ASSESSMENTS OF BACKLASH: EVALUATING THE RESPONSE OF THE PROPERTY RIGHTS MOVEMENT TO *KELO V. CITY OF NEW LONDON*

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INTRODUCTION

The 2005 case of *Kelo v. City of New London*[1] provoked a wave of hostile public reaction. In *Kelo*, Justice Stevens wrote on behalf of a five-member majority to uphold the condemnation of a number of privately owned homes so that an economic redevelopment project could be carried out in New London, Connecticut.[2]

The decision was widely criticized by the American public, and was denounced by the media, politicians, and four members of the Supreme Court, two of whom wrote impassioned dissents.[3] Legislators on both the federal and state levels responded to the condemnation of the decision by introducing measures designed to address the alleged "abuse" of eminent domain by local governments. Many states passed laws to restrict the power of eminent domain, through such means as altering the definition of public use to preclude transfers of private property from one owner to another for the purpose of economic redevelopment.[4]

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[1] Kelo v. City of New London, 545 U.S. 469 (2005).

[2] *Id.* at 490.

[3] *Id.* at 494 (O'Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting).

[4] *See* CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO 1, 5 (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf [hereinafter 50 STATE REPORT CARD].

Advocates of property rights were especially galvanized by the decision. In recent decades, a property rights movement has emerged in the United States. This movement, which includes grassroots advocacy groups, libertarian organizations such as the Cato Institute, and members of the legal academy, is devoted to the defense of "private property rights" from what is perceived to be an "assault" on those rights "by officials at all levels of government."[5] Members of the property rights movement, who in the years prior to *Kelo* had criticized the ways in which local governments used their power of eminent domain, mobilized to protest the decision and to fight for legal reforms that would prohibit condemnations of the kind seen in *Kelo*. Their campaign for reform focused on the passage of state legislation which would be effective in curbing what they saw as abusive exercises of eminent domain by local government officials.

In this Note, I assess the property rights movement's response to the state reform laws passed in the wake of *Kelo*. Advocates of property rights have concentrated their attention on the language of state reform laws, while paying little heed to the ways in which state courts, both before and after *Kelo*, have dealt with questions involving the use of eminent domain. While this approach is a natural consequence of the movement's presumption that courts are excessively deferential to local governments in regard to eminent domain, it is incorrect to assume that all courts behave in an identical manner when confronted with this issue. By looking at the ways in which the courts of two states, Pennsylvania and California, have actually addressed issues arising from exercises of eminent domain, I show that the property rights movement has presented an inadequate account of the judicial response to eminent domain.[6] The property rights critique of post-*Kelo* reform laws is flawed, inasmuch as it fails to consider the particular

[5] Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 77 (2002). Eagle asserts that the growth of the movement is "attributable primarily to the general disregard of private property rights by numerous federal and state agencies and the subsequent realization that the courts offer owners little help in vindicating their rights." *Id.* For another perspective on the rise of the movement that does not take for granted that the government generally "disregard[s]" property rights, *see* Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 514 (arguing that the property rights movement is fueled "primarily" by "a sense of unfairness arising because the rules of the land-use game often get changed late in the day, to the advantage of some neighbors (those who have already built) and at the expense of others (those who have delayed development)").

[6] Pennsylvania and California are the subject of my analysis because they led the nation in the number of *Kelo*-type property transfers in the years leading up to *Kelo*, and

ways in which different state courts deal with eminent domain. In order to arrive at an accurate estimate of the significance of post-*Kelo* reform laws, it is essential to look closely at the judicial practice in each individual state.

I. Opening a Can of Worms: *Kelo v. City of New London*

During the 1990s, the city of New London, Connecticut experienced a severe economic downturn.[7] Because of the city's economic situation, the New London Development Corporation was authorized to put together a development plan for the city's Fort Trumbull area.[8] The plan would have transferred property to the pharmaceutical company, Pfizer, which local planners hoped would "draw new business to the area" and thus serve as a "catalyst to the area's rejuvenation."[9] The area in which the development was to take place included 115 privately owned properties that the City authorized the Development Corporation to acquire through eminent domain.[10] One of those properties was a house owned by Susette Kelo who, along with several other petitioners, challenged the exercise of eminent domain, arguing that the taking of their properties would violate the "public use" restriction of the Fifth Amendment.[11]

In its majority opinion, the Court considered the history of the "public use" requirement in American law.[12] The Court noted that it had "long ago rejected any literal requirement that condemned property be put into use for the general public."[13] Instead, the Court stated that since the end of the nineteenth century it had embraced the

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because their post-*Kelo* reform measures have been the subject of significant analysis by members of the property rights movement. *See infra* text accompanying notes 100-102.

[7] *See Kelo*, 545 U.S. at 473. The story of *Kelo* has been told hundreds of times in the last few years. *See, e.g.*, Shaun Hoting, *The* Kelo *Revolution*, 86 U. Det. Mercy L. Rev. 65, 75-86 (2009) (offering a standard summary and analysis of the opinions in *Kelo*). For more extensive (if tendentious) treatments of the background to the case, *see* Jeff Benedict, Little Pink House: A True Story of Defiance and Courage (2009) *and* Carla T. Main, Bulldozed: "Kelo," Eminent Domain, and the American Lust for Land 147-94 (2007). I offer only the most cursory of summaries here, as so many accounts of the case are readily available. The reader who is already familiar with *Kelo* is strongly encouraged (if any encouragement is necessary) to skip ahead to the next section of this Note.

[8] *Kelo*, 545 U.S. at 473-74.

[9] *Id.* at 473.

[10] *Id.* at 474-75.

[11] *Id.* at 475.

[12] *Id.* at 477-83.

[13] *Id.* at 479 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

"broader and more natural interpretation of public use as 'public purpose.' "[14] The Court added that it had always interpreted the concept of public purpose "broadly," reflecting a "longstanding policy of deference to legislative judgments in this field."[15]

On the facts before it, the Court concluded that the takings conducted in furtherance of the plan "satisf[ied] the public use requirement."[16] The Court observed that the City's development plan had been "carefully formulated" to bring "appreciable benefits to the community."[17] The Court steadfastly "decline[d] to second-guess the City's considered judgments about the efficacy of its development plan," or to "second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."[18]

In a concurring opinion, Justice Kennedy pointed out that courts employ a "deferential standard of review" similar to a rational basis test when determining whether takings should be upheld as consistent with the Fifth Amendment.[19] However, he noted that even under such a standard, it was still the case that "transfers [of property] intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden" by the Fifth Amendment.[20] Kennedy emphasized that courts should "strike down" takings which, "by a clear showing," could be established to "favor a particular private party, with only incidental or pretextual public benefits."[21] He instructed courts, when "confronted with a plausible accusation of impermissible favoritism to private parties," to "treat the objection as a serious one" and review the record to assess its "merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."[22] In the case at hand, he concluded that the trial court had satisfactorily conducted such a review.[23]

The decision also inspired two dissenting opinions. Justice O'Connor argued that the majority had effectively "delete[d] the

