Invitation to Defy: *Kelo v. New London* and Legislative Responses to the Supreme Court

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Invitation to Defy: *Kelo v. New London* and the Supreme Court’s Role in Policy Diffusion

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Abstract of Dissertation

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The U.S. Supreme Court is often thought of as the final arbiter in the policymaking process, either affirming or rejecting the constitutionality of federal, state, or local laws. In some instances, however, the Court can also be an early-stage actor, providing criteria or guidelines in its decisions for other policymakers to follow when they draft legislation or administrative rules. Although these permissive rulings give other political actors a degree of leeway, there is usually a presumption, based in theories of Court compliance and legitimacy, that they will act in spirit of the Court’s decision and support the Court’s legal reasoning. The case of *Kelo v. City of New London* (2005) and the subsequent state and federal legislative responses to it serve as a counterexample to this expectation. After the decision, Court-curbing behavior occurred by both federal and state legislators, and members of the public and government officials expressed widespread disagreement with the ruling and with the Court’s rationale for it. Using *Kelo* as a lens, this project explores why federal and state legislators voluntarily enact policy changes in opposition to the Court. Instead of being the end of the policymaking process, an unpopular Court ruling can create an opportunity for policy change to begin among legislative actors, particularly if they are ideologically opposed to the Court or the direction of its decision.
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Chapter 1: Introduction

In many ways, all politics is both local and national. The United States’ system of separated institutions sharing powers creates a number of opportunities for interactions between actors at various levels of government (federal, state and local) and across branches (executive, legislative, and judicial). Sometimes, actors from different institutions cooperate with one another to achieve common policy objectives; in other instances, actors disagree with one another and work toward divergent policy objectives in their respective institutions. The checks and balances provided by the U.S. Constitution provide a partial framework for these interactions at the federal level, but the Constitution is fairly ambiguous on the relationship between federal and state government institutions, particularly across branches.

Under the framework provided by the Constitution, the U.S. Supreme Court’s role in the policymaking process is usually considered to be as the final arbiter, either affirming or rejecting the constitutionality of federal, state, or local statutes. With this as the Court’s presumed role in the policymaking process, the Court is most commonly thought of as an agent of policy change when it declares something unconstitutional, and other actors must then rewrite legislation or regulations to comply with the Court’s legal standard. When the Supreme Court declares something constitutional, it can also initiate policy change by signaling to other actors that similar policies would not be likely be considered legally dubious, particularly for policies that are not yet widespread. These two scenarios, importantly, rely on the common presumption that other political actors accept the Court’s decision as valid and seek to comply with the Court if it finds
something unconstitutional or wish to spread the policy sanctioned by the Court if it upholds something as constitutional.

The Court might provide clear policy prescriptions regarding the constitutionality of certain elements of the law, but the Court can also indicate that policymakers have some degree of leeway under its interpretation of the law in a permissive ruling. For example, a Court ruling might establish a set of criteria or standards for legislators to follow, giving legislators a degree of discretion and flexibility in creating compliant policies. In other cases, the Court might find that a particular issue is not something that should be determined by the judiciary and defer to legislative actors to decide instead. In these situations, the Supreme Court may also be initiating policy change, and these scenarios can lead to a greater variety of legislative and regulatory responses from federal, state, and local government actors. Following Court decisions that are more permissive than prescriptive, some political actors may not feel compelled to take any further action. Whether or not any policy changes result from permissive Court rulings, the high degree of institutional esteem and legitimacy the Court enjoys would at least suggest that other actors should accept the Court’s legal reasoning in these cases.

This project explores the interactions between the U.S. Supreme Court and federal and state legislatures, specifically by looking at how and why the Court’s decision in Kelo v. New London (2005) resulted in substantive policy responses by the U.S. House of Representatives and most every state legislature. In the Kelo case, the Court was asked to interpret the Fifth Amendment’s “public use” clause and determine whether eminent domain powers could be used by a local government under the justification of economic development and in a scenario where the property in question would be transferred to
another private owner, not held or used by a government entity. The Court’s decision in this case can be characterized as permissive, essentially letting states set their own standards for public use without further guidance or requirements, and the majority grounded its ruling in similar precedents from cases like Berman v. Parker (1954) and Hawaii Housing v. Midkiff (1984). The decision granted states the freedom to strengthen property owner rights, weaken them, or maintain the status quo, yet for some reason, the decision was met with widespread public disapproval. A Saint Index poll from 2005, for example, revealed that 81% of national respondents (79% of Democrats surveyed; 85% of Republicans surveyed) disapproved of the decision; a Knowledge Networks poll found that a similar level of 83% of national respondents (81% of Democrats surveyed; 86% of Republicans surveyed) still disapproved of the decision in 2009 (Somin 2015, 139).

Widespread public disagreement with the Supreme Court is itself unusual, as research indicates that the Court’s rulings rarely differ significantly from the overall public mood (Marshall 1989; Mishler and Sheehan 1996); as the “weakest” branch, the Court must often rely public and legislative support to help implement its decisions and, accordingly, tries to avoid making unpopular decisions. When people do disagree with the Court, it is commonly expected to be on issues that are inherently polarizing and controversial, rather than something like eminent domain that is often low-salience. Because the Court’s ruling in Kelo deflects the real decision-making back to state legislatures, the public opposition following the Kelo case does not reflect frustration with the substantive effects of the decision, as would normally be expected. Opposition to Brown v. Board of Education (1954), for example, was often characterized as resistance to actual school integration policies that were required by the decision, although the view
of an inappropriately activist Court was sometimes a secondary critique. Instead, in Kelo, the discourse surrounding the case focused on perceived, hypothetical consequences that it could have, if states sought to abuse eminent domain authority because of the latitude granted by the Court.

This opposition to Kelo based on its perceived, worst-case effects was aided by the way the issue became framed as a matter of property rights rather than local government economic or land-use regulation. By not exploring the technical and procedural requirements that would constitute a public use or fair takings in its ruling, the Court enabled the discourse surrounding the case to remain in the abstract, focusing on the concept of property rights at its most basic level. The issue at hand in Kelo was presented as a fundamental civil liberties matter regarding the right to own private property, reverting back toward a more conservative Enlightenment and early American conceptualization of property rights that minimized the role of appropriate government regulation rather than the expanded local government police powers that developed by the early twentieth century to ensure public health, safety, and environmental conservation.

When the Court failed to protect this right of private property ownership in Kelo, it also failed to live up to the public’s expectations that the Court would defend individual liberties against state infringement. While Kelo may be an unusual case in some regards, the reframing of a more technical issue as a civil liberties issue can be seen in other policy areas, such as abortion. Instead of discourse that primarily focuses on medical safety or access to services (the latter of which, arguably, could be a civil liberties issue in its own right), the Court presented abortion as protected under a constitutional right to
individual privacy. Presenting a case as a civil rights or liberties issue can make it easier for members of the public to form an opinion on a decision where the policy in question is actually more complex and may be difficult to understand.

In addition to the public opposition, the legislative response to the Kelo decision has been widely described as unique due to its swiftness and scope; the 45 states that enacted restrictions on eminent domain use did so within two years of the decision, and the U.S. House passed the Private Property Rights Protection Act (PPRPA) in 2005 by a vote of 376-38. The Kelo responses provide an opportunity to explore how legislators at both the federal and state level responded to the same judicial stimulus and explore how different institutional considerations or constituent influences may affect policy outcomes at the two levels.

The relationship between the Supreme Court and Congress is sometimes explored in political science, since Congress’ constitutional role in judicial appointments and administration and the longstanding expectation that the Court may exercise the power of judicial review over congressional acts set up a natural relationship between the two branches. The Kelo case addressed a city-level policy, not any federal statute, so it is somewhat surprising that the House did, and continues to, respond to the Kelo case by proposing, and sometimes passing, a response measure in the form of the Private Property Rights Protection Act (PPRPA). The bill regularly includes symbolic language, but also substantive provisions, namely, prohibiting federal funding to states or localities that engage in economic development takings similar to the ones that occurred in Kelo. Although the substantive component of this bill may be difficult to enforce, if it ever is enacted, it is interesting that the House continues to include it, rather than simply express
its dissatisfaction with the Court or the Kelo decision through a resolution, which could be done instead as an expression of position-taking. Because Kelo addressed state and local policies, Congress’ response likely reflects institutional disagreement with the Court, rather than concerns that the Court is misinterpreting congressional policies or thwarting congressional objectives or statutory impact.

Since much of the Supreme Court’s modern docket addresses the constitutionality of state and local laws, the Kelo policy response provides an opportunity to explore the possibility that a Supreme Court decision can act as a catalyst to generate state policy change. This dynamic can be easier to observe when the Court declares a state act unconstitutional and other states must adjust their laws to be in compliance; it is more difficult to observe in the case of a permissive ruling as with Kelo where states may not feel compelled to take quick action following a decision. Permissive (Glick 1994) or state-empowering (Sharp and Haider-Markel 2008) rulings may provide guidelines for states to follow or specify a few restrictions, but generally afford state policymakers a high degree of latitude. If state policy change occurs several years after a Court ruling, it is less clear that the state’s decision can be linked to the Court’s decision; with Kelo, there can be reasonable certainty that the Court’s ruling led to these changes, since work typically began on state policy responses during the first legislative session following the decision. Abortion, right-to-die, and death penalty policies have been studied as permissive rulings that led to state policy changes, but these can be viewed as polarizing social policy areas; eminent domain, instead, presents a policy area that is thought of as more regulatory and economic, which can provide insights about why states respond to the Court on issues that are less well explained by ideological predispositions.
The first chapter of this project provides a broad-based discussion on the historical, political, and legal context in which the Kelo v. New London case occurred. The Framers of the U.S. Constitution valued private property rights, and, for many early settlers in the United States, it was easier to own land in the United States than it was in the nations from which they came. The protections for private property under the Fifth Amendment, however, do not guarantee an absolute freedom from government intervention, but instead set out the criteria that the government must follow if it wishes to take someone’s property. The due process clause, which was at issue in Kelo, states that any private property taken must be for a public use, and the just compensation clause ensures that the government provides payment to the property owner in exchange for the property. Other interpretations of the Fifth Amendment, coupled with fact that in early American history, takings and land use regulations were not often used, have provided the basis for property owners to expect fairly high degrees of autonomy and view this as an essential American value.

During the twentieth century, a variety of federal, state, and local government initiatives led to an increased role for government in land use regulation, and by the last decades of the century, some constituent groups became concerned that private property rights were being infringed upon. In the early 1900s, city governments inevitably began to expand their view of appropriate police powers to include policies like zoning regulations that were necessary to ensure the health and safety of the large number of residents in a relatively small geographic area. Federal funding initiatives by the mid-twentieth century, like urban renewal programs, encouraged additional involvement in land use by state and local actors, and additional federal regulations in the 1960s and
1970s added additional restraints on the ability of property owners to use their land without restriction. Generally, the right of the government to engage in these sorts of actions would be upheld in judicial challenges before the U.S. Supreme Court.

Following the growth of government involvement in land-related regulation, private property rights protection became an important issue for some conservatives and libertarians in the 1970s. Among these individuals, there was a sense that government had become too involved in a number of policy areas, particularly through large social policy initiatives like the New Deal and Great Society. At issue, fundamentally, were differing constitutional interpretations about what the appropriate role for government involvement was. Conservative property rights proponents, therefore, largely assumed a legal strategy to enact change, building up legal scholarship and support institutions like public interest law firms to help litigate for their objectives. Property rights advocates adopted a long-term strategy, and, in some ways, the Kelo case can be viewed as a culmination their efforts, following years of building up case law, legal arguments, and supporters to help further their aims.

The next chapter provides an examination of how and why Kelo v. New London arrived before the U.S. Supreme Court. The ruling in the Kelo case may have served as the catalyst for legislative responses from state governments and from the U.S. Congress, but in many ways, the Court upheld and reiterated longstanding legal precedent regarding public use and eminent domain. How the Court arrived at its decision in Kelo, therefore, may be less interesting than other questions related to the judicial politics involved in the case. For example, why would strategic property rights advocates choose to represent the plaintiffs in Kelo in its appeals up to the Supreme Court? Were there indications that the
Court might decide in their favor or that the case, regardless of its outcome, could be instrumental in achieving property rights protections? The background of the Kelo case itself reveals a number of factors that would have made it an appealing case to litigate. The exercise of eminent domain in question was for an additional business and residential area in support of a corporate facility that would relocate to New London; the additional development was not a requirement from the corporation and would not provide the same degree of economic growth for the city as the corporate site itself. In addition to the affected property owners, other residents were skeptical about the efficacy and legitimacy of New London’s redevelopment initiatives, following a number of unfulfilled promises by area officials in the preceding decades. Although property rights activists may have viewed the ruling in Kelo as a setback, the resulting public opposition and legislative backlash to the Kelo decision indicate that the case may still have been instrumental for property rights proponents, as it elevated the salience of their cause and initiated a number of policy changes in the legislative arena.

Case facts alone, however, do not necessitate an audience before the Supreme Court. Another important question to consider is why four or more Justices on the Court decided Kelo was a case worth hearing. If the Justices expected an outcome consistent with existing precedent, or if they expected widespread and active opposition to the decision, they could have chosen instead to keep Kelo off their docket. An analysis of the broader judicial environment provides insights about why the Court chose to grant certiorari to Kelo v. New London and why the litigants thought the case was worth pursuing to this level. Activism from public interest law firms on behalf of property rights had affected the judicial landscape in a number of ways by 2004, when the petition
to hear Kelo arrived at the Court. The Rehnquist Court, compared to previous Court eras, had received a relatively high number of appeals regarding takings and had heard a comparatively high number of takings cases. Many of these cases were litigated by property rights organizations, and they were also actively engaging the Court with amicus briefs. In the lower federal and state supreme courts, property rights advocates began winning some legal victories, which created a degree of conflicting precedent among these courts and with the Supreme Court’s interpretation of public use.

The final two chapters provide analyses of the unusual response by federal and state legislators to the Kelo decision. First, the response by Congress is addressed, focusing on the passage of the Private Property Rights Protection Act (PPRPA) of 2005 by the U.S. House of Representatives by a vote of 376-38 less than six months after the Kelo decision. PPRPA is an atypical piece of legislation because it directly referred to the Supreme Court’s decision in Kelo v. New London; expressed the sense of Congress that all private property owners’ rights were at risk following the decision; and provided limitations on the use of federal funds for any project involving eminent domain for economic development if the property seized would be conveyed to another private owner. The substantive attempt to limit the effects of the decision, overt reference to the case, and bipartisan support make PPRPA different than other examples of congressional responses to the Supreme Court, as discussed in literature on Court-curbing and other inter-branch conflicts between Congress and the Court.

An examination of the congressional opposition to Kelo, as measured by votes for PPRPA, cosponsorship of PPRPA, and floor comments expressing disagreement with the decision, reveals that substantive House member opposition to the Kelo decision is better
explained by party identification and ideology. Although House members expressed concerns about the possible impact of the decision on their districts, they also expressed their desire to take a stand against the Supreme Court or their view that the decision in Kelo was incorrectly decided. Republican House members and those who were more ideologically conservative than the Supreme Court were more likely to vote for PPRPA and show their support as cosponsors of the bill. Comments in opposition to Kelo were more evenly distributed among Republicans and Democrats, but Democrats perhaps displayed a greater degree of institutional deference to the Court when asked to take a stronger oppositional stance as a legislative cosponsor.

The level of state policy responses following Kelo was also unusual, with almost every state passing eminent domain reforms within two years of the decision. The decision in Kelo, importantly, can be characterized as a permissive ruling, largely deferring to state and local legislators to determine what public use means rather than declaring a policy unconstitutional or setting clear criteria for legislators to follow. States had the option to act, or not, under the ruling, which makes it surprising that so many of them passed legislation to limit the effects of the Kelo decision. The Supreme Court is not often considered as an agent of policy change and diffusion among state governments, though this appears to have occurred after Kelo. The timing of these state policies, coupled with the fact that some state laws also included language that directly referred to the Supreme Court and its ruling, suggest that the decision directly led to these responses.

Whereas the state policies passed following Kelo each represent attempts to limit eminent domain abuse, there is a high degree of variation in the quality, strength, or presumed efficacy of these reforms. Given the high degree of public opposition to the
case, legislators likely felt pressure to act, but what differentiates position-taking responses from substantive attempts to protect private property rights? At the state-level, a more conservative citizenry and greater Republican strength in the legislature are associated with more substantive property rights protections. States home to actively engaged interest groups, who were mobilized in opposition to the Kelo case prior to the decision, were also more likely to pass substantive property rights protections. This suggests that although there was greater public awareness regarding eminent domain after the decision, policymakers may have recognized much of this as fleeting, whereas the presence of these interest groups indicates a degree of sustained issue attention, or a degree of involvement in state policymaking, that led to substantive enacted policies. The threat of eminent domain, as discussed by many members of Congress, may also have played a role in substantive state reforms, as areas that had experienced a high degree of population growth in the decade prior to Kelo also enacted stronger eminent domain restrictions.

The Kelo v. New London case and subsequent legislative policy responses provide an opportunity to explore understudied dynamics in contemporary American politics, including opposition to the Court by legislative actors, which presents challenges to the concept of judicial legitimacy. Because many Court decisions affect state and local policies, it is particularly important to continue to explore how these actors perceive and respond to the Court, even if there is no constitutionally prescribed relationship between these institutions.

The Kelo case also highlights the significant role that issue framing can play in shaping the judicial environment, bringing a case before the Supreme Court, and
generating public attention and support on a typically low-salience policy matter. Strategic actors, including a number of public interest law firms, successfully framed the case in a way that had broad appeal, using the language of individual rights and civil liberties. This widespread support for the property rights cause enabled the legislative progress in the House and across state legislatures following Kelo that may not have otherwise been possible. Conservatives and Republicans may have remained the strongest eminent domain reform advocates when it was time to support actual legislative measures, but the widespread public attention helped place economic development takings on the issue agenda that it otherwise would not have been.

Instead of adopting the perspective that the Kelo case was primarily a civil liberties issues, the majority of the Court focused on legal precedent and the practical challenge of mandating a nationwide standard for a local government tool that was used in many diverse contexts. This proved to be a mistake, and illustrates that when a case is presented as a rights issue, involving a right that a large majority of the nation believes it is entitled to, the modern Supreme Court is expected to act. While the Supreme Court had logical and legally sound reasons to refer decision-making back to the states in Kelo, this deflection may have contributed significantly to the backlash. After decades of expanding its role as the final arbiter on civil rights and civil liberties issues, the Court was expected to take a stronger stand. In this void, state and federal legislators felt pressure to act and responded accordingly.
Chapter 2: The Historical, Legal, and Political Context for Kelo

Introduction

The Kelo decision brought a heightened level of public attention to the issues of public use and eminent domain, as well as state and local government processes for economic development. When people learned about the case and its implications, many disagreed with the Court’s decision and grew concerned about a slippery slope of the government’s takings power being used for increasingly questionable standards of public use. Over the course of the twentieth century, the Supreme Court had significantly expanded its conceptualization of public use, and state and local governments had become increasingly involved in land planning and initiatives to spur economic growth. The standards applied by the Court in Kelo, however, in which a locality could define public use more broadly than utilities or government-utilized properties, had been in place decades prior, following the 1954 decision of Berman v. Parker. Relatively widespread local government exercises of eminent domain for economic revitalization date back to the same era under urban renewal initiatives and were not without their own contemporary critics.

If takings for economic development had been a longstanding tool of state and local governments, and U.S. Supreme Court precedents had supported these exercises for decades, something else must have changed about the political context to lead to the Kelo v. New London case itself, as well as the widespread awareness of it and concern about its implications. Notably, in the 1970s, a conservative legal movement developed and began concerted advocacy efforts in support of private property rights. Although takings practice and legal standards had not substantially changed since the mid-twentieth
century, these groups had developed compelling legal arguments and successful strategies for influence in the decades immediately preceding the Kelo case. As the response to the Kelo decision indicates, their concerns about abuses of eminent domain resonated with lawmakers and citizens, both conservative and liberal.

This section provides the broader historical, political, and legal context leading up to the Kelo v. New London case. It begins with a discussion of the constitutional foundations of property rights and how the role of eminent domain and police powers as policy tools changed over time, through judicial interpretations and initiatives undertaken by other federal, state, and local government actors. As the definition of public use expanded, government actors increasingly used regulations or takings as methods for achieving different objectives; in several high-profile examples, it seemed apparent that the constitutionally required public use was merely a byproduct of more deliberate plans to promote the interests of local business and government officials. Federal funding in the latter-half of the twentieth century further incentivized local leaders to undertake these types of projects. As state and local government initiatives pushed the boundaries of constitutional property provisions, judicial actors affirmed many of these actions by issuing decisions that often sided with state or local government determinations of public use. When the U.S. Supreme Court was involved, it generally found that legislative representations of the public’s will are the best way to determine what public use is in a given scenario.

The widespread legislative response by state legislatures seeking to limit or curb eminent domain use for economic development marks a reversal from the trajectory many legislatures had been on in the decades preceding Kelo. Similarly, the degree of
widespread public opposition was unusual, given that similar exercises of eminent domain had occurred across the country for many years before New London attempted its redevelopment of the Fort Trumbull neighborhood. The second part of this section addresses what had changed about the political environment prior by the early 2000s that helps explain this level of public awareness and opposition: namely, the conservative and libertarian legal activists that emerged in the 1970s and 1980s to establish institutions and strategies to change the status quo in support of greater property rights protections.

The increasing scope of the federal government throughout the second half of the twentieth century contributed to a higher level of public opposition to regulation, and the status of the law regarding property rights regulations made it a particularly attractive issue area for conservative activists to address through the courts. This legal approach to policy change required a long-term commitment, which was aided by other conservative political activists who created a support structure of research institutes, financiers, and political networks. The response to the Kelo case, in part, may be explained as the culmination of a thirty-year conservative activism movement that, over time, developed effective strategies to affect policy change and garner public attention.

Property Protections Due to Limited Government, 1786-1900

The concept of private property, and its presumed protection from government interference, is deeply embedded in American political thought, adopted from Enlightenment thinkers like John Locke in his Second Treatise of Government (1689). The Virginia Constitution, for example, adopted in June 1776, states that all men “have certain inherent and natural rights…among which are the enjoyment of life and liberty, with the means of acquiring and possessing property.” Some Framers, like James
Madison, adopted an expansive definition of personal property, but even a narrow conceptualization of property includes protections for possession of one’s privately owned land.

In the United States Constitution, property rights are addressed at the end of the Fifth Amendment, following a variety of provisions addressing judicial procedure and protections for those who are accused of crimes.\(^1\) Instead of being expressly stated, the right to private property in the Constitution is implied and, importantly, limited. Under the due process clause of the Fifth Amendment, government may take property, as long as it is done through appropriate procedural means, including that the purpose of the takings must be for a public use, which is not further defined. The takings clause (or just compensation clause) also provides that if the government takes property, it must provide fair financial compensation to the property owner. As illustrated in Barron v. Baltimore (1833), the Fifth Amendment’s protections to property owners initially only applied against federal government actions, though the adoption of the Fourteenth Amendment in 1868 expanded these protections to include state and local government actions as well.\(^2\)

Case law related property rights can involve conflicts related to the due process clause, the just compensation clause, or the public use clause of the Fifth Amendment. The latter

\(^1\) The full text of the Fifth Amendment is as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

\(^2\) In 1897, the Supreme Court applied takings protections to local government actions in Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, ruling that Chicago, IL, must provide property owners with just compensation for appropriating their land. The case is widely cited as the first Supreme Court case to incorporate any Bill of Rights protections to citizens against state and local governments.
is most relevant for understanding the legal precedents and controversies leading up the Kelo case.

Throughout the early 1800s, a fairly literal standard of public use applied to a similarly narrow view of government takings: a taking occurred if government actors seized someone’s property, and this action was justifiable as long the property would be used as a public space, such as a road, bridge, governmental building, or park. By the end of the nineteenth century, however, more lax conceptualizations of public use and of takings actions would set the stage for increasing legal conflicts between property owners and government actors. The public use standard at the end of the 1800s included government-granted easements to privately-run railroad and utilities projects. Beginning in the 1870s, the Supreme Court also expanded its view of what constituted government takings to include inverse condemnations, or actions that severely damaged or substantially limited property owners’ use of their land. On one hand, the courts now protected an expanded view of property rights, including owners’ viable use of their land and not just possession of it: on the other hand, the courts expanded the acceptable range of takings to include projects where public use was less clear and land would ultimately be used by private corporations.

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4 Many of these cases involved government-created dams that flooded neighboring lands. To be considered a taking, the damage had to essentially destroy all value of the land. For examples of takings determined under this standard, see United States v. Cress (1917); United States v. Welch (1910); United States v. Lynah (1903); United States v. Great Falls Mfg. Co. (1884); Pumpelly v. Green Bay Co. (1871). For cases where the Court ruled the level of damage did not meet the standard for a taking, see Lewis Blue Point Oyster Cultivation Co. v. Briggs (1913); Manigault v. Springs (1905); Bedford v. United States (1904); Scranton v. Wheeler (1900); Gibson v. United States (1897).
Expanding Role for Local Government Regulation, 1900-1930

At the turn of the twentieth century, an expanded view of government police powers began to take hold as state and local government actors realized that an individual’s unrestrained ability to use land for any purpose could have detrimental effects on the community at large, particularly in more densely populated urban areas. In Mugler v. Kansas (1887), the U.S. Supreme Court showed support for this principle, noting that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community” (123 U.S. 665). Many piecemeal zoning and land use regulations were adopted across localities during the early twentieth century as an outgrowth of Progressive Movement campaigns for housing and sanitation improvements and urban beautification (Isenberg 2004, ch. 1). The first comprehensive set of zoning regulations was adopted by New York City in 1916 and many localities of varying sizes soon followed suit. In 1924, the U.S. Department of Commerce issued model legislation for states, the Standard State Zoning Enabling Act, based on many of the standards used by New York City.\(^5\) The Court upheld the constitutionality of zoning in 1926 with Village of Euclid, Ohio v. Ambler Realty Co., and by the 1930s, most states had adopted zoning plans that mirrored the Department of Commerce’s Standard State Zoning Enabling Act.

Federal Government Funding Enables Local Growth Coalitions, 1930-1960

Between the 1930s and 1950s, new federal government programs and funding streams enabled and encouraged local government actors to become more involved in

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\(^5\) One of the creators of the New York City zoning plan, Edward Bassett, served as head of the committee that wrote the Standard State Zoning Enabling Act on behalf of the U.S. Department of Commerce.
land use determinations and regulations. Federal funding did not come as a blank check, but most programs during this period were marked by a high degree of decentralized administration and local autonomy. Local government actors viewed federal funds as a necessary and desirable means to spur development, as the programs offered generous benefits while allowing them to retain overall control of the growth strategy and its beneficiaries (Fainstein et al. 1983, 248–250). By allowing a high degree of local autonomy and encouraging development activities, federal programs during this era enabled the creation of local growth coalitions, typically comprised of government officials and business leaders, and the development of local government institutions that helped to ensure the continuing preservation of their interests. In many localities, these early decisions, like the delegation of eminent domain powers to private or quasi-governmental agencies for redevelopment, involved the creation of procedures and institutions that would persist and continue to benefit the interests of their creators.

Although a variety of federal programs during the era apply to this discussion, the best example involves urban renewal programs. The same factors that led local governments to adopt simple zoning regulations, like public health and safety, encouraged the adoption of more ambitious slum clearance and affordable housing programs, managed by local public housing authorities throughout the 1930s and 1940s, aided by the establishment of the United States Housing Authority in 1937. The federal government’s involvement in this area increased significantly under the Housing Act of 1949, which provided federal funding to cities to purchase slums for redevelopment. Early proponents of these initiatives were generally social reformers, but their supporters came to include businessmen and real estate interests as the policy objectives expanded
from the simple provision of public housing to more ambitious programs of overall urban improvement and redevelopment. These new advocates saw urban renewal as an opportunity to revitalize downtown property values and central business districts in the wake of growing suburban development (Gotham 2000, 269; Hunt 2005). The Housing Act of 1954 offered Federal Housing Administration (FHA) mortgages to developers involved in slum redevelopment projects, clearly illustrating how these policies could serve as financial incentives.

Much has been written on how these federal subsidies mobilized local business leaders and led them to work closely with local government officials to ensure that they would benefit from the new redevelopment plans (Kleniewski 1984; Mollenkopf 1976, 1983; Squires 1989; Weiss 1980). This is known as the growth machine approach to urban politics, wherein the push for development creates a long-term, symbiotic relationship between city officials and local business leaders (Calavita 1992; Horan 1991; Logan and Molotch 1987; Molotch 1976). The specific composition of a growth machine or growth coalition and its strength varies depending on local power dynamics, but the general relationship pattern is evident across many different cities and typically involve leaders from the real estate and banking sectors (Bennett et al. 1988; Calavita 1992; DeLeon 1992; Elkins 1995; Fleishmann and Feagin 1988; Gotham 2000, 275; Logan, Whaley, and Crowder 1997, 610). Growth machine success may also vary due to an area’s planning process and related procedures adopted by the local government. Although some cities hired visionary architects to orchestrate carefully-designed city plans, many localities simply established planning commissions and/or redevelopment agencies in the 1940s and 1950s to design and implement their urban renewal programs.
Business leaders were frequently influential decision-makers in these organizations, and many localities delegated legal powers of condemnation and eminent domain to these groups, even if they operated as private organizations.

Unsurprisingly, allegations and documented incidents of corruption surrounded many urban renewal projects. In many situations, redevelopment agencies were accused of favoritism, granting generous contracts to friends who were ill-suited for their roles as contractors or real estate developers. Other examples involved dubious definitions of slums that seemed to target less affluent, but fairly well-maintained, neighborhoods where residents were primarily African-Americans or other racial or ethnic minorities. In some projects, much of the razed low-income housing was replaced by more upscale housing that former residents could not afford. The scandal surrounding the Manhattantown project in New York City publicly highlighted all of these concerns and ultimately resulted in an investigation by the U.S. Senate Banking and Currency Committee in 1954.

Despite the many issues related to fair implementation of urban renewal, the Supreme Court showed support for the underlying values of the program in the 1954 case Berman v. Parker by expanding the legal definition of public use under the Fifth Amendment to include a public purpose. In an 8-0 decision, the Court argued that if a government agency prepared a comprehensive redevelopment plan, designed to better the entire community by eliminating blight, improving substandard housing conditions, or serving some other public purpose, the government was within its rights to use the power of eminent domain to carry out the plan. The exact definition of public purpose was not to be judicially determined, as the Court claimed, “the legislature, not the judiciary, is the
main guardian of the public needs to be served by social legislation enacted in the exercise of the police power” (348 U.S. 32). The Court did imply, however, that public purpose could be very broadly defined, noting that if a legislature decides an area “shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way” (348 U.S. 33).

Increased Federal Oversight and Government Regulations, 1960-1980

In the 1960s and 1970s, the influence of existing urban growth coalitions somewhat faltered. As wealthier residents continued to move out of downtown areas, the suburbs became where most business owners and real estate developers saw potential for growth. Instead of strictly looking within traditional city boundaries, suburbanization required planners to consider a broader metropolitan area, with an expanded geographic terrain and population base. After the tribulations of the initial urban renewal programs, these later growth and redevelopment plans faced increased scrutiny and became more complex under new federal guidelines. Various constituent groups sought and secured federal protections for their interests, further expanding the range of actors who needed to be involved with planning processes. Instead of giving state and local actors loose rein, federal funds increasingly came with more restrictions on use and were accompanied by more centralized oversight through new federal agencies. Despite falling out of favor somewhat, growth coalitions persisted, as the desire for growth can unite a diverse array of local actors and members of the public. Ultimately, growth coalitions transformed during this time to incorporate participation from more actors, yet the interests of local political elites and business leaders would continue to dominate in many localities, as
they had become entrenched and their interests institutionalized through the decision-making structure of the planning commissions and redevelopment agencies.

Civil rights groups, like the National Association for the Advancement of Colored People (NAACP), represented an important new set of constituents involved in the planning process. Recognizing a variety of racially discriminatory practices, new federal policies, like the Fair Housing Act (1968) and the Housing and Community Development Act (1974), were designed to fix problems with existing policy commitments to public housing. New policy commitments also brought in new constituent groups. Neighborhood leaders and others became concerned that new development destroyed community character and culturally significant sites, and their interests were reflected in the National Historic Preservation Act (NHPA) of 1966, which established the process for federal landmark status and grants for preserving identified sites (Listokin, Listokin, & Lahr, 1998). Environmental activists grew increasingly concerned with ecological damage from manmade construction, as reflected in the adoption National Environmental Policy Act (NEPA) of 1969, which required environmental impact assessments for any construction project involving federal funding. Many states adopted their own bills addressing historic preservation and environmental protection, further requiring local planners to incorporate these considerations into development decisions.

At the same time, citizens in rural western states grew concerned with individual property rights, though in a different context. The federal government owns large amounts of land throughout the western United States, and, after generations of lesser involvement, these lands were subject to a number of new federal regulations in the 1960s and 1970s. What became known as the Sagebrush Rebellion was a movement
started in opposition to the Federal Land Policy and Management Act (FLPMA) of 1976. Prior to FLPMA, homesteading allowed individuals to live on public land and apply for eventual ownership after meeting certain criteria. The end of homesteading meant that all remaining public land would be permanently owned by the federal government. Individuals using public lands for ranching, mining, or other purposes were now subject to land use regulations issued by the Bureau of Land Management (BLM), which, to protect the environment, often limited what individuals could do. The Sagebrush Rebels thus included individuals whose livelihoods were affected by the new rules, but also state leaders who resented the federal intrusion and wanted states to control the land within their borders (Babbitt 1982; Cawley 1993).

Development of the Property Rights Movement

The organized property rights movement that would begin to emerge during the late 1970s and 1980s was mainly led by conservative and libertarian intellectuals who thought that the growing regulatory state was doing more harm than good to American society (Eagle 2002; Oswald 2000). Although the constituent groups discussed above were sometimes allied with property rights activists, the movement, by and large, was not a grassroots effort led by frustrated citizens and property owners. However, at a micro-level, it was increasingly difficult for local government officials to please every group of constituents with new development plans, so property rights advocates could usually find case-specific allies from different citizen groups whose interests were not adequately represented.

Although their early attempts to build advocacy organizations and institutions would not be very successful, a core group of property rights activists persisted within
and alongside the broader conservative movement. Republican Party control of the White House throughout the 1980s provided the movement’s activists with important political supporters and opportunities for influence. The issue networks these activists formed and the political strategies they ultimately developed would prove fruitful later, in the 1990s and 2000s, even though they remained relatively small in number.

Fundamentally, the property rights movement was a reaction to the growing web of government regulations that conservative and libertarian activists viewed as too far-reaching and constitutionally dubious. Environmental regulations, in particular, were the subject of many attacks and legal challenges (Wenner 1983). In its early stages, the movement failed to garner much public support and was perceived as an attempt by business leaders to use their political clout to subvert regulations that would hurt their profits. By the late 1980s, however, the ideology of property rights was presented in a way that framed it as an individual civil liberties issue, which helped it resonate with a broader audience outside of the conservative intellectual community.

The property rights movement is frequently treated as a part of modern American conservative movement. Generally, historians, sociologists, and political scientists agree that the conservative movement began to advance after World War II, though it may be more accurate to place its origins earlier in the twentieth century (Critchlow & MacLean 2009; Nash, 2006). Instead of being considered a coherent, ideologically-consistent movement, American conservatism is better understood as a series of smaller movements, with different ideas, values, leaders, and constituencies. To gain political success, however, different groups within conservative movements have frequently allied
together and with the Republican Party, yet there are often conflicts between principles and priorities of different sub-groups.⁶

Many distinctions can be made among conservatives, but one standard generalization is to distinguish social conservatives from economic conservatives (Hart 2005). The property rights movement that developed in the 1970s and early 1980s is best understood as part of the latter group, with its core supporters coming from libertarian and conservative intellectuals in the burgeoning law and economics field who believed that the American regulatory state had grown too large. Those who would eventually become the leaders of the property rights movement legitimated themselves early in their careers by working within established Republican institutions and in the federal government under the Reagan administration. At the same time, they also worked to build their own set of networks and organizations, which operate largely independent of the Republican Party. Key among these organizations are the public interest law firms and the related groups of academic institutions, think tanks, and charitable foundations that helped make their work possible.

Throughout the history of the property rights movement, conservative and libertarian “non-traditional” public interest law firms have been the main advocacy groups consistently working toward policy change. The Institute for Justice (IJ), for example, represented the plaintiffs in Kelo v. New London and is viewed as one of the leading activist groups in the property rights movement today. These groups adopted strategies that liberal public interest law firms had already employed successfully, such as

seeking out ideal litigation opportunities and using these cases to try to change the law. Perhaps more importantly for non-salient issues like property rights, public interest law firms launched public relations campaigns to generate awareness about their cases and about the current state of the law. Just as their liberal predecessors found allies within the Carter administration, conservative public interest law firms benefited from the changing political climate of the Reagan administration. The following discussion of the broader conservative intellectual and political movement helps illustrate the development of these firms, their adoption of property rights as an issue priority and the external support that helped these groups succeed.

Intellectual Entrepreneurs and Conservative Activism, 1970s-1980s

By the 1970s, many conservatives felt disenfranchised from positions of societal and political influence. Although Republicans enjoyed some electoral successes, liberal and progressive values had mostly dominated national policymaking since the 1930s, beginning with the New Deal and continuing on with the Great Society. In the process of enacting new policies to reflect their goals, liberals had fundamentally transformed the political system and policymaking process into a new “regime” in which the overall structure of the state put conservatives at a disadvantage, even when Republicans controlled the White House (Skowronek 2008).

