have not yet firmly interpreted section 2206.001. In Western Seafood Co. v. United States, the Fifth Circuit Court of Appeals held that a city’s taking of land owned by a commercial shrimp company to “revitalize a flagging local economy” was “[a]s in Kelo . . . the result of a carefully considered development plan” and thus did not violate the Takings Clause.105 The court remanded the case, however, to determine whether the enactment of

100. Limitations on Use of Eminent Domain Act, TEX. GOV’T CODE ANN. § 2206.001(b) (West 2008); S.B. 7, 79th Leg., 2d Called Sess. (Tex. 2005).
101. Somin, supra note 24, at 2136.
102. Loc. Gov’t CODE ANN. § 374.003.
103. Id. § 373.005(b)(1)(A).
104. Id. § 374.002(b).
105. See 202 F. App’x 670 (5th Cir. 2006).
section 2206.001 of the Texas Government Code, discussed above, would render the condemnation unconstitutional under the Texas Constitution. On remand, the district court abstained and stayed the case pending resolution of the state court issue before the Texas Supreme Court. However, in City of Austin v. Whittington, the case to which the district court referred, the Texas Supreme Court did not address section 2206.001, instead deciding the case on other grounds.

The state has seen some additional changes to its eminent domain law since Kelo. House Bill 1495, adopted in 2007 and codified at section 402.031 of the Texas Government Code, requires the Texas Attorney General to summarize eminent domain law into a “Landowner’s Bill of Rights,” which educates the public on the notice, procedure, and compensation rights associated with eminent domain. In November 2009, Texas adopted a constitutional amendment, House Joint Resolution 14, which requires a two-thirds vote of each house of the legislature to grant the power of eminent domain to an entity (public or private) and tightens the state’s blight exemption by requiring that government declare blight on a property-by-property basis, rather than through the area-wide designation previously allowed. As a practical matter, this latter limitation could have a substantial impact on economic redevelopment. Redevelopment seeks to merge and reconfigure small and legacy parcels in an area-wide process to facilitate development of modern use; typically, most buildings are in poor condition, but some are not. As recognized by the Supreme Court in Berman v. Parker, building-by-building blight determinations would render the process impractical. The amendment also altered the definition of “public use,” mandating that condemnations proceed only for “ownership, use and enjoyment of the property” by the public. The amendment allows condemnation with incidental private use, prohibiting taking private land for the primary purpose of economic development or an increase in tax revenue. As in Ohio, this is effectively an exception to the new rule as communities can claim an alternative primary objective in most condemnation proceedings.

Overall, Texas’s limitations on eminent domain contain substantial exceptions to the aforementioned prohibitions for utilities, port authorities, and

106. Id at 677.
110. H.R.J. Res. 14, 81st Leg., Reg. Sess (Tex. 2009). Proposition 11 was the ballot measure for House Joint Resolution 14. Id. The amendment alters the Texas Constitution, article 1, section 17. Id.
112. H.R.J. Res. 14, supra note 110.
113. Id.
other agencies and projects, along with a blight exemption. In 2009, the Governor vetoed a bill that would have narrowed the definition of public use and eliminated the blight exemption. As it currently stands, Professor Somin argues “Texas’ post-Kelo legislation is likely to be almost completely ineffectual because of its major loopholes.” Texas received a “C-” on the Castle Coalition’s 50 State Report Card.

C. Washington (Legislative Limitations)

Decades prior to Kelo, Washington’s eminent domain power had already contracted somewhat, leaving relatively minimal space for post-Kelo limitations. Article I, section 16 of the Washington Constitution ostensibly bans condemnation for private use and declares that the judiciary has plenary review over legislative condemnation determinations. Some courts interpreted this clause to significantly narrow the state’s eminent domain power. However, the 2009 Final Report of the Washington Eminent Domain Task Force (“the Report”) determined that pre-Kelo courts had revitalized eminent domain power in the state of Washington, as condemning authorities could generally dispose of property as they wished after initial public use condemnations. Washington had also adopted a law governing blight condemnations, entitled “The Community Renewal Law” and codified in section 35.81 of the Washington Code, only three years after Berman v. Parker, nearly a half-century prior to Kelo. The law declares removal of blight a valid public use, and the Washington courts have interpreted the blight definition, as noted by the Report, broadly.

