STATE REACTION TO KELO V. CITY OF NEW LONDON

A Senior Honors Thesis

by

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ABSTRACT

State Reaction to Kelo v. City of New London (April 2007)

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In 2005, the Supreme Court ruled in *Kelo v. City of New London* that government use of eminent domain laws to promote economic development was allowed under the Fifth Amendment of the U.S. Constitution. The Court's majority emphasized, however, states were not barred from restricting this particular use of eminent domain. Within a very short time, more than half of the states heeded the Court's suggestion, but others did not. This project explains why state reaction to *Kelo* varied by looking at the effects of state population demographics, political ideology, and legislative partisan composition and unity. The influence of these factors on the content, and thus the strength, of the legislation enacted is also addressed. Finally, state reaction is evaluated within the context of the intense criticism generated by the decision as well as the emerging property rights movement.

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INTRODUCTION: AN INVITATION TO THE STATES[1]

In *Susette Kelo, et al., Petitioners v. City of New London, Connecticut, et al.*, Susette Kelo and a group of fellow homeowners in the blue-collar neighborhood of Fort Trumbull appealed a Connecticut Supreme Court decision permitting the City of New London's exercise of eminent domain to transfer the land in the Fort Trumbull area to a private developer. The redevelopment plan called for the construction of a waterfront hotel, a conference center, office spaces, and condominiums that would replace Fort Trumbull's older homes and businesses in order to accommodate a new research center for the Pfizer pharmaceutical company, generate higher tax revenues for the city, and create new jobs (Rubin and Barrett 2005).

On September 28, 2004, the U.S. Supreme Court accepted the case to decide whether the government has the authority to exercise eminent domain for the sole purpose of economic development. The Fifth Amendment to the U.S. Constitution allows private property to be taken for "public use" provided that the owners receive "just compensation." On June 23, 2005, the Court ruled 5-4 that the City of New London's proposed condemnations qualified as a "public use" within the meaning of the Fifth Amendment (Rubin and Barrett 2005).

Writing for the majority, Justice John Paul Stevens asserted that "promoting economic development is a traditional and long-accepted function of government." The Court's decision simply affirmed "over a century of case law interpreting [the Fifth Amendment]." However, Justice Stevens emphasized that "nothing in [the Court's]

[1] This thesis follows the style and format of the American Political Science Association's *Style Manual for Political Science*.

opinion precludes any state from placing further restrictions on its exercise of the takings power." He also noted that "the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate." (Legal Information Institute 2005)

Justice Stevens' acknowledgement that states can limit the use of eminent domain raises the question whether the states responded to the Justice's suggestion. This project investigates this question and explores what factors led the states to act differently. Thus, the project is organized about three principal questions:

(1) Did the states react to *Kelo*?

(2) If so, how did the states react to *Kelo*?

(3) What explains the variations in the states' reactions to *Kelo*?

A state is considered having reacted to *Kelo* if its legislature enacted legislation limiting the use of eminent domain in the year and a half following the Court's decision. How a state reacted is evaluated according to the content of the legislation. The state characteristics affecting whether and how a state reacted are determined by the construction of a statistical model.

THE COURT RULED: DID THE STATES REACT?

The project's first question asks whether the states reacted to *Kelo* by enacting legislation limiting the exercise of eminent domain. The National Conference of State Legislatures (NCSL) is a bipartisan organization that tracks state legislation according to issue areas. The NCSL has cataloged state legislation limiting the exercise of eminent domain from July 2005 to December 2006. The NCSL's official website provides summaries of the legislation as well as links to the state legislatures' official databases where full-text versions of the legislation are available. Based on the NCSL's summaries and after double-checking the full-text versions of the legislation, it was determined that thirty states reacted to *Kelo* by enacting legislation limiting the exercise of eminent domain. The legislation took two forms. Some state legislatures passed statutes that were subsequently signed by the governor while others passed constitutional amendments that were approved by voters in the 2006 election. A few states in addition to enacting statutes also passed constitutional amendments. The following table shows the states that reacted to *Kelo*. (Note: A more detailed table of the states' reactions appears in the appendix.)

Table 1: States that Enacted Legislation in Reaction to *Kelo*

States that Enacted Statutes	Alabama, Alaska, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin
States that Enacted Constitutional Amendments	Louisiana, Michigan, South Carolina
States that Enacted Statutes and Constitutional Amendments	Florida, Georgia, New Hampshire

THE COURT RULED: HOW DID THE STATES REACT?

Given that three-fifths of the states reacted to *Kelo* by enacting legislation limiting the exercise of eminent domain, the project's second question concerns the substance of the limitations. The NCSL has identified seven nonexclusive categories of legislation limiting the exercise of eminent domain. The categories are: (1) prohibition of eminent domain for economic development, (2) explicit definition of blight and restriction of eminent domain to blighted properties, (3) limitations to public use, (4) revising the eminent domain process, (5) revamping methods of compensation, (6) imposing a moratorium on the use of eminent domain, and (7) the formation of a study committee.

Legislation in the "prohibition for economic development" category reaffirms that the exercise of eminent domain is limited to only "public uses" and that it cannot be used to increase tax revenue or to transfer property to another private entity. Legislation in the "blight" category restricts the exercise of eminent domain to blighted property and/or redefines what constitutes a blighted property, accentuating detriment to public health and safety. The "public use" category includes legislation that limits the exercise of eminent domain to only acceptable "public uses" that involve the possession, occupation, or enjoyment of property by the public at large or public agencies. The "process" category includes laws that are less restrictive but impose new procedural requirements such as greater public notice, more public hearings, negotiation in good faith, or approval by elected governing bodies before eminent domain can be exercised for any reason. The category concerning "compensation" involves laws that raise the

costs to governments when they exercise eminent domain for economic development. These laws require that property owners be awarded more than one hundred percent of the value of their property if governments condemn it for economic development, which presumably will deter the use of eminent domain for this purpose. Legislation in the "moratorium" category places a temporary moratorium on the exercise of eminent domain for economic development. The legislation in the "study committee" category is the least restrictive and is perhaps little more than a symbolic gesture; this legislation creates a study committee to investigate the state's exercise of eminent domain then report back to the legislature with recommendations.

After several careful readings, the legislation enacted in reaction to *Kelo* was classified according to the NCSL's seven categories. The greatest number of states enacted legislation with the "prohibition for economic development" provision followed by the "blight" provision. Only Ohio enacted legislation with the "moratorium" and "study committee" provisions. The following table shows how the states enacted legislation according to the NCSL's seven categories.

