

Positioning Politics: *Kelo*, Eminent Domain, and the Press

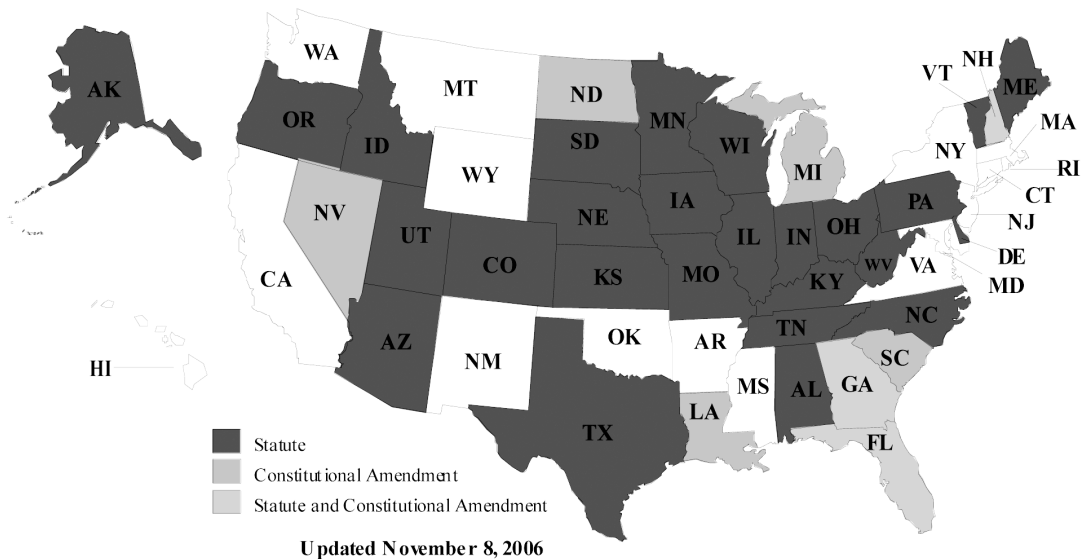
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Near the end of its 2004 term when the U.S. Supreme Court announced its long-awaited decision in *Kelo v. City of New London*, the 5–4 split ruling in favor of New London exposed a deep political fissure across the nation. For more than 50 years, legal scholars and government officials understood the court’s interpretation of the Fifth Amendment phrase “public use” as placing few, if any, meaningful restrictions on government’s broad exercise of the power of eminent domain, including economic development (Mahoney 2005). The *Kelo* ruling did not substantively alter that precedent, legally. The justices did not see *Kelo* as a landmark case, according to one inside account, even though different views on the case led them to write four separate opinions. As a marker of populist politics, however, *Kelo* became a defining event in America. Home-owners, politicians, opinion makers, and special interest groups vented strong and immediate opposition to the court’s ruling in editorials, op-eds, editorial cartoons, letters-to-the editor, and opinion polls. Ideology, rhetoric, reason, symbolism, and emotion—all were enjoined in backlash commentary about two formerly obscure Latin words that had suddenly become common household words. At its core, the backlash to *Kelo* reflects a political

debate about how much range government should have to intervene in the affairs of a market-driven economy and to enter into joint projects with private enterprises to foster economic growth locally. Framed another way, the debate is about the circumstances under which government can reconfigure private property rights for collective public benefit.

The across-the-board character of the backlash appeared at first to be nonpartisan, “an ironic means of uniting red and blue America,” the *Wall Street Journal* editorialized (2/28/06). Subsequent events, though, revealed more nuanced politics than the immediate fury of complaint against the court’s ruling suggested. Thirty-four states¹ (shown in Figure 1) enacted legislation or passed ballot measures during 2005 and 2006 in response to the *Kelo* decision; many laws were at best modest procedural reforms (National Conference of State Legislatures 2007). Only 11 states enacted laws that either banned economic-development takings or severely restricted eminent domain for that purpose (Somin 2007: 15). To judicial conservative scholars, the results were “largely symbolic in nature,” though just another round in the ongoing campaign of reduced government intervention in the realm of individual property rights (Somin 2007: 2). When eminent domain was put up to the ballot test, voters approved 10 of the 12

Figure 1
Legislative/Electoral Response to *Kelo*



Source: National Conference of State Legislatures

referendum initiatives in the November 2006 elections, though again, the degree to which eminent domain powers were materially cutback varied.²

Public opinion that appeared so strong and uniform fractured in ways that frustrated, if not confounded, libertarians and strict judicial conservatives who sought an absolute judicial ban on economic-development takings. What is it about the event and the issue that produced an immediate consensus crossing income, race, and gender, but proved to be less than robust when it came to enacting reforms in response to perceived abuses in the takings power?

My goal in this paper is to explore the politics of the *Kelo* backlash by analyzing the content of public opinion published in editorials, op-eds,

editorial cartoons, and letters-to-the-editor on the pages of the nation's daily papers. Work by Nader, Diamond, and Patton (2006) analyzes public opinion from five polls conducted in fall 2005, after the decision came down.³ I am interested in how press editors, elected officials, grass-roots organizations, organized constituencies, and individuals positioned their opinions in response to the controversial ruling, and what these opinions tell us about the character of backlash. In a political battlefield such as *Kelo*, where the legal and policy—if not emotional—issues are complex, what role does the press play in framing the issues? What coalitions are evident in the way various interests frame the issue? And how might such framing shape the politics of the many efforts to reform government's powers of eminent domain?

Although it is still too early to tell how economic development and urban redevelopment policies and practices will get reconfigured by post-*Kelo* legislative changes and administrative actions, the *Kelo* backlash presents an opportune event for analyzing how the framing process can shape the policy debate. At this juncture, one thing is clear: Notwithstanding the win for the City of New London, the split decision has reconfigured the political terrain of economic-development initiatives beyond the immediate facts of the *Kelo* case.

The story of this reconfiguration has yet to be told. The academic community responded immediately and prolifically with commentary about *Kelo*. By the end of 2005, scholars had published more than 25 articles on *Kelo* and eminent domain in U.S. law reviews and journals; another 100-plus appeared in 2006. Constitutional scholars interested in the nature of discourse parsed the dialogue of the decision (Barros 2006, Peñalver 2006, Roark 2006, Mahoney 2005, Baron 2007) in search of the court's reasoning on precedents and preference for judicial deference. Other constitutional scholars interested in the relationship between the political sphere and the judiciary documented the intense public reaction to *Kelo* (Nadler et al 2007) and extensive legislative responses to reform eminent domain procedures or curb its use (Somin 2007). Academic experts in land use and redevelopment explored the implications for redevelopment and economic-development practice in a post-*Kelo* environment (Prichett 2006, Blais 2007, Lefcoe 2007, Mihaly 2007).