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[14] *Id.* at 480.
[15] *Id.*
[16] *Id.* at 483-84.
[17] *Id.* at 483.
[18] *Id.* at 488-89.
[19] *Id.* at 490 (Kennedy, J., concurring).
[20] *Id.*
[21] *Id.* at 491.
[22] *Id.*
[23] *Id.* at 491-92.

words 'for public use' from the Takings Clause."[24] She agreed that courts should "give considerable deference to legislatures' determinations about what governmental activities will advantage the public," but warned that if the political branches were the "sole arbiters" in this area, the "Public Use Clause would amount to little more than hortatory fluff."[25] She offered an alternative reading of the Court's major twentieth-century decisions about the taking of property by eminent domain, and concluded that economic development takings are not constitutional.[26] While O'Connor agreed that those prior decisions "emphasized the importance of deferring to legislative judgments about public purpose," she argued that "for all the emphasis on deference," the cases adhered to a "bedrock principle," according to which any "purely private takings" simply "serve no legitimate purpose of government" and therefore must be "void."[27] Under the majority's holding, O'Connor warned, the "specter of condemnation hangs over all property," as the state would be free to decide that an owner was not making the "most productive or attractive possible use of her property" and could choose to replace a "Motel 6 with a Ritz-Carlton" or a "home with a shopping mall."[28]

The other dissent was written by Justice Thomas, who stated that the majority opinion was merely the "latest in a string" of Supreme Court decisions which had construed the Public Use Clause so as to render it a "virtual nullity, without the slightest nod to its original meaning."[29] He argued that the "most natural reading of the [Public Use] Clause" is that it permits the government "to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[30] Thomas urged the Court to "revisit" its Public Use Clause cases and to "consider returning" to what he deemed the "original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property."[31]

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[24] *Id.* at 494 (O'Connor, J., dissenting).
[25] *Id.* at 497.
[26] *Id.* at 498.
[27] *Id.* at 499-500.
[28] *Id.* at 503.
[29] *Id.* at 506 (Thomas, J., dissenting).
[30] *Id.* at 508.
[31] *Id.* at 521.

II. The *Kelo* Backlash: Widespread Outrage Leads to State Legislation

A. Kelo *Was Condemned Almost Universally*

The *Kelo* decision provoked a firestorm of popular opposition. A year after *Kelo* was handed down, a *New York Times* account summarized the response to the case as a "revolt."[32] As the *Times* noted, the decision "provoked outrage from Democrats and Republicans, liberals and libertarians, and [everyone else]."[33] That outrage was reflected in the editorial denunciations of the decision offered by other newspapers. In Connecticut, for instance, the *Hartford Courant* reacted to the decision by running an editorial entitled "A Sad Day for Property Rights."[34] The *Courant* described the ruling as "dangerous," and warned of the "corruption that is bound to thrive under the broadened scope of eminent domain."[35] Similarly, the *Boston Globe* feared that a "property grab" would follow from the decision, unless states passed laws to restrain municipalities from taking "perfectly functional private homes and businesses" at the behest of "private developers whose interests lie mainly in creating commercial profit centers for themselves."[36]

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[32] Adam Liptak, *Case Won on Appeal (to Public)*, N.Y. Times, July 30, 2006, at A3.

[33] *Id.* At the time of the decision, the *Times* had been one of the few American newspapers to support the Supreme Court's opinion, arguing in an editorial that *Kelo* was a "welcome vindication of cities' ability to act in the public interest," and calling the case a "setback to the 'property rights' movement, which is trying to block government from imposing reasonable zoning and environmental regulations." Editorial, *The Limits of Property Rights*, N.Y. Times, June 24, 2005, at A22. *But cf.* Matt Welch, *Why the New York Times Loves Eminent Domain*, Reason, Oct. 2005, *available at* http://reason.com/news/show/32227.html (arguing that the *Times* was "almost completely alone" among newspapers in approving of *Kelo*, and asserting that most newspapers "condemned the ruling").

[34] Editorial, *A Sad Day for Property Rights*, Hartford Courant, June 24, 2005, at A10.

[35] *Id.*

[36] Editorial, *Property Grab*, Boston Globe, June 25, 2005, at A10. Outside New England, newspapers were considerably less restrained in their negative assessments of the opinion. In an impassioned denunciation of "court-endorsed theft," the *Richmond Times-Dispatch* claimed that the *Kelo* majority had "botched [the decision] royally," and warned that the Court had not only "interpreted away the takings clause of the Fifth Amendment," but also had "interpreted away most of the distinction between public and private" and, indeed, "much of the concept of property rights." Editorial, *Court-Endorsed Theft*, Richmond Times-Dispatch, June 25, 2005, at A10. Likewise, the *Washington Times* prophesied that *Kelo* could lead to a "wave of property seizures" as cities could now "take land from ordinary people and hand it to preferred customers to build shopping malls, hotels, or other richly taxable properties," and concluded "[s]o much for property rights." Editorial, *A Win for Big Government*, Wash. Times, June 24, 2005, at A20.

Many Americans were appalled by the ruling. A poll conducted by the University of New Hampshire the month after *Kelo* was handed down indicated that 93 percent of that state's voters were opposed to the idea that "towns and cities should be allowed to take private land from . . . owners and make it available to developers" for economic redevelopment.[37] Political leaders were quick to gauge the public mood, and rushed to condemn the Court's ruling. A week after *Kelo* was handed down, the U.S. House of Representatives overwhelmingly passed a resolution expressing its "grave disapproval" of the majority opinion in the case.[38] The resolution asserted that *Kelo* had rendered the "public use provision" of the Takings Clause "without meaning," and announced that the House of Representatives "disagrees" with *Kelo*'s "holdings that effectively negate the public use requirement of the takings clause."[39] The House went on to pass the Private Property Rights Protection Act of 2005, which would have prohibited "eminent

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[37] The Granite State Poll, July 20, 2005, University of New Hampshire Survey Center, https://www.unh.edu/survey-center/news/pdf/gsp2005_summer_sc072005.pdf; *but cf.* Janice Nadler, Shari Seidman Diamond, & Matthew M. Patton, *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 301 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008) (offering a detailed analysis of the New Hampshire poll which suggests that "beneath the vigorous public opposition to *Kelo* lay a more nuanced evaluation of government takings"). The Institute for Justice, a property rights organization dedicated to fighting eminent domain abuse, collected a number of polls that indicate Americans surveyed after *Kelo* found the decision "just plain wrong." *See* Castle Coalition, The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain, http://castlecoalition.org/index.php?option=com_content&task=view&id=43&Itemid=143 (last visited May 10, 2009); *see also* Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2974 (2006) (commenting on Castle Coalition polling data which indicated that about 90 percent of Americans were opposed to *Kelo* in the weeks following the decision). That was also the conclusion of two nationwide surveys conducted in the fall of 2005, which showed that over 80 percent of respondents disapproved of *Kelo*. *See* American Farm Bureau Federation Survey, Oct. 29-Nov. 2, 2005, Zogby International (showing 95 percent of respondents disagreed with the Court's ruling in *Kelo*); The Saint Index Poll, Oct.-Nov. 2005, Center for Economic and Civic Opinion at the University of Massachusetts/Lowell (showing 81 percent of respondents disagreed with the ruling). For discussion of both surveys, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2109-14 (2009) [hereinafter Somin, *The Limits of Backlash*].

