WHAT IF *KELO V. CITY OF NEW LONDON* HAD GONE THE OTHER WAY?

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INTRODUCTION

Kelo v. City of New London[1] is one of the most controversial decisions in U.S. Supreme Court history. The *Kelo* Court held that the Public Use Clause of the Fifth Amendment allows government to condemn private property and transfer it to other private parties for purposes of "economic development."[2] The ruling resulted in an unprecedented political backlash, with some eighty percent of the public opposing the decision and a record forty-three states enacting eminent domain reform legislation in its aftermath.[3]

This Article considers the question of what might have happened if the Supreme Court decided *Kelo v. City of New London* in favor of the property owners. What might a ruling in favor of the owners have said? Would the cause of property rights have been better or worse off with such an outcome? Given that a contrary decision in *Kelo* might have prevented the political backlash that followed the real-world ruling in favor of the government, is it possible that property rights advocates actually won more by losing *Kelo* than they could have achieved by winning it?

Such counterfactual analysis may seem frivolous. After all, *Kelo* came out the way it did. What use is there in speculating about alternative outcomes that never happened? But counterfactual speculation is, in fact, useful in understanding constitutional history. Any assessment of the impact of a given legal decision depends on at least an implicit judgment as to the likely consequences of a ruling the other way. Analysis can be improved by making these implicit counterfactual assumptions clear and systematically considering their implications.

Part I briefly describes the *Kelo* case and its aftermath, focusing especially on the massive political backlash. That backlash led to numerous new reform laws. However, many of them turned out to be largely symbolic, purporting to forbid economic development takings but actually allowing them to continue under other names.[4] This has important implications for assessing the possible implications of a decision in favor of the property owners.

Part II discusses the potential value of a counterfactual analysis of *Kelo*. It could help shed light on a longstanding debate over the effects of Supreme Court

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1. 545 U.S. 469 (2005).

2. *Id.* at 478-86.

3. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2111-15 (2009) [hereinafter Somin, *Limits of Backlash*].

4. *See id.* at 2120-30.

decisions on society. Scholars such as Gerald Rosenberg and Michael Klarman have argued that court decisions have little impact, mostly protecting only those rights that the political branches of government would protect of their own accord.[5] Others contend that this analysis underrates the potential effect of Supreme Court decisions.[6]

Part III considers the possible legal effect of a ruling in favor of the property owners. Such a decision could have taken several potential forms. One possibility is that the Court could have adopted the view advocated by the four *Kelo* dissenters: that economic development condemnations are categorically forbidden by the Public Use Clause.[7] This would have provided strong protection to property owners and significantly altered the legal landscape. However, "blight" condemnations would have been allowed to continue. And it is not entirely clear whether the dissenters' approach would forbid condemnations under very broad definitions of "blight" of the sort that have been adopted by many states. Nonetheless, a decision categorically forbidding economic development takings would have greatly strengthened judicial protection for property rights.

It is also possible that the Court could have decided in favor of the property owners on one of two narrower grounds. The first of these would have invalidated the taking because there was no clear plan as to what should be done with the condemned property. Under this approach, state and local governments would be much less constrained than under a categorical ban on economic development condemnations. Most economic development condemnation could still be upheld so long as the condemning authority has a clear plan as to how the property will be used.

Another possible narrow ground for striking down the taking would be to hold that it is invalid because the officially announced "public purpose" was actually "pretextual." There was considerable evidence that the New London condemnations were instigated for the benefit of the Pfizer Corporation rather than to advance the public interest. Whether such a holding would have significantly constrained future condemnations depends very much on the standards that the Court adopted for determining whether a taking counts as pretextual or not. Overall, however, it is unlikely that the Court would have adopted a pretext standard that imposed more than relatively modest restrictions on state and local governments. In the real world, *Kelo* ruled that pretextual

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5. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-7 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-36 (2d ed. 2008); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

6. *See, e.g.*, R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

7. *See* Kelo v. City of New London, 545 U.S. 469, 499-504 (2005) (O'Connor, J., dissenting); *id.* at 506-21 (Thomas, J., dissenting).

takings are still unconstitutional, but also concluded that the New London condemnations were not pretextual.[8] Since *Kelo*, state and federal courts have differed widely among themselves in their efforts to define the concept of "pretext."[9]

Part IV weighs the potential political impact of a decision favoring the property owners. Such an outcome might have forestalled the massive political backlash that *Kelo* caused. Ironically, a narrow ruling in favor of the owners that did not significantly constrain future takings might have left the cause of property rights worse off than defeat did. That could have occurred if the narrow ruling avoided angering public opinion, thereby preventing a political backlash. On the other hand, a strong ruling categorically banning economic development takings would likely have done more for property rights than the backlash did, especially considering the uneven nature of the latter. Such a decision would have protected property owners nationwide, while the backlash left some key states with no reforms and many others with only cosmetic ones. Furthermore, political movements sometimes build on legal victories, as well as defeats, as previously happened the case of the Civil Rights movement in the wake of *Brown v. Board of Education*.[10] It is possible that property rights advocates could have similarly exploited a victory in *Kelo*.

Public knowledge is a key factor in each of these scenarios. In previous work, I have argued that the public's "rational ignorance" about politics explains many key aspects of *Kelo* and its aftermath.[11] For example, it explains why there was so little public anger about takings before *Kelo* (most of the public was simply unaware of the problem) and why so many of the new reform laws were ineffective (interest groups and politicians exploited the public's inability to tell the difference between genuine and purely cosmetic reforms).[12] The political effect of a pro-property rights decision in *Kelo* would also depend in large part on the extent to which it would influence a generally inattentive public.