Since Kelo, the Legislature adopted House Bill 1458 in April 2007 in response to a 2006 Washington Supreme Court decision, Central Puget Sound Regional Transportation Authority v. Miller. Miller had limited the notice

114. THE CASTLE COAL., supra note 24.
115. Somin, supra note 24, at 2135.
120. WASH. REV. CODE ANN. §§ 35.81.015–35.81.040 (West 2010).
requirements under eminent domain law, requiring the condemning authority to give notice of the final condemnation meeting on a government website. In contrast, House Bill 1458, codified at section 8.25.290 of the Washington Code, requires that a government seeking condemnation notify affected property owners by certified mail at least fifteen days before the public meeting at which the authority will make a final decision on the condemnation. Several bills introduced this term would significantly limit the eminent domain authority, but the Legislature has not yet enacted any of them. Thus, as noted by Professor Somin, the recent change in eminent domain law, however minimal, cannot really even qualify as "post-Kelo [sic] reform" given the substantial narrowing of the law that occurred well before Kelo. Washington received a "C-" on the Castle Coalition's 50 State Report Card.

D. Castle Coalition "Grades" of Other Weak Limitations

Wisconsin (C+), Colorado (C), North Carolina (C-), West Virginia (C-), New Jersey (F).

IV. STATUS QUO PLUS

Some state governments have either not altered their eminent domain power or have strengthened that power through judicial decisions. States in this category include New York, Connecticut, and Oklahoma.

123. Miller, 128 P.3d at 595.
126. Somin, supra note 24, at 2138.
127. THE CASTLE COAL., supra note 24.
128. Although the Castle Coalition gave New Jersey an "F," this summary considers New Jersey to have intermediate limitations due to its judicial involvement in eminent domain law since Kelo. Although New Jersey did not institute any legislative limitations, their supreme court issued two restrictive opinions which limited the blight exemption to exclude condemnations to put land to a more productive use. In Gallenthin Realty Development Inc. v. Borough of Paulsboro, the court held that property could only be considered "blighted" if the property suffered "deterioration or stagnation that has a decadent effect on surrounding property." 924 A.2d 447, 459 (N.J. 2007). In City of Long Branch v. Anzalone, the court clarified Gallenthin's standard, holding that the New Jersey Constitution requires "the area to be characterized by physical or social deterioration that threatens to become intractable" and that the Local Redevelopment and Housing Law requires a finding that the "physical condition of the properties was contributing to social problems not only within the redevelopment area, but also in nearby areas." Nos. A-0067-06T2, A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2, A-0654-06T2, 2008 WL 3090052, at *18 (N.J. Super. Ct. App. Div. Aug. 7, 2008). The court reiterated that economic benefits of redevelopment are not enough to justify the use of eminent domain. Id. Thus, New Jersey's courts have narrowed the state's eminent domain law since Kelo.
A. New York (Judicial Limitations)

Since Kelo, New York has not passed any broadly applicable eminent domain limitations. Rather, the state’s highest court, the Court of Appeals of New York, has emphasized the breadth of New York’s eminent domain power. In Matter of Goldstein v. New York State Urban Development Corp., the court approved the Empire State Development Corporation’s slating of homes for condemnation for the Atlantic Yards stadium project. In its decision, the court affords substantial deference to the legislature, stating that:

Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies.129

More recently in Kaur v. New York State Urban Development Corp., the court affirmed its holding in Matter of Goldstein.130 In Kaur, the Empire State Development Corporation had approved acquisition by eminent domain of property in Manhattan for an expansion of Columbia University’s campus based on its finding that the condemned area was blighted.131 In response to a landowner challenge, the court held that “the Empire State Development Corporation’s . . . findings of blight and determination that the condemnation of petitioners’ property qualified as a ‘land use improvement project’ were rationally based and entitled to deference.”132 In so holding, the court reiterated principles enunciated in New York case law which “are based on a consistent body of law that goes back over fifty years,” stating that “a court may only substitute its own judgment for that of the legislative body authorizing the project when such judgment is irrational or baseless.”133 Thus, since Kelo, New York has emphasized the broad eminent domain power afforded to the state by its laws. New York received an “F” on the Castle Coalition’s 50 State Report Card.134

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130. 933 N.E.2d 721, 724 (N.Y. 2010), cert. denied, 131 S. Ct. 822, 823 (2010). As noted, the Supreme Court of the United States declined to hear the case.
131. Id.
132. Id.
134. THE CASTLE COAL., supra note 24.
B. Connecticut (Legislative Limitations)

The forty-second state to adopt legislation limiting eminent domain authority, Connecticut has not dramatically altered its takings law.\(^{135}\) In June 2007, the Connecticut General Assembly passed Senate Bill 167, which bans condemnation of private property when “the primary purpose [is] increasing local tax revenue,” and requires a super-majority vote in municipalities to acquire property through eminent domain.\(^{136}\) In addition to the obvious ability to proceed on the grounds of mixed purpose, this bill contains significant exceptions. Most municipalities can point to a primary purpose for condemnation other than increased tax revenue; and, as long as the condemnation is part of a larger plan for “redevelopment,” increasing tax revenue may be an ancillary purpose.\(^{137}\) Further, municipalities proposing condemnation proceedings could avoid this limitation by garnering a super-majority of their constituents to favor their proposals. The law does not bar condemnation for economic development or to alleviate blight.\(^{138}\) In the 2009 legislative session, the General Assembly repealed a provision of the state’s eminent domain law, adopted shortly after Kelo, which had created an ombudsman of property rights, thereby eliminating the position.\(^{139}\) Thus, Connecticut’s eminent domain power is still strong in the face of minor alterations in the law since Kelo. Connecticut, the state in which Kelo arose, received a “D” on the Castle Coalition’s 50 State Report Card.\(^{140}\)

C. Oklahoma (Judicial Limitations)

Title 27 of the Oklahoma Code governs the states’ power of eminent domain.\(^{141}\) Oklahoma did not adopt legislative limitations after Kelo, although it did form study committees before the 2006 legislative session.\(^{142}\) In May 2006, however, the judiciary stepped in to institute post-Kelo limitations to eminent domain authority. In Muskogee County v. Lowery, the Oklahoma Supreme Court came to a different conclusion than the Kelo Court, holding instead that economic development is not a constitutional reason to use eminent domain under the Oklahoma Constitution.\(^{143}\) In Lowery, Muskogee County attempted to condemn an easement across private property to make way for a

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135. Id.
137. See §§ 8-125–8-133 (delineating procedures for condemnation in “redevelopment areas”).
138. §§ 8-124, 8-140, 8-141 (delineating a broad blight exemption).
140. THE CASTLE COAL., supra note 24.
141. OKLA. STAT. ANN. tit. 27, §§ 1–16 (West 2010).
143. 136 P.3d 639, 650 (Okla. 2006).
private electric generation plant’s appurtenances, with a stated purpose of “economic development.”\[144\] The court noted that Justice Stevens had explicitly stated that states may interpret their constitutional eminent domain clauses differently than the Supreme Court interprets the federal Constitution.\[145\] The court held that Oklahoma’s “constitutional eminent domain provisions place more stringent limitation on government eminent domain power than the limitations imposed by the Fifth Amendment of the Constitution” and that “economic development alone does not constitute a public purpose.”\[146\] However, the court explicitly preserved the state’s blight exemption.\[147\] Apart from the notable judicial incursion in Lowery, Oklahoma has not significantly altered its eminent domain law since Kelo. Oklahoma received an “F” on the Castle Coalition’s 50 State Report Card.\[148\]

D. Castle Coalition “Grades” of Other States Maintaining the Status Quo

Idaho (D+), Illinois (D+), Kentucky (D+), Maine (D+), Nebraska (D+), Alaska (D), Maryland (D),\[149\] Missouri (D),\[150\] Montana (D), California (D-),\[151\] Rhode Island (D-),\[152\] Tennessee (D-), Vermont (D-), Arkansas (F), Hawaii (F),\[153\] Mississippi (F).