[38] H.R. RES. 340, 109th Cong. (2005); *see also* 151 CONG. REC. 714, 715 (2005) (noting that the Resolution passed by a vote of 365-33).

[39] H.R. RES. 340, at 1-2. The House further admonished state and local governments to "only execute the power of eminent domain for those purposes that serve the public good in accordance with the fifth amendment," and warned such governments not to take *Kelo* as "justification to abuse the power of eminent domain." H.R. RES. 340, at 2-3. For a discussion of the immediate Congressional response to *Kelo*, *see* Bernard W. Bell,

domain abuse" by the states by forbidding state or local governments which receive federal economic development funds from using eminent domain to acquire property "to be used for economic development."[40] However, the Act failed to pass the Senate and never became law.[41]

Academic commentators were also quick to attack the decision. One prominent scholarly advocate of property rights, Gideon Kanner, wrote an article denouncing the ruling as "bad law, bad policy, and bad judgment."[42] In Kanner's view, the *Kelo* majority "mangled the law" and had simply issued an "invitation to abusive use of the eminent domain power."[43] Another leading academic defender of property rights, James Ely, described the decision as "profoundly disquieting because of its flawed reasoning and dismissive attitude toward the constitutional rights of property owners," and argued that it "underscores the Supreme Court's persistent refusal to treat the property rights of owners seriously."[44]

Other members of the legal academy who support property rights were more sanguine about the decision, as they believed that *Kelo* (and the outrage it had provoked) could be an opportunity for profound legal reform.[45] Eric Claeys urged academic opponents of *Kelo* to use the case's "teaching moment to its fullest," arguing that "[a]nyone who

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Legislatively Revising Kelo v. City of New London*: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 172-75 (2006).

[40] H.R. 4128, 109th Cong. (2005). For discussion of the proposed legislation, *see* Bell, *supra* note 39, at 174-75. **R**

[41] *See* Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's Summer of Scrutiny*, 59 ALA. L. REV. 561, 591 (2008) (observing that the Act passed the House by a vote of 376-38, but "stalled" in the Senate).

[42] Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006). Kanner helped to write one of the amicus curiae briefs filed in the Supreme Court on behalf of the petitioners in *Kelo*. *Id.* at 201.

[43] *Id.* at 203, 205.

[44] James W. Ely Jr., Kelo*: A Setback for Property Owners*, 20 PROB. & PROP. 14, 14 (2006). Ely also joined one of the amicus curiae briefs filed on behalf of the petitioners in *Kelo*. *Id.*

[45] *See generally* Edward J. López & Sasha M. Totah, Kelo *and its Discontents: The Worst (or Best?) Thing to Happen to Property Rights*, 11 INDEP. REV. 397 (2007). López and Totah argue the *Kelo* backlash would make it easier for states to pass new laws restricting the use of eminent domain, and that as a consequence "individual property owners ultimately may benefit from the effects of *Kelo*." *Id.* at 412. *Compare* Jennifer Bradley, *Property Wrongs*, AMERICAN PROSPECT, Dec. 18, 2005, *available at* http://www.prospect.org/cs/articles?article=property_wrongs (warning that the "property-rights movement" could be "galvanized" by *Kelo*, and that their "loss" in the case "could turn out to be better than a win").

wants to see *Kelo* corrected in a serious and sustainable way needs to address the entire problem of takings, not only for economic redevelopment but also for blight."[46] A similar perspective was adopted by Charles Cohen, who conceded that the result in *Kelo* was correct "as a matter of law," but found that its policy implications were so "troubling" that the best solution would be a total "ban on takings for economic development," which would ideally be enacted by state constitutional amendments.[47]

While the public and members of the legal academy railed against the opinion, its supporters took a defensive position. Academic commentators who approved of the holding in *Kelo* tended to adopt a cautious approach, arguing that the case was best seen as a mere reaffirmation of precedent. Daniel Curtin, for instance, observed that *Kelo* merely "upheld the long-accepted principle that the taking of property for the purpose of economic development" satisfies the public use requirement of the Fifth Amendment, and argued that the decision was "not a departure from precedent, or otherwise surprising."[48] Similarly, Daniel Cole asserted that the Court in *Kelo* "simply followed well-established precedents."[49] Cole insisted that *Kelo* was "*not* a landmark case" because it relied "entirely on precedent," and argued that it was, if anything, a "legally conservative decision."[50]

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[46] Eric R. Claeys, *Don't Waste a Teaching Moment:* Kelo*, Urban Renewal, and Blight*, 15 J. AFFORDABLE HOUS. & CMTY. DEV. L. 14, 14 (2005). Claeys also helped to write one of the amicus curiae briefs filed on behalf of the petitioners in *Kelo*. *Id.*

[47] Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 496, 498 (2006).

[48] Daniel J. Curtin, Jr., *The Implications of* Kelo *in Land Use Law*, 46 SANTA CLARA L. REV. 787, 787 (2006).

[49] Daniel H. Cole, *Why* Kelo *is Not Good News for Local Planners and Developers*, 22 GA. ST. L. REV. 803, 803 (2006).

[50] *Id.* at 803-04; *see also* Thomas W. Merrill, *Six Myths About* Kelo, 20 PROB. & PROP. 19, 19-20 (2006) (arguing that the Supreme Court has upheld the use of eminent domain for economic development takings on "numerous" occasions); Joseph L. Sax, Kelo*: A Case Rightly Decided*, 28 U. HAW. L. REV. 365, 365 (2006) (observing that the Supreme Court has decided twelve cases addressing issues of eminent domain and public use, including *Kelo*, and that in each case the "Court sustained the exercise of the eminent domain power against a claim that it violated the 'public use' provision of the Fifth Amendment"). The strongest supporter of the decision was, perhaps, Harvard law professor David Barron, who wrote that in *Kelo*, the Court had "affirmed principles as old as the Constitution." David Barron, *New London Case Not a Ruling to Condemn*, HARTFORD COURANT, June 26, 2005, at C1.

B. *States Responded to the Popular Outrage by Passing Reform Laws*

Given the outrage with which *Kelo* was met, it is unsurprising that a legal reform movement quickly emerged in response to the decision. This movement, which focused its energy on changing state laws regulating the use of eminent domain, took its cue from a line in the *Kelo* majority opinion itself. Justice Stevens made a point of emphasizing that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[51] Many supporters of property rights took the hint, and in the aftermath of *Kelo,* advocated for numerous state laws purporting to place "further restrictions" on the use of eminent domain. In fact, two years after *Kelo,* forty-two states had passed some sort of law on the subject.[52]

The first state to react was Alabama, which passed a law mere weeks after *Kelo* was handed down.[53] The Alabama bill was framed as a response to the decision "recently announced by the United States Supreme Court interpreting the extent of the power of government to take property for public use . . . and providing that individual states may restrict the exercise of that power."[54] It proposed to limit the power of government bodies in Alabama to "take the private property of any person for the private use of another, as opposed to the use thereof by the public generally," save under certain "limited circumstances."[55]

Other states responded in similar fashion.[56] A Kansas bill observed that while the Supreme Court had ruled that the "taking and transferring of private property from one private party to another is a

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[51] Kelo v. City of New London, 545 U.S. 469, 489 (2005). In her dissent, Justice O'Connor objected to this suggestion, describing it as an "abdication" of the Court's responsibility to "enforce properly the Federal Constitution." *Id.* at 504 (O'Connor, J., dissenting).

