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Government Takings of Private Property

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In June 2005, the U.S. Supreme Court decided *Kelo v. City of New London*, which held that the government can force the sale of private property for the purpose of economic development. Although the ruling was largely in line with established legal precedent regarding “takings”—the extent to which the government can take private property or otherwise regulate its use for a public purpose—news of the *Kelo* decision was highly salient, and the public’s reaction was uniformly negative. *Kelo* thus stands as a rare instance in which a Supreme Court ruling that reaffirmed the status quo nevertheless raised the awareness and ire of a previously inattentive public.

At issue in the case was a plan by the City of New London, Connecticut, to redevelop the waterfront neighborhood of Fort Trumbull. But some homeowners in the area refused to sell. The City of New London sought to use its power of eminent domain to condemn the properties. The homeowners objected on the grounds that taking their property would violate their rights under the Fifth Amendment of the U.S. Constitution, which states: “nor shall private property be taken for public use without just compensation.” The Supreme Court has interpreted the Fifth Amendment to mean that the government can take private property only for a public use and only if it pays the owner just compensation. The City of New London claimed that it was justified in taking the homeowners’ property because the proposed development promised to bring jobs and tax revenue to the city. The homeowners argued that this justification did not constitute a “public use” within the meaning of the Fifth Amendment.

In a five-to-four decision, the Supreme Court decided the case in favor of the City of New London and held that the proposed development constituted



a public use. Public reaction to the case was surprisingly strong and uniform across the political spectrum. An overwhelming majority of citizens were astonished and dismayed by the decision. At the same time, most legal scholars and practitioners viewed the decision as a logical product of established precedent in the Supreme Court's earlier takings jurisprudence, in which the "public use" requirement was already very relaxed.

Rarely has a single U.S. Supreme Court decision triggered such a wave of popular outrage and immediate legislative response. In testimony before Congress, property scholar Thomas Merrill commented that *Kelo* "is unique in modern annals of law in terms of the negative response it has evoked" (U.S. Senate 2005). What explains the extreme public reaction to the *Kelo* case, given that the outcome matched what most legal experts expected? One possibility is that prior Supreme Court eminent domain cases did not receive much attention, leaving the public generally unaware of the long history of Court decisions approving government takings for a variety of purposes. For example, in 1954 in *Berman v. Parker*, the Court permitted the taking of two non-blighted stores in Washington, D.C., on the grounds that the neighborhood in which the stores were located was blighted and that the redevelopment of the neighborhood was necessary. The Court issued a sweeping ruling, holding that Congress was not required to "take a piecemeal approach" but rather had broad authority to condemn entire areas. As a result, thousands of poor black residents were pushed out of their homes (Kanner 2006; Pritchett 2003). Remarkably, the decision received little notice in the press.

Little is known about public impressions of takings prior to *Kelo*, largely because takings occur on the local level, affecting local communities. A local government taking might provoke sharp controversy, but the controversy would be reported mostly in the local press. Before *Kelo*, there was almost no polling on eminent domain or on takings.

This chapter discusses the conflict between the public's expectations about the circumstances under which government should be permitted to exercise its power of eminent domain to effect an outright taking of private property, on the one hand, and the U.S. Supreme Court's Fifth Amendment "public use" jurisprudence, on the other. We focus largely on outright takings in which the government forces the sale of private property—a situation that usually arises when the government feels it necessary to assemble parcels that have a particular configuration (Dana & Merrill 2002; Fischel 2004). To prevent private property owners from refusing to sell or from holding out for an unreasonably high price, the government can exercise its power of eminent domain to force the sale of the land and go forward with the project. The Fifth Amendment to the U.S. Constitution limits the power of eminent domain to situations in which the government takes land for "public use," a requirement that the Supreme Court has long interpreted quite loosely. The toothlessness of the public use requirement went mostly unnoticed by the general public until the Supreme Court declared in *Kelo* that taking homes for the purpose of economic development satisfies the public use requirement. The *Kelo* decision

seemed to trigger a sudden collective recognition of the Court's public use doctrine, and in this chapter we explore the possible reasons for this change.

We note, however, that forced sale of private property by the government is not the only instantiation of the government's power to control private property. Local land-use regulations restrict the use of private property, and sometimes those restrictions are so burdensome that courts have declared them to constitute "takings" under the Fifth Amendment, which requires the government to pay just compensation. These regulatory takings cases provide an important comparison with forced-sale takings cases, in part because the former are often perceived to stem from local government decisions that are responsive to the majority of voters, rather than the product of special interests such as developers (Fischel 2004). In recent years, the Supreme Court has decided many more regulatory takings cases than forced-sale takings cases. Public opinion data on land-use regulation therefore offer useful insights into attitudes toward private property and the government's right to control it, and as we will see, those attitudes pose a counterpoint to the strong public reaction to *Kelo*.

We begin by discussing the data available about public opinion in reaction to eminent domain prior to *Kelo*, and we then turn to the backlash that followed the decision. We show that the backlash was remarkably uniform across virtually all dimensions of identification, including political party, race, income, and education. We note the ongoing efforts—through legislation and voter initiative campaigns—to curb government eminent domain powers. Interestingly, many of these efforts go well beyond the issue of the circumstances under which property can be condemned, attempting more broadly to curb land-use regulation, including environmental regulation and zoning restrictions. We argue that the nearly uniform popular denunciation of *Kelo* suggests that the decision was perceived to violate fundamental cultural values, which we attempt to identify. We conclude by speculating why the Court ended up with a position so out of step with the opinions of the American public.

Public Opinion about Takings Prior to *Kelo*

Before *Kelo*, pollsters and academic researchers who study public opinion did not focus on public reaction to the use of the power of eminent domain to take property. Some scholars did, however, study and address public reaction to urban renewal programs—"slum clearance"—that promised to create healthier, more modern, and more beautiful urban communities. During this period, the power of eminent domain was a key tool in the effort to reinvigorate areas deemed blighted. Critiques of urban renewal did not generally take issue with the use of eminent domain per se, but rather with the focus of redevelopment officials on clearance of minority communities and the creation of new, racially segregated neighborhoods (Pritchett 2003).