I. *KELO* AND ITS AFTERMATH

A. The Decision

Kelo arose from the condemnation of ten residences and five other properties as part of a 2000 development plan in New London, Connecticut.[13] Planners

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8. *See id.* at 478-86.

9. For a detailed discussion of the disagreements in this area, see Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1, 25-35 (2011) (Introduction to the Symposium on Eminent Domain in the United States) [hereinafter Somin, *Judicial Reaction*].

10. 349 U.S. 294 (1955).

11. Somin, *Limits of Backlash*, *supra* note 3, at 2154-70.

12. *See id.* at 2163-65.

13. *Kelo*, 545 U.S. at 475. For a detailed history of the development project that led to the litigation, see JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009).

intended to transfer the property to private developers for the stated purpose of promoting economic growth in the area.[14] Unlike in many other takings cases, none of the condemned tracts were alleged to be "blighted or otherwise in poor condition."[15] The key constitutional question arising in the case was whether a taking that transferred property from one private owner to another in order to promote economic development qualifies as a "public use" under the Fifth Amendment's Public Use Clause. The Clause has historically been interpreted as permitting property to be taken only for a "public use."[16] The Connecticut Supreme Court upheld the *Kelo* takings against both state and federal constitutional challenges in a narrow 4-3 decision concluding that "economic development" is indeed a public use.[17]

In a closely divided 5-4 ruling, the U.S. Supreme Court upheld the New London takings and endorsed the economic development rationale for condemnation.[18] Justice John Paul Stevens's majority opinion defended a "policy of deference to legislative judgments in this field."[19] The Court rejected the property owners' argument that the transfer of their property to private developers rather than to a public body required a heightened degree of judicial scrutiny.[20] It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.[21] On all these points, the *Kelo* majority emphasized that courts should not "second-guess the City's considered judgments about the efficacy of [the] development plan."[22]

Despite this result, *Kelo* may have actually represented a slight tightening of judicial scrutiny relative to earlier cases such as *Hawaii Housing Authority v. Midkiff*, which held that the public use requirement is satisfied so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[23] Moreover, the fact that four Justices not only dissented but actually concluded that the economic development rationale should be categorically forbidden shows that the judicial landscape on public use had changed.[24] Justices Sandra Day O'Connor and Clarence Thomas both wrote forceful dissents chiding the majority for gutting the Public Use Clause and arguing that economic

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14. *Kelo*, 545 U.S. at 473-75.

15. *Id.* at 475.

16. U.S. CONST. amend. V; *see also Kelo*, 545 U.S. at 475.

17. Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

18. *Kelo*, 545 U.S. at 483-84.

19. *Id.* at 480.

20. *Id.* at 487-88.

21. *Id.* at 488.

22. *Id.*

23. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984); *see also* Berman v. Parker, 348 U.S. 26 (1954) (establishing highly deferential approach to public use).

24. *See Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting); *id.* at 521–22 (Thomas, J., dissenting).

development takings are unconstitutional.[25]

The key swing voter in the case, Justice Anthony Kennedy, signed on to the majority opinion.[26] But he also wrote a concurrence emphasizing that heightened scrutiny should be applied in cases where there is evidence that a condemnation was undertaken as a result of "impermissible favoritism" toward a private party.[27] The close 5-4 split was a marked change from the unanimity the Court displayed in earlier decisions that gave the government nearly unlimited discretion to condemn property for almost any reason.[28]

Finally, the majority opinion noted that the government is still not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[29] This aspect of Kelo has caused considerable controversy in lower state and federal courts,[30] and might have formed the basis of a ruling in favor of the property owners.

B. The Political Reaction

Kelo triggered a massive political backlash. Surveys showed that some eighty percent of the public opposed the decision.[31] The ruling was also denounced by politicians, activists, and advocacy groups from across the political spectrum, including former President Bill Clinton, Democratic National Committee Chair Howard Dean, conservative talk show host Rush Limbaugh, liberal activist Ralph Nader, and others.[32] Forty-three states and the federal government enacted legislation intended to curb economic development takings.[33]

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25. *See id.* at 494 (O'Connor, J., dissenting) (claiming that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded"); *see also id.* at 523 (Thomas, J., dissenting) (criticizing the majority for allowing "boundless use of the eminent domain power").

26. *Id.* at 470.

27. *Id.* at 493 (Kennedy, J., concurring).

28. *See Midkiff*, 467 U.S. at 241 (concluding that a public use was any objective "rationally related to a conceivable public purpose"); *Berman*, 348 U.S. at 32 (ruling that the legislature has "well-nigh conclusive" discretion in determining what counts as a public use); *see also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 224-25 (2007) (discussing *Midkiff* and *Berman* in greater detail) [hereinafter Somin, *Controlling the Grasping Hand*].

29. *Kelo*, 545 U.S. at 478.

30. *See* Somin, *Judicial Reaction*, *supra* note 9, at 25-35.

31. Somin, *Limits of Backlash*, *supra* note 3, at 2109.

32. *Id.* at 2109 nn.37-39 and accompanying text.