[52] 50 STATE REPORT CARD, *supra* note 4, at 1.

[53] Alabama's first legislative response to *Kelo* was signed into law on August 3, 2005. *Id.* at 5.

[54] S.B. 68, § 1, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

[55] *Id.* The "limited circumstances" under which the law permitted eminent domain to be exercised for private development included seizure of blighted land. *Id.* § 2. The next year, the Alabama House of Representatives passed a follow-up bill which restricted the criteria under which properties could be designated as blighted. *See* H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006).

[56] There is considerable literature assessing the effectiveness of these state reform laws. *See, e.g.*, Somin, *The Limits of Backlash*, *supra* note 37, at 2166-68 (arguing that citizen-initiated referenda were more "effective" than most of the reform laws passed by state legislatures). I will be considering one aspect of this literature in the following

valid use of the power of eminent domain," the "people of Kansas" believed that "the use of eminent domain" for such purposes "should only be allowed in extraordinary and limited situations and with explicit procedural safeguards."[57] Likewise, Alaska's legislature found that "the United States Supreme Court decision in *Kelo* . . . demonstrates that an overly expansive application of eminent domain powers can be a threat to the property rights of all private property owners," and prohibited the use of eminent domain to "acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes."[58] Tennessee's legislature took the opportunity to

> reaffirm[ ] the rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution . . . of an individual to privately own property and for such property to be free from condemnation and taking by the government . . . through the power of eminent domain unless the taking is for a public use and accompanied by just compensation.[59]

My purpose here is not to offer a comprehensive overview of the state legislation which followed *Kelo*.[60] What is in question is the *signifi-*

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section. Here, my goal is merely to offer a brief description of the ways state legislatures initially responded to *Kelo*.

[57] S.B. 323, 2006 Leg., Reg. Sess. (Kan. 2006). The Bill specified a handful of such "limited situations," including the taking of property that is "unsafe for occupation by humans under the building codes of the jurisdiction." *Id.* § 2.

[58] H.B. 318, 24th Leg., 2d. Sess. (Alaska 2006). For particular criticism of the Alaska bill, see 50 STATE REPORT CARD, *supra* note 4, at 6 (arguing that by "focusing on the intent behind the transfer" of property, the law provides a "ready-made excuse for authorities to say that a private transfer was not their purpose when they *originally* acquired the property").

[59] H.B. 3450/S.B. 3296, 104th Gen. Assem., Reg. Sess. (Tenn. 2006). The Tennessee law declared that eminent domain should be "used sparingly," and that laws permitting the use of eminent domain should be "narrowly construed." *Id.* § 1. Under the rubric of "public use," the bill included the acquisition of property to implement a "redevelopment plan in a blighted area," though it defined "blighted areas" more narrowly than Tennessee law had done previously. *Id.* §§ 1, 14 (specifying that "blighted areas" are those which are "detrimental to the safety, health, morals, or welfare of the community").

[60] This task has been undertaken by a number of scholars. *See, e.g.*, Steven J. Eagle & Lauren A. Perotti, *Coping with* Kelo*: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 803-45 (2008) (offering a typology of post-*Kelo* statutes and a description of post-*Kelo* laws by state); Edward J. López, R. Todd Jewell, & Noel D. Campbell, *Pass a Law, Any Law, Fast!: State Legislative Responses to the* Kelo *Backlash*, 5 REV. L. ECON. 101 (2009) (evaluating each of the state reform laws and offering a theoretical analysis which assesses the meaningfulness of each law); Mary Massaron Ross & Kristen Tolan, *Legislative Responses to* Kelo v. City of New London *and Subsequent Court Decisions – One Year Later*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 52, 53-69 (2006) (offering a

cance of much of the States' legislative responses. In the wake of *Kelo*, property rights advocates struggled to come to terms with these laws. In particular, they were concerned about differentiating legislative measures, which were mere rhetoric, from those which constituted meaningful reform.

C. *The Property Rights Movement Responds to* Kelo *by Evaluating State Reform Laws and Calling for "Effective" Legislation*

The property rights movement took *Kelo* as a call to arms. Members of the movement called for legal reform in response to the decision, and offered detailed assessments of the state laws passed in the aftermath of *Kelo*. In this section, I offer an overview of the attitudes toward local and state governments held by several representative members of the property rights movement, and discuss their evaluation of the post-*Kelo* state reform laws. While property rights advocates differ in their level of distrust of the government, they are alike in their approach to post-*Kelo* reform measures. Advocates all focus on the text of state laws, both as those laws stood prior to *Kelo* and as they have been reformed in the aftermath of the decision. Almost exclusively, these critics devote themselves to assessing what the laws *say*, without paying close attention to the ways in which courts have interpreted and applied those laws.

One of the most influential advocacy groups advancing the property rights position is the Castle Coalition. The Castle Coalition is a branch of the Institute for Justice, which describes itself as the nation's only "libertarian public interest law firm,"[61] and is devoted to "nationwide grassroots property rights activism."[62] It was the Institute for Justice, in fact, that represented Susette Kelo and the other petitioners in *Kelo*.[63] In response to the decision, the Castle Coalition (the "Coalition") launched a campaign to "effect significant and substantial re-

descriptive overview of the initial state reform laws). For an extremely succinct overview of the post-*Kelo* legislative measures, coupled with a sensible summary of the debate about "*Kelo*-style redevelopment," see Christopher W. Smart, *Legislative and Judicial Reactions to* Kelo*: Eminent Domain's Continuing Role in Redevelopment*, 22 PROB. & PROP. 60, 61-64 (2008).

[61] Institute for Justice, Institute Profile: Who We Are, http://www.ij.org/index.php?option=com_content&task=view&id=566&Itemid=192 (last visited April 7, 2010).

[62] Castle Coalition, About Us, http://castlecoalition.org/index.php?option=com_content&task=view&id=42&Itemid=138 (last visited April 7, 2010).

[63] Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1.

forms of state and local eminent domain laws."[64] Among other things, it has created model language intended to be used in state constitutional amendments restricting the power of eminent domain;[65] published detailed evaluations of state reform laws;[66] and offered assistance to property owners who face eminent domain actions.[67] Because of the organization's prominence, its views on "eminent domain abuse" merit close consideration.

According to the Coalition, cities "already regularly abused the power of eminent domain" prior to *Kelo*, and "emboldened [local] officials and developers" have further abused the power in the decision's aftermath.[68] For the Coalition, it is important to note, almost *any* exercise of the power of eminent domain is actually a form of "eminent domain abuse."[69] As one Coalition report asserts, "[w]hen the government knocks on your door and gives you two choices—'Take this money or we'll kick you out'—or more likely unveils a map with a shopping center replacing your home, the government is using eminent domain and an abuse clearly occurs."[70] This perspective is explained more fully in another report:

> When the government has all the power, cities can plan projects on the assumption that there is no need to incorporate existing homes or businesses because they can simply be taken. Cities often target poor and middle-class communities for condemnations, and government officials are well aware that people in these communities rarely have the financial means to fight eminent domain through the courts. With the threat of eminent domain always looming in the background, developers know that local officials can acquire almost any piece of land they choose—and many are all too willing to do so . . . . When city officials say they will use eminent domain only if negotiations fail, it simply means they will use

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[64] Castle Coalition, *supra* note 62.