Examples include the construction of the interstate highway network beginning in the late 1950s. In urban areas, there was a concerted effort to reduce blight by routing the interstate highway through poor neighborhoods (Mohl 1993). Until the rise of the neighborhood preservation movements of the late 1960s, the plans to raze minority communities met little resistance, and that resistance was mostly futile. Opponents' objections were not so much to the use of eminent domain, but rather to the policies that were perceived to work to the detriment of poor or otherwise powerless communities.

To our knowledge, only two public opinion polls asked about eminent domain prior to *Kelo*. One was a poll in Montana that addressed a local issue with a unique history. In the western United States, state and local governments sometimes delegated their power of eminent domain to private developers of mines and electric power lines (Fischel 2004). A summary, but not the language, of a 1975 poll of Montanans is reported by Calvert (1979). Respondents were asked if they favored or opposed a law that would take from private corporations their right to exercise the power of eminent domain, primarily for mining and power line construction. Eighty percent of respondents favored this law, and this percentage did not vary substantially across political party identification. More recently, in 1997, a national poll asked whether the government adequately compensates owners when property is taken for public use (as is required by the Fifth Amendment to the U.S. Constitution). Thirty-five percent of respondents thought that the government does not adequately compensate in these situations (Wisconsin Public Television/Princeton Survey Research 1997).¹

In contrast, information on public opinion about government regulation of private property is more readily available. In an early national survey (Gallup poll, 1964), 40% of respondents agreed with the statement "The government is interfering too much with property rights."² Like questions in many of the early polls and some of the post-*Kelo* polls, this question was highly abstract.

Focusing more specifically on regulation, 59% of respondents in a 1995 national Harris poll said that the government should not have the right to regulate private property.³ It is not clear, however, what meaning respondents attached to this question because when the next question asked whether the government should have the right to prevent owners of private land from developing the land if it would harm the environment, 79% of respondents agreed. As a general matter, in the pre-*Kelo* era, a substantial minority of Americans expressed some concern that governmental action poses a threat to private property.

The sanctity of private property to Americans is well documented. For example, in 1974 a Time/Yankelovich national poll gave respondents a series of "statements which represent some traditional American values," and 70% said they strongly believed in the statement "The right to private property is sacred." (By comparison, 62% said they strongly believed that "The American way of life is superior to that of any other country," and

57% said they strongly believed that “Belonging to some organized religion is important in a person’s life.”) Similarly, in a 1973 Harris Survey, 88% of respondents rated “allowing people to own private property” as a major contributor to making America great. Other qualities also rated high were “rich natural resources” (88%), “hard-working people” (90%), and “industrial know-how and scientific progress” (90%), but the ability to own private property rated higher than “free education for all qualified” (74%), “high quality products and services” (69%), and “outstanding political leaders” (63%).

Some polls focused on specific regulatory concerns. For example, in a 1977 Cambridge Reports poll, respondents were asked whether they favored or opposed various “measures for dealing with growth and population problems.” Sixty-one percent of respondents said they opposed the government “restricting the ways people can use their land or property.”⁴ Yet this general reaction is misleading; public opinion depends on the type of restriction. In response to a question in a 1973 Harris poll concerning “restrictions on the size of house lots and houses to prevent overcrowding,” only 37% of respondents said they opposed such a restriction.

Conflicts between environmental concerns and private property rights attracted the most frequent polling in the pre-*Kelo* era. National polls conducted in 1995 (Gallup/CNN/USA Today), 1999 (Gallup/U.S. News and World Report/CNN), and 2001 (Los Angeles Times) asked the same question: “Which is more important—protecting endangered species from extinction or protecting the ability of property owners to do what they want with their land?” The percentage of respondents who selected protecting property owners as more important ranged from 33% to 41%. Thus, a substantial minority of the respondents saw the rights of property owners as sufficient to overcome at least some competing environmental values.

Another national poll (Times Mirror/Roper, 1992) examined the influence of context on people’s choices. The survey described five situations pitting specific environmental interests against specific property owner desires and asked respondents: “Which is more important—protecting the environment or the owner’s rights?” (see Table 12.1). Respondents consistently rated the owner’s rights as less important than environmental protection, but the percentage favoring the owner varied substantially, with far greater support for an owner who was an individual rather than a developer or a logging company. It appeared to make little difference what use the owner had in mind (a golf course or a barn) or the environmental interest that was threatened (an endangered species or a wetland).

The Fifth Amendment to the U.S. Constitution requires that property owners receive just compensation for any government taking of property, and some public opinion polls explored perceptions of the adequacy and propriety of the compensation offered. In 1997, a national poll (conducted by Wisconsin Public Television/Princeton Survey Research) asked whether the government adequately compensates owners when the property is taken for

Table 12.1
Opinion on Hypothetical Conflicts Pitting Property Rights Against Environmental Concerns, 1992

Property owner	Owner's desired use	Threatened Environmental Interest	More important to protect...		
			The environment	The owner's rights	Don't know
Developer	Build 50 homes for middle-class families	Land designated as an official wetland area	71%	20%	9%
Logging company	Harvest timbers in forest it own	Harm endangered bird species	68%	23%	9%
Private individual	Build golf course	Harm endangered butterfly species	53%	37%	10%
Homeowner	Build barn behind house	Damage wetland area	52%	39%	9%
Homeowner in financial trouble	Sell 1 acre for home construction to raise money	Damage wetland area	48%	40%	12%

Source for data: *Times Mirror/Roper poll, 1992.*

Question wording: see text.

public use. Thirty-five percent of respondents thought that the government does not adequately compensate in these situations.

Responses to the question of whether compensation should be required at all for a regulatory taking varied considerably, depending on what information was made salient in the framing of the question. For example, an Electorate Survey in 1994 (conducted by League of Conservation Voters/Mellman, Lazarus & Lake) asked about compensation for regulation (as opposed to actual forced sale) and framed the issue as a contrast between whether private landowners have the right to do what they want with their land, so that restrictions must be compensated, versus whether restrictions without payment (such as prohibiting the building of a toxic dump) are justified to keep neighborhoods healthy and safe and to protect endangered habitats. On this question, a majority (55%) responded that payment was not justified, and only 28% responded that property owners have the right to do what they wish with their land.