In large part, the sense of a liberal regime resulted from the complexity of new federal policy commitments: to implement, these policies required an increased role for regulatory agencies, policymaking professionals, and greater cooperation between the federal government, state and local governments, and nongovernmental organizations (Crenson and Ginsberg 2002; Derthick 1970, 1979; Landy and Levin 1995; Skocpol
Policymaking became an insiders’ game involving incremental changes made by congressional committees, bureaucrats, and the courts, where mass mobilization and electoral victories alone could no longer produce significant reversals of existing policy commitments (Melnick 1983, 1984). Individuals who were in influential positions during the 1970s often came from the cadre of liberal activists involved the social movements that led to these policy changes.

Conservatives perceived themselves outsiders to the existing system, and in the 1970s, began to sow the seeds for an “alternative governing coalition” that could effectively counter the liberal political order (Skowronek 1982). Recognizing that liberal values were deeply entrenched in American society, conservatives realized that simple electoral victories would not change their status, and in addition to developing networks of political activists and patrons, they viewed intellectual entrepreneurs as an essential component of their coalition. By reintroducing conservative thought into academia, and into legal scholarship in particular, intellectual entrepreneurs began to “denaturalize” the liberal regime “by exposing the hidden normative assumptions embedded in seemingly neutral professional, scientific, or procedural standards and practices, forcing those assumptions to be justified and alternatives to them entertained” (Teles 2008, 17). As they made some inroads within established university programs (Gottfried and Fleming 1988, chap. 3–4), conservative legal thinkers also seized opportunities to create their own law programs, which would become increasingly prominent by the 1990s.

The 1970s and early 1980s represented a formative period for the conservative movement. Though conservatives were successfully developing law programs and establishing academic credibility, they still needed to develop the activist groups,
networks, and institutions outside of academia that would be required to translate their legal principles into real policy change. As a natural outgrowth of the academic movement, a number of think tanks emerged to develop policies that incorporated conservative and libertarian values and conservative public interest law firms also began to emerge. Overall, this time period is noteworthy for building the linkage organizations that would help connect the growing network of conservative government leaders, financial patrons, activists, and academics (Southworth 2008, ch. 2). These linkage institutions include a number of charitable foundations established by financial patrons to fund these think tanks and other organizations. Another noteworthy example of a linkage institution is the Federalist Society, which largely operated as a networking group that connected conservative academics and legalists and provided a forum for intellectual debate (Southworth 2008, ch. 6). Although most of the think tanks and foundations established during this time could be labeled successes, many of the public interest law firms faced a number of organizational challenges that thwarted their efforts.

During the 1970s, a number of think tanks emerged that would help provide some of the research and advocacy work to bolster the property rights movement (Ricci 1993; Edwards 1997). These groups utilize in-house and visiting scholars to conduct policy research, host seminars and conferences to share ideas, and promote political advocacy. Many adopted goals and values that were similar to those of the long-standing American Enterprise Institute (AEI), established in 1938. Like many think tanks, AEI operates under the U.S. Tax Code as a 501(c)(3) organization, which prohibits it from formally associating with any political party, but AEI is commonly associated with neoconservative values. AEI’s core commitments remain “expanding liberty, increasing
individual opportunity, and strengthening free enterprise,” and similar tenets are found in the mission statements and values of the newer conservative and libertarian think tanks (American Enterprise Institute 2014, 2).

One prominent think tank established during this time was the Heritage Foundation, which is generally considered the first conservative think tank in this movement. The Heritage Foundation began in 1973, and its mission statement notes that it strives to “formulate and promote conservative public policies” that represent, among other principles, “free enterprise, limited government, [and] individual freedom” (The Heritage Foundation 2015). The libertarian Cato Institute is another influential organization, created in its present form in 1977 “to originate, disseminate, and increase understanding of public policies based on the principles of individual liberty, limited government, free markets, and peace” (The Cato Institute 2015).

Many charitable foundations were also created during this time by wealthy individuals to fund conservative organizations. These foundations emulated the Ford Foundation, begun in 1936 and known for funding more liberal causes (Rabin 1976, 210-219). Each foundation often contributes to multiple groups and causes, thus sometimes serving as a linkage organization. One prominent early example was the John M. Olin Foundation, established in 1953 and existing until 2005 (Aron 1898, 77). The Olin Foundation sponsored law centers at elite universities like Yale, Harvard, and the University of Virginia that promoted the conservative field of law and economics scholarship, and it also created endowed professorships at these and other institutions. Additionally, the Olin Foundation was a strong initial supporter of the Federalist Society, in addition to funding think tanks like AEI, and public interest law firms like the Center
for Individual Rights (CIR) (Miller 2005; Cady 2015). In 1974, the first Charles Koch Foundation was created as a think tank, and a few years later was renamed the Cato Institute. The present Charles Koch Foundation was established in 1980 and sponsors the Mercatus Center at George Mason University; donates large amounts of money to a variety of universities, including Florida State University and Clemson University; and provides funds to public interest law firms, like the Institute for Justice (IJ) and the Pacific Legal Foundation (PLF) (Skocpol & Hertel-Fernandez, 2016).

Early Conservative Public Interest Law Firms

A number of conservative public interest law firms began in the late 1970s and early 1980s to counter the perceived liberal successes in the judicial system (R. Epstein 1985, 656). In general, these early conservative firms faced organizational challenges related to establishing clear and tangible goals, developing effective legal strategies, and securing financial support from the right sources. At a regional level, some of these groups were fairly successful and many of them persist today, but the attempts to create national groups modeled after these smaller-scale organizations ran into significant obstacles. By correcting the mistakes made by earlier organizations, a second wave of national conservative public interest firms in the late 1980s and early 1990s became much more influential.

The Pacific Legal Foundation (PLF) was established in 1973 and is considered the first conservative public interest law firm (Pacific Legal Foundation 2018). Within its first few years, PLF was able to fundraise very successfully, expand its operations, and litigate several high-profile cases (Teles 2008, 62). PLF became a template for other organizations that would follow in other regions throughout the country, though many of
its successors would not be as successful. PLF was created in response to a particular judicial setback, giving the group a clearer policy focus on property rights in the context of environmental regulations than some other conservative firms that adopted more generalized conservative legal advocacy.

PLF was created following a legal challenge to the construction of the Trans-Alaska Pipeline (Singer 1979, 2055). Environmental activist groups, represented by liberal public interest lawyers, used the recently enacted NEPA (1969) as grounds to file an injunction against pipeline construction. The California Chamber of Commerce and other business leaders recognized that similar opposition by environmental groups could thwart other economic development projects, and the business community became mobilized to act. As Richard Epstein notes, conservatives may have had powerful allies, like California Governor Ronald Reagan, but they were fundamentally “disadvantaged in the courts, where they believed that liberal firms had a ‘moral monopoly’ on the public interest” (1985, 133). While an injunction against the pipeline was initially granted in Wilderness Society v. Hickel (1970), the pipeline was ultimately constructed.

Later Successes of Public Interest Firms

A large part of PLF’s success stemmed from the fact that it was able to articulate a clearer vision for its organization than some of its immediate successor groups. From the outset, PLF positioned itself in defense of property rights, recognizing the potential threat posed to businesses and on individual property owners from growing

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7 J. Simon Fluor, a California businessman involved in the oil industry, reportedly met with William French Smith, a Los Angeles lawyer who would later become U.S. Attorney General under the Reagan administration, to discuss the legal disadvantage business interests felt at the time. Smith connected Fluor with Ronald Zumbrun, a former advisor to Reagan, who would become the leader of PLF. The founding group of members included other Reagan aides, and their mission was supported by members of the Chamber of Commerce and high-level state officials like California Attorney General Edwin Meese (Tushnet 2007).
environmental regulations (Edwards 2004). The more successful conservative public interest law firms that formed in the late 1980s and 1990s recognized the organizational value of strong ideological commitments and used these to guide their fundraising and activism efforts. Examples of these new firms include the Center for Individual Rights (CIR), founded in 1989, and the Institute for Justice (IJ), founded in 1991. Property rights became a particularly attractive issue to address, though these firms worked in other legal areas as well. Conservative legal activists realized that the state of the law regarding property rights created a number of opportunities for litigation, as many precedents were ambiguous and lacked a clear constitutional grounding. Once they became aware of the current state of the law, members of the public outside of the conservative movement sometimes supported stronger protections for property rights, viewing it as a fundamental individual right. By positioning themselves as defenders of civil liberties, conservative firms were better able to convince others that they were true public interest firms and distanced themselves from critics who accused them of promoting conservative business interests.

Early conservative public interest firms experienced frequent tension between business interests, which their corporate patrons often expected them to protect, and the ideologically-driven activists who operated the organizations. When these activists left to start new firms, they sought to avoid these types of patron entanglements that they felt compromised the mission and work of their law firms. One notable example of these conflicts of interest involved Mountain States Legal Foundation (MSLF) in 1982. MSLF’s board of directors included the president of its parent organization, the National Legal Center for the Public Interest (NLCPI), along with three CEOs or high-level
executives representing each of its member states. It received much of its initial startup capital in 1976-1977 from Joseph Coors, of the Coors Brewing Company, who remained an active patron and member of the board of directors during the early 1980s (Decker 2016). In 1982, Denver, Colorado, granted Mile Hi Cablevision an exclusive cable television franchise agreement. William H. “Chip” Mellor and the other attorneys steering MSLF’s legal activism wanted filed a lawsuit challenging the cable monopoly as a violation of the First Amendment, despite opposition from members of the board of directors (Brenner 1988; Schmidt 1982). On the day MLSF filed its lawsuit, Coors resigned from the board, and Mellor later acknowledge that the case “gored the wrong ox,” upsetting powerful local interests and the Republican Party (Teles 2008, 65).

Soon after Mellor left MLSF in 1983, he began brainstorming with fellow MLSF attorney Clint Bolick about creating their own law public interest firm, which would eventually emerge as the Institute for Justice. Planning documents from 1985 identify key issue areas where precedents set by conservative litigation could potentially make significant change, including property rights, civil rights, education, and free enterprise. Mellor and Bolick planned to introduce litigation in different areas of the country, hoping to “increase the likelihood that favorable fact-situations and forums can be found, and that a conflict may emerge among the circuit courts leading to possible resolution by the Supreme Court.” These planning documents also note the need for close partnerships between the law firm’s attorneys, think tank researchers, and conservative academics as a way to further legitimize their campaigns and constitutional arguments, noting that “in some mission areas, it will be necessary to lay extensive scholarly groundwork before litigation is commenced” (Teles 2008, 81). By assuming this long-term approach and
seeking out strategic opportunities for litigation, Mellor and Bolick adopted strategies very similar to those that liberal public interest firms, like the NAACP, had successfully used.

The later conservative public interest firms and their intellectual allies began to reframe liberal causes and policies in a way that made them less sympathetic to the public, and this approach gained traction, giving conservatives an equal counterclaim as representatives of the true public interest. Liberals, for example, often won moral ground as being the defenders of the poor. Conservatives instead argued that the bureaucracy set up to implement liberals’ social programs did little to help the poor and, instead, promoted the middle-class interests of the new professionals who oversaw the regulatory machine. As an alternative to government involvement in welfare and housing programs, conservative thinkers often advocated for “empowerment,” arguing that government welfare programs and accompanying regulations actually kept people in a cycle of poverty and prevented them from economic advancement (Butler 1981; Butler and Kondratas 1987).

After committing firmly to their ideological principles and establishing areas of policy interest, the founders of CIR and IJ were able to find financial patrons who were similarly committed to their causes. Instead of a hodgepodge of corporate donors, these new firms turned increasingly to wealthy individual patrons from the technology and finance sectors, who were libertarian-leaning. Many of these individuals were not closely associated with the existing Republican establishment, but relished the opportunity to be involved with these new conservative and libertarian causes (Borsook 2000).
Why Focus on Property Rights

Property rights activism in particular was bolstered by a new and influential legal theory among conservatives and libertarians set forth by University of Chicago law professor Richard Epstein in his 1985 book, Takings: Private Property and Eminent Domain. In his writings, Epstein argued for a broad interpretation of the definition of property and of the takings clause. Property ownership, in Epstein’s view, represented a bundle of individual rights, including possession, use, and disposition of one’s property (R. Epstein 1985b, 57–62). Any government regulation that infringed upon any one of these rights could be interpreted as a taking. Epstein, and proponents of his theory, believed that such a view could render unconstitutional “many of the heralded reforms and institutions of the twentieth century: zoning, rent control workers’ compensation laws, transfer payments, [and] progressive taxation” (R. Epstein 1985b, x). Takings is often criticized within the mainstream legal academe for resting upon dubious constitutional and legal grounds (Kendall and Lord 1998, 516–518; Ross 1986), however, it provided a legitimizing tool for those who were opposed to the regulatory state, including President Ronald Reagan.

Property rights and the regulations affecting them were also issues that many Americans knew little about. As Mellor recalls, with Kelo v. New London and other property rights litigation, “we had the challenge to take an issue that we thought was vitally important, but by its very nature conducted in such a way that it was not on the radar screen of most Americans….We had to figure out ways to mobilize people and public outrage around the issue” (Teles 2008, 241). This public mobilization could then be channeled into legislative action to further drive policy change.
The Changing Environment of the Reagan Administration

Throughout the 1980s, Republicans controlled the executive branch under the Reagan and Bush administrations. Reagan, in particular, shared conservative activists’ conviction that the regulatory state needed to be curtailed. As a result, his presidency created opportunities for many conservative activists to serve in executive branch or judicial positions and begin affecting change from within the political system they had previously felt excluded from. As bureaucrats, conservative leaders gained important insights into how the political system worked and were able to make some immediate policy changes. More significant, however, would be the long-term influence that Reagan and Bush had over the composition of the judicial branch, as many of their appointees would continue serving well into the 1990s and 2000s, deciding numerous precedents that shaped property rights case law.

President Ronald Reagan wanted to eliminate many environmental and social regulations that he believed were detrimental to businesses (Harris and Milkis 1996, 6). Through executive orders and his control of the federal bureaucracy, Reagan made progress in this area. More than many of his predecessors, Reagan was committed to active oversight of the executive branch agencies and appointed ideological allies, committed to decreasing regulation, to bureaucratic posts, even when these beliefs fundamentally conflicted with the work of the appointee’s agency (Fried 1991, 230; Houck 1987, 538; Morrison 1986). Many of these appointees were well known within the conservative legal movement, including, perhaps most notably, Edwin Meese, a founding member of PLF, as U.S. attorney general and Stephan Markman, chair of the Washington Chapter of the Federalist Society, as assistant attorney general. Similarly-
minded conservatives were also hired to fill other bureaucratic positions during the
Reagan administration, including Clint Bolick, who had worked at MSLF and would later
cofound IJ, at the Equal Employment Opportunity Commission (EEOC) and the Justice
Department.

Beyond these bureaucratic allies, Reagan’s commitment to deregulation can be seen through his actions and policies. One early attempt came in January 1981 with the creation of the Task Force for Regulatory Relief, led by Vice President George H.W. Bush and including other top administration officials like the attorney general, the director of the Office of Management and Budget (OMB), and the secretaries of commerce, labor, and treasury. The Task Force for Regulatory Relief would consult with business and industry leaders to determine which existing federal regulations were overly burdensome and needed revision. This reflected Reagan’s belief that federal regulations financially hurt American businesses, but other policies reflected his belief that regulations also were costly for the federal government. The latter is evident in Executive Order No. 12,291 issued in February 1981, which required federal agencies to submit a cost-benefit analysis of new and existing regulations to OMB for review. Before a new regulation could go into effect, an agency had to demonstrate that the benefits to society provided by the regulation outweighed its costs. Essentially, E.O. 12,291 added red tape to the approval process, creating opportunities for Reagan’s allies at OMB to delay, and hopefully derail, new regulation.

Reagan’s first-term efforts at deregulation were met with opposition from Congress and from the American public (Folsom 1993, 654). During his second term, Reagan continued this general pursuit, but changed tack, using the takings clause as a
way to justify deregulation. Adopting arguments very similar to those espoused in Richard Epstein’s legal doctrine, the Reagan administration pushed the Supreme Court to adopt a more expansive view of regulatory takings. In March 1988, Reagan issued Executive Order No. 12,630, sometimes referred to as the Takings Order. This policy required agencies to assess whether or not an action would have any takings implications, under Reagan’s expanded conceptualization of regulatory takings. If it did, the agency was required to explore alternatives that would affect property owners less and estimate the amount of damages a court would find if the action were legally challenged.

More significantly, Reagan was able to affect long-term change for conservatives through his judicial appointments (Goldman 1997; Giles, Hettinger, & Peppers 2001). By increasing the number of conservative judges on the federal bench who were similarly committed to dismantling the regulatory state, Reagan helped create a more favorable judicial environment for the conservative and libertarian public interest firms and activists seeking legal change to operate in. Conservative activists had long realized that legal precedents related to property rights were murky and ripe for litigation, but the lack of a clear judicial framework would lead many federal courts to try to avoid hearing these cases. Increasing the number of like-minded conservative legal activists in the federal courts meant that the judges would be more likely to hear these types of cases and, ultimately, would be more likely to issue rulings conservatives wanted to see.

In 1982, Reagan urged Congress to pass the Federal Courts Improvement Act (FCIA). FCIA created two new courts: the first was a new U.S. Claims Court (known today as the Court of Federal Claims) to replace the Court of Custom and Patent Appeals and the Court of Claims, and the second was the Federal Circuit Court of Appeals. The
U.S. Claims Court would hear takings claims against the federal government seeking at least $10,000 in damages: the Federal Circuit Court of Appeals would hear U.S. Claims Court appeals (Miller 1983, 7–8). The statute provided that all present Court of Claims judges would serve on the new U.S. Claims Court, but their terms would expire, at the latest, on October 1, 1986, meaning that Reagan was able to nominate all members of the two new courts (28 U.S.C. §171). Reagan, and later Bush, included a number of politically active conservatives among their nominees to these courts (Kendall and Lord 1998, 521).

Reagan was also able to leave a lasting impact on the U.S. Supreme Court, nominating four of the nine justices serving at the time of the Kelo decision, including Chief Justice William Rehnquist (Goldman 1989). After Reagan left office, Bush appointed two more justices to the Court. In the takings cases that would lead up to Kelo during the 1990s, these justices showed their support for property rights. In Lucas v. South Carolina Coastal Council (1993), five of these six appointees8 sided with the property owner, and they did so again in Dolan v. Tigard (1994). Through changes to the structure of the federal judiciary and its composition, Reagan created a judicial climate that could be more sympathetic to conservative activists.

The Legal Issues: Questions of Takings and Public Use

The section below summarizes some of the major trends in property rights law and the development of key precedents that led to Kelo. The Fifth Amendment’s protections for property owners are unclear on a number of points regarding what constitutes a taking, just compensation, and public use. This ambiguity, the increased

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8 The five justices were Rehnquist, O’Connor, Thomas, Scalia, and Kennedy.
involvement of government in land use and economic development, and conservatives’ constitutional perspective and activism led to many cases in the 1980s and 1990s addressing regulatory takings. These cases attempted to determine the point at which government regulation so restricts an owner’s use of property that it essentially equates to a taking of the property, but the courts did little to alleviate the confusion and set a clear standard for assessing these matters. Other cases involved government exercises of eminent domain, where a taking decidedly occurred, but the controversy surrounded the end goal, or public use, the government used to justify its actions. In these cases, the courts were more consistent in their rulings, typically siding with the government and its increasingly expansive conception of public use. Conservatives could lose the legal battle in these cases but would win in the court of public opinion, sometimes rallying enough supporters to pass property rights protections through legislative measures. Taking on public use cases, like Kelo v. New London, could advance the cause of property rights even if the cases lost in court.

The concept of a regulatory taking was introduced in Pennsylvania Coal v. Mahon in 1922, when the Supreme Court recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (260 U.S. 415). Since the ruling was made during the very early days of zoning and property regulations, it would have been difficult, though helpful, for the Court to better prescribe the “too far” standard. Later courts similarly view regulatory takings along a continuum, searching for the critical balancing point between property owners’ rights and legitimate government interest (Oswald 2000). In 1978, the Supreme Court articulated three criteria for determining regulatory takings in Penn Central Transportation Co. v.
City of New York, proposing that the economic impact borne by the property owner, the extent to which government regulation interfered with investment-backed expectations for the property, and the “character of the government action” be considered in determinations (438 U.S. 124). This helped little: in the 1986 case MacDonald, Sommer, & Frates v. Yolo County, the Court acknowledged there was “no ‘set’ formula to determine where regulation ends and takings begins.’ Instead, we rely ‘as much [on] the exercise of judgment as [on] the application of logic’ (477 U.S. 348-349).

The murky judicial waters of regulatory takings jurisprudence provided conservative public interest firms many opportunities to litigate and gain experience before the courts. As property rights activists realized, however, the decisions had little meaningful impact. Due to the lack of a clear judicial framework, and the generally complex and technical nature of the policies involved, federal judges would avoid these cases whenever possible, and avoid making decisions based on the merits of the case when they did have to hear them. Data from 1983-1988 suggest federal judges avoided the merits in 94% of these cases (Overstreet 1994). A later analysis from 1990-1998 finds federal judges avoided the merits in 83% of cases, and stretched out the proceedings to last, on average, 9.6 years before a case could be settled (Delaney and Desiderio 1999).

Despite these trends, a few key legal advances for property rights in this area are worth mentioning. Property rights advocates won a victory First English Evangelical Lutheran Church v. Los Angeles in 1987 when the U.S. Supreme Court ruled that even a temporary taking of private property required appropriate compensation. Also that year, the Court ruled against a public easement requirement in Nollan v. California Coastal Commission. In 1994, the Court similarly found that the government could not require a
public greenway and bike path as a condition for a building permit in Dolan v. City of Tigard. Lucas v. South Carolina Coastal Council in 1992 established that a taking occurred if a regulation deprived a property owner of all economically beneficial uses. In addition to helping set some favorable precedents, these cases were important because they gave property rights activists chances to litigate in front of the Supreme Court and helped bolster public awareness and activism for their cause.

The cases that address the question of what constitutes public use are more directly comparable to Kelo v. New London. Narrowly construed, public use involves literal use by the public, involving projects where the land becomes publicly owned or accessible. The broader interpretation, and the one the courts increasingly adopted over the twentieth century, is a standard of public benefit, which can incorporate a host of justifications, including economic redevelopment, slum clearance, beautification, or redistributing concentrated land ownership. Additionally, governments do not have to retain legal ownership of the property: it can be transferred to a private entity charged with implementing these public benefit objectives. Since Berman v. Parker (1954), the Supreme Court argued that the determination of public use should be a legislative decision, and as long as the legislature had a well-founded expectation of a community benefit, it was constitutionally permissible as public use.

Compared to regulatory takings cases, these public use cases are relatively rare. Part of this stems from the fact that actual exercises of eminent domain tend to be used as a last resort for state and local planners, once other attempts through regulation or private purchases of property fail. In many instances, the threat of eminent domain can be used as a bargaining chip. According to an IJ analysis of properties condemned and
transferred to private use between 1998-2002, about twice as many properties were threatened with eminent domain (6,560) as were actually acquired through eminent domain (3,722) (Berliner 2003, 9). Moreover, since Berman, the Supreme Court has consistently deferred to legislative determinations of public use, so as long as local law was being followed, few of these cases merited legal attention.

At the U.S. Supreme Court level, Hawaii Housing Authority v. Midkiff in 1984 represents the only major case addressing eminent domain and public use between Berman in 1954 and Kelo in 2005. In Midkiff, the Court unanimously upheld a state statute that exercised eminent domain to redistribute property among private landholders. Since a small group of individuals held a disproportionate share of very limited available land, allowing a broader distribution of ownership served the public benefit of keeping real estate prices reasonable.

Among state courts, two Michigan Supreme Court cases are worthy of note due to their direct implications for Kelo. In 1981, Poletown Neighborhood Council v. City of Detroit upheld use of eminent domain by the city to condemn a neighborhood and convey ownership of the land to a corporation for a new manufacturing plant. This was considered public use because the city already faced high levels of unemployment, and if a suitable site was not available in the city, the corporation planned to move all its operations elsewhere, causing further damage to the local economy that it anchored. The Michigan Supreme Court reversed its Poletown ruling in July 2004 with County of Wayne v. Hathcock, prohibiting the exercise of eminent domain for the creation of a business and technology office park, noting that Poletown “was such a radical departure from constitutional principles and…eminent domain jurisprudence” (684 N.W.2d 787).
Poletown was supposed to be seen as an exception to the public use rule, given the dire economic consequences that would have otherwise occurred, not as justification for marginal improvements to localities’ tax bases or employment rates. The U.S. Supreme Court granted cert for Kelo in September 2004, leading many to wonder whether the Court would uphold the longstanding precedent based on Berman and Poletown, or if it would similarly adopt the reasoning used in Hathcock (Salkin 2005, 478).

Although it is less well-known than Poletown or Hathcock, one other public use case deserves mention, in part for its precedent, but in part because it was a solid victory for IJ and closely resembled what was to come in Kelo. In 1998, the IJ represented the plaintiffs in Casino Reinvestment Development Authority v. Banin before a New Jersey superior court. In the thirteen years preceding Banin, the New York Times reported that the Atlantic City redevelopment authority had condemned 300-400 properties, most of which had been related to casino improvements (Herszenhorn 1998). In Banin, the state of New Jersey sought to seize three Atlantic City properties, including an elderly woman’s home, in order to resell the land to the Trump Organization for use as a casino parking lot and some landscaped green space. The state argued that casinos provided tremendous economic benefits for the area, but the court sided with the plaintiffs, in part because there were no guarantees that the developer would have use the properties as promised in the condemnation request. This case served, in many ways, as a blueprint the IJ followed in Kelo, looking for sympathetic plaintiffs and very broad legislative determinations of public use that might not look credible under closer scrutiny. These scenarios could help IJ make stronger legal cases, as well as gain favorable public attention.
Legislative Attempts at Property Rights Protections

Since many of the best-established activist groups were public interest law firms, property rights advocates primarily pushed for reform through the legal system. They recognized, however, that this process was slow and that the existing jurisprudence relied heavily upon legislative standards for public use. Therefore, property rights advocates engaged in a complementary strategy of using public opinion and their conservative political allies to push for property rights protections through legislative channels. In the 1990s, they did make some inroads, as several states passed reforms attempting to protect property rights, and the U.S. Congress introduced bills every session since 1995, proposing that no federal funds be used for projects involving eminent domain exercises.

Although property rights remained a low priority issue for many Americans, the 1990s and 2000s also saw the development of an anti-sprawl movement, as suburbs increasingly moved outside of the urban core into rural lands (Downs 1999; Lopez & Hynes, 2003; Bruegmann, 2006). Opponents of sprawl had existed for as long as suburbs had, but this modern incarnation has been the most effective, implementing “smart growth” and New Urbanist principles in many communities (Knaap & Talen, 2005; Freilich, Sitkowski, & Mennillo, 2010). Increasingly, many development projects involved shopping centers, industrial parks, and housing subdivisions that required large parcels of land, destroyed open spaces, and could only be accessed by car. Housing developers, big-box retailers, and corporations promised to boost local tax bases, and while lauded by many citizens, were opposed by others who lamented geographic homogenization and the loss of local character. Anti-sprawl advocates often worried about the potential environmental dangers of these projects, and had high-profile allies,
including Vice President Al Gore and the Environmental Protection Agency (Samuel and O'Toole 1999). The typically conservative property rights activists and the typically liberal anti-sprawl activists were still often at odds, though they would coalesce around certain projects, but the discussion of smart growth raised awareness about property rights protections and local government powers like eminent domain.

Conclusion

The struggle to define the appropriate balance between individual property rights and reasonable government interests in its regulation has been a perennial challenge in American law and politics, and Kelo v. New London certainly did not settle the matter. The redevelopment project proposed in Kelo, that the public and property rights activists found egregious, is a fairly standard exercise of local eminent domain power in pursuit of economic development. The Supreme Court, as it did in Kelo, typically permits these exercises, stating that local communities, via their elected representatives, are best able to establish an appropriate public use standard based on their needs.

Takings cases before the courts can address a variety of questions. Public use cases before the courts, when an actual exercise of eminent domain was involved, have proven to be easier to litigate than related cases where the main question addresses determining whether or not some form of regulatory takings occurred. By the 2000s, public interest law firms advocating for property rights were well aware of this, as they had been litigating cases in this area for over twenty years. They had learned from past organizational mistakes and had established clear, ideologically-based principles and developed particular issue niches, with the IJ becoming the group most closely associated with property rights. The leaders of the IJ also realized they won more cases on appeal.
than pushing initial litigation and shifted their strategy accordingly (Levy 2012). Since 2002, IJ argued five cases before the Supreme Court and won all but Kelo.

Over the years, activists developed a constitutional theory to support their cause, built the networks and organizations needed to successfully engage in litigation, and had a number of judicial allies in the courts. This support structure made their judicial activism somewhat easier, but also enabled property rights advocates to simultaneously focus their attention on generating public support for their cause. In part, this came from reframing the issues: instead of assuming the government had an inherent right to regulate, activists asserted that the right to own and use one’s property was a fundamental natural right, requiring a much higher burden of proof before any government interference was permissible. To further generate public support, IJ selected its cases strategically, making sure the facts were straightforward and their clients were likeable and relatable. Favorable public opinion and citizen mobilization could also be used to pursue legislative strategies: IJ viewed legislation as a necessary complement to litigation, given that the courts relied on statutory determinations of public use.

The property rights movement was ready for Kelo by the 2000s, and this is the primary reason why the subsequent reaction to the decision was so unusual. A case like Kelo could have been litigated any time after 1954, with the same judicial finding, but a decision in the 1980s or 1990s would not have generated such a response. During this time, property rights activists and the broader conservative movement made important inroads in both law and politics, making a number of different venues more amenable to their cause. This support structure by itself, however, was not enough to spur the level of action seen after Kelo. With the necessary support structure and strategy in place,
property rights activists were able to use Kelo as a galvanizing event to spur subsequent policy responses across the nation.
Chapter 3: From New London to the U.S. Supreme Court

Introduction

Kelo v. New London is now considered an important U.S. Supreme Court case, but it would never have become one without two critical decisions. First, strategic litigants from the Institute for Justice (IJ) decided to represent the plaintiffs in Kelo and pursue a lengthy and expensive process of judicial redress. As the subsequent discussions of Kelo v. New London have revealed, many people found the eminent domain exercise in New London particularly egregious; it was unsettling for property owners across the nation to hear that non-blighted homes could be seized for a possible private development that could improve tax revenue or be otherwise loosely construed as economic growth. The New London situation certainly provided a sympathetic case, but strategic litigants like the IJ would know that relatable plaintiffs alone would not win the case. What made the IJ think that the Supreme Court would hear the Kelo case, and, more importantly, what made the IJ think that the Supreme Court might decide in their favor? The second important decision related to the Kelo case was made by the U.S. Supreme Court itself in its choice to grant a writ of certiorari and hear the case. If the Justices expected to follow existing precedent or thought that their ruling could be broadly unpopular, why would they choose to hear Kelo when they must deny hundreds of other appeals each year?

This chapter will explore the reasons behind these two critical decisions and provide background information on the Kelo case itself, as well as the judicial environment in which it was decided. The first section of this chapter discusses the case facts, providing background about New London, the city's development plans, and why Kelo and the other plaintiffs pursued litigation. The case facts suggest that the legal
issues raised in Kelo were not markedly different than other Supreme Court cases addressing eminent domain for public use. It was, however, a compelling case. First, the takings of the properties at issue were not required as part of the city's agreement with Pfizer: the plant could be built, along many of the supporting services and facilities, without demolishing the homes in question. This, many argued, was an inappropriately expansive view of “public use.” Second, New London had a history of failed redevelopment initiatives, which contributed to a sense of skepticism from the outset about the Pfizer initiative. The role of Connecticut's governor, who was unpopular among city leaders, in initiating the project drove further opposition to the redevelopment, as did the sense that the head of the redevelopment corporation stood to personally gain financially from the project.

Following this background is a discussion of the Kelo court cases in Connecticut that preceded the appeal to the U.S. Supreme Court case. This leads into a second section that explores the decision of the Supreme Court to grant certiorari for Kelo. The Supreme Court exercises significant control over its own docket, and the Justices did not have hear Kelo if they expected an outcome consistent with their existing precedent, or if they expected a widespread backlash against the verdict. This decision likely resulted from a combination of increased activism by public interest law firms supporting property rights, which affected the judicial landscape in a number of ways, and an interest by some Justices on the Court in changing existing precedent. The Rehnquist Court, compared to other Court eras, heard comparatively high numbers of takings cases and received a relatively high number of appeals regarding takings. This coincided with greater activism by the IJ and similar property rights organizations. Only a few years prior to Kelo, IJ won
a high-profile eminent domain case in the New Jersey Supreme Court, and the IJ continually sought to bring a similar case before the U.S. Supreme Court. In Kelo, the IJ and another property rights group submitted amici briefs at the cert stage; this type of participation at the cert stage increases the likelihood that the Court will hear a case. Perhaps more importantly, throughout state and lower court decisions involving eminent domain, a degree of confusion was evident regarding whether or not public use applied when properties were transferred to other private owners, creating conflicting precedents the Court may have felt were necessary to clarify.

The final section addresses takings cases other than Kelo that were heard by the Supreme Court to provide insights on why the IJ thought the Supreme Court, once it granted cert, would be likely to find in favor of stronger property rights protections. The two cases frequently cited as the closest parallels to Kelo, Berman v. Parker (1954) and Hawaii Housing v. Midkiff (1984) were decided decades earlier, but throughout the 1990s, several cases were heard by the Supreme Court addressing takings that occurred through zoning and regulations. These precedents suggested the Court was, in some cases, imposing greater limits of government in favor of private property owners. The ideology of the Justices, and the conservative rulings in other takings cases under the Rehnquist Court, would have also suggested to the IJ that they might find a favorable reception before the Supreme Court with Kelo.

Background for New London Redevelopment and Case Facts

New London, Connecticut, is a waterfront community that was founded in 1646 along the Thames River and Long Island Sound. In 1777, Fort Trumbull was built in New London at the request of Connecticut’s colonial governor to help defend the capital city
of Hartford upriver. Fort Trumbull persisted as a military base throughout the 1800s, and then transitioned into an educational facility, as home to an early version of the U.S. Coast Guard Academy from 1910-1932, the Merchant Marine Officers Training School from 1939-1946, and a post-war satellite campus for University of Connecticut from 1946-1950. Between 1950 and 1990, Fort Trumbull served as the Naval Underwater Sound Laboratory, working on sonar systems for the U.S. Navy, and it continued to house some Navy operations until the facility finally closed in 1996. Outside of the military facilities, a small neighborhood of about 20 homes was built in the early 1900s, becoming known as the Fort Trumbull neighborhood at issue in the Kelo v. New London case.

Beyond Fort Trumbull and the federal government jobs it provided, New London’s economy has historically rested upon maritime industries. As a well-defended port city located between Boston and New York City, New London cultivated trade opportunities with Europe and the West Indies in the 1700s. By the early 1800s, New London had become the second-largest whaling town in the United States and earned the nickname “The Whaling City.” The prosperity brought by the whaling industry can still be seen in downtown New London’s grand historic homes and buildings. Shipbuilding has been and remains a large industry in the city, but it does not provide the affluence that New London enjoyed in the past.

By the 1970s, New London had become a more working-class area, like many small seaport cities and towns throughout New England, but with a high degree of poverty and unemployment. Factories in New London began to relocate in the 1960s (Hamilton 1999a). Due to 1960s-era attempts at urban renewal, New London also became
home to a disproportionately high level of public housing units per capita, concentrating
the poorest residents from New London County and the surrounding towns in its
jurisdiction (DeCoster 1979). According to the U.S. Census, in 1990, New London had a
poverty rate of 15.15% and an unemployment rate 8.0%. In contrast, the surrounding
New London County and the state of Connecticut had poverty rates of 6.37% and 6.61%,
and unemployment rates of 5.6% and 5.1%, respectively. Since the 1990s, major
employers in New London have included Lawrence & Memorial Hospital, Connecticut
College, the U.S. Coast Guard Academy, and The Day newspaper publishing group.
Many employees, however, commute in to New London from nearby towns. The
population of New London steadily declined for many years, reaching its lowest points
during the 1990s and 2000s. U.S. Census records reveal the city reached its population
peak in 1960, with 34,182 residents. By 1990, the number had dropped to 28,540, and
continued to dip until 2000, reaching 25,671.

Previous Economic Redevelopment Initiatives in New London

Since the decline of shipbuilding and whaling, economic growth has proved
particularly tricky for New London. Much of its challenge stems from the fact that
available land in the city is at an incredible premium. Although the city boundaries
technically encompass 10.76 square miles, only 5.56 square miles are on land, and the
rest are under water. Municipalities heavily rely on property taxes for operating revenue,
so this lack of land naturally creates tax revenue challenges for New London. Additional
revenue challenges result because much of the city’s land is occupied by institutions that
are exempt from property taxes. An estimate from 2012 reveals that about 54% of the
city’s land was occupied by institutions exempt from property taxes, including Lawrence
& Memorial Hospital, Connecticut College, Mitchell College, and the U.S. Coast Guard Academy (Cosgrove 2012).9 These institutions provide civic pride and represent several of the city’s largest employers, so although they do not directly contribute to the tax base via property taxes, they are valuable to the local economy.

To help localities like New London compensate for this type of lost revenue, the state of Connecticut implemented a payment in lieu of taxes (PILOT) program in the 1970s, and although the local governments receive some revenue through this initiative, the local governments only receive a fraction of the assessed tax value of the property.10 Since the 2000s, Connecticut College and Mitchell College have also pledged to annually donate tens of thousands of dollars back to the City of New London as a good neighbor effort. Although these supplementary funds are useful for New London, they still do not fully make up for what the city loses in tax revenue. Property owners feel that they are shouldering an undue burden with their tax payments, since the government services they pay for in New London are stretched thin (Choiniere 2012; McGinley 2005; O’Leary 2014).