33. See generally *id.* for the most comprehensive discussion of the post-*Kelo* reforms. For other discussions, see, for example, Janice Nadler et al., *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 287 (Nathaniel Persily et al. eds., 2008); Lynn E. Blais, *Urban Revitalization in the Post*-Kelo *Era*, 34 FORDHAM URBAN L.J. 657 (2007); James W. Ely, Jr., *Post*-Kelo *Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Edward J. López et al., *Pass a Law, Any Law, Fast!: State Legislative*

This is probably the broadest legislative reaction ever generated by any Supreme Court ruling.[34]

However, it eventually became evident that the majority of the post-*Kelo* reform statutes imposed little or no meaningful constraint on economic development takings.[35] Many states forbade condemnations that transfer property to a private party for "economic development" purposes, but continued to allow them for the purpose of eliminating "blight"—a term defined so broadly that almost any area qualifies.[36] In many cases, this simply continued a pre-*Kelo* practice of defining "blight" in a way that maximized local government discretion to condemn any property they might wish to take.[37] In the years just before *Kelo*, state courts ruled that such unlikely areas as Times Square in New York City and downtown Las Vegas were blighted.[38]

Why did so many post-*Kelo* reform laws turn out to be ineffective? Various factors played a role, but a particularly crucial one was voters' ignorance about the details of reform legislation. A 2007 Saint Index survey found that only twenty-one percent of Americans knew whether their state had enacted post-*Kelo* reforms, and only thirteen percent knew whether their state's reforms were likely to be effective in restricting economic development takings.[39] For most voters, paying little or no attention to political issues is actually rational behavior, because there is so little chance that any one vote will have an impact on electoral outcomes.[40] Public knowledge and ignorance turn out to be crucial to assessing the possible impact of alternative holdings in *Kelo*.

II. *KELO* AND THE CASE FOR CONSTITUTIONAL COUNTERFACTUALS

Given that *Kelo* was a close and controversial decision, there is a real

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Responses to the Kelo *Backlash*, 5 REV. L. & ECON. 101 (2009), *available at* http://www.bepress.com/rle/vol5/iss1/art5/; Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237 (2009); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711-68.

34. Somin, *Limits of Backlash*, *supra* note 3, at 2101-02.

35. *See id.* at 2120-38; *see also* Morriss, *supra* note 33, at 266-68 (reaching a similar conclusion); Sandefur, *supra* note 33, at 726-68 (same).

36. Somin, *Limits of Backlash*, *supra* note 3, at 2120-30.

37. *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320–21 (2004); Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 1.

38. *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 13-15 (Nev. 2003); W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 124-26 (App. Div. 2002).

39. Somin, *Limits of Backlash*, *supra* note 3, at 2155-57.

40. For the concept of rational ignorance, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238-59 (1957). For a recent defense of the idea, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE ch. 4 (manuscript on file with author).

possibility that it could have turned out differently. But is there anything to be gained from such a counterfactual analysis? The answer is yes.

In trying to understand the impact of *Kelo*, or any court decision, a key issue is whether events would have turned out differently without it. Whenever we claim that X caused Y, we are implicitly saying that Y would not have happened without X, or at least that the probability of Y occurring would have been lower. To assess the claim that X caused Y, it often helps to consider what might have happened without X.

Considerations such as these have led leading historians and social scientists to advocate the use of counterfactual scenarios. These scholars include Niall Ferguson,[41] Philip Tetlock and Geoffrey Parker,[42] Hugh Trevor-Roper,[43] and Geoffrey Hawthorn.[44] As Tetlock and Parker put it, "[w]henever we draw a cause-effect lesson from the past, we commit ourselves to the claim that, if key links in the causal chain were broken, history would have unfolded otherwise."[45]

To be sure, some scholars reject the use of counterfactuals on the grounds that they are hopelessly speculative, subjective, and permeated with political bias.[46] However, these dangers can be minimized by rigorously stating the assumptions of a counterfactual scenario and checking it against the available evidence. Even more importantly, some degree of counterfactual analysis is inevitable any time we make causal claims about past events. Given that reality, explicitly discussing counterfactual scenarios and making their assumptions explicit can actually reduce the risks of bias and subjectivity. It is easier to hide biased and subjective elements in counterfactual scenarios when they are only implicitly stated.

Bias and subjectivity can also be reduced if scholars stick to Philip Tetlock and Aaron Belkin's "minimal-rewrite" rule,[47] which urges scholars to focus on scenarios that are based on "plausible premises that require tweaking as little of

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41. *See* VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS (Niall Ferguson ed., 1997).

42. Philip E. Tetlock & Geoffrey Parker, *Counterfactual Thought Experiments: Why We Can't Live Without Them & How We Must Learn to Live with Them*, *in* UNMAKING THE WEST: "WHAT-IF?" SCENARIOS THAT REWRITE WORLD HISTORY 14-44 (Philip E. Tetlock et al. eds., 2006).

43. Hugh Trevor-Roper, *History and Imagination*, *in* HISTORY & IMAGINATION: ESSAYS IN HONOR OF H.R. TREVOR-ROPER 356-69 (Hugh Lloyd-Jones et al. eds., 1981).

44. GEOFFREY HAWTHORN, PLAUSIBLE WORLDS: POSSIBILITY AND UNDERSTANDING IN HISTORY AND THE SOCIAL SCIENCES (1991).

45. Tetlock & Parker, *supra* note 42, at 17.

46. *See, e.g.*, E. H. CARR, WHAT IS HISTORY? 81-102 (1961); Richard J. Evans, *Telling It Like It Wasn't*, 5 HISTORICALLY SPEAKING (2004), *available at* http://www.bu.edu/historic/hs/march04.htm#s.