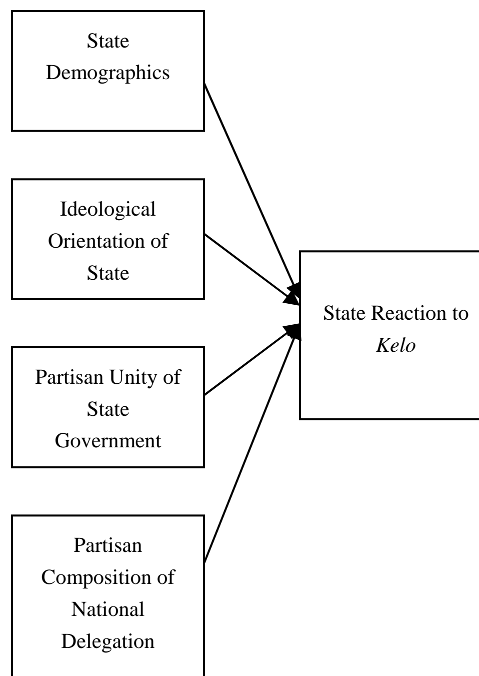
Table 2: Categories of Legislation that States Enacted in Reaction to *Kelo*

Category	States
Prohibition of Eminent Domain for Economic Development	Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wisconsin
Explicit Definition of Blight and Restriction of Eminent Domain to Blighted Properties	Alabama, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Minnesota, Missouri, Nebraska, North Carolina, Pennsylvania, South Carolina, Tennessee, West Virginia, Wisconsin
Limitations to Public Use	Delaware, Georgia, Indiana, Iowa, Kentucky, Louisiana, Minnesota, New Hampshire, Tennessee, West Virginia
Revising the Eminent Domain Process	Georgia, Indiana, Iowa, Minnesota, Missouri, Utah, West Virginia
Revamping Methods of Compensation	Indiana, Kansas, Michigan, Missouri
Imposing a Moratorium on the Use of Eminent Domain	Ohio
Formation of a Study Committee	Ohio

A MODEL OF THE STATES' REACTIONS TO *KELO*

Having determined that thirty states reacted to *Kelo*, the project's final question addresses what state characteristics affected whether and how a state reacted. The state characteristics considered in the project include: the demographics of the state, the ideological orientation of the state, and the partisan unity and composition of the state. To test the relationships between these state characteristics and whether and how a state reacted, the following model was developed.

Figure 1: State Characteristics and Reaction



The dependent variables for the analysis based on this model parallel the first two questions: (1) "Legislation Enacted" and (2) "Strength of Legislation." These variables were constructed with the information displayed in Table 1 and Table 2.

For "Legislation Enacted," states that enacted legislation were coded "1" while those states that did not react to *Kelo* were coded "0."

For "Strength of Legislation," the sample size declined from fifty to thirty states; only the states that enacted legislation were included in this variable. States that enacted legislation with both the "prohibition for economic development" and "blight" provisions were coded "1" as this was considered the "strongest" legislation. States that enacted just one of these provisions or any other combination of the other five provisions were coded "0" as this was considered "weaker" legislation. See the appendix for an explanation of how the "strongest" and "weaker" distinctions were determined.

Four indicators of the state characteristics shown in the preceding model are the four independent variables in the analysis. The first characteristic "State Demographics" was measured according to the percentage of the state's population that was "white persons not Hispanic" in 2004. This data is available online from the U.S. Census Bureau's *State & County QuickFacts*. The percentage of the state's population that was "white persons not Hispanic" ranges from 23.3% in Hawaii to 96.1% in Maine.

The second characteristic "Ideological Orientation of State" was measured according to the percentage of the state's population that was conservative in 2003. "To assess the relative differences in state ideology across space and over time," political scientists Gerald C. Wright, Robert S. Erickson, and John P. McIver have developed a

measure of state ideology "based on the aggregation of national CBS/*New York Times* public opinion surveys at the state level." They originally drew on surveys taken between 1976 and 1988 and produced cross-sectional measures of state ideology; more recently, they have drawn on additional polling data to further disaggregate state-year estimates of ideology (Brace et al. 2004, 531). The state ideology estimates for 2003 were used in this study and can be downloaded from Wright's website. The "conservativeness" of the states' populations ranges from 23.6% in Wyoming to 58.3% in South Dakota.

The indicator for the third characteristic "Partisan Unity of State Government" was constructed from information obtained about the political affiliation of the governors and state legislators in the 2006 edition of *The Book of the States*. For this variable, states were coded "1" if the political affiliation of the governor and the majorities in both the state house and senate were Republican; states were coded "0" if either the governor or the majority in the state house or senate was Democratic. A little over a fifth of the states have unified Republican governments.

The indicator for the fourth characteristic "Partisan Composition of National Delegation" addresses Republican Party dominance in each of the state delegations elected to the U.S. House of Representatives for the 109th U.S. Congress (in session throughout 2005 and 2006); the measure is the percentage of Republican U.S. Representatives in the state delegations. The percentage ranges from zero to one hundred. This information is available from the official website of the Office of the

Clerk of the U.S. House of Representatives. (Note: A table of the variable measures for each state appears in appendix.)

AN EMPIRICAL ASSESSMENT OF THE MODEL

An initial logistic statistical analysis was performed because the first dependent variable – whether a state enacted legislation – is dichotomous. The following table presents the results of this analysis.

Table 3: Results for Dependent Variable "Legislation Enacted"

Concepts and Variables	Expected	b	p
Demographics of State			
% Population White, Not Hispanic	+	0.073	0.017
Ideological Orientation of State			
% Conservative Wright	+	0.048	0.365
Partisan Unity of State Government			
Republican Unified State Government	+	2.342	0.049
Partisan Composition of National Delegation			
% Republican U.S. Representatives	+	2.270	0.094
Model Diagnostics			
Number of Cases	48*		
Percent Correctly Predicted	75.0		
Negelkerke R Square	0.397		

*Wright ideology scores are not available for Alaska and Hawaii.

Overall, the model correctly classified 75.0% of the states. Three of the four independent variables are statistically significant and in the hypothesized direction. Reactions to *Kelo* were most likely to have occurred in states with predominantly white populations. States with unified Republican governments and high percentages of Republicans in their delegations to the U.S. House of Representatives were also more likely to have responded to the Court's decision. With a p-value of 0.017, the percentage white of a state's population is most likely related to whether the state enacted legislation. With a p-value of 0.365, the percentage conservative of a state's population has no statistically significant impact on whether the state enacted legislation. The

following charts illustrate the positive relationships between the statistically significant independent variables and the probability that legislation was enacted. As the proportion white, the Republican control of state government, and the proportion of Republican U.S. Representatives vary from their minimum to maximum values, the probability that legislation was enacted increases. In the construction of each chart, the other continuous variables were held constant at their mean and the other categorical variables were held constant at their median.