Prior to the redevelopment initiatives that led to Kelo in 2005, New London had made several previous attempts to find a suitable solution for its economic challenges. Many of its attempts involved utilizing funding provided by the federal government.

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9 To illustrate these losses, the four properties listed are currently assessed at $540.8 million, and although they are the most valuable, they are not the only tax-exempt properties in the city. According to the New London Grand List from October 2014, the city’s net taxable property assessment is $1.255 billion (including real estate, motor vehicles, and personal property). If these four properties were not tax-exempt, the city’s taxable property would increase by 43%.

10 Currently, the program will allow payments to localities of up to 77% for college and hospital properties and 45% for state-owned properties. This, however, is contingent on the availability of state funds, which results in lower PILOT payment levels: in 2014, for example, the reimbursement rate had fallen to 33% for college and hospital properties and 20% for state-owned properties. See Mary E. O’Leary, “Senator Looney Proposes Changes to Connecticut’s PILOT Program,” The New Haven Register, March 17, 2014.
When federal funding became less readily available, New London turned to more public-private partnerships for revitalization, but they were also met with frequent opposition. After decades of public skepticism surrounding failed proposals, altered plans, and unsuccessful completed projects, the 1990s plans for Pfizer and Fort Trumbull faced an uphill battle from the outset.

Federal Funding, Urban Renewal, and Origins of Citizen Opposition

Many of the provisions in Connecticut's state code pertaining to redevelopment initiatives were created in 1949 and underwent revisions throughout the 1950s, enabling local governments and agencies to exercise this practice and receive state and/or federal support for their initiatives (General Statutes of Connecticut, Title 8, ch. 130). Like many cities in the 1960s, New London participated in the urban renewal programs of the 1960s and 1970s to help bulldoze blighted properties and create new subsidized housing for low-income tenants. Between 1968 and 1979, New London received $100 million in funds for urban redevelopment under various federal programs, including Model Cities, Community Development Block Grants (CDBGs), and the Comprehensive Employment and Training Act. During this time, New London was among the top ten cities in the United States in terms of federal money received per capita (DeCoster 1979; Stone 1973).

While providing a short-term boon in construction, these programs from the 1960s and 1970s did not help the city reverse its economic course. Local residents

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11 As another indicator of New London’s involvement with federal funding programs, in proposals for the Better Communities Act, Congress allotted $6.4 million for New London, the third highest level in the state of Connecticut behind New Haven and Hartford. The bill never passed, but this amount was determined based on localities’ previous received levels of federal funding.
believed that these projects only served to attract poor residents from other towns to New London, further hurting the city’s growth outlook. A group of citizens organized to form the New London Taxpayers Association (NLTA) in 1969, and the organization had about 500 members by the early 1970s. NLTA would become a consistent opponent of New London’s redevelopment efforts, and its members were described by one city councilman as “out-and-out slumlords” favoring the status quo over any betterment to the city (Fisher 1973). NLTA, however, did help increase public awareness about development projects, by frequently purchasing newspaper advertisements and hosting public forums to discuss local plans, though the objectivity and accuracy of their information was often questioned.

Many of New London’s subsequent attempts at economic revitalization followed the top-down approach of the urban renewal mold, where local officials tailored their redevelopment initiatives to meet available federal and state funding opportunities. The restrictions or requirements placed upon these plans, and sometimes the lack of citizen involvement in the planning process, often put local residents and the NTLA at odds with the redevelopment proponents. A New London newspaper editor commented that by the mid-1970s, “public trust in local government was at ebb tide….The distrust further was fed by a procession of developers with often harebrained schemes to take advantage of the abundant federal and state aid available then” (Grube 1981a).

One early example of this tension between redevelopment advocates and residents occurred in the early 1970s, surrounding rebuilding of homes, businesses, and recreational areas in a neighborhood known as Shaw’s Cove. In April 1973, New London voters needed to vote on a referendum to authorize $1.4 million in local
spending, enabling the city to receive $29 million in federal and state funding for the project (D. Heckerman 1973a). Much of the controversy centered on how many new homes would be constructed in Shaw’s Cove, with detractors greatly over exaggerating the number of housing units that would be built and falsely claiming that the project would involve creating new public housing to meet federal guidelines (Diemer 1973; Fisher 1973; D. Heckerman 1973b; D. L. Heckerman 1973; McGinley 1973). In this instance, NTLA was even at odds with some of the Shaw’s Cove residents, who supported some new housing in the area (D. Heckerman 1973a). The Shaw’s Cove redevelopment was a lengthy process, and debates over other aspects of the project continued, as the project stretched well into the mid-1980s (Baldelli 1984; Cray 1985).

Plan modifications also alienated some supporters: in 1987, for example, developers expanded one part of the site plan from two office buildings to three office buildings, a six-story residential building, retail, and additional parking (Clarke 1987).

Given its inherent economic challenges, New London officials have sought to capitalize on one of the city’s underutilized assets: its undeveloped waterfront areas. The Fort Trumbull plan at stake in Kelo was one of several plans since the 1970s when concerted efforts to develop these spaces began. A lengthy newspaper story from 1976 describes potential opportunities for harbor-area development, noting that although the city itself was small, it could draw people in from the surrounding market area of over 250,000 people (Stone 1976). One effort at waterfront development from the 1970s dealt with the fate of a turn of the century facility, the Old Thames Shipyard. The U.S. Coast Guard owned the facility but leased it to a family to build ferryboats, since the facilities were too dilapidated and outdated for Coast Guard use. The Coast Guard initially
planned to bulldoze the existing shipyard but was thwarted in 1975, when the Old Thames Shipyard was nominated and placed on the National Register of Historic Places. At this point, the long-term tenants were prepared to purchase the property and continue to use it for shipbuilding. The New London Redevelopment Agency, however, also became interested in the shipyard, hoping to utilize the low-interest federal loans and other financial incentives afforded historical landmarks to create “Thamesport,” a $10 million marina and luxury apartments (DeCoster 1979; Rozhon 1981). The tenants prevailed and purchased the property, marking the first of many failed attempts by the city to develop the waterfront of New London (Hamilton 1999a).

Adding to public mistrust, even the redevelopment initiatives that were implemented proved unsuccessful at invigorating New London’s economy. Like other small cities with a deteriorating downtown business and retail corridor, New London attempted to construct a pedestrian mall along State Street, known as Captain’s Walk, to help bolster the banking, professional services, and existing shops in the neighborhood. After raising $50,000 in seed money, the Downtown New London Association received the remainder of the funding for Captain’s Walk from the Federal Urban Renewal Agency. The project, proposed in 1969 and built in 1973, is largely thought of as a failure. By 1977, a majority of residents favored nixing the plaza and reopening the street to vehicular traffic. Many storefronts remained vacant, and at times, over half the buildings sat unoccupied (Rubenstein 1992, 171–73). When Crystal Mall, a large, suburban shopping mall, opened in a neighboring town in 1985, the remaining optimism surrounding Captain’s Walk faded. The New London Historical Society even notes that “Captain’s Walk is often blamed for having ‘killed’ State Street.”
Federal funding clearly did not guarantee surefire economic revitalization, but New London officials tended to view it as their best, and perhaps only, means to achieve success, given the city’s limited ability to generate its own revenue. This is evident in a 1979 interview with the city manager, C. Francis Driscoll, who worried that the 1980s would usher in an era of reduced federal spending and require New London to find other means of support. It is rare to see local officials describe the impact federal elections will have on their towns and cities, but Driscoll acknowledged that “much will depend upon the outcome of the 1980 presidential race. The president will set the tone for how the cities will be treated in the new decade.” The change had already begun, he noted, citing that New London had received $6 million in CDBG funds for 1976, but the amount had been reduced to $1 million for 1980, and no commitments had been made for future years (DeCoster 1979).

New London Development Corporation (NLDC): Alternative to Federal Funding

As many cities have done, New London adapted its development strategy when federal funding dwindled, turning to a non-profit corporation in the 1980s to facilitate development arrangements between local government actors and businesses. State law enabled these types of projects, through the passage of legislation in 1967 allowing the use of eminent domain for municipal development projects (General Statutes of Connecticut, Title 8, ch. 132). Further state enabling legislation, the City and Town Development Act in 1975, however, was met with opposition from the NLTA. In a newspaper ad that almost perfectly foreshadowed the controversy surrounding the Fort Trumbull development two decades later, NTLA warned, “This act will allow the City of New London to acquire property through purchase, gift, or otherwise (condemnation) and
to use your tax dollars to buy the property and loan money to private and non-profit corporations to develop this same property” (New London Taxpayers Association 1975). Opposition was not limited to NTLA, and the governor vetoed the bill the first time it passed, allowing it the second time once certain safeguards were added, like adding local referenda for citizens to authorize their local governments’ use of these new powers. New London voters did not approve of the measure the first time it came up in a local referendum in 1975, but did approve it subsequently in 1981, as a part of the Shaw’s Cove redevelopment effort (Grube 1981a; The Day 1982).

In the late 1980s, city officials used the New London Development Corporation (NLDC) as its agent to facilitate its economic renewal projects. NLDC formed in 1978 by three local businessmen, jeweler Edward Perry, retailer Joseph Gorra, and attorney William Miner with the initial purpose of helping others file for federal small business loans. In this role, NLDC assisted with processing one loan, citing federal spending cuts and bureaucratic red tape for their lack of success. Between 1980 and 1985, the group still held meetings, as a coalition of local business leaders, but did not undertake any major projects or advocacy efforts (Bass 1989; The Day 1985a). Meanwhile, some city leaders advocated that “a community effort is needed [and a] coalition of bankers, businessmen and city officials should be formed” to better coordinate redevelopment efforts and make sure that they are successfully completed (Grube 1981b). This is the role that NLDC would soon fill. When New London embarked upon a waterfront development project called Thames Wharf in the late 1980s, city officials sought to revive NDLC and utilize it as the primary fundraising vehicle for the project (The Day 1985b; Tolson 1987). In support of NLDC, Mayor Jay B. Levin described it as “a real
broad-based group” representing “all kinds of community groups and every segment of the population” (The Day 1985a).

New London officials authorized NLDC, a non-profit corporation, to make revitalization plans as an effort to keep “political whims” out of the planning process. Trust in the local government remained low, as the group’s then-president, William Miner, even remarked, “the City Council has enough problems running the city” (Bass 1989, 3). In such a small city, however, local business and political elites often are one and the same: Carl Stoner, for example, served as the NLDC vice-president and strongly advocated for private sector involvement in planning, though in the past, he had served both as a city councilman and a mayor of New London. NLDC operated in a somewhat ad hoc capacity, reviving to work on a few projects in the late 1980s, working on a proposed science education center called OceanQuest in the early 1990s, before falling largely dormant until 1997 and the Fort Trumbull plan.12

By 1997, members of the public grew somewhat mistrustful of NLDC. The Thames Waterfront project was thwarted by the national economic recession and ultimately nixed in 1990. The more recent OceanQuest project was also scrapped, leaving another undeveloped site in its wake. NLDC was also increasingly criticized for being a secretive, unaccountable organization. The local newspaper, The Day, for example filed a freedom of information complaint against NLDC because its reporters could not attend or see records from the group’s meetings. The Day argued that if NLDC

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12 Annual reports for corporations must be filed every year with the Connecticut Secretary of State, but state records only for NLDC jump from 1982 to 1997, when reports for 1994, 1996, and 1997 were filed simultaneously. News reports, however, indicate more NLDC activity: in addition to the projects mentioned, reports note that NLDC disbursed funds to merchants as part of a settlement from Crystal Mall, and in 1989, the city council authorized NLDC to implement suggestions drafted by a group of architects (Schuerman 1997a).
was authorized to spend and receive government money, including federal funds, as the city’s key development actor, it should qualify as a public agency for transparency purposes (Schuerman 1997a). In addition to public mistrust, city officials were increasingly at odds with NLDC, as The Day observed, “what has no doubt increased the tension between city officials and the corporation is the departure from the past, when the old corporation acted as an advisory board made up of businessmen, rather than as a developer in its own right” (Schuerman 1997b).

Pfizer Development Plan and the Fort Trumbull Neighborhood

Although NLDC played an active role in developing the Fort Trumbull project that would result in Kelo v. New London, the initial push for economic revitalization came from the state of Connecticut, adding another actor to decision-making arena. As part of his campaign platform in 1994, Governor John Rowland promised to remedy the deteriorating urban centers scattered throughout Connecticut. Rowland’s co-chief of staff, Peter Ellef, and the state Department of Economic and Community Development targeted New London’s port and state pier as likely projects (McGinley 2005). As momentum built to focus efforts on New London, Ellef began working with New London attorney Jay Levin to develop a strategic plan. Ellef and Levin decided to utilize the NDLC as a means to create a public-private partnership for development, and identified Claire L. Gaudiani, president of Connecticut College, as a leader for these efforts. Gaudiani became president of NLDC and worked to reactivate its membership base and diversify it further (Cosgrove 2012, 1–2).

Although elected officials often seek better economies in the true interest of the public good, Governor Rowland’s activities have been criticized as serving political
purposes. One account argues that Republicans in state office “pressed for major projects within New London and in other Democratic strongholds in Connecticut [and] controlled them tightly” for electoral gain. Others speculate that the governor and his allies financially benefited from many of these projects, a claim supported by the federal corruption charges that both Ellef and Rowland were later convicted of in the 2000s (McGinley 2005). Underlying political tension between the Democratic local city government and the Republican state government has been cited as a reason why Rowland and his supporters sought to revive and utilize the NLDC. As a private, non-profit organization, NLDC could help state leaders circumnavigate some of the local leaders in New London (Burnett 2015, 12).

NLDC sought a large Fortune 500 company to anchor New London, and pharmaceutical company, Pfizer, with its nearby research and development facilities in Groton, CT, seemed an ideal choice. Knowing that Pfizer was set to expand its research operations, Gaudiani approached George M. Milne, Jr., who was the president for central research at Pfizer and a member of Connecticut College’s board of trustees in August 1997, to discuss New London as a site. Milne initially demurred, saying that the site selection process was too far along, but he did accept Gaudiani’s offer to join NLDC and became a co-chair of its commercial development committee. Milne ultimately conceded that New London would be a good site for Pfizer’s new global development facility and recused himself the NLDC and its planning efforts (Cosgrove 2012, 1–4). By the end of 1997, Pfizer had decided to build its research facility in New London, though the company required a renovation of New London's sewage treatment plant, restoration of
the Fort Trumbull park, and commitment from the city that it would leverage Pfizer's arrival to its own advantage (2002 Conn. Super. LEXIS 789).

In October 1997, Gaudiani and Milne met with the governor to secure financial backing from the state for the project, and they spent the next months working with myriad agencies to create a comprehensive plan. The plan included a facility for Pfizer, a new state park at the historic Fort Trumbull site, environmental and infrastructure upgrades, and a mixed-use business, residential, and retail area in the Fort Trumbull neighborhood. Pfizer would bring 600 new jobs to the site and move 1,300 existing employees to New London, in addition to paying taxes to the city. There would also be employment and tax base opportunities with the new, additional businesses built in Fort Trumbull. The city council of New London approved the NLDC plan in December 1997. The board of directors of Pfizer gave formal approval for the new Pfizer global development facility in January 1998, and at the same time, the State Bond Commission authorized the first bonds to support NLDC's planning efforts.

The initial plan, formally, was only for the Pfizer plant itself, although a letter from Gaudiani to Milne on December 15, 1997, detailed NLDC's further plans for mixed retail and residential space. James Mahoney, director of NLDC from April 1992 through November 1998, also told the Connecticut Superior Court that discussions with Pfizer had always included talk about further development at Fort Trumbull; although Pfizer made no demands, the company did suggest that it needed a hotel/conference center facility nearby. In April 1998, the New London city council gave its initial approval for the additional Fort Trumbull development and began holding informational neighborhood meetings (Cosgrove 2012, 5-7; 2002 Conn. Super. LEXIS 789).
Although the relationship between Gaudiani and Milne raised concerns about the influence of private corporations and interests in the planning process, other concerns were raised about the state involvement, as both NLDC and city leaders complained to state officials about its overbearing involvement in the decision (McGinley 2005). NLDC did make a concerted effort to engage citizens in the process, holding 20 public meetings, 15 neighborhood meetings, and setting up an information hotline.

The project seemed to gain initial momentum. Commercial tenants in the areas to be redeveloped viewed the transition positively (Hamilton 1999a). In June 1999, the U.S. Coast Guard announced plans to create a new Coast Guard museum at Fort Trumbull, and, based on the proposed plans, Standard & Poor raised the rating of the city’s investment outlook from “stable” to “positive.” Pfizer also acquired a rival pharmaceutical company, Warner-Lambert, and announced in April 2000 that its New London facility would be bigger, since it would now be the home to both companies’ research operations. Although the New London County Historical Society voiced some initial opposition to the Fort Trumbull redevelopment, no sites of historical significance were set for demolition. The New London City Council approved the Fort Trumbull plan in a 6-1 vote in January 2000.

As the initial discussions between NLDC, state officials, and Pfizer began in 1997, Susette Kelo purchased a home in the Fort Trumbull neighborhood. A year later, Kelo was approached by a real estate agent, offering to purchase her home for an unnamed client. According to Kelo, when she declined the offer, the realtor told her that if she refused to sell, she would lose her home anyway because the local government would exercise its eminent domain powers (Kelo 2013, 29).
On February 4, 1998, Pfizer announced that it would build a $185 million biotechnology park in New London to employ 1,300 people. The site for the Pfizer facility was a 24-acre plot that had formerly been a mill before burning down in the 1980s. Although much of the project would be financed by Pfizer, some financial incentives would be provided by the state of Connecticut, by giving Pfizer sales tax relief for construction-related equipment, materials, and services and providing $4.5 million to cover liens on the property (Associated Press 1998a). The state of Connecticut would also provide assistance to New London, as Governor John G. Rowland announced $65 million in loans and grants for the waterfront redevelopment. At the time, the state had already spent $4.4 million to get a waterfront site for Pfizer and was expecting it to generate $21 million in new state revenue once completed (Associated Press 1998b). Part of this state aid included the fast-tracking of $20 million in development projects for Fort Trumbull, like the construction of a new state park and improved water access, and $7 million in low-interest rates to improve sewage treatment (Associated Press 1998a). Construction was set to begin in the spring of 1998 and be completed by 2000.

In July 1998, Governor Rowland announced a number of state budget allocations to New London. The waterfront state park, set to be built along the Thames River, would receive $5 million initially as part of a $20 million allocation for the total job. The park was supposed to be located on 14 acres formerly home to the Naval Undersea Warfare Center and was scheduled to open in June 2000. While the waterfront was under redevelopment, $10.25 million in aid would be available to the displaced residents. A week before the governor’s relocation aid announcement, the NLDC board of directors had met and agreed to begin discussions with residents who had expressed concerns
about not receiving fair compensation for losing their property. Under Connecticut’s plan, $250,000 was set aside for displaced business owners in Fort Trumbull, and the State Housing Finance Authority would provide $10 million in low-rate financing for 80 residents to purchase new homes. (Associated Press 1998b). Some residents also qualified for up to $2,800 in relocation expenses (Hamilton 1999a).

State government issues with the private, non-profit NLDC were apparent by December 1999, when Governor Rowland sent NLDC a letter, stating that they needed to comply with Freedom of Information Act (FOIA) requests or risk losing state funding. Gaudiani said she would recommend that the board follow Rowland’s directive, but also argued that the NLDC was a private corporation, not subject to right-to-know laws, despite being almost fully financed by state money. By this time, the state had given NLDC $23 million, and $75 million would be required to complete the project. Rowland noted that “[a]long with [state] funds comes public scrutiny and the obligation to conduct your business in an open, public manner consistent with state law.” (Associated Press 1999).

New London’s initiatives to attract tourism, meanwhile, were also faltering. Some in the city accused officials in Boston, Massachusetts, of subverting New London’s plans to host several large sailing ships at its OpSail 2000 event, scheduled for the same time as Sail Boston 2000 in July of 2000. According New London’s city manager, Richard M. Brown, “What really irritates New London officials is what they perceive as Boston’s big-city attitude and attempts to paint New London as too small to host a world-class event” (Hamilton 1999b). New London also submitted a bid to house a new museum for
the United States Lighthouse Museum, and although it was considered as a finalist, Staten Island, New York, ultimately received the museum.

Other indicators may have suggested that the Pfizer development was in trouble. In 1999, for example, Pfizer withdrew a proposal to purchase 430 acres of state land in Norwich, Connecticut, a town about 25 miles north of New London. One business observer noted that southeastern Connecticut was not particularly attractive to larger corporations like Pfizer, because it lacked the workforce such companies would require, and is relatively inaccessible, with the nearest airport an hour away in Rhode Island (Annand 2000).

The initial year 2000 completion date was pushed back to early 2001, and the scope of the Pfizer complex had also grown. Estimates from the spring of 2000 were that the plant would cost $270 million to complete, but would house 2,000 employees. By 2001, estimates had grown to project Pfizer would create 5,000 New London jobs generate $12.5 million a year in local taxes (Humphries 2001). The state legislature approved additional funding in 2000, in the form of a two-year $50 million bond authorization. At the same time, residents of Fort Trumbull were receiving sales offers for their properties and were expressing concerns about why their neighborhood had to be razed for auxiliary projects, not clearly connected to or necessary for the Pfizer plant. Suzette Kelo had also become active in the community, serving as president of the Fort Trumbull Neighborhood Association (Associated Press 2000b). Residents were concerned about losing their property for the private development of the conference center, hotel, and other businesses, and were also concerned about the proposition of a new, non-profit Coast Guard museum (Associated Press 2000a).
Initial Court Challenges by Kelo, et al.

NLDC purchased 65 properties in the Fort Trumbull neighborhood by early 2000, and sought to use eminent domain to acquire 21 additional properties, including the one owned by Suzette Kelo, who was initially ordered out of her home by March 9, 2000 (Herszenhorn 2000), and received a final condemnation notice the day before Thanksgiving (Mansnerus 2001). Along with Kelo, other affected residents continued to resist NLDC’s takings initiatives. On December 20, 2000, Kelo and eight other property owners in the Fort Trumbull neighborhood sued the city of New London and NLDC, claiming that the project benefitted Pfizer and not the public. The lawsuit was filed in Connecticut Superior Court, the trial court for the state, and began on July 23, 2001. The plaintiffs were represented by the Institute for Justice (IJ), a libertarian public interest firm based in Arlington, Virginia (Associated Press 2000c). Under common interpretations of the Fifth Amendment, governments seeking to take private property under eminent domain powers must utilize the property for a public use, though the definition of a public use can vary based on local legislative determinations.

One of the attorneys for the property owners, Scott Bullock, claimed that the Fort Trumbull development was “one of the most outrageous examples” of eminent domain abuse (Associated Press 2001). In the trial, they claimed that developers did not have a concrete, comprehensive development plan for the land in Fort Trumbull and could thus not justify property takings (Scarponi 2001b). The city only had plans for some, but not all, of the parcels it was seeking to take via eminent domain. The actual Pfizer plant, located elsewhere in New London, had opened on June 8, 2001, further demonstrating that the land in question was not necessary for the main loci of the city’s Pfizer-based
economic redevelopment (Scarponi 2001a). Some disagreed with the perspective that “public use” grounds could be used for economic development, while others claimed that Gaudiani, the head of the NLDC, would personally benefit from the project, since she was married to a Pfizer executive (Charles 2001).

In addition to the affected residents, others in New London sought ways to oppose the Fort Trumbull development. For example, one initiative used the Environmental Policy Act of 1971’s requirement for archaeological site studies to move the location of a parking lot slated for the Fort Trumbull development away from a 19th century engine house and railroad turntable (Honan 2001). A total of 10 lawsuits were eventually filed by the Fort Trumbull Conservancy alleging environmental law violations in the proposed redevelopment plans for the Fort Trumbull site (Connecticut Law Tribune 2003; Florin 2013).

By the time the lawsuit was filed in Connecticut Superior Court in July 2001, the state had invested $50 million in a new state park in the Fort Trumbull neighborhood that was close to completion and would help demonstrate the public use of the proposed redevelopment (Associated Press 2001). Comments from New London’s mayor, Ernest Hewitt, indicated the long frustration city leaders had felt with faltering economic development initiatives, saying, “…we’ve done everything within the parameters of the law. People left this city out of frustration that nothing has happened here for the past 50 years. They wanted something to happen, and by God we’re doing it!” (Charles 2001).

The property owners’ litigation challenged New London on a number of constitutional, statutory, and technical grounds. Their arguments, and the court’s opinion, which was handed down on March 13, 2002, highlighted some of the existing ambiguity
in the assortment of city and state laws that applied to eminent domain, redevelopment initiatives, and pseudo-governmental redevelopment agencies. Much of the attention in this initial case focused on whether or not NLDC, as a private entity, held the legal authority to exercise eminent domain powers. The court found that Connecticut law allowed for this type of delegation to a nonprofit development corporation, and this issue remained largely resolved in the subsequent Kelo appeals (Burnett 2015, 14–15).

The issue of public use would become more central in the subsequent cases, but it was also addressed in the initial legal challenge. The court noted that many definitions of public use were vague and could be construed expansively or narrowly, but also stated that efforts at constructing a sufficiently detailed definition would never succeed. On a case-by-case basis, the courts would be able to intervene if and when legislatures stretched their takings powers too far. Accordingly, the original ruling indicated general deference to New London’s determination of public use. The judge, however, also found no evidence that Pfizer made demands regarding the Fort Trumbull neighborhood as a condition of its plant relocation elsewhere in the city.

NLDC’s ability to exercise eminent domain powers as an agent of the local government was upheld, but the Connecticut Superior Court issued injunctions on the takings in Fort Trumbull. Some of the properties, where the city did not have a clear plan for their use, were granted permanent injunctions; the others were granted temporary injunctive relief pending an appellate court resolution (Kelo, et al., v. City of New London, et al. 2002). Had New London or NLDC provided a clearer justification for why the Fort Trumbull properties were needed, the takings likely might have been upheld.
The Kelo case was then heard on appeal by the Connecticut Supreme Court on December 2, 2002. The Connecticut Supreme Court decision was issued on March 9, 2004, and it reversed the lower court injunctions and upheld all of the takings initiated by NLDC (Kelo, et al., v. City of New London, et al. 2004). The Connecticut Supreme Court noted that the principal issue at hand was the question of public use, as the property owners challenged the overall constitutionality of Connecticut’s eminent domain statute, as well as its particular application for projected economic development initiatives in New London. The state supreme court upheld the general constitutionality of the Connecticut’s statute, citing the key federal precedents of Hawaii v. Midkiff (1984) and Berman v. Parker (1954), among others, and finding that the state’s statutory language was similar enough to these standards to be permissible.

The plaintiffs presented some examples of cases from other states’ courts where eminent domain exercises for local economic redevelopment were declared inappropriate, but the Connecticut Supreme Court believed those instances to be “outliers” and reiterated the important role of “responsible judicial oversight” to prevent such abuses. Although much of the plan development was delegated to NLDC, the New London City Council voted to approve the plan, providing legislative oversight before the implementation of the redevelopment initiative. In its ruling, the state supreme court noted that the preface to NLDC’s development plan included the stated goals of providing facilities in support of the Pfizer plant, encouraging public access to the waterfront area of New London, and “build[ing] momentum” for the revitalization of the rest of the city. These stated objectives, coupled with the economic projections for the development, were sufficient to indicate that a public use existed for the project.
Granting Cert in Kelo and Eminent Domain in the Lower Courts

U.S. Supreme Court takings precedents regarding eminent domain exercises for economic development can be thought of as fairly consistent, prior to and including the Kelo decision. In general, the Court’s rulings favor government actors and typically uphold their exercises of eminent domain when challenged by private property owners. Although the decision of the Court proved unpopular,\textsuperscript{13} it appears consistent with their precedents in this area. The question of why the Court reached its decision in Kelo, therefore, can be explained by consistency with existing precedents. The relatively straightforward answer to this question, however, raises another question that is more difficult to answer. If, from the outset, Kelo was likely to result in a reaffirmation of longstanding Court deference to state legislatures on definitions for public use, why did the Court decide to grant certiorari to the petitioners and hear the Kelo case?

On an annual basis, the U.S. Supreme Court receives approximately 7,000-8,000 petitions for a writ of certiorari, yet it only hears about 80 cases, a number that has decreased over time (O’Brien 1997; U.S. Supreme Court 2016). A variety of factors go into the Court’s determination of whether or not a case should be heard, including relatively practical reasons like workload management and mootness of a case. It is also commonly presumed that, in addition to considering the letter of the law, existing precedents, and legal standards, the Justices also seek policy outcomes that are consistent with their ideological values. Strategic Justices can use the cert stage to screen out cases that would likely be decided in ways inconsistent with their preferences or advance cases

\textsuperscript{13}For example, a poll conducted by the University of New Hampshire in July 2005 found that only 4\% of respondents supported the Kelo grounds for takings and 93\% of respondents opposed them. A Saint Index national survey from the fall of 2005 revealed that 81\% of respondents disagreed with the Kelo decision, with 63\% of the respondents disagreeing strongly (Somin 2009, 2019-2010).
that would likely promote their preferences (Epstein and Knight 1998; Schubert 1962; Spiller and Gely 2008).

Lower court activity is usually a necessary precursor for an appeal to the Supreme Court, and as a result, a sizable “supply” of cases seeking cert from the Court provides more opportunities for the Court to choose the cases it wants to fill its docket. A high volume of cases litigated in the lower courts may signal to the Supreme Court that a legal issue needs attention; it can also create conflicting precedents between courts. These assumptions are reflected in the approaches undertaken by the public interest law firms advocating for property rights, which engaged in an increasing amount of litigation throughout the lower courts in hopes of, someday, changing existing Supreme Court precedent related to eminent domain. The sections below will first examine the volume of judicial activity related to eminent domain in the years preceding Kelo, and then examine how those cases may have been addressing new legal questions, modifying existing precedents, or countering the Court’s interpretation of public use in ways that could have necessitated the Court’s granting of cert in Kelo.

Increased activity on eminent domain and takings cases at the lower court level by itself might provide a reason for the Court to take on a case like Kelo and clarify precedent. Even if the lower courts consistently side with the Supreme Court’s precedent, a higher volume of cases being litigated might suggest that there is an additional legal question that the Court should weigh in on, or perhaps that new laws or other societal changes were causing litigants to misinterpret how existing precedent would apply under changed circumstances. An examination of the possible cases the U.S. Supreme Court could have heard on property rights provides insight into the overall level of legal activity.
on the subject. The ascendancy of public interest law firms advocating for property rights suggests that there should be an increasing number of legal conflicts and litigation in this issue area. The lower courts should be hearing more cases addressing questions of property owner rights over time as public interest law firms like IJ push litigation in this area: by extension, the number of petitions received by the Supreme Court to take a property rights case like Kelo should also increase over time, culminating in 2005 when the Court did take Kelo.

Analyzing the set of cases appealed to the Supreme Court from lower state and federal courts provides a way to examine the broader universe of takings cases. Because some cases are sufficiently settled in their initial trials or earlier appeals, this subset of cases in the state and federal courts represents the pool of cases from which the Justices select appeals to hear. At an average of 7,000-8,000 cases per year, the subset of cases in which cert petitions were filed is still rather large and should provide the Justices a number of opportunities to hear cases on a variety of issues.

Data on cases appealed to the U.S. Supreme Court were gathered using the Supreme Court Today Navigator.\textsuperscript{14} Information on cases dating back to 1995 are available through this source, which covers much of the time period after the public interest firms had been established and were increasingly organized and taking on property rights cases. The search field was limited to select cases through December 31, 2005, the end of the calendar year in which Kelo was decided. To limit the scope to cases

\textsuperscript{14} Supreme Court Navigator is a tool available to search the archives of Supreme Court Today, via subscription service from Bloomberg BNA, available at http://www.bna.com/supreme-court-today-p5946.
most similar to the main issue in Kelo, the search was limited to cases involving the Fifth Amendment’s takings clause, as coded in the dataset.\footnote{For the variable “lawSupp,” the selected cases were the ones coded 211, or “Fifth Amendment (takings clause).”}

Between August 15, 1995, and December 31, 2005, 387 cases appealed to the U.S. Supreme Court addressed the takings clause. Within this entire set of appeals, only about 4\% were granted cert and decided by the Court, including Kelo.\footnote{The coding and search criteria used by Supreme Court Navigator are somewhat different from those used in the Supreme Court Database and mentioned in preceding sections. The total number of takings cases heard by the Supreme Court in this period, for example, using the Supreme Court Navigator criteria is 16. The data from Supreme Court Navigator, therefore, may be underrepresenting the pool of cases on takings that do make it to the U.S. Supreme Court. Because the Supreme Court Navigator data are being used only to examine the potential universe of appeals to the U.S. Supreme Court, and not the cases heard by the Court, the lack of direct comparability in takings cases heard by the Court should not be consequential.} Many of these cases, however, are not very comparable to Kelo, since the issue of takings encompasses much more than only eminent domain exercises of private property for redevelopment.

Subdividing this set of cases seeking certiorari helps better identify parallels to Kelo that were more closely related to its legal questions. Table 2 lists the lower court cases that were appealed to the U.S. Supreme Court and that specifically addressed eminent domain between 1995 and 2005.\footnote{The Suitum and Tahoe-Sierra cases that were heard by the U.S Supreme Court and discussed in the preceding paragraph are not included here, as they were classified as zoning-related (regulatory) takings cases by Supreme Court Navigator.} Including Kelo, only eighteen cases addressing eminent domain were appealed to the U.S. Supreme Court. This represents only 4.7\% of the overall takings appeals during this period. The Court received multiple petitions each year addressing some aspect of takings but comparatively few involved challenges involving public use, as it related to exercises of eminent domain over private property.
By itself, the small overall number of eminent domain cases appealed the U.S. Supreme Court might not indicate a level of issue salience sufficient to hear a case like Kelo. The dates of these appeals, however, may suggest that more of a momentum was building by the early 2000s. Between 1995-1999, only four of these cases were appealed to the Court, but over the next span of four years, from 2000-2004, eleven of these cases were appealed to the Court, with Kelo marking the last of these petitions for 2004. This small but comparatively large increase of appeals suggests a possible degree of salience or lower-court disagreement that merited involvement by the U.S. Supreme Court.

Table 1: Eminent Domain Cases Appealed to U.S. Supreme Court, 1995-2005

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Date Filed</th>
<th>Last Action</th>
<th>State</th>
<th>Court Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bugryn v. Bristol, CT</td>
<td>9/5/2001</td>
<td>11/13/2001</td>
<td>CT</td>
<td>State Appellate</td>
</tr>
<tr>
<td>Baillon Co. v. Port Authority of City of Saint Paul, MN</td>
<td>1/14/2002</td>
<td>3/25/2002</td>
<td>MN</td>
<td>State Appellate</td>
</tr>
<tr>
<td>Urbine v. Piedmont Triad Airport Authority</td>
<td>1/25/2002</td>
<td>4/1/2002</td>
<td>NC</td>
<td>State Appellate</td>
</tr>
<tr>
<td>Tal Technologies Inc. v. Oklahoma City, OK</td>
<td>2/1/2002</td>
<td>4/15/2002</td>
<td>OK</td>
<td>State Appellate</td>
</tr>
<tr>
<td>Walser v. Richfield, MN, Housing and Redevelopment Auth.</td>
<td>8/20/2002</td>
<td>10/21/2002</td>
<td>MN</td>
<td>State Supreme</td>
</tr>
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</table>
The Kelo plaintiffs provide several reasons in their petition to the U.S. Supreme Court for a writ of certiorari to explain why their case was different from other public use cases that had sought an audience before the Court. Kelo was granted cert, even though the Court had not heard any of the other substantively similar eminent domain cases in recent years: it is worth considering the points made in the plaintiffs’ petition, since the Court likely found something about it persuasive. Although the plaintiffs do not expressly discuss legal conflict among the lower courts, it is alluded to at various points throughout their brief, as the broad judicial deference to state legislatures in determining public use created ambiguity that resulted in differing interpretations and applications across states.

Scholars frequently find that disagreements between courts leads the Supreme Court to take a case on a particular legal question (Caldeira and Wright 1988; Clark and Kastellec 2013; Grant, Hendrickson, and Lynch 2012; Lindquist and Klein 2006). Many examine this dynamic as circuit conflict, where multiple appellate courts create conflicting precedents, and the Court may engage in a form of error correction by setting a uniform interpretation. These studies typically examine the influence of lower court conflict on the Supreme Court’s decision to grant certiorari, but the Supreme Court may also take information cues from the lower courts when they are deciding the outcome of a
case. Lindquist and Klein (2006), for example, find that the Supreme Court is more likely
to make a decision in keeping with the majority view expressed by the lower courts.

In their petition to the Supreme Court, the Kelo plaintiffs noted that the Court
consistently upheld the need for a public use in order to justify any property takings, and
they cited a number of examples in which local government actors, or their designees,
appeared to be stretching that public use connection for economic development projects.
In their brief, the plaintiffs note that under Connecticut’s ruling, “private business
development is transformed into a public use simply because of the ‘secondary’ or
‘trickle-down’ benefits a business may produce” (13). This line references decisions
made, respectively, by a federal circuit court in Daniels v. Area Planning Commission of
Allen County (2002) and by a state court in Southwestern Illinois Development Authority
v. National City Environmental (2002), both of which invalidated those types of takings.
In the Southwestern Illinois Development case, the state supreme court actually reversed
itself; in its first decision, the court upheld the takings, but upon reconsideration, it
declared it impermissible.