[65] *See* Castle Coalition, Model Language for State Constitutional Amendments, http://castlecoalition.org/index.php?option=com_content&task=view&id=182&Itemid=119 (last visited April 7, 2010).

[66] *See, e.g.*, 50 State Report Card, *supra* note 4.

[67] *See* Castle Coalition, Eminent Domain Abuse Survival Guide (2006), http://castlecoalition.org/pdf/publications/survival-guide.pdf.

[68] Dana Berliner, Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World 1 (2006), http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf.

[69] Castle Coalition, *supra* note 62 (stating that the organization teaches citizens how to "stand up to the greedy governments and developers who seek to use eminent domain" and "provide[s] activists . . . with the tools and strategies necessary to successfully stop the abuse of eminent domain").

[70] Institute for Justice, Dreher and Echeverria: Disinformation & Errors on Eminent Domain 10 (2007), http://www.castlecoalition.org/pdf/publications/Dreher-Echeverria-Response.pdf.

> force to take people's property against their will if they do not agree on a price. Eminent domain is not just abused when a person loses his home in court. It is also abused when a home or business owner sells under the threat of condemnation.[71]

For the Coalition, "local governments and developers" are united as "beneficiaries of eminent domain abuse" who "will not easily relinquish" the "powerful tool" of eminent domain unless state government removes it from their grasp.[72] The Coalition asserts that although there is no "concrete proof that redevelopment does any good," cities will nonetheless take every opportunity to undertake redevelopment projects, as they "*always* want to replace low-tax land uses, such as single-family homes and small businesses, with tax-intensive uses, such as high-rise condominiums and big-box stores."[73]

From the Coalition's perspective, it is extremely difficult to prevent local officials from taking such abusive measures, as cities can "easily assert" a pretextual purpose for their exercises of eminent domain.[74] In particular, the Coalition fears statutes that allow municipalities to levy the "blightion" designation on the belief that such statutes make it almost too easy for predatory local governments to take property from its owners.[75] One Coalition report asserts that the "definition

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[71] CASTLE COALITION, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE 4-5 (2006), http://www.castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf; *see also* BERLINER, *supra* note 68, at 2 ("The threat of condemnation for private development is just as much an abuse of eminent domain as the actual filing of condemnation proceedings").

[72] 50 STATE REPORT CARD, *supra* note 4, at 48.

[73] CASTLE COALITION, CALIFORNIA SCHEMING: WHAT EVERY CALIFORNIAN SHOULD KNOW ABOUT EMINENT DOMAIN ABUSE 7 (2008), http://www.castlecoalition.org/images/publications/californiaschemingfinal.pdf (emphasis added) [hereinafter CALIFORNIA SCHEMING]. For an even more blistering expression of this perspective on local government, see the work of Gideon Kanner, who derides "local municipal functionaries [who,] are often not trained in the law, who serve local private interests, and who lack either the intent or the mandate to pursue the broad public interest, as opposed to the interest of the developer du jour and his political allies in city hall." Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 337 (2006). After *Kelo* was handed down, Kanner argued that the decision would open the door to more "abusive and corrupt uses of the eminent domain power," as "municipal functionaries" would collude with "well-connected redevelopers" who use redevelopment "for their own benefit at both public and private expense." *Id.* at 365. In Kanner's view, it is "obvious today that an unwholesomely close relationship exists between municipal officials and land-use functionaries on the one hand, and large redevelopers on the other." *Id.* at 375.

[74] 50 STATE REPORT CARD, *supra* note 4, at 11.

[75] *See id.* at 9-10.

of blight has become so expansive that tax-hungry governments now have the ability to take away perfectly fine middle- and working-class neighborhoods and give them to land-hungry private developers who promise increased tax revenue and jobs."[76] According to the Coalition, the presence of "vague and undefined terms" in a blight statute leaves such provisions "wide open to the very subjective interpretation of local officials" who may "easily use" such statutes to "blight perfectly good properties."[77]

Though the Coalition is deeply skeptical of local government, which it assumes to be uniformly susceptible to the temptation of conspiring with developers to deprive property owners of their land, it is equally (if implicitly) trusting of *state* government, which it assumes to be capable of, and interested in, policing the greed of cities and municipalities. The premise of the Coalition's *50 State Report Card* is that "cities, developers and planners" have an inveterate interest in abusing eminent domain, but that state governments will be able and willing to take steps to "protect homes, businesses, churches, and farms" from their predations.[78] The point of the report card is to praise those states which have passed "model reforms that can serve as an example for others," while encouraging the citizens of other states—those states which "enacted nominal reform," or which "failed to act altogether"—to pressure their state legislators to revise their eminent domain laws.[79] But the Coalition doesn't assume that a state legislature's failure to enact true reform is indicative of any ineradicable propensity, inherent in the nature of state government as such, to abuse eminent domain. Rather, it takes for granted that "significant reform" at the state level may "take[ ] years to accomplish," and that states which have enacted mere "nominal" reforms may have done so for such honest reasons as "haste, oversight, or compromise."[80]

It is not clear from the Coalition's writings why its skepticism of local government does not extend to state governments as well.[81] Other advocates of property rights, including Timothy Sandefur and

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[76] *Id.* at 3.

[77] CALIFORNIA SCHEMING, *supra* note 73, at 3-4.

[78] 50 STATE REPORT CARD, *supra* note 4, at 2.

[79] *Id.*

[80] *Id.*

[81] Indeed, there is a body of scholarship which suggests that local governments are *more* responsive than state governments to the desires of property owners. *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001) (arguing that because homeowners have a powerful financial interest in the success of their community, they will be

Ilya Somin,[82] take that skepticism a step further, and cast doubt on state legislators as well as local officials. Somin shares the Coalition's certainty that "[c]reative local governments" will "easily" be able to come up with pretextual objectives to mask their true purposes for taking property.[83] He claims that local officials "can (and do) always claim that the goal of a taking is to benefit 'the general public' and not 'merely' the new owners."[84]

However, Somin goes beyond the Coalition by extending this distrust to government officials at the state level. He finds that most post-*Kelo* reform laws passed by state legislatures are ineffective, a phenomenon he explains by positing that state legislators sought to palliate popular outrage over *Kelo* by supporting symbolic legislation "that purported to curb eminent domain, while in reality having little effect."[85] By doing so, Somin explains, such legislators could "simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development con-

especially vigilant toward the conduct of local officials, making municipal government more efficient than state or national government can be).

[82] Somin wrote an amicus curiae brief in support of the petitioners in *Kelo*. Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Economic Protection*, 84 WASH. U. L. REV. 623, 623 n.* (2006). He also wrote an amicus curiae brief on behalf of the Institute for Justice in *County of Wayne v. Hathcock*, a 2004 case in which the Michigan Supreme Court ruled that economic development was not a public use justifying condemnation of private property. *See* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1005-07 (2004).