Figure 2: The Positive Relationship between "% Population White, Not Hispanic" and the Probability that a State Enacted Legislation

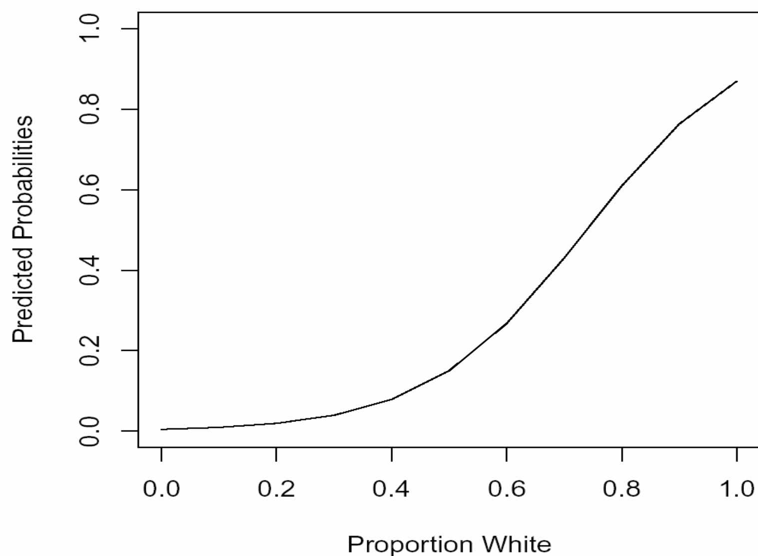


Figure 3: The Positive Relationship between "Republican Unified State Government" and the Probability that a State Enacted Legislation

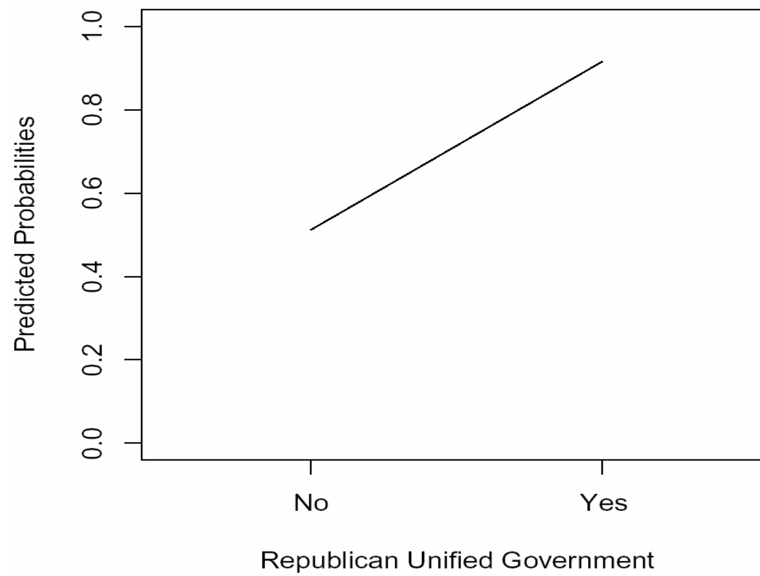
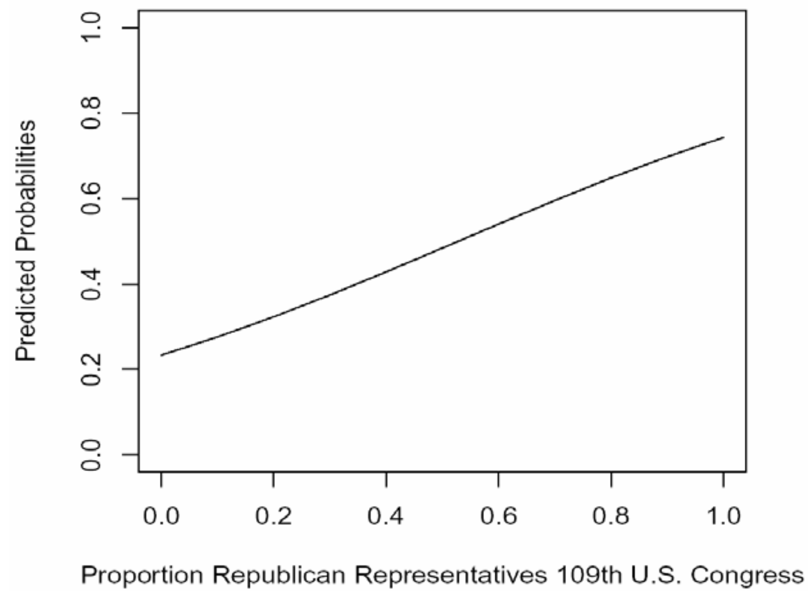


Figure 4: The Positive Relationship between "% Republican U.S. Representatives" and the Probability that a State Enacted Legislation



Another logistic statistical analysis was performed because the second dependent variable is also dichotomous. The following table presents the results when the dependent variable is the substance or strength of the legislation enacted by those states that reacted to *Kelo*.

Table 4: Results for Dependent Variable "Strength of Legislation"

Concepts and Variables	Expected	b	p
Demographics of State			
% Population White, Not Hispanic	+	0.055	0.143
Ideological Orientation of State			
% Conservative Wright	+	-0.043	0.488
Partisan Unity of State Government			
Republican Unified State Government	+	0.460	0.637
Partisan Composition of National Delegation			
% Republican U.S. Representatives	+	1.941	0.246
Model Diagnostics			
Number of Cases	29*		
Percent Correctly Predicted	62.1		
Negelkerke R Square	0.147		

*Wright ideology score is not available for Alaska.

None of the p-values for the four independent variables are statistically significant. They range from 0.143 for "% Population White, Not Hispanic" to 0.637 for "Republican Unified State Government." Thus, none of the independent variables can consistently predict whether a state enacted strong or weak legislation.

A SUBSTANTIVE ANALYSIS OF WHY AND HOW THE STATES REACTED

At the start of the project, it was found that thirty of the fifty states reacted to *Kelo* by enacting legislation limiting the exercise of eminent domain. Considering that the Court's decision generated immediate, widespread criticism and occurred within the context of a nationwide property rights movement, this reaction makes sense.

According to the Institute for Justice, the libertarian public interest law firm that represented Susette Kelo and her fellow Fort Trumbull homeowners, "the public reaction to the *Kelo* decision by the Supreme Court [was] widespread and nearly unanimous in its outrage." (2005a) *The Washington Post* columnist Kenneth Harney declared: "To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate."