Salient Takings Cases Prior to *Kelo*

In the past several decades, the Supreme Court has addressed the use of eminent domain to accomplish outright condemnation of property only a few times. Instead, the Court has more often turned its attention to the question of when government regulation of property becomes a “taking” for purposes of the Fifth Amendment, requiring payment of compensation to the owner. Cases involving regulatory restrictions on property use provoked little public attention, despite the fact that the Supreme Court has decided several such cases in the past twenty years (see Table 12.2). The most notable feature of these regulatory takings cases is that the media attention they received did not even approach the media attention generated by *Kelo*. Prior to *Kelo*, the public’s concern with government encroachment on property rights was largely unaffected by questions of entitlement to compensation for land-use regulations. That lack of concern has changed markedly in the western United States, ever since the introduction of a variety of post-*Kelo* voter initiatives that would require compensation for a much larger set of regulations—an issue we return to later.

Prior to *Kelo*, the U.S. Supreme Court had decided very few cases in recent decades involving the use of eminent domain to force the sale of property. During the early twentieth century, large American cities used eminent domain to revitalize areas that were considered slums. Controversy over housing and highway projects seemed to focus more on debates about location, rather than questioning the more basic premise that the government is entitled to use the power of eminent domain for large, ambitious projects such as these. This premise, however, was explicitly questioned in connection with an enormous urban renewal project in the nation’s capital that led to the U.S. Supreme Court’s 1954 decision in *Berman v. Parker*. The Supreme Court permitted the project to go forward, even though it meant that nonblighted stores would be condemned, thousands of predominantly African American residents would be displaced, and the land would be turned over to a private developer. No public opinion polls assessed the reaction to the decision or the plan itself. Press coverage of the decision appears to consist of two short articles in the *Washington Post* and one in the *Chicago Tribune*, none of which were critical of the case or the plan.

The other main legal pillar on which the *Kelo* decision rests is *Hawaii Housing Authority v. Midkiff* (1984), in which the Supreme Court issued a unanimous decision holding that a property redistribution plan in Hawaii was constitutional under the public use clause. We are aware of no public opinion polls following *Midkiff*, but the public reaction largely seemed to favor the land redistribution plan.

A final case, *Poletown Neighborhood Council v. City of Detroit* (1981), is important because it involved the forced sale (not just restricted use) of residential property by relatively powerless homeowners—and it, like *Kelo*, sparked public opposition. In *Poletown*, the Michigan Supreme Court ruled in favor of

Table 12.2
News Coverage of Prominent U.S. Supreme Court Takings Decisions, 1981–2005

U.S. Supreme Court Case (Year)	Holding	Perceived "Victim" of Regulation	Decision in favor of property owner or government	News stories (1 month) / (6 months)*
<i>Keystone Bituminous Coal (1987)</i>	Restriction on coal removal is not a taking (must leave 50% of coal for structural safety)	Coal company	Government	3 7
<i>First English (1987)</i>	Government must pay retroactive compensation after removing restriction on flood area without compensation	Church	Property owner	16 20
<i>Nollan (1987)</i>	Conditions on building permits must be related to proposed construction (cannot require easement for beach access as a condition for lifting building height restriction)	Beachfront landowners	Property owner	14 23
<i>Lucas (1992)</i>	Regulation that denies all economically productive use of land is a taking (involving prohibition on beachfront construction without compensation)	Beachfront landowner	Property owner	15 23
<i>Dolan (1994)</i>	Conditions on building permits must be related to impact of proposed development (cannot require bike path as condition of parking lot permit)	Small business owner	Property owner	23 32
<i>Palazzolo (2001)</i>	Landowner can challenge regulations even if regulations predated purchase	Beachfront landowner	Property owner	8 8
<i>Tahoe-Sierra (2002)</i>	Moratorium on construction is not a per se taking	Developers	Government	12 15

Table 12.2
(continued)

U.S. Supreme Court Case (Year)	Holding	Perceived "Victim" of Regulation	Decision in favor of property owner or government	News stories (1 month) / (6 months)*
<i>Lingle v. Chevron</i> (2005)	A regulation need not "substantially advance" government interests (rent control on gas stations is not a taking even though it might not substantially advance governmental interest)	Chevron Corporation	Government	4 / 8
<i>Kelo</i> (2005) [†]	Forced sale of private property to promote economic development is permissible	Middle-class homeowners	Government	64 / 107

* Number of stories appearing within one month and six months after the decision in five major newspapers—*New York Times*, *Washington Post*, *Los Angeles Times*, *Chicago Tribune*, and *Wall Street Journal*—identified by using the following search terms: ([name in case] & property & "supreme court").

† We include the *Kelo* case for comparison purposes, although it is not a regulatory takings case.

a city redevelopment plan involving the forced sale of homes in Detroit's working-class Poletown neighborhood. Eminent domain was invoked to require the removal of more than 4,000 residents and the condemnation of more than 1,000 homes and businesses, as well as several churches, to make room for a new General Motors assembly plant. Public reaction to the *Poletown* decision was strongly negative. By comparison, *Kelo* arguably was a less egregious case: many fewer people, homes, and businesses were displaced, the neighborhood was less tight-knit, and the influence of large corporate interests was less explicit. Nonetheless, public disapproval of *Poletown* in Michigan foreshadowed the national backlash that ensued when the U.S. Supreme Court decided *Kelo*.