My work on the politics of the backlash presented in this paper is exploratory in

nature. My purpose is not to argue the merits or demerits of the U.S. Supreme Court's *Kelo* ruling, but rather to analyze the political tenor and character of the backlash so that we might better understand how to craft fair and efficient procedures for using eminent domain or exercising the threat (which is sometimes all that is needed to deal with the economic holdout) in ways that balance private property rights with takings for collective social benefit. To do this, I pursue a line of inquiry communication scholars pursue when they ask questions about how issue framing by the media and other special interests influences the formation of policy debate (Capella and Jamieson 1996, Iyengar 1997, Terkildsen et al 2007). In linking these two inquiries, I want to open a window on the politics of issue framing as a means of interpreting the unanticipated and powerful response to *Kelo*. The ideas presented here represent the first stage of research on this topic. In the next section of the paper, I describe the search methodology used to develop a database on *Kelo* press commentary and present the profile of editorial commentary and news coverage in the aftermath of the *Kelo* decision. Following this descriptive section, I present the results of my content analysis and discuss the contesting frames of the editorial commentary. I conclude with comments on the void in the anti-eminent domain debate created by the absence of planners and urban advocates.

EVENT METHODOLOGY

The U.S. Supreme Court process created three newsworthy event episodes in *Susette Kelo, et al., Petitioners v. City of New London*: the decision

on September 28, 2004, to accept the case for its 2004 term ("KE1"), oral arguments before the justices in February 22, 2005 ("KE2"), and the announcement of its ruling ("KE3") on June 23, of the same year. (Its August 22 decision denying property owners a rehearing—not unexpected because the court rarely rehears a case—went unnoticed by the press.⁴) On the basis of these three events, I defined three search periods: KE1, covering nearly four months from the week prior to the petitioners' appeal to the U.S. Supreme Court through the week after the court agreed to hear the case (July 12, 2004 to October 5, 2004); KE2, covering two weeks from the week before through the week after the court heard oral arguments (February 15, 2005, to March 1, 2005), and KE3, covering the one month subsequent to the decision (June 23, 2005, to July 22, 2005). The referendum response in 12 states constitutes a fourth event ("KE4") to be analyzed in a separate paper.

To develop a comprehensive database of the daily newspaper commentary on *Kelo*, I con-

ducted three search protocols.⁵ The first and primary search ("editorial search") culled all editorial-page items (unsigned editorials, signed op-eds, and letters-to-the-editor) with the key words "Kelo" and "eminent domain" in the text from the LexisNexis Academic database of all "U.S. newspapers, general news sources." This database includes 272 newspapers, of which approximately 172 are single-source dailies. (Though the list is large, it is not inclusive; for example, it includes only 88 of the top 100 daily newspapers in the U.S. by circulation in 2005; eight of these omissions are in the top 50 rankings.⁶) The search yielded 362 items in 81 dailies with circulations large and small, city and suburban, blanketing all regions of the country and extending considerably beyond the elite national papers. The second search ("news search") focused on news articles for the four event periods from the LexisNexis database noted above and yielded 239 items from 94 papers. The third search focused on editorial cartoons and was more complicated because of copyright issues, which often precluded inclusion in the Lexis/Nexis database.

TABLE I
Expanding News Coverage of *Kelo* and the U.S. Supreme Court

Search event frame	Total	Editorial	Opinion	Letter	News articles	Number of newspapers represented
KE1: week before 1J appeal to USSC through one week after court agrees to hear the case: 7/12/04–10/5/05	28	2	5	1	20	21
KE2: week before USSC hears oral arguments through one week after court hears oral arguments: 2/15/05–3/1/05	71	6	14	7	44	46
KE3: one month from the day USSC issues its opinion: 6/23/05–7/22/05	440	52	96	133	159	118
Total	539	60	115	141	223	

Source: Author's files

To find images, I did two Google searches, one for “editorial cartoons” and the other for “eminent domain images,” which together yielded 33 editorial cartoons, 27 of which were accessed through Daryl Cagle’s Professional Cartoonists Index (<http://cagle.msnbc.com>). The editorial search and news searches were scrubbed so that the final dataset includes only items about the *Kelo* decision in daily papers; this meant eliminating *Kelo* items from news wires (which would be picked up by press subscribers), weekly publications, and general items about the Supreme Court or any of the justices. A summary profile of the data in Table 1 presents a picture of expanding news coverage as *Kelo* moved through the U.S. Supreme Court process, culminating in extensive coverage of the court’s split and controversial ruling.

BENCHMARKING PRESS COVERAGE

As news, no precedents existed for the scope of press coverage that followed in the aftermath of the *Kelo* ruling. The two leading case precedents addressing eminent domain and the meaning of “public use” under the Fifth Amendment, *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984), elicited but a yawn from the press, which took scant notice of these landmark rulings. The few exceptions are relevant, though. In the case of *Berman*, a unanimous decision to uphold the use of the government’s condemnation powers a for large-scale redevelopment project even though the takings might include non-blighted properties, localism prevailed, as evident in the headlines of three *Washington Post* articles (there were no editorials): “Development Act

of D.C. is Upheld,” “High Court Go-Ahead Sparks RLA Action on SW Project” and “Judge Rules RLA Legal in SW Area Land Deals.” *Midkiff*, also a unanimous decision holding that a property redistribution plan in Hawaii was constitutional under the public use clause of the Fifth Amendment, drew the attention of the editors of both the *New York Times* and the *Wall Street Journal*, who penned positions characteristic of their differing political leanings: “Eminent Sense on Eminent Domain” (NYT 6/1/84) and “Lords of the Manor” (WSJ 6/1/84). Upholding its staunch position on private property as “the foundation of individual freedom,” the *Journal* followed up with additional editorials critical of the court’s direction on economic issues (WSJ 6/8/84, 7/5/84, 7/9/85). Indeed, the infrequency with which the U.S. Supreme Court agreed to hear eminent domain cases combined with growing public concern over government encroachment upon property rights, particularly in the western United States, and the emergence of an organized activist property-rights campaign among libertarians (and judicial conservatives) in the 1990s,⁷ suggested that whatever way the decision turned, the press was likely to take notice of *Kelo* (Nadler et al 2007).