"Instant polls on national news websites show[ed] widespread opposition to eminent domain for private economic development." An MSNBC.com poll reported ninety-eight percent public opposition to *Kelo* and a CNN.com poll reported ninety-nine percent public opposition to *Kelo* (Institute for Justice 2005a). Negative letters flooded newspapers across the country. Typical of the letters published was that of law professor Steve Calandrillo in the June 25 edition of the *New York Times*. Calandrillo wrote: "The Supreme Court's decision … is a devastating blow to property rights all over America … As it now stands, we are badly shortchanging homeowners, who have long relied on property rights that this decision seems to hopelessly erode." More than 300 protestors gathered for a rally in New London demanding: "Let the homeowners stay." (Institute for Justice 2005a) Throughout the country, membership in the Institute for Justice's

Castle Coalition nearly tripled (Institute for Justice 2005a). According to its official website, the Castle Coalition is "a nationwide grassroots property rights activism project." The Castle Coalition promotes awareness of eminent domain abuse and holds training sessions and offers support to those communities directly threatened by the exercise of eminent domain for economic development.

Kelo became the rallying cry of a property rights movement that was launched twenty years earlier with the publication of Richard Epstein's *Takings: Private Property and the Power of Eminent Domain*. In *Takings*, Epstein contends that there is a natural right to property ownership based on the philosophy of John Locke. Property ownership consists of a bundle of rights, of which possession, use, and disposition are the most important. Government interference with any right in the bundle, or the bundle itself, is a taking that must be compensated (Kendall and Lord 1998, 519).

Inspired by Epstein's ideas and concerned about the increasing federal and state regulation of business and property during the Cold War, President Ronald Reagan's Administration looked to the Takings Clause of the Fifth Amendment to put "a severe brake" upon these regulations and to facilitate "a restoration of economic liberty." (Kendall and Lord 1998, 529) President Reagan appointed conservative activist judges to the three courts that control federal takings law – the U.S. Supreme Court, the Federal Circuit Court of Appeals, and the Court of Federal Claims (Kendall and Lord 1998, 530). During and beyond his Presidency, these judges have awarded compensation when partial or total takings have infringed on any or all of the property rights of possession, use, and disposition. Many who served in the Reagan Administration have continued to

promote the belief that ownership of private property is critical to individual liberty throughout the 1990s and 2000s. Through involvement in organizations such as the Institute for Justice, the Pacific Legal Foundation, and the Federalist Society, former Reagan officials have trained lawyers and judges in how to protect property rights; they have also initiated litigation and lobbied for legislation against "abuses of eminent domain." (Hatcher 2005; Kendall and Lord 1998)

The proponents of the property rights movement were instrumental in bringing important property rights cases before the Supreme Court in the years preceding *Kelo*. A table of some of these cases appears in the appendix. Most of the time, property rights advocates were successful in utilizing the judiciary to further their agenda. In *Loretto v. Teleprompter Manhattan CATV Corp.*, *Hodel v. Irving*, and *Lucas v. South Carolina Coastal Council*, the Court declared that each of the critical strands in the bundle of property rights – the right to exclude others from, dispose of, and use property – is protected by the Takings Clause of the Fifth Amendment (Dana and Merrill 2002; Kendall and Lord 1998). In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the "nexus" and "rough proportionality test" were established to ensure that "the means used by federal, state, and local governments to achieve their regulatory objectives are closely tailored to achieve permissible ends." (Kendall and Lord 1998, 580) Governments, in other words, could not exploit their takings powers to advance their own interests. However, in 2002, the Court did rule that a temporary moratorium on new development did not constitute a taking requiring the payment of compensation in

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (Dana and Merrill 2002, 270).

Thus, the intense negative reaction of the public and the activity of property rights advocates (probably escalated having been dealt two recent judicial setbacks in *Tahoe-Sierra Preservation Council* and *Kelo*) could have induced the states to react to *Kelo*. The following three charts illustrate these forces graphically. The first two charts trace the mentions of “eminent domain” in major newspapers and magazines and journals from 1985 to 2005. The information used to construct these charts was obtained from a *LexisNexis* search of “eminent domain” in the headlines, lead paragraphs, and terms in the “general news” of “major papers” and “magazines and journals” from January 1, 1985 to December 31, 2005. They show that the public’s attention to “eminent domain” spiked in 2005 when *Kelo* was decided. As the earlier discussion suggests, it can be hypothesized that this attention was negatively disposed to the Court’s ruling. The third chart traces the mentions of “eminent domain” in legal periodicals and books from 1985-2004. While the 2005 edition of the *Index to Legal Periodicals and Books* was not yet available at this writing, this chart shows increased discourse about the exercise of eminent domain within the legal community from 1985 onward. Whether the property rights movement was the impetus for such discussion or not, increasing attention to eminent domain assured a prominent place for property rights proponents in the years leading up to *Kelo*.