47. Philip E. Tetlock & Aaron Belkin, *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives*, *in* COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL, AND PSYCHOLOGICAL PERSPECTIVES 18-25 (Philip E. Tetlock & Aaron Belkin eds., 1996).

the actual historical record as possible."[48] As we shall see, several alternative outcomes to *Kelo* are entirely consistent with the "minimal-rewrite rule."[49]

In sum, counterfactual scenarios are useful in assessing causal claims. More specifically, constitutional counterfactuals about Supreme Court cases are useful in assessing causal claims concerning the impact of Supreme Court decisions.

In the case of *Kelo*, considering counterfactual scenarios can help shed light on a longstanding debate over the social impact of Supreme Court decisions. Some scholars argue that the Court's decisions have little social impact, except possibly their ability to stimulate a political backlash, such as the "massive resistance," with which white southerners responded to *Brown v. Board of Education*.[50] Others contend that these arguments understate the impact of the Court.[51] If a victory by the property owners in *Kelo* would have had little effect, this would tend to support the former school of thought, what Gerald Rosenberg calls the "constrained court" theory.[52] That position would be even more strongly supported if a victory for the property owners would have actually led to fewer gains for property rights than occurred in reality, by forestalling the anti-*Kelo* political backlash.

If, on the other hand, a victory for the property owners would have strengthened protection for property rights more generally, that would cut against the "constrained court" hypothesis, especially if the added protection was extensive in nature. That view would also be reinforced if a win for the property owners were to stimulate political efforts to protect property rights rather than impede them.

III. POSSIBLE ALTERNATIVE HOLDINGS IN *KELO*

What might a Supreme Court decision in favor of the property owners have looked like? The most likely scenario is one in which Justice Anthony Kennedy, the key swing-voter in the case, had sided with the four dissenters, thereby creating a pro-*Kelo* majority. There are two possible ways in which Kennedy might have joined with the dissenters.

The first possibility is one where Kennedy signs on to Justice Sandra Day O'Connor's position that economic development takings are categorically unconstitutional.[53] Alternatively, Kennedy could have written a concurring opinion striking down the New London condemnations on narrower grounds, holding that the takings in question were pretextual because the official rationale for them was just an excuse for a scheme to promote the interests of a private party.

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48. Tetlock & Parker, *supra* note 42, at 34.

49. *See infra* Part II.

50. *See* KLARMAN, *supra* note 5, at 415; *see generally* ROSENBERG, *supra* note 5; Dahl, *supra* note 5.

51. *See generally* MELNICK, *supra* note 6; Bernstein & Somin, *supra* note 6.

52. ROSENBERG, *supra* note 5, at 10-36.

53. Kelo v. City of New London, 545 U.S. 469, 497-504 (2005) (O'Connor, J., dissenting).

Both scenarios are historically plausible. They would require only one justice to switch his vote. And Anthony Kennedy is known for having some degree of a libertarian streak that might lead him to be sympathetic to property rights.[54] Prior to *Kelo,* Kennedy had given conservatives a decisive fifth vote in several important 5-4 property rights decisions under the Takings Clause.[55] It is not hard to imagine him aligning with fellow swing-voter Justice O'Connor in *Kelo* as well.

This type of change would be consistent with the "minimal-rewrite" rule, which requires counterfactual analysis to stick to relatively modest, plausible alterations of the past.[56] If anything, it is even easier to imagine Justice Kennedy voting to strike down the *Kelo* takings without voting to invalidate all economic development condemnations. As discussed below, such a decision would not have required him to give up the idea that public use cases should generally be evaluated under a "deferential standard of review."[57]

Either of these alternative paths could have led Kennedy to vote to strike down the New London takings, but they would have had very different implications for future cases. Joining with O'Connor and the other *Kelo* dissenters would have provided strong protection for property rights. By contrast, a narrower decision holding that economic development takings are generally valid, but striking down the *Kelo* takings because of their pretextual nature would have imposed only modest restrictions on future condemnations.

A. What if Justice Kennedy Had Joined with Justice O'Connor?

The simplest way for Justice Kennedy to change the outcome in *Kelo* would have been to sign on to Justice O'Connor's dissenting opinion, thereby instantly converting it into the majority opinion of the Court. Justice O'Connor insisted in no uncertain terms that economic development takings are categorically forbidden by the Fifth Amendment: "Are economic development takings constitutional? I would hold that they are not."[58]

She approvingly cited Justice Ryan's dissenting opinion in the "infamous" 1981 Michigan Supreme Court decision in *Poletown Neighborhood Council v.*

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54. See HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009), for an interpretation of Kennedy's jurisprudence that highlights his libertarian tendencies. *But see* Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 333 (2010) (reviewing and critiquing HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009)).

55. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 626-30 (2001); Dolan v. City of Tigard, 512 U.S. 374, 392 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992);

56. *See supra* Part II.

57. *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring); *see infra* Part III.B (discussing how Kennedy could have preserved this deferential approach while voting to strike down the *Kelo* takings on narrow grounds).

58. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

City of Detroit, which argued that "economic development takings 'seriously jeopardiz[e] the security of all private property ownership.'"[59] The *Poletown* case was by far the most famous economic development taking in American history prior to *Kelo*. The takings upheld in *Poletown* forcibly displaced some 4000 Detroit residents in order to transfer their property to General Motors for the construction of a new factory.[60] If Kennedy had given O'Connor's position a fifth vote, it would have banned economic development takings across the country.