The plaintiffs used these and other examples to argue that local governments and
developers were not truly abiding by the public use standard and that state and federal
courts were beginning to mark some boundaries where the claim of public use as an
ancillary benefit would not be sufficient grounds for taking private property when
business entities were the primary beneficiaries. They note that seven states, including
Connecticut, allowed condemnations solely for private business, but eight states
prohibited eminent domain exercises that transferred property to private owners for
purposes other than blight elimination and other states were struggling to determine how
to handle these situations. The petitioners also pointed the Court to the dissenting opinion they received from the Connecticut Supreme Court, which explained how their case was different from Berman and Midkiff and provided a legal rationale that “harmonizes those decisions” while providing “greater scrutiny of municipal decisions regarding particular economic development considerations” (22). The plaintiffs highlighted the diverging judicial ideas emerging from state and federal Courts, and the Court may have viewed this as a reason to take the case; unfortunately for the plaintiffs, the Court would then go on to reaffirm its longstanding interpretation of public use rather than change its standard.

The petitioners’ claim in Kelo was also supported at the certiorari stage by two prominent public interest law firms. Pacific Legal Foundation and the Property Rights Foundation of America both submitted amicus briefs at the cert stage in Kelo. As Gregory Caldeira and Jack Wright have demonstrated, amicus briefs increase the likelihood that the Court will grant cert (1998; 1990). Interest group may submit amicus briefs to provide policy insights or information regarding the scope of the affected parties in the hopes of affecting the outcome of a case (Collins 2004, 2008a; Shapiro 1984; Spriggs & Wahlbeck 1997), but they may also submit briefs as a form of credit-claiming or otherwise advancing their own organizational objectives (Zuber, Sommer, & Parent 2015). Contemporary legal observers have also noted the particularly high number of certiorari-stage amicus briefs submitted by public interest law firms around the time of the Kelo case and their relative success in having cases heard by the Court. In terms of the number of cert-stage amicus briefs submitted, one analysis ranked Washington Legal Foundation, Pacific Legal Foundation, and Mountain States Legal Foundation among the
ten most active participants between May 2004 and August 2007.\textsuperscript{18} In terms of success in reaching the Court, Washington Legal Foundation had the best performance of any cert-stage amicus participant, with the Court granting cert in 39\% of the cases it had submitted a brief for. Pacific Legal Foundation had a 28\% success rate, and Mountain States Legal Foundation had an 18\% success rate (Chandler 2007).

Finally, the petitioners argued that their case presented a simpler question for the Court than other cases brought before the Court, many of which involved eminent domain exercises to remove blighted properties. In New London, however, the properties were being condemned solely for economic development and the Court would not have to make any considerations involving the blight determination process. They noted that their New London case “presents the issue with a fully-developed record and legal decisions and is not muddied by procedural difficulties that could frustrated review. The legal issue could not be more clearly presented to this Court: What, if any, limits does the U.S. Constitution’s public use requirement place on government’s ability to use eminent domain for the purpose of generating tax revenue and increasing employment?” (21).

The particular reasons why the Justices decided to grant cert in Kelo may never be known, but the petitioners’ cert brief contains arguments that were presented to the Justices, and it is reasonable to infer that some of those arguments may have been persuasive. First, the increased volume in eminent domain cases circulating through the lower courts may have created opportunities for conflicting, or at least muddling, interpretations of appropriate standards of public use, as indicated in the petitioners’

\textsuperscript{18} Washington Legal Foundation was ranked third with 26 cert-stage briefs; Pacific Legal Foundation was ranked fourth with 25 submitted briefs; and Mountain States Legal Foundation was tied for eighth place with 10 submitted briefs.
account of other recent cases. Secondly, public interest law firms were also advocating for the Court to hear the Kelo case by submitting amicus briefs at the cert stage. Lastly, the legal question at hand in Kelo may have been more straightforward and easier to adjudicate than other cases related to public use appealed to the Court. Outside of the Kelo example, these explanations are all consistent with factors that political scientists have linked to the Court’s decisions to grant cert.

Takings Cases Before the U.S. Supreme Court

In addition to the Court’s decision to hear Kelo, it is also worth considering whether the Court should have been expected to rule in favor of the local government instead of the individual property owners, as it did in the Kelo decision. Issue salience, and Court receptivity, are the types of factors that strategic litigants might consider when deciding whether or not to invest significant time and resources pursuing cases they hope could change existing legal precedents. As a national, ideologically-based, public-interest law firm, the IJ should be considered as a strategic litigant, pursuing in the Kelo case because of its desire to enact legal reform regarding property rights jurisprudence. The volume of takings cases heard by the Supreme Court, and the direction in which they were decided, provide context for the salience of takings as an issue before the Court and some indication of whether or not a verdict in favor of the local government and against the property owners, as occurred with Kelo, was to be expected.

Table 2 displays the number of takings cases heard by the Supreme Court between 1946-2015, divided by Court eras, or periods of time led by a particular Chief Justice. Also included is the overall ideological trend for takings decisions in each era, based on the classification system used by the Supreme Court Database at the
Washington University in St. Louis. Typically, in this issue area, a liberal decision would favor government/development interests and allow a taking; a conservative decision would favor the property owner(s) and prohibit a taking.

The conservative public interest firms involved in Kelo and other property rights litigation rightly observed that the Warren Court (1953-1968) and the Burger Court (1971-1985) tended to make liberal decisions in this area, siding with government more frequently than individual property owners. As expected, the Rehnquist Court (1986-2005) was more conservative than the preceding Courts; however, under Rehnquist, the Supreme Court did not completely reverse directions. Overall, the Rehnquist Court made liberal rulings in takings cases 48% of the time, with Kelo, the last takings case heard by the Rehnquist Court, included. If Kelo is omitted, however, the Rehnquist Court record skewed in a more liberal direction, with 54% of the takings cases heard resulting in liberal decisions. While the Rehnquist Court record on takings was not overwhelmingly conservative, it was at least more favorable to property rights proponents than previous Court eras had been. Those involved with the Kelo litigation, therefore, may have rationally assumed the Rehnquist Court could side in their favor.

Table 2: Supreme Court Takings Cases, by Era and Outcome

<table>
<thead>
<tr>
<th>Court Era (Chief Justice)</th>
<th>Takings Cases Heard*</th>
<th>% Liberal Rulings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vinson (1946-1952)</td>
<td>26</td>
<td>65%</td>
</tr>
<tr>
<td>Warren (1953-1968)</td>
<td>14</td>
<td>71%</td>
</tr>
<tr>
<td>Burger (1971-1985)</td>
<td>29</td>
<td>69%</td>
</tr>
<tr>
<td>Rehnquist (1986-2005)*</td>
<td>25</td>
<td>48%</td>
</tr>
<tr>
<td>Roberts (2005-2016)</td>
<td>6</td>
<td>67%</td>
</tr>
</tbody>
</table>

* Data for this category were drawn from Harold J. Spaeth, et al., The Supreme Court Database, Washington University, updated 2016, available at http://www.supremecourtdatabase.org. The primary selection criteria involved the “issue area” variable with values of representing “due process: takings clause, or other non-constitutional governmental taking of property (40070).
* Kelo was the last takings case heard by the Rehnquist Court. It is included in this table, but if it is omitted, the Rehnquist Court heard 24 takings cases, with 54% of them decided in a liberal direction.
Since the Roberts Court began after the Kelo decision, its attitude toward takings cases are not particularly relevant to the discussion on why the Supreme Court took Kelo, however, it is interesting to note that the Roberts Court is more consistent with the Burger, Warren, and Vinson Courts in its rulings on takings. The Rehnquist Court, in hindsight, appears to have provided property rights advocates their best opportunity for shifting takings precedents in their favor. In addition to deciding a higher proportion of cases in a liberal direction, the Roberts Court does not hear very many takings cases, when compared to its predecessors. The first takings case after Kelo was not decided until 2010.\(^\text{19}\) The low number of takings cases heard by the Supreme Court in recent years may indicate a degree of reluctance on the part of the Justices, post-Kelo, to avoid additional property rights controversies.

Figure 1 provides further suggestions that property rights advocates might have presumed a more favorable Rehnquist Court outcome. The same data are used, divided by year of takings case decision and the direction of the ruling. Although the overall number of cases is very small, the Rehnquist Court throughout the 1990s was consistently more conservative in its takings decisions than it had previously been in the 1980s. When Kelo was being initially litigated and appealed, indications from the immediately preceding years (1998-2001) would have suggested to property rights advocates that a more favorable outcome was likely. By 2005, however, the Rehnquist Court had returned to more liberal positions. Kelo was the last one of three takings cases decided by the

\(^{19}\)Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al. (560 U.S. 702, 2010). This case was decided in a liberal direction, but involved environmental regulations imposed on property owners, which is a fairly common source of property rights litigation. It did not address an economic redevelopment takings as in Kelo.
Court that year. By the time the other cases were decided, Kelo had already been granted cert, and it would have been too late for this information to have affected the plaintiffs’ choice to pursue a case before the Court.

**Figure 1: Direction of Rehnquist Court Takings Decisions, 1987-2005**

![Diagram showing the direction of Rehnquist Court takings decisions from 1987 to 2005.](source)


Figure 2 illustrates the dynamics on the Supreme Court leading up to, during, and following the Kelo decision, by displaying estimated ideological ideal points for each Justice. While some ideological principles may remain stable over time, evidence

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20 In the year following the Kelo ruling, Chief Justice Roberts replaced Chief Justice Rehnquist, and Justice O’Connor was also replaced by Justice Alito; the replacement Justices are marked with triangles in the same color as the circle markers that represent their predecessors.
suggests that the preferences of some Justices do change over time (Epstein, Hoekstra, Segal and Spaeth 1998). Figure 2 provides further evidence that strategic property rights advocates may have viewed the Rehnquist Court in the early 2000s as more sympathetic to their cause. In the figure, higher values represent more conservative perspectives; lower values represent more liberal perspectives. Two key dates are highlighted in the figure: 2001 (the year the Kelo case was first taken to court in Connecticut) and 2005 (the year Kelo was heard by the U.S. Supreme Court).

A number of factors beyond ideology influence judicial decision-making and these scores represent views on a number of issues, not just property rights, so they are somewhat limited in their predictive power for case outcomes. Lawyers working on cases, however, also lack perfect information about how Justices are likely to respond. Thus, making general inferences from these types of ideology scores can serve as a suitable approximation of what the plaintiffs' attorneys might have expected from the Court.
Importantly, the Supreme Court had a majority of five consistently conservative Justices in the years leading up to the Kelo decision. This did not, however, reflect a sudden change in the Court's composition, as its members and their general ideological positions had remained the same since the early 1990s. As the Kelo case matriculated from state court to the Supreme Court between 2001 and 2005, the ideology scores of most of the Justices moderated, importantly, including those of the more liberal Justices. With a solid majority of conservative Justices, and the minority liberal Justices sometimes tending toward more conservative positions, strategic lawyers seeking a new precedent favoring property owners in the face of eminent domain may have viewed the early 2000s as a window of opportunity.
Shifting Supreme Court Precedents Regarding Zoning as Takings

The content of the takings cases heard before the Supreme Court can provide additional clues about why Kelo was likely heard and why property rights advocates believed a favorable outcome was possible. The number of takings cases that involve local or state governments using eminent domain powers, as in Kelo, is very small. As discussed previously, many observers reach all the way back to the 1954 case of Berman v. Parker or, sometimes, the 1984 case of Hawaii Housing v. Midkiff when looking for landmark Supreme Court cases similar to Kelo. Yet as indicated by Table 1, cases addressing the broader issue of takings continued to be heard regularly by the Court. The case facts and legal issues in these cases may not be as similar to Kelo as Berman or Midkiff are, however, some of them bear similarities, or set encouraging precedents for property rights advocates if examined more closely.

As increasingly comprehensive, and in many ways restrictive, land planning occurred among state and local governments during the 1970s and 1980s, zoning codes and associated regulations promoting environmental protection, historic preservation, or other policy objectives were challenged in the courts. When a regulation went too far, it could be considered, effectively, a taking of private property; because these regulations were government requirements, no compensation of any sort was usually provided to the property owner. When the early conservative public interest law firms formed during this time, many of them sought to undo the environmental regulations that they saw put into place by the liberal public interest law firms that preceded them. Thus, conservative public interest firms often took on challenges to environmental regulations, and the
rulings in this area of takings law may have suggested to public interest litigants that they may have an opportunity to rewrite a bigger property rights precedent set in Berman.

Three particular cases are often cited as key zoning-related takings cases, and each represented at least partial victories for property rights advocates. Whereas precedents in eminent domain cases like Berman and Midkiff consistently favored the government and its definition of public use, the precedents in these zoning cases consistently favored the property owners and challenged the government’s definition of public use. First, in Nollan v. California Coastal Commission (1987), city government regulations required property owners to build an easement in order to qualify for a building permit; the Supreme Court, in a 5-4 decision, ruled that the requirement was not permissible. In Lucas v. South Carolina Coastal Council (1992), state environmental regulations prevented a property owner from building on his lots; in a 6-2 decision, the Supreme Court found that by preventing use of the property, the owner’s land had been effectively taken by the government without just compensation. In Dolan v. Tigard (1994), a city granted a property owner a building permit on the condition that she provide land city public spaces; the Supreme Court found, in a 5-4 ruling, that the city requirements were not related to the permit sought.

By the 2000s, the public interest law firms that worked to promote individual property rights protections were well-established and had begun litigation in pursuit of their objectives. Their advocacy, in part, may have helped shape the judicial environment that they were operating in at the time of Kelo, through their amici participation and representation of plaintiffs in other cases. In general, contemporary takings-related decisions by the Rehnquist Court and the overall ideology of the Justices should have...
indicated an opportunity for an outcome more favorable for property rights advocates. Indeed, the close 5-4 split of the Kelo decision illustrates that several Justices agreed with the property rights advocates more than with the Court majority that chose to continue the precedent of deferring to legislative definitions of public use.

Conclusion

Because many people found the legislative and public reactions to Kelo v. New London surprising, it is worth considering if there was anything unusual about the case itself, the Supreme Court’s decision to hear the case, or the Court’s verdict. The circumstances surrounding the Pfizer development in New London contributed to its appeal as a justiciable case for the IJ, and, as the plaintiff’s brief argued, to the Supreme Court. The portion of development requiring an exercise of eminent domain in Kelo was for additional waterfront business development, not clearly required by the main economic development initiative, which was the Pfizer facility itself in another area of the city. The residents of New London were particularly primed to oppose the NLDC redevelopment initiative and support the IJ’s case, in part due to their experience with the city’s other failed economic redevelopment measures. Ultimately, the residents’ instincts were correct: although the Supreme Court upheld NLDC’s ability to take the properties in question, and the Fort Trumbull houses were relocated or demolished, no development has occurred on the properties taken via eminent domain, and the Pfizer plant has closed (Chhokra 2015; Epstein 2015). For the IJ, the facts in the New London case were well-documented and presented a sympathetic case; for the Court, the relatively narrow legal question involving how to define parameters for public use may have made it an easier case to address than other similar cases.
In the broader judicial landscape, other factors contributed to the Court’s decision to hear Kelo and the IJ’s presumption that Kelo might provide an opportunity to change the legal status quo. After the urban renewal initiatives of the 1970s, many state and local governments began to assume more active roles in facilitating economic development and revitalization of depressed downtown areas. As these projects involved nonprofit development corporations or partnerships with business entities, many state and local actors adopted a broader conceptualization of public use. Although the U.S. Supreme Court remained consistent in its position of deferring to these state and local legislators’ definitions of public use, conflicting standards came to exist among lower court precedents. This, coupled with the advocacy by public interest law firms at the cert stage, and the comparatively high number of eminent domain cases seeking certiorari by the early 2000s, likely contributed to the Court’s decision to hear Kelo. The ideology of the Justices, which was skewing more conservative by this time, may also have led some of the Justices to grant cert in hopes of shifting precedent toward greater protections for property owners. Although it is commonly thought that the Court makes decisions that generally align with public opinion, the Justices may not have been able to reasonably anticipate the degree of backlash that would occur following Kelo. The general direction of the Rehnquist Court’s decisions in takings cases, coupled with the small changes in precedents in related zoning cases and the overall ideological composition of the Court would have led strategic litigants like the IJ to presume Kelo provided an opportunity for a favorable Court outcome.
Chapter 4: Congressional Responses to Kelo v. New London

Introduction

Policymakers, following the Kelo v. New London decision, shared the public’s negative view of the ruling and perceived it as a broader threat to private property owners. Although the case involved a local economic development law, members of Congress felt compelled to take legislative actions intended to limit exercises of eminent domain similar to the takings that had occurred in Kelo. To date, sixteen bills have been introduced in the House or Senate referring to the Kelo v. New London decision; eight of these measures were introduced in the 109th Congress, which was the session in which the case was decided. Any substantive, legislative response from Congress attempting to undermine the implementation of a Supreme Court ruling is a relatively unusual action for members to take. The volume of legislation in response to Kelo, and the passage of one bill by the House, serves as an exceptional example of Court-curbing behavior by Congress.

This chapter will explore the response to Kelo v. New London from Congress, the Supreme Court’s co-equal branch in the federal government. The first sections provide background on generalized and particular sources of conflict between Congress and the Supreme Court, as well as determinants of congressional behavior. They are followed by an analysis of congressional support for the Kelo-related bill that passed the House. H.R. 4128, the Private Property Rights Act of 2005, was passed by the House on November 3, 2005, by a vote of 376 to 38, though it would stall in the Senate. Further insights on why a broad coalition within Congress supported such Court-curbing efforts in response to
Kelo are provided through an examination of members’ floor statements from the Congressional Record.

The Relationship Between Congress and the Supreme Court

In many respects, the three branches of the U.S. government are separate and enjoy a relatively high degree of independence from one another, yet, to some degree, each operates in an environment constrained by other political actors. Richard Neustadt described this as a “government of separated institutions sharing powers,” in which each branch has limited autonomy and must constantly interact with and anticipate reactions from other branches (Neustadt 1990, 29). Sometimes, the nature of federalism can introduce additional considerations for federal policymakers, who may feel constrained by how their policy choices may affect state and local government practices, norms, or expectations. The degree to which policymakers feel constrained by other political actors can vary based on ideological or political dynamics at the time of action and can depend on the nature of the policy issue, with deference to other political actors often coinciding with the perceived expertise or traditional role of various actors.

The Supreme Court and Congress often collaborate in federal policymaking. When Congress passes legislation, rulings by the Supreme Court can help ensure that federal agencies or state governments are following through with Congress’ intentions. The Supreme Court’s ability to invalidate congressional legislation, however, can place the two institutions at odds. Generally, however, Congress is expected to acknowledge the Supreme Court’s knowledge of law and the U.S. Constitution and defer to its interpretation and decisions. The sections below focus on some of the reasons why
Congress and the Supreme Court may come into conflict with each other, as well as the ways in which Congress can respond to the Court in a negative manner.

Separation of Powers

Some historians and scholars of American political development believe that tension between Congress and the Supreme Court stems from the separation of powers structure of the political system (Eskridge 1991; Ignagni and Meernik 1994; Marshall 1989). The structure of limited powers and checks and balances designed by the Framers has been further complicated over American history, as each branch has developed more expansive institutional roles than what was originally specified by the Constitution. In this view, as Congress and the Court each seek more influence over various policy realms, they naturally find themselves in conflict with each other and with the Executive Branch.

In the early history of the United States, Congress was intended to be the strongest branch, and the Supreme Court did not have very broad jurisdiction or much political influence. The most important areas of public policy, namely taxation, appropriations, and foreign relations, were considered outside of the judicial domain. Supreme Court jurisdiction increased throughout the nineteenth and twentieth centuries, and its jurisprudence began to overlap more with congressional policymaking. According to C. Herman Pritchett, for example, American government evolved “in such a way as to place responsibilities upon the Court which inevitably make it the subject of controversy and bring it into conflict with the two other branches of government” (1961, 5). As late as the 1960s, however, scholars were still divided over the Court’s institutional role in
relation to the other branches, and they had written little assessing the differences between judicial and legislative policymaking (Wells and Grossman 1966).

Conflict between branches can come from dynamics within Congress and the Court, but other political actors can also contribute to inter-branch tensions. Strategic businesses, labor unions, and citizen groups, for example, may venue-shop for the branch that is most closely aligned with, or most responsive to, their interests. Early in the 1930s, for example, Congress was more favorable toward union interests than the Supreme Court was, and labor activists focused their efforts on Congress. Yet after World War II, unions found that the Supreme Court was more responsive to their interests and turned their attention toward judicial policymaking (Schmidhauser and Berg 1972, 33). In these situations, the institution formerly courted by the advocates may believe that the new institution making policy on the group’s behalf is not only making the wrong policy decisions but is overstepping into a policy realm that traditionally is the other’s domain.

Instead of leading to conflict between Congress and the Supreme Court, separation-of-powers considerations also imply that the different branches of government must work together to successfully implement lasting policy. Once a justiciable issue is brought before the Supreme Court, the effects of its decisions have always been determined by other political actors, since the Court lacks any substantial means of enforcement. If the Court anticipates the other actors’ policy preferences and makes a decision in keeping with them, the Court may prevent other political institutions from taking actions to undermine a decision. Instead, the Court can rely upon the other institutions for assistance with enforcing the ruling (Epstein, Knight and Martin, 2001; 2004).
Ideological Differences

Many scholars have also traced inter-branch conflict between Congress and the Supreme Court to ideological or partisan disagreements between the institutions that get reflected in policy outcomes. Despite adherence to precedent and legal jurisprudence, Supreme Court justices do have political preferences that affect their decisions (Segal and Spaeth 2002). As political parties have become more polarized along ideological divisions, it is likely that members of Congress view many disagreements with the Court as ideologically based and not driven by fundamental inter-branch differences. Even before the modern shift toward party polarization, scholars noted that policy disagreements might be the biggest cause of inter-branch conflicts. In 1962, for example, Walter Murphy wrote that members of Congress view the Supreme Court as a “potential threat to their own policy aims,” and this leads them to “view judicial power with a suspicion which will turn to hostility whenever they themselves or articulate segments of their constituencies disapprove of specific decisions, or when those officials fear that their own policy-making prerogatives are being threatened” (268).

Why Congress Responds to the Court

Scholars have also focused on specific types and features of Court decisions that could increase the likelihood of a substantive congressional response. Early attempts to study congressional reactions to Court cases were rare and tended to explore the subject from a judicial perspective (e.g., Dahl 1957; Stumpf 1965, 1966; Schmidhauser and Berg 1972). Efforts have been increasing since the 1980s and 1990s to take a more comprehensive approach and also consider congressional motivations for responding to the Court. This coincides with the increasing occurrence of Congressional attempts to
intervene in policy decisions handed down by the Supreme Court (Eskridge 1991, 335-338; Henschen 1983).

Most Supreme Court decisions affecting Congress are reviews of laws passed by Congress and can be broadly classified as statutory interpretations or constitutional interpretations of legislation. Statutory interpretation can clarify the intent or provisions of the legislation, whereas constitutional interpretation determines whether or not the legislation conflicts with constitutional principles. Depending on the outcome, the Supreme Court can legitimize a statute or invalidate it, in part or in whole. Beyond the type of decision the Court is making, other factors, such as the salience of the issue or the broader political context, may also affect the likelihood and type of congressional response.

In Statutory Decisions

Laws written by Congress may be vague or ambiguous, and formal legal analysts view this as a legislative oversight problem the Supreme Court needs to solve by clarifying the intent and provisions of the legislation (Pritchard and Grundfest 2002). Ambiguity, however, may be a deliberate and strategic choice by members of Congress. When compromises among a variety of members are required to pass a bill, vague language can allow different legislators, or their constituents, to read the provisions the way they want to. Political scientists and legal scholars thus often view statutory ambiguity as a deliberate effort by Congress to delegate responsibility to the Court to legislate on its behalf. Strategic legislators from the minority congressional party may support more ambiguous language in a bill to let a more ideologically sympathetic Court provide an authoritative interpretation (Shipan 2000). On a particularly controversial
issue that is unpopular with key constituencies, Congress may also create a vague bill to deflect blame for the legislation (Balla, et al. 2002; Weaver 1986)

Once the law has been written and is before the Supreme Court, scholars have explored the possibility that, in statutory cases, the Court might “invite” Congress to respond to its decisions and welcome subsequent legislative changes made in response to its rulings (Henschen 1983, 447; Paschal 1991, 150-151; Ignagni and Meernik 1994, 362-363; Hausegger and Baum 1999, 163). Much of this literature has been theoretical, exploring the motivations behind Supreme Court invitations with little systematic analysis (Murphy 1964, 129-131; Spiller and Spitzer 1995; Spiller and Tiller 1996). Some studies suggest that justices might be inclined to let Congress respond on issues that are more complex or technical, presuming that Congress has better expertise in those areas (Eskridge 1991, 388-389); “political questions” brought before the Court may also be left to the legislative branch to decide (Diller 2008, 285). Other studies suggest that the justices are more interested in certain policy areas than others and will choose to let Congress resolve the issues that they care less about (Pacelle 1991, 1995; Petty and Krosnick 1995; Schauer 1991). Just as Congress may create ambiguous legislation to deflect controversy, the Supreme Court might also want to minimize criticism from the public, interest groups, or other political actors and encourage Congress to rework a statute and take the ultimate responsibility for the policy consequences.

When tested empirically, it is unclear if the Supreme Court is in fact constrained by other political actors’ preferences in its statutory decisions (Segal and Spaeth 2002, ch. 8). If Congress purposively creates ambiguity, the decision to write vague legislation may itself be a delegation of responsibility to the Supreme Court (A. S. Miller 1956, 31).
Congress, in these cases, would have no reason to respond back with legislation countering the Court’s decision, as it achieved its preferred outcome of having the Court interpret and further clarify the law. The Court can take cues from likely congressional preferences or general political conditions, but in many instances, it may be difficult for justices to gauge whether Congress will respond, and the Court might alter its decisions accordingly (Segal, Westerland and Lindquist 2011, 101).

In Constitutional Decisions

The power of judicial review has become increasingly powerful over the history of the Supreme Court. By invalidating a federal statute on constitutional grounds, the Court provides an important check on overreaches of congressional power (Barnum 1993; Epstein and Walker 1992; Murphy and Pritchett 1961; Segal and Spaeth 2002; Spaeth 1979). Members of Congress, however, may view the exercise of judicial review as an overreach of judicial power, or they may disagree with the ideological direction of the Court’s policy position, thus initiating a congressional response to the Court’s decision. This view is supported by legal academics who acknowledge that judicial review has the potential to produce counter-majoritarian outcomes (Bickel 1986; Friedman 1993). Responses from Congress often reflect the broader public sentiment, as constituent preferences appear to be a primary determinant of legislative responses to the judiciary. These actions by Congress are often referred to as “Court-curbing” behavior, and they may involve attempts to limit the Court’s powers or to thwart implementation of a specific decision (J. A. Clark and McGuire 1996; T. S. Clark 2009; Handberg and Hill 1990; Harvey and Friedman 2006; McDowell 1988). Court-curbing can have an instant
effect in limiting the Court, but it can also have a future constraining effect on Court
decisions, if the Court fears or anticipates more backlash from Congress.

Some scholars note that the Supreme Court is constrained by other political actors
when it issues constitutional rulings, even though it is more difficult for other actors to
effectively overturn a constitutional decision through normal legislative means (Meernik
and Ignagni 1995; Murphy 1964; Rosenberg 1992; Fisher 1993; Dahl 1957). Since the
Court can choose to invalidate a statute on its face or as applied, the latter may be used
strategically to prevent congressional reaction by limiting the effects of the policy
(Lindquist and Corley 2011). Constitutionally, it is permissible for Congress to pass
statutes that modify the impact of a Court ruling that struck down unconstitutional federal
or state law (Agresto 1984; Stumpf 1965, 382). Unlike statutory cases, however, it is
more difficult for Congress to legislatively respond in a way that would substantively
change the effect of the decision. Scholars have found mixed results regarding the
effectiveness of congressional reversal of constitutional decisions through regular
legislation (Segal, Westerland and Lindquist 2011). The strongest response Congress can
take to a Court ruling is proposing a constitutional amendment, but this does not often
occur.

Legal observers have noted that the Supreme Court under Chief Justice William
Rehnquist (1986-2005) was potentially more confrontational with Congress than previous
Courts. The Supreme Court historically has given laws passed by Congress a
presumption of constitutionality, believing that Congress passed legislation in a good
faith effort, consistent with its own responsibility to uphold the Constitution. Congress, in
this view, deserves judicial deference as a coequal branch of government, and one that
may reflect evolving popular conceptions of constitutionality.\textsuperscript{21} Ruth Colker and James Brudney, however, argue that by 1995, the Rehnquist Court had done away with the “longstanding presumption of deference toward the work of Congress” (2001, 105). One analysis shows that between 1994 and 2004, the Rehnquist Court struck down 30 federal statutes, many of which would have likely been interpreted in Congress’ favor by previous Courts (Diller 2008, 291-293).\textsuperscript{22} If the Rehnquist Court was more frequently at odds with Congress over the way Congress interpreted the Constitution through legislation it passed, it is likely that Congress and the Supreme Court could also differ on their interpretation of constitutional issues unrelated to federal legislation, such as the state legislation at issue in Kelo.

Scholars also suggest that Congress might be concerned when the Supreme Court declares certain state laws unconstitutional. Judicial review of state laws has historically been used to create consistent policies throughout states, thus imposing a Court-created federal standard upon the states (Caldeira and McCrone 1992, 120). This may inevitably create a conflict with members of Congress who believe in states’ rights and a more limited role for the federal government. For members of Congress from the state whose law was invalidated, or from states with similar values or policies, constituent concerns may motivate a reaction against the Supreme Court. Senators, in particular, often feel that they are responsible for advocating for their states’ interests at the federal level. Court

\textsuperscript{21} For example, see the dissenting opinion from Justice John Paul Stevens in United States v. Booker, 543 U.S. 220, 274 (2005) or United States v. Morrison, 529 U.S. 598, 607 (2000).

\textsuperscript{22} Diller argues that cases like United States v. Lopez, 514 U.S. 549 (1995), and Morrison v. United States, 529 U.S. 598 (2000) illustrate that the Rehnquist Court no longer deferred to Congress’ interpretation of its Commerce Clause powers. Earlier courts, however, in Wickard v. Filburn, 317 U.S. 111 (1942) and Katzenbach v. McClung, 379 U.S. 294 (1964), had shown greater deference to Congress in similar issues. He provides other examples, including civil rights matters and Congress’ ability to exercise 14\textsuperscript{th} Amendment powers over states.
decisions affecting state law may also have implications for related federal law in the same policy area. If Congress wishes to pass federal legislation that mirrors a given state law, it effectively must challenge the logic and grounds the Court used in determining that the state law was unconstitutional. Rulings related to state laws in civil rights, abortion, labor, interstate economic regulation are more likely to generate a legislative response (Meernik and Ignagni 1995, 44, 57).

Types of Congressional Responses to the Supreme Court

Because statutory decisions are narrow in scope, the resulting congressional response is usually similarly narrow, relating to the provisions of the specific legislation addressed by the Court. Scholars, therefore, have devoted more attention to studying congressional responses to constitutional decisions and have identified a variety of ways in which Congress has responded outside of legislative modifications (Rosenberg 1991, 377). In constitutional cases, scholars generally observe that although Congress may try to nullify the effects of a decision, it is usually careful not to attack the Supreme Court as an institution (M. C. Miller 1992, 960). Although constituent interests might cause members of Congress to oppose certain Supreme Court decisions, the professional and educational backgrounds of members and the general institutional support for the Supreme Court lead members to avoid institutional attacks (Clark and McGuire 1996, 775). Some findings also suggest that if the Court feels its institutional legitimacy is threatened, it will act in a constrained fashion to bring its rulings closer to congressional preferences and avoid congressional attacks (Handberg and Hill 1990; Nagel 1965; Toma 1996). Scholars looking at congressional Court-curbing thus find that Congress rarely diminishes the Supreme Court’s powers of judicial review (Gunther 1984; Peretti 1999;
Resnik 1998). Despite the lack of empirical findings, a large volume of theoretical literature exists, addressing the types of authority Congress can exercise over the courts or possible motivations for congressional action.

The most straightforward and effective response Congress can take to change the Supreme Court’s influence on constitutional matters is proposing a constitutional amendment. It is difficult, however, to successfully change the Constitution. Cognizant of this reality, members of Congress only rarely resort to proposing constitutional amendments as a direct result of a Supreme Court ruling. These proposed amendments, even if not passed by Congress or ratified by the states, may still have a future constraining effect on the Court. A constitutional amendment initiative can signal to the justices that their ruling is out of step with public opinion, or it is at least significant source of public controversy (Klarman 1998, 161-162; Raskin 1999, 85).

The last instance of a successful amendment to the Constitution initiated by Congress in response to a Court ruling came in 1971, following the decision in Oregon v. Mitchell (1970). In this case, the Supreme Court ruled that Congress could not set a voting age in state elections. Congress initiated what would become the 26th Amendment in response, which set a minimum voting age of 18 (O'Brien 1993, 397). Since it is understood that constitutional amendments will likely not succeed, members of Congress who propose and support these amendments are engaging in a position-taking activity that they know will not really have a direct impact on Court powers.

A notable example of a failed congressional attempt at amending the Constitution in response to the Court came in response to the flag-burning case of Texas v. Johnson (1989) (Clark and McGuire 1996). The Supreme Court invalidated a Texas statute that
banned flag desecration, asserting that it was protected expression under the First Amendment guarantee of free speech. In response, Congress first passed the Flag Protection Act of 1989, which was invalidated in United States v. Eichman (1990). Eichman then led members of Congress to advocate for the Flag Protection Amendment of 1990, but it was unsuccessful.

Another category of responses from Congress involves attempts to change the operations of the Supreme Court and/or lower federal courts. Changing the composition of the courts is one way Congress could do this, either by altering the number of available positions, seeking to remove judges through impeachment, or through carefully vetting judicial nominees through the Senate confirmation process. Due to the greater number of available lower court judgeships relative to Supreme Court vacancies, scholars have examined how the politics of the Senate nomination process can affect the ideological composition of the federal district courts (Martinek, Kemper and Van Winkle 2002; Binder and Maltzman 2002). Congress may also initiate legislation to increase the number of judgeships available throughout the federal judiciary when there is unified government and Congress can be more confident that the ideological makeup of the courts will tilt in its favor (de Figueiredo, et al. 2000; de Figueiredo and Tiller 1996).

Most importantly, Congress can change the jurisdiction of the Court, removing some of its authority over particular policy matters and thus restricting its powers of judicial review (Gunther 1984; Epstein, Knight and Martin 2001; Segal and Spaeth 2002; Lindquist and Solberg 2007; Chutkow 2008). These congressional responses are also relatively rare against the Supreme Court, though Congress may more commonly exert this type of influence over the lower levels of the federal judiciary (Chutkow 2008,
Generally, jurisdiction-stripping or similar measures are viewed as encroaches upon judicial independence, but it remains an important power available to Congress if dissatisfied with the federal judiciary (Moliterno 2006, 1205).

Congressional Deference to Court Decisions

It is difficult to find many clear instances of Congress responding to the Supreme Court constitutional decisions in a substantive way. Judicial politics literature explores several plausible reasons why Congress might not respond to Supreme Court decisions, including the idea that Congress might be deferential to the Court as an institution or that the majority of Court cases are low-salience and do not generate a response. The most compelling explanation, however, for the lack of a congressional response to Court decisions comes from the literature on strategic judicial decision-making (Epstein and Knight 1997; Spiller and Gely 1992; Gely and Spiller 1990; Epstein, Knight and Martin 2001; Bergara, Richman and Spiller 2003). Justices are forward-looking, sophisticated political actors who realize the role other branches play in helping to implement their policy preferences. Justices are aware of their reliance upon other branches for enforcement of decisions, and they also desire to maintain the Supreme Court’s public legitimacy. By factoring this into the decisions they make, Supreme Court justices design rulings that will not generate much of a negative response from Congress. In keeping with this view, scholars have frequently found that the Court and its constitutional decisions are rarely far-flung outside the general public mood (Marshall 1989; Mishler and Sheehan 1993; Friedman 2009; Caldeira 1986; 1987; McGuire and Stimson 2004). One study estimates that between 1947 and 1992, the Supreme Court was constrained by congressional and presidential preferences in approximately one third of its cases. In the
1950s, the Supreme Court was close to the conservative Pareto boundary of Congress, but the Court became liberal in relation to Congress during the late 1960s and returned to approaching the conservative boundary again in the late 1980s (Bergara, Richman and Spiller 2003). By anticipating reactions from Congress, the Court can make a decision that falls within the acceptable range of outcomes to Congress, and therefore, prevent a congressional response.

Determinants of Congressional Policy Support

Institutional or ideological disagreements with the Supreme Court clearly only apply to a small number of congressional actions. Political scientists have commonly explored theories of congressional behavior to explain why members of Congress do what they do, including how they vote on policies, what legislative and representational activities they engage in, and how they shape the structure or procedures of the House or Senate. These theories and models may also help explain why members of Congress undertake actions in response to a Supreme Court ruling. Scholars often talk about influences on congressional behavior as individual motivations, district-specific characteristics, or national level partisan and political considerations (Jacobson and Kernell 1983). Early theories of congressional behavior posited that norms, or the culture of the institution, helped shape members’ actions (Matthews 1959; Fenno 1962). More commonly today, economic or rational choice models posit that members of Congress are utility-maximizers in pursuit of a particular goal and as a result, congressional activities can be explained as ways for members to achieve their goals.

Members of Congress often may have multiple goals, such as creating good public policy, advancing their own power within the House or Senate, and winning
reelection (Fenno 1978). The desire to win re-election is usually viewed as the primary goal, or at least a necessary goal (Dodd 1977), of members of Congress, since staying in office is a prerequisite to achieve most other legislative or career goals. With elections occurring every two years, scholars have noted that members of the House wage a “permanent campaign” and start thinking about the next election almost immediately after Election Day (Blumenthal 1980; Brady and Fiorina 2000). As a result, members of Congress pay careful attention to important constituencies within their districts (Fenno 1977; Cain, Ferejohn and Fiorina 1987). Constituencies may include groups within the electorate, but may also include state-level political leaders or officials. David Mayhew famously delineated types of congressional activities that help members achieve their reelection goals. Members advertise themselves and seek name recognition; they engage in position-taking to present themselves favorably on a policy issue; and they engage in credit-claiming for popular initiatives (Mayhew 1974).