[83] Somin, *supra* note 37, at 2134; *see also* Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 624 (2008) (asserting that local officials make pretextual assertions of some "ostensible public use" to conceal their desire to "achieve the naked transfer of property from one private party to another," and that this situation now "looms larger" as the "behavior of public bodies has become more aggressive in the wake of *Kelo*"). For a less extreme version of this kind of skepticism toward local governments, see William Woodyard & Glenn Boggs, *Public Outcry:* Kelo v. City of New London*—A Proposed Solution*, 39 ENVTL. L. 431, 448-50 (2009) (arguing that the Supreme Court should adopt an "intermediate scrutiny" standard for reviewing exercises of eminent domain in economic redevelopment cases, because using the current "rational basis standard trusts local governments too much," though using "strict scrutiny does not trust them enough"); *see also* Michael Paul Wilt, Note, *Intermediate Scrutiny for Economic Development Takings: Proposing a New Test Based on Justice Kennedy's* Kelo *Concurrence*, 31 T. JEFFERSON L. REV. 431, 434, 450-52 (2009) (also proposing an "intermediate scrutiny" standard of review for cases involving economic development takings).

[84] Somin, *The Limits of Backlash*, *supra* note 37, at 2153.

[85] *Id.* at 2165.

demnations."[86] On this view, state legislators took advantage of the "widespread political ignorance," which (Somin argues) is characteristic of the American people, to "pass off primarily cosmetic laws as meaningful reforms."[87]

A similar perspective can be found in the work of Timothy Sandefur.[88] Sandefur argues that, under the "current system of economic development," local governments and developers "conspire to deprive property owners of their land, and devote it instead to uses that are more profitable to both the government and the private developer."[89] In his view, a "major industry has grown up around eminent domain," in which private developers and local government agencies work together to "exploit[ ] government authority" in order to "create shopping centers and other private developments."[90] He argues that local government officials benefit from these redevelopment projects because the projects give them "an opportunity for reelection and advancement," as "mayors and city council members can point to a redevelopment project and declare that their vision and dedication has created a new, improved shopping area."[91]

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[86] *Id.*

[87] *Id.* at 2104. One of Somin's central arguments is that "referenda initiated by citizen groups were far more likely to lead to effective laws than those enacted by state legislatures," because of the "identity and purposes" of the people who drafted the referenda. *Id.* at 2144, 2168. That is, the people who drafted the referenda were "property rights activists," and thus more likely to provide "effective protection" for property, whereas reform laws enacted by legislatures had to be "filtered through the legislative process, where organized interest groups will inevitably have a significant say." *Id.* at 2167. However, it is not clear why, on Somin's account, "property rights activists" should not simply be viewed as another kind of "organized interest group," one which sometimes loses and sometimes prevails in the give-and-take of politics. *Id.*

[88] Sandefur is an adjunct scholar at the libertarian Cato Institute and an attorney at the Pacific Legal Foundation, where he "works to prevent the abuse of eminent domain." Cato Institute, Timothy Sandefur, *available at* http://www.cato.org/people/timothy-sandefur (last visited April 7, 2010). He also wrote an amicus curiae brief on behalf of "several victims of eminent domain" in *Kelo.* Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 CHAP. L. REV. 1, 1 (2006) [hereinafter Sandefur, *Mine and Thine Distinct*].

[89] Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 724 (2006) [hereinafter Sandefur, *The "Backlash" So Far*].

[90] *Id.* at 770.

[91] *Id.*; *see also* Sandefur, *Mine and Thine Distinct*, *supra* note 88, at 36 (claiming that the erosion of the public use limitation on takings in the second half of the 20th century "meant that pressure groups raced to local governments, seeking to have property condemned for their benefit," which meant that "developers [got] rich" while "politicians . . . look[ed] like visionaries" for having approved successful development projects).

Furthermore, Sandefur argues that state legislatures won't be much help with the problem of eminent domain "abuse," because they are "liable to being captured by interest groups," which "can be counted on to powerfully oppose any attempt" to limit the use of eminent domain which "has conferred inconceivably vast wealth upon them."[92] He concludes, like Somin, that state politicians will "holler out for reform as loudly as necessary to appease outraged constituents, and perhaps pass ineffectual measures designed to allay their outrage," but will not "accomplish any substantial reform."[93]

None of these property rights advocates attend closely to the ways in which courts have interpreted and applied the post-*Kelo* reform laws that they evaluate. For instance, the *50 State Report Card* has little to say about how courts have approached important questions of eminent domain in the states it examines. It only alludes vaguely and in general terms to "the unthinking deference that has so long marked courts' consideration of blight designations by municipalities."[94] Elsewhere, it observes that a provision in the Montana reform law that "purports to stop the use of eminent domain when its 'purpose' is increased tax revenue" would be "easy to get around," because "local governments can always claim a different reason for acquiring property, and courts will not question that assertion."[95]

Similarly, Somin and Sandefur pay little attention to how the courts in any given state have interpreted eminent domain laws. Somin, for instance, claims in passing that "[f]or decades, courts have interpreted broad definitions of blight in ways that allow the condem-

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[92] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 772.

[93] *Id.* For an even more emphatic statement of Sandefur's skepticism of government officials at all levels, see TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 116 (2006) [hereinafter SANDEFUR, CORNERSTONE OF LIBERTY] ("From the halls of Congress to city hall, government at every level infringes on private property rights with regulations that take away the value of land or seize homes and businesses outright to transfer them to people bureaucrats believe are better suited to use them—or even to the bureaucrats themselves.").

[94] *See* 50 STATE REPORT CARD, *supra* note 4, at 19. Obviously, the report could not consider judicial interpretations of state reform laws which have only recently been passed, as few if any cases under those laws had yet reached the courts at the time the report was issued. My point here is that the report has almost nothing to say about how courts have interpreted the pre-*Kelo* eminent domain laws which the report assumes are ineffectual and in need of reform.

[95] *Id.* at 30. In one of its only other mentions of the judicial branch, the report asserts that "eminent domain had repeatedly been used for private benefit" in Kansas, and that those "shady deals" were "justified by the state's courts, creating a persistent climate of abuse in the state." *Id.* at 20.

nation of almost any property."[96] But it isn't clear what, if any, support Somin really has for this assertion.[97] Sandefur is equally vague in his references to judicial interpretations of eminent domain laws. For example, he claims that excessive judicial deference to local findings of blight means that "property owners can rarely prevail in cases falling short of actual corruption," but offers no documentation for this sweeping assertion.[98] Elsewhere, he asserts that "judicial deference is a major factor contributing to the abuse of eminent domain," but has nothing to say about that allegedly excessive "deference."[99]

III. Taking a Closer Look at Judicial Approaches to Findings of Blight: A Comparison of Two States

As I have shown, advocates of property rights focus almost exclusively on the text of state eminent domain laws, while paying little at-

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[96] Somin, *The Limits of Backlash*, *supra* note 37, at 2121.