The lack of *direct* national press attention on the U.S. Supreme Court’s rulings on eminent domain does not, of course, mean that governments’ ongoing exercise of their eminent domain powers went unopposed politically or unchallenged legally. Quite the contrary: for decades the story was largely local. Many large-scale urban redevelopment and economic development projects could be cited to prove the point, but one high-profile case in

particular—*Poletown Neighborhood Council v. City of Detroit* (1981) and its subsequent reversal by the Michigan Supreme Court more than two decades later in *City of Wayne v. Hathcock* (2004)—presaged the potential of a *Kelo* backlash. The *Poletown* situation was both similar and different. In *Poletown*, the Michigan Supreme Court had ruled in favor of a highly contentious city redevelopment plan involving the condemnation of more than 1,000 homes and businesses, as well as several churches, to create a development site of a size (465 acres) and configuration required by General Motors, which sought to build a new car assembly plant. The case sparked tremendous dissension and resentment among residents and policy activists. But *Poletown* was a local controversy, and the strong negative reaction was a local reaction. As one leading scholar explains, “most

of the public knowledge about the case came from work by people who had strong opinions and no desire to present a balanced view of the issue” (Fischel 2004: 935, footnoting Wylie 1989 and *Poletown Lives!* 1983). “By comparison, *Kelo* was a less egregious case on its merits than *Poletown*—many fewer people, homes and businesses were displaced, the neighborhood was less tight-knit, and the influence of large corporate interests was less explicit. Nonetheless, public dismay about *Poletown* in Michigan foreshadowed the national backlash that ensued when the U.S. Supreme Court decided *Kelo*” (Nadler et al, 2007: 13).

When the Michigan Supreme Court reversed itself in *Hathcock*, ruling that the economic development taking was not in accord with the state constitution, many read the case as a

TABLE 2a
Headline Message the Day After *Kelo* Decision June 23, 2005

Message	Number	Percent
Scope of government power has been expanded	22	28.2%
Homeowners are vulnerable	11	14.1
Impact is local	9	11.5
Status quo remains in place	9	11.5
Post- <i>Kelo</i> , process will differ	6	7.7
Taking private property for development (developer) allowed	5	6.4
Warning and caution ahead	5	6.4
Cities win, actions validated	4	5.1
Economic-development takings okay	2	2.6
Property rights get cutback	2	2.6
Local politicians are concerned	2	2.6
Federalism is working, issue back in states' hands	2	1.3
Total	78	100.0%

Source: Author's files

TABLE 2b

Headline Message Rest of the Month Following *Kelo* Decision June 24 to July 22, 2005

Message	Number	Percent
Local politicians are concerned	41	48.8%
Warning and caution ahead	10	11.9
Bipartisan action is coming	11	13.1
Homeowners are vulnerable	9	10.7
Other	4	4.8
Scope of government power has been expanded	3	3.6
Status quo remains in place	3	3.6
Federalism is working, issue back in states' hands	2	2.4
Impact is local	1	1.2
Cities win, actions validated	0	0.0
Economic-development takings okay	0	0.0
Property rights get cutback	0	0.0
Taking private property for development (developer) allowed	0	0.0
Post- <i>Kelo</i> , process will differ	0	0.0
Total	84	100.0%

Source: Author's files

ruling of repudiation, of a past wrong rightfully undone.⁸ Coming less than two weeks after the Institute for Justice, a prominent libertarian public-interest law firm, succeeded in convincing the U.S. Supreme Court to hear the *Kelo* case in July 2004, the coincidental timing of *Hathcock* could easily have been viewed as a harbinger of change. Although this decision (and a similar, though less high-profile ruling in Illinois⁹) “did not of course carry any formal authority with the [U.S. Supreme] Court, they had the potential to influence its deliberations, if only as indications of shifting societal attitudes” (Mahoney 2005: 114). The shifting societal attitudes Mahoney references are fundamental to the story of the *Kelo* backlash. These attitudes had found expression in the mainstream press, in articles critical of eminent

domain transfers from one private owner to another, especially when the next owner was a politically connected developer, and in articles “sympathetic to property owners injured by eminent domain programs—particularly owners of homes and small businesses” like Susette Kelo and the other petitioners in the New London case (Mahoney 2005: 114). Both of these frames would reappear with frequency in the *Kelo* backlash.

Although the court typically bypassed hearing new eminent domain cases, in the 20 years prior to *Kelo* it had ruled on at least eight cases addressing a question that differed legally but was related in the minds of the public to the issue of governmental land use powers: When does government regulation of property

TABLE 2c

Headline Message the Month of the *Kelo* Decision June 23 to July 22, 2005

Message	Number	Percent
Local politicians are concerned	45	27.6%
Scope of government power has been expanded	23	14.1
Homeowners are vulnerable	19	11.7
Warning and caution ahead	18	11.0
Status quo remains in place	14	8.6
Impact is local	9	5.5
Bipartisan action is coming	11	6.7
Post- <i>Kelo</i> , process will differ	6	3.7
Taking private property for development (developer) allowed	5	3.1
Cities win, actions validated	4	2.5
Other	4	2.5
Economic-development takings okay	2	1.2
Property rights get cutback	2	1.2
Federalism is working, issue back in states' hands	1	0.6
Total	163	100.0%

Source: Author's files

become a "taking" for the purposes of the Fifth Amendment, requiring payment of compensation to the owner? Comparing the frequency of news stories about these court rulings in five national papers¹⁰ to the media attention generated by *Kelo* (see Table 2, 11), Nadler et al reasonably conclude that coverage of these regulatory-taking rulings was not even close in magnitude to the *Kelo* coverage. I take a different cut on this comparison. Considering how infrequently land use decisions engaged the national press, heightened coverage of regulatory-taking decisions in national newspapers can just as easily be interpreted as another piece of evidence supporting the shifting-societal-attitudes argument.

PRESS MESSAGES

HEADLINE NEWS

Three salient messages characterized the reporting on *Kelo* in the month following the U.S. Supreme Court's ruling. First, the scope of government power has been broadened, bolstered, expanded, extended, strengthened, or widened. Second, homeowners have been shown the door, they are vulnerable, or their homes are up for grabs by government. Third, elected politicians are concerned, ready to take up land fight, and vow to protect property rights; they will seek an amendment overturning the ruling, propose bills to curb eminent domain, call for a moratorium on condemnation, establish a task force to review eminent domain in the state, move to revamp