Would this have given property owners ironclad protection against future *Kelos* and *Poletowns*? It is logically possible that it would not have. Although Justice O'Connor's opinion unequivocally repudiated economic development takings, it did not invalidate blight condemnations.[61] Indeed, O'Connor's opinion distinguishes blight condemnations from economic development takings on the ground that the former remove a "precondemnation use of the targeted property [that] inflicted affirmative harm on society."[62] She therefore would not overrule the Supreme Court's 1954 decision in *Berman v. Parker*, which held that blight condemnations are permissible.[63] On this point, O'Connor's approach differs from that of Justice Clarence Thomas, who argued that *Berman* was wrongly decided and would at least "consider" overruling it.[64] In the unlikely event that Kennedy chose to join Thomas's opinion rather than O'Connor's, there would still have been only two votes for overruling *Berman*. In that scenario, O'Connor's opinion would still have been the controlling one as the ruling of the justice who concurred on the "narrowest grounds."[65]

With blight takings still permitted, it is possible that a victory for the property owners under O'Connor's approach would have still given states a free hand to condemn virtually any property simply by defining blight extremely broadly. As we have seen, this is exactly what has happened in many states that have enacted post-*Kelo* reform laws banning economic development takings, but leaving broad definitions of blight in place.[66]

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59. *Id.* at 504-05 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 465 (Mich. 1981) (Ryan, J., dissenting), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)) (alteration in original).

60. *Poletown*, 304 N.W.2d at 457; *see also* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1006-27 (discussing in detail the *Poletown* decision and its effects).

61. *See supra* Part I.B (discussing blight takings).

62. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

63. Berman v. Parker, 348 U.S. 26, 35-36 (1954).

64. *Kelo*, 545 U.S. at 519-21 (Thomas, J., dissenting).

65. *See* Marks v. United States, 430 U.S. 188, 194 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds. . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

66. *See supra* Part I.B.

However, it is unlikely that a *Kelo* decision where O'Connor's opinion becomes the majority would have actually led to this result. O'Connor repeatedly emphasized that the reason why the economic development rationale must be struck down is that under it "all private property is now vulnerable to being taken and transferred to another private owner."[67] It seems unlikely that a Supreme Court majority committed to O'Connor's view, or lower courts, would interpret the decision in a way that allows the same risk to enter through the back door. Moreover, if insufficient "economic development" is not enough to qualify as an "affirmative harm" justifying a taking,[68] the same logic applies to "blight" that essentially consists of inadequate development.[69] In 2006, the Ohio Supreme Court directly addressed the issue of whether blight condemnations under a definition of "blight" that includes economic underdevelopment, can be reconciled with a state constitutional ban on economic development takings.[70] It ruled that they are not.[71] The Ohio Supreme Court cited Justice O'Connor's interpretation of the federal Public Use Clause as a model for its decision under its Ohio state equivalent.[72] It is likely that federal courts interpreting O'Connor's opinion would have reached the same result.

A *Kelo* decision based on O'Connor's opinion would therefore have given property owners far stronger protection against takings than before. It would have eliminated economic development takings in all fifty states and would also have put a stop to the growing tendency to use expansive definitions of blight to subject virtually any property to condemnation.[73] On the other hand, it would have fallen short of ending all blight condemnations. Blight takings in genuinely dilapidated and unhealthy neighborhoods would still be allowed to continue. Historically, these have displaced far more people than pure economic development takings.[74] Despite this important limitation, a *Kelo* decision based on Justice O'Connor's opinion would have been a major victory for property rights – the most important in many decades. It would have prevented numerous takings and also reversed the longstanding conventional wisdom that the Public Use Clause imposes no meaningful limits on condemnations.

B. What if the Kelo *Condemnations Had Been Invalidated on Narrow Grounds?*

While it is possible to imagine Justice Kennedy signing on to O'Connor's

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67. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting); *see also id.* at 505.

68. *Id.* at 500.

69. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2120-31 (explaining how many state statutes with broad definitions of "blight" essentially define blight in terms of insufficient development).

70. City of Norwood v. Horney, 853 N.E.2d 1115, 1146-47 (Ohio 2006).

71. *Id.* at 1146-52.

72. *Id.* at 1136-37.

73. *See supra* Part I.B.

74. *See* Somin, *Controlling the Grasping Hand*, *supra* note 28, at 269-71.

opinion, it is even more plausible to imagine him voting to strike down the *Kelo* takings without simultaneously holding that all economic development takings are constitutional. Doing so would have enabled him to rule in favor of the property owners without jeopardizing his preference for a deferential approach in most public use cases.

1. The Pretext Standard.—The most obvious way for Justice Kennedy to do this would have been to conclude that the *Kelo* condemnations were impermissible because the economic development rationale was a mere pretext for a scheme intended to benefit a private party: the Pfizer Corporation. The *Kelo* majority emphasized that pretextual takings "for the purpose of conferring a private benefit on a particular private party" are still forbidden by the Public Use Clause.[75] Similarly, Justice Kennedy wrote that a taking may be invalidated if it was the result of "impermissible favoritism" to a private party.[76]

There was in fact considerable evidence of "favoritism" in the *Kelo* takings. The Pfizer Corporation had played a key role in instigating the condemnations.[77] Although Pfizer was not expected to be the actual owner of the condemned property, it hoped to benefit from the takings because the resulting development would provide facilities that would increase the value of the new headquarters it was building in the area.[78] Some of the evidence of Pfizer's involvement in the project did not become available until after the Supreme Court had already reached its decision.[79] Nonetheless, considerable evidence of Pfizer's role was available to the Court. At state court trial, New London's own expert testified that Pfizer was the "[ten-thousand] pound gorilla" behind the takings.[80] The trial evidence also revealed that the New London Development Corporation's plans for the development project closely matched Pfizer's demands.[81] Claire Gaudiani, the Chairman of the NLDC, was the wife of a high-ranking Pfizer employee, and her connections with the firm played a key role in instigating the takings.[82]

In the end, all nine Supreme Court Justices concluded that there was no pretextual motive in the case, as had the justices of the Connecticut Supreme Court.[83] But it is possible to imagine Justice Kennedy reaching a different

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75. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

76. *Id.* at 491 (Kennedy, J., concurring).