[97] To be precise, he documents the assertion by referring to two articles, neither of which appear to support his claim. *See id.* at 2121 n.86. The first of these is an extensive descriptive account of statutes defining blight and court cases interpreting those statutes. *See* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Prop. Prob. & Tr. J. 389 (2000). However, far from indicating that courts have allowed the "condemnation of almost any property," the article lists numerous cases in which courts have *refused* to uphold a finding of blight. In particular, it notes that while redevelopment authorities have "tried to base a finding of blight on the economic use of land," courts "tend not to find blight" if economic use is the sole factor (or even "one of only two factors") cited for the blight finding. *Id.* at 464. Luce's article then discusses a series of cases in which courts *rejected* such blight determinations, and observes that "[o]nly the Missouri courts have found blight when economic use was the sole factor." *Id.* at 466-68. The second article Somin relies on is a critique of tax increment financing programs and the use of blight as a justification for urban renewal which was written by a professor of history. *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 Fordham Urb. L.J. 305 (2004). But the Gordon article hardly constitutes a thorough examination of the ways in which courts have interpreted definitions of blight, as it looks at a total of eighteen decisions handed down by the Supreme Court, various federal appellate courts, and a handful of state courts between the years 1954 and 2002. *See id.* In pointing this out, my intent is not merely to be pedantic. Rather, it is to underscore the casual way in which Somin generalizes about how courts will interpret definitions of blight. My point is that Somin, like other property rights advocates, seems to use the word "courts" generically: he doesn't distinguish between state and federal courts, or between courts in different states which might adopt different approaches. He simply assumes that all courts will rubber-stamp any governmental exercise of eminent domain.

[98] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 725. He also laments that in "Missouri, as in many other states, courts routinely defer to legislative declarations of blight," without any discussion of the judicial interpretations of blight which may be characteristic of those "other states." *Id.* at 747.

[99] *Id.* at 735.

tention to the ways in which different courts have interpreted those laws. This Part will show that such focus leads to an inaccurate understanding of the law in this area. By considering eminent domain laws merely as legislative documents, without also looking at how the judiciary has interpreted those laws in the course of reviewing the use of eminent domain by local governments, the property rights movement has presented a misleading picture of the way eminent domain works. Because it takes for granted that all courts are highly deferential to any exercise of eminent domain, the property rights critique of post-*Kelo* reform laws is doomed to fall wide of the mark, inasmuch as it fails to take account of differences among state courts in their handling of issues arising from the exercise of eminent domain. If a state's courts really are as totally deferential to local governments as the property rights perspective assumes, then state reform laws will have to be written with extreme caution to remove any possible loophole that might be exploited by local governments and approved by pliant courts. Indeed, if courts really are as supine as is suggested by some property rights advocates, it may be the case that only a near-total ban on the use of eminent domain by local government will suffice to curb "eminent domain abuse." On the other hand, if a state's courts are in fact less deferential to local government than the property rights movement supposes, then post-*Kelo* reform laws in that state might not need to be nearly so rigorous.

This Part looks at the ways in which courts in two states—Pennsylvania and California—have dealt with findings of blight made by local governments preliminary to redevelopment. According to one report, Pennsylvania and California led the nation in *Kelo*-type transfers for economic redevelopment between 1998 and 2002.[100] Property rights critics generally agree that Pennsylvania's post-*Kelo* reform law was effective, while they dismiss California's as ineffective.[101] I will consider the reform laws enacted in the aftermath of *Kelo* by both states; examine the criticism of those laws put forth by members of the property rights movement; and then look closely at the manner in which the courts of those states approached findings of blight, both before and after the reform laws were passed.

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[100] Somin, *The Limits of Backlash*, *supra* note 37, at 2118 (claiming that Pennsylvania led the nation in such transfers by a wide margin, with 2,517, while California was a distant second, with 223).

[101] *E.g.*, *id.* at 2115-16.

Before proceeding, a word may be in order about why I am taking blight findings as the focus of my analysis. Blight is a major concern for property rights advocates, who fear that the concept is frequently abused to provide local governments with a pretext for condemning areas that are coveted by developers. The Coalition, for example, warns that "[o]pen-ended blight designations provide a way for local governments to circumvent the public use requirement."[102] If broad definitions of blight are allowed to remain in a statute, the Coalition warns, "local governments" will "affix the label [of blight] to almost any neighborhood that a private developer might desire, regardless of the condition of the targeted buildings."[103] Because it believes that blight is merely a "device that allows local governments to abuse the power of eminent domain," the Coalition argues that state legislatures need to "either eliminate the use of eminent domain for blight or redefine the term narrowly so" that local governments are unable to exploit it to benefit "politically connected developers."[104]

A similar attitude is expressed by Sandefur, who asserts that "many states" have defined blight "so vaguely that officials are free to declare virtually any property 'blighted.'"[105] The "amorphous" blight standards of a state like California, he asserts, "make it possible to declare property blighted whenever officials believe it is failing to produce revenue at their preferred level."[106] For Sandefur, vague definitions of blight are simply an invitation to rapacious local officials to "seize property and transfer it to private developers."[107]

Academic advocates of property rights are also disturbed by the possibilities for "abuse" inherent in blight statutes. Somin argues that sixteen of the post-*Kelo* reform laws will be largely ineffective because of their "broad exemptions for blight condemnations."[108] For instance, he observes that Iowa's statute allows areas that include a substantial number of "deteriorated structures" to be designated as blighted, and

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[102] 50 STATE REPORT CARD, *supra* note 4, at 3.

[103] *Id.* at 31.

[104] *Id.* at 4.

[105] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 722. **R**

[106] *Id.*

[107] *Id.* at 741; *see also* SANDEFUR, CORNERSTONE OF LIBERTY, *supra* note 93, at 120 ("[I]t is important that legal definitions of 'blight' be narrowly drawn, to prevent bureaucrats from condemning property simply because they don't like the way it's being used. Unfortunately, legal definitions of 'blight' are often so broadly drawn that just about any property can qualify.").

[108] Somin, *The Limits of Backlash*, *supra* note 37, at 2120.

argues that this "broad" exemption could vitiate the statute, as "it is possible that courts will interpret [it] to permit a very broad definition of blight by virtue of the use of the term 'deteriorated.'"[109] Likewise, Steven Eagle describes blight as a "scary pretext for the acquisition of land that is desired by others."[110] Eagle asserts that "[w]hile it is conventional to state that the presence of blight results in condemnation, it is more likely that the availability of condemnation results in 'blight.'"[111] On Eagle's view, blight is so disturbing because condemnation of blighted land "typically leads to the transfer of the land to a private developer for revitalization," and it "is difficult to escape the presumption that the selection of such a sensitive and lucrative task is in some measure political."[112] Because blight looms so large in the fears of the property rights movement, it is important to take a closer look at how courts actually deal with blight designations.

A. *Pennsylvania Passed an Eminent Domain Reform Law in 2006 That Was Largely Celebrated by Property Rights Advocates*

Pennsylvania passed its *Kelo* reform law in 2006.[113] That law, the Property Rights Protection Act, rejected the *Kelo* holding by prohibiting the use of eminent domain to "take private property in order to use it for private enterprise."[114] The law provided several exceptions to this prohibition, including an exception for property which met the new statutory definition of blight.[115] The revised definition, which was intended by the legislature to render it more difficult to certify areas as blighted, limited blight to characteristics which pertain to the physical condition of the property.[116] However, the law carved out a special ex-

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[109] *Id.* at 2130; *see also* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 3 (arguing that legislators can and will satisfy ignorant "ordinary" voters by "enacting toothless reforms that do not offend the powerful interest groups that benefit from condemnation," and exhorting judges to use their power to "curb blight condemnations," as "[b]road judicial deference to legislative definitions of blight" would "effectively gut" post-*Kelo* reform laws).

