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**The Wake of *Kelo* Five Years After: A Survey of State and  
Federal Legislative Action and Judicial Activity**

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## Summary:

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 afforded by their laws.<sup>1</sup> According to the Castle Coalition, a project of the Institute for Justice, 43 states have enacted post-*Kelo* reform legislation to limit governments' use of eminent domain.<sup>2</sup> In some states, courts have also played a role in limiting situations in which states and municipalities can constitutionally "take" private property.<sup>3</sup> However, though many states have reformed their eminent domain laws since *Kelo*, the content of the reforms in many states has not effectively narrowed states' eminent domain powers. Rather, much of the eminent domain legislation "passed in the wake of *Kelo* was merely cosmetic—a sop to appease public opinion—and will likely have little or no effect on economic development takings."<sup>4</sup> This summary of eminent domain law five years after the *Kelo* decision delineates states' responses to *Kelo* into four categories: "strong reforms" which significantly limit states' eminent domain powers; "intermediate reforms" which impose some limits on eminent domain powers, but which have exceptions by which a state or local government can likely maneuver to maintain some of the power; "weak reforms" under which states' eminent domain powers remain largely unchanged; and "ineffective or nonexistent reforms," where states' eminent domain power has either remained the same or been strengthened since *Kelo*. Within each category, this summary provides several notable examples, summarizes both legislative and judicial responses, and lists additional examples. Notable judicial involvement appears in text or in footnotes throughout.

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<sup>1</sup> *Kelo v. New London*, 545 U.S. 469 (2005).

<sup>2</sup> Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101 (2009) (citing THE CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM SINCE KELO (2009), [http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=2412&Itemid=129](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129)).

<sup>3</sup> INSTITUTE FOR JUSTICE, FIVE YEARS AFTER KELO: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST DESPISED OPINIONS 5 (2010).

<sup>4</sup> Edward J. Erlar, *In Kelo's Wake*, HILLSDALE COLLEGE FREE MARKET FORUM 13 (2008).

Each example also includes the grade assigned by the Castle Coalition on its *50 State Report Card*, which measures the success of post-*Kelo* reform from the perspective of the private property rights movement. The following section presents the federal responses to *Kelo*. Finally, this paper summarizes general trends in eminent domain reform and briefly discusses possible explanations for these trends.

## **I. Strong Reforms:**

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.”<sup>5</sup> States with the strongest eminent domain laws 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.<sup>6</sup>

### **a. Florida (Constitutional and Legislative Reform)**

Chapters 73 and 163 of the Florida General Statutes and Article 10 § 6 of the Florida Constitution contain the state’s eminent domain authority.<sup>7</sup> House Bill 1567, signed into law in 2006 and codified in Sections 73 and 163 of the Florida General Statutes, incorporates proposals of a Florida legislative commission organized after *Kelo* to study eminent domain.<sup>8</sup> Section

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<sup>5</sup> *Id.* (citing Somin, *supra* note 2, at 2120) (internal quotation marks omitted).

<sup>6</sup> THE CASTLE COALITION, *supra* note 2.

<sup>7</sup> FLA STAT. ANN. §§ 73, 163.55 (West 2010). FLA. CONST. art. X, § 6.

<sup>8</sup> FLA STAT. ANN. § 73.013. H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

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.<sup>9</sup> 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.<sup>10</sup> If ten years have elapsed since the acquisition of the property, the government may freely convey the land to a private party.<sup>11</sup> 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 an individual property poses a danger to public health or safety before exercising eminent domain.<sup>12</sup> 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].”<sup>13</sup> 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 [Section] 6(a), [Article] X of the State Constitution.”<sup>14</sup> Florida also passed a constitutional amendment (House Joint Resolution 1569) in 2006 which requires a three fifths majority in both legislative houses to grant exceptions to the general prohibition against taking private property for private use.<sup>15</sup>

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<sup>9</sup> FLA STAT. ANN. § 73.013(1)(a-e). H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>10</sup> FLA STAT. ANN. § 73.013(1)(f), (2)(b). H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>11</sup> FLA STAT. ANN. § 73.013 (1)(g), (2)(a). H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>12</sup> FLA STAT. ANN. § 73.014. H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>13</sup> FLA STAT. ANN. § 73.014(1), (2). H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>14</sup> FLA STAT. ANN. § 163.335. H.B. 1567, 19th Leg., 2d Reg. Sess. (Fla. 2006).

<sup>15</sup> FLA. CONST. art. X, § 6(c). H.R.J. Res. 1569, 19th Leg., Reg. Sess. (Fla. 2006).