77. *See* Somin, *Controlling the Grasping Hand*, *supra* note 28, at 237 (summarizing the relevant evidence).

78. *See id.*

79. *Id.* The evidence was obtained as a result of a Freedom of Information Act request filed by *The Day*. Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, http://www.theday.com/article/20051016/BIZ04/911119999.

80. Brief of Petitioners at 4-5, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811059 at *4-5.

81. *Id.*

82. BENEDICT, *supra* note 13, at 24-26.

83. *See* Kelo v. City of New London, 545 U.S. 496, 478 (2005) (asserting that "there was no evidence of an illegitimate purpose in this case"); *id.* at 493 (Kennedy, J., concurring) (stating that there is no evidence of "an impermissible private purpose"); *id.* at 495 (O'Connor, J., dissenting)

conclusion on this issue, either because he interpreted the available evidence differently or because the evidence discovered after the case somehow emerged earlier.

What would have been the effect of a decision striking down the *Kelo* condemnations as pretextual takings? Much depends on how Kennedy would have chosen to define what counts as pretextual. In the actual *Kelo* decision, both his concurrence and the majority opinion were extremely unclear on this point.[84] As a result, there is deep division in both federal and state courts over the question.[85] Lower courts have identified four possible standards for determining whether a taking is pretextual:[86]

1. The magnitude of the public benefit created by the condemnation. If the benefits are large, it seems less likely that they are merely pretextual.
2. The extensiveness of the planning process that led to the taking.
3. Whether or not the identity of the private beneficiary of the taking was known in advance. If the new owner's identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude that government undertook the condemnation in order to advance his or her interests.
4. The subjective intent of the condemning authorities. Under this approach, courts would investigate the motives of government decision-makers to determine what the true purpose of a taking was.[87]

At least two of these four standards find direct support in Kennedy's

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(stating that the NLDC had acted "[c]onsistent[ly] with its mandate" to "assist the city council in economic development planning"); Kelo v. City of New London, 843 A.2d 500, 538-41 (Conn. 2004) (concluding that the NLDC and New London were not motivated by a desire to advance Pfizer's interests), *aff'd*, 545 U.S. 469 (2005); *id.* at 595 (Zarella, J., concurring in part and dissenting in part) (stating that "[t]he record clearly demonstrates that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy").

84. *See* Somin, *Judicial Reaction*, *supra* note 9, at 24-25; *cf.* Goldstein v. Pataki, 488 F. Supp. 2d 254, 288 (E.D. N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) ("[A]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext' . . . .").

85. *See* Somin, *Judicial Reaction*, *supra* note 9, at 25-35.

86. *See id.*

87. *Id.* at 25 (citing Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184-99 (2009)). Note, however, Kelly proposes his own alternative approach after finding fault with these criteria. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 215-20. See Somin, *Judicial Reaction*, *supra* note 9, at 25-35, for further description of the use of all four standards by state and federal courts.

concurring opinion. Kennedy seems to endorse the relative benefits standard, writing that a taking may be invalidated if it has "only incidental or pretextual public benefits."[88] He also noted that the absence of a known private beneficiary was a relevant factor in *Kelo*.[89]

Either of these standards could potentially have justified a ruling in favor of the property owners in *Kelo*. Although Pfizer was not intended to be the new owner of the condemned property, it was possible to conclude that the lion's share of the benefits of the project would go to the firm indirectly. And, Pfizer was certainly a known, private beneficiary of the takings. Unfortunately, Kennedy's and the majority's attention was diverted away from this point because the private benefit to Pfizer did not take the form of ownership rights to the condemned property. However, one can imagine Kennedy concluding that the pretext doctrine should treat indirect, private benefits the same way as benefits from ownership.[90] Finally, Kennedy could also have justified a pretext-based ruling on the basis of condemnor intent. As discussed above, Pfizer's lobbying played a major role in instigating the taking.[91]

A decision striking down the *Kelo* takings based on the intent standard probably would have imposed only minor constraints on future economic development takings.[92] Motivations for takings are often difficult to discern, especially in cases that have not received as much media scrutiny as *Kelo*, and where the property owners lack the kind of top-notch representation that the New London property owners got from the Institute for Justice.[93] Moreover, in practice, officials can often convince themselves that a condemnation undertaken for the purpose of benefiting a politically influential private interest also benefits the public. For these reasons, an intent test is only likely to ferret out the most extreme cases of blatant favoritism.

The relative benefits approach could potentially have had greater bite. If Justice Kennedy chose to adopt a test under which the public benefits had to greatly outweigh those to the main private beneficiary, that could substantially impair many takings. In practice, however, it seems unlikely that he would have adopted such a restrictive approach. Doing so would have forced lower courts to make difficult case-by-case assessments of the benefits of proposed takings and their distribution. Lower courts that have adopted this strategy since *Kelo* have generally singled out only extreme cases for heightened scrutiny.[94] Like the intent test, the relative benefits test would probably weed out only unusually blatant cases of favoritism.