Figure 5: "Eminent Domain" Mentions in Major Papers from 1985-2005

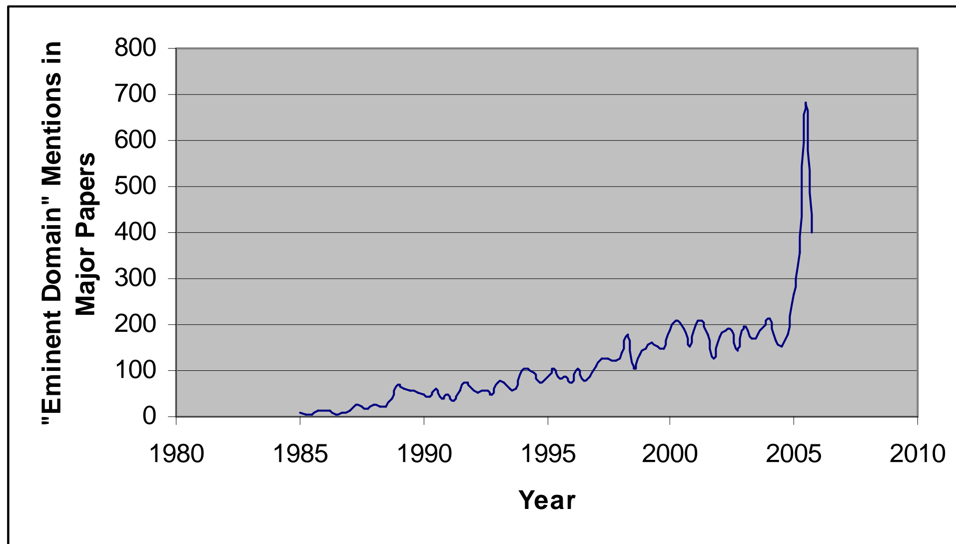


Figure 6: "Eminent Domain" Mentions in Magazines and Journals from 1985-2005

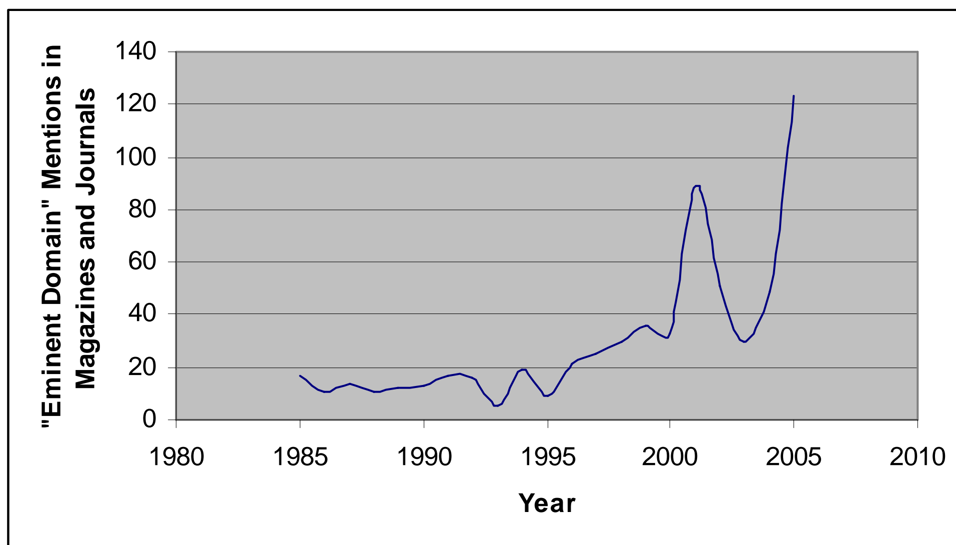
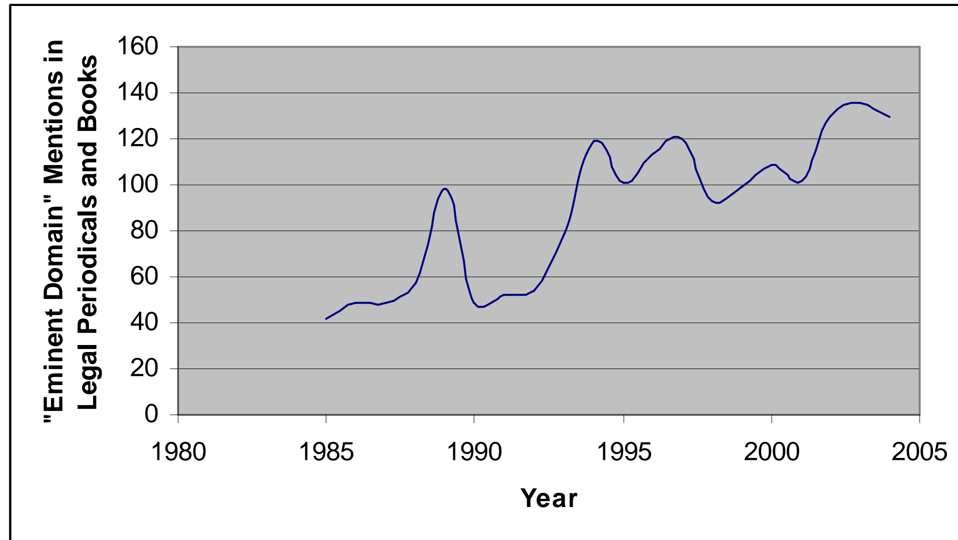


Figure 7: "Eminent Domain" Mentions in Legal Periodicals and Books from 1985-2004



Having explored why the states reacted to *Kelo*, it makes sense that the states reacted to *Kelo* by *enacting legislation* limiting the exercise of eminent domain because the U.S. House of Representatives reacted to *Kelo* by passing legislation and the Institute for Justice's Castle Coalition urged the states to do so.

Just one week after the Court announced its decision, the House passed House Resolution 340 which "disagree[d] with the majority opinion in *Kelo*." The resolution asserted that state and local governments should never use eminent domain to advantage one private property over another and should not construe *Kelo* as justification to abuse the power of eminent domain. Additionally, "Congress maintain[ed] the prerogative and reserve[ed] the right to address through legislation any abuses of eminent domain by state and local government in light of the ruling in *Kelo*." The resolution passed overwhelmingly 365 to 33 (Library of Congress 2005a).

On November 3, 2005, the House passed H.R. 4128, or the Private Property Protection Act of 2005. "The bill denies, for two fiscal years, economic development funds to state and local governments that use eminent domain for private commercial development." "It also directly prohibits the federal government from using eminent domain for private development."(Institute for Justice, 2005b) It too passed by an overwhelming majority of 376 to 38 (Library of Congress 2005b).

Shortly after *Kelo* was decided, the Castle Coalition launched a $3 million "Hands Off My Home" campaign, "an aggressive initiative to affect significant and substantial reforms of state and local eminent domain laws." The "Hands Off My Home" campaign encouraged governors, state legislators, and municipal officials to sign the "Hands Off My Home" pledge which reads: "I pledge to the citizens of this State that I will: Oppose efforts by my state government or municipalities within my state to use the government power of eminent domain for private development. Support legislation and other efforts to ensure that citizens of this State are safe from eminent domain for private development." (The Castle Coalition 2007) The Castle Coalition also posted sample legislation on its official website, instructing legislators in the language of bills that prohibit eminent domain for economic development, redefine blight and public use, increase process, and place a moratorium on the exercise of eminent domain for economic development.

Thus, in order to not risk reprimand by the U.S. Congress for "abuses of eminent domain" and to avoid losing federal economic development funds, the states had good reason to enact legislation limiting the exercise of eminent domain. With their

mobilization of voters to contact legislators about the “Hands Off My Home” pledge and their sample legislation, the Castle Coalition facilitated the states enacting legislation limiting the exercise of eminent domain.

A SUBSTANTIVE ANALYSIS OF THE MODEL

When a model of the states' reactions to *Kelo* was constructed, it was determined that the indicators for the demographics of a state, the partisan unity of the state government, and the partisan composition of the state's national delegation were positively related to whether the state enacted legislation. Also, there was no statistically significant relationship between the ideological orientation of a state and whether the state enacted legislation.

It makes sense that states with unified Republican governments and higher percentages of Republican U.S. Representatives had a greater probability of enacting legislation than states where Democrats were stronger either in the state government or the U.S. House of Representatives. Of the country's two primary political parties, the GOP is the principal proponent of the property rights movement.