Political parties assist members of Congress with their goals and also have broader effects on congressional outcomes (Cox and McCubbins 1993; Rohde 1991). Party identification is often cited as one of the most reliable predictors of congressional voting behavior, although it may reflect a correlation with legislators’ and constituents’ policy preferences rather than the influence of the party itself (Snyder and Groseclose 2000). Some studies suggest that party influence over members’ voting behavior has weakened in recent decades (Collie and Brady 1985; Krehbiel 1993). As the two parties have become more ideologically distinct, party and ideological preferences may be more difficult to distinguish from one another.
Party leaders, however, are often credited with influencing both the policy agenda and policy outcomes, particularly in the House. For example, majority party leaders are able to exert negative agenda control and keep bills from serious consideration or floor vote or invoke procedural processes to favor or disadvantage particular pieces of legislation (Bach and Smith 1989). Under the theory of conditional party leadership, party leaders are stronger when their party is ideologically homogeneous, institutional features support the powers of the leader, and the leader is willing to exercise those powers (Rohde 1991). The strength of party leadership may also be stronger when the two parties are ideologically polarized (Cooper and Brady 1991).

Despite the increasing importance of party leaders in Congress and the increased polarization between the parties, some findings suggest that there is relatively seldom conflict over legislation. Many bills are multifaceted, or do not deal directly with controversial issues or provoke intraparty disagreements. John Aldrich and David Rohde note, “[b]ecause members do not run directly against one another, there is not a zero-sum relationship among them, and all members can potentially benefit from the adoption of legislation” (2008, 262).

Measuring Congressional Support

Members of Congress can publicly indicate their support or disapproval of an idea or policy proposal in several ways. Roll-call voting is a common measure of legislator’s views; legislators and the public alike know this is an action that has substantive effects and becomes a permanent legislative record. A vote is often viewed as one of the strongest indicators of one’s support or opposition. On the other end of the spectrum, members of Congress can make statements on the floor of the House or Senate that
appear in the Congressional Record. Comments during a debate on a bill or an amendment may be clearer indications of policy concerns or preferences; other opportunities, like morning speeches or special order speeches, may be symbolic signals to constituents akin and position-taking behavior (Hatch 1988, 44-45; Maltzman and Sigelman 1996; Morris 2001).

Sponsorship of legislation is another measure that indicates a significant level of commitment to an issue or policy (Krehbiel 1995, 906, 910; Talbert and Potoski 2002). Bill sponsorship may also be used to signal positions and legislative activity to constituents (Schiller 1995). More legislators can engage in cosponsorship of a bill, but there are conflicting interpretations regarding the meaning of cosponsorship. Some believe that cosponsorship is a signal to other legislators regarding how they should vote and can affect the decision-making calculus for other members (Kessler and Krehbiel 1996; Talbert and Potoski 2002). Others note that cosponsorship is higher among newer members and those with less electoral security and suggest that it is a position-taking signal to constituents (Mayhew 1974; Campbell 1982; Koger 2003). Members may undertake a variety of actions to signal support or strategy to different audiences.

The Congressional Response to Kelo v. New London

Members of the U.S. House of Representatives issued several legislative responses in the days and weeks following the Supreme Court’s Kelo v. New London decision on June 23, 2005. Members of Congress occasionally addresses Supreme Court rulings directly, and often when they do, their proposals come in the form of a resolution. These resolutions are largely symbolic measures, expressing the sense of Congress, but have no substantive impact. On June 29, 2005, the House did agree to a resolution of this
type (H. Res. 340) by a 365-33 vote to express members’ opposition to the Supreme Court’s decision in Kelo v. New London. Although resolutions are a more common legislative response from Congress than bills addressing a Supreme Court decision, even resolutions are still relatively rare.

To illustrate the relative infrequency of congressional legislative responses, Table 3 provides a list of other major Supreme Court decisions during its 2004-2005 term and notes what, if any, legislative proposals during the 109th Congress, referred to the case. Excluding Kelo v. New London, nine major cases for the term were identified by Congressional Quarterly. Two House resolutions were introduced, making references to three Supreme Court decisions, but neither resolution was agreed to. Two Senate resolutions were agreed to, making references to two other Supreme Court decisions. Of these, only S. Res. 92, referring to Roper v. Simmons, could be construed as a message in response to the Court: the resolution expressed a sense of the Senate that the judiciary should interpret the U.S. Constitution based “an understanding of its original meaning.” None of these other resolutions can be characterized as a strong stance against the Supreme Court’s decision, as was the case with H. Res. 340 in response to Kelo.

Table 3: Legislative Responses During the 109th Congress to Major U.S. Supreme Court Cases (2004-2005 Term)

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision Date</th>
<th>Actions During 109th Congress (2005-2006)</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Booker</td>
<td>01/12/2005</td>
<td>H. Res. 771 introduced 04/06/2006; Republican sponsor and 2 Republican co-sponsors; written to express the sense of the House that those who commit acts of sexual violence against children should be prosecuted to the fullest extent of the law</td>
</tr>
<tr>
<td>Roper v. Simmons</td>
<td>03/01/2005</td>
<td>S. Res. 92 introduced 03/20/2005; Republican sponsor. “Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States” should be based on “an understanding of the original meaning of the Constitution of the United States.”</td>
</tr>
<tr>
<td>Case</td>
<td>Date</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>-----------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Smith v. City of Jackson</td>
<td>03/30/2005</td>
<td>N/A</td>
</tr>
<tr>
<td>Granholm v. Heald</td>
<td>05/16/2005</td>
<td>N/A</td>
</tr>
<tr>
<td>Medellin v. Dretke</td>
<td>05/23/2005</td>
<td>N/A</td>
</tr>
<tr>
<td>Gonzales v. Raich</td>
<td>06/06/2005</td>
<td>N/A</td>
</tr>
<tr>
<td>McCreary County v. ACLU</td>
<td>06/27/2005</td>
<td>H. Res. 214 introduced 04/14/2005; Republican sponsor and 11 Republican co-sponsors; would have directed Speaker to display Ten Commandments in the House chamber if the Supreme Court, in its ruling for this case, prohibited the display of the Ten Commandments in public places</td>
</tr>
<tr>
<td>Van Orden v. Perry</td>
<td>06/27/2005</td>
<td></td>
</tr>
<tr>
<td>MGM Studios v. Grokster</td>
<td>06/27/2005</td>
<td>Senate hearing (S. Hrs. 109-115) on 07/28/2005; S. Res. 448 agreed to 05/22/2005; Republican sponsor and 2 Republican and 2 Democratic co-sponsors; expressed sense of Senate that higher education institutions should deter and eliminate copyright infringement from occurring on their computers and networks</td>
</tr>
</tbody>
</table>

*Bills referring to Roper v. Simmons were introduced in the 110th Congress (H.R. 4300, H.R. 2289, and H.R. 3305) |

Notes: Kelo v. New London was also included in the list of major cases for the term but was excluded from this table.
Source: CQ Press, Major Cases: U.S. Supreme Court, 2004-2005 Term and legislative information from Proquest Congressional

Importantly, H. Res. 340 was not the only legislative action Congress took in response to the Kelo decision. Appendix B lists and summarizes all the bills introduced by members of Congress that directly refer to Kelo v. New London from 2005 through 2017. Eight bills in the 109th Congress were introduced in response to Kelo. This is an unusually high number of legislative proposals in response to a Court ruling, and it may even underestimate the congressional legislative response because the count excludes some substantively similar eminent domain bills that did not make a reference to the case.23 Bills mentioning Kelo and seeking limitations on eminent domain have also been

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23 One bill that is excluded, for example, is H.R. 3135, the Private Property Rights Protection Act, which Rep. James Sensenbrenner (R-WI) introduced on June 30, 2005. The bill shares a title with later measures that Sensenbrenner introduced that do include a reference to Kelo; many of its provisions are, in fact, found in H.R. 4128, which passed the House and referred directly to Kelo. Another bill, H.R. 3405, the Strengthening the Ownership of Private Property (STOPP) Act of 2005, was introduced on July 22 by Rep. Henry Bonilla (R-TX). The purpose of the STOPP Act was to prohibit federal economic development funds from being distributed to any state or local government that used eminent domain powers to take
introduced in every session since the 109th Congress. Many of these bills died in committee and did not receive significant consideration by the House or the Senate.

One bill in particular stands out among the Kelo legislation introduced at the federal level. H.R. 4128, the Private Property Rights Protection Act (PPRPA), passed the House and contained concrete, substantive provisions designed to inhibit the use of eminent domain.\textsuperscript{24} PPRPA was introduced in the House on October 25, 2005, by Representative James Sensenbrenner (R-WI). Because the House had been considering similar responses to Kelo over the previous months, PPRPA was quickly reported out of committee and passed the House by a vote of 376-38 on November 3, 2005. Although the measure reached the Senate, it failed to move out of the Senate Judiciary Committee.\textsuperscript{25} The passage of PPRPA provides a clear example of an attempt by Congress to limit the effects of a specific Supreme Court decision. Its very introduction was an uncommon action for a House member to undertake, and its passage by the House was a particularly unusual occurrence that merits attention as a Court-curbing activity, even if the bill was never fully enacted into law.

PPRPA would have barred any state or local government from using eminent domain to take property for economic redevelopment if it received any federal economic development funds. If such a taking did occur, states or localities would have to repay the

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\textsuperscript{24} After the completion of this dissertation, a similar bill, H.R. 1689, the Private Property Rights Protection Act of 2017, was agreed to by the House on July 23, 2018, and referred to the Senate Committee on the Judiciary on July 24, 2018. The bill had first been introduced on March 22, 2017, and these latest actions mark the first time since 2005 that the House had passed one of the Kelo response bills.

\textsuperscript{25} A bill with similar technical provisions, H.R. 926, the Strengthening the Ownership of Private Property Act of 2007, was introduced by Representative Stephanie Herseth Sandlin (D, SD) on February 8, 2007, though the bill died in the Agriculture Committee.
funds and replace or repair any property damaged by the takings. If states or localities did not comply, they would be ineligible to receive future federal economic redevelopment for two fiscal years. The U.S. attorney general would track which jurisdictions received federal economic development funds and which improperly exercised eminent domain (Meltz 2005). Although PPRPA has been cited as the strongest federal response to Kelo, its substantive effects may have been negligible in many areas of the country: in 2005, federal grants to states for economic development only comprised 1.8% of total federal funds issued to states and localities (Somin 2009, 2125).

In addition to its technical prohibitions, PPRPA included a great deal of rhetoric and a bit of hyperbole. The text of the bill, in a section relaying the findings of Congress, referred directly to Kelo and indicated that the bill is a deliberate reaction against the Court’s ruling, stating: “In the wake of the Supreme Court’s decision in Kelo v. City of New London, abuse of eminent domain is a threat to the property rights of all private property owners” (Sec. 7(a)(4)). Members of Congress feared that the Kelo precedent created a threat to property owners in a variety of circumstances, and some of these potential takings scenarios were incorporated into the text of PPRPA. For example, although Kelo did not involve seizure of rural farm lands, the text of H.R. 4128 showed concern that expanded eminent domain powers posed a grave threat to rural America. Additional language was also inserted expressing concern for property owners affected

26These provisions are a vestige of H.R. 3405, which was a product of the Agriculture Committee. A subset of the text reads as follows: “It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America…. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. Americans should not have to fear the government’s taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse” (H.R. 4128, Sec. 7 (b)).
by the recent Hurricane Katrina, stating “that any and all precautions shall be taken by the
government to avoid the unfair or unreasonable taking of property away from survivors
of Hurricane Katrina who own, were bequeathed, or assigned such property, for
economic development purposes or for the private use of others” (Sec. 15).

Congressional Support Model for H.R. 4128

Exploring why members of Congress supported PPRPA can provide broader
insights into why federal legislators engage in Court-curbing behavior. The analysis in
this section seeks to replicate and build upon research by John A. Clark and Kevin T.
McGuire (1996) who similarly examine determinants of congressional responses to Court
decisions by looking at supporters of the Flag Protection Amendment Act of 1990,
deliberated in the wake of the Supreme Court’s 1989 Texas v. Johnson case (491 U.S.
397). Direct responses from Congress regarding Supreme Court constitutional cases are
rare, and PPRPA represents the only similar scenario found in congressional records
since the 1990 bill examined by Clark and McGuire.

The unit of analysis here is individual House members. Two separate dependent
variables measure House member support for PPRA. One dependent variable indicates
whether a House member was a co-sponsor of the bill before its passage (Co-sponsor
PPRPA); the other dependent variable indicates whether a House member voted for the
final bill (Vote PPRPA). Among the 435 representatives in the House, 97 became co-
sponsors of the bill and 384 ultimately voted in favor for it. The large-scale support at the
final bill vote stage requires the consideration of co-sponsorship as an alternative measure
for legislator support. Due to the widespread voting support, all relationships should be
stronger for co-sponsorship than for voting.
Electoral scholars have considered bill co-sponsorship to be a position-taking activity. Constituents, in this view, will provide support for a legislator’s stated position on an issue, without requiring the legislator to take substantive action on the matter (Mayhew 1974, 132). If co-sponsorship is a signal to constituents, then this suggests that co-sponsorship should be treated as a signal akin to voting, since legislators’ view it as a publicly taken action. Other scholars have viewed co-sponsorship as a form of legislative signaling, designed to communicate internally within the House and form legislative coalitions. These studies will often look at the timing and sequence of co-sponsorship, arguing that ideological extremists are more likely to be early co-sponsors than more moderate legislators (Kessler and Krehbiel 1996). The intent behind co-sponsorship may vary based upon the type of legislation being considered: due to the salient nature of the Kelo case, and the simplistic nature of the bill, the position-taking explanation for co-sponsorship seems appropriate. Votes may also be viewed as position-taking, although they represent a more permanent commitment to a position than recorded statements or co-sponsorship.

Hypotheses

Party and Ideology

Member party identification (Party ID\textsuperscript{27}) should affect support for PPRPA. As noted, political parties play an especially important role in the organization and operation of the House (Aldrich 1995; Cox and McCubbins 1993; Rohde 1991). Since PPRA was introduced by a Republican, and the Republican Party was the majority party in 2005, Republican House members should be more likely to support PPRPA, both by co-

\textsuperscript{27} Details on variables can be found in Appendix A.
sponsorship and by voting. Beyond party cohesion, traditional party values supporting individual property rights and less government intervention would also suggest that Republican members are more likely to support PPRPA (Jacobs 2003).

Although ideology within the House may affect support for PPRPA, ideological distance from the Supreme Court should result in a stronger attempt at Court-curbing (Distance from Court). The two institutions may come into conflict simply due to the separation of powers structure of American government, but such inter-branch tensions are exacerbated when the policy preferences of members of Congress and the Supreme Court are at odds. Here, the ideological distance between individual House members and the Supreme Court, overall, is calculated using the Bailey and Maltzman (2011) institutional ideal point scores. These scores provide comparable measures of ideology across institutions and capture ideological dimensions that should be applicable here. Through the use of bridging observations, where different federal actors take stances on the same issue, such as presidential and congressional statements on Court decisions, these scores are better able to provide an equivalent scale on which to gauge participants’ ideological positions relative to other actors. Supreme Court decisions involving criminal procedure, civil rights, the First Amendment, due process, and privacy cases serve as the basis for the ideology measure. As the ideological gap between members of Congress and the Supreme Court increases, members of Congress should be more inclined to support Court-curbing measures like PPRPA. For this example, members of Congress who are more conservative than the Court should be more supportive of PPRPA.
Electoral Interests

Congressional scholars frequently cite an electoral motivation behind House members’ activities (Fenno 1978; Mayhew 1974). Electoral security can be measured by campaign spending levels of incumbents versus challengers. Incumbents can typically raise five to six times as much campaign money as their challengers, but only spend a fraction of it (Davidson, Oleszek, and Lee 2008, 70; Jacobson 1978). Due to this incumbent fundraising advantage, many serious challengers are scared away from the race (Cox and Katz 1996; Jacobson 1989). Therefore, a race with relatively even spending levels can be viewed as a competitive election. Following, or anticipating, a competitive election, members may especially engage in behavior they perceive to be electorally beneficial. Therefore, in districts where the last congressional race (2004) was more competitive, members should be more likely to support PPRPA. A competitive race is measured by the difference in spending between the incumbent and challenger (Spending Gap): a smaller gap represents a more competitive race.

District Interests

By rationally anticipating public opinion and adjusting their policy positions accordingly, members of Congress attempt to side with their constituents and prevent electoral backlash (Kingdon 1989; Stimson, Mackuen, and Erikson 1995). Although many people opposed the Kelo decision on ideological grounds, the potential impact of the Court’s ruling is stronger in some districts than in others. Districts where growth is stagnant are more likely to be targets for state and local government economic development projects. Despite the objective need for economic growth in these districts, the fear of wanton government property seizures under the Kelo standard that was present
after the ruling should lead these citizens, and their congressional representatives by extension, to support PPRA. This assumes that people are more concerned with their known short-term material interests than they are about uncertain longer-term material interests or an uncertain public good.

One economic indicator is the district’s 2005 unemployment rate (District Unemployment). As the unemployment rate increases, support for PPRA should also increase. Another indicator is the value of new home construction between 2000 and 2005 (New Housing Value). The volume and value of residential properties can show how desirable a community is to live in, implying information about job availability, community resources, safety, and general quality of living. If there has been more recent home construction in a district, the community is in less need of economic development projects, and thus, should be less likely to support PPRA.

Professional Norms

Professional expectations may affect certain legislators’ responses to the Court. Members of the Agriculture Committee, which originated PPRA, should be more likely to show support for the bill (Agriculture Committee). Similarly, members of the Judiciary Committee should be more likely to support PPRA (Judiciary Committee). The Judiciary Committee sponsored H.R. 3135, a bill that was mostly incorporated into PPRA.

House members who are lawyers should be less likely to support PPRA, as norms within the legal community would encourage deference to the Court’s decision (Lawyer). Just as judges typically enforce Supreme Court rulings, despite the Court’s lack of enforcement powers, lawyers are similarly socialized to respect and support the
interpretation or precedent set by the Court. Although members who are lawyers may also have political interests, this legal professional standard should still affect their behavior (J. A. Clark and McGuire 1996; McGuire 1993; Miller 1993a, 1993b).

Data and Findings

Results for the PPRPA co-sponsorship and PPRPA vote models are displayed above in Table 4. As expected, relationships were stronger for the co-sponsorship model than the voting model. For the statistically significant variables in the co-sponsorship model, the marginal effects at the mean (MEM) are also displayed in Figure 1 and Figure 2. The MEM provides an estimate of how the probability of PPRPA cosponsorship would change, provided a one unit change in a given independent variable while holding the rest at their means. Figure 1 illustrates how a House member being a Democrat, on the Agriculture Committee, on the Judiciary Committee, or being a lawyer would change the predicted probability of that member co-sponsoring PPRPA. Figure 2 displays the changes in predicted probability of a House member co-sponsoring PPRPA.

Partisan and ideological considerations and professional norms are strong predictors of congressional behavior in the co-sponsorship model. Republicans were more likely to co-sponsor PPRPA than their Democratic counterparts. Although partisanship often explains congressional behavior, is somewhat surprising that party has a strong effect here, since many prominent Democrats, including former President Bill Clinton and then-Democratic National Committee chairman Howard Dean, made early public declarations against the Kelo ruling. It is important to note that party identification was only significant for co-sponsorship: the final bill passed with an overwhelming majority, so party had no effect on the voting outcome. Co-sponsorship, however, may
have required a higher level of commitment to the property rights cause, which has historically been more conservative and associated with the Republican Party.

Table 4: Probit Models for Congressional Support of PPRPA

<table>
<thead>
<tr>
<th></th>
<th>Co-sponsor PPRPA</th>
<th>MEM</th>
<th>Vote for PPRPA</th>
<th>MEM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party ID</td>
<td>-0.930***</td>
<td>-0.213***</td>
<td>-0.566</td>
<td>-0.038</td>
</tr>
<tr>
<td></td>
<td>(0.287)</td>
<td>(0.064)</td>
<td>(0.390)</td>
<td>(0.026)</td>
</tr>
<tr>
<td>Distance from Court</td>
<td>0.329**</td>
<td>0.075**</td>
<td>0.773***</td>
<td>0.052***</td>
</tr>
<tr>
<td></td>
<td>(0.154)</td>
<td>(0.035)</td>
<td>(0.225)</td>
<td>(0.018)</td>
</tr>
<tr>
<td>Spending Gap</td>
<td>0.019</td>
<td>0.004</td>
<td>-0.125</td>
<td>-0.009</td>
</tr>
<tr>
<td></td>
<td>(0.834)</td>
<td>(0.021)</td>
<td>(0.134)</td>
<td>(0.009)</td>
</tr>
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<td>District Unemployment</td>
<td>-0.086</td>
<td>-0.020</td>
<td>0.101</td>
<td>0.007</td>
</tr>
<tr>
<td></td>
<td>(0.300)</td>
<td>(0.020)</td>
<td>(0.089)</td>
<td>(0.006)</td>
</tr>
<tr>
<td>New Housing Value</td>
<td>-0.019*</td>
<td>-0.004*</td>
<td>0.006</td>
<td>0.000</td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td>(0.002)</td>
<td>(0.012)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Agriculture Committee</td>
<td>0.641***</td>
<td>0.147***</td>
<td>0.437</td>
<td>0.030</td>
</tr>
<tr>
<td></td>
<td>(0.245)</td>
<td>(0.056)</td>
<td>(0.511)</td>
<td>(0.035)</td>
</tr>
<tr>
<td>Judiciary Committee</td>
<td>0.595***</td>
<td>0.136***</td>
<td>0.007</td>
<td>0.001</td>
</tr>
<tr>
<td></td>
<td>(0.266)</td>
<td>(0.061)</td>
<td>(0.362)</td>
<td>(0.025)</td>
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<tr>
<td>Lawyer</td>
<td>-0.424**</td>
<td>-0.097**</td>
<td>-0.205</td>
<td>-0.014</td>
</tr>
<tr>
<td></td>
<td>(0.178)</td>
<td>(0.041)</td>
<td>(0.221)</td>
<td>(0.015)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.227</td>
<td></td>
<td>3.438*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.278)</td>
<td></td>
<td>(1.892)</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>435</td>
<td></td>
<td>421</td>
<td></td>
</tr>
<tr>
<td>p</td>
<td>0.000***</td>
<td></td>
<td>0.000***</td>
<td></td>
</tr>
<tr>
<td>R²</td>
<td>0.234</td>
<td></td>
<td>0.251</td>
<td></td>
</tr>
</tbody>
</table>

* p<0.10, ** p<0.05, *** p<0.01
Figure 3: House Member Characteristics and Cosponsorship of PPRPA

Average Marginal Effects with 95% CIs

Party

Agriculture Cmte

Judiciary Cmte

Lawyer

Effects with Respect to

Effects on Probability of Co-sponsoring PPRPA

-0.4 -0.2 0 0.2 0.4

Figure 4: Ideological Distance from Court and Cosponsorship of PPRPA

Predictive Margins with 95% CIs

Prob. of Co-sponsoring PPRPA

0 0.2 0.4 0.6

-2 -1.5 -1 -0.5 0 0.5 1 1.5 2

Ideological Distance from Court
Ideological distance from the Supreme Court was the only variable to be statistically significant for both co-sponsorship and voting for PPRPA. Members of the House who were more conservative than the Supreme Court were more likely to support PPRPA, effectively responding against the Court’s decision. Again, given the widespread eventual support for PPRPA, this is somewhat notable, since many liberal, Democratic members of the House did vote for the bill. Whereas the party variable serves as a proxy for individual legislator’s ideological perspectives, this ideology variable measures how an individual legislator’s views compares to the overall ideological perspective of the Supreme Court. These findings indicate that ideological distance from the Court, consistent with theories on inter-branch tensions in the separation of powers system, did contribute to congressional reactions against the Court’s decision in Kelo. A number of liberal Democrats, for example, may have disagreed with this particular decision and voted for PPRPA, rendering party an insignificant predictor of final votes on the bill. Yet the significance of the ideological distance variable as a predictor of voting for PPRPA suggests that these individuals may generally be more supportive of the Court as an institution or of its decisions than some of their fellow legislators. These findings support the notion that there can be sharp opposition to a specific Court decision, separate from general levels of ideological agreement with the Court. Whether or not these instances of opposition may change one’s future attitudes toward and ideological agreement with the Court is a question worthy of further consideration.

For co-sponsorship of PPRPA, membership on the Agriculture Committee was a significant correlate, as was membership on the Judiciary Committee. Consistent with
expectations, members of these committees, which either had a direct hand in drafting PPRPA or came up with similar legislation, showed support for the committee product by signing on as co-sponsors. Finally, House members who were also lawyers were significantly less likely to co-sponsor PPRPA. Part of this explanation may be that legal socialization trains lawyers to be deferential to the Supreme Court: another part of the explanation may be that their legal training led these members to arrive at the same objective conclusion that the Court did.

Congressional Considerations from Floor Speeches

Floor speeches by Members of Congress can provide additional insights into their reasons for supporting or opposing particular pieces of legislation, or, in this example of actions against the Supreme Court, their reasons for asserting or opposing an exercise of congressional authority against the judiciary. Comments from members of the House and Senate related to Kelo v. New London and congressional eminent domain legislation were examined in the Congressional Record. Representative John Duncan (R-TN) first referred to Kelo and the dangers of eminent domain abuse on March 10, 2005, following the February oral arguments in the case; the most recent discussion of Kelo was on July 19, 2017, as Representative Jamie Raskin (D-MD) expressed concerns over growing government police powers.

For this analysis, Congressional Record comments were examined in the year immediately following the Kelo decision (June 24, 2005-June 24, 2006). During that year, 130 substantive comments were identified regarding legislation that referred directly to Kelo v. New London (H.R. 3058, S. 1313/H.R. 3083/H.R. 3087, H.R. 3631, S. 1895, and H.R. 4128). These comments came from 96 different members of Congress: 85
House members and 11 Senators. The number of speakers represent roughly equivalent proportions of each chamber’s membership (19.5% for the House and 22% for the Senate), which indicates some similar degree of issue attention across the chambers, even as the House more seriously pursued legislative actions regarding Kelo. Although the House and Senate are often studied separately, comments from members of both chambers are considered together here, as representative of an institutional stand by Congress regarding its role in relation to the Supreme Court.

Table 5 provides a summary of party affiliation and U.S. Census region designations for members of Congress who spoke regarding Kelo. Representatives and Senators from all areas of the nation made comments, though more members of Congress from the South, Midwest, and West spoke about the decision than the Northeast, which includes Connecticut, where the case originated. This is consistent with the content of congressional statements, and the involvement of the House Committee on Agriculture in drafting Kelo response legislation, which revealed members’ concerns that the decision could have negative implications for farms and rural areas. More Republicans than Democrats spoke against Kelo, but not by a large margin. Overall, 55 Republicans made comments and 41 Democrats did, reflecting the concerns that individuals from both parties had about the possible implications of the Kelo decision.

Table 5: Characteristics of Congressional Speakers Making Remarks Against Kelo

<table>
<thead>
<tr>
<th></th>
<th>House</th>
<th>Senate</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Republican</td>
<td>47</td>
<td>8</td>
<td>55</td>
</tr>
<tr>
<td>Democratic</td>
<td>38</td>
<td>3</td>
<td>41</td>
</tr>
<tr>
<td>Region</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West</td>
<td>20</td>
<td>4</td>
<td>24</td>
</tr>
<tr>
<td>Midwest</td>
<td>24</td>
<td>3</td>
<td>27</td>
</tr>
</tbody>
</table>
Members of Congress consistently expressed disapproval of the Kelo decision in their comments, but provided a variety of reasons for why and the degree to which they linked their disapproval of the decision to broader disapproval for the Supreme Court or its jurisprudence. Table 6 provides a summary of common themes found in congressional comments involving legislation intended to dampen the effects of Kelo v. New London. A full list, along with summaries of each comment, is found in Appendix C. Although some members spoke multiple times on these bills, their comments typically reflected different considerations, so the total number of comments found in the Congressional Record is used here.

Many members evoked themes of national values in their comments. Approximately 10% of the comments in the Congressional Record described the importance of private property rights to the Founders to argue that the Kelo decision was not in keeping with American values. In approximately 8% of the comments, members of Congress went further and claimed that the decision was fundamentally anti-democratic. Examples of the latter include comparing exercises of eminent domain to the actions of Russia or China or feudal fiefdoms.

As expected, some Members of Congress revealed concerns about the effects the Kelo decision would have on their state or district. In approximately 13% of the comments, members revealed that their constituents expressed strong opposition to the Kelo ruling, discussed state-level attempts to limit the decision’s effects, or described general concerns about the district impact. Some members identified particular
constituencies that would be affected, including farmers or ranchers (4.7%), low-income individuals (8.5%), and religious or non-profit organizations (3.1%). Approximately 13% of members’ comments revealed concerns that state or local officials could use dubious economic justifications, like simply improving tax revenue, for exercises of eminent domain under Kelo.

A number of Congressional Record comments reveal members’ attitudes about the role of Congress, both in its role relative to the Supreme Court and its role relative to state and local governments. Approximately 19% of members’ comments were classified as making a statement against the Supreme Court. These included statements that the Supreme Court ruling was wrong or comments denouncing judicial activism; one even referred to the Court as “schizophrenic.” Several members, in approximately 16% of the comments, also reasserted their view that congressional action to limit the effect of the Kelo decision was appropriate. A smaller proportion expressed concerns that Congress was overreaching its authority (8.5%), or that congressional action was less appropriate than state or local government action (6.2%). In addition to expressing disagreement with Kelo, members of Congress expressed their own constitutional interpretations in approximately 19% of their comments.

Soon after the Kelo decision, the Supreme Court experienced two vacancies: Justice Sandra Day O’Connor announced her retirement on July 1, 2005, and Chief Justice William Rehnquist died on September 3, 2005. A number of comments from members of Congress (9.3%) were related to these vacancies, or to the consideration of the nomination of John Roberts for chief justice. Some comments, for example, were tributes to O’Connor or Rehnquist expressing support for their dissents in Kelo. Other
comments expressed support for Roberts, in part, because of how members believed he
would act in cases similar to Kelo.

Table 6: Congressional Record Statements Related to Kelo Legislation

<table>
<thead>
<tr>
<th>Statement Category</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional Role</td>
<td></td>
</tr>
<tr>
<td>Statement Against Supreme Court</td>
<td>18.6% (n=24)</td>
</tr>
<tr>
<td>Offered Own Legal Interpretation</td>
<td>18.6% (n=24)</td>
</tr>
<tr>
<td>Congress Should Act</td>
<td>15.5% (n=20)</td>
</tr>
<tr>
<td>Separation-of-Powers Concerns</td>
<td>8.5% (n=11)</td>
</tr>
<tr>
<td>Advocates Stronger Congressional Action</td>
<td>3.9% (n=5)</td>
</tr>
<tr>
<td>DefERENCE to States/Localities</td>
<td>6.2% (n=8)</td>
</tr>
<tr>
<td>Related to Supreme Court Vacancies</td>
<td>9.3% (n=12)</td>
</tr>
<tr>
<td>Policy-Related Motivations</td>
<td></td>
</tr>
<tr>
<td>Impact on District/Constituent Concerns</td>
<td>13.2% (n=17)</td>
</tr>
<tr>
<td>Effects on Rural Areas/Farms</td>
<td>4.7% (n=6)</td>
</tr>
<tr>
<td>Effects on Poor/Low-Income Individuals</td>
<td>8.5% (n=11)</td>
</tr>
<tr>
<td>Effects on Religious/Nonprofit Organizations</td>
<td>3.1% (n=4)</td>
</tr>
<tr>
<td>Dubious Economic Justifications</td>
<td>12.4% (n=16)</td>
</tr>
<tr>
<td>Ideological Concerns</td>
<td></td>
</tr>
<tr>
<td>Undermines Democracy</td>
<td>7.8% (n=10)</td>
</tr>
<tr>
<td>Evoking American Ideals</td>
<td>10.9% (n=14)</td>
</tr>
</tbody>
</table>

Conclusion

As with many areas of legislative behavior, ideology appears to be a key
determinant in congressional responses to the Kelo case. Issue salience and public
opinion, as related to ideology, are also influential. Objective economic concerns, at least
as measured here, do not show much of an effect on congressional policy choices. A
number of members, however, referred to the perceived economic effect of Kelo, through
their references to constituent concerns or likely district impact. More commonly,
however, their comments indicated a degree of disapproval with the Supreme Court and
its constitutional interpretations that was broader than simple disagreement with the Kelo
decision. Ideological and institutional disagreement seem to lead members of Congress to act legislatively against a Supreme Court ruling.

A number of members’ comments suggest that they recognize and respect the constitutional roles set out for each branch of government. Although they acknowledged that they were taking a deliberate action in hopes of limiting the effects of Supreme Court’s ruling in Kelo, several members pointed out that PPRPA and similar legislation was clearly within Congress’ purview. By simply limiting federal economic funds, members of Congress were responding to the Court by tightening their purse strings. This type of response also reflected an acceptable congressional response with regards to state and local policymakers. Congress could not easily, or constitutionally, prohibit all economic development takings by state and local governments. Several members with past experience in local government recognized that eminent domain sometimes was a necessary and desirable tool for governments to use. In PPRPA, the House simply attached a condition on to existing federal funding, creating an economic disincentive for states or localities from engaging in takings behavior that Congress did not like.
Chapter 5: State Legislative Response to Kelo v. New London

Introduction

Many U.S. Supreme Court rulings affect matters of state law, particularly in cases where the Court’s decision addresses the constitutionality of state or local policies, like Kelo v. New London. In the Kelo decision, the Supreme Court issued what can be characterized as a permissive ruling, finding that the laws in New London were acceptable and indicating that the courts should defer to legislative determinations of “public use” made by state or local government actors. Unlike cases where the Supreme Court provides a clear declaration of constitutionality, effectively mandating certain types of policies from states, the Kelo decision instead provided an invitation for states and localities to adjust their eminent domain policies, should they choose to.

By and large, state governments accepted the Court’s invitation and initiated subsequent eminent domain reform laws in the years immediately following the decision. One group tracking the response to Kelo estimates that in the first year after the decision (2006), 35 states had passed eminent domain reforms; the number grew to 42 the following year (Castle Coalition 2007). After this initial flurry of legislative activity, state eminent domain reforms largely tapered off; an analysis from 2015 indicates that only 3 additional states have enacted eminent domain reforms since 2007 (Somin 2015). It appears that Kelo v. New London has elicited one of the strongest state legislative responses to the U.S. Supreme Court, which is puzzling for a couple key reasons. First, other Court rulings that have generated significant state legislative activity have tended to address highly salient social or moral issues—school desegregation, abortion, the death penalty, or same-sex marriage, for example—and eminent domain typically is not
thought of as similarly salient. Secondly, no state had to act following the Kelo ruling, since no statute, standard, or practice was declared unconstitutional. The uniformity in state responses, which generally sought to limit the exercise of eminent domain, is also somewhat unusual, given the variety across existing state law, as well as differences in state economies and constituent ideologies.

The state legislative responses to Kelo can also be characterized as reactions against the Court’s majority opinion. Laws restricting the use of eminent domain for economic development, or narrowing the definition of public use, indicate that state legislators shared the same concerns as the dissenting justices in Kelo, which were captured in the opinion written by Justice Sandra Day O’Connor: “The specter of condemnation hangs over all property. 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 (545 U.S. 469, 10-11). The willingness of state lawmakers to take a clear stand against the Court runs counter to normative expectations and evidence that suggests generally high levels of diffuse support and public esteem for the Supreme Court (Gibson 1989; Caldeira and Gibson 1992; Tyler 1990).

In many instances, state legislatures can vary greatly in the degree of compliance, noncompliance, or inaction they take in their immediate responses to federal policy directives. States may feel that they have greater latitude in how they respond to policy directives from the Supreme Court, since the Court is unable to provide financial incentives or sanctions that other federal actors can use to encourage states to adopt particular policies (Savage 1985). The type of response might also be determined by existing laws across states, some of which may already be in compliance with the
standard set by the Supreme Court, whereas others may clearly violate the new standard or have laws that are somewhere in between. These existing laws likely reflect divergent political environments of the various states, which vary for a number of reasons, including citizen and legislator ideology, sources of influence in the legislative process, as well as state demographics, economic circumstances, or cultural values.

Natural diversity across states, and the permissive nature of the Supreme Court’s ruling in Kelo, suggests that states should have passed a variety of legislation should have been following the decision in June 2005. While state reforms did vary in terms of the particular policy provisions they implemented to curb eminent domain use, the vast majority of states implemented policies of a similar nature—policies that can be characterized as attempts to limit, not expand, the use of eminent domain for economic development. States responded to the Court’s invitation to legislate as an opportunity to strengthen their eminent domain laws, pleasing critics of the Kelo decision who initially feared that state and local governments would use the Court’s legislative deference to justify the expansion of takings for economic development.

This section explores the intersection of policy diffusion and Supreme Court implementation that results from the role of state legislatures in American politics. Although the federal government grew and expanded its role over the twentieth century, a considerable amount of policy responsibility remains under the jurisdiction of state governments. The Supreme Court regularly addresses state statutes, and its interpretation of the constitutionality of states’ policies provides an information signal to legislators in other states. A decision from the Court can tell other state legislators which initiatives are permissible, which are not, and where the boundary between the two lies. Court opinions
can provide further insights about which specific legislative components may be problematic, how exactly they contradict statutory or constitutional provisions, and imply ways in which a statute could be better written for compliance. Policy diffusion literature assumes that state legislators will adopt initiatives that have been tried elsewhere, but it generally neglects to consider how these information signals provided by the Supreme Court regarding state law may influence subsequent legislative decisions by other states.