144. \textit{Id.} at 642-43.
145. \textit{Id.} at 650.
146. \textit{Id.} at 650-53.
147. \textit{Id.} at 642, 647 n. 11.
149. In \textit{Mayor and City Council of Baltimore v. Valsmaki}, the Maryland Court of Appeals adopted the \textit{Kelo} standard regarding economic development takings, finding that “government ... does not have the authority to take a private individual’s property and convey it to another private individual for a purely private purpose.” 916 A.2d 324, 336 (Md. 2007).
150. In \textit{Centene Plaza Redevelopment Corp. v. Mint Properties}, the Supreme Court of Missouri held that the property at issue “failed to meet the statutory definition of ‘blighted area’” and reversed a lower court decision that held to the contrary. 225 S.W.3d 431, 435 (Mo. 2007). In so holding, the supreme court noted that a “city’s ultimate goals for [an] area cannot serve as probative evidence of social liability in light of [a] lack of evidence concerning the public health, safety, and welfare in the record.” \textit{Id.} at 434.
151. In \textit{County of Los Angeles v. Glendora Redevelopment Project}, a California court of appeals held that a legislative determination that property targeted for redevelopment was blighted was not binding on a court of appeals, and that, in fact, the blight designation in that case was in error. 111 Cal. Rptr. 3d 104, 116 (Cal. Ct. App. 2010). In so holding, the court noted that California’s definition of blight has “progressively narrowed and tightened,” and that under current California statutory law, property must satisfy four detailed criteria to qualify as blighted. \textit{Id.} at 116–17. Moreover, in January 2011, Governor Brown proposed to eliminate redevelopment agencies in the state as a cost-cutting measure. See Press Release, Office of Governor Jerry Brown, Governor Brown’s Budget Slashes States Spending by $12.5 Billion (Jan. 10, 2011), \textit{available at} http://gov.ca.gov/news.php?id=16872; Edmund G. Brown Jr., 2011–2012 Governor’s Budget Summary 28 (2011), \textit{available at} http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf. Accordingly, the last-minute California legislative budget approval included two companion redevelopment bills, Assembly Bill 26 and Assembly Bill 27. A.B. X1 26, 2011–12 Leg., 1st Ex. (Cal. 2011); A.B. X1 27, 2011–12 Leg., 1st Ex. (Cal. 2011). Governor Brown signed Assembly Bills 26 and 27 on June 29, 2011. \textit{See Lauren Silva, AB X1 26 and AB X1 27, AMERICAN PLANNING ASSOCIATION – INLAND EMPIRE SECTION (July 5, 2011), http://www.ies-apa.org/news.asp?epyT_hcraperS=0&hcreeaS_drowyeK=&edoC_htnoM=5&edoC_raeY=}
Federal eminent domain law has largely remained unchanged since the *Kelo* decision, despite legislative and executive attention to the topic. The Legislature has attempted to alter eminent domain law through at least three avenues: the Private Property Rights Protection Act of 2005 ("PRPA"), the Bond Amendment, and Executive Order 13,406. In contrast, federal courts have generally not strayed from the *Kelo* doctrine.  