Evidence of GOP concerns regarding property rights can be found in the party's national platforms which since the 1988 presidential election have all included a specific section devoted to property rights. In 1988, the Republican Party declared that "the right of private property is the cornerstone of liberty … it safeguards for citizens everything of value, including their right to produce and sell goods and services." In subsequent platforms, the party emphasized its support for "strong enforcement" of the Takings Clause of the Fifth Amendment. For the past twenty years, Republican Party leaders have "spearheaded efforts to protect private property rights" and "oppose[d] efforts to diminish the rights of private citizens to the [property] they own." In contrast,

Democratic Party platforms for each of the five presidential elections since 1988 were silent on this issue (Woolley and Peters 2007).

Furthermore, many officials from Republican Administrations, particularly the Reagan Administration, have gone on to found or assume prominent roles in the myriad of groups propelling the property rights movement. Generally conservative or libertarian, some of these groups are dedicated entirely to the property rights movement while others are engaged in a range of civil issues. One such group is the Institute for Justice, which litigated on behalf of Susette Kelo and her fellow Fort Trumbull homeowners. A review of the parties that filed amicus curiae briefs on behalf of Kelo reveals many key contributors to the property rights movement – among them, the Pacific Legal Foundation, the Mountain States Legal Foundation, and the Property Rights Foundation of America. Other important property rights proponents include the Federalist Society and the Cato Institute (Hatcher 2005; Kendall and Lord 1998). Brief descriptions of these groups are located in the appendix.

While all the groups are unique in their specific missions, they are alike in their "conservative" character. Thus, returning to the project, it is surprising that there was no statistically significant relationship between the percentage conservative of a state's population and its probability of enacting legislation. The ideological orientation of the states was measured with several different versions of state ideology, but none of the results for this variable were statistically significant. Thus, quite unexpectedly, it must be concluded based on the model in this study that whether a state was ideologically conservative was unrelated to its reaction to *Kelo*.

Equally surprising are the results for the state demographic variable: states with proportionately larger white populations were more likely to have reacted to *Kelo* than states with proportionately smaller white populations. Due to the uncertainty surrounding the theoretical rationale for this variable's strong performance, the model was re-run with an alternative measure based on median household income drawn from the 2005 American Community Survey (available online from the U.S. Census Bureau's *American Factfinder*). However, even when this "income variable" was included in the analysis, the white percentage of a state's population remained statistically significant.

In the search for an explanation as to why the white percentage of a state's population impacted whether or not the state enacted legislation, legal scholar David A. Dana's "The Law and Expressive Meaning of Condemning the Poor after *Kelo*" provides some insight. Dana argues that "'reform' efforts in the law of eminent domain have largely focused on economic development condemnations in middle-class areas, and not blight condemnations in poor areas." He notes that the two eminent domain cases that "spawned the greatest public outrage" both involved middle-class areas – Fort Trumbull in *Kelo* and the "lower-middle class, largely European immigrant" Poletown neighborhood in Detroit in the 1980 Michigan Supreme Court case *Poletown Neighborhood Council v. City of Detroit*. In contrast, the public, the media, and legislators "quietly approved or at least accepted" the ruling in the 1954 Supreme Court case *Berman v. Parker* which allowed blight condemnations in poor areas (2006, 5). Dana thus suggests that the characteristics of the property owners in eminent domain cases affect subsequent "reform efforts." This study confirms Dana's conclusion: As the

white percentage of a state's population increases, so does the probability that the state enacted eminent domain reform.

The model was less successful in explaining the substance or strength of these reforms in states that reacted to *Kelo*. None of the independent variables were significantly related to whether a state enacted strong or weak legislation. Again, these results were unexpected. It was anticipated that white, conservative, Republican states would have enacted strong as opposed to weak legislation. One possible explanation for the lack of statistically significant relationships in this model involves the construction of distinctions between strong and weak legislation. As discussed in the appendix, what constitutes strong and weak legislation is certainly a matter of debate. Perhaps, no provisions are in and of themselves "strong" or "weak" but that each piece of legislation must be evaluated independently according to its language and within the context of the entire body of state property law.

SUMMARY

In summary, the preceding project found that the states did respond to the Justices' suggestion in the majority opinion of *Kelo v. City of New London*. Three-fifths of the states "place[d] further restrictions on [their] exercise of the takings power" by enacting statutes or constitutional amendments (Legal Information Institute 2005). This project attributed the states' response to the immediate, widespread criticism generated by the decision as well as its context within a nationwide property rights movement. Furthermore, both the U.S. Congress and public interest groups encouraged states to limit the use of eminent domain for economic development.

Through the construction of a statistical model, this study then evaluated the effects of state demographics, ideological orientation, and partisan unity and composition on whether a state enacted legislation and the substance of the legislation enacted. Because of the Republican Party's active role in the property rights movement, it was not surprising that states with unified Republican governments and high percentages of Republican U.S. Representatives were the most likely to enact legislation in response to *Kelo*. Because of the conservative character of the groups propelling the property rights movement, the absence of a statistically significant relationship between the conservatism of a state and whether it enacted legislation was unexpected. The strongest predictor of whether a state enacted legislation – the percentage white of the population – was also unanticipated; however, this discovery makes sense in the context of legal scholar David A. Dana's theory that the characteristics of property owners in eminent domain cases affect public reaction and subsequent reform efforts.

Finally, none of the state characteristics explored in this study were able to predict whether a state enacted “strong” or “weak” legislation. One potential explanation for this finding involves the lack of a uniform and multidimensional legislation classification method.

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APPENDIX A

Table 5: Detailed State Reactions to *Kelo*

State	Statute Passed	Governor Signed	Gubernatorial Veto Overridden	Date Governor Signed or Gubernatorial Veto Overridden	Constitutional Amendment Passed for Placement on 2006 Ballot	Percentage of Vote for Constitutional Amendment on 2006 Ballot
Alabama	X	X		05.08.03; 06.04.25*		
Alaska	X	X		06.07.05		
Arizona						
Arkansas						
California						
Colorado	X	X		06.06.06		
Connecticut						
Delaware	X	X		05.07.21		
Florida	X	X		06.05.11	X	69.0
Georgia	X	X		06.04.04	X	82.7
Hawaii						
Idaho	X	X		06.03.21		
Illinois	X	X		06.07.28		
Indiana	X	X		06.03.24		
Iowa	X		X	06.07.14		
Kansas	X	X		06.05.18		
Kentucky	X	X		06.03.28		
Louisiana					X	55.0
Maine	X	X		06.04.13		
Maryland						
Massachusetts						
Michigan					X	80.1
Minnesota	X	X		06.05.19		
Mississippi						
Missouri	X	X		06.07.13		
Montana						
Nebraska	X	X		06.04.13		
Nevada						
New Hampshire	X	X		06.06.23	X	85.7
New Jersey						
New Mexico						
New York						
North Carolina	X	X		06.08.10		
North Dakota						
Ohio	X	X		05.11.16		
Oklahoma						
Oregon						
Pennsylvania	X	X		06.05.04		

State	Statute Passed	Governor Signed	Gubernatorial Veto Overridden	Date Governor Signed or Gubernatorial Veto Overridden	Constitutional Amendment Passed for Placement on 2006 Ballot	Percentage of Vote for Constitutional Amendment on 2006 Ballot
Rhode Island						
South Carolina					X	86.0
South Dakota	X	X		06.02.21		
Tennessee	X	X		06.06.05		
Texas	X	X		05.09.01		
Utah	X	X		06.03.21		
Vermont	X	X		06.04.14		
Virginia						
Washington						
West Virginia	X	X		06.04.05		
Wisconsin	X	X		06.03.29		
Wyoming						

*Alabama enacted statutes in both 2005 and 2006.