These efforts “mark. . .probably the most restrictive legislation passed by any state.”<sup>16</sup> Florida received an “A” on the Castle Coalition’s *50 State Report Card*.<sup>17</sup>

**b. South Dakota (Legislative and Judicial Reform)**

The South Dakota Legislature narrowed eminent domain power through House Bill 1080, signed into law in February 2006 and codified in South Dakota Codified Laws Section 11-7-22.<sup>18</sup> The Bill outlaws the use of eminent domain to “take” private property “for transfer to any private person, nongovernmental entity or other public-private business entity.”<sup>19</sup> The legislation also prohibits condemnation “primarily for enhancement of tax revenues.”<sup>20</sup> 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.<sup>21</sup>

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, § 13 of South Dakota Constitution “provides its landowners more protection against a taking of their property than the United States Constitution.”<sup>22</sup> The court contrasted its interpretation of the South Dakota Constitution with that of the federal constitution proffered by the *Kelo* Court. Specifically, “in its interpretation of article VI, section 13, [the] [c]ourt adopted the ‘use by the public test’. . . . which requires that there be a ‘use or right of use

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<sup>16</sup> Erler, *supra* note 4 at 14. See also Shaun Hoting, *The Kelo Revolution*, 86 U. DET. MERCY L. REV. 65, 106-08 (2009).

<sup>17</sup> *Id.*

<sup>18</sup> H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006). S.D. CODIFIED LAWS § 11-7-22 (2010).

<sup>19</sup> H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006). S.D. CODIFIED LAWS § 11-7-22.1 (2010).

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

<sup>21</sup> S.D. CODIFIED LAWS § 11-7-22.2 (2010).

<sup>22</sup> 710 N.W.2d 131, 146 (S.D. 2006).

on the part of the public or some limited portion of it.”<sup>23</sup> 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*.<sup>24</sup>

**c. Michigan (Constitutional and Legislative Reform)**

Michigan received an “A-” on the Castle Coalition’s *50 State Report Card*.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> In *Kelo* itself, Stevens referred to *Hathcock* as an example of how states were permitted to adopt eminent domain “requirements that are stricter than the federal baseline.”<sup>28</sup>

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 in Article 10, § 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.”<sup>29</sup> The amendment also narrowed the state’s blight

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<sup>23</sup> *Id.* (citing *Illinois Central R.R. Co. v. East Sioux Falls Quarry Co.*, 144 N.W. 724, 728 (1913)).

<sup>24</sup> THE CASTLE COALITION, *supra* note 2.

<sup>25</sup> Castle Coalition, *supra* note 3.

<sup>26</sup> 684 N.W.2d 765, 786-87 (Mich. 2004).

<sup>27</sup> *Id.* at 783.

<sup>28</sup> *Kelo*, 545 U.S. at 489.

<sup>29</sup> MICH. CONST. art. X, § 2. S.R.S. Res. E, 93d Leg., Reg. Sess. (Mich. 2006).

exemption so that a state actor must prove by clear and convincing evidence that property is blighted on a parcel-by-parcel basis.<sup>30</sup> The Michigan Legislature also modified procedures for condemnation and calculation of compensation through the Uniform Compensation Procedures Act.<sup>31</sup> 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.<sup>32</sup> The Act also incorporates House Bills 5820 and 5821, which outlines procedures for determining and delivering compensation.<sup>33</sup> Further, in the same session, the legislature adopted Senate Bill 693, which narrowly defines the public uses for which private property may be condemned.<sup>34</sup> As noted by one academic observer, Michigan's eminent domain reform "surely ranks as one of the most effective reactions to *Kelo*."<sup>35</sup>

**d. Other Examples of Strong Reforms (and their Castle Coalition "grade")**

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 Reforms:**

In many states, changes in eminent domain law after *Kelo* did not so substantially curtail the power. Such states used measures such as constitutional and legislative amendment and judicial mandate to prohibit takings for private use, to allow landowners the right to repurchase after condemnation, to limit or eliminate blight exemptions, or to ban condemnation for solely

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<sup>30</sup> *Id.*

<sup>31</sup> Uniform Condemnation Procedures Act, MICH. COMP. LAWS ANN. § 213.55 (West 2010).

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

<sup>33</sup> *Id.* H.B. 5820, 93d Leg., Reg. Sess. (Mich. 2006). H.B. 5821, 93d Leg., Reg. Sess. (Mich. 2006).

<sup>34</sup> S.B. 693, 93d Leg., Reg. Sess. (Mich. 2006).

<sup>35</sup> Erler, *supra* note 4, at 11.

economic development purposes, among other tactics. In these states, a variety of exceptions exist in the reforms, including but not limited to 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. Louisiana, Minnesota and Utah are examples of states that substantially altered their eminent domain law but left devices which allow communities to exercise eminent domain power much like that asserted in *Kelo*.

**a. Louisiana (Constitutional Reform)**

Louisiana amended its Constitution in September 2006 through Senate Bill No. 1.<sup>36</sup> Part of the Amendment, codified in Article 1 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.<sup>37</sup> The Amendment also limits the blight exemption to condemnation for the sole purpose of removing a threat to public health and safety caused to a particular property.<sup>38</sup> 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.<sup>39</sup> Another Constitutional Amendment adopted in September 2006 as House Bill 707 and codified in Article 1 Section 4(G) of the Louisiana Constitution 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.<sup>40</sup> This reform is fairly strong because the legislature adopted the changes into the state Constitution. However, the changes do

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<sup>36</sup> S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

<sup>37</sup> LA. CONST. art. I, § 4(B). S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

<sup>38</sup> LA. CONST. art. I, § 4(B)(2)(c). S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

<sup>39</sup> LA. CONST. art. VI, § 21. S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

<sup>40</sup> LA. CONST. art. I, § 4(G). H.B. 707, 2006 Leg., Reg. Sess. (La. 2006).

