THE POLITICS OF ECONOMIC DEVELOPMENT TAKINGS

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INTRODUCTION

The Supreme Court's controversial 2005 decision in *Kelo v. City of New London*[1] focused public attention on takings for "economic development." The *Kelo* Court held that the condemnation of private property for transfer to other private owners is a constitutional "public use" under the Fifth Amendment even if the only justification for doing so was the hope that the transfer would increase "economic development" in the area.[2]

The case generated an enormous and unprecedented political backlash, with forty-two states and the federal government all enacting legislation intended to curb eminent domain in its aftermath.[3] This Essay briefly considers some of the reasons why economic development takings are vulnerable to "capture" by powerful interest groups, and therefore unlikely to produce benefits for communities that outweigh their harms. It also considers some of the shortcomings of the political backlash against *Kelo*. The majority of the reform laws enacted over the last three years are likely to prove ineffective. In both cases, a key culprit is widespread public

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1 545 U.S. 469 (2005). For my analysis and critique of *Kelo*'s holding, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 224–33 (2007) [hereinafter Somin, *Grasping Hand*].

2 *Kelo*, 545 U.S. at 473–84.

3 For a survey of these laws, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, MINN. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract_id=976298 [hereinafter Somin, *Limits of Backlash*].

ignorance. The ignorance of voters makes it difficult or impossible for them to effectively monitor economic development takings and prevent interest group capture. It also reduces the odds of enacting effective—as opposed to purely symbolic—legislation banning such condemnations.

In putting forward these two hypotheses, I draw extensively on a prior article analyzing *Kelo* and economic development takings,[4] and on a forthcoming one that provides a comprehensive analysis of the *Kelo* backlash.[5] Many of the relevant arguments are developed more fully in those two pieces than is possible here. The function of this Essay is to tie the main themes of the two longer articles together and show how political ignorance affects both economic development takings and attempts to enact legislation to abolish them.

I. "CAPTURE," RENT-SEEKING, AND ECONOMIC DEVELOPMENT TAKINGS

Economic development takings are not the only exercises of the eminent domain power vulnerable to capture by interest groups seeking to use the powers of government for their own benefit ("rent-seeking" as it is known in the literature). Indeed, interest group capture of government agencies and rent-seeking are serious dangers for a wide range of government activities.[6] However, there are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the economic development rationale; severe limits on electoral accountability caused by low transparency; and time horizon problems.

A. Nearly Limitless Scope

The economic development rationale for takings can potentially justify almost any condemnation that benefits a commercial enterprise. As the Michigan Supreme Court explained in its 2004 decision invalidating the economic development rationale under its state constitution:

> [The] "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a

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[4] *See* Somin, *Grasping Hand*, *supra* note 1.

[5] *See* Somin, *Limits of Backlash*, *supra* note 3.

[6] For a useful summary of the literature on rent-seeking and capture, see DENNIS C. MUELLER, PUBLIC CHOICE III 333–58 (2003).

> private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.[7]

Courts in at least two of the other states that forbid economic development takings have reached the same conclusion. The Supreme Court of Illinois recently refused to allow a "contribu[tion] to positive economic growth in the region" to justify a taking because such a standard could justify virtually any condemnation that benefited private industry since "every lawful business" contributes to economic growth to some degree.[8] Similarly, the Supreme Court of Kentucky banned the economic development rationale in 1979 largely because "[w]hen the door is once opened to it, there is no limit that can be drawn."[9] The U.S. Supreme Court dissenters in *Kelo* have also focused on this threat, warning that "nearly all real property is susceptible to condemnation on the Court's theory" that the economic development rationale is a sufficient justification.[10]

Those decisions and dissents may slightly overstate the case, but their basic logic is sound. Economic development can rationalize virtually any taking that benefits a private business because any such entity can claim that its success might "bolster the economy."[11]

Such a protean rationale for the use of eminent domain exacerbates the danger of interest group capture by greatly increasing the range of interest groups that can potentially use it. By the same token, it also increases the range of projects that those interest groups can hope to build on condemned land that is transferred to them; presumably, any project that might increase development or produce tax revenue would be acceptable. Finally, the wide range of projects and interest groups involved makes it more difficult for rationally ignorant voters to assess the takings in question.[12] All three factors tend to increase the attractiveness of eminent domain condemnations as a means of making political payoffs to powerful interest groups.

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[7] County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) (emphasis in original).

[8] Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

[9] Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979) (quoting 26 AM. JUR. 2D *Eminent Domain* § 34, at 684–85 (1966)).