Media Coverage of *Kelo*

One dimension of the public outrage in response to the *Kelo* decision was the high level of public awareness of the case, an awareness that reflects the

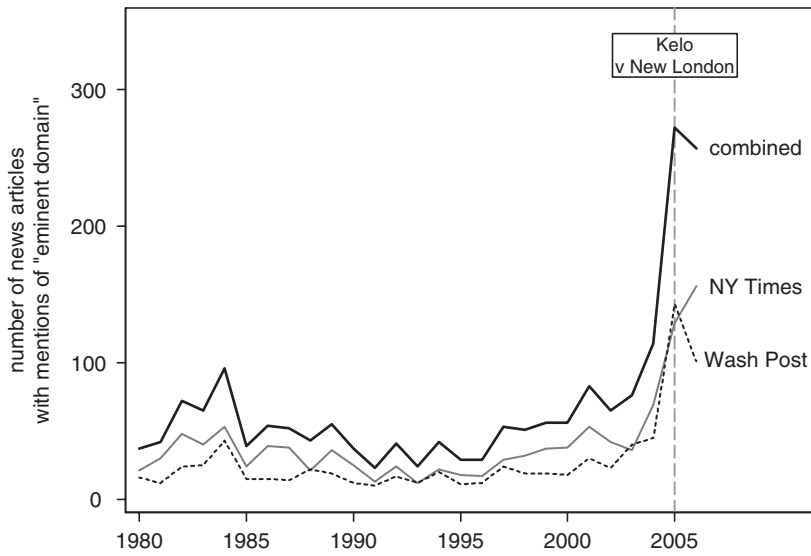


Figure 12.1. Coverage of Eminent Domain by the *New York Times* and *Washington Post*, 1980–2006. Source: Lexis-Nexis.

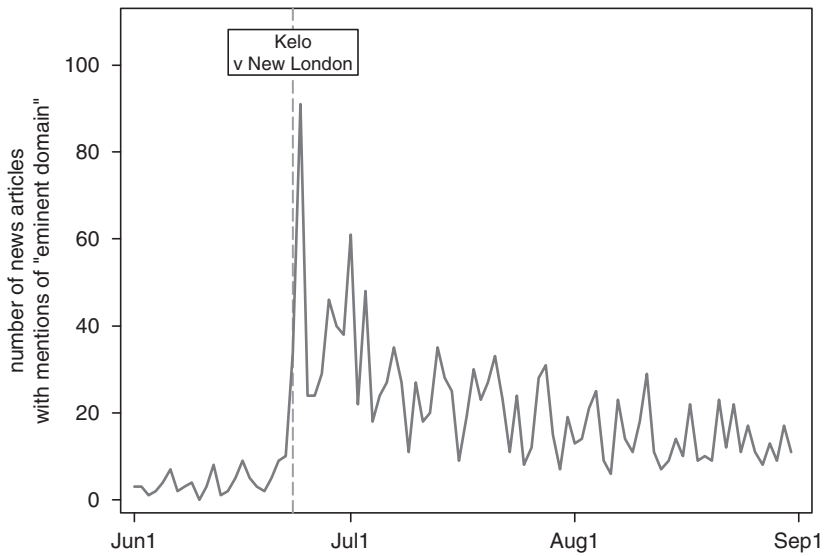


Figure 12.2. Coverage of *Kelo v. New London* by Major Newspapers and Wire Services, Summer 2005. Source: Lexis-Nexis.

intensity of media coverage. More newspapers editorialized about *Kelo* than any other takings case. The *Economist* reported that *Kelo* “has set off a fierce backlash that may yet be as potent as the anti-abortion movement” (“Hands off Our Homes” 2005).

After the Court announced its opinion, there was a sudden burst of national coverage of eminent domain controversies (see Figure 12.1) and extensive coverage of the *Kelo* case, coverage that persisted throughout the summer (see Figure 12.2). By the end of August, coverage had dropped off, but it still remained substantially higher than before the decision was announced. Part of the reason for the continued media focus on eminent domain was the introduction of various federal and state legislative proposals in response to *Kelo*.

Public Opinion on *Kelo*

The intense media coverage given to the *Kelo* decision in the summer of 2005 was accompanied both by a rise in the public’s interest in the case and by opposition to the ruling that crossed ideological, partisan, and demographic lines. In a July 2005 poll conducted by NBC News and the *Wall Street Journal*, 42% of respondents listed “private property rights” as one of the one or two issues before the Court in which they were most interested at the time—a proportion much greater than other contenders, including cases involving parental notification for abortions by minors (34%), display of the Ten Commandments on public property (32%), and right-to-die laws (24%).

Of the controversial cases decided by the U.S. Supreme Court in the 2004–2005 term, *Kelo* was identified in this poll as the most controversial. At the same time, it is worth noting that, except for a brief period during the New Deal, the Supreme Court’s agenda has scarcely overlapped the public’s agenda (Schauer 2006). According to a Gallup poll in July 2005, the “most important problem[s]” facing the country at that time, as perceived by ordinary Americans, were the economy and unemployment, the war with Iraq, terrorism, and fear of war. The issues decided by the Supreme Court are generally not the same policy issues that are of primary concern to the public, and features of Supreme Court cases that are of public concern do not necessarily correspond to the legal aspects of the case considered by the judiciary.

Nonetheless, the decision in *Kelo* touched a nerve. Indeed, *Kelo* has proven to be one of the most unpopular decisions of the Rehnquist court. Table 12.3 displays the results of polling data regarding *Kelo*. As shown in the table, disapproval of *Kelo* averaged well above 80%, higher than the disapproval rating for such controversial cases as *Brown v. Board of Education*, the school prayer cases, *Webster* (1989, affirming abortion rights), and *Texas v. Johnson* (1989, protecting flag burning).⁵ Furthermore, a large majority in one national and two local polls—ranging from 69% to 89%—favored legislation restricting the

Table 12.3
Opposition to *Kelo* and Support for Legislative Reform, Summer and Fall 2005

Poll Name	Sample	% Disagreeing with <i>Kelo</i>	% Favoring Legislation Restricting Eminent Domain
Saint Index	National	81%	N/A
American Survey	National	N/A	69%
NH Granite State	NH	92%	N/A
Quinnipiac	CT	88%	89%
Mason-Dixon	FL	88%	89%

Question wording:

Saint Index: The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling? [Strongly Support, Somewhat Support, Somewhat Oppose, Strongly Oppose, Don't Know]

American Survey: As you may have heard, the Supreme Court recently announced a decision saying federal, state, and local governments may take away private property and give it to developers for commercial development even if the homeowners object, so long as the homeowners receive compensation for their homes. Congress is considering legislation that would say the federal government cannot take private property for private commercial development if homeowners object. It also would say state and local governments cannot take private property for private commercial development against homeowners' wishes if any federal funds are being used in the project. What about you, would you favor or oppose Congress placing these limits on the ability of government to take private property away from owners?