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88. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

89. *Id.* at 491-92.

90. *See* Somin, *Judicial Reaction*, *supra* note 9, at 29-30 (discussing this possibility).

91. *See supra* Part III.B.1.

92. For a more extensive discussion of the limitations of the intent approach, see Somin, *Controlling the Grasping Hand*, *supra* note 28, at 235-38.

93. *See* BENEDICT, *supra* note 13, at 158-61.

94. *See* Somin, *Judicial Reaction*, *supra* note 9, at 27-28 (reviewing lower court cases adopting this standard).

Finally, it is unlikely that Justice Kennedy would have applied the known beneficiary standard in a highly restrictive way. Almost every taking has *some* beneficiary whose identity is known in advance. Even if the identity of the future owners of the condemned property is unknown, it is usually possible to identify other likely beneficiaries, such as local businesses who might benefit from new development in their vicinity or interest groups that might benefit from a potential increase in the local government's tax base.

This reality may be the reason why no lower court has invalidated a taking solely based on this standard in the aftermath of *Kelo*,[95] though a Third Circuit panel did rely on the *absence* of a known beneficiary as a reason to *uphold* a taking.[96] To make the standard workable, Kennedy would probably have had to restrict it to cases where the presence of a known beneficiary was combined with a vast disproportion of benefits or improper condemnor intent. In either case, the rule would have imposed only modest restrictions on future economic development takings.

2. The Absence of a Clear Use for the Condemned Property.—An alternative basis for a narrow decision in favor of the property owners was the lack of a clear plan for the use of the condemned property. The property owners argued that New London did not have a set plan for how the condemned land would be used.[97] They cited evidence showing that the City's plan for the condemned properties had assigned four of the lots to an "office building" that might never be built and eleven to unspecified "[p]ark [s]upport" purposes.[98] This, they contended, was not a specific enough plan to qualify as a genuine public use.[99]

Justice Kennedy could have adopted this argument, ruling that economic development takings are impermissible unless the condemning authority has a clear and specific plan for the future use of the property it seeks to take. Several state court decisions previously adopted this approach under their state constitutions.[100] The Supreme Court itself ruled in a 1930 case that a taking was

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95. *See id.* at 28-30.

96. *See* Carole Media LLC v. N.J. Transit Corp., 550 F.3d 302, 311 (3d Cir. 2008).

97. Brief of Petitioners, *supra* note 80, at 40-43.

98. *Id.* at 40-41.

99. *Id.* at 40-42.

100. *See, e.g.*, State *ex. rel.* Sharp v. 0.62033 Acres of Land in Christiana Hundred, New Castle Cnty., Del., 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd*, 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time" (emphasis added)); Alsip Park Dist. v. D & M P'ship, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "if the facts" in a condemnation proceeding "established that [the condemnor] had no ascertainable public need or plan, current or future for the land, [the property owner] should prevail"); Krauter v. Lower Big Blue Natural Res. Dist., 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation.").

impermissible if based solely on a future use "to be determined only by such future action as the city may hereafter decide upon."[101]

Adoption of this rule would have constrained speculative economic development takings that lacked a clear plan for the future use of the property. But it would still have been easy for local governments to pursue economic development condemnations, so long as they developed a clear plan in advance for how the property in question would be used. Once the rule was firmly established, state and local governments would be able to adjust their planning practices to comply with it without having to give up on very many planned takings.

IV. THE POLITICAL IMPACT

To fully understand the potential effects of a decision in favor of the property owners in *Kelo*, we have to assess its likely political effects, as well as the purely legal ones. Unlike most Supreme Court decisions, *Kelo* resulted in a massive political backlash that led to the enactment of eminent domain reform laws in forty-three states.[102] If *Kelo* had come out the other way, it is possible that there would not have been any outburst of popular anger and, therefore, no post-*Kelo* reform laws. If so, winning *Kelo* might have been less advantageous to the property rights movement than losing turned out to be.

Despite this possibility, it seems highly likely that *Kelo* would have been a major victory for property rights if Justice Kennedy had joined with Justice O'Connor and the other *Kelo* dissenters in voting for a categorical ban on economic development takings.[103] Such a decision would have banned economic development takings all over the country and also probably would have prevented blight condemnations conducted under extremely broad definitions. By contrast, the majority of the new post-*Kelo* laws are likely to be ineffective because they essentially allow economic development takings to continue under the guise of blight takings.[104]

A handful of states have enacted post-*Kelo* reform laws that give property rights even greater protection than they would have had if Justice O'Connor's dissenting opinion had become the majority.[105] Two states—Florida and New Mexico—have banned blight condemnations entirely.[106] South Dakota has banned blight condemnations that transfer property to a private party.[107] Finally, Kansas has restricted blight condemnations to properties that are "unsafe for

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101. City of Cincinnati v. Vester, 281 U.S. 439, 448 (1930).

102. *See supra* Part I.B.

103. *See supra* Part III.A.

104. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2120-31.

105. *See id.* at 2138-39 (discussing reform laws in states such as Florida, New Mexico, South Dakota, and Kansas, which provide increased protection for property owners).

106. *Id.* at 2138.