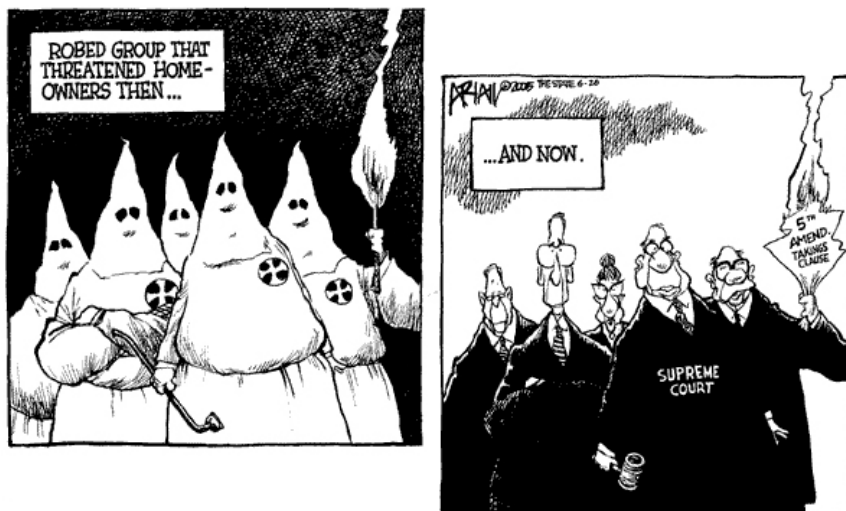
eminent domain law, or lobby to curb eminent domain. If one only read the headlines on June 24, the day after the court's ruling, the most frequent message was the expanded scope of government power and vulnerability of homeowners. If one followed the headlines throughout the month as the backlash gathered strength, the message of politicians are concerned and taking action dominated. Together, these three messages accounted for 53 percent of the headlines in 163 articles collected in the news search, as coded and presented in Table 2c.

A few headlines aimed to report the straight facts of the ruling without interpretation. They noted that the court had upheld the city's use of eminent domain in a split decision and put the issue back in states' hands. More common were headlines designed to capture the reader's attention by relying on varying degrees of hyperbole and provocation, using words like

"seize," "wrest," and "land grab" that denied the legitimacy of well-established statutory procedures and administrative processes associated with the use of eminent domain. Some headlines come off as exercises in fear-mongering: "Land's not your land"; "High court protects convicts, snubs homeowners"; "Can Big Brother seize your home?"; "Homeowners were 'mugged' by decision to allow cities to seize private property"; and "So the city says it has a plan for your property—a new shopping center to benefit everyone. Start packing." Editorial cartoons followed through with vivid symbolic imagery [Figure 2].

Using the word "seize" is inflammatory. Although government's exercise of eminent domain powers constitutes an involuntary sale (the British term for eminent domain is most apt: "compulsory purchase"), the word seize implies that the property was confiscated, taken forcibly or suddenly without due process

Figure 2



Robert Ariail: © The State/Dist. by Newspaper Enterprise Association, Inc.

or compensation. In one form or another, “seize” appeared in 23 of the 78 (nearly 30 percent) day-after headlines in news articles about *Kelo*.¹¹ In using seize, many newspapers, including the *New York Times*,¹² unwittingly adopted the language of the Institute for Justice. Speaking at a conference, *Times* reporter Terry Pristin remarked on the press coverage of *Kelo* (Pristin 2006):

Much of the coverage has bordered on the hysterical. Last fall [2005] a consumer reporter on CNN offered [me] “five tips for what to do when your home is threatened by eminent domain.” Other articles have reported that *Kelo* was a radical departure from existing precedent, or had “eviscerated” the public-use clause. So it is hardly surprising that the politicians have embraced the anti-eminent domain cause.

The chasm between what legal scholars and other professionals long understood to be

court precedent in eminent domain cases and how the media presented the *Kelo* ruling to the public was wide and deep. Intentional or unintentional, the media often misrepresented the decision on several substantive dimensions, which added fuel to an already combustible topic and demonstrated the strong effect of issue framing.

EDITORIAL FRAMES

On the editorial pages, publishers, columnists, and guest op-ed writers express their views, critique, goad, question; concur, praise, or celebrate; advocate a position or voice caution; push for change or press for the status quo. After reading the headlines on page one, politicians, political consultants, and policy advisers turn to the editorial pages to gauge the tenor of political issues.

TABLE 3
Positioning Frames in *Kelo* Editorials (KE1, KE2, KE3)

Positioning frame #1	Number	Percent
Constitutional issue/public use	16	26.7%
Federalist response to decision	10	16.7
Scope of government	9	15.0
Take from one to give to another	7	11.7
Vulnerability	6	10.0
Castle metaphor	5	8.3
Property rights	3	5.0
Economic development as valid public purpose	2	3.3
Procedural adherence	1	1.7
Blight rationale	1	1.7
Precedent ruling	0	0.0
Land assembly problems	0	0.0
Total	60	100.0%

Source: Author's files

TABLE 4
Positioning Frames in *Kelo* Editorials (KE1, KE2, KE3)

Positioning frame #1		National		NE/SE/MW/W		NE	SE	MW	W
		Number	Percent	Number	Percent				
Scope of government	9	3	30.0%	6	12.0%	1	2	1	2
Economic development as valid public purpose	2	1	10.0	1	2.0	1	0	0	0
Property rights	3	0	0.0	3	6.0	0	2	1	0
Constitutional issue/public use	16	3	30.0	13	26.0	4	4	1	4
Procedural adherence	1	0	0.0	1	2.0	0	0	0	1
Precedent ruling	0	0	0.0	0	0.0	0	0	0	0
Castle metaphor	4	0	0.0	4	8.0	0	3	1	0
Vulnerability	6	0	0.0	6	12.0	0	4	1	1
Take from one to give to another	8	1	10.0	7	14.0	2	3	1	1
Land assembly problems	0	0	0.0	0	0.0	0	0	0	0
Blight rationale	1	0	0.0	1	2.0	0	0	0	1
Federalist response to decision	10	2	20.0	8	16.0	2	4	0	2
Total	60	10	100.0%	50	100%	10	22	6	12

Source: Author's files

With the *Kelo* decision, editorialists had a lot of choice material to use in framing their opinions. Either implicitly or explicitly, the court passed judgment on a complex set of components: the purposes for which property can be acquired by eminent domain, the type and condition of property that can be acquired, and the processes and procedures necessary to meet the requirements of due process and just compensation. Moreover, these components attach themselves to larger societal issues that go to the heart of American democracy and culture: constitutional law, property rights, federalism, and the sanctity of homeownership. When put in the context of real people—Susette Kelo and other middle-class white homeowners who did not want to be bought out, and an organized constituency

of libertarians and property-rights activists who found in *Kelo* a near-perfect vehicle for mobilizing support for their agenda—it is not surprising that the decision elicited so much media coverage. In terms of for-and-against positions, four of every five editorials that appeared in the month following the decision voiced dissent with the Supreme Court's ruling. This robust statistic mirrored the strong sentiment of public opinion polls on *Kelo* and the issue of eminent domain.¹³