New Hampshire Granite State: Recently, the Supreme Court ruled that towns and cities may take private land from people and make it available to businesses to develop under the principle of eminent domain. Some people favor this use of eminent domain because it allows for increased tax revenues from the new businesses and are an important part of economic redevelopment. Other people oppose this use of eminent domain because it reduces the value of private property and makes it easier for big businesses to take land. What about you? Do you think that towns and cities should be allowed to take private land from the owners and make it available to developers to develop or do you oppose this use of eminent domain?

Quinnipiac: As you may know, the Court ruled that government can use eminent domain to buy a person's property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling?

Mason Dixon: In that Connecticut case, the U.S. Supreme Court ruled government can use the power of eminent domain to acquire a person's property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling?

power of eminent domain. A majority of New Jersey residents (66%) stated support for a temporary moratorium on eminent domain until further study (Monmouth University/Gannet, 2005).

Other questions during this time period reflect specific anxieties that the *Kelo* decision seemed to trigger. For example, New Jersey residents were overwhelmingly opposed to the prospect of government takings of low-value

homes to build a shopping center (90%) or to build high-value homes (86%) (Monmouth University/Gannet, 2005). Responses to other questions reflect dissatisfaction with current local eminent domain practices. For example, 65% of New Jersey residents thought that property owners were not given fair market value when their property was taken (Monmouth University/Gannet, 2005).

The *Kelo* decision seems to have provoked concern that the Court had endorsed a kind of “reverse Robin Hoodery,” whereby, in Justice O’Connor’s words, “the government now has license to transfer property from those with fewer resources to those with more” (Kanner 2006, 358). Consistent with this concern, 76% of New Jersey residents endorsed the statement that “eminent domain in my area has benefited private developers more than local communities.” Aside from the perception that *Kelo* would encourage exploiting those who are particularly vulnerable, the polls convey a general sense of skepticism about, if not outright opposition to, the power of eminent domain in any form whatsoever. Thus, 61% of Connecticut residents and 53% of Florida residents reported that they were opposed to “the longstanding practice” of eminent domain in which the government takes private property “for important public projects” and pays just compensation. A smaller but still substantial number (39%) of New Jersey residents reported that it was never acceptable for the government to exercise its eminent domain power.

Public disapproval of *Kelo* is notable in its uniformity across traditional political cleavages. The percentage of Democrats, Republicans, and Independents who oppose the *Kelo* decision was nearly equal in national and state polls conducted in 2005, hovering between 80 and 85%.⁶ We further confirmed the uniformity of opposition in a multivariate regression analysis (not shown here) performed with data from a national poll conducted by the Saint Consulting Group in 2005. The question was: “The US Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?” Responses were measured on a 4-point scale (1 = strongly support; 4 = strongly oppose). This analysis found that variables which typically predict attitudes on public affairs—such as political affiliation, age, sex, education, income, and home ownership—explained less than 5% of the variation in opinion regarding *Kelo*. The subgroup least opposed to the decision was respondents with incomes of \$150,000 and over, and yet even these respondents opposed the decision on average (3.12). The subgroup that expressed the greatest disapproval (3.64) was the Native American respondents ($N = 28$), which is consistent with previous examples of Native American resistance to government efforts to place a dollar value on forced relocation.⁷ On the other hand, the small absolute difference between these two extremes illustrates what the regression analysis confirms: that group membership is not a strong predictor of opposition to *Kelo*.

The Complexity of the *Kelo* Decision and the Nuances of Attitudes Regarding Eminent Domain

Because the *Kelo* decision endorsed either explicitly or implicitly a complex set of propositions (including the purposes for which property can be acquired by eminent domain, the characteristics of properties that can be acquired, the processes that comport with the requirements of due process, and the determinations of just compensation), writing a single polling question that fairly characterizes the decision is perhaps impossible. But many of the polls either intentionally or unintentionally slanted the presentation of *Kelo* by using inflammatory language to frame the question or by omitting important elements that might affect responses. For example, in a survey conducted in Minnesota by Decision Resources Ltd. of Minneapolis, respondents who indicated they were not aware of the recent Supreme Court decision on eminent domain (31% of the sample) received the following explanation before being asked their opinion:

The U.S. Supreme Court recently ruled that local governments have the right to take land from private owners for not only public purposes, but also to support private development. For example, under this decision a city could condemn an existing business property or residential neighborhood in order to create a new privately-owned shopping center. Supporters of this decision say that city council members should have the authority to make decisions about the best kinds of development for their community. Opponents say that governments should only be allowed to take land away from private owners for truly public purposes, such as a new highway or a government building.

All respondents were then asked whether they supported “allowing local governments to use eminent domain to take private property for another private development project.” This explanation of *Kelo* was misleading. Contrary to the first sentence in this description, *Kelo* requires a public purpose, and the issues addressed in *Kelo* were whether economic development could constitute a sufficient public purpose and whether a public purpose was sufficient to meet the constitutionally required standard of public use. Moreover, the description used in the survey suggests that any transfer of property to a private business would be permissible; by contrast, *Kelo* requires an asserted public benefit. Finally, the description does not mention that if the government exercises its power of eminent domain, it must fairly compensate the owner of the property. Not surprisingly, 91% of respondents said they would not support the use of eminent domain.

Some of the polls further misled respondents by describing eminent domain takings as “seizures.” In a follow-up question on the Minnesota survey, respondents were asked whether they were likely to support a candidate who “voted to restrict the power of local governments to use eminent domain to seize private property.” Although the exercise of the power of

eminent domain constitutes a taking, rather than a voluntary sale, certain procedures must be followed before the property can be taken. The use of the word “seize” arguably implies the absence of process or compensation. Eighty-three percent of the Minnesota respondents said they would be more likely to support a candidate who would vote to restrict the power to seize private property. We note that although the misleading wording of questions regarding eminent domain undoubtedly affected survey responses, the broad opposition to the *Kelo* decision found in the polls shown in Table 12.3 was nevertheless consistent across a wide range of question wordings regarding the ruling (see appendix).