APPENDIX B

"Strongest" and "Weaker" Legislation Distinctions Explanations

Unfortunately, the NCSL does not discuss the relative effectiveness of its seven categories of legislation in protecting property owners from state and local governments' exercise of eminent domain for economic development. However, the Institute for Justice (IJ), Timothy Sandefur of the Pacific Legal Foundation, and legal scholar David A. Dana have classified the legislation enacted in reaction to *Kelo* according to whether or not the statutes and constitutional amendments produced meaningful reform of eminent domain laws. The IJ, Sandefur, and Dana vary in what constitute strong and weak legislation; often, a state is classified as having enacted strong legislation by the IJ and weak legislation by Sandefur. However, a few trends are common to the IJ, Sandefur, and Dana.

The IJ and Sandefur are concerned with redefining "blight" to emphasize detriment to public health or safety, to encompass only the most dangerous or extremely distressed property. The IJ writes: "Most abuses of eminent domain for private use occur because states' definitions of blight are so broad and vague that they could apply to practically every neighborhood in the country." (2007, 2) Sandefur expresses the similar concern that a vague definition of blight allows governments "to declare property blighted whenever officials believe it is failing to produce revenue at a level that they would like to see." (2006, 19)

The IJ and Dana are concerned with the explicit prohibition of eminent domain for economic development. The IJ asserts that the states that include "prohibition on

private development" have "the strongest reforms," and Dana heralds Florida legislation which banned "condemnations based on both economic development and blight rationales." (Dana 2006, 17; Institute for Justice 2007, 2)

Considering the observations of the IJ, Sandefur, and Dana and the fact that *Kelo* surrounded the issue of exercising eminent domain for economic development, legislation that includes both the "prohibition for economic development" and "blight" provisions was classified as the "strongest" legislation. Legislation that contains just one of these provisions or any combination of the other five provisions was classified as "weaker" legislation.

APPENDIX C

Table 6: State Measures for Variables

State	% Population White, Not Hispanic (2004)	% Conservative Wright (2003)	Republican Unified State Government (as of 2/2006)	% Republican Representatives 109th U.S. Congress	Legislation Enacted	Strength of Legislation
Alabama	69.5	37	0	71.4286	1	1
Alaska	66.9	*	1	100.0000	1	0
Arizona	61.1	42.4	0	75.0000	0	
Arkansas	77.2	53.1	0	25.0000	0	
California	44.5	27.5	0	37.7358	0	
Colorado	72.5	26.5	0	57.1429	1	0
Connecticut	75.9	29.6	0	60.0000	0	
Delaware	70.2	52.5	0	100.0000	1	0
Florida	62.8	35.7	1	68.0000	1	1
Georgia	60.2	41.9	1	53.8462	1	1
Hawaii	23.3	*	0	0.0000	0	
Idaho	87.2	43	1	100.0000	1	1
Illinois	66.2	31.7	0	47.3684	1	1
Indiana	84.6	33.8	1	77.7778	1	1
Iowa	91.7	39.7	0	80.0000	1	1
Kansas	81.9	34.6	0	75.0000	1	0
Kentucky	88.7	43.3	0	83.3333	1	1
Louisiana	61.8	39.4	0	71.4286	1	0
Maine	96.1	35.8	0	0.0000	1	1
Maryland	59.8	40.9	0	25.0000	0	
Massachusetts	80.8	29.1	0	0.0000	0	
Michigan	78.1	32.8	0	60.0000	1	0
Minnesota	86.7	29.1	0	50.0000	1	1
Mississippi	59.9	44.6	0	50.0000	0	
Missouri	83.1	36.5	1	55.5556	1	1
Montana	89.1	31.9	0	100.0000	0	
Nebraska	85.7	38.3	0	100.0000	1	1
Nevada	61.2	33.8	0	66.6667	0	
New Hampshire	94.3	36.3	0	100.0000	1	1
New Jersey	63.8	33.4	0	46.1538	0	
New Mexico	43.5	43.1	0	66.6667	0	
New York	61.1	28.5	0	31.0345	0	
North Carolina	68.6	35.8	0	53.8462	1	0
North Dakota	91.1	32.6	1	0.0000	0	
Ohio	83.3	37	1	61.1111	1	0
Oklahoma	72.9	37.7	0	80.0000	0	
Oregon	82	44	0	20.0000	0	
Pennsylvania	82.9	33.1	0	63.1579	1	1
Rhode Island	80.5	23.7	0	0.0000	0	
South Carolina	65.6	44.3	1	66.6667	1	1

State	% Population White, Not Hispanic (2004)	% Conservative Wright (2003)	Republican Unified State Government (as of 2/2006)	% Republican Representatives 109th U.S. Congress	Legislation Enacted	Strength of Legislation
South Dakota	87.1	58.3	1	0.0000	1	0
Tennessee	78.1	44.5	0	44.4444	1	1
Texas	49.8	37.8	1	65.6250	1	0
Utah	83.8	49.6	1	66.6667	1	0
Vermont	96	27.2	0	0.0000	1	0
Virginia	68.7	38.4	0	72.7273	0	
Washington	77.5	30.9	0	33.3333	0	
West Virginia	94.4	37.2	0	33.3333	1	1
Wisconsin	86.2	39.4	0	50.0000	1	1
Wyoming	88.6	23.6	0	100.0000	0	

*Wright ideology scores not available for Alaska and Hawaii.

APPENDIX D

Property Rights Related Supreme Court Cases

In *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), the Court held that "a New York law requiring a landlord to permit a cable television company to install a cable over the roof and down the side of her building was a taking, notwithstanding the fact that the cable was installed by a third party and occupied only a trivial space on the building." *Loretto* established that permanent, physical occupations by the government automatically constitute takings requiring the payment of compensation (Dana and Merrill 2002, 94). In *Loretto*, the Court began to move away from a focus on the parcel of property rights as a whole and toward an assessment of the impact of a regulation on a single right (in this case, the right of exclusion) (Kendall and Lord 1998, 563).