[10] Kelo v. City of New London, 545 U.S. 469, 504 (2005) (O'Connor, J., dissenting).

[11] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[12] See the discussion of rational ignorance in Part I.B, *infra*.

B. Severely Constrained Electoral Accountability

Interest group manipulation of economic development takings could be curtailed if public officials responsible for condemnations faced credible threats of punishment at the polls after they approved condemnations that reward rent-seeking. Unfortunately, such punishment is highly unlikely for two important reasons. First, the calculation of the costs and benefits of most development projects is extremely complex, and it is difficult for ordinary voters to understand whether a particular project is cost-effective or not. Studies have repeatedly shown that most voters have very little knowledge of politics and public policy.[13] Most are often ignorant even of basic facts about the political system.[14] Such ignorance is neither an accident nor a consequence of "stupidity." It is in fact a rational response to the insignificance of any one vote to electoral outcomes. If a voter's only reason to become informed is to ensure that she votes for the "best" candidate in order to ensure that individual's election to office, this turns out to be almost no incentive to acquire knowledge at all. The likelihood that any one vote will be decisive is infinitesimally small, thereby making it irrational for individual voters to acquire significant knowledge if influencing electoral outcomes is the only reason for doing so.[15] Such rational ignorance is likely to be an even more serious problem in a complex and nontransparent field such as the evaluation of economic development takings.

While the same danger may exist with some traditional takings, these takings usually at least produce readily observable benefits such as a road or a bridge—public assets that can be seen and used by the average voter. Moreover, these benefits usually become apparent as soon as the project in question is completed. By contrast, the alleged public benefit of economic development takings is a generalized contribution to the local economy that the average citizen often will not notice, much less be able to measure.

Second, even if voters were much better informed, democratic accountability for economic development takings may still often be inadequate. Unlike with most conventional takings, the success or failure of a project made possible by economic development

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

[14] Somin, *Voter Ignorance and the Democratic Ideal*, *supra* note 13, at 416–19.

[15] *See id.* at 435–38 (providing a more detailed discussion).

condemnations is usually apparent only years after the condemnation takes place. In the famous 1981 *Poletown* case,[16] some 4,000 Detroit residents were forcibly expelled from their homes as part of a condemnation intended to provide land for General Motors to build a new factory.[17] Yet the factory did not even open until 1985, four years after the 1981 condemnations and two years behind schedule.[18] And not until the late 1980s did it become clear that the plant would produce far less than the expected 6,000 jobs.[19] It is highly likely that the costs of the *Poletown* takings ultimately outweighed the benefits.[20]

By that time, of course, public attention had likely moved on to other issues, and, in any event, many of the politicians who had approved the 1981 condemnations might no longer be in office. Moreover, even if a political leader in question is still in office, and voters do check to see whether the promises made years ago have been kept, it will still be difficult for voters to tell whether the resulting economic development was greater than what might have occurred had the land not been condemned, and its preexisting owners left in place.

Given such limited time horizons, a rational, self-interested Detroit political leader might well have been willing to support the *Poletown* condemnations even if he anticipated that the expected benefits would eventually fail to materialize. By the time that became evident to the public, he could be out of office. In the meantime, he could benefit from an immediate increase in political support from General Motors and other private interests benefiting from the taking.

Some argue that such abusive condemnations will be constrained by the power of property owners over local governments. Because property owners are the dominant interest in many localities,[21] they may be able to use their political power to prevent abusive economic development condemnations. However valid this argument is with respect to other functions of local government, it is flawed when applied to economic development takings. Because of their nontransparent nature and the general problem of widespread

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[16] 304 N.W.2d 455.

[17] For a detailed analysis of the case, see Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (2004) [hereinafter Somin, *Overcoming* Poletown].

[18] JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 214 (1989).

[19] *Id.* at 214–15.

[20] *See* Somin, *Overcoming* Poletown, *supra* note 17, at 1016–19.

[21] *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001) (providing extensive evidence of the ability of homeowners to influence local governments to adopt policies that protect their interests and maximize property value).

ignorance, property owners are unlikely to be able to determine which development condemnations serve their interests and which do not. Moreover, even in situations where voters do understand the tradeoffs involved, the relevant variable is not the political power of property owners generally, but the power of those who are targeted for condemnation. As in *Poletown,* these are likely to be poor, politically unorganized or both.[22] Even if property owners are politically powerful as a group, this fact will not prevent eminent domain abuse if such abuses usually target subsets of owners who are politically weak.