To analyze the frames used in these editorials, I developed descriptive labels reflective of the legal, political, and cultural components of the case, such as “castle metaphor,” to describe opinions framed in terms of the cultural symbolism of home-as-castle, or “federalism,”

Figure 3



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if the frame was about state and local government as the appropriate venue for reforming exercises of eminent domain. The results of this analysis for the first three event periods are presented in Tables 3 and 4.¹⁴

What does this frame analysis tell us? First, the *Kelo* backlash has been a local issue presented as a nationwide consensus. While all of the elite papers, as well as others with national circulations,¹⁵ ran editorials the day after the ruling, in sheer numbers, regional and local papers ran four times the number of editorials. The pattern of editorial framing, however, does not appear to differ substantially across regions of the country, as evident in Table 4. (With more editorials than any other region, the South East editorials could be said to show more framing diversity.) Editorials in these papers far outnumbered those in papers with

national circulations and those with a business readership or other special interests. Second, the issues in the case are sufficiently complex that editorialists typically relied on more than one frame to present the full force of their opinion.

Using the constitutional public-use doctrine was the most frequent frame editorialists used to position their dissenting opinions on *Kelo*. In these, the decision is presented as a perversion of the literal meaning of the takings clause [Figure 3]. The Fifth Amendment has been “eviscerated” (*Union Leader* 6/24/05), rendered “all but meaningless” (*Roanoke Times* 6/28/05), and “undermined” (*Telegram and Gazette* 7/12/05). The concept of “public purpose” has been stretched beyond recognition (*Post and Courier* 6/24/05), beyond “the breaking point” (*Roanoke Times* 6/28/05). Explicitly

Figure 4



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or implicitly, this set of editorials slammed hard against economic development as an invalid exercise of government's takings power. "How can a private development possibly meet the definition of 'public use'.... Public use should mean public use and nothing more" (IDB 6/24/05). "Politicians can replace your home with whatever they expect will pay more taxes than you do—and call their money grab a 'public purpose'" (*Chattanooga Times Free Press* 6/29/05).

Framing the issue in terms of "public use" language, editorials frequently referenced the founding fathers, which in the language of judicial conservatism is code for the doctrine of "original intent." "'Public use' was self-evident to the Framers," the editors of the *Pittsburgh Tribune Review* (2/24/05) said in a comment on oral arguments in *Kelo*; "constitutional relativ-

ists corrupted the precept. From the bench, Ms. Ginsburg and Messrs. Souter and Breyer turned willing accomplices." Or the *Wall Street Journal* (6/24/05): "The founding fathers added this clause to the Fifth Amendment...because they understood that there could be no meaningful liberty in a country where the fruits of one's labor are subject to arbitrary government seizure."

Some of the same reasoning appears in those editorials which argued against the decision in terms of the taking-from-one-to-give-to-another frame: "Cities may now take land from ordinary people and hand it to preferred customers to build shopping malls, hotels or other richly taxable property. The only things cities will have to do to justify their actions will be to argue that revenues and tonier neighborhoods will result. So much for property rights"

(*Washington Times* 6/24/05). "The court's decision to uphold a local government's use of eminent domain to take from homeowners and give to developers so the town can collect more taxes astonished many people" (*Charlestown Daily Mail* 7/4/05).

From these frames, editors perceived a slippery slope of unrestrained government takings in the judicial logic of *Kelo*. They voiced alarm that the ruling put nearly all property at risk and warned homeowners that all are vulnerable: "Homeowners now own their homes only if the government wants them to" (*Washington Times* 6/24/05); "When will they come for 'your' property?" (*Chattanooga Times Free Press* 6/25/05); and, "When you're home, keep an ear out for the bulldozers" (*Palm Beach Post* 6/29/05). There was little in the media reports about the decision that suggested any natural limit on whose home could be targeted in the future for government condemnation (Nadler et al 2007). Economic-development takings opened the door to potential abuse by government to take any property so long as the future (speculative) uses promised to enhance tax revenues. Moreover, outrage at the ruling gave vent to a general distrust of government and visions of an expected "dream scenario" of the powerful and well-connected connecting (if not colluding) for mutual benefit: "It will make it much easier for powerful real-estate companies and others, acting with local government, to evict whomever they want. They will simply cite a proposed project's unprovable benefits to local or regional economic development" (*Providence Journal* 6/24/05). "It is inevitable that large corporations and developers will increasingly try to use the government as their real estate

agent. After all, who needs to bid for property on the open market, when the government will confiscate what you want, and at bargain 'fair market' prices?" (*St. Petersburg Times* 6/24/05). The door to this way of thinking had been opened by Justice O'Connor in the oft-quoted warning within her dissent: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."¹⁶

Within a week of the ruling, editorialists switched gears to focus on what state and local politicians were doing or should do to curb the powers of eminent domain. Events in Washington, D.C. paved the way. On June 30, just a week after the ruling, the U.S. House of Representatives passed a non-binding resolution, by a vote of 365 to 33, expressing "grave disapproval" of the majority opinion in *Kelo*. At the same time, it approved by a 231 to 189 vote a bid by one of New Jersey's Republican representatives to bar federal transportation funds from being used to make improvements on lands taken via eminent domain for private development. More to the point, in his decision for the 5–4 majority, Justice Stevens wrote, "Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."¹⁷

Using the lens of federalism turned out to be editors' second most frequent positioning frame. Castigating non-partisan efforts of the U.S. House of Representatives to curb economic-development takings through the

power of the purse as a “form of bullying built on the conceit that all wisdom lies in Washington,” the *Charleston Daily Mail* (7/4/05) argued that the “slower road to righting this wrong is in state legislatures.” “The Assembly must act on eminent domain,” said Bridgeport’s *Connecticut Post* (7/12/05). “It is now up to state and local governments to do what the Supreme Court should have done: place limits on eminent domain so that it is used only for needed public projects or to eliminate blight or a public hazard” (*Contra Costa Times* 7/4/05).

The pattern of framing among the seven papers¹⁸ whose editors voiced concurrence with the decision differs, not surprisingly, from the dissenting editorials in two fundamental ways: the belief that a public purpose inheres to the collective benefits of economic development, and that the ruling was “legally logical” and consistent with the Supreme Court’s precedent. “As unjust as the New London decision seems in personal terms, it makes sense as a matter of constitutional interpretation.... The court’s decision may fuel the trend for big box stores to displace little businesses and homes... but it will also help cities improve their economic health or aesthetics... the decision is a bow to modernity” (*St. Louis Post-Dispatch* 6/24/05). “New London’s development may hurt a few small property owners, who will, in any case, be fully compensated. But many more residents are likely to benefit if the city can shore up its tax base and attract badly needed jobs” (*New York Times* 6/24/05). “The trouble is that there is no good way to distinguish New London’s use of eminent domain from assertions of the power that local governments depend on all the time for worthy projects.