not completely eliminate eminent domain power, as localities can still use the power for traditional uses such as utility and infrastructure provision, can still use the blight exemption (but in very limited ways), and can take property as long as they do so without consideration of economic development and revenue generation. Louisiana received a mere “B” on the Castle Coalition’s *50 State Report Card*.<sup>41</sup>

**b. Minnesota (Legislative and Judicial Reform)**

Article I Section 13 of the Minnesota Constitution and Section 117.012 of the Minnesota Statutes Annotated contain Minnesota’s eminent domain authority.<sup>42</sup> In May 2006 the governor of Minnesota signed Senate File 2750 (House File 2846) to limit eminent domain authority.<sup>43</sup> 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.”<sup>44</sup> 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.<sup>45</sup> The Bill also includes a right-of-first-refusal provision, requiring governments 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.<sup>46</sup> Minnesota received a “B-” on the Castle Coalition’s *50 State Report Card*.<sup>47</sup>

While these provisions ostensibly limit localities’ eminent domain power, they have

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<sup>41</sup> THE CASTLE COALITION, *supra* note 2.

<sup>42</sup> MINN. CONST. art I, § 13. MINN. STAT. ANN. § 117.012 (West 2010).

<sup>43</sup> S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006).

<sup>44</sup> MINN. STAT. ANN. § 117.025(11). S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006).

<sup>45</sup> MINN. STAT. ANN. § 117.027. S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006).

<sup>46</sup> MINN. STAT. ANN. § 117.226. S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006).

<sup>47</sup> THE CASTLE COALITION, *supra* note 2.

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. Also, the Bill exempts over 2,000 Tax Increment Financing districts, including many districts in the Twin Cities, from the aforementioned requirements for up to five years.<sup>48</sup>

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”).<sup>49</sup> The 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.<sup>50</sup> 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.<sup>51</sup> This case is some indication that the Minnesota Supreme Court may give deference to governments’ use of eminent domain. Thus, though Minnesota changed its eminent domain law in response to *Kelo*, it has not as significantly the states above limited eminent domain power relative to its pre-*Kelo* analogue.

**c. Utah (Legislative Reform)**

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 controlling eminent domain authorities in Utah.<sup>52</sup> In 2005, prior to *Kelo*, Utah restricted its eminent domain authority by removing the blight exception for

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<sup>48</sup> 2006 Minn. Sess. Law Serv. 214 (West).

<sup>49</sup> 2010 WL 2943477 (Minn. July 29, 2010).

<sup>50</sup> *Id.* at \*3.

<sup>51</sup> *Id.* at \*1.

<sup>52</sup> UTAH CONST. art. I, § 22. UTAH CODE ANN. §§ 78B-6-501 to -22 (West 2010). *Id.* §§ 17C-2-301 to 04.

urban renewal projects.<sup>53</sup> 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.<sup>54</sup> In March 2007 the state adopted House Bill 365.<sup>55</sup> 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.<sup>56</sup> In 2008 the Utah Legislature adopted House Bill 78, codified in relevant part in Section 78B-6-520 to 21 of the Utah Code, which provides a right to repurchase if the condemning authority sells the condemned property and creates a cause of action by condemnees can “set aside condemnation for failure to commence or complete construction within reasonable time.”<sup>57</sup> The 2008 Utah Legislature also adopted the Private Property Protection Act, codified in Section 63-90-4 of the Utah Code.<sup>58</sup> 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.<sup>59</sup> Yet another Bill adopted in 2008, House Bill 78, contains detailed pre-condemnation notice requirements.<sup>60</sup> In March 2009, the Utah Legislature adopted Senate Bill 83, codified in Section 78B-6-520.3 of the Utah Code, which provides property owners a right to repurchase taken property if the condemning authority puts

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<sup>53</sup> UTAH CODE ANN. 1953 § 17B-4-601 (repealed 2006).

<sup>54</sup> S.B. 196, 56th Leg., Gen. Sess. (Utah 2006). UTAH CODE ANN. § 17C-2-102 (West 2010).

<sup>55</sup> H.B. 365, 57th Leg., Gen. Sess. (Utah 2007). UTAH CODE ANN. § 17C-2-601 (West 2010).

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

<sup>57</sup> H.B. 78, 57th Leg., Gen. Sess. (Utah 2009). UTAH CODE ANN. § 78B-6-521.

<sup>58</sup> Private Property Protection Act, UTAH CODE ANN. §§ 63L-3-200 to -02 (West 2010). H.B. 63, 57th Leg., Gen. Sess. (Utah 2008).

<sup>59</sup> *Id.*

<sup>60</sup> H.B. 78, 2008 Leg., Reg. Sess. (Utah 2008).

the property to a use other than that for which it was originally taken.<sup>61</sup> Current Utah law, however, still allows broad eminent domain power to take land “for all public uses authorized by the federal government.”<sup>62</sup> 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 *50 State Report Card*.<sup>63</sup>

**d. Other Examples (and their Castle Coalition “grades”)**

Indiana (B), Kansas (B), Wyoming (B), Iowa (B-), Pennsylvania (B-).<sup>64</sup>

**III. Weak Reforms:**

Other states reacted to *Kelo* with laws and judicial reform that contain substantial exceptions and other devices such 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 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-*Kelo* reform include Ohio, Texas, and Washington.