Similarly, the political power of the press as a whole will not prevent government from violating free speech rights if such violations usually target segments of the press that are politically unpopular or have little lobbying power. Just as the influence of the press does not obviate the need for judicial enforcement of the First Amendment, the political power of property owners cannot substitute for judicial review of economic development takings.

II. THE *KELO* BACKLASH AND ITS LIMITS

A. The Political Backlash Against Kelo

Prior to the *Kelo* decision, economic development takings had not been a major political issue. Only one state legislature—Utah—passed legislation banning such condemnations in the years immediately prior to the decision.[23] The *Kelo* decision focused public attention on the issue and generated an unprecedented political backlash. Some forty-two states, as well as the federal government, enacted laws purporting to ban or restrict economic development takings.[24] This constitutes a more extensive legislative response than that generated by any other Supreme Court decision in recent decades.[25] Opinion polls showed that 81 to 95 percent of the public

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[22] *See* Somin, *Overcoming* Poletown, *supra* note 17, at 1019.

[23] *See* UTAH CODE ANN. § 17C-1-202 (West 2005) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); *see also* Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV'T & CLIMATE NEWS, June 2005, at 1, *available at* http://www.heartland.org/article.cfm?artID=17162 (describing the politics behind the Utah law). In March 2007, Utah partially rescinded its ban on blight condemnations. *See* H.B. 365, 57th Leg., Gen. Sess., 2007 Utah Laws 379 (permitting blight condemnations if approved by a supermajority of property owners in the affected area).

[24] For a description of these laws, see Somin, *Limits of Backlash*, *supra* note 3.

[25] The closest competitor is *Furman v. Georgia*, 408 U.S. 238 (1972), which struck down all then-existing state death penalty laws. In response, some thirty-five states and the federal government enacted new death penalty statutes between 1972 and 1976 intended to conform to

disapproved of the Supreme Court's decision.[26] Some 63 percent of the public not only disapproved of *Kelo,* but did so "strongly."[27] This anti-*Kelo* consensus cut across party ideological, racial, and gender lines.[28] A later survey showed 71 percent of the public supported the enactment of state laws forbidding economic development takings.[29] Both liberal and conservative politicians and activists rushed to denounce *Kelo*. Among those who did so were Bill Clinton, Rush Limbaugh, Ralph Nader, Maxine Waters, and Howard Dean.[30]

The vehemence and scope of the backlash against *Kelo* led some prominent scholars and jurists—including Richard Posner and soon-to-be Supreme Court Chief Justice John Roberts—to suggest that judicial protection of property rights against economic development takings was superfluous or unnecessary.[31] Such claims have turned out to be premature at best.

As I show in a forthcoming comprehensive study of post-*Kelo* reform, the majority of the federal and state laws enacted in the aftermath of *Kelo* are likely to have little or no effect in actually constraining economic development takings.[32] This is true of twenty-one of thirty-five reform laws enacted by state legislatures,[33] and also of all the reforms enacted by the federal government.[34] Moreover, many of the states that have passed effective reforms are ones that rarely, if ever, used economic development takings to begin with. Most of the states that engaged in the largest number of *Kelo*-style

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Furman's requirements. *See* Gregg v. Georgia, 428 U.S. 153, 179–80 n.23 (1976) (noting that "at least 35 States" and the federal government had enacted new death penalty statutes in response to *Furman*, and listing the laws in question).

[26] Somin, *Limits of Backlash*, *supra* note 3, at 8 tbl.1.

[27] *Id.* at 7.

[28] *Id.* at 7–8.

[29] Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931, 1940 tbl.2 (2007).

[30] Somin, *Limits of Backlash*, *supra* note 3, at 2–3, 6–7.

[31] *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 98 (2005) (claiming that "the strong adverse public and legislative reactions to the *Kelo* decision" are justifications of the decision). At his confirmation hearing before the Senate, then-Judge John Roberts commented that the legislative reaction to *Kelo* shows that "this body [Congress] and legislative bodies in the states are protectors of the people's rights as well" and "can protect them in situations where the court has determined, as it did 5-4 in *Kelo*, that they are not going to draw that line." *Transcript: Day Three of the Roberts Confirmation Hearings*, WASH. POST, Sept. 14, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/ar2005091401445.html (last visited Oct. 25, 2005).

[32] Somin, *Limits of Backlash*, *supra* note 3.

[33] *Id.* at 16–34.