Some polls sought to assess opposition to *any* form of eminent domain for *any* purpose. In a poll conducted by the Monmouth University Polling Institute, the interviewer explained, “Eminent domain is the process by which towns take control of property after paying compensation in order to use the land for other purposes to benefit the public good.” Although one might quarrel with the assumption that such takings actually benefit the public good or whether government personnel are always properly motivated, the characterization includes neutral language describing the taking and acknowledges that the property owner is compensated for the loss. After hearing this description, respondents were asked, “In general, do you agree or disagree that there are times when it is O.K. to use eminent domain to rebuild an area?” and 39% disagreed. The Florida survey by Mason-Dixon obtained a similar level of rejection for any form of eminent domain (43%). The level of rejection was even higher (61%) in the Quinnipiac survey conducted in Connecticut, the state where *Kelo* originated.

The rejection rate of any form of eminent domain by two of five respondents is misleading, however. The Monmouth poll also asked each respondent about four of eight hypothetical situations that combine different types of property and possible uses (see Table 12.4). Approval or disapproval of these takings begins to reveal the contours of the opposition to *Kelo*. Reaction depends on what is taken (whether land or a business or a home) and how it will be used. For example, the use of eminent domain to take vacant land and run-down buildings for a school garnered almost uniform support (88%) and minimal outright rejection (7%). Part of this strong support might be explained by the minimal harm to the owner because of the nature of the property taken—vacant land. When low-value homes rather than vacant land would be taken to build a school, support dropped from 88% to 33%. Thus, a large proportion of respondents reject the idea of taking homes, even for an important use. The proposed use of the land did affect reaction to takings, however. Although using eminent domain to take low-value homes to build a school garnered the support of 33% of respondents, support dropped to 7% when low-value homes were to be taken to build high-value homes, and to 4% when low-value homes were to be taken to build a shopping center. The proposed shopping center garnered far more support (55%) when the property taken would be vacant land and run-down buildings.

Table 12.4
Attitudes regarding eminent domain in hypothetical situations (New Jersey residents)

Use eminent domain to take	In order to	O.K.	Not O.K.	Depends/ Don't Know
Vacant and run-down buildings	Build a school	88%	7%	4%
Land from a developer	Preserve open space	65%	28%	8%
Land from a business to keep it from expanding	Prevent noise and traffic	43%	48%	8%
Low-value homes from people	Build a school	33%	55%	11%
Low-value homes from people	Build higher value homes	7%	86%	8%
Low-value homes from people	Build a shopping center	4%	90%	7%

* The order of the items was rotated. *N* = 800 New Jersey adults.

Source. Monmouth University/Gannett New Jersey Poll, Fall 2005.

Question wording: "I'm going to read you some situations where eminent domain might be used. Please tell me whether you think using eminent domain is O.K. in each case. Is it O.K. or not O.K. to use eminent domain to [READ ITEM]"*

These results suggest that beneath the vigorous public opposition to *Kelo* lay a more nuanced evaluation of government takings—a complex structure of public attitudes not easily gauged at an abstract level by simply measuring attitudes toward eminent domain in general. In particular, the level of support for use of eminent domain appears to depend on, among other things, the nature of the property (homes, vacant land, etc.) and the proposed use for the property (a school, a shopping center, etc.). The complete rejection of eminent domain by 40% to 60% of respondents answering a general question probably reflects the salience of the *Kelo* facts and the outrage in response to its perceived unfairness rather than a wholesale rejection of the legitimacy of eminent domain.

Elite Opinion and Spillover into Regulatory Takings Initiatives in the Western United States

The legal academy recognized that the *Kelo* decision took the public by surprise, and scholars sought to assure the public that the decision changed nothing.⁸ After all, most legal academic commentators understood that the Supreme Court's interpretation of the phrase "public use" in the takings clause did not meaningfully restrict the exercise of the eminent domain power (Mahoney, 2005),⁹ and the Court's prior "public use" cases contained language that

seemed to rule out a decision for the property owners in *Kelo*. For example, in 1984, the Court proclaimed, “[W]here the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause” (*Midkiff*, 241). Because of this sweeping language, many observers in the legal academy correctly predicted that the Court would rule against the property owners in *Kelo*. A notable feature of the reaction to *Kelo*, then, is the large disparity between elite opinion and popular opinion.

Two prominent newspapers echoed legal commentators and editorialized in favor of the *Kelo* decision. The *Washington Post* acknowledged that the result for the property owners in the case was “quite unjust” but “the court’s decision was correct” (“Eminent Latitude” 2005). The *New York Times* (“The Limits of Property Rights” 2005) also called the result in *Kelo* correct; however, as others have noted, the *Times* recently had been the beneficiary of New York City’s exercise of eminent domain, which enabled construction of a new, subsidized *Times* headquarters in midtown Manhattan (Kanner 2006). In conceding that the outcome for the plaintiffs was harsh, even those who supported the decision in *Kelo* seem to acknowledge, either implicitly or explicitly, that the case posed a challenge to important cultural values, such as the sanctity of the home. The Court’s majority opinion, authored by Justice Stevens, insisted that “we do not minimize the hardship that condemnations may entail.”

The public backlash quickly generated a multitude of legislative proposals to limit the exercise of eminent domain for the purpose of economic development, in state legislatures as well as the U.S. Congress.¹⁰ Losing *Kelo* energized opponents of takings. Less than a week after the decision, the Institute for Justice, a libertarian public interest law firm that represented Susette Kelo before the U.S. Supreme Court, announced that it would spend \$3 million, about half of its annual budget, to “combat eminent domain at the state and local level” (Institute for Justice 2005). Americans for Limited Government, another libertarian group, also saw an opportunity to gain support for opposition to regulatory takings and has funded state groups in Arizona, California, Idaho, Michigan, Montana, Nevada, North Dakota, and Washington “to protect property rights” in the wake of *Kelo* (Americans for Limited Government 2005). Within a few months after *Kelo*, some states had passed broad prohibitions on the use of the eminent domain power to transfer property to private parties,¹¹ and others made procedural changes.¹² The trend gathered steam in November 2006, when residents of twelve states were asked to vote on proposals for constitutional amendments,¹³ changes in statutory language,¹⁴ and other measures that would limit the ability of governments to exercise the power of eminent domain.