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<sup>61</sup> S.B. 83, 2009 Leg., Reg. Sess. (Utah 2009). UTAH CODE ANN. § 78B-6-520.3.

<sup>62</sup> UTAH CODE ANN. § 78B-6-501.1.

<sup>63</sup> THE CASTLE COALITION, *supra* note 2.

<sup>64</sup> In *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 (Penn. 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.” *Id.* at 338.

**a. Ohio (Legislative and Judicial Reform)**

Ohio received a “D” on the Castle Coalition’s *50 State Report Card*.<sup>65</sup> While this grade indicates minimal reform, the state of the law in Ohio currently does contain limitations the use of eminent domain power for economic development. In 2006, the Ohio Supreme Court handed down a unanimous decision in favor of private property owners in *City of Norwood v. Horney*.<sup>66</sup> 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.”<sup>67</sup> The court also interprets the Ohio Constitution to require that courts apply “heightened scrutiny” in eminent domain cases.<sup>68</sup> The court said that a town ordinance at issue was a “standardless standard,” as it allowed condemnation in a “deteriorating area,” defined to include areas that “may deteriorate in the future.” The court found that “a municipality has no authority to appropriate private property for only a contemplated or speculative use in the future.”<sup>69</sup> 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 scrutiny applied in eminent domain cases.<sup>70</sup> However, these changes may have little effect in reducing takings similar to *Kelo* in that

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<sup>65</sup> THE CASTLE COALITION, *supra* note 2.

<sup>66</sup> 853 N.E.2d 1115 (Ohio 2006).

<sup>67</sup> *Id.* at 1123.

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

<sup>69</sup> *Id.* at 1145.

<sup>70</sup> *Id.*

a municipality needs only point to a justification for a condemnation project other than economic benefit to satisfy the *Norwood* standard.

Apart from this judicial reform, Ohio has seen little substantive change in its eminent domain law. After *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.”<sup>71</sup> This law did not effect substantial change as it was temporary, maintained a broad blight exemption, and most governments could point to a primary purpose other than economic development for any proposed condemnation.<sup>72</sup> The GA also commissioned a “Legislative Task Force to Study Eminent Domain and its Use and Application in the State.”<sup>73</sup> 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.”<sup>74</sup> To qualify for an exemption, the proposed condemnation must affect an area in which 70% of properties are found blighted.

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<sup>71</sup> S.B. 167 § 2, Oh. Gen. Assem. (Oh. 2005). An Act to Establish a Moratorium on Eminent Domain, OHIO REV. CODE ANN. § 1426 (West 2010).

<sup>72</sup> Somin, *supra* note 2, at 2134-35.

<sup>73</sup> S.B. 167 § 2, Oh. Gen. Assem. (Oh. 2005). OHIO REV. CODE ANN. § 1426 (West 2010).

<sup>74</sup> OHIO REV. CODE ANN. § 1.08 (West 2010). *Id.* § 303.26.

**b. Texas (Legislative, Judicial and Constitutional Reform)**

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...”<sup>75</sup> 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.”<sup>76</sup> Also, Texas did not change its blight definition, which includes dangerous conditions that “adversely affect. . .the public health, safety, morals, or welfare. . . or results in an economic or social liability to the municipality.”<sup>77</sup> The “community development” exemption is quite broad, defined as property that is “inappropriately developed from the standpoint of sound community development and growth.”<sup>78</sup> 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

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<sup>75</sup> Limitations on Use of Eminent Domain Act, TEX. GOV’T CODE ANN. § 2206.001(b) (Vernon 2008). S.B. 7, 79th Leg., 2d Called Sess. (Tex. 2005).

<sup>76</sup> Somin, *supra* note 2, at 2136.

<sup>77</sup> TEX. GOV’T CODE ANN. 374.003 (Vernon 2010).

<sup>78</sup> *Id.* § 373.005(b)(1)(A).

ultimate clause, as most projects can be said to promote community development. Texas received a “C-” on the Castle Coalition’s *50 State Report Card*.<sup>79</sup>

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 of the United States Constitution.”<sup>80</sup> The court remanded the case, however, to determine whether the enactment of Section 2206.001 of the Texas Government Code, discussed above, would render the condemnation unconstitutional under the Texas Constitution.<sup>81</sup> On remand, the District Court abstained and stayed the case pending resolution of the state court issue in a case before the Texas Supreme Court.<sup>82</sup> 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, deciding the case on other grounds.<sup>83</sup>

The state has seen some additional changes to its eminent domain law since *Kelo*. House Bill 1495, adopted in 2007 and codified in 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.<sup>84</sup> In November 2009 Texas voters 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, tightens the state’s blight

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<sup>79</sup> THE CASTLE COALITION, *supra* note 2.

<sup>80</sup> 202 F.Appx. 670 (5th Cir. 2006).

<sup>81</sup> *Id.* at 677.

<sup>82</sup> *Western Seafood Co. v. United States*, 2007 WL 2351198 (S.D. Tex. Aug. 15,2007).