107. *Id.* at 2139.

occupation by humans under the building codes."[108] Because they forbid or severely restrict even narrowly defined blight condemnations, post-*Kelo* reform laws in these four states give property owners broader protection than Justice O'Connor's opinion would have.

Some fifteen other states have adopted reform laws that give property owners roughly the same level of protection as they would have enjoyed under the O'Connor approach.[109] These laws ban economic development takings and restrict the definition of blight to areas that are genuinely dilapidated or pose a danger to public health.[110] Minnesota and Pennsylvania have enacted similar laws, which are weakened by temporary geographic exemptions for takings in their largest urban areas.[111] The state of Utah banned both blight and economic development takings even before *Kelo*.[112]

This leaves twenty-two states that enacted ineffective reforms that impose little or no constraint on economic development takings, and six others (not including Utah) that have not adopted any post-*Kelo* reforms at all.[113] Minnesota and Pennsylvania's reform laws also give property owners less protection than Justice O'Connor's approach would have, because of their geographic exceptions. All told, an O'Connor majority opinion would probably have given property rights greater protection than the *Kelo* backlash in thirty states, roughly equal protection in sixteen (including Utah), and lower protection in four.[114] The thirty states where O'Connor's opinion would have led to an increase in protection for property rights include numerous big states with large numbers of condemnations, such as California, New York, Massachusetts, New Jersey, and Texas.[115]

A very different picture emerges when we consider the potential effects of a narrower decision in favor of the property owners that did categorically forbid economic development takings. A decision striking down the New London takings as pretextual would probably have imposed only very modest restraints on economic development takings.[116] The same goes for a decision in favor of the property owners based on the fact that New London did not have a clear plan for how to use the condemned property.[117] It is highly likely that the laws enacted

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108. *Id.* (internal citation omitted).

109. *See id.* at 2140-48 (discussing reform laws in Alabama, Georgia, Idaho, Indiana, Michigan, New Hampshire, Virginia, and Wyoming, among others). This includes a Delaware law that I could not fully analyze because it was enacted just as my article on post-Kelo reform went to press. *See id.* at 2133 n.143.

110. *Id.* at 2140-48.

111. *Id.* at 2141-42.

112. *Id.* at 2120 n.81 and accompanying text.

113. *See id.* at 2115 tbl.3.

114. *See id.* at 2115-16 tbls.3-4.

115. *See id.* at 2115-16 tbl.4, 2118-19 tbl.5, 2111-32, 2135-37 (discussing these states individually).

116. *See supra* Part III.B.1.

117. *See supra* Part III.B.2.

as a result of the *Kelo* backlash provided much greater protection for property owners in those states that succeeded in banning economic development takings. In states with ineffective reform laws, a narrow decision in favor of the property owners would have strengthened protection for property rights only slightly. It is therefore likely that a narrow decision in favor of the property owners would actually have left the cause of property rights worse off than it would have been otherwise.

The above analysis assumes, conservatively, that there would have been *no* state-level eminent domain reform in the aftermath of a property rights victory in *Kelo*. The assumption is that the *Kelo* backlash would simply never have gotten started in the absence of an adverse Supreme Court ruling that galvanized public opinion. That assumption may not be completely accurate, however. History shows that legal victories sometimes galvanize political movements as much, or more, than defeats do. For example, *Brown v. Board of Education*[118] and other legal victories in the 1950s provided a political boost for the civil rights movement.

More generally, because the public knows very little about the details of eminent domain law,[119] much would have depended on how the media portrayed a *Kelo* decision in favor of the property owners. If the decision were portrayed as a minor matter or as a complete solution to the problem of eminent domain abuse, there might have been little public reaction. By contrast, if it was portrayed as merely the first step in dealing with a wider problem, the reaction may have been different. The latter portrayal might have created an opportunity for the Institute for Justice and other property rights advocates to promote reform laws in the aftermath of a legal victory, much as they actually did in the aftermath of defeat.

In sum, it seems clear that a legal victory in *Kelo* could have given property owners much greater protection than they eventually got from the gains created by the *Kelo* backlash. However, such an outcome would only have been likely if the Court had imposed a categorical ban on economic development takings. A narrower decision in favor of the property owners might have been even worse than an outright defeat.

CONCLUSION

The *Kelo* story provides some support for those who believe judicial decisions can have major effects on public policy.[120] But the exact nature of those effects is heavily dependent on the details of the legal rule adopted by the Court and the way in which it interacts with public opinion. In the best case scenario for activists, a victory in the courts both provides stronger protection for their rights and focuses favorable public attention on their issue, thereby leading to

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118. 349 U.S. 294 (1955).

119. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2154-70 (describing evidence of widespread public ignorance).

120. *See supra* notes 5-6 and accompanying text.

follow-up political successes.

A highly visible defeat that stirs public outrage can also galvanize political efforts, as happened in the real world version of *Kelo*. Such a decision would have little effect in a world where voters follow politics closely and are well aware of the details of current policy. In such a world, most voters would have known about the problem of eminent domain abuse long before *Kelo*, and any resulting public backlash would already have occurred. In a world of widespread political ignorance, however, a high-profile Supreme Court decision can raise political awareness about issues that most of the public would otherwise ignore. The *Kelo* case was a particularly striking example of this phenomenon.

On the other hand, a narrowly technical legal victory that has little effect on future cases can be even worse than no victory at all. If the public believes that the courtroom triumph has solved the problem, there will be little or no momentum for legislative reform. Much depends on how the decision will look to voters who are "rationally ignorant" about the details of public policy and usually do not follow politics closely.