[34] *Id.* at 38–43.

condemnations in the years prior to the Supreme Court's decision have enacted ineffective reforms or none at all.[35]

B. The Impact of Political Ignorance

Why this pattern of largely ineffective reform? I tentatively suggest that the same political ignorance that plays a crucial role in magnifying the flaws of economic development takings also makes it difficult to enact effective legislation banning them.

*1. Public Ignorance About Post-*Kelo *Reform*

As noted earlier,[36] the majority of voters are "rationally ignorant" about most aspects of public policy because there is so little chance that an increase in any one voter's knowledge would have a significant impact on policy outcomes. No matter how knowledgeable a voter becomes, the chance that his or her better-informed vote will actually swing an electoral outcome is infinitesimally small. There is, therefore, very little incentive for most citizens to acquire information about politics and public policy—at least so long as their only reason to do so is to become better-informed voters.[37]

Recent survey data compiled at my request by the Saint Consulting Group, a firm that sponsors surveys on land use policy, confirms the hypothesis that most Americans have little or no knowledge of post-*Kelo* reform.[38] They show that political ignorance about post-*Kelo* reform is widespread. Only 13% of respondents could both correctly answer whether or not their states had enacted eminent domain reform laws since 2005, and correctly answer a follow-up question about whether or not those laws were likely to be effective in preventing condemnations for economic development.[39] Only 21% could even correctly answer the first question in the sequence: whether or not their state had enacted eminent domain reform since *Kelo* was decided in 2005.[40]

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[35] *Id.* at 13–16.

[36] *See supra* Part I.B.

[37] For a more detailed discussion of the theory of rational ignorance, see Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255 (2006); *see also* Somin, *Political Ignorance*, *supra* note 13. The concept of rational political ignorance was first developed in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957).

[38] The data in question was produced by the August 2007 Saint Index survey, which polled a random sample of 1000 Americans over the age of twenty-one. For full details on the survey and question wording, see Somin, *Limits of Backlash*, *supra* note 3, at 43–49, 63 app. b.

[39] For the exact wording of the two questions involved, see *id.* at 63 app. b.

[40] Data calculated from Saint Index 2007, Question 9. *See id.*

It is also important to recognize that 6% of respondents believed that their states had enacted post-*Kelo* reforms that were likely to be "effective" in reducing economic development takings even though the state in fact had not. This is not a large number in absolute terms, but it still represents more than one-third of the 17% of respondents who expressed any opinion at all about the effectiveness of their state's reforms.[41] An additional 2% wrongly believed that their states' reform laws were ineffective even though the opposite was in fact true. Even among the 17% of Americans who paid close enough attention to post-*Kelo* reform legislation to have an opinion about its effectiveness, there was a high degree of ignorance.[42]

Ignorance about states' post-*Kelo* reform cut across gender, racial, and political lines. Some 85% of men and 90% of women were ignorant about the condition of post-*Kelo* reform in their states, as were 82% of African-Americans, 89% of whites, and similar overwhelming majorities of liberals and conservatives, Democrats and Republicans, and other groups.[43] It is difficult to avoid the conclusion that most Americans are ignorant about the mere existence, or lack thereof, of post-*Kelo* reform in their states, and even fewer can tell whether the reform was effective or not.

The Saint Index data may even understate the amount of ignorance about post-*Kelo* reform. Several factors suggest that its estimates of public knowledge are biased upward.[44]

The fact that most citizens are ignorant about post-*Kelo* reform is not surprising to public opinion researchers. Large majorities know little or nothing about far more important policies.[45] For example, polls conducted around the time of the 2004 election showed that 70% of Americans did not know that Congress had recently enacted a massive prescription drug bill, and 58% admitted that they knew little or nothing about the controversial USA Patriot Act.[46] What may be somewhat surprising—especially to nonexpert observers—is that

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[41] Data calculated Saint Index 2007, Question 10. *See id.*

[42] Only 17% of respondents expressed any opinion at all about the effectiveness of post-*Kelo* reform in their states. *Id.*

[43] *Id.* at 46 tbl.6.

[44] *Id.* at 45.

[45] For summaries of the data, see, e.g., SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); Somin, *Political Ignorance*, *supra* note 13.

[46] Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, at 6 tbl.1, *available at* http://www.cato.org/pub_display.php?pub_id=2372 [hereinafter Somin, *When Ignorance Isn't Bliss*].

ignorance is so widespread despite the immense public outcry that the issue has generated.