<sup>83</sup> *City of Austin v. Whittington*, 2010 WL 567153, at \*3 (Tex. App. Feb. 18, 2010) (mem.).

<sup>84</sup> Landowner’s Bill of Rights Act, TEX. GOV’T CODE ANN. 374.003 (Vernon 2010). H.B. 1495, 80th Leg., Reg. Sess. (Tex. 2007).

exemption, requiring that government must declare blight on a property-by-property basis, rather than area-wide designation as it had done previously.<sup>85</sup> As a practical matter, this latter limitation could have a substantial impact on economic redevelopment. The amendment also altered the definition of “public use,” mandating that condemnations only proceed for “ownership, use and enjoyment of the property” by the public.<sup>86</sup> 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.<sup>87</sup> As in Ohio, this is an effective exception to the new rule as communities can claim an alternative primary objective in most condemnation proceedings. The amendment also allows legislatures to give any private entity the power of eminent domain by a two-thirds vote.

Overall, Texas’s eminent domain reform contains substantial exceptions to the aforementioned prohibitions for utilities, port authorities, and 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.<sup>88</sup> As it currently stands, Professor Somin argues, “Texas’ post-Kelo [sic] legislation is likely to be almost completely ineffectual because of its major loopholes.”<sup>89</sup>

### **c. Washington (Legislative Reform)**

Washington’s eminent domain power had contracted somewhat prior to *Kelo*. Article I Section 16 of the Washington Constitution ostensibly bans condemnation for private use and

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<sup>85</sup> H.R.J. Res. 14, 81st Leg., Reg. Sess (Tex. 2009). The ballot measure for H.R.J. Res. 14 was Proposition 11. The amendment alters TEX. CONST. art. I, § 17.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> THE CASTLE COALITION, *supra* note 2.

<sup>89</sup> Somin, *supra* note 2, at 2135.

declares that the judiciary has plenary review over legislative condemnation determinations.<sup>90</sup> Some courts interpreted this clause to significantly narrow the state’s eminent domain power.<sup>91</sup> However, the 2009 Final Report of the Washington Eminent Domain Task Force determined that pre-*Kelo* courts had revitalized the eminent domain power in the state of Washington, as condemning authorities can generally dispose of property as they wish after initial public use condemnations.<sup>92</sup> 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*.<sup>93</sup> The law declares removal of blight a valid public use and, as noted by the Report, has been interpreted broadly by Washington courts.<sup>94</sup>

Since *Kelo*, the Legislature adopted Senate Bill 1458 in April 2007 in response to a 2006 decision by the Washington Supreme Court, *Central Puget Sound Regional Transportation Authority v. Miller*.<sup>95</sup> *Miller* had limited the notice requirements under eminent domain law, requiring the condemning authority to give notice of the final condemnation meeting on a government website.<sup>96</sup> In contrast, Senate Bill 1458, codified in Section 8.25.290 of the Washington Code, requires that a government seeking condemnation notify affected property owners by certified mail at least 15 days before the public meeting at which the authority will

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<sup>90</sup> WASH. CONST. art. I, § 16 (2010) (“Private property shall not be taken for private use...”).

<sup>91</sup> See *Hogue v. Port of Seattle*, 341 P.2d 171, 187 (Wash. 1959) (banning the practice of condemning residential property to “devote [the property] to what [an agency] consider[ed] a higher and better economic use”).

<sup>92</sup> Washington Eminent Domain Task Force, *2009 Final Report*, 18 (2009), available at [http://www-dev.atg.wa.gov/uploadedFiles/Home/Office\\_Initiativies/Eminent\\_Domain/Eminent\\_Domain\\_Task\\_Force\\_Report.pdf](http://www-dev.atg.wa.gov/uploadedFiles/Home/Office_Initiativies/Eminent_Domain/Eminent_Domain_Task_Force_Report.pdf).

<sup>93</sup> WASH. REV. CODE. §§ 35.81.015-040 (West 2010).

<sup>94</sup> Eminent Domain Task Force, *supra* note 89, at 21.

<sup>95</sup> S.B. 1458, 61st Leg., 1st Reg. Sess. (Wash. 2007). *Central Puget Sound Regional Transit Authority v. Miller*, 128 P.3d 588 (Wash. 2006).

<sup>96</sup> *Id.* Washington’s Senate Committee cited *Miller* as justification for the new notice law. See S. Report, Substitute H.B. 1458, 60<sup>th</sup> Leg. (Wash. 2007).

make a final decision on whether condemnation will proceed.<sup>97</sup> Several bills introduced this term would significantly limit the eminent domain authority, but have not yet been enacted.<sup>98</sup> 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*.<sup>99</sup> Washington received a “C-” on the Castle Coalition’s *50 State Report Card*.<sup>100</sup>

#### **d. Other Examples (and their Castle Coalition “grades”)**

Wisconsin (C+), Colorado (C), North Carolina (C-), West Virginia (C-), New Jersey (F).<sup>101</sup>

### **IV. Ineffective or Nonexistent Reform:**

Some state governments chose either not to alter their eminent domain power or to strengthen that power through judicial interpretation. States in this category include New York, Connecticut, and Oklahoma.