A. Property Rights Protection Act

The U.S. House of Representatives passed PRPA in November 2005 by a vote of 376 to 38. However, PRPA has not yet passed the Senate. In May 2007, PRPA passed in the Agriculture Committee of the House of Representatives under the name "Strengthening the Ownership of Private

2010&hcreaS_yrogetaC=&DI_kniL_sweN=7. Assembly Bill 26 dissolves redevelopment agencies as of October 1 if they do not refrain from undertaking certain actions, including incurring indebtedness or entering into contracts. A.B. X1 26, 2011–12 Leg., 1st Ex. (Cal. 2011). Assembly Bill 27 allows local governments to save redevelopment agencies by making annual payments to the agencies' respective county auditors. A.B. X1 27, 2011–12 Leg., 1st Ex. (Cal. 2011). San Francisco will have to pay an estimated $21-25 million over the next year under Assembly Bill 27. Email from Jesse Smith, Chief Assistant City Attorney, San Francisco City Attorney's Office to Marc Mihaly, co-author (July 10, 2011, 17:48 EST) (on file with Marc Mihaly, co-author). The California Redevelopment Association has filed a lawsuit in Sacramento Superior Court challenging the constitutionality of Assembly Bill 26. California Redevelopment Association, *Compliance with AB 26 4x, State Take of $2.05 Billion, CALIFORNIA REDEVELOPMENT ASSOCIATION* (Nov. 24, 2009), http://69.63.138.11/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6279. The decisions by California's Governor and Legislature to target redevelopment may reflect the political damage done by the post-*Kelo* backlash.

152. In *Rhode Island Economic Development Corp. v. The Parking Co.*, the Supreme Court of Rhode Island barred the quick-condemnation of an airport parking garage in part based on its finding that the condemnation did not satisfy a public use. 892 A.2d 87, 104 (R.I. 2006). The court cited *Kelo* in comparison, noting that the taking at issue in this case had nothing to do with a public use. Id. More specifically, the court noted, the condemning authority did not have a "deliberate and methodical approach to formulating its economic development plan" and instead made a "conclusory" determination that the project would further economic development objectives. Id. at 105.

153. In *County of Hawaii v. C&J Coupe Family Limited Partnership*, the Supreme Court of Hawaii declined to adopt "a per se rule for roads under the public use clause" as it would "deprive the court of its judicial function." 198 P.3d 615, 648 (Haw. 2008). Citing *Kelo*, the court noted that "even where government's stated purpose is a 'classic' one, where the actual purpose is to confer a private benefit on a particular private party, the condemnation is forbidden." Id. (internal quotations omitted). The court remanded the case to determine whether the "public use" declared in the case at bar was a pretext for the transfer of property to benefit private parties. Id. at 653.

154. E.g., *Didden v. Vill. of Port Chester*, 173 Fed. Appx 931, 933 (2d Cir. 2006) (citing *Kelo* to uphold condemnation furthering a private use within a larger redevelopment plan); *Goldstein v. Pataki*, 516 P.3d 50, 64 (2d Cir. 2008) (citing *Kelo* to uphold a redevelopment condemnation, noting that the existence of private benefit does not by itself render invalid a proposed condemnation).


156. See id.
KELO’S TRAIL

Property Act of 2007” but did not receive a full vote on the floor of the House of Representatives under the new Democratic Congress. In April 2011, Representative Sensenbrenner reintroduced PRPA as “PRPA 2011.” If adopted, PRPA would eliminate any state or local government’s power to condemn property through the eminent domain power if the locality used the property at issue for economic development at any point in the future and if the “state or political subdivision receives Federal economic development funds during any fiscal year in which it does so.” Violation of PRPA by a state or local government would result in the loss of all “[f]ederal economic development funds” for two fiscal years. PRPA defines condemnation for economic development as one which transfers property “from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment or general economic health.” According to Professor Somin, though PRPA would seem to deter economic development takings, it actually would only apply to “at most just 7.4 billion dollars in federal grants to state and local governments, a mere 1.8 [percent] of all federal grants to states and localities.” However, as Congress has not yet enacted the bill, its potential effects on states’ use of eminent domain are unclear.