2. *Ignorance as an Explanation for the Limited Impact of the* Kelo *Backlash*

Widespread public ignorance about post-*Kelo* reform helps explain why so many of the new laws have been ineffective. Public ignorance is also the best available explanation for the seeming scarcity of effective post-*Kelo* reform laws. The highly publicized Supreme Court decision apparently increased awareness of the problem of eminent domain abuse, perhaps as a result of extensive press coverage. That fact helps explain why *Kelo* produced such an outcry despite the reality that it made little change in existing precedent and that economic development takings had gone on for decades before with relatively little public outcry.[47] But while the publicity surrounding *Kelo* made much of the public at least somewhat aware of the issue of economic development takings, it probably did not lead voters to closely scrutinize the details of proposed reform legislation. After all, the Saint Index survey showed that almost 80% of Americans do not even know whether their state has passed a reform law at all.[48]

Few citizens have the time or inclination to delve into such matters and many are often ignorant of the very existence of even the most important legislative items.[49] Thus, it would not be difficult for state legislators to seek to satisfy voter demands by supporting "position-taking" legislation that purported to curb eminent domain,[50] while in reality having little effect. In this way, they can simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development condemnations.

This strategy seems to have been at the root of the failure of post-*Kelo* reform efforts in California. In that state, legislative reform efforts were initially sidetracked by the introduction of weak proposals that gave legislators "a chance . . . to side with the anti-eminent domain sentiment without doing any real damage to

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[47] Somin, *Limits of Backlash*, *supra* note 3, at 51–52.

[48] *See supra* notes 38–44 and accompanying text.

[49] *See, e.g.*, Somin, *When Ignorance Isn't Bliss*, *supra* note 46, at 6 tbl.1 (providing data that the majority of citizens are unaware of the very existence of several of the most important pieces of legislation adopted by Congress in recent years).

[50] For the concept of position-taking legislation, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

redevelopment agencies."[51] At a later stage in the political battle, the Democratic majority in the state legislature tabled even these modest reforms by claiming that they were being blocked by the Republican minority, despite the fact that "the stalled bills required only simple majority votes and thus needed no Republicans to go along."[52] As one Sacramento political reporter put it, the entire process may have been "just a feint to pretend to do something about eminent domain without actually doing anything to upset the apple cart."[53] Eventually, California did enact some reforms, but only ones that are almost completely ineffective.[54] A leading advocate for eminent domain reform in Nevada also believes that, in his state as well, legislators sought to "look good while not upsetting anyone."[55]

The California League of Cities (the "CLC"), an organization composed of local governments with an interest in preserving their eminent domain authority, has also sought to exploit political ignorance about post-*Kelo* reform. In 2007, The CLC succeeded in placing Proposition 99, an essentially ineffective eminent domain "reform" referendum initiative, on the state's June 2008 ballot as a way of pre-empting Proposition 98, a stronger referendum initiative sponsored by property rights advocates. The CLC-sponsored initiative cleverly included a provision stating that it would supersede any other eminent domain referendum enacted on the same day, so long as the latter gets fewer votes than the CLC proposal.[56]

In the end, Proposition 98 was defeated outright by the voters. At this time, it is difficult to tell whether Proposition 98 was defeated because of the availability of Proposition 99 as a seemingly effective alternative, or whether it failed primarily because, in addition to its eminent domain provisions, it included an unpopular phaseout of rent

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[51] Dan Walters, *Eminent Domain Bills Are Stalled—Except One for Casino Tribe*, SACRAMENTO BEE, Sept. 16, 2005, at A3.

[52] *Id.*

[53] *Id.*

[54] *See* Somin, *Limits of Backlash*, *supra* note 3, at 25–26.

[55] Interview with Steven Miller, Nevada Policy Research Institute (Mar. 14, 2007). Nevada eventually passed effective eminent domain reform by referendum. *See supra* note 3 and accompanying text.

[56] For the text of Proposition 99, see Letter from Christopher K. McKenzie to Judge Edmund G. Brown, Jr., Attorney General, California (May 10, 2007), *available at* http://ag.ca.gov/cms_pdfs/initiatives/2007-05-14_07-0018_Initiative.pdf (last visited Jan. 15, 2008). The provision negating other eminent domain reform laws passed the same day is Section 9. For discussion of the reasons why Proposition 99 does not actually provide any meaningful protection for property owners, see Ilya Somin, *Prop. 99's False Promise of Reform*, L.A. TIMES, May 19, 2008, at A15 and Posting of Ilya Somin, The California League of Cities' Deceptive Eminent Domain "Reform" Referendum Initiative, to The Volokh Conspiracy, http://volokh.com/posts/1175462916.shtml (Apr. 1, 2007, 17:28 EST).

control.[57] Quite likely, both played a role. The rent control provision probably caused some voters to oppose Proposition 98 who might otherwise have supported it. Proposition 99, for its part, may have led swing voters to believe (wrongly) that Proposition 99 offered an alternative to Proposition 98 that would curb economic development takings without affecting rent control.