In Kelo, the Supreme Court reiterated its interpretation that state and local governments were responsible for determining public use standards and other criteria for exercising eminent domain. The Court did not prescribe what states’ policies should be, but it sent a clear signal of legislative deference and invitation for states to act. The number of states that passed eminent domain reforms soon after the Kelo decision indicates that the Court had a role in initiating state legislative action. Beyond the decision to act, this section will explore the variation in the strength of eminent domain protections states implemented following Kelo. While the Court may have provided the impetus to enact some eminent domain reform, other signals from the national policy debate, state-level political factors, and state demographics help explain why some states enacted substantive eminent domain reform and others passed more symbolic legislation following Kelo.

States’ Role in Implementing U.S. Supreme Court Decisions

Many issues in American politics involve cooperation among various government entities to implement particular policy aims. The U.S. Supreme Court, and judicial actors generally, are less favorably situated than other policymakers to ensure that their preferred outcomes are achieved. Constitutionally, the Supreme Court is positioned with
greater independence than other actors, and lacks formal powers of the purse or the sword; these institutional features can hamper the Court’s ability to negotiate with or pressure other government institutions into compliance. In some instances, cooperation among policymakers can be thought of along a horizontal dimension, occurring between actors in the legislative, executive, and judicial branches, but with all actors operating within the same level of government (e.g., federal or state). In other instances, cooperation is vertical, between actors within the same branch of government, but across the federal, state, and/or local levels. Although there were federal legislative responses to the Kelo decision, another important part of the politics surrounding Kelo involved the responses of state legislatures to the U.S. Supreme Court. This situation serves as an example of how policy implementation in the United States today can involve actors who are interrelated in ways that are not clearly delineated under the traditional conceptualization of separation of powers or federalism.

Most studies examining the U.S. Supreme Court and its role related to state policies focus on the vertical relationship between the Court and lower courts. This approach is often appropriate, given the hierarchical nature of the judicial system. Judicial actors in the lower courts often hear subsequent challenges to a Court ruling and issue their own interpretations of the decision that state legislators are expected to follow. Compliance with the Court is, therefore, studied among federal district or appeals courts (Gruhl 1980; Johnson 1987; Songer 1987; Songer and Sheehan 1990) and in state courts (Romans 1974; Hoekstra 2005). The hierarchical judicial structure, coupled with shared professional norms among judicial actors, typically lead to the expectation that lower courts will comply with the U.S. Supreme Court. Within the federal judiciary, the
Supreme Court’s ability to ensure compliance is theoretically strongest, since it could invalidate any lower federal court ruling that went against its precedent. In practice, however, the Supreme Court does regularly hear (and overturn) noncompliant lower court decisions (Cameron, Segal and Songer 2000; Lindquist, Haire and Songer 2007; Black and Owens 2011).

As these examples reveal, lower court judges are not fully constrained by the U.S. Supreme Court or expectations of judicial deference, leading also to studies of noncompliance among judicial actors (Songer, Segal and Cameron 1994; Benesh and Reddick 2002). Lower court judges may differ from the Supreme Court’s interpretation if they question the legitimacy of the Court’s decision or find the directive from the Court unclear (Cannon and Johnson 1984, 49-59). In controversial civil liberties cases, lower courts may also be less willing to follow the Supreme Court (Baum 1978). Generally, some degree of differing policy perspectives, ideologies, or political considerations can be expected to explain many instances of judicial noncompliance (Johnson and Canon 1984, 59-70; Songer, Segal and Cameron 1994; Brehm and Gates 1997; Spriggs and Hansford 2001; Westerland, et al. 2010).

Even when lower courts comply with the Supreme Court, implementation of a decision is uncertain, since any judicial actor is limited in the actions it can take to enforce its own decisions. When a state supreme court deems a state law unconstitutional, it relies upon state legislatures and executive branches to uphold its rulings by enacting any necessary policy changes, just as the Supreme Court relies upon Congress and the Executive Branch to uphold its rulings pertaining to federal policies. State policymakers, along with other non-judicial actors, comprise what Charles Johnson and Bradley Canon
refer to as “the implementing population” (1984, ch. 3), which varies from case to case. The implementing population, in deciding whether to enforce, ignore, or act against the Supreme Court, is influenced by many of the same factors as lower court actors are, including the clarity of the Court’s directives, their own policy preferences, political constraints and organizational norms, and constituent attitudes. As might be expected, Matthew Hall (2011) finds that the Court has better success with implementation in cases that can be directly implemented by lower courts than it does in cases that rely upon other, nonjudicial actors. Norms of judicial deference and respect for the higher court could lead even ideologically divergent state courts to comply with a Supreme Court ruling, whereas state legislatures may not feel a similar constraint.

Scholars have examined the role that state and local government agencies play in enforcing, ignoring, or defying a directive from the U.S. Supreme Court. These actors often represent the last stage of implementation, after the legal standard has been established by the Court and legislators have adjusted any necessary statutes as a result. Bureaucracies are often more removed from public scrutiny than other government actors, and their position as a late-stage actor in the implementation process means public attention to the Court decision or policy issue may have subsided. A number of studies have indicated that government agencies do not always faithfully interpret or implement Supreme Court rulings (Baum 1976; Johnson 1979; Johnson and Canon 1984; Spriggs 1997). This has occurred with Court decisions involving school desegregation (Peltason 1971; Bullock and Rodgers, Jr. 1976), school prayer (Birkby 1966; Dolbeare and Hammond 1971; Sorauf 1959), and criminal justice (Medalie, Zeitz and Alexander 1968; Milner 1971), among others.
The middle step, involving the relationship between the Supreme Court and state legislatures, is rarely explored directly, although many Court decisions affect matters of state or local law. Since 1987, for example, the Supreme Court has only overturned 36 congressional acts, but the Court has declared 113 state laws and 18 local laws unconstitutional and has held that federal law preempted state or local laws in an additional 39 cases (The Annotated Constitution, S. Doc. No. 112-9, 2017). When the Supreme Court declares a state law unconstitutional, the decision often contains a clear directive for states to follow or disregard, and if the decision addresses a widespread policy, it can generate a significant number of state legislative responses. A key example of this dynamic occurred following the 1954 decision in Brown v. Board of Education, which declared public school segregation unconstitutional. Opposition to Brown led to subsequent years of “massive resistance,” during which state and local officials fought compliance with the Supreme Court through a combination of new legislation and by simply ignoring the Court’s directive to racially integrate schools. Another example is Furman v. Georgia from 1972, which found that existing administration of the death penalty was unconstitutional “cruel and unusual” punishment; in the four years following the decision, 35 states enacted new capital punishment statutes to comply with the new Court standards (428 U.S. 179).

Unlike Brown, the Kelo decision is better characterized as a “permissive” (Glick 1994) or a “state-empowering” (Sharp and Haider-Markel 2008) ruling from the Court, in which the Court may provide particular criteria for states to follow, but generally allows a high degree of discretion for policymakers, presuming their laws fall within the boundaries established by the Court’s guidelines. State legislative responses to these
types of Court rulings have explored three main issue areas—the death penalty, abortion, and right to die policies. As social or moral issues, state responses to Court decisions in these previously examined policy areas may have limited generalizability for eminent domain, if eminent domain is considered a largely economic issue. The framing of individual property rights protections as a civil liberties issue may, however, be a reason to think these policy areas are more similar than they might initially appear.

The Furman decision provides an example of a ruling in which the Court declared something unconstitutional but was also somewhat permissive or state-empowering. The Court declared current state death penalty laws unconstitutional, but permitted the practice generally, provided that states revise their capital punishment laws to meet certain standards. Four years later, Gregg v. Georgia (1976) reiterated the permissibility of capital punishment, in limited circumstances and with certain procedural requirements. David Jacobs and Jason Carmichael examined the sociological and political reasons why certain states reintroduced the death penalty after these decisions and found that states with higher levels of economic inequality, African-American residents, and conservative or Republican legislatures are related to states’ decisions to reinstate capital punishment. Because the Court declared a widespread policy impermissible in Furman, it may be more appropriate to treat the state responses to Furman and Gregg as conventional compliance responses from the states that had to revise their statutes to stave off further legal challenges.

In 1989, the Supreme Court issued a decision in Webster v. Reproductive Health Services that upheld a number of state restrictions on abortion. Webster, along with a similar ruling from 1992 in Planned Parenthood of Southeastern Pennsylvania v. Casey,
indicated to state legislators that they could enact more restrictive abortion laws without violating the basic right to access established previously in 1973 by Roe v. Wade. Studies found that public opinion, specifically tied to abortion, and the presence of abortion-related interest groups in a state explained the variation in state abortion laws following Webster and Casey (Cohen and Barrilleaux 1993; Wetstein and Albritton 1995; Medoff 2002). The Supreme Court continues to hear abortion cases, and Dana Patton’s more recent study (2007) examines how the possibility of future Court action in this domain affects state legislatures, finding that legislatures will commonly modify their abortion policies before the Court takes on a case, or, less frequently, modify their policies after a Court ruling to bring their statutes into compliance.

Finally, Henry Glick’s research (1994) explores right to die policies enacted by state legislatures following the 1990 decision Cruzan v. Director, Missouri Department of Health (497 U.S. 261). Glick describes Cruzan as a “permissive decision,” in which the Court did not impose any legal obligation for further action and gave government actors wide latitude with regard to how they regulate certain activities. In response to Cruzan, states that had not previously legislated on right to die issues acted to mirror common policies already existing in other states as an attempt to meet the allowable standard implied by the Court.

In these examples regarding the death penalty, abortion, and the right to die, the actions taken by state legislatures after the Supreme Court’s ruling can typically be categorized as compliance with the Court’s intent, if not its formal directives. Thus, they differ to some degree from the more oppositional measures taken by states following Kelo. It has long been noted that state and local governments are, formally, more
removed from the Court and have fewer ways in which they can substantively undermine the Court’s authority, as compared to Congress or the president which ultimately share constitutional checks and balances with the Court (Petrick 1968). This separation between state legislatures and the Court, however, also hampers the Court’s ability to ensure compliance with decisions that affect state and local law. Although some notable examples of noncompliance with explicit Court directives exist, like Brown, the overall degree of compliance by state legislatures with the intent of permissive Court rulings is somewhat remarkable, given the separation of the two types of institutions and the lack of required prescriptions from the Court in many of these cases.

Policy Diffusion Across States

State legislative responses to the Supreme Court’s decision in Kelo can also contribute to a number of lines of research related to policy adoption and diffusion. Policy diffusion is a framework commonly used to explain why and how states adopt certain policies. State policy adoption and diffusion are growing areas of interest to political scientists, but there are still a number of underexplored issues in these areas that the responses to Kelo v. New London may help illuminate. Post-Kelo reforms provide an example of top-down, vertical policy diffusion, where federal government action serves as an impetus for policy change at the state level. While the role of national-level actors in shaping public opinion or otherwise influencing state policies seems like a logical mechanism underlying state policy adoption, it is relatively understudied in policy diffusion literature (Karch 2006). In many instances, federal policy initiatives targeted at states come with clear mandates or financial incentives that easily explain why states are likely to adopt the federal directives. When the Supreme Court provides the impetus for
state policy change, however, it lacks the usual incentives or penalties other federal actors can use to spur policy adoption across states. A ruling that declared a widespread policy unconstitutional may pressure states to act, but the Kelo decision was a permissive ruling that did not require further actions from state governments. As seen in the Kelo responses, vertical diffusion can often result in many states implementing policies simultaneously, or very close in time to one another.

In contrast to this, most policy diffusion literature assumes a bottom-up approach and examines policy adoption timelines that unfold more slowly across states. In these models, states serve as “laboratories of democracy,” in which innovative states develop a new policy approach that is gradually adopted and refined by other states. Geographic proximity to, learning from, and competing with early-adopters are reasons commonly believed to lead to state policy diffusion, but these do not appear as plausible as explanations to explain the quick and widespread eminent domain reforms following Kelo.

A number of studies focus on geographic diffusion, or the idea that states most often adopted policies based on neighboring states’ experiences, due to similar interests or better available information on policy outcomes (Crain 1966; Foster 1978; Berry and Berry 1990; 1992; Haider-Markel 2001; Mintrom 1997; 2000; Daley and Garand 2005). In earlier studies of policy diffusion, geographic proximity made a more plausible mechanism for policy diffusion, as regional distinctions may have been more pronounced and states were limited in what information was available from far-away states. Improvements in communications and transportation in recent decades, however, challenge the argument for strictly geographic-based policy diffusion. Instead,
geographic proximity may simply be a proxy for the more specific underlying mechanisms that are actually driving diffusion, like learning from other states’ experiences (Boehmke and Witmer 2004; Grossback, Nicholson-Crotty, and Peterson 2004; Berry and Baybeck 2005; Volden 2006; Karch 2007).

The high number of states enacting legislation after Kelo suggests that geographic diffusion does not provide an explanation, as the response occurred nationwide. A quick review of the states’ enactment dates further discredits the idea of a geographically based dynamic at work in this instance. The first five states to enact legislation following the Kelo decision, for example, were Delaware, Alabama, Texas, Michigan, and South Dakota. These early adopters represent a variety of areas within the United States, and no discernible regional patterns or clusters emerge as enactments occurred across the other states.

Learning from early-adopting states does not appear to explain policy adoption following Kelo either. If the early-adopters are successful, more states may adopt similar policies, or states may learn from other states’ policy mistakes and avoid implementing similar provisions (Hays 1996; Boehmke and Witmer 2004; Volden 2006; Karch 2007).

In general, learning may be difficult to capture, as policy analysts note a number of difficulties in objectively establishing criteria by which to judge “successful” policies (Lindblom and Cohen 1979, 12; Nathan 2000, 5). The political context in which legislators operate may also lead to strategic choices that result in a sub-optimal policy, when evaluated solely on objective metrics or criteria (Levitt and March 1988; Rose 1993). Many state eminent domain reforms were enacted within two years of the Kelo decision, suggesting a more simultaneous adoption pattern across the states. Few, if any,
reform policies would have truly been implemented before other states were also enacting reforms, so their effects were not yet known or observed by outside legislators. Two other mechanisms of policy diffusion—imitation (or emulation) and competition—may have contributed to the spread of eminent domain reforms across states following the Kelo decision. These explanations are used both to explain the spread of similar policies across states and to explain individual states’ policy adoption decisions.

Imitation suggests states will adopt policies that “similar” states have adopted. The matching characteristics between states can vary, based on considerations relevant to the policy at issue in a given scenario. Sometimes, as suggested by geographic diffusion models, neighboring states share similar characteristics (Foster 1978; Lutz 1987). Usually, in imitation models, these shared characteristics are political, demographic, or economic indicators (Abbott and DeViney 1992, 248; Volden 2006). David Dolowitz and David Marsh argue that ideology and resource similarities are “necessary preconditions” for a state to adopt another state’s policies (1996, 252). Lawrence Grossback, et al., (2004) also find support for imitation among ideologically similar states. This approach to policy diffusion is more common in comparative politics, studying similar policies adopted by different nations (Esping-Andersen 1990; Obinger and Wagschal 2001). Given the political salience of the Kelo decision, it is plausible that state leaders, feeling pressure to enact something quickly, looked to other states that were similar ideologically and economically, and approached the problem of eminent domain reform as those states did. This could also be an example of risk-averse behavior by state leaders, who lacked full information about the likely policy outcomes; by presuming that elected officials in comparable states represented the interests of their residents when creating their eminent
domain reform policies, officials in a state considering an imitative policy may infer that their residents would be similarly supportive.

Another mechanism possibly at work in post-Kelo eminent domain reform is competition. States compete with each other to have strong economies (Saiz and Clarke 1999) and be desirable places to live (Peterson 1981; Tiebout 1956). Comprehensive economic redevelopment plans, as in Kelo, are one way that governments attempt to attract new businesses and citizens. In this model of diffusion, failure to adopt a particular policy, particularly a measure that is attractive to businesses, puts a state at a disadvantage. Citizens and businesses today are informed and mobile: they can learn about more favorable states and can move elsewhere if their current state officials do not continually improve. Interstate competition is rarely mentioned in policy diffusion literature, but it does affect the adoption of certain policies (Berry and Berry 1990; Berry and Baybeck 2005; Boehmke and Witmer 2004). Competition as the “race to the bottom” is more frequently discussed, as states try to cut back on welfare programs or other widely dispersed services so they will not become magnets for free-riders (Allard and Danziger 2000; Berry, Fording, and Hanson 2003; Brueckner 2000; Corbett 1991; Figlio, Koplin, and Reid 1999; Peterson and Rom 1990). Since eminent domain is often used to carry out large-scale redevelopment projects, states in need of economic growth should be more hesitant to implement reforms that substantively limit the exercise of eminent domain.

The question of which political actors facilitate diffusion across states is also of increasing interest among policy diffusion scholars (Balla 2001; Haider-Markel 2001; Mintrom 2000). Individual policy entrepreneurs were long ignored in the diffusion
literature (Mintrom 2000; Savage 1985), but can be influential, either as independent individuals or as actors within particular organizations. These entrepreneurs can work within a model of vertical diffusion, if their role is as a nationally-recognized advocate, or within traditional models of horizontal diffusion, if their role is more akin to a grassroots advocate. Some studies have looked at the role of professional networks and think tanks (Ballinger 2001; Clark and Little 2002; McGann 1992; Rich 2004; Walker 1969; Weaver 1989). Others have begun to study interest groups, whose influence is likely stronger today than in the past as linkages between national offices and their state/local affiliates have grown stronger (Haider-Markel 2001; Martin 2001; Skocpol, et al. 1993; Thomas and Hrebenar 1992). In some instances, interest groups and professional associations may work together to influence diffusion (Glick 1992; Hays 1996; Hays and Glick 1997). The introduction and enactment of “model legislation” created by certain groups across various states is another example of entrepreneurship leading to policy diffusion (Hertel-Fernandez 2014).

It would be surprising if states were not influenced by nationally-based organizations when adopting policies after the Kelo decision, given the activism of property rights advocates prior to the decision and the involvement of a number of groups during the case. A variety of national interest groups submitted amicus briefs in the Kelo case,28 and the open-ended nature of the Supreme Court’s decision (allowing state and local governments to determine their own standards of public use for eminent domain) provided an incentive for groups on both sides to remain active in subsequent state

legislative initiatives. In addition to continued advocacy, the proponents of eminent domain reform reflected an unusual and diverse coalition of interests. Those who advocated for stronger state laws to protect individual property rights naturally included conservative research institutes and legal organizations, such as the Cato Institute, National Taxpayers Union, and Pacific Legal Fund, but they also included the National Association for the Advancement of Colored People (NAACP), the American Association of Retired Persons (AARP), the American Farm Bureau Federation, and the National Association of Realtors. The use of eminent domain for economic development proved to be an issue that mobilized a variety of interest groups, as it cut across typical issue area distinctions.

Capturing interest group influence, however, is a continual challenge (Dexter 1969; Smith 1995; Hall and Deardorff 2006). Interest group activities and legislative activities can each be measured but establishing casual linkages between the two is difficult. Interest group influence at the state government level presents additional challenges, and the research on it is more limited and often not connected to the literature on interest group influence at the federal level (Gray and Lowery 2002). One common proxy for influence at the federal level, for example, is campaign contributions, which must be reported to the Federal Election Commission (FEC); state campaign finance disclosure rules and records, however, can vary significantly from one another (Powell 2012). Ronald Hrebenar describes this as one of seven factors that can affect the degree of influence interest groups may have over public policy in a state: other factors include the policy issue area, political attitudes, degree of integration/fragmentation of a state’s public policy process, the level of professionalization of the state government, level of
state socioeconomic development, the extent and enforcement of public disclosure laws, and the level of campaign costs and sources of campaign support (1993a, 14-15).

Those who have studied state interest groups have posited that interest group influence in a state is inversely related to the strength of political parties within the state (Zeller 1954; Francis 1967; Morehouse 1981; Engel 1985; Wiggins, Hamm and Bell 1992). Some research also finds that business interests are more commonly represented by groups at the state level than other interests, and these business groups are able to influence legislation. Alexander Hertel-Fernandez (2014), for example, suggests that the limited resources available to state legislators for policy research and analysis creates openings for opportunistic business interest groups to provide information or even sample legislation to state legislators. Organized business associations may be more influential in state policy choices than ideologically-based interstate organizations (Hertel-Fernandez, Skocpol and Lynch 2016).

The prevalence of economic development initiatives from states during the 1980s and 1990s has generated research specific to state policymaking and interest group activities in this issue area. Although eminent domain was used in Kelo as an economic development tool, these studies often measure other policy provisions related to economic development, such as tax concessions, job training programs or job creation, or funding for construction. Some research indicates that government officials are the key participants in the economic development process; the interdependence of elected officials and bureaucrats at this level prevents significant policy innovation from occurring without consensus of other relevant political actors (Grady and Chi 1994). Another study indicates that different categories of interest groups appear to exert
influence in state economic development policies, depending on the particular policymaking context (Hunter 1999).

Analysis of State Legislative Responses to Kelo v. New London

The widespread enactment of state eminent domain reforms following the 2005 Kelo v. New London decision provides a unique opportunity to examine the role of the U.S. Supreme Court in state policy diffusion and, in particular, how state legislatures voluntarily respond to permissive Court rulings that do not require policy change. Counter to widespread fears that states would use the Kelo decision to expand their use of eminent domain, the policies enacted by states are attempts to restrict eminent domain use or protect individual property owners. These policies can range from additional procedural requirements or oversight when state or local government entities want to exercise eminent domain to overall prohibitions on eminent domain for economic development, job creation, or tax growth. The quality of legislation varied substantially across states in terms of its perceived efficacy in protecting property rights, with some bills thought of as largely symbolic and others considered strong protections for property owners (Castle Coalition 2007; Lopez, Jewell and Campbell 2009; Somin 2009, 2015; Jacobs and Bassett 2011).

Data and Variables

For this portion of the study, the unit of analysis will be individual states, and the main question of interest focuses on why some states chose to enact stricter eminent domain reforms than others in the years immediately following Kelo. A majority of states enacted these types of bills soon after the ruling, with 35 states enacting eminent domain reforms in 2006 and 7 more states enacting reforms in 2007 (Castle Coalition 2007). Due
to this high level of state activity, the variation among their resulting bills is more important to consider than simply the decision to act in response to Kelo. A table providing a summary of major provisions found in each state’s eminent domain reform bill(s) is found in the appendix. The small number of observations for any one policy element precludes the analysis of particular provisions, so an overall assessment of the quality of state reforms was used instead.

The dependent variable of interest here is the quality of the state eminent domain reform enacted in each state following the Kelo decision. Because of the high salience of the Kelo case, and the unusual volume of state responses, several measures of legislative quality exist, created by legal scholars or interest groups. One widespread measure is a ranking scale created by the Castle Coalition in their 50 State Report Card. The Castle Coalition is a property rights activism project initiated by the Institute for Justice (IJ), a non-profit libertarian law firm specializing in civil liberties. Attorneys from IJ represented the plaintiffs in Kelo v. New London, and, as would be expected, the Castle Coalition is clearly opposed to the Supreme Court’s Kelo decision. The Castle Coalition’s perspective on the Kelo decision, however, does not preclude it from providing reliable assessments of states’ eminent domain reforms. Its state rankings have been used by other scholars studying eminent domain (Morriss 2009; Sharp and Haider-Markel 2008; Somin 2009, 2015) and have been compared against alternative measures for reliability (Lopez, Jewell, and Campbell 2009). Given IJ’s decades of advocacy and legal work in this policy area, the rankings should effectively sort out symbolic from substantive.

29 Details on variables can be found in Appendix D.
legislation; if any bias exists among the rankings, they would likely be more critical of states’ post-Kelo reforms in order to encourage further lobbying and legislation.

As its name suggests, the 50 State Report Card provides grades for each state, on a scale that ranged from an F (for states that did not implement any eminent domain reforms) to an A+ (for states that implemented the strongest eminent domain reforms), though no state achieved an A+ grade. Any score above an F represents some restriction on eminent domain exercises; no examples of states expanding eminent domain powers were found by the Castle Coalition or other analyses of state policies during these years. California, for example, received a D-, and the Castle Coalition characterized its reforms as “mostly cosmetic,” but acknowledged that the state did “create a few additional procedural hoops for condemning authorities to jump through” (2007, 9). While California’s policies may not have been effective, they nevertheless represented an attempt to add steps to the condemnation process, rather than make the process easier for government authorities. These grades were translated into a numerical scale, ranging from 0 (F) to 11 (A). The Castle Coalition provides explanations to accompany each state’s score: the rankings focus primarily on legislative provisions that would (1) prevent eminent domain from being used for economic development purposes or transferring property to private owners and (2) provisions that would narrow blight exemptions. States receiving the highest grades often implemented both types of reforms in a substantive way, and states received more moderate grades if they enacted only one type of reform or reforms that appeared more symbolic than practicable.

Three general categories of hypotheses attempt to capture the dynamics of state policymaking and the circumstances unique to the Kelo policy response. First are general
political determinants of state policymaking, including the ideological tendencies of citizens and state governments, whether the state has unified or divided government, and the generalized direction of public opinion. Individuals who support restrictions on eminent domain typically are thought of as private property rights advocates and are considered ideologically conservative (Hays, Esler and Hays, 1996). Therefore, states that are more conservative or Republican should be more inclined to enact stronger protections for private property owners.

General public attitudes are captured using an ideology measure created by William D. Berry, et al. (state citizen ideology). Information on state legislative elections were collected from Princeton University’s Election Consortium and the National Institute on Money in State Politics. The number of Republican and Democratic seats in the lower legislative house for each state were obtained, and the ratio of seats held by Democrats was calculated as of June 30, 2005, to represent the state legislative climate at the time of the Kelo decision and the following months (proportion of Democrats in legislature).30 Using data from the next legislative election in each state, a variable was created to measure whether the proportion of Democratic seats had grown or diminished since the last state election (Democratic trend in legislature) as an indicator of how political attitudes may be shifting in a state as legislation was under consideration. If key state leaders come from different political parties, it may be more difficult for legislation

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30 Most states hold legislative elections every two years in even-numbered years, and a majority of this data reflects the outcome of the 2004 election. The 2002 election results were used for Alabama and New Hampshire, which hold legislative elections every four years in even-numbered years; the 2003 election results were used for Louisiana and New Jersey, which hold legislative elections every four years in odd-numbered years, as well as for Virginia, which holds legislative elections every two years in odd-numbered years. Seats held by independent or third-party legislators were omitted from the analysis, due to the challenges in determining their ideological perspectives as compared to Republicans or Democrats. Nebraska is omitted from the analysis because its state legislature is nonpartisan and unicameral.
to be enacted; here, a state’s government is considered under divided party control if the
governor and the majority of the lower statehouse represent different parties (divided
state government). As a measure of issue salience and public awareness, the number of
newspaper stories in a state that referred to Kelo v. New London between May and
December 2005 are included (news coverage of decision). Greater issue awareness
should be correlated with stricter eminent domain reforms.

The second set of hypotheses surround state demographic characteristics that
indicate the level of policy need or potential impact of eminent domain. States in which
many residents and legislators can identify with the Kelo plaintiffs, or recognize ways in
which their own communities are similar to New London, are expected to oppose to the
Court’s ruling and support greater legislative protections for individual property rights.
For individuals in these situations, the Kelo decision should be a salient policy issue.
Recent state experiences related to economic growth, population change, and eminent
domain should inform a state’s legislative response to the Kelo decision. In general, states
that exercise eminent domain for economic development, or could have been perceived
as areas where that would be likely to occur, should experience a stronger “backlash”
against eminent domain in the post-Kelo environment.

In states where a higher number of takings had recently occurred, for example,
the public and state legislators may have been concerned that existing practices could be
stretched into overuse under the permissive ruling in Kelo. The number of filed and
threatened takings in each state between 1998 and 2002 were obtained from the Castle
Coalition, and adjusted to account for the varying geographic sizes of states (takings per
thousand miles). Other information on relevant state demographics was obtained through
Current Population Survey data available from the U.S. Bureau of Labor Statistics and the U.S. Census Bureau. Concentrated residential areas may contribute to local governments’ decisions to use eminent domain, as they seek to maximize the utility of popular neighborhood spaces (housing density). Areas that had recently experienced higher levels of population growth may have achieved that through successful economic redevelopment initiatives involving eminent domain, or they may be areas where further revitalization efforts are underway to serve the new residents (population change). Persistently higher levels of unemployment may lead local officials to utilize eminent domain for economic development and generate post-Kelo opposition (unemployment change). Larger populations of African-American residents may lead states to enact stricter reforms, as some of the opposition to the Kelo decision came from the NAACP and others who noted that eminent domain exercises often target black property owners and further racial and economic segregation (African-American residents).

Finally, the third set of hypotheses focus on variables that highlight aspects of policy diffusion. If the policies enacted by states are, in fact, initiated as attempts to refute the U.S. Supreme Court ruling in Kelo, it would be expected that the states that enacted legislation soon after the decision would have enacted stronger reforms than those that enacted legislation later. Early adopters are considered those that enacted eminent domain reform legislation prior to June 23, 2006, which was the one-year anniversary of the decision (early adoption of reforms). State government actors may also be looking to other national political leaders to signal an appropriate response. The proportion of a state’s delegation in the U.S. House of Representatives that co-sponsored H.R. 4128, the main congressional bill expressing opposition to Kelo, should be positively correlated
with the strength of eminent domain reforms produced by the state legislature (delegation co-sponsorship of H.R. 4128). Interest group activity in response to the Kelo decision is approximated by measuring whether or not interest groups or other parties from the state submitted amicus curiae briefs to the case on behalf of the plaintiffs (amici briefs from state). While this is not a direct measure of interest group activity in the state legislative process, it is reasonable to assume that if interest groups were mobilized enough to participate prior to the Court decision, when the issue of eminent domain was less salient, the same groups would be playing an influential role in the subsequent lobbying efforts in their home states.

Table 7: Determinants of Post-Kelo Eminent Domain Reforms by States

<table>
<thead>
<tr>
<th>State Political Environment</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>State Citizen Ideology</td>
<td>0.051**</td>
</tr>
<tr>
<td>(0.018)</td>
<td></td>
</tr>
<tr>
<td>Proportion of Democrats in Legislature</td>
<td>-6.221***</td>
</tr>
<tr>
<td>(1.701)</td>
<td></td>
</tr>
<tr>
<td>Democratic Trend in Legislature</td>
<td>0.839</td>
</tr>
<tr>
<td>(0.486)</td>
<td></td>
</tr>
<tr>
<td>Divided State Government</td>
<td>0.639</td>
</tr>
<tr>
<td>(0.401)</td>
<td></td>
</tr>
<tr>
<td>Newspaper Coverage of Kelo Decision</td>
<td>-.007</td>
</tr>
<tr>
<td>(0.001)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State Demographics and Policy Impact</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Takings Per Thousand Miles (1998-2002)</td>
<td>0.007</td>
</tr>
<tr>
<td>(0.006)</td>
<td></td>
</tr>
<tr>
<td>Housing Density (2005)</td>
<td>-0.004</td>
</tr>
<tr>
<td>(0.002)</td>
<td></td>
</tr>
<tr>
<td>(2.030)</td>
<td></td>
</tr>
<tr>
<td>Unemployment Change (2000-2005)</td>
<td>-0.178</td>
</tr>
<tr>
<td>(0.487)</td>
<td></td>
</tr>
<tr>
<td>African-American Residents (2004)</td>
<td>.567</td>
</tr>
<tr>
<td>(2.190)</td>
<td></td>
</tr>
</tbody>
</table>
Policy Diffusion Considerations

<table>
<thead>
<tr>
<th>Policy Diffusion Considerations</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early Adoption of Reforms</td>
<td>0.813*</td>
<td>(0.414)</td>
</tr>
<tr>
<td>Delegation Co-Sponsorship of H.R. 4128</td>
<td>1.299</td>
<td>(0.574)</td>
</tr>
<tr>
<td>Amici Briefs from State</td>
<td>1.058**</td>
<td>(0.499)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.017</td>
<td>(1.192)</td>
</tr>
<tr>
<td>N</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>Adj. $R^2$</td>
<td>0.632</td>
<td></td>
</tr>
</tbody>
</table>

Notes: Regression analysis coefficients are provided with robust standard errors in parentheses; significance levels of *** $p<0.01$; ** $p<0.05$; * $p<0.10$

Figure 5: Coefficients Plot for Determinants of State Reform Strength

Findings and Discussion

Overall, the strength of state eminent domain reforms passed following the Kelo v. New London decision can be attributed to several of the expected explanatory variables. Although public opposition to the decision was widespread, and in some ways,
bipartisan, stronger eminent domain restrictions typically came from states where citizens were more ideologically conservative and in which there were greater numbers of Republican legislators. This matches with the ideological tendencies of many of the advocacy groups, like the nonprofit conservative law firms, that were active on behalf of the Kelo plaintiffs and were longstanding proponents of stronger property rights protections. There is not, however, a connection between stronger state legislative reforms and congressional support for H.R. 4128, suggesting that different determinants may drive state and federal responses to the Court and policymaking generally.

In many instances, divided government is thought to impede legislative progress, but the findings here suggest that split party control in states had no effect on the strength of eminent domain reforms. These findings are in keeping with the conventional assessment of bipartisan opposition to the Kelo decision. Conservatives may have primarily been the original activists seeking property rights protections, but as awareness about the issue grew after Kelo, people from both sides of the aisle were concerned about possible eminent domain abuses, resulting in pressure on Democratic and Republican state leaders alike to respond to the decision.

States that adopted legislation within one year of the Kelo decision were also more inclined to enact stronger eminent domain reforms than those who passed legislation later. Immediately following the Kelo decision, greater public attention was paid to eminent domain reform, and legislators, at the state level, responded with substantive legislation rather than simply passing reflexive, symbolic bills. Interest group activity also appears to have been associated with stricter eminent domain reforms, but the level of newspaper coverage in a state regarding the Kelo decision was
not. More frequent news reports within a state here serve as a proxy indicator for higher levels of issue salience or attention. Although eminent domain reform became a more salient issue for a broader subset of the public after the Kelo decision, it did not become a widespread, sustained public concern. Instead of a grassroots movement, it appears that stronger reforms in state legislatures are associated with more concentrated groups of interested constituencies. States that had been represented by individuals or interest groups submitting amicus curiae briefs on behalf of the Kelo plaintiffs were more likely to enact stronger eminent domain reforms. This may indicate that a natural base of opposition to the decision existed within a state, or that the interest groups that were mobilized to act at the Supreme Court level continued their advocacy once the policy forum reverted back to state legislatures.

The perceived threat posed by existing takings laws following Kelo appear to have motivated states to take action. States’ recent eminent domain activity, however, had no effect on the strength of eminent domain protections put into place by states. This could be because eminent domain exercises, in many instances, had previously been put to good ends and were generally thought of as benefitting the local economy or community. Whereas many of the opponents of Kelo warned about the potential for eminent domain abuse, other individuals may have recognized examples in which takings had improved their communities. In states where there had been more frequent exercises of eminent domain, towns and cities may have been able to successfully remove blighted areas or overcome property owner holdouts and been able to deliver on their promises of redevelopment and a net public benefit. States that did not have this experience may have reacted more strongly to curb the use of eminent domain.
Some of the rhetoric against the Kelo decision reflected concerns about the impact it could have on rural areas, where land was comparatively cheap and plentiful, but essential to the livelihood of farmers, ranchers, and others whose income was dependent on their property. States in which residential homes are more broadly dispersed, however, were no more likely to enact stronger eminent domain reforms than states that had higher levels of housing density. States that experienced greater levels of population growth in the decade preceding Kelo did enact stronger eminent domain protections. If communities within a state are thought of as desirable places to live, they often attract more affluent new property owners who would support protections for property. Older residents may also be concerned that they could be displaced by proposed developments that cater to the newer residents and would support stronger eminent domain restrictions to preserve their status quo in the face of a changing community. This finding regarding population change may reflect genuine concerns over real threats to property, as was the case in New London, or it may reflect more hypothetical concerns over what could possibly happen under the Kelo standard.

Conclusion

The volume of state legislation passed in response to Kelo v. New London was an unusual occurrence in American politics and policymaking, and the variation among these state eminent domain reforms provides an opportunity to explore unusual dynamics of federalism and policy diffusion wherein the U.S. Supreme Court initiates voluntary state policy changes. A majority of states were compelled to act, but some of their

31 See, for example, hearings held by the U.S. House Committee on Agriculture, regarding a Kelo response bill under its jurisdiction, H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005 (STOPP), on September 7, 2005, (H.Doc. 109-15) and October 27, 2005 (H.Doc. 109-33).
reforms are categorized as symbolic responses whereas others were substantial limitations on the exercise of eminent domain for economic development. The variation across these policies may be able to provide further lessons on how states respond to political pressure created by the Court or from national politics more broadly.

Although this example provides an unusual scenario of state actions in response to a Court decision, many usual policymaking influences appear to have affected the substance of state responses. Much of the legislation that strengthened property rights protections, for example, came from states where interest groups had been active in the Kelo decision, and where citizens and legislators were more conservative and ideologically aligned with the original proponents of eminent domain reform—many of which had been seeking similar changes as far back as the 1990s. These findings suggest that a Supreme Court decision can serve as an important catalyst for state legislative action, as many activists believe. Yet the Court’s ability to generate sustained public attention and political mobilization is limited. Effective implementation of a Court decision through state legislatures may still result from having ideological allies in state government or from continuing advocacy by mobilized constituencies.
Chapter 6: Concluding Observations

Typically, land-use planning and local economic development initiatives are not policy matters that generate much, if any, attention outside of the immediate community in which they occur. Blight designations, property condemnations, and takings regularly happen, and while the affected owners may feel that the loss of their property was unfair, others see a greater community benefit from the infrastructure or economic opportunity that will be provided. When local governments exercise eminent domain authority, it is generally treated as something akin to zoning or other property-related regulations and thought of as a standard use of police powers in the interest of a greater public benefit. The U.S. Constitution contains clear language that government is able to take private property for public use, provided that there is just compensation for the owner. Historically, this has usually been accepted by elected officials and members of the public, and if pressed to further clarify what “public use” means, the Supreme Court has deferred to state or local legislative standards in cases like Berman v. Parker (1954) and Hawai‘i Housing v. Midkiff (1984), even when the resulting precedent gives legislators broad leeway for permissible takings.