Ten of the twelve propositions passed (all except California and Idaho). Many of these referendums were stimulated by political interest groups, particularly libertarian and small-government organizations, which used the concerns generated by *Kelo* as an opportunity to press for legal limits on government that exceeded the concerns raised by *Kelo* (Brady 2006). For example,

the referendums in Arizona, California, and Idaho included a regulatory takings component that would have required governments to compensate owners not only when their property was taken outright under eminent domain but also when their property values were reduced by land-use regulations. Other referendums inserted additional protections for property owners who might be subject to a legitimate governmental taking under *Kelo*. For example, the Michigan referendum on a state constitutional amendment provided that if a government takes an individual's principal residence for public use, the individual must be paid at least 125% of the property's fair market value.

Voters' reaction to these referendums provides an indication of public opinion on *Kelo*-related matters—but this indication is imperfect, as Arizona Proposition 207 demonstrates. The proposition, which passed with 65.2% of the vote, appeared on the ballot under the title of an initiative “relating to eminent domain.” Voters had the following choice:

A “yes” vote shall have the effect of [1] establishing additional rights for individuals whose property is taken by the government for public use (eminent domain), [2] defining “public use,” [3] prohibiting the taking of property for economic development, [4] requiring primary residences taken by eminent domain be replaced by a comparable dwelling, [5] requiring compensation for property values reduced by land use laws, [6] requiring attorneys' fees in eminent domain lawsuits, and [7] allowing attorneys' fees in property value reduction lawsuits. A “no” vote shall have the effect of retaining the current eminent domain law.

Thus, the “yes” vote choice began with a general description of the initiative as providing rights for individuals. A “yes” vote supported prohibiting takings for economic development, yet also endorsed a requirement of compensation for reductions in property values brought about by regulation (fifth element). Voters' response to this initiative offers little insight into how they might evaluate each of the seven elements covered by the statutory amendment. The elements themselves are shorthand descriptions, and even if each were offered separately, it would have been difficult for voters to have evaluated each element beforehand. In preparation, some voters might have braved the Arizona Secretary of State's detailed description of each proposed measure, in this case nineteen pages including the proposed amendment itself (four pages), an analysis by legislative counsel, a fiscal impact statement, and fourteen pages of arguments submitted by identified private individuals, officials, and organizations favoring (fifteen) and opposing (twenty-one) the measure.

It would be surprising, however, if many voters performed a thorough examination of this information (Magleby 1995). More likely, the broad news coverage of *Kelo* made it easy to characterize a proposal limiting eminent domain and protecting property rights as worthy of support. The upshot is that the proposal obtained support from two thirds of the voters for limits on condemnation and also endorsed costs to be imposed on governments exercising their regulatory powers.

The difficulty of educating the electorate on a complex referendum has received substantial scholarly attention (e.g., Cronin 1989; Magleby 1984, 1995), and it may explain the last-minute shifts in public opinion in California on a similar referendum. In November 2006, California voters defeated the proposed referendum by a narrow margin (47.5% to 52.5%), and polls taken among likely voters in July and October showed a substantial shift from 46% in favor in July to 35% in favor in October (23% undecided at each point).

Conclusion

The real story in the *Kelo* backlash is the remarkable consistency of opinion across political and demographic subgroups. Something about *Kelo* spoke to core values shared by Americans of various racial, ethnic, religious, and ideological groups.

The first value threatened by *Kelo* is the sacredness of the home. Although most of the public knew little about the nuances of the *Kelo* decision, they seemed to have implicitly understood that the Supreme Court's eminent domain jurisprudence afforded no special protection for ordinary homeowners, and some might have felt disappointed that the Supreme Court declined to act to protect their rights against what they perceived to be local government encroachment. This is borne out by the strong opposition to hypothetical takings of homes, as compared with other types of property, illustrated in Table 12.4 and discussed earlier. The cultural importance of homeownership also helps to explain the high public disapproval rating for the *Kelo* decision, because there was little in the media reports about the decision that suggested any natural limit on whose home could be targeted in the future for government condemnation. Alarming headlines such as "Your Home Could Be Up for Grabs" made many ordinary citizens feel vulnerable. The fact that the plaintiffs in *Kelo* were white middle-class residents whose homes were well maintained probably exacerbated the public's feelings of vulnerability (Pritchett 2006).

A second value concerns the expectation that the Supreme Court will protect ordinary citizens from overreaching governmental power. The public's sense of equity is challenged by takings whose purpose diverges from public use archetypes like schools and post offices. The more the proposed use for the targeted property appears speculative, vague, or for the benefit of private parties, the more unfair the taking will be perceived.

A most unusual feature of the public backlash following *Kelo* is that it signified overwhelming opposition to a ruling that respected local control, a decision in which the Court declined to interfere with the act of a local government and let stand a permissive policy of a state. The structure of the majority's decision is consistent with principles of federalism, in which the federal government defers to the states to develop and experiment with their own policies. The popular backlash, by contrast, seemed to object to this

hands-off approach and instead called for the Court to step in and impose limits on eminent domain powers, which have historically been seen as properly residing in state and local governments. Unlike other controversial court decisions involving abortion, gay marriage, and school integration, where courts have overturned legislative action, in *Kelo* the Court endorsed local and state control, and it was the Court's *failure* to intervene that has upset the public.