Railroads, stadiums, inner-city redevelopment plans and land reform efforts all have involved taking land from one owner for the apparently private use of another” (*Washington Post* 6/24/05). “Without the power of eminent domain, there might be no Nissan plant covering 1,400 acres in Canton, Miss., producing thousands of jobs in a once depressed part of that state, or a new NASCAR raceway reinvigorating Kansas City, Kan, or...” (*Arkansas Democrat-Gazette* 6/28/05).

THE POLITICAL POWER OF FRAMING

In his testimony before Congress a bare three months following the *Kelo* decision, Columbia University Law School Professor Thomas A. Merrill, a well-regarded scholar of administrative law, remarked that *Kelo* is “unique in modern annals of law in terms of the negative response it has evoked” (Merrill 2005). He went on to discuss five myths about *Kelo* that needed to be dispelled before federal, state, or local legislators undertake “far-reaching reforms of the eminent domain system:”

Myth one: *Kelo* breaks new ground by authorizing the use of eminent domain solely for economic development.

Myth two: *Kelo* authorizes condemnation where the only justification is a change in use of the property that will create new jobs or generate higher tax revenue.

Myth three: *Kelo* dilutes the standard of review for determining whether a particular taking is for a public use.

Myth four: The original understanding of the Takings Clause limits the use of eminent

domain to cases of government ownership or public access.

Myth five: Takings for economic development pose a particular threat to “discrete and insular minorities.” The blight precondition of economic development takings, he said, seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities.

These myths found widespread expression in the content of *Kelo* editorials and news headlines about a judicial ruling with particular social-policy salience. They became powerful framing devices shaping the tone and tenor of the *Kelo* backlash and the legislative and referendum responses that followed. As others have pointed out, broad news coverage of an issue that touched on the sacredness of the home “made it easy to characterize a proposal limiting eminent domain and protecting property rights as worthy of respect” (Nadler et al 2007:27).

In retrospect, it is not hard to see that *Kelo*’s attributes all fit what it takes to be a media event: intense ideological controversy, important if not inviolable American cultural values, political resonance in suburbs as well as cities large and small, and masterful public-relations operations calibrated to capture press interest. The issue of eminent domain had been framed by libertarian and property rights’ interests in ways that created great populist appeal. It was, as one editorial put it, “the kind of ruling that’s red meat for any candidate looking for a hot issue” (*Arkansas Democrat-Gazette* 7/20/05). Justice O’Connor’s dissent, with its emotion-laden rhetoric and

apocalyptic visions of property confiscation—“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”¹⁹—repeatedly referenced in editorials,²⁰ provided additional fuel for pumping up hysteria about making communities “*Kelo*-proof.”

Eminent domain has become a touchstone social policy battle with a life of its own. The words are political symbolism, a metaphor for excessive use of government power. Nowhere is this transformation more evident than in the editorial cartoons, which gave dramatic visual power to the populist appeal of the little homeowner threatened by the big and powerful U.S. Supreme Court bulldozing house and home [Figure 4]. Other cartoons reveal the broad reach of the eviction metaphor—to Halliburton’s contracts in Iraq, Chinese farmers protesting compulsory purchases, and Republicans complaining “those dirty democrats... now they’re claiming eminent domain to take back the House!” (Matson 6/28/05).

The *Kelo* petitioners lost the judicial case but they won the public-relations battle with brilliant framing and a well-orchestrated campaign by the Institute for Justice, which represented Susette Kelo and had been working since the mid-1990s to make eminent domain a cause célèbre. “It was so bad, it was good,” one property-rights activist said in reference to the *Kelo* ruling (Rushton cited in Toobin 2007: 308). The media picked up the story as much as scripted by the Institute for Justice. As *Times*’ reporter Pristin remarked: “The other side—public officials, planners, environmentalists, redevelopment officials—seemed slow

to react to the challenge posed by property-rights groups. After *Kelo* was decided, I wanted to write about a recent instance—anywhere in the country—in which eminent domain had been used for the public good. It took weeks to get some case studies to choose from” (Pristin 2006).

If redevelopment failed to make its case in the *Kelo* debates, as Marc B. Mihalý (2006) cogently argues, the public nevertheless seemed to understand more nuances of the complex issue than the overwhelming and seemingly uniform negative opinion-poll statistics suggested. Peeling back the layers here reveals the power of framing to shape issue politics. In their analysis of public opinion poll data on responses to *Kelo*, Nadler et al (2007) looked at how respondents reacted when the questions describing the taking and acknowledging that the property owner would be compensated for the loss were framed in neutral language. Respondents also were asked to react to different situations (other than *Kelo*) in which eminent domain powers might be exercised. Their findings opened up “a complex structure of public attitudes not easily gauged at an abstract level by simply measuring attitudes toward eminent domain in general.” Particulars and context mattered. They found that the level of support for use of eminent domain in any given situation appears to depend on, among other things, the nature of the property (i.e., homes, vacant land, etc.), and the proposed use for the property (i.e., school, a shopping center, etc.). They cautioned against making sweeping generalizations about the public’s evaluation of eminent domain based on responses to a general ques-

tion. They reasoned that the salience of the *Kelo* facts and the outrage in response to its perceived unfairness, rather than a wholesale rejection of the legitimacy of eminent domain, probably accounted for the seemingly uniform backlash to the ruling (Nadler et al 2007: 23).

Neither political consensus nor empirical data exist to address the essential policy questions of the *Kelo* backlash: What constitutes “abuse” in the exercise of eminent domain, and how extensive is it? Most of what is cited is anecdotal. Empirical data on the extent of actual use and character of eminent domain takings is hard to come by. In response to a Congressional legislative mandate, the U.S. General Accounting Office (GAO) conducted a nationwide study on the use of eminent domain by state and local governments. After review of relevant laws, site visits, and interviews with a broad range of affected interests, the GAO found “no centralized or aggregate national or state data exist on the use of eminent domain,” which precluded it from “any national or statewide assessments of, among other things, how frequently eminent domain is used for private-to-public or private-to-private transfer of property and purposes of these transfers” (GAO 2006). As to what constitutes abusive eminent domain practices, editorials and editorial cartoons classified certain types of takings as eminent domain abuses: takings for private real estate development/developers, takings for shopping malls, takings to generate greater tax revenues, and takings to build condos “you can’t afford” [Figure 5].