In *Hodel v. Irving* (1987), the Court struck down a law that severely limited Indian inheritance rights because it "amount[ed] to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times." (Eagle 2001, 10) By declaring a taking where the government's regulation only affected the right to dispose of property, the Court continued its movement away from a focus on the parcel of property rights as a whole and toward the protection of each individual right (Kendall and Lord 1998, 564).

In *Nollan v. California Coastal Commission* (1987), the Court ruled that the Commission could not grant building permits to beachfront property owners with the

stipulation that they maintain a public walkway on their property. *Nollan* is considered one of two leading exactions decisions for it established the "nexus test"; according to the "nexus test," there must be an "essential nexus" between the purpose of the condition and the purpose that would be served by prohibiting the proposed development (Dana and Merrill 2002, 118-222; Kendall and Lord 1998, 581).

In *Lucas v. South Carolina Coastal Council* (1992), the Court ordered that the owner of a beachfront property be compensated after a state law stopped all new construction on the property because the law totally eliminated the land's economic value. In *Lucas*, the Court established that when a government's regulation renders a property valueless, it automatically constitutes a taking requiring the payment of compensation. With *Lucas*, the Court's adoption of Epstein's theory was complete; all the critical strands in the parcel of property rights – the rights to exclude, dispose, and now use property – were protected by the Takings Clause (Kendall and Lord 1998, 564).

In *Dolan v. City of Tigard* (1994), the Court ruled that the City of Tigard could not require property owners to forfeit parts of their land for public use in order to receive permits to develop the land. *Dolan* is the other of two leading exactions decisions for it established the "rough proportionality test"; according to the "rough proportionality test," "to be constitutional, a development condition must have a nexus to the anticipated harms resulting from the development and be roughly proportionate" – that is to say, the reduction in social costs from the exaction must be roughly proportionate to the social costs attributable to the development (Dana and Merrill 2002, 222-224).

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court declared that a moratorium on the development of properties in the Lake Tahoe Region was not a taking requiring compensation (Jones 2004). The Court recalled that a permanent deprivation of all use is a taking but that a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted. Thus, the Court construed the category of government regulations that escape categorical takings treatment to include even multi-year moratoria on land development instructing that such restrictions should be assessed under the *ad hoc* approach (Dana and Merrill 2002, 88 and 185).

APPENDIX E

Groups Propelling the Property Rights Movement

The Institute for Justice (IJ) describes itself as "the nation's only libertarian public interest law firm." The IJ was founded in 1991 by William Mellor, a Reagan Administration official, and Clint Bolick, a veteran of the Justice Department in the 1980s and a former assistant to Justice Clarence Thomas (Kendall and Lord 1998, 542-543). According to its mission statement, the IJ litigates "to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government." To advance these aims, the IJ hosts Policy Activist Seminars for practicing lawyers and educational programs for law students. In areas of the country where they are litigating, the IJ maintains active grassroots campaigns to "build public support and foster an ethos of economic liberty." The IJ files frequent *amicus curiae* briefs on behalf of property owners in takings cases; often Richard Epstein pens these briefs (Hatcher 2005, 126-130).

The Pacific Legal Foundation (PLF) submitted an *amicus curiae* brief on behalf of Susette Kelo on August 19, 2004. The PLF was founded in Sacramento in the early 1970s by Ronald Zumbrun and Raymond Mombroisse, former assistants to President Reagan during his governorship. The PLF is the self-proclaimed oldest and largest public interest legal organization dedicated to property rights, limited government, and a balanced approach to environmental protection. It represents the beginning of nonprofit law firms devoted to right-wing causes. Today, the PLF's strategies include: litigating

precedent-setting cases, legal research, public outreach, monitoring government administrative proceedings, preparation of legal briefs and oral arguments, moot court sessions, on-site meetings, and other related activities (Hatcher 2005, 124-126). The PLF has filed a brief in favor of the property owner in every important regulatory takings case that has been heard by the Supreme Court since the mid-1970s (Kendall and Lord 1998, 541).

The Mountain States Legal Foundation submitted an *amicus curiae* brief on behalf of Susette Kelo on December 2, 2004. The Mountain States Legal Foundation is a nonprofit, public interest law firm. “The right to own and use property” is one of the four principal purposes to which the Mountain States Legal Foundation is dedicated. The Mountain States Legal Foundation’s President and Chief Legal Officer William Perry Pendley served as the Deputy Assistant Secretary for Energy and Minerals of the Department of Interior during the Reagan Administration. Several of the Mountain States Legal Foundation staff attorneys were presidents of Federalist Society chapters while in law school (Mountain States Legal Foundation 2007).

The Property Rights Foundation of America filed *amicus curiae* briefs on behalf of Susette Kelo both on August 23, 2004 and December 3, 2004. “The Property Rights Foundation of America is a national, grassroots, New York-based non-profit organization dedicated to the right to own and use private property in all its fullness as guaranteed in the United States Constitution.” The Property Rights Foundation is best known for its flagship publication *Positions on Property* which began in 1994. This

publication was the first to compile all the land-use regulations and pre-zoning plans in a state (New York) (Property Rights Foundation of America 2007).

The Cato Institute submitted an *amicus curiae* brief on behalf of Susette Kelo on December 2, 2004. The Cato Institute, a non-profit public policy research foundation, was begun in 1977. According to its mission, "the Cato Institute seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace." The Cato Institute is engaged in legal issues surrounding the Fifth Amendment, particularly property rights, eminent domain, and takings. Richard Epstein is an adjunct scholar at the Cato Institute. Roger Pilon, Vice President for Legal Affairs and a "Cato scholar" in the area of property rights, held five senior posts in the Reagan Administration, including at the Departments of State and Justice (Cato Institute 2007).

The attorneys who litigate on behalf of property rights for the IJ, PLF, and other legal foundations are often drawn from the Federalist Society. The Federalist Society was created in response to concerns in the late 1970s and early 1980s about the lack of conservatives in the legal academy. The Federalist Society is a "group of legal academics and practitioners seeking to understand the way in which the economic analysis of law can enable sound judicial interpretation." At present, the Federalist Society has membership in excess of 5,000 law students and 20,000 professionals (Hatcher 2005, 134-138). In addition to linking lawyers who wish to litigate on behalf of conservative and libertarian causes with legal foundations, the Federalist Society hosts

many training seminars for law students, attorneys, and judges that discuss conservative and libertarian views on topics including property rights (Kendall and Lord 1998, 546-547).

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