As with many political topics and policy matters, issue attention and framing appear to play an important role in the public response to Kelo v. New London. Across the country, blight designations and takings occur and, many times, can even escape the attention of residents in the same town or county. Kelo v. New London, however, brought an unusual level of public attention to economic development takings and the discourse surrounding the case presented New London’s actions as a violation of a fundamental constitutional right to own private property. In effect, this is the same dynamic that E.E.
Schattschneider observed back in 1960: to bring an issue to the forefront of the policy agenda, it is usually necessary to expand the scope of conflict surrounding the issue. Here, the scope of the conflict expanded when eminent domain was presented as a rights violation rather than a reasonable exercise of police powers and tool for local economic growth.

The argument that property ownership is an inherent American right certainly was not new in Kelo, yet the view of property ownership as an inalienable constitutional right is not necessarily supported by the language of the Fifth Amendment that Kelo opponents frequently invoke, nor in its consistent interpretation by the Supreme Court. For decades, local governments have not really considered the question of whether or not it is permissible to use eminent domain to take control of private property; the questions have instead focused on when these exercises should be used and how—questions more closely associated with the due process and just compensation caveats provided by the Constitution.

When the public-at-large learned that local governments could engage in a wide range of projects, including those that involved the transfer of property from one private owner to another, and still satisfy the public use criterion, many viewed this as a gross violation of a constitutional right to own private property. It appears that many people were persuaded to essentially place a period after the Fifth Amendment’s phrase, “nor shall private property be taken,” and ignore the final clause “for public use, without just compensation.” Attention to economic development takings, and the framing of the issue as a matter of constitutional rights, was certainly encouraged by property rights activists who utilized legal scholarship, litigation, and media opportunities among their tactics to
gather support for their objectives, namely, limiting government regulation over private property. One area worth further exploration is the role that property rights advocates played in generating media coverage that helped promote the visibility of *Kelo v. New London* and also perpetuated the idea that the case was an issue of individual rights. By 2005, cable news and internet news likely provided better opportunities to raise public awareness than had been available during earlier property rights cases before the Supreme Court, like *Hawaii Housing v. Midkiff* (1984) or *Dolan v. Tigard* (1994). Information about the *Kelo* case could reach a wide audience, and property rights advocates likely had more of an opportunity to shape the narrative in ways that were sympathetic to their position.

The popular conception of the *Kelo* case as a challenge to a fundamental constitutional right of property ownership affected public expectations for the Supreme Court in an important way. Because the case was framed as an issue of rights, many members of the public and many legislators expected the Supreme Court to take a more principled stand, rather than to deflect decision-making back to elected officials. A defining feature of the Supreme Court over the last half century has been its expanding role as a champion of civil rights and liberties. Some civil liberties cases simply involved the Court adhering to stated constitutional provisions (e.g., protection of First Amendment free speech in cases like *New York Times v. Sullivan* (1964) and *Texas v. Johnson* (1989). In a number of other civil liberties cases, however, the Court interpreted stated constitutional provisions more broadly to expand individual rights protections to include unremunerated rights not specifically addressed in the text of the Bill of Rights. Most notable in this regard, perhaps, is the Court’s ruling in *Griswold v. Connecticut*
(1965), which found abortion permissible under a “zone of privacy” implied by provisions in the First, Third Fourth, Ninth and Fourteenth; this rationale was upheld in Roe v. Wade (1973), which also used the Fourteenth Amendment’s due process clause to apply this standard across all the states.

There are, thus, two divergent views of what the Kelo case represented before the Supreme Court. On one side are the majority Justices, who predominately viewed the case through a more technical and legalistic lens; on the other side are the minority Justices, who adopted considered property rights from a more abstract civil liberties perspective. This contrast is evident throughout the Court’s majority opinion and the dissenting opinions. In the majority opinion, for example, Justice Stevens began with lengthy details about the New London situation and the alignment of the case with standing public use precedents. Justice Thomas’ dissent, in contrast, begins with a quote from William Blackstone, describing the sacred and inviolable right to property ownership. The majority in Kelo likely failed to anticipate that so many outsiders would view the case as a civil liberties issue and expect the Court to act in defense of individual property rights.

The analysis of the Court’s decision to grant certiorari in Kelo provides some suggestions that this framing should not have been a complete surprise to the majority. The dissenting opinions, and subsequent comments from the minority Justices, reveal that they at least acknowledged and understood the conceptualization of property takings as a civil liberties issue; their four votes, presumably, could have been all that were needed to place Kelo on the docket, even if they were unsure whether they could secure another vote to overturn existing eminent domain precedent. The judicial environment
surrounding economic development takings had been shaped over the preceding decades by property rights advocates who sought to reframe the issue as a civil liberties issue and raise awareness about the extent of local government authority in this area. These advocates helped present a higher number of takings cases before lower federal courts and state supreme courts throughout the late 1990s and early 2000s, generating a degree of legal salience that might not have otherwise existed and creating an opportunity for conflicting legal precedents to be established, including the examples cited in the Kelo petitioners’ brief.

There is a widely held expectation that the Supreme Court today will clarify questions about fundamental constitutional rights and civil liberties, helping to define a national standard through the process of incorporation under the Fourteenth Amendment. In Kelo, however, the Court deflected the question back to state legislatures. While the Court majority maintained that this was consistent with what they had always done on these questions, the public expected the Court to more clearly draw some parameters for public use and define certain protections for property rights. This, in part, helps explain the extent of the backlash to Kelo and the fact that it came from both liberals and conservatives; as a rights issue, property ownership can be unifying.

Although it appears the public wanted the Court to set more of a standard for public use, had it done so, the Court likely still would have faced considerable opposition, as it would be difficult for it to create a definition or criteria that would satisfy both conservatives and liberals. The Court’s approach of legislative deference generated backlash, but any further involvement might have also generated critiques of judicial activism from one ideological side or the other, and created a number of
additional lower court challenges to be addressed. When states enacted eminent domain reforms, the more restrictive policies were associated with states that had conservative populations and legislatures controlled by Republicans, indicating that the implementation of widely-agreed upon property rights principles devolved into partisan disagreements over how to appropriately define “public use” and balance community interests over individual rights.

In some ways, with turning the decision back to legislative actors in Kelo, the Court avoided wading into another “political thicket,” a phrase coined by Justice Felix Frankfurter to argue why the Court should not address state legislative redistricting in Colgrove v. Green (1946). In the years that followed Colgrove, however, the Court began to issue rulings regarding redistricting, such as Baker v. Carr (1962), as voting access increasingly became viewed as a fundamental constitutional right the Court needed to preserve. The same dynamic, where the Court’s view of an issue as a political and legislative matter conflicted with the public’s view that the same issue was actually a constitutional rights matter, is apparent in Kelo.

Comments from members of Congress in opposition to the Kelo decision similarly invoked the issue of rights. While a number of members mentioned concerns about the possible policy implications on farmers, nonprofit organizations, or low-income constituents whose properties could be taken for more profitable redevelopment, members of Congress more frequently instead addressed abstract American democratic ideals, provided their own constitutional interpretations, and directly criticized the Supreme Court. Through this lens, members of Congress were frustrated that the Court did not perform its institutional role of settling an important civil liberties question. The
passage of the Private Property Rights Protection Act (PPRPA) in 2005, then, represents the House attempting to act where the Court did not. The bill would have prevented federal funds from being used by localities where property taken for economic development was transferred to another private owner; it is one of several measures drafted by members of Congress that provided some substantive measures to limit the effects of the Kelo decision. These measures may be considered largely symbolic, but it is important to also acknowledge that Congress, much like the Court, would have faced similar challenges in establishing criteria for public use that would have appeased legislators from both sides of the aisle and from a variety of districts.

Given the large House majority that passed the Private Property Rights Protection Act (PPRPA) in 2005, cosponsorship of the bill may represent a stronger commitment from House members than roll-call vote in this instance, as an optional, additional public indication of support. As it did with PPRPA, the House occasionally writes statements into bills that indicate that the legislation was created to address an issue that arose from a Supreme Court decision. In the current 115th Congress, for example, three House bills refer to Court cases in this manner, including another version of PPRPA that continues to address Kelo v. New London. Conclusions from the cosponsorship analysis, therefore, be applicable to other instances in which Congress proposes legislation intended to limit the effects of a Supreme Court decision. Further exploration of this topic may provide better insights about whether members of Congress respond to specific Court decisions they disagree with, or if their disagreement is more generally and broadly directed at the Court as an institution.
Among members of the House, ideological distance from the Court was associated with a greater likelihood of cosponsorship of PPRPA. The bipartisan public opposition to Kelo and statements against the decision from both Republicans and Democrats in Congress might have suggested, instead, that this ideological divergence from the Court would not have any effect on cosponsorship of this bill. Members who took stronger positions against the Kelo decision by cosponsoring PPRPA were ideologically predisposed to disagree with the Court. This provides empirical evidence against the longstanding expectation of legislative deference to the Court and presents the possibility that, in a polarized political environment, members of the House who disagree with the Court, generally, may take other opportunities to limit the effects of Court decisions. In other words, it is not simply the unpopularity of the Kelo decision that led members to cosponsor PPRPA; Kelo might have represented a manifestation of more fundamental disagreements House members have with the Court. Professional norms and expectations, on the other hand, among members of the House who held law degrees and perhaps had prior legal careers, may encourage these individuals to be less oppositional to the Court or lead these members to rely upon the same rationale of precedent and legal interpretation that led the Court majority to arrive at its ruling.

At the state level, legislators also felt public pressure to act where the Court did not. The attempts by states to implement stronger eminent domain protections for property owners represents a role reversal, as many of the Court’s civil rights and liberties rulings are viewed as protections from state infringements on individual rights and liberties. Cases like Brown v. Board of Education (1954), Roe v. Wade (1973), and Obergefell v. Hodges (2015) have created the perception that the Supreme Court defends
individual citizens from constitutionally inappropriate exercises of state government authority. Under the Court’s decision, states were free to make it easier or harder for state and local authorities to use eminent domain or simply to take no action regarding their existing policies. In this instance, a large majority of states chose, voluntarily, to take actions that would be perceived as protecting individual property owners against future state or local government actions.

The scope of 45 states passing eminent domain reform legislation within two years of the Kelo decision, amid the discourse and public opposition to the decision, has been characterized as remarkable by legal and policy scholars. Although the overall efficacy of the post-Kelo reforms in preventing eminent domain takings may be questioned, the actions taken by so many states with that intent imply that a legal loss before the Supreme Court may not be a total loss for policy advocates. Instead of issuing a final, decisive verdict, the permissive ruling by the Court in Kelo served as an invitation for many state legislators to act. Had the decision in Kelo not been viewed as a rights issue that the public expected the Court to weigh in on, there likely would not have been as much attention paid to the case or pressure on state legislators to step in. In this instance, the combination of a permissive Court ruling with a civil liberties issue likely contributed to the degree of the state-level responses.

Because many Supreme Court decisions address matters of state policy, there are a number of other examples where state legislatures respond to the Court. In many instances of permissive rulings, however, the causal link between a Court decision and state legislation may be less clear. Further work in this area should explore the role that organized advocacy groups, through lobbying, legislative drafting, and public awareness
campaigns, can play in sustaining issue attention after a Court decision and encouraging and enabling states to act. The ways in which states respond to the Court can either assist or obstruct the implementation of the Court’s decisions, and this dynamic is important to better understand, given its implications for the Court’s authority and institutional legitimacy.


Chhokra, Shubhankar. 2015. “Ten Years Later, the Seizure of Private Property in Kelo Hasn’t Done Anything for the Public.” National Review.


Gibson v. United States. 1897. 166 U.S. 269.


Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).


Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1976)


Pumpelly v. Green Bay Co. 1871. 80 U.S. 166.


Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al. 2010. 560 U.S. 702.


United States v. Lynah. 1903. 188 U.S. 445.


White v. Kansas City & Memphis Ry. & Bridge Co. 1898. 45 S.W. 1073.


Appendices

Appendix A: Congressional Model Variables

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<tr>
<th>Dependent Variables</th>
<th>Description/Source</th>
<th>Descriptive Statistics</th>
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<tr>
<td>Co-sponsor H.R. 4128</td>
<td>Whether or not the House Member co-sponsored H.R. 4128 (Source: Congressional Bioguide)</td>
<td>Yes = 97  No = 338</td>
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<td>Vote H. R. 4128</td>
<td>Whether or not the House Member voted for H.R. 4128 (Source: Congressional Bioguide)</td>
<td>Yes = 384  No = 37</td>
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<tr>
<td>Party ID [-]</td>
<td>House Member party identification for the 109th Congress; 1=Democrat, 0=Republican (Source: Congressional Bioguide)</td>
<td>Republicans: 232  Democrats: 203</td>
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<tr>
<td>Distance from Court [+]</td>
<td>Ideological distance between House Member and average for Supreme Court justices; negative= liberal, positive = conservative (Source: calculated from Bailey and Maltzman institutional ideal points data for 2004)</td>
<td>Min: -1.72  Max: 1.2  Mean: .2  [Court mean: 0.011]</td>
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<tr>
<td>Spending Gap [-]</td>
<td>Natural logarithm of the difference in incumbent and challenger spending in 2004 election (Source: calculated from Jacobson’s congressional elections data)</td>
<td>Min: 0  Max: 15.42  Mean: 13.32</td>
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<tr>
<td>District Unemployment [+]</td>
<td>Unemployment rate within a district 2005 (Source: American Community Survey)</td>
<td>Min: 1.68  Max: 9.83  Mean: 3.67</td>
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<td>Agriculture Committee [+]</td>
<td>Whether or not the House Member belongs to the Agriculture Committee (originator of H.R. 4128); 1=yes, 0=no. (Source: House Agriculture Committee hearing records)</td>
<td>Yes = 41  No = 394</td>
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<td>Judiciary Committee [+]</td>
<td>Whether or not the House Member belongs to the Judiciary Committee (originator of H.R. 4128); 1=yes, 0=no. (Source: House Judiciary Committee hearing records)</td>
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<td>Lawyer [-]</td>
<td>Whether or not the House Member holds a juris doctorate degree; 1=yes, 0=no (Source: Congressional Bioguide)</td>
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<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
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<tr>
<td>06/24/2005</td>
<td>H.R. 3058 - Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006</td>
<td>House Committee on Appropriations</td>
<td>House vote: 405-18 on 06/30/2005</td>
<td>Section 726 prohibits use of funds provided under this legislation in support of federal, state, or local projects that seek to use eminent domain for anything other than a public use. Public use is defined as “to include economic development that primarily benefits private entities,” and some specific exceptions for utilities, infrastructure, and public health are delineated. The Government Accountability Office (GAO), “in consultation with the National Academy of Public Administration, organizations representing State and local governments, and property rights organizations,” was directed to conduct and submit a study to Congress within 12 months detailing nationwide use of eminent domain and its impact on property owners and communities. (119 Stat. 2494)</td>
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<td>Sponsor Party</td>
<td>Senate vote: 93-1 on 10/20/2005</td>
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<tr>
<td>06/27/2005</td>
<td>S. 1313 – Protection of Homes, Small Businesses, and Private Property Act of 2005</td>
<td>Senate Committee on the Judiciary</td>
<td>Hearings held 09/20/2005 (S. Hrg. 109-208)</td>
<td>Refers to the Kelo decision multiple times throughout §2 and states that “[t]he Court’s decision in Kelo is alarming.” The bill would have required that “[t]he power of eminent domain shall be available only for public use,” and public use “shall not be construed to include economic development.” It would cover all exercises of eminent domain by the federal government, and all exercises of eminent domain by state or local governments involving federal funds.</td>
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<td>Sponsor introductory remarks on 06/23/2006</td>
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<td>07/29/2005</td>
<td>H.R. 3631 – Eminent Domain Limitation Act of 2005</td>
<td>House Committee on Transportation and Infrastructure; House Committee on Financial Services</td>
<td>Referred to Subcommittee on Economic Development, Public Buildings, and Emergency Management (Transportation and Infrastructure) (08/01/2005)</td>
<td>Refers to the Kelo decision multiple times in §2, stating that the decision “appears to expand the definition of public use under eminent domain to significantly threaten private property rights,” and “economic development is not a public use, for the purposes of eminent domain.” The bill would have prevented states from receiving any federal assistance for economic development, unless state law prohibited using eminent domain for economic development; limited eminent domain exercises to public health/safety, public utilities, highways, or parks; and required the entity engaging in a taking to demonstrate its necessity and lack of alternative options.</td>
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<tr>
<td>10/19/2005</td>
<td>S. 1895 – Private Property Rights Protection Act</td>
<td>Senate Committee on Finance</td>
<td>Read twice and referred to committee (10/19/2005)</td>
<td>Refers to the Kelo decision multiple times in §2, along with a summary of the case and a history of property rights in the United States. The bill would prohibit an entity from</td>
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Democrats: 0
Republicans: 2

receiving federal funding if it participated in a taking or condemnation for any reason other than public use without the owner’s consent. The entity would certify its eligibility, which could be subjected to an IRS audit. Property owners facing eminent domain could claim the condemning entity is exceeding its authority in court, and property owners could also seek legal action after a taking, if it was in violation of these terms.

The federal government, an entity receiving federal assistance, or a project involving interstate or foreign commerce would also be prohibited from using eminent domain for reasons other than public use.

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<th>Introduced</th>
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<tr>
<td>10/25/2005</td>
<td>H.R. 4128 – Private Property Rights Protection Act</td>
<td>Committee on the Judiciary, Sponsor Party: Republican, Co-sponsor(s): Democrats: 9, Republicans: 88</td>
<td>House vote: 376-38 on 11/03/2005, Received in Senate; read twice and referred to Committee on the Judiciary (11/04/2005)</td>
<td>Refers to Kelo in §7, noting that “abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.” The bill would have prohibited any state or locality from utilizing eminent domain for economic development, if it receives federal economic development funds during a fiscal year. Economic development was defined as “conveying or leasing” property “to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.” The attorney general would monitor all federal programs under which economic development funds were distributed and annually report to House and Senate Committees on the Judiciary to identify noncomplying states or localities. Would prohibit the federal government from using eminent domain to take property from religious or nonprofit organizations because of their tax-exempt status.</td>
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| 09/08/2006 | S. 3873 – Private Property Rights Protection Act of 2006 | N/A, Sponsor Party: Republican, Co-sponsor(s): Democrats: 0, Republicans: 1 | Read twice and placed on Senate Legislative Calendar No. 596 under General Orders (09/08/2006) | Refers to Kelo in §7, noting that “abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.” The bill would prohibit any state or locality receiving federal economic development funds in a fiscal year from allowing (or delegating authority for) eminent domain for economic development or to target a religious or
nonprofit organization. Economic development defined as conveying or leasing property to a private entity to use for profit or to increase tax revenue, tax base, employment, or general economic health. The federal government would also be prohibited from undertaking these exercises of eminent domain.

Those in violation of the bill would be ineligible for federal economic development funding for two fiscal years. Private property owners could bring legal action to enforce the provisions of the act. The attorney general would monitor how federal economic development funds are distributed and report to the House and Senate Committees on the Judiciary regarding noncomplying states or localities.

### 110th Congress (2007-2008)

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<td>01/04/2007</td>
<td>S. 48 – Private Property Rights Protection Act</td>
<td>N/A</td>
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<td>Substantively similar to S. 1895 (109th Congress)</td>
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### 111th Congress (2009-2010)

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<td>04/02/2009</td>
<td>H.R. 1885 – Private Property Rights Protection Act of 2009</td>
<td>House Committee on the Judiciary</td>
<td>Referred to the Subcommittee on the Constitution, Civil Rights, and Civil</td>
<td>Substantively similar to H.R. 4128 (109th Congress)</td>
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<td>H.R. 1443 – Private Property Rights Protection Act of 2012</td>
<td>House Committee on the Judiciary</td>
<td>Agreed to by House voice vote (02/28/2012)</td>
<td>Substantively similar to H.R. 4128 (109th Congress). Instead of prohibiting economic development takings, the bill would have prohibited states or localities receiving federal economic development funds from utilizing a property seized by eminent domain from for economic development within 7 years of the takings.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Introduced</th>
<th>Bill</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>06/21/2012</td>
<td>S. 3334 – Protection of Homes, Small Businesses, and Private Property Act of 2012</td>
<td>Senate Committee on the Judiciary</td>
<td>Read twice and referred to Senate Committee on the Judiciary (06/21/2012)</td>
<td>Substantively similar to S. 1313 (109th Congress).</td>
</tr>
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## 113rd Congress (2013-2014)

<table>
<thead>
<tr>
<th>Introduced</th>
<th>Bill</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
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<tbody>
<tr>
<td>05/09/2013</td>
<td>H.R. 1944 – Private Property Rights Protection Act of 2014</td>
<td>House Committee on the Judiciary</td>
<td>Reported by the Committee on the Judiciary 02/25/2014 (H.Rept. 113-357)</td>
<td>Substantively similar to H.R. 1443 (112th Congress).</td>
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<tr>
<th>Introduced</th>
<th>Bill</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>02/26/2014</td>
<td>S. 1313 – Protection of Homes, Small Businesses, and Private Property Act of 2014</td>
<td>Senate Committee on the Judiciary</td>
<td>Read twice and referred to Senate Committee on the Judiciary (02/27/2014)</td>
<td></td>
</tr>
</tbody>
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## 114th Congress (2015-2016)

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<thead>
<tr>
<th>Introduced</th>
<th>Bill</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
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211
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<thead>
<tr>
<th>Date</th>
<th>Bill Description</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>07/29/2015</td>
<td></td>
<td>Sponsor Party</td>
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<td>Republican</td>
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<td>Co-sponsor(s)</td>
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<td>Democrats: 1 Republicans: 4</td>
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<thead>
<tr>
<th>115th Congress, 1st Session (2017)</th>
<th>Introduced</th>
<th>Bill Description</th>
<th>Committee(s)</th>
<th>Major Actions</th>
<th>Provisions Related to Eminent Domain and Public Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>03/22/2017</td>
<td>H.R. 1689 – Private Property Rights Protection Act of 2017</td>
<td>House Committee on the Judiciary</td>
<td>Reported by the Committee on the Judiciary (H. Rept. 115-859); agreed to in the House by voice vote (07/23/2018); read twice and referred to Senate Committee on the Judiciary (07/24/2018) Substantively similar to H.R. 1443 (112th Congress).</td>
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<td>Sponsor Party</td>
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<td>Co-sponsor(s)</td>
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<td>Democrats: 1 Republicans: 1</td>
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</tr>
</tbody>
</table>
Appendix C: Congressional Record Comments Regarding Kelo v. New London (June 24, 2005-June 24, 2006)

<table>
<thead>
<tr>
<th>Date</th>
<th>Member</th>
<th>State</th>
<th>Party</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>06/24/2005</td>
<td>John J. Duncan, Jr.</td>
<td>TN</td>
<td>R</td>
<td>Concerned about Kelo decision and effects on freedom and prosperity; believed that it runs counter to Founding Fathers’ critical concept of private property; referred to lack of tax revenue from public lands and large amount of land already owned by government; described district history where land taken from lower-income families who would be wealthier if they still owned their land (vol. 151, pt. 10, pp. 14236-14237)</td>
</tr>
<tr>
<td>06/27/2005</td>
<td>John Cornyn</td>
<td>TX</td>
<td>R</td>
<td>Introductory remarks on S. 1313; noted that protection of private property is a fundamental principle and commitment of the Founders; called Kelo decision “alarming” and compares eminent domain exercises to what might be expected in China or Russia; believed it is appropriate for Congress to regulate all exercises of eminent domain made by federal government and those made by state or local governments via federal funds (vol. 151, pt. 10, pp. 14311-14313)</td>
</tr>
<tr>
<td>06/27/2005</td>
<td>Maxine Waters</td>
<td>CA</td>
<td>D</td>
<td>Recognized that June is National Homeowner Month; expressed outrage over Kelo decision enabling takings of homes for private use; stated she and colleagues from other party would be working on legislation to “undermine this decision” and reinterpret takings clause (vol. 151, pt. 10, pp. 14385-14386)</td>
</tr>
<tr>
<td>06/28/2005</td>
<td>Cliff Sterns</td>
<td>FL</td>
<td>R</td>
<td>Praised Canadian Supreme Court for providing access to health insurance; summarized Kelo case facts; noted that home state only allowed eminent domain for blight but he did not think that was sufficient protection; invoked Founders view of private property; noted how takings historically disenfranchised minorities, elderly, and the poor (151 Cong Rec E1379)</td>
</tr>
<tr>
<td>06/28/2005</td>
<td>Louie Gohmert</td>
<td>TX</td>
<td>R</td>
<td>Made analogy of kingdoms and fiefdoms where authorities could redistribute property arbitrarily; applauded the “mental gymnastics” of the Supreme Court in crafting decision that he believed is unfair and not in keeping with the American way (151 Cong Rec H5256)</td>
</tr>
<tr>
<td>06/28/2005</td>
<td>Jim Ryun</td>
<td>KS</td>
<td>R</td>
<td>Stated he was against Kelo decision; believed it misrepresents intent and precedent regarding takings; Kelo created a loophole for government to define public use in ways to generate tax revenue (151 Cong Rec H5259)</td>
</tr>
<tr>
<td>06/29/2005</td>
<td>Marsha Blackburn</td>
<td>TN</td>
<td>R</td>
<td>Disliked Kelo decision because it runs counter to America’s tradition and respect for public property;</td>
</tr>
<tr>
<td>Date</td>
<td>Member</td>
<td>State</td>
<td>Party</td>
<td>Speech/Action</td>
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<tr>
<td>06/29/2005</td>
<td>Denny Rehberg</td>
<td>MT</td>
<td>R</td>
<td>Remarked on his introduction of Private Property Protection Act the previous day; stated its intention to “correct the erroneous decision” in Kelo; feared effects on homeowners and small businesses from aggressive use of eminent domain by government officials; stated legislation sets standards that eminent domain should only be used for “true” public use, which would not include private economic development for improved tax revenue</td>
</tr>
<tr>
<td>06/29/2005</td>
<td>Phil Gingrey</td>
<td>GA</td>
<td>R</td>
<td>Stated he is “incensed” by the Kelo decision and claimed it “effectively turned the deeds to every American home and business over to the government”; provided a hypothetical example of a business that could be threatened in his district; declared “Congress cannot…stand idly by”; withdrew his amendment to prevent the use of federal funds for economic development takings</td>
</tr>
<tr>
<td>06/29/2005</td>
<td>Steve King</td>
<td>IA</td>
<td>R</td>
<td>Introduced amendment related to Kelo; amendment would strike $1.5 million from the U.S. Supreme Court’s proposed budget of $60 million; believed homes and businesses are “no longer safe”; estimated that the amount removed from the Supreme Court budget would roughly be the nominal amount of the value of 15 properties taken by eminent domain in New London as a result of the ruling</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Deborah Pryce</td>
<td>OH</td>
<td>R</td>
<td>Spoke “to protest the attack” on private property rights from Kelo; referenced his experience as a former judge; criticized decision as a “gross misinterpretation” of the Constitution</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Scott Garrett</td>
<td>NJ</td>
<td>R</td>
<td>Defended Garrett-Kennedy he co-introduced to prevent federal funds from being used to “enforce the judgment” in Kelo; believed federal funds should not assist with infrastructure or other means of support for private projects if eminent domain had been exercised and removed others from property they once owned; noted that the decision “will continue to be respected” by the House and his amendment simply prevents the federal government from subsidizing private developers in those initiatives</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>John Olver</td>
<td>MA</td>
<td>D</td>
<td>Opposed to Garrett-Kennedy amendment; believed that amendment was problematic by overstepping constitutional system of checks and balances and separation of powers; noted that a split Supreme Court decision was not an invalid decision</td>
</tr>
</tbody>
</table>
| 06/30/2005 | Marty Knollenberg | MI    | R     | Opposed to Garrett-Kennedy amendment; noted the debate on eminent domain the preceding day lasted 45 minutes and resulted in the rejection of a similar amendment; believed amendment would set “a more
“dangerous precedent” enabling Congress to override the Supreme Court (vol. 151, pt. 11, p. 14908)