In 2003, the Institute for Justice published *Public Power, Private Gain: A Five-Year State-by-*

Figure 5



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State Study Examining the Abuse of Eminent Domain. The report cites 10,282 cases (in 41 states) of “filed or threatened condemnations for private parties.” Of those 10,282 cases, approximately 3,722 were filed cases and some 6,560 were cases in which condemnation was “threatened” (Berliner 2003: 3). As Burke (2006) points out, the report may be of limited value because multiple methodological issues undermine the credibility of its claims. The state-by-state data appears to be drawn solely from news sources, which as the *Times’* Pristin remarked, “have largely been left to write about the horror stories” of eminent domain (Pristin 2006). News stories also rarely provide enough information to determine if the exercise of eminent domain power was, in fact, abusive. Tax-related considerations affect whether a property owner being condemned

opts not to settle voluntarily, and therefore becomes part of the taking population. The research does not present the ultimate outcome of a case, making it difficult to conclude that the taking was “abusive” (Burke 2006: 30–32). The report’s tally of eminent domain abuse is, in other words, only consistent with its sponsor’s libertarian interpretation of what constitutes a legitimate taking under the Public Use Clause. Desirous of some data on the issue, editorialists would cite the Institute for Justice report,²¹ without qualification.

The findings of one recent empirical study on the use of eminent domain for downtown economic development provide suggestive evidence that resonates with the tone of government distrust underlying the intense backlash to *Kelo*. Using data collected from a

nationwide survey of city managers, business economists Matthew L. Cypher and Fred A. Forgey (2003) set out to evaluate selective aspects of takings for economic development, whether they were fair, effective, and efficient. They wanted to know whether the powers of eminent domain were being used to attract national real estate development companies to the redevelopment of an area by conveying property to these private companies at a minimal dollar amount.²² Their findings, based on 145 survey respondents (a high 61 percent response rate) mostly from cities with populations of 500,000 or less, are interesting.

First, not all eminent domain takings resulted in property going to developers. Property was conveyed to real estate developers only 49 percent of the time; the municipality retained ownership 33 percent of the time, and conveyed the property to a nonprofit organization 13 percent of the time. (The “other” types of dispositions revealed the complexity of these transfers, many of which involved public/private partnerships for redevelopment.) Second, of the property dispositions to private developers, the recipients were predominately local (55 percent) or regional (defined as one who operates within 50 miles of the municipality, 47 percent). Third, property was sold to the developer(s) at a price that equaled the compensation price in 46 percent of the cases; in roughly the same incidence (48 percent), the developer(s) received the property at a value less than that paid to the original owner in compensation. In approximately 6 percent of the cases, the property was given away or donated to the developer. In these latter two instances, the developer was given a “write-

down” incentive.²³ And more often than not, it was the local and regional developer, not the national developer, who was able to purchase the property at a dollar cost below the compensation price.

The revealed preference for local and regional developers might match a situation of favoritism corresponding to dubious (e.g., abusive) eminent domain practices. There is no way to tell without case-based analysis. Yet the notion of favoritism indeed may be implicit and fundamental to the public-opinion discomfort evident in the intense backlash to government’s exercise of its eminent domain power. In his concurrence, Justice Kennedy discusses the basis on which the court would review a “plausible accusation of impermissible favoritism,” emphasizing that the “transfers intended to confer benefits on particular, favored private entities, with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.”²⁴ The perception of questionable dealings between local government and business interests resonates, if not with identification of specific cases, then with a strong belief that the ability of government to exercise eminent domain powers opens the door to such “impermissible takings.” The notion is close to an embedded stereotype of local politics. For example, writing about *Kelo*, legal scholar Richard Posner remarked that while it is uncertain whether examples of “what appear to be foolish, wasteful, and exploitive redevelopment plans” are representative, it “would not appear to be surprising to discover that redevelopment plans are for the most part unholy collusions between the real estate industry and local

politicians" (Posner cited in Mahoney 2005: 26 fn 89). In editorial cartoons on eminent domain, it is not hard to find caricatures of local government as handmaiden of the real estate developer, as evident in Figure 6.

ENGAGING AND INVIGORATING THE DEBATE

Planners, redevelopment officials, and urban advocates were AWOL in the *Kelo* anti-eminent domain debates. One indicator of just how far outside from the action they stood is the sharply different number of amicus briefs submitted to the Supreme Court on behalf of *Kelo* and her fellow petitioners—27—compared to 13 committing formal support to the City of New London. The alignment of interests backing the petitioners revealed a familiar pattern of libertarians and property-rights groups and some coalitions of convenience.

The lack of an active response on the part of planners and urban advocates is disturbing. Mihaly (2006) made the point succinctly: "Redevelopment has failed to make its case. Most Americans enjoy the fruits of revitalized urban cores, but they do not understand how this transformation occurred." Given how long and how hard they have worked and how many strategies they have pursued, urban interests were surprisingly passive in this most powerful debate—a debate with the capacity to reshape their field of practice. On the other hand, it is not hard to understand why much of the real estate industry chose to remain silent. One exception was the real estate community in New York, which post-*Kelo* has been quite active in opposing restrictions proposed by state and federal legislators. (I have a firsthand

perspective on this because I was called for information on the takings for the 42nd Street Development Project.) Mayor Bloomberg has made opposing eminent domain restrictions one of his five top priorities.

Not making a clear, strong, and, most of all, visible statement on the *Kelo* case carried a huge cost: it gave ideological groups such as the Institute for Justice and its Castle Coalition affiliate the opportunity to frame the debate in charged political symbolism. The Institute for Justice simplified complex issues and designed slogans that successfully captured the media and the public. The Institute for Justice built a strong grass-roots campaign against eminent domain, complete with a "Freedom Market" selling "Blight Me" T-shirts, "Eminent Domain Abuse Survival Guides," "Survival Kits," and "Sticker Packs" to promote the cause. The Institute for Justice provided the press with a beautifully written narrative about the *Kelo* case, as Pristin (2006) explained: "It was such a compelling read that it got me to go to New London....[they] have a very comprehensive website. They return calls immediately. Their lawyers are very accessible and quotable." The actions of the Institute for Justice and its coalition of activists did more than just slant the issues. By being first out, tactically, they put any other views on eminent domain on the defensive. Most striking of all, their issue frames found their way into the Supreme Court opinions.