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<sup>97</sup> WASH. REV. CODE. § 8.25.290 (West 2010). S.B. 1458, 61st Leg., 1st Reg. Sess. (Wash. 2007).

<sup>98</sup> See H.B. 2425, 61st Leg., Reg. Sess. (Wash. 2010) (declaring economic development an invalid public use); H.B. 1392, 61st Leg., Reg. Sess. (Wash. 2009) (elaborating compensation and notice procedures); S.B. 5664, 61st Leg., Reg. Sess. (Wash. 2009) (citing *Kelo* and limiting takings to those which carry out traditional police powers and do not proffer private benefits); S.B. 6200, 61st Leg., Reg. Sess. (Wash. 2010) (declaring economic development an invalid public use).

<sup>99</sup> Somin, *supra* note 2, at 2138.

<sup>100</sup> THE CASTLE COALITION, *supra* note 2.

<sup>101</sup> Though the Castle Coalition gave New Jersey an “F,” this summary considers New Jersey to have minimal reform due to its judicial involvement in eminent domain law since *Kelo*. Although New Jersey did not institute any legislative reform, their Supreme Court issued two restrictive opinions which limited the blight exemption to exclude condemnations to put land to, effectively, 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, 460 (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.” 2008 WL 3090052, at \*18 (N.J. Super. App. Div. Aug. 7, 2008). The court reiterated that economic promise of redevelopment is 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 Reform)**

New York received an “F” on the Castle Coalition’s *50 State Report Card*.<sup>102</sup> Since *Kelo*, New York has not passed any broadly-applicable eminent domain reform, although the state did adopt legislation specifically targeting a golf club on Long Island and a large electric-line project.<sup>103</sup> Rather, the state’s highest court, the Court of Appeals of New York, has emphasized the breadth of New York’s power of eminent domain. In *Matter of Goldstein v. N.Y. State Urban Dev. Corp*, the court approved the Empire State Development Corporation’s slating of homes for condemnation for the Atlantic Yards stadium project.<sup>104</sup> In its decision, the court affords substantial deference to the legislature, stating that:

“[w]hether 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.”<sup>105</sup>

More recently in *Matter of Kaur v. N.Y. State Urban Dev. Corp.*, the court affirmed its holding in *Goldstein*.<sup>106</sup> 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.<sup>107</sup> In response to a landowner challenge, the court held that “the Empire State Development Corporation’s...

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<sup>102</sup> THE CASTLE COALITION, *supra* note 2.

<sup>103</sup> See Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, COLUM. L REV., 895 (2007) (summarizing a town’s failed effort to condemn a private golf course).

<sup>104</sup> 921 N.E.2d 164 (N.Y. 2009).

<sup>105</sup> *Id.* at 172.

<sup>106</sup> 2010 WL 2517686, at ¶ 1 (N.Y. Jun. 24, 2010).

<sup>107</sup> *Id.* at ¶ 3.

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."<sup>108</sup> Thus, since *Kelo* New York has emphasized the broad eminent domain power afforded by its laws.

**b. Connecticut (Legislative Reform)**

Connecticut, the state in which *Kelo* arose, received a "D" on the Castle Coalition's 50 *State Report Card*.<sup>109</sup> The 42<sup>nd</sup> state to adopt eminent domain reform, Connecticut has not dramatically altered its takings law.<sup>110</sup> In June 2007, the General Assembly passed Senate Bill 167, which bans condemnation of private property "for the primary purpose of increasing local tax revenue" and requires a supermajority vote in municipalities.<sup>111</sup> 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. As long as the condemnation is part of a larger plan for "redevelopment," increasing tax revenue may be an ancillary purpose.<sup>112</sup> Further, municipalities proposing condemnation proceedings can likely garner a supermajority of their constituents to favor their proposals. The law does not bar condemnation for economic development or to alleviate blight.<sup>113</sup> 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, thus

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<sup>108</sup> *Id.* at ¶ 1.

<sup>109</sup> THE CASTLE COALITION, *supra* note 2.

<sup>110</sup> THE CASTLE COALITION, *supra* note 2.

<sup>111</sup> CONN. GEN. STAT. ANN. § 8-193(b)(1) (West 2010). *Id.* § 8-127(b)(6)(D). S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007).

<sup>112</sup> See CONN. GEN. STAT. ANN. §§ 8-125 to -133 (West 2010) (delineating procedures for condemnation in "redevelopment areas").

<sup>113</sup> CONN. GEN. STAT. ANN. § 8-10 (West 2010) (delineating a broad blight exemption).

eliminating the position.<sup>114</sup> Connecticut's eminent domain power is still strong in the face of minor alterations in the law since *Kelo*.

**c. Oklahoma (Judicial Reform)**

Oklahoma received an “F” on the Castle Coalition’s *50 State Report Card*.<sup>115</sup> Title 27 of the Utah Code governs the states’ power of eminent domain.<sup>116</sup> Oklahoma did not adopt legislative reform after *Kelo*, although it did form study committees before the 2006 legislative session.<sup>117</sup> In May 2006, however, the judiciary stepped in to institute post-*Kelo* reform. 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.<sup>118</sup> In *Lowery*, Muskogee County attempted to condemn an easement across private property to make way for water pipelines for a private electric generation plant with a stated purpose of “economic development.”<sup>119</sup> The court noted that Stevens had explicitly stated that states may interpret their constitutional eminent domain clauses differently than the Supreme Court interprets Federal Constitution.<sup>120</sup> The court held instead that the Oklahoma “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

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<sup>114</sup> CONN. GEN. STAT. ANN. §§ 48-50 to -57 (West 2010).