In any event, the use of an ineffective "reform" initiative to block a potentially effective competitor is an indication that supporters of unrestricted eminent domain power have sought to turn political ignorance to their advantage.

Such maneuvers as Proposition 99 would be difficult to pull off if the public paid close attention to pending legislation. In that event, voters would have recognized that Proposition 99 would have little or no effect on eminent domain, and would also have understood that voting for it would end up blocking a reform measure that would have actually eliminated economic development takings. But tactics of this kind can be effective in the presence of widespread political ignorance, as the passage of Proposition 99 suggests. Unfortunately, public ignorance of the details of eminent domain policy is unlikely to be easily remedied.

A possible alternative explanation for the scarcity of effective reform laws is the political power of developers and other organized interest groups that benefit from the transfer of property condemned as a result of economic development and blight condemnations.[58] There is little question that this factor does play a role. Developers, local government planning officials, and other interest groups have indeed spearheaded opposition to post-*Kelo* reform.[59] In Texas, for example, advocates of strong eminent domain reform concluded that lobbying by developers and local governments played a key role in ensuring that the state passed an essentially toothless reform law.[60]

However, the mere existence of interest group opposition does not explain why state legislators would choose to satisfy a few small interest groups while going against the preferences of the vast

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[57] Opponents of Proposition 98 focused on the rent control issue in their efforts to defeat it. I have discussed the political impact of the rent control issue on The Volokh Conspiracy weblog. Posting of Ilya Somin, Causes of the Defeat of Proposition 98, to The Volokh Conspiracy, http://www.volokh.com/archives/archive_2008_06_01-2008_06_07.shtml#1212612106 (June 4, 2008, 16:41 EST).

[58] *See, e.g.*, Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 769–72 (arguing that interest group opposition accounts for the many ineffective laws enacted during the *Kelo* backlash).

[59] *Id.*

[60] Interview with Brooke Rollins, Texas Public Policy Foundation (Mar. 17, 2007).

majority of the electorate.[61] It is possible that the pro-condemnation interest groups simply have more intense preferences about the issue than most of the opponents in the general public and are therefore more likely to cast their votes based on politicians' stances on the issue. However, 63% of the respondents in the 2005 Saint Index survey said that they not only opposed *Kelo,* but felt "strongly" about it;[62] more recent survey data shows that 43% of Americans "strongly" support reform legislation banning economic development takings.[63] If even a fraction of that 63% were willing to let post-*Kelo* reform influence their voting decisions, they would probably constitute a much larger voting bloc than all of the pro-*Kelo* developers and government officials put together.

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

CONCLUSION

Political ignorance both exacerbates the harm caused by economic development takings and makes it difficult to restrict such takings through legislation—even during a period of massive public anger against the use of eminent domain. It would be wrong to assume that the *Kelo* backlash has been wholly ineffective. Fourteen state legislatures have passed relatively strong laws that either curb or abolish economic development takings, including a handful that had an extensive prior record of utilizing such condemnations.[64] Several other states have enacted strong reforms by referendum.[65] For reasons I have discussed in detail elsewhere, the relatively greater effectiveness of reforms enacted by referendum supports the broader public ignorance explanation of the *Kelo* backlash and its impact.[66]

Nonetheless, the combined impact of political ignorance on both economic development takings and legislative efforts to abolish such takings makes it highly unlikely that the political process can curb such condemnations as effectively as many expect. A truly effective

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[61] *See* survey data cited *supra* Part I.B.

[62] *See supra* notes 26–27.

[63] *See* Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, *supra* note 29, at 1940 tbl.2.

[64] *See* Somin, *Limits of Backlash*, *supra* note 3, at 31–37.

[65] *Id.* at 34–37.

[66] *Id.* at 53–54.

ban on *Kelo*-style takings probably requires judicial as well as legislative action.[67]

[67] I defend this conclusion at greater length in Somin, *Grasping Hand*, *supra* note 1.