Not having substantive information on the uses and abuses, costs and social benefits of eminent domain seriously abridged the debate as well. It meant that the advocates and activ-

Figure 6



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ists seeking to rewrite the court's precedent on the takings clause could pick and choose in ad hoc fashion particular cases with which to dramatize the points of their arguments. There was no way to know what was what, to push back with data that told a more complete story, or to present a tract record of collective benefits to be evaluated alongside the easy-to-find "horror stories." Moreover, many of the horror stories about eminent domain in the news and the references to "negro removal" in Justice Thomas' dissent hark back from the 1950s and 1960s era of federal urban renewal and its master practitioner, Robert Moses. These rough and aggressive practices of the past have been political taboos for quite some time, sure to elicit the type of intense high-profile opposition evident in *Poletown*.

They represent a legacy of lessons learned, not current planning practice (Frieden and Sagalyn 1989). Today, with very few exceptions, site selection for large-scale projects involving the public sector follows a do-no-harm strategy: choosing sites that have few if any residents who would be displaced by the project (Altshuler and Luberoff 2003).

There is a geography to the *Kelo* backlash that calls for further study. Much of the general opposition to the exercise of eminent domain comes from suburban communities and smaller cities where people close to the scene resent those who are benefiting from the takings and know their neighbors who are affected. The political dynamic of development in big cities is different; takings are more often

seen as business as usual. Again, there are exceptions in large-scale, high-profile projects such as Forest City Ratner's Atlantic Yards project in Brooklyn and Columbia University's expansion north of its present Morningside Heights campus in Manhattan.

In his opinion for the court, Justice Stevens put the task of determining the boundaries of eminent domain power back into the political realm. This is a wake-up call for popular deliberation consistent with the country's political values and a pragmatic court (Posner 2005: 98):

Paradoxically, the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness. When the Court declines to invalidate an unpopular government power, it tosses the issue back into the democratic arena. The opponents of a broad interpretation of "public use" now know that the Court will not give them the victory they seek. They will have to roll up their sleeves and fight the battle in Congress and state legislatures—where they may well succeed.

Planners and urban advocates cannot stand on the sidelines of the debates on this next round. We need some systematic way to evaluate the usage of eminent domain. We need strong administrative procedures to ensure accountability for actions taken in the name of the public interest. We need to balance the collective benefits of economic growth with the need for individual fairness and just compensation. Public efforts to shape and rebuild cities have undergone profound change in the past 60 years, moving from a top-down strategy of massive land clearance and redevelopment under the federal urban renewal program to a selective project-based strategy of public/private redevelopment and neighborhood revitalization. The use of eminent domain powers carried over from one period to the next and is now being applied to economic-development initiatives. The *Kelo* backlash has sent a clear and direct political message that it is now time for review and reform—and preservation—of this important local government planning tool.

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NOTES

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1. Nevada, Colorado, and Utah passed *Kelo*-related legislation in advance of the U.S. Supreme Court's decision. The difference between the 34 states that enacted legislation and the 27 that enacted legislation plus 10 in which ballot initiatives passed reflect three states with both enacted legislation and a successful ballot initiative (New Hampshire, Georgia, and Florida).

2. Referendum defeats as presented in the relatively small number of editorials related to *Kelo*-based reform initiatives suggest that the anti-government tide may have run its course. Voters seemed

reluctant to "cripple" land use regulation (Washington), impose compensation requirements for regulatory takings (California, Arizona, Idaho), and narrowly constrict the use of eminent domain (Oregon), despite the strong rhetoric of commentary and populist sentiment revealed by *Kelo* opinion polls. Several editorials noted the possibility of "faux populism," that is, ballot initiatives attributable only to heavy support from out-of-state political groups, in particular, libertarian Howard Rich's Americans for Limited Government.

3. See pages 16–25.

4. A LexisNexis search of all U.S. newspapers and news wire for *Kelo* and U.S. Supreme Court and rehearing for the day of and eight days following the denial (August 22) turned up only one 483-word article in the *Pittsburgh Post-Gazette*.

5. I also conducted a fourth protocol for the post-Kelo referendum period, which will be analyzed in a subsequent paper.

6. *Charlotte Observer*, *Courier-Journal Louisville*, *Fort Worth Star Telegram*, *Indianapolis Star*, *Kansas City Star*, *Newsday* (New York), *Oklahoman*, and *Orlando Sentinel*.

7. In fall 1991, advocates of libertarian persuasion founded the Institute for Justice as a nonprofit, public-interest law firm that litigates to “secure economic liberty, school choice, private property rights, freedom of speech, and other vital individual liberties and to restore constitutional limits on the power of government.” Active litigation in eminent domain cases started in 1996. For a history of its property rights’ litigation efforts, see www.instituteforjustice.com.

8. The facts of the situation and its interpretation are of course more complex. See Jones et al (1986) and Fischel (2004), particularly pages 935–40.

9. *Southwestern Ill. Dev. Auth. v. Nat’l City Envtl.*, 768 NE2s 1 (Ill 2002), cited in Mahoney 2005: 114.

10. *New York Times*, *Washington Post*, *Los Angeles Times*, *Chicago Tribune*, and *Wall Street Journal*.

11. The word “seize” was also used in a number of public opinion polls on eminent domain.

12. Referring to a headline over one of her recent eminent-domain stories, “Bank to Deny Loans if Land was Seized” (*New York Times* 1/26/06), Pristin pointed out that reporters do not write their own headlines.

13. The disapproval rating for Kelo was around 80 percent to 90 percent, a figure Nadler et al (2007:

16) note, is higher than that for other controversial cases.

14. The analysis of the referendum period, KE4, will be done in the future.

15. These included the *Bond Buyer*, *Christian Science Monitor*, *Environment and Energy Daily*, *Investor’s Business Daily*, *New York Times*, *Washington Post*, *USA Today*, and *Wall Street Journal*.

16. 125 S Ct at 2677 (O’Connor, J. dissenting).

17. 125 S Ct at 2676 (O’Connor, J. dissenting).

18. *Arkansas Democrat-Gazette* (Little Rock), *Grand Rapids Press*, *New York Times*, *Newsday*, *San Bernardino Sun*, *St. Louis Post-Dispatch*, and *Washington Post*.

19. 125 S Ct. at 2676 (O’Connor, J. dissenting).

20. Justice O’Connor was cited in 21 of the 52 editorials (40 percent) during the KE3 event period.

21. The Institute for Justice and/or its report were noted in 10 of the 60 editorials in the KE1, KE2, and KE3 event periods.

22. They also sought to determine whether the use of eminent domain delivered higher tax revenues from the redevelopment area where it was used, and how the use of eminent domain subsequently affected litigation-based project delays.

23. Only in 6 percent of the cases was the property sold for more than its compensation price.

24. 125 S. Ct. at 2669 (Kennedy, J., concurring).