<sup>115</sup> THE CASTLE COALITION, *supra* note 2.

<sup>116</sup> OKLA. STAT. ANN. tit. 27, §§ 1-16 (West 2010).

<sup>117</sup> See Press Release, Senator Mike Morgan, State Senate Leader Creates Official Interim Committee to Study Eminent Domain Issues, Oklahoma State Senate (July 6, 2005), [http://www.oksenate.gov/news/press\\_releases/press\\_releases\\_2005/pr20050706b.html](http://www.oksenate.gov/news/press_releases/press_releases_2005/pr20050706b.html).

<sup>118</sup> 136 P.3d 639, 650 (Okla. 2006).

<sup>119</sup> *Id.* at 642-43.

<sup>120</sup> *Id.* at 650.

public purpose.”<sup>121</sup> However, the court explicitly preserved the state’s blight exemption.<sup>122</sup> Apart from the notable incursion in *Lowery*, Oklahoma has not significantly altered its eminent domain law since *Kelo*.

#### **d. Other Examples (together with their Castle Coalition “grade”:**

Idaho (D+), Illinois (D+), Kentucky (D+), Maine (D+), Nebraska (D+), Alaska (D), Maryland (D),<sup>123</sup> Missouri (D),<sup>124</sup> Montana (D), California (D-),<sup>125</sup> Rhode Island (D-),<sup>126</sup> Tennessee (D-), Vermont (D-), Arkansas (F), Hawaii (F),<sup>127</sup> Mississippi (F).

#### **V. Federal Response:**

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<sup>121</sup> *Id.* at 650-51.

<sup>122</sup> *Id.* at 642.

<sup>123</sup> In *Mayor and City Council of Baltimore v. Valsmaki*, the Maryland Court of Appeals adopted the *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).

<sup>124</sup> In *Centene Plaza Redev. Corp. v. Mint Prop.s*, the Supreme Court of Missouri held that the property at issue “failed to meet the statutory definition of ‘blighted area,’” thereby reversing a lower court decision. 225 S.W.3d 431, 435 (Mo. 2007). In so holding, the 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.” *Id.* at 434.

<sup>125</sup> In *County of Los Angeles v. Glendora Redev. Project*, the Supreme Court of California 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. 2010 WL 2367468, at \*21 (Cal. Ct. App. June 15, 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. *Id.* at \*6-7.

<sup>126</sup> In *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, the Supreme Court of Rhode Island barred a 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.

<sup>127</sup> In *County of Hawaii v. C&J Coupe Family Ltd. P’ship*, the Supreme Court of Hawaii court 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, “even where government’s stated purpose [for a condemnation] 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.

Federal eminent domain law has largely remained unchanged since the *Kelo* decision, despite legislative and executive attention to the field. The federal government 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 13406. In contrast, federal courts have generally not strayed from the *Kelo* doctrine.<sup>128</sup>

**a. PRPA**

The U.S. House of Representatives passed PRPA in November 2005 by a vote of 376 to 38.<sup>129</sup> However, PRPA has not yet passed the Senate.<sup>130</sup> In May 2007, PRPA passed in the Agriculture Committee of the House of Representatives under the name “Strengthening the Ownership of Private Property Act of 2007” but has not received a full vote on the floor of the House of Representatives under the new Democratic Congress.<sup>131</sup> PRPA remains un-passed, “with no indication as to whether [it] will be taken up by the new administration and Congress that were elected in November 2008.”<sup>132</sup> 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.”<sup>133</sup> 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.<sup>134</sup> PRPA defines condemnation

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<sup>128</sup> *E.g.* Didden v. Village 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 F.3d 50 (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).

<sup>129</sup> THE CASTLE COALITION, *supra* note 2. H.R. 4128, 109th Cong. (as passed by House, Nov. 3, 2005).

<sup>130</sup> *Id.*

<sup>131</sup> H.R. 926, 110th Cong. (Feb. 8, 2007).

<sup>132</sup> Somin, *supra* note 2, at 2149.

<sup>133</sup> H.R. 4128, 109th Cong. § 2(a) (as passed by House, Nov. 3, 2005).

<sup>134</sup> *Id.* § 2(b)

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.”<sup>135</sup> 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% of all federal grants to states and localities.”<sup>136</sup> However, as Congress has not yet enacted the bill, however, its potential effects on states’ use of eminent domain are unclear.

### **b. The Bond Amendment**

Congress imposed limitations on eminent domain by amending 2006 appropriations bill for the Transportation, Treasury, and Housing and Urban Development departments, the judiciary, and the District of Columbia, collectively called “the Bond Amendment.”<sup>137</sup> 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.”<sup>138</sup> 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 includes broad exemptions that might include private development projects, like “utility projects which benefit or serve the general public.”<sup>139</sup> Also, as noted by Professor Somin, the Bond Amendment’s

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<sup>135</sup> *Id.* § 8(1).