<table>
<thead>
<tr>
<th>Date</th>
<th>Member</th>
<th>State</th>
<th>Party</th>
<th>Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>06/30/2005</td>
<td>Mark Kennedy</td>
<td>MN</td>
<td>R</td>
<td>Defended of Garrett-Kennedy amendment; expressed concern about the effects of Kelo on property owners facing state and local governments; urged Congress to consider how decision would “disproportionately affect the poor, the elderly, and minorities”; noted opposition to Kelo from NAACP, AARP, National Association of Homebuilders, and others (vol. 151, pt. 11, p. 14908)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>David Obey</td>
<td>WI</td>
<td>D</td>
<td>Opposed to Garrett-Kennedy amendment; stated its passage would be akin to tearing up the Constitution; believed Kelo decision “was nutty” and agreed with the substance of the Amendment; sought a separate law with hearings and full discourse rather than a bill striking federal funding or proposing a constitutional amendment (vol. 151, pt. 11, pp. 14908-14909)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Ron Paul</td>
<td>TX</td>
<td>R</td>
<td>Spoke in opposition to legislation involving sale of Unocal; implied that conservatives advocating for the sale but opposed to Kelo were hypocritical by having Congress “attempt to do something that may be even worse than Kelo v. New London” (vol. 151, pt. 11, p. 14980)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>James Sensenbrenner</td>
<td>WI</td>
<td>R</td>
<td>Called for House to agree to H. Res. 940 expressing “grave disapproval” of Kelo; noted he introduced H.R. 3135 (Private Property Rights Protection Act of 2005) that day to give “legislative force” to the resolution; H.R. 3135 would prevent federal government takings for economic development and prevent federal funds from being used by state or local governments for economic development takings; described opposition to Kelo from American Farm Bureau and religious organizations; noted religious organizations and other non-profits would be most at-risk for takings; compared long-term effects of Kelo to Dred Scott decision, with a Supreme Court “mistake” leading to national conflict (vol. 151, pt. 11, pp. 14982-14983; 14989)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>John Conyers</td>
<td>MI</td>
<td>D</td>
<td>“Reluctantly” opposed to H. Res. 940 because of its rhetoric against the Court, but supported its principle; disliked the exaggeration of the scope of the ruling; expressed concerns over eminent domain abuse enabling corporate interests over individual rights; referred to NAACP, Southern Christian Leadership, and other civil rights organizations that opposed Kelo; doubted whether Congress could address eminent domain abuses alone, given the historic role of the judiciary in protecting individual rights (vol. 151, pt. 11, p. 14984)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Tom DeLay</td>
<td>TX</td>
<td>R</td>
<td>Dismissed wisdom of the Court as an institution; believed Kelo violated “the most basic fundamental tenet of the social contract”; decried the impact the decision would have on poor, elderly, and minorities; stated “[i]t is not a debatable ideological overreach but a universally deplorable assault of the rights of man”; called on public to reassert its constitutional authority (vol. 151, pt. 11, p. 14985)</td>
</tr>
<tr>
<td>Date</td>
<td>Name</td>
<td>State</td>
<td>Party</td>
<td>Remarks</td>
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<tr>
<td>06/30/2005</td>
<td>Barney Frank</td>
<td>MA</td>
<td>D</td>
<td>Corrected H. Res. 940 language claiming the 14th Amendment immediately applied the 5th Amendment to the states; noted the case deferred to state/local elected officials and those usually seeking judicial restraint wanted an activist Court; expressed support for the resolution on the grounds that it would protect low-income housing (vol. 151, pt. 11, p. 14985-14986)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Jerry Nadler</td>
<td>NY</td>
<td>D</td>
<td>Changed to support H. Res. 940, based on Frank’s argument that it would protect low-income housing (vol. 151, pt. 11, p. 14986)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Christopher Cannon</td>
<td>UT</td>
<td>R</td>
<td>Concurring with Frank’s reasoning to support H. Res. 940 to protect low-income housing; noted the “frightening prospect of the wealthy and connected preying on the poor”; called Kelo ruling “mistaken” and argued that as a coequal branch of government, “it is incumbent upon Congress” to protect property owners (vol. 151, pt. 11, p. 14986)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Roy Blunt</td>
<td>MO</td>
<td>R</td>
<td>Supported H. Res. 490 and H. R. 3135; stated Kelo “effectively rewrote the 5th Amendment” and defined “public good” as “the best taxpayer” (vol. 151, pt. 11, p. 14986-14987)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Sheila Jackson-Lee</td>
<td>TX</td>
<td>D</td>
<td>Voted for amendment to appropriations bill; noted her past experience as a city council representative; disagreed with H. Res. 490 language pertaining to the Court’s decision, but supports “the idea of a remedy for those who have been harmed” (vol. 151, pt. 11, p. 14987)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Richard Pombo</td>
<td>CA</td>
<td>R</td>
<td>Stated he had been advocating for congressional protections to private property rights for 13 years; Kelo brought issue to the forefront of all Americans, not just farmers and ranchers who had been experiencing similar takings; “thrilled” House is acting (vol. 151, pt. 11, p. 14987)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Steny Hoyer</td>
<td>MD</td>
<td>D</td>
<td>Noted a broad consensus and his shared views with Frank; did not believe that government can decide a definition of public use; believed that H. Res. 490 was “premature” but supported it (vol. 151, pt. 11, pp. 14987-14988)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>John Duncan</td>
<td>TN</td>
<td>R</td>
<td>Believed Kelo decision to be “very harmful to our freedom and our prosperity”; drew correlations between well-off nations and those that allow their people the most freedoms and private property protections; believed “we can never satisfy governments’ appetite for money or land” (vol. 151, pt. 11, p. 14988)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Steve King</td>
<td>IA</td>
<td>R</td>
<td>Appreciated House unity on defending the Constitution; stated that the Supreme Court “amended our Constitution with their sliver thin majority opinion”; tied economic strength of U.S. to its property rights protections (vol. 151, pt. 11, pp. 14988-14989)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Mark Udall</td>
<td>CO</td>
<td>D</td>
<td>Supported H. Res. 490; disagreed with language stating that Kelo rendered 5th Amendment meaningless; expressed concerns over actions by Congress that might</td>
</tr>
<tr>
<td>Date</td>
<td>Name</td>
<td>State</td>
<td>Party</td>
<td>Remarks</td>
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<tr>
<td>06/30/2005</td>
<td>Todd Tiahrt</td>
<td>KS</td>
<td>R</td>
<td>Stated Supreme Court “effectively changed our Constitution”; called Kelo a “weak majority ruling”; noted nations that do not protect property rights also infringe upon other rights of the people; described possible effects on small business or lower-income homeowners; needed to defend “the public good” from “the whim of the wealthy” by challenging the Court’s ruling (vol. 151, pt. 11, p. 14990)</td>
</tr>
<tr>
<td>06/30/2005</td>
<td>Jay Inslee</td>
<td>WA</td>
<td>D</td>
<td>Opposed Supreme Court ruling in Kelo; feared abuse by local governments and private developers against working-class homeowners; noted separation of powers and believed it would be inappropriate for Congress to “punish” the Court for its decision (vol. 151, pt. 11, p. 14990)</td>
</tr>
<tr>
<td>07/01/2005</td>
<td>John Cornyn</td>
<td>TX</td>
<td>R</td>
<td>Commented on retirement of Justice Sandra Day O’Connor; noted her Kelo dissent as one of her “important contributions to our jurisprudence” (vol. 151, pt. 11, p. 15279)</td>
</tr>
<tr>
<td>07/01/2005</td>
<td>James Sensenbrenner</td>
<td>WI</td>
<td>R</td>
<td>Extension of remarks on his introduction of H.R. 3135; referred to Kelo decision; described historical protections for private property; noted NAACP, AARP, American Farm Bureau, and religious organizations opposition to decision (vol. 151, pt. 11, pp. 15345-15346)</td>
</tr>
<tr>
<td>07/13/2005</td>
<td>Terry Everett</td>
<td>AL</td>
<td>R</td>
<td>Extension of remarks to explain how he would have voted during an absence; would have voted “yes” on H. Res. 490 in opposition to Kelo decision (vol. 151, pt. 11, p. 15915)</td>
</tr>
<tr>
<td>07/18/2005</td>
<td>Phil Gingrey</td>
<td>GA</td>
<td>R</td>
<td>Introduction of co-sponsored H.R. 3268 (Eminent Domain Tax Relief Act of 2005); stated the bill was continuing congressional opposition to Kelo; bill would prevent those who lose property through eminent domain from having to pay capital gains tax on revenue from the forced sale; believed “the Constitution speaks loud and clear” about the bounds of eminent domain for public use only; questioned method of determining just compensation (vol. 151, pt. 12, pp. 16287-16288)</td>
</tr>
<tr>
<td>07/13/2005</td>
<td>Michael McCaul</td>
<td>TX</td>
<td>R</td>
<td>Extension of remarks to explain how he would have voted during an absence; would have voted “yes” on H. Res. 490 in opposition to Kelo decision; noted he was an original cosponsor of the resolution (vol. 151, pt. 12, p. 16323)</td>
</tr>
<tr>
<td>07/29/2005</td>
<td>Mark Udall</td>
<td>CO</td>
<td>D</td>
<td>Extension of remarks expressing disagreement with Kelo and stating he voted for H. Res. 490; noted that Congress may be considering stronger legislative responses and he believed that to be acceptable; declared that “it is important to remember that the primary responsibility in this area rests with the states&quot;</td>
</tr>
<tr>
<td>Date</td>
<td>Name</td>
<td>State</td>
<td>Party</td>
<td>Remarks</td>
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<tr>
<td>09/07/2005</td>
<td>James Sensenbrenner</td>
<td>WI</td>
<td>R</td>
<td>Introduction of H. Res. 423 to honor Chief Justice William Rehnquist upon his death; described Rehnquist joining O’Connor’s dissent in Kelo (vol. 151, pt. 14, p. 19647)</td>
</tr>
<tr>
<td>09/07/2005</td>
<td>Louie Gohmert</td>
<td>TX</td>
<td>R</td>
<td>Tribute to Chief Justice William Rehnquist; Rehnquist’s dissent in Kelo reminded him that “the price of liberty is eternal vigilance”; described Kelo as a “phenomenal decision, just an embarrassment” for all judges; admired Rehnquist for maintaining integrity and principle (vol. 151, pt. 14, p. 19694)</td>
</tr>
<tr>
<td>09/07/2005</td>
<td>Steve King</td>
<td>IA</td>
<td>R</td>
<td>Tribute to Chief Justice William Rehnquist; discussed Rehnquist and O’Connor’s dissent in Kelo; stated “I do not believe that the 5th Amendment could be written more precisely, more concisely” than in its original text (vol. 151, pt. 14, p. 19696)</td>
</tr>
<tr>
<td>09/14/2005</td>
<td>Byron Dorgan</td>
<td>ND</td>
<td>D</td>
<td>Introductory remarks on S. 1704 to prevent federal funds from use for economic development takings or takings where property is transferred to another private individual/entity; Kelo “stands logic on its head” and sets a “dangerous precedent”; believed government should protect and strengthen property rights (vo. 151, pt. 15, p. 20318)</td>
</tr>
<tr>
<td>09/15/2005</td>
<td>John Boehner</td>
<td>OH</td>
<td>R</td>
<td>Extension of remarks honoring Constitution Day; described a “depressing trend” evidenced by Kelo where justices disregard the Constitution and instead think ‘government knows best’; spoke in support of John Roberts for new chief justice (vol. 151, pt. 15, p. 20594)</td>
</tr>
<tr>
<td>09/20/2005</td>
<td>Bob Bennett</td>
<td>UT</td>
<td>R</td>
<td>Requested unanimous consent for authorization for the Judiciary Committee to hold its hearing on “The Kelo Decision: Investigating Takings of Homes and Other Private Property” that day (vol. 151, pt. 15, p. 20721)</td>
</tr>
<tr>
<td>09/21/2005</td>
<td>Wayne Allard</td>
<td>CO</td>
<td>R</td>
<td>Spoke in support of John Roberts as new chief justice; Roberts “recognizes the importance of property rights and the role of the legislature in drawing the line in cases of eminent domain; quoted Roberts’ comments on Kelo (vol. 151, pt. 15, p. 20892)</td>
</tr>
<tr>
<td>09/26/2005</td>
<td>Arlen Specter</td>
<td>PA</td>
<td>R</td>
<td>Introductory remarks on legislation to introduce television coverage of the Supreme Court; discussed Kelo and other split decisions as examples where it would have been educational for the public to watch the justices grapple with important issues and undertake the deliberative process of the Court (vol. 151, pt. 16, pp. 21222-21223)</td>
</tr>
<tr>
<td>09/27/2005</td>
<td>Bill Nelson</td>
<td>FL</td>
<td>D</td>
<td>Support of John Roberts for chief justice; discussed Kelo with Roberts due to its important implications for Florida; Roberts did not state whether he agreed with the decision but noted “a person’s home is their castle” and it is not for the Court to decide what is public use; Nelson “appreciated that answer” (vol. 151, pt. 16, p.</td>
</tr>
<tr>
<td>Date</td>
<td>Name</td>
<td>State</td>
<td>Party</td>
<td>Remarks</td>
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<tr>
<td>09/28/2005</td>
<td>Wayne Allard</td>
<td>CO</td>
<td>R</td>
<td>Support of John Roberts for chief justice; noted Roberts “recognizes the limitations on the government’s taking of private property and the role of the legislature in drawing lines that the Court should not” (vol. 262, pt. 16, pp. 21397-21398)</td>
</tr>
<tr>
<td>09/28/2005</td>
<td>John Thune</td>
<td>SD</td>
<td>R</td>
<td>Support of John Roberts for chief justice; noted Kelo as an example of “damage” done if Supreme Court is not committee to judicial restraint; majority “deleted an inconvenient clause in the 5th Amendment” (vol. 151, pt. 16, p. 21405)</td>
</tr>
<tr>
<td>09/28/2005</td>
<td>George Allen</td>
<td>VA</td>
<td>R</td>
<td>Support of John Roberts for chief justice; Kelo “willfully ignored the Bill of Rights”; tied home ownership to the American dream and stated support for economic policies to make home ownership “more affordable to more people” (vol. 151, pt. 16, p. 21418)</td>
</tr>
<tr>
<td>09/29/2005</td>
<td>Trent Lott</td>
<td>MS</td>
<td>R</td>
<td>Support of John Roberts for chief justice; Kelo and other decisions indicate “dangers of judicial activism”; concerned for public legitimacy of the judiciary (vol. 151, pt. 16, p. 21631)</td>
</tr>
<tr>
<td>09/29/2005</td>
<td>Louie Gohmert</td>
<td>TX</td>
<td>R</td>
<td>Evoked Kelo in discussion of legislation to amend the Endangered Species Act of 1974; made analogy of colonial era, where “[i]f you were a suck up to the king, if you paid homage, kind of like the Kelo decision, you were the better friend of the government, then the government was going to treat you good” (vol. 151, pt. 16, p. 21839)</td>
</tr>
<tr>
<td>10/18/2005</td>
<td>Orrin Hatch</td>
<td>UT</td>
<td>R</td>
<td>Introductory remarks for S. 1883, the Empowering More Property Owners with Enhanced Rights Act (EMPOWER) Act of 2005; notes constituents contacting Congress with concerns from Kelo; notes that the bill does not address Kelo directly but enhances rights of property owners; would create a Property Owners’ Bill of Rights and an ombudsman to assist property owners if federal actions affected their property; modeled after a Utah program (vol. 151, pt. 17, pp. 22962-22963)</td>
</tr>
<tr>
<td>10/19/2005</td>
<td>Kit Bond</td>
<td>MO</td>
<td>R</td>
<td>Filed an amendment in response to Kelo attached to Transportation, Treasury, the Judiciary, Housing and Urban Development, and related agencies appropriations bill for 2006; noted “tremendously harmful” examples of eminent domain in home state; would limit federal funds from use for eminent domain activities that primarily benefit private entities; would require GAO to study use and outcomes of eminent domain nationwide (vol. 151, pt. 17, pp. 23155-23156)</td>
</tr>
<tr>
<td>10/19/2005</td>
<td>Patty Murray</td>
<td>WA</td>
<td>D</td>
<td>Stated Kelo “was a great shock to many”; support of Bond’s amendment (vol. 151, pt. 17, p. 23156)</td>
</tr>
</tbody>
</table>
| 10/19/2005 | John Ensign     | NV    | R     | Introductory remarks of S. 1895 “to return meaning to the 5th amendment by limiting the power of eminent domain”; summarized Kelo case details; noted Kelo “highlighted a serious problem with how government
<table>
<thead>
<tr>
<th>Date</th>
<th>Name</th>
<th>State</th>
<th>Party</th>
<th>Statement</th>
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</thead>
<tbody>
<tr>
<td>11/01/2005</td>
<td>John Carter</td>
<td>TX</td>
<td>R</td>
<td>Called Kelo “one of the worst opinions” ever made by the Supreme Court; decision “totally outside” the Constitution; referred to past experience as a lawyer in takings cases; called Kelo “an abomination” (vol. 151, pt. 18, p. 24382)</td>
</tr>
<tr>
<td>11/01/2005</td>
<td>Phil Gingrey</td>
<td>GA</td>
<td>R</td>
<td>Discussion of H.R. 4128; concerned that property owners are “powerless” if an authority targets them with eminent domain; believed Kelo “suddenly expanded” eminent domain boundaries; decision created incentives to use takings to target small businesses on behalf of larger ventures (vol. 151, pt. 18, pp. 24395-24340)</td>
</tr>
<tr>
<td>11/01/2005</td>
<td>Marsha Blackburn</td>
<td>TN</td>
<td>R</td>
<td>Stated “if there is anything that strikes me and my constituents as contrary to our values, it is this Kelo decision; called it “un-American” and a “stunning display of judicial activism”; noted property rights concerns in her home state also include intellectual property rights (vol. 151, pt. 18, pp. 24396-24397)</td>
</tr>
<tr>
<td>11/01/2005</td>
<td>Jean Schmidt</td>
<td>OH</td>
<td>R</td>
<td>Concerned that the Supreme Court “has become a little schizophrenic” on issues like property rights since the 1940s; noted Kelo overstepped bounds of interpreting law and attempted to make law; relayed history of past takings decisions (vol. 151, pt. 18, pp. 24397-24398)</td>
</tr>
<tr>
<td>11/01/2005</td>
<td>Ted Poe</td>
<td>TX</td>
<td>R</td>
<td>Noted past as a trial judge; stated his respect for the Supreme Court but that the Kelo “ruling was wrong”; public takes property rights for granted; recalled history of property rights in U.S. and how important/novel individual ownership for non-nobles was; Supreme Court “authorized land grabbing” and “sacrificed private property on the altar of greed” (vol. 151, pt. 18, pp. 24398-24399)</td>
</tr>
<tr>
<td>11/02/2005</td>
<td>Virginia Foxx</td>
<td>NC</td>
<td>R</td>
<td>Spoke in support of H. R. 4128 as an appropriate response by Congress; recalled Kelo case facts (vol. 151, pt. 18, p. 24428)</td>
</tr>
<tr>
<td>11/02/2005</td>
<td>Jim Ryun</td>
<td>KS</td>
<td>R</td>
<td>Spoke in support of H.R. 4128; noted public reaction to Kelo was “both swift and decisive”; those in homestate “are outraged” (vol. 151, pt. 18, p. 24428)</td>
</tr>
<tr>
<td>11/02/2005</td>
<td>John Doolittle</td>
<td>WI</td>
<td>R</td>
<td>Spoke in support of H.R. 4128; Kelo “empowered the government” to utilize economic development takings; stated bill is “an appropriate use of Congress’ spending power” (vol. 151, pt. 18, p. 24429)</td>
</tr>
<tr>
<td>11/02/2005</td>
<td>Barney Frank</td>
<td>MA</td>
<td>D</td>
<td>Agreed that Kelo was a bad decision; thought Republicans were “blaming some of the wrong people” by criticizing the Supreme Court, which “was not the author of this policy”; rhetoric of “activist judges” inappropriately applied in this case (vol. 151, pt. 18, p. 24429)</td>
</tr>
<tr>
<td>Date</td>
<td>Representative</td>
<td>State</td>
<td>Party</td>
<td>Remarks</td>
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<tr>
<td>11/03/2005</td>
<td>Phil Gingrey</td>
<td>GA</td>
<td>R</td>
<td>Consideration of procedural rule and H.R. 4128; since Kelo, homes and businesses in “grave jeopardy and threatened by the government wrecking ball”; decision “ripped” property rights protections out of the Constitution (vol. 151, pt. 18, pp. 24751-24752); introduced amendment to prevent takings of religious or other non-profit organizations that do not generate tax revenue (pp. 24790-24791)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>James McGovern</td>
<td>MA</td>
<td>D</td>
<td>Spoke in support of H.R. 4128; noted a “bipartisan, collaborative effort” produced “sound legislation”; linked bill to H. Res. 340 and Kelo; believed Kelo was “wrongly decided”; noted need to balance economic development with constitutional rights; noted 4 months since decision was “too long” without legislative protections for property rights (vol. 151, pt. 18, pp. 24752-24753)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>James Sensenbrenner</td>
<td>WI</td>
<td>R</td>
<td>Introductory remarks on H.R. 4128; noted “strong opposition” to Kelo “from across the political, ideological, and socioeconomic spectrum”; stated public response “swift and strong” and polled as number one issue; described new bill as a stronger version of H.R. 3135 he introduced the week after the decision (vol. 151, pt. 18, pp. 24761-24762; 24770); opposed to Nadler amendment as a “gutting amendment” by removing property owner redress provision; questioned Nadler amendment’s constitutionality; noted denial of federal funds as constitutional and something Congress had previously done (p. 24784); opposed to Turner amendment for creating “undefined terms that would gut this vital legislation”; criticized groups lobbying for Turner amendment; stated bill includes a “reasonable exception” if there is an “immediate threat” to public health or safety (p. 24787)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>John Conyers</td>
<td>MI</td>
<td>D</td>
<td>Spoke in support of H.R. 4128; noted Poletown decision in home state as a similar issue to Kelo before reversed by Michigan Supreme Court; bill advances “a more traditional view of public use” (vol. 151, pt. 18, p.24762)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Bobby Scott</td>
<td>VA</td>
<td>D</td>
<td>Spoke in opposition of H.R. 4128; believed it was “undermining the states’ rights and assuming the role of a city council”; stated Congress “should not change federal law every time” it disagrees with a locality; impossible for Congress to know how to draw an appropriate line when circumstances are community-specific; noted complications from public-private partnerships used to build stadiums and undertake downtown revitalization projects; criticized bill for not ensuring just compensation (vol. 151, pt. 18, pp.24762-24763)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Steve Chabot</td>
<td>OH</td>
<td>R</td>
<td>Pleased Congress is acting and believed bill anticipates “unintended consequences” that congressional action could have; believed Supreme Court was supporting a “distinctly un-American ideal” (vol. 151, pt. 18, p. 24785)</td>
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<td>Date</td>
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<tr>
<td>11/03/2005</td>
<td>Earl Blumenauer</td>
<td>OR</td>
<td>D</td>
<td>Recalled experience as a local official and only rarely resorting to eminent domain; expressed concern over “dangers of having the federal government rush into something that is appropriately the province of state and local affairs”; concerned over unintended consequences of congressional action; noted Congress “failed to recognize the many benefits we experience thanks to eminent domain” (vol. 151, pt. 18, pp. 24764-24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Louie Gohmert</td>
<td>TX</td>
<td>R</td>
<td>Stated 5th Amendment clearly specifies public use; believed that decision was reminiscent of colonial era where king could redistribute property; asked if members “really want to tell voters that you support this ridiculous Supreme Court notion that a government can take their property…to give it over to someone richer who is going to pay more taxes, and that is the only reason?” (vol. 151, pt. 18, p. 24765)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>David Davis</td>
<td>TN</td>
<td>R</td>
<td>Noted home state experiences with public works condemnations and that many acknowledged the economic benefits but still “felt the government takeover of land was wrong”; stated that had land been taken for private ownership “my ancestors would have felt like declaring war on the government”; called Kelo “wrongheaded and wrong-hearted”; acknowledged that the legislation was the strongest Congress could go in response, barring a constitutional amendment (vol. 151, pt. 18, p. 24765)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Maxine Waters</td>
<td>CA</td>
<td>D</td>
<td>Stated support for H.R. 4128; was “shocked” at Kelo; noted at least 125 examples of economic development takings and that they are fairly common; felt compelled for Congress to act; believed mayors are too cozy with developers; noted bipartisan nature of issue (vol. 151, pt. 18, pp. 24765-24766; 24769); opposed to Nadler amendment (p. 24784); feared Moran amendment would “create a loophole” for state or local governments to declare economic development the primary purpose of a project (p. 24786); opposed to Turner amendment for “essentially creating a blight exemption” (p. 24788); concerned that Miller amendment would lead cities to “use the brownfields label as an excuse” for takings as a “modern-day blight exception” (p. 24789)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Don Young</td>
<td>AK</td>
<td>R</td>
<td>Concerned that H.R. 4128 may adversely affect transportation projects, including those undertaken as public-private partnerships (vol. 151, pt. 18, p. 24766)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Ted Poe</td>
<td>TX</td>
<td>R</td>
<td>Noted experience as judge; property ownership as a fundamental reason for starting the nation; Supreme Court “misinterpreted this very simple rule” of the 5th Amendment (vol. 151, pt. 18, p. 14766)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Jim Moran</td>
<td>VA</td>
<td>D</td>
<td>Opposed to H.R. 4128 as introduced; believed bill was too broad and length of time permitted to take legal action is too long; noted views were affected by his experiences as a mayor utilizing eminent domain for important projects; planned to introduce an amendment to correct the “unintended consequences” of H.R. 4128 (vol. 151, pt. 18, p. 24766-24767); offered amendment to narrow definition of “economic development” used in</td>
</tr>
<tr>
<td>Date</td>
<td>Member</td>
<td>State</td>
<td>Party</td>
<td>Statement</td>
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<tr>
<td>11/03/2005</td>
<td>James Gibbons</td>
<td>NV</td>
<td>R</td>
<td>Stated support for H.R. 4128 as a “reasonable solution; Congress is responsible to uphold and protect the Constitution; Supreme Court rewriting Constitution (vol. 151, pt. 18, p. 24767)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Thelma Drake</td>
<td>VA</td>
<td>R</td>
<td>Noted co-sponsorship of H.R. 4128; stated role of Congress is “to protect the public” and it had “a responsibility to use legislative powers to clearly define private property rights” (vol. 151, pt. 18, p. 24767)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Jerry Nadler</td>
<td>NY</td>
<td>D</td>
<td>Agreed with the concept of H.R. 4128 but believed it is “poorly drafted”; bill would enable “many of the abuses and injustices of the past, while bankrupting State and local governments” (vol. 151, pt. 18, p. 24767)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Steve King</td>
<td>IA</td>
<td>R</td>
<td>Claimed no amount of homeowner tax revenue could match tax base provided by a corporation; stated Founders did not intend for “federal judges to impart their wisdom on this issue” (vol. 151, pt. 18, pp. 24767-24768); introduced an amendment to enable property owners to seek a court injunction before takings; bill provisions that allow property owners to sue for 7 years following condemnation if property is transferred to a private owner “is an open-ended and catastrophic threat” (pp. 24783-24784)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Frank Pallone</td>
<td>NJ</td>
<td>D</td>
<td>Introduced Protect Our Homes Act to “curb all abuses of eminent domain”; concerned with increasing rates of eminent domain; “shocked” by Kelo; believed H.R. 4128 is a “strong first step” but that Congress “can do better” and implement stronger legislation (vol. 151, pt. 18, p. 24768)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Dennis Kucinich</td>
<td>OH</td>
<td>D</td>
<td>Believed discussion is not about Supreme Court’s interpretation of public use, but whether Congress stands with the people or with developers; stated Kelo limits “the right to the pursuit of happiness to large corporate developers at the expense of small business and private citizens” (vol. 151, pt. 18, p. 24768)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Sheila Jackson-Lee</td>
<td>TX</td>
<td>D</td>
<td>Concerned that eminent domain will be utilized to target poor communities; stated Kelo “needs to be fixed by this Congress”; supported H.R. 4128 and introduced an amendment to add further protection to property affected by natural disasters; stated Supreme Court “made a wrong decision and ratified the unconstitutional acts of the local government” (vol. 151, pt. 18, pp. 24768-24768); introduced an amendment to include a sense of Congress that “any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property” from Hurricane</td>
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<td>Date</td>
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<td>Party</td>
<td>Remarks</td>
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<tr>
<td>11/03/2005</td>
<td>Shelley Berkley</td>
<td>NV</td>
<td>D</td>
<td>Cited example of constituent property seized by eminent domain for private use; noted that legislation would “restore the rightful limits on this power that have been eroded by time” (vol. 151, pt. 18, p. 24769)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Jeff Flake</td>
<td>AZ</td>
<td>R</td>
<td>Offered an amendment to address legal fees faced by property owners affected by a taking as part of just compensation (vol. 151, pt. 18, pp. 24769-24770)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Bob Goodlatte</td>
<td>VA</td>
<td>R</td>
<td>Co-sponsored H.R. 4128; acknowledged bipartisan effort on private property protection bills; Kelo as a “step in the opposite direction” from Founder’s intention (vol. 151, pt. 18, pp. 24770; 24774); opposed to Moran amendment for reintroducing confusion into what constituted permissible economic development takings (vol. 151, pt. 18, p. 24787)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Stephanie Herseth</td>
<td>SD</td>
<td>D</td>
<td>Support of H.R. 4128; noted importance of bill to farmers and ranchers in home state and their opposition to Kelo; appreciative of collaborative efforts between Agriculture and Judiciary Committees; constituents hold sacred the values of faith, family, community, and property; believed bill has “attempted to respond in the most effective way to a ruling”; stated Congress needed to take immediate action (vol. 151, pt. 18, pp. 24770-24772; 24774)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Henry Bonilla</td>
<td>TX</td>
<td>R</td>
<td>Noted “rare moment” of “widespread bipartisan support”; described background of legislation (vol. 151, pt. 18, p. 24771)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Zoe Lofgren</td>
<td>CA</td>
<td>D</td>
<td>Support of H.R. 4128; anticipated resulting litigation; noted clarification regarding affordable housing in committee report; had sought to add an amendment to create an “economic development” takings exemption for low-income housing (vol. 151, pt. 18, pp. 24771-24772)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>John Salazar</td>
<td>CO</td>
<td>D</td>
<td>Noted his opposition to similar takings as a state legislator; co-sponsor of H.R. 4128 (vol. 151, pt. 18, p. 24772)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Tom Osborne</td>
<td>NE</td>
<td>R</td>
<td>Support of H.R. 4128; Kelo as “one of the most unpopular decisions ever rendered”; believed over 90% of Americans opposed it and other 10% might not understand it fully; worried about effects of economic development takings on agriculture and nonprofits (vol. 151, pt. 18, p. 24772)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>David Scott</td>
<td>GA</td>
<td>D</td>
<td>Kelo as a “wake-up call”; expressed constituents’ concerns; support for H.R. 4128 (vol. 151, pt. 18, p. 24772)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Mike Pence</td>
<td>IN</td>
<td>R</td>
<td>Support for H.R. 4128; noted “rare moment of bipartisanship”; believed action was “bearing true faith to the Constitution”; feared “unbridled appetite of urban areas against rural areas” (vol. 151, pt. 18, p. 24773)</td>
</tr>
<tr>
<td>Date</td>
<td>Name</td>
<td>State</td>
<td>Party</td>
<td>Position</td>
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<tr>
<td>11/03/2005</td>
<td>Gene Green</td>
<td>TX</td>
<td>D</td>
<td>Co-sponsored H.R. 4128; believed Kelo “essentially stripped the public of the constitutional right to own that property if someone thought they had a better use for it than they did”; noted home state’s curbing efforts (vol. 151, pt. 18, p. 24773)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Virginia Foxx</td>
<td>NC</td>
<td>R</td>
<td>Believed decision “contradicts the very ideals of liberty and property rights that have for 229 years defined the greatest government on Earth”; noted that “property rights are a hallmark of what separates America from nations whose citizens live in fear of their own government; called Kelo “atrocious”; noted Congress’ responsibility to uphold the Constitution and protect constituents’ rights (vol. 151, pt. 18, p. 24773)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Jean Schmidt</td>
<td>OH</td>
<td>R</td>
<td>Support for H.R. 4128; noted constituent concerns and a pending state supreme court case (vol. 151, pt. 18, pp. 24774-24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Todd Tiahrt</td>
<td>KS</td>
<td>R</td>
<td>Noted constituents opposed to ruling; support for H.R. 4128; noted nations that disregard property rights disregard other rights (vol. 151, pt. 18, p. 24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Lynn Woolsey</td>
<td>CA</td>
<td>D</td>
<td>Noted city council experience and utility of eminent domain sometimes; support for H.R. 4128 (vol. 151, pt. 18, p. 24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Cathy McMorris Rogers</td>
<td>WA</td>
<td>R</td>
<td>Support for H.R. 4128; Kelo did not distinguish from project where economic development is the primary goal or a secondary aspect of a project (vol. 151, pt. 18, p. 24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Dutch Ruppersberger</td>
<td>MD</td>
<td>D</td>
<td>Support for H.R. 4128; recalled experience in county government when eminent domain was useful and now questions its prudence (vol. 151, pt. 18, p. 24775)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Tim Murphy</td>
<td>PA</td>
<td>R</td>
<td>Believed Kelo violated 14th Amendment protections regarding public use and the equal protection clause; “sets a precedent that can turn the American Dream into a nightmare” (vol. 151, pt. 18, pp. 24775-24776)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Pete Stark</td>
<td>CA</td>
<td>D</td>
<td>Opposed to H.R. 4128; noted positive benefits of urban renewal on district and nationwide (vol. 151, pt. 18, p. 24776)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Sander Levin</td>
<td>MI</td>
<td>D</td>
<td>Opposed H.R. 4128; “legislative cure that is worse than the underlying disease”; acknowledges some questionable exercises of eminent domain; land use planning as a state or local function (vol. 151, pt. 18, p. 24776)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Solomon Ortiz</td>
<td>TX</td>
<td>D</td>
<td>Support for H.R. 4128; “disturbed” by Kelo; violation of a “basic tenet of American fairness” (vol. 151, pt. 18, p. 24776)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Bob Menendez</td>
<td>NJ</td>
<td>D</td>
<td>Homeownership as the “backbone of the American Dream”; support for H.R. 4128 (vol. 151, pt. 18, p. 24776)</td>
</tr>
</tbody>
</table>
| 11/03/2005 | John Larson           | CT    | D     | Concerned over “dangerous expansion” of eminent domain; bill does not “bring justice to communities or
<table>
<thead>
<tr>
<th>Date</th>
<th>Name</th>
<th>State</th>
<th>Party</th>
<th>Position and Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>11/03/2005</td>
<td>Mark Udall</td>
<td>CO</td>
<td>D</td>
<td>Support for H.R. 4128; bill intended to make Kelo effects less likely but does not replace state or local authority with federal (vol. 151, pt. 18, p. 24777)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Joel Hefley</td>
<td>CO</td>
<td>R</td>
<td>Support for H.R. 4128; even as a supporter of states’ rights, questioned whether states can abridge property rights; wished bill could go further (vol. 151, pt. 18, p. 24777)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Dave Weldon</td>
<td>FL</td>
<td>R</td>
<td>Support for H.R. 4128; Kelo broke “dangerous new ground”; cited example of protestors attempting to take Justice Souter’s home to convert into a libertarian hotel (vol. 151, pt. 18, pp. 24777-24778)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Christopher Cannon</td>
<td>UT</td>
<td>R</td>
<td>Support for H.R. 4128; Kelo “eviscerated one of our most fundamental constitutional rights”; Congress a co-equal branch and must remedy; noted bill in home state to limit ruling; noted importance of property rights to western states; noted issue is not class-based or partisan (vol. 151, pt. 18, p. 24779)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Ron Kind</td>
<td>WI</td>
<td>D</td>
<td>Support for H.R. 4128; provided history of eminent domain; noted impact on rural district; commended bill for its economic disincentive (vol. 151, pt. 18, pp. 24779-24780)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Jerry Costello</td>
<td>IL</td>
<td>D</td>
<td>Support for H.R. 4128 in response to Kelo; stated “landowners should not be vulnerable to the whims of government”; claimed ruling “threatens to make all private property subject to the highest bidder” (vol. 151, pt. 18, p. 24780)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Richard Pombo</td>
<td>CA</td>
<td>R</td>
<td>Support for H.R. 4128 as “a timely response to the horrendous Kelo decision”; noted that property rights comprise “the heart of individual freedom” and serve as the basis for other civil rights; bill would discourage improper behavior by state or local governments due to Congress’ “power over the purse strings”; would like bill to withhold funding for a longer period of time; noted family history as ranchers and values shaped by “stewardship of the land” (vol. 151, pt. 18, pp. 24780-24781)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>John Boehner</td>
<td>OH</td>
<td>R</td>
<td>Support for H.R. 4128; “alarmed” by Kelo; stated “your property is now only your property so long as the government wants it to be” (vol. 151, pt. 18, pp. 24780-24781)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Rush Holt</td>
<td>NJ</td>
<td>D</td>
<td>Support for H.R. 4128; noted constituent concerns; stated eminent domain is a “fearsome power” if used inappropriately (vol. 151, pt. 18, p. 24781)</td>
</tr>
</tbody>
</table>
| 11/03/2005 | Michael Capuano    | MA    | D     | Opposed to H.R. 4128; noted past experience as a mayor; disliked bill preempting local policy choices; believed Congress “should have spent more time developing legislation that was less intrusive on States’

comprehensively [secure]’’ property rights from misuse; bill narrowed “scope of eminent domain through broad and vague terms”; attempts to define local public needs (vol. 151, pt. 18, p. 24777)
<table>
<thead>
<tr>
<th>Date</th>
<th>Name</th>
<th>State</th>
<th>Party</th>
<th>Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>11/03/2005</td>
<td>Michael Sodrel</td>
<td>IN</td>
<td>R</td>
<td>Support for H.R. 4128 because “it addresses a newly discovered power of government that frightens every homeowner and small businessman; offered amendment to “clarify that the burden of proof is on the state or the agency seeking to take the property” (vol. 151, pt. 18, p. 24785)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Michael Turner</td>
<td>OH</td>
<td>R</td>
<td>Offered amendment to enable takings in instances where property creates a threat to public health or safety, including brownfields; stated support from builder, commercial, real estate, and local government associations (vol. 151, pt. 18, p. 24787)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Sam Farr</td>
<td>CA</td>
<td>D</td>
<td>“Mixed emotions” about H.R. 4128; viewed “it as an environmental bill” to stop growth; concerned that stopping federal funded development would hamper military bases, transportation, sewer and water projects (vol. 151, pt. 18, p. 24788)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Gary Miller</td>
<td>CA</td>
<td>R</td>
<td>Introduced amendment to encourage brownfield redevelopment; noted they are not residential but industrial sites where redevelopment is difficult due to environmental concerns (vol. 151, pt. 18, pp. 24788-24789)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Eddie Bernice</td>
<td>TX</td>
<td>D</td>
<td>Support for Miller amendment; noted benefits communities have realized by “responsible brownfield development that can transform environmentally impaired property into productive property and positively impact distressed communities” (vol. 151, pt. 18, p. 24789)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Roscoe Bartlett</td>
<td>MD</td>
<td>R</td>
<td>Support for Gingrey amendment; expressed concern that expanded &quot;public use&quot; could “limit the scope” of the 1st Amendment’s free exercise clause (vol. 151, pt. 18, p. 24791)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Henry Cuellar</td>
<td>TX</td>
<td>D</td>
<td>Introduced amendment to have federal agencies “review their practices with regard to eminent domain” and attest to the Attorney General that they comply with H.R. 4128 (vol. 151, pt. 18, p. 24792)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Melvin Watt</td>
<td>NC</td>
<td>D</td>
<td>Opposed to H.R. 4128; believed “this bill is an overreaction”; introduced an amendment to remove its substantive components and leave only the sense of Congress (vol. 151, pt. 18, p. 24793)</td>
</tr>
<tr>
<td>11/03/2005</td>
<td>Katherine Harris</td>
<td>FL</td>
<td>R</td>
<td>Support for H.R. 4128; Kelo decision “mind-boggling”; reviewed Founders' perspectives on property rights (vol. 151, pt. 18, pp. 24806-24807)</td>
</tr>
</tbody>
</table>
| 11/03/2005 | Cliff Sterns       | FL    | R     | Extension of remarks; support for H.R. 4128; Kelo as “a gross misinterpretation” of the 5th Amendment; sought to “close the loophole created in Kelo” and “punish those states and localities that take advantage of their
Spoke in opposition to the Kelo decision on its first anniversary; called it scary that “the law can simply change from age to age to age” regarding public use standards; called for “limitations on the courts’ jurisdictions before every one of our liberties and freedoms are clutched from our very possessions as our homes now apparently may be”; introduced a resolution emphasizing House’s disapproval of decision (vol. 152, pt. 9, p. 11972)

Appendix D: State Model Variables

<table>
<thead>
<tr>
<th>Dependent Variable</th>
<th>Description/Source</th>
<th>Descriptive Statistics</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Description/Source</th>
<th>Descriptive Statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Citizen Ideology</td>
<td>Liberal or conservative tendency of state citizens (Source: William D. Berry, Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson, Measuring Citizen and Government Ideology in the American States)</td>
<td>Min: 28.91 (Oklahoma), Max: 89.82 (Vermont), Mean: 53.76, Median State: Wisconsin</td>
</tr>
<tr>
<td>Measure</td>
<td>Description</td>
<td>Minimum</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Proportion of Democrats in Legislature</td>
<td>Calculated by dividing the number of total seats in a state’s lower legislative house by the number of Democratic legislators in that body in 2005, based on results of the last legislative election; higher values represent greater Democratic strength in the legislature (Source: Brian Remlinger, State Legislative Elections, 1971-2016, 2017)</td>
<td>0.23</td>
</tr>
<tr>
<td>Democratic Trend in Legislature</td>
<td>Calculated difference in the proportion of Democratic seats held in 2005 and 2007; negative values represent a Republican drop and positive values represent a Democratic gain (Source: Brian Remlinger, State Legislative Elections, 1971-2016, 2017)</td>
<td>-0.22</td>
</tr>
<tr>
<td>Divided State Government</td>
<td>Whether or not a state’s governor and the majority of the lower legislative house come from the same political party (Source: National Conference of State Legislatures)</td>
<td>0</td>
</tr>
<tr>
<td>News Coverage of Decision</td>
<td>Number of newspaper stories between May and December 2005 attributable to newspapers located within the state containing the search terms (“Kelo” AND “New London”) (Source: Factiva)</td>
<td>0</td>
</tr>
<tr>
<td>Takings Per Thousand Miles (1998-2002)</td>
<td>Calculated number of filed and threatened condemnations by states between 1998 and 2002 proportional to the geographic area of a state measured in thousands of miles (Source: Castle Coalition; U.S. Census Bureau)</td>
<td>0</td>
</tr>
<tr>
<td>Housing Density (2005)</td>
<td>Number of housing units per square mile in a state for 2005 (Source: U.S. Census Bureau, American Housing Survey)</td>
<td>0.5</td>
</tr>
<tr>
<td>Population Change (1995-2005)</td>
<td>Calculated percentage change in state population from 1995 to 2005 (Source: Statistical Abstract of the United States, Current Population Survey)</td>
<td>-0.02</td>
</tr>
<tr>
<td>Unemployment Change (2000-2005)</td>
<td>Change in state’s rate of unemployment from 2000 to 2005; larger values represent higher rates of unemployment (Source: American Community Survey)</td>
<td>Min: -1.60 (Hawaii) Max: 3.20 (Michigan) Mean: 0.96 Median States: Utah; Nebraska</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>African-American Residents (2004)</td>
<td>Proportion of American-American residents relative to a state’s overall population in 2004 (Source: American Community Survey)</td>
<td>Min: 0.004 (Montana) Max: 0.366 (Mississippi) Mean: 0.102 Median States: California; Massachusetts</td>
</tr>
<tr>
<td>Early Adoption of Reforms</td>
<td>Whether or not state enacted new eminent domain within one calendar year of the Kelo decision (June 23, 2006) (Source: Castle Coalition)</td>
<td>Min: 0 Max: 1 Mean: 0.45 Median States: Pennsylvania (05/04/06); Florida (05/11/2006)</td>
</tr>
<tr>
<td>Delegation Co-Sponsorship of H.R. 4128</td>
<td>Proportion of state congressional delegation co-sponsoring H.R. 4128 (109th Congress) (Source: Congressional Record)</td>
<td>Min: 0 Max: 1 Mean: 0.255</td>
</tr>
<tr>
<td>Amici Briefs from State</td>
<td>Individual or interest group from the state submitted an amicus brief to the Supreme Court in Kelo v. New London (Source: U.S. Supreme Court)</td>
<td>Min: 0 Max: 1 Mean: 0.68</td>
</tr>
</tbody>
</table>

**Appendix E: Major Provisions of State Eminent Domain Legislation**

<table>
<thead>
<tr>
<th>State Bill(s)</th>
<th>Enacted Date</th>
<th>Kelo or Court</th>
<th>Prohibited Takings For:</th>
<th>Public Use:</th>
<th>Procedural Revisions:</th>
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<tbody>
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<td>Alabama</td>
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<td>sb68</td>
<td>8/3/05</td>
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<td>●</td>
<td>● ● ●</td>
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<td>hb654</td>
<td>4/25/06</td>
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<td>●</td>
<td>● ● ●</td>
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<td>Alaska</td>
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<td>hb318</td>
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<td>Arizona</td>
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<td>prop207</td>
<td>11/7/06</td>
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<td>California</td>
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230
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<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Date</th>
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<tbody>
<tr>
<td>Colorado</td>
<td>hb1411</td>
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<tr>
<td>Connecticut</td>
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<td>6/25/07</td>
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<tr>
<td>Delaware</td>
<td>sb217</td>
<td>7/21/05</td>
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<td>sb7</td>
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<td>Florida</td>
<td>hb1567</td>
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<td>Georgia</td>
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<td>Idaho</td>
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<td>Illinois</td>
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<td>Indiana</td>
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<td>Iowa</td>
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<td>Montana</td>
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<td>5/14/07</td>
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<tr>
<td>New Hampshire</td>
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<tr>
<td>State</td>
<td>Bill No.</td>
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<tr>
<td>---------------------</td>
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<tr>
<td>New Mexico</td>
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<td>North Carolina</td>
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<td>Ohio</td>
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<tr>
<td>Wyoming</td>
<td>hw124</td>
<td>2/28/07</td>
</tr>
</tbody>
</table>

Notes: Relevant bills were identified using the Castle Coalition’s 50 State Report Card. The date provided in this table represents the day on which the legislation was enacted into law, which may be different from the day a bill was passed by the state legislature. The main provisions for each piece of legislation were collected through reading the bill text provided by each state’s legislative information system.