Judge Richard Posner has called the public indignation engendered by the *Kelo* decision "surprising because it is a restrained decision that leaves the states free to curtail their eminent domain powers" (Posner 2006). In a comment in a law review, Justice John Paul Stevens, the author of the majority *Kelo* opinion, said, "Though much criticized, the *Kelo* opinion was surely not an example of 'judicial activism' because it rejected arguments that federal judges should review the feasibility of redevelopment plans, that they should evaluate the justification for the taking of each individual parcel rather than the entire plan, and that they should craft a constitutional distinction between blighted areas and depressed areas targeted for redevelopment" (Stevens 2006).

A difficult aspect of drawing general lessons from an examination of the popular reaction to *Kelo* is that, in some sense, the backlash seems to have come out of nowhere. Unlike prominent debates implicating cultural values like the role of race and religion in the social order (implicating desegregation, affirmative action, and school prayer), the meaning of family and marriage (implicating gay rights and gender equality), and the sanctity of human life (implicating the death penalty, the right to die, and abortion), debates about the sanctity of property were not featured prominently in public discourse prior to *Kelo*.

But the *Kelo* decision seems to have tapped into existing concerns about the sanctity of the home, government overreaching, and tensions between protecting public goods (like the environment) and protecting private rights. In some sense, *Kelo* was a "perfect storm" because all of these issues were directly implicated in the decision, a circumstance highlighted by Justice O'Connor's dissent, in which she warned, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." These images were invoked in hundreds of news stories on the decision and the flurry of legislative proposals that followed.

Everyone could find something to hate about the *Kelo* decision. Middle-class homeowners identified with the middle-class homeowners who were the plaintiffs in *Kelo*. For urban residents and members of communities that had been displaced by urban renewal programs, the decision renewed fears that a new era of displacement was afoot. In his dissent, Justice Thomas noted that the racially discriminatory nature of urban renewal had caused many to refer to these programs as "Negro removal," and he predicted that the *Kelo* decision would exacerbate these effects. The decision also troubled residents of the western states who were already concerned about excessive government regulation of private property, and the numerous post-*Kelo* voter initiatives that would restrain regulatory power reflect this concern. As a result, *Kelo* generated the

perfect storm that, for different reasons and toward different ends, brought liberals, conservatives, and libertarians to seek shelter under the same umbrella.

APPENDIX

University of New Hampshire Granite State Poll, July 2005. “Recently, the Supreme Court ruled that towns and cities may take private land from people and make it available to businesses to develop under the principle of eminent domain. Some people favor this use of eminent domain because it allows for increased tax revenues from the new businesses and are an important part of economic redevelopment. Other people oppose this use of eminent domain because it reduces the value of private property and makes it easier for big businesses to take land. What about you? Do you think that towns and cities should be allowed to take private land from the owners and make it available to developers to develop or do you oppose this use of eminent domain?”

Quinnipiac University Poll, July 2005. (A preliminary question asked whether the respondent was familiar with the *Kelo* case.) “As you may know, the Court ruled that government can use eminent domain to buy a person’s property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling? Do you agree/disagree strongly or somewhat?”

Mason-Dixon Polling & Research, October 2005. (A preliminary question on familiarity asked: “A recent U.S. Supreme Court decision involving a Connecticut case held that local government could also use its eminent domain power to acquire homes and businesses for redevelopment projects which could benefit the local economy. Do recall hearing of this decision in the news?”) “In that Connecticut case, the U.S. Supreme Court ruled government can use the power of eminent domain to acquire a person’s property and transfer it to private developers whose commercial projects could benefit the local economy. Do you agree or disagree with this ruling?”

Saint Consulting Group, October 2005. “The US Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?”

Notes

1. Nineteen percent thought people were overcompensated, 38% thought compensation was about right, and 8% did not know.
2. Thirty-eight percent disagreed, and 23% did not know.

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3. Thirty-eight percent said the government should have the right, and 3% were not sure.

4. Thirty percent were in favor, and 10% did not know.

5. For example, opposition to *Brown v. Board of Education* was about 40%–45% (see chapter 1, this volume), disapproval of the school prayer decisions ranged from 52% to 67% (see chapter 3, this volume), disapproval for *Webster* ranged from 35% to 46% (see chapter 4, this volume), and disapproval for *Texas v. Johnson* ranged from 65% to 79% (see chapter 8, this volume).

6. These include polls conducted by the Saint Consulting Group (national sample), Quinnipiac (Connecticut residents), Mason-Dixon (Florida), and the University of New Hampshire (New Hampshire).

7. See, for example, Espeland (1998).

8. Harvard Law School professor David Barron wrote that despite the un-American-sounding headlines reporting the case, such as “Court Authorizes Seizure of Homes,” the *Kelo* decision “affirmed principles as old as the Constitution” (Barron 2005). Professor Eugene Volokh at UCLA Law school said *Kelo* did not represent much of a change in law (Canellos 2005). University of Connecticut law professor Jeremy Paul said, “I think the worries for individual homeowners are exaggerated” (Tuohy 2005).

9. Mahoney cites Ackerman (1977) (“any state purpose otherwise constitutional should qualify as sufficiently ‘public’ to justify a taking”), Tribe (2000) (noting that the Court in modern times “refuses to give ‘teeth’ to the public use requirement”), and Merrill (1986) (“most observers today think the public use requirement is a dead letter”). For a dissenting view, see Epstein (1985).

10. As of early 2007, the Private Property Rights Protection Act (PRPA) has been passed by the House but not by the Senate. Under the act, state and local governments that use eminent domain for economic development would lose federal economic development funds for two years. Even if PRPA is enacted, its effects may be small because of the small amounts of federal funds that offending state and local governments stand to lose. By one estimate, PRPA applies only to about 1.8% of all federal grants to states and localities (Somin 2007).

11. For example, South Dakota.

12. For example, Georgia and Utah moved decisions on takings from appointed boards to elected officials. As of early 2007, twenty-seven state legislatures have enacted post-*Kelo* reforms. However, many of these reforms are purely symbolic, because they only nominally forbid “economic development” condemnations but permit them to continue under another name (e.g., “blight reduction”) (Somin 2007).

13. California, Florida, Georgia, Louisiana, Michigan, New Hampshire, and South Carolina.

14. Arizona, Idaho, Nevada, Oregon, and Washington.

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