<sup>136</sup> Somin, *supra* note 2, at 2151.

<sup>137</sup> Transportation, Treasury, Housing, and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, 119 Stat. 2396 (codified as amended in scattered sections of 26 U.S.C.).

<sup>138</sup> *Id.* § 726.

<sup>139</sup> Somin, *supra* note 2, at 2152.

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.”<sup>140</sup>

### **c. Executive Order 13,406**

On June 23, 2006 President Bush issued Executive Order 13406, entitled “Protecting the Property Rights of the American People.”<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup> Thus, the executive order adheres to the *Kelo* doctrine.

### **d. Summary of Federal Efforts**

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<sup>140</sup> Somin, *supra* note 2, at 2153. Exec. Order No. 13,406, 3 C.F.R. 235 (June 23, 2006).

<sup>141</sup> Exec. Order No. 13,406, 3 C.F.R. 235 (June 23, 2006).

<sup>142</sup> *Id.*

<sup>143</sup> Erler, *supra* note 4, at 17.

PRPA, the Bond Amendment, and the Executive Order have not significantly altered the state of 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 reforms.

## VI. Summary of General Trends in Post-*Kelo* Legislation

Although thirty six states have enacted post-*Kelo* legislative reform, only fourteen state legislatures enacted laws that either ban or significantly restrict condemnation for economic development.<sup>144</sup> Laws that ostensibly ban economic development takings can in fact permit them through exemptions for “‘blight’ or ‘community development’ condemnations.”<sup>145</sup> Some 47 states allow takings to remedy blight.<sup>146</sup> Sixteen states’ eminent domain reform laws have broad blight exemptions, “by far the most common factor reducing the changes effected by post-*Kelo* legislation in abrogating governments’ eminent domain powers.”<sup>147</sup> Ten of these states defined blight as any obstacle to “sound growth” or an “economic or social liability.”<sup>148</sup> 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.<sup>149</sup> Other states’ eminent domain reforms 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.<sup>150</sup> States have also adopted procedural

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<sup>144</sup> Somin, *supra* note 2, at 2120.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2121.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2122. These include Alaska, Colorado, Missouri, Montana, Nebraska, North Carolina, Ohio, Texas, Vermont and West Virginia. *Id.* at 2123-24.

<sup>149</sup> *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.

<sup>150</sup> *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 *infra* note 95.

limitations on eminent domain powers.<sup>151</sup> While time will tell whether these laws restrain governments' use of eminent domain, at first glance they appear "purely symbolic in nature."<sup>152</sup>

## **VII. Relationship of Quantity of Condemnation Proceedings to Adoption of Reform**

The relationship between pre-*Kelo* use of eminent domain for economic development and post-*Kelo* reform is not 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 another study by the Institute for Justice.<sup>153</sup> 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."<sup>154</sup> Also, "only seven of the twenty states with the most threatened condemnations have enacted effective reforms."<sup>155</sup>

## **VIII. Explaining the Infrequency of Substantive Reform:**

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.<sup>156</sup> One explanation posits that "widespread public ignorance" is responsible based on a survey showing that most citizens actually know very little about eminent domain reform in their states.<sup>157</sup> This explanation, could account for the ineffectiveness of new laws, the timing of the *Kelo* backlash, the greater effectiveness of laws

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<sup>151</sup> 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).

<sup>152</sup> *Id.*

<sup>153</sup> Somin, *supra* note 2, at 2118.

<sup>154</sup> *Id.* at 2117.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2154.

<sup>157</sup> *Id.*

enacted by referenda relative to those adopted through the legislative process.<sup>158</sup> Another explanation proffered by Professor Sandefur is that interest-group opposition is responsible for the failures of the political uprising after *Kelo* to produce substantive reform.<sup>159</sup> Professor Morriss used a logistic regression analysis to support several additional explanations. According to 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.”<sup>160</sup> Further, Morriss found that an electorate’s overall political ideology, greater degrees of inequality, and larger African American populations, respectively, did not correlate with the strength of eminent domain reform.<sup>161</sup> Finally, Morriss shows, states undergoing economic growth were more likely to adopt substantive restrictions.<sup>162</sup> Thus, 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. Mihaly wonders if one cause may be, after the initial rush to judgment, 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.

## IX. Conclusion

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<sup>158</sup> *Id.* See also Erler, *supra* note 4, 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”). See also Somin, *infra*, at 2114-15 (breaking down “effectiveness,” in terms of curbing eminent domain power, of laws and referenda in each state).

<sup>159</sup> Timothy Sandefur, *The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform*, 2006 MICH. ST. L. REV. 709, 766-72 (2006).

<sup>160</sup> Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, SUP. CT. ECON. REV. 237 (2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

Eminent domain law has received much attention over the last five years, yet, as this summary suggests, the attention has not necessarily resulted in changes in the law. In some states, like Florida, the *Kelo* backlash has dramatically altered the law, yet 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 the post-*Kelo* reforms. The results of the backlash may take more time to properly manifest, but, as of now, the *Kelo* uprising has led to little substantive reform, thus permitting most states to condemn property in the context of economic development projects or to cure blight. The federal standard enunciated in *Kelo* appears dominant throughout the states.