B. The Bond Amendment

Congress imposed limitations on eminent domain by amending a 2005 appropriations bill for the Transportation, Treasury, and Housing and Urban Development departments, the judiciary, and the District of Columbia, collectively called “the Bond Amendment.” Section 726 of the Amendment specifies that “no funds . . . may be used to support any Federal, State or local projects that seek to use the power of eminent domain, unless eminent domain is employed for a public use . . . [p]rovided, [t]hat for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities.” However, like many state law analogues, this law only prohibits takings when economic development primarily benefits private parties; it does not prohibit takings where a locality can point to an alternative or additional substantial public benefit. The Amendment also

159. H.R. 4128, 109th Cong. § 2(a) (as passed by House, Nov. 3, 2005).
160. Id. § 2(b).
161. Id. § 8(1).
162. Somin, supra note 24, at 2151.
164. Id. § 726.
includes broad exemptions that might include private development projects, like “utility projects which benefit or serve the general public.” Also, as noted by Professor Somin, 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.”

C. Executive Order 13406

On June 23, 2006, President Bush issued Executive Order 13406, entitled “Protecting the Property Rights of the American People.” The order states:

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. By mandating that private transfers cannot occur “merely” to benefit private parties economically, the Executive Order allows private transfers when a condemning authority can point to any additional purpose(s). As noted by one observer, “it is easy to argue... that private use will ultimately benefit ‘the general public,’” including revenue enhancements. Thus, the executive order adheres to the Kelo doctrine.

D. Summary of Federal Efforts

PRPA, the Bond Amendment, and the Executive Order have not significantly altered the state of federal eminent domain law. Thus, the federal eminent domain standard largely remains that enunciated in Kelo, and states are free to adopt their own eminent domain limitations beyond Kelo.

VI. SUMMARY OF GENERAL TRENDS IN POST-Kelo LEGISLATION

Although approximately forty states have enacted post-Kelo legislative limitations, only fourteen state legislatures enacted laws that either ban or significantly restrict condemnation for economic development. Laws that ostensibly ban economic development takings can in fact permit them through exemptions for “‘blight’ or ‘community development’ condemnations.”

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165. Somin, supra note 24, at 2152.
166. Id. at 2153.
168. Id.
169. Erler, supra note 26, at 17.
170. Somin, supra note 24, at 2120.
171. Id.
Some forty-seven states allow takings to remedy blight.172 Sixteen states’ eminent domain amendments have broad blight exemptions, "by far the most common factor" reducing the changes effected by post-*Kelo* legislation in abrogating governments’ eminent domain powers.173 Ten of these states defined blight as any obstacle to "sound growth" or an "economic or social liability."174 The remaining six states’ laws contain similarly broad definitions of blight in that they contain a laundry list of conditions that can qualify a property as blighted.175 Other states’ eminent domain amendments have different exceptions to limitations on the condemnation power, including restricting takings on a temporary basis and banning takings for private development, but allowing condemnations to proceed if a government can point to any public benefit.176 States have also adopted procedural limitations on eminent domain powers.177 While time will tell whether these laws actually restrain governments’ use of eminent domain, at first glance they appear "purely symbolic in nature."178

VII. RELATIONSHIP OF QUANTITY OF CONDEMNATION PROCEEDINGS TO ADOPTION OF LIMITATIONS

The relationship between pre-*Kelo* use of eminent domain for economic development and post-*Kelo* limitations is far from clear. Professor Somin has compiled data showing the number of takings in each state and the “effectiveness of reform” in each state using data from the Castle Coalition Grade Report and an Institute for Justice study.179 As Somin notes, “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.”180 Also, “only seven of the twenty states with the most threatened condemnations have enacted effective reforms.”181

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172. *Id.* at 2121.
173. *Id.*
174. *Id.* at 2122–24. These include Alaska, Colorado, Missouri, Montana, Nebraska, North Carolina, Ohio, Texas, Vermont and West Virginia.
175. *Id.* at 2125. Somin actually describes eight states’ laws which fall into this category, rather than six, including Illinois, Nevada, Kentucky, Maine, Tennessee, Rhode Island, Iowa, and Wisconsin. *Id.* at 2125–26.
176. *Id.* at 2131. The other states Somin lists in this category include California, Connecticut, Maryland, and Delaware, Texas and Ohio. *Id.* Texas and Ohio also have broad blight exemptions. See [*supra* notes 102 (Texas) and 98 (Ohio)].
177. For a summary of states’ procedural changes to eminent domain law, see D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010).
178. Somin, [*supra* note 24, at 2120. The large quantity of “low” grades assigned by the Castle Coalition supports this conclusion as well, *See* THE CASTLE COAL., [*supra* note 24].
179. *Id.* at 2118.
180. *Id.* at 2117.
181. *Id.*
VIII. EXPLAINING THE INFREQUENCY OF SUBSTANTIVE LIMITATIONS

Given the “massive public backlash” against Kelo, coupled with Justice Stevens’ invitation to the states to enact stronger condemnation laws, the paucity of substantive change to states’ eminent domain laws is notable.182 One explanation posits that “widespread public ignorance” is responsible, based on a survey showing that most citizens actually know very little about eminent domain amendments in their states.183 This explanation could account for the ineffectiveness of the new laws, the timing of the Kelo backlash, and the greater limitations imposed by laws enacted by referenda relative to those adopted through the legislative process.184 Another explanation, proffered by Professor Sandefur, is that interest-group opposition to such limitations is responsible for the failures of the post-Kelo political uprising to produce substantive limitations.185 Professor Morriss used a logistic regression analysis to support several additional explanations. According to Professor Morriss, state legislatures with tax and expenditure limits were less likely to adopt substantive restrictions, and state legislatures with more Republicans were more likely to adopt substantive restrictions, but Republican strength, as measured through gubernatorial elections, made states less likely to adopt substantive response, “suggesting political competitiveness not ideology motivated action.”186 Further, Morriss found that neither greater degrees of inequality nor larger African American populations correlated with the strength of eminent domain limitations.187 Finally, Morriss shows, states undergoing economic growth were more likely to adopt substantive restrictions.188

It would seem that no single explanation suffices: many diverse explanations, including but not limited to those listed here, may support the results of the last five years of eminent domain laws. Given the subject, the lack of a coherent theme is no surprise. Land use is intensely local. Public-private development is notoriously difficult to describe. Conference panels regarding urban economic revitalization often involve disconnected presentations of project after project, devoid of connecting themes, reflecting the reality that large urban public-private redevelopment engages multiple actors in such complex political realities so as to defy generalization.189

182. Id. at 2154.
183. Id.
184. Id. See also Erler, supra note 26, at 14 (noting that “as a general matter . . . legislatively passed reforms in the wake of Kelo tended to be weaker than those passed by initiative”); Somin, supra note 24, at 2114–15 (breaking down “effectiveness,” in terms of curbing eminent domain power, of laws and referenda in each state).
187. Id.
188. Id.
189. Mihaly, supra note 1, at 8–9.
Eminent domain law has received much attention over the last five years, yet, as this summary suggests, the attention has not necessarily resulted in substantive changes in the law. In some states, like Florida, the *Kelo* backlash has dramatically altered the law, but in others, like New York, it seems to have had little effect. In many of the states between the two extremes, courts have not yet interpreted possible exceptions or limitations, de jure or de facto, to post-*Kelo* eminent domain amendments. The results of the backlash may take more time to properly manifest; but, as of the time of this Article, the *Kelo* uprising has led to little substantive limitation on states' eminent domain authority, thus permitting most states to condemn property in the context of economic development projects or to cure blight. The federal constitutional standard enunciated in *Kelo* appears dominant throughout the states.

We expect that the essence of the redevelopment power will survive and eventually thrive simply because it is necessary. Cities throughout the developed and developing world are undergoing intense redevelopment, most of it the result of extensive use of the tool of public-private partnerships, including the necessary ancillary use of eminent domain. It is difficult to believe that the United States will deprive itself of the tools necessary to ensure the continued vitality of its own great cities. After the initial rush to judgment following *Kelo*, the growing recognition by various interest groups of the social utility of eminent domain used for economic redevelopment, and the success of their quiet lobbying efforts, will allow public-private economic redevelopment, and the necessarily concomitant use of eminent domain, to continue where it is needed.

We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.