[110] Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 833 (2007).

[111] *Id.* at 840.

[112] *Id.* at 856.

[113] Property Rights Protection Act, ch. 2, 2006 Pa. Laws 35 (act providing for limitations on the use of eminent domain approved by the Governor on May 4, 2006).

[114] Property Rights Protection Act, 26 PA. CONS. STAT. § 204(a) (2006).

[115] *Id.* § 204(b)(5).

[116] *See id.* § 205; Anthony B. Seitz, Comment, *The Property Rights Protection Act: An Overview of Pennsylvania's Response to* Kelo v. City of New London, 18 WIDENER L.J. 205, 231-37 (2008).

ception for cities such as Pittsburgh and Philadelphia. Under this exception, which is slated to expire on December 31, 2012, those cities would be allowed to condemn property in areas that had already been designated as blighted prior to the new law.[117]

In general, Pennsylvania's reform law was warmly received by property rights advocates. Attorneys from the Institute for Justice described it as a "near total victory" and a "model for other states looking to prohibit eminent domain for the benefit of private businesses and developers."[118] The Coalition praised Pennsylvania for responding to the "widespread abuse of eminent domain throughout the state by taking a giant step toward providing its citizens with the property rights protection that they deserve."[119] In particular, the Coalition approved of the fact that the law "significantly tighten[ed] the definition of 'blight' in the state's eminent domain laws."[120] Because of the seven-year period during which cities like Pittsburgh and Philadelphia would be allowed to condemn property in areas that had previously been designated as blighted, the Coalition was unable to fully endorse the law.[121] However, it referred to that exception as an "unfortunate addition to an otherwise good bill," and assigned the law a B- overall.[122]

Somin was somewhat less sanguine about the Pennsylvania law because he feared that its geographical exemptions were more than an unfortunate addition. He approved of the way the law forbade economic development takings and "imposes a restrictive definition of 'blight,'" but feared that the "effective exclusion of Philadelphia and Pittsburgh," among other areas, would "significantly undermine" the law's effectiveness.[123] The difference between the Coalition's estimate of the law and Somin's stems from their differing attitudes toward state legislatures. The Coalition, as discussed above, places its faith in the

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[117] *See* 26 PA. CONS. STAT. §§ 203(b)(4)-(5) (providing an exception for cities "of the first or second class" and for municipalities located in "a home rule county of the second class A"); *see also* Somin, *The Limits of Backlash*, *supra* note 37, at 2141 n.194 (pointing out that under Pennsylvania law, cities of the first or second class turn out to be Pittsburgh and Philadelphia). R

[118] James Hoare, *Pennsylvania Senate Passes Eminent Domain Reform*, ENV'T & CLIMATE NEWS, Feb. 1, 2006, *available at* http://www.heartland.org/publications/environment%20climate/article/18436/Pennsylvania_Senate_Passes_Eminent_Domain_Reform.html (statements of Dana Berliner and Bert Gall).

[119] 50 STATE REPORT CARD, *supra* note 4, at 42.

[120] *Id.*

[121] *See id.*

[122] *Id.*

[123] Somin, *The Limits of Backlash*, *supra* note 37, at 2141.

capacity and willingness of state legislatures to rein in the rapacious tendencies of local government, and is thus willing to view an exception like the one in the Pennsylvania law as a mere temporary compromise, which will disappear in time. Somin, who takes a darker view of state legislators, emphasizes that the geographical exception will not expire until the end of 2012, and worries that by that time "it is possible that legislators will be able to extend the deadline, once the public furor over *Kelo* has subsided."[124]

Sandefur was more impressed by the Pennsylvania law, which he classed among the "Meaningful Reforms."[125] Sandefur called the bill a "vast improvement" over laws passed in other states, and focused on how its restrictive "definition of blight" would "eliminate[ ] the possibility of economic development condemnations in the style of *Kelo*," as it "allows government to declare property blighted only if it is actually a danger to the public health and safety."[126] He also lamented the exception for such cities as Philadelphia, but concluded that "as far as it does apply, [the law] is a well-crafted, carefully thought-out measure providing serious protection for property owners."[127]

B. *Pennsylvania's Courts, Deferential to Legislative Findings of Blight Prior to the Reform Law, Remained So Afterwards*

While advocates of property rights hailed Pennsylvania's reform law, they said little about the ways in which Pennsylvania courts have actually dealt with blight designations. Prior to the passage of the 2006 reform law, it was in fact the case that state courts in Pennsylvania

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[124] *Id.* at 2141-42; *see also* Andrew Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo* 31-32 (Illinois Law and Econ. Res. Papers Series, Research Paper No. LE07-037) (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113582 (arguing that politicians in "declining urban area[s]" have a strong interest in "minimizing the constraints on their ability to use their eminent domain powers," and that because such politicians have "ready access to legislators" at the state level, they will be able to oppose post-*Kelo* reforms of eminent domain by bringing about "changes to the legislation rather than through overt opposition," as in the case of Pennsylvania's exceptions for certain urban areas).

[125] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 757, 760.

[126] *Id.* at 760-61.

[127] *Id.* at 761; *but cf.* Patricia E. Salkin, *The* Kelo*-Effect in New York, New Jersey and Pennsylvania: Assessing the Impact of* Kelo *in the Tri-State Region* 23-25 (Albany Law Sch. Research Paper No. 09-06, 2009), *available at* http://ssrn.com/abstract=1028893 (observing that while "property rights activists" have hailed the law as one of the best eminent domain reforms, it is "not clear that the law significantly changes the pre-existing takings jurisprudence" because of its numerous exceptions).

"adopted a highly deferential standard toward the legislature on eminent domain questions."[128] However, passage of the law has not altered the judicial approach to eminent domain in the way that property rights advocates assume it must have done.

In Pennsylvania, the Urban Redevelopment Law ("URL") has permitted takings for the purpose of economic development since 1945.[129] The law includes a broad definition of blight, noting that the term could apply because of such conditions as "unsafe, unsanitary, inadequate or over-crowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or . . . faulty street or lot layout, or economically or socially undesirable land uses."[130] The law observes that such "conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance, replanning and redevelopment is difficult . . . without the effective public power of eminent domain."[131] To deal with such conditions, the law created Redevelopment Authorities, which "exist and operate for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such areas."[132]

In *Belovsky v. Redevelopment Authority of Philadelphia*, an early case upholding the constitutionality of the URL, the Pennsylvania Supreme Court held that the law's purpose of eliminating and rehabilitating blighted sections of municipalities, "certainly falls within *any* conception of 'public use,'" because "nothing can be more beneficial to the community as a whole than the clearance and reconstruction of those sub-standard areas which are characterized by the evils described in the Urban Redevelopment Law."[133] The court brushed aside the objection that the final result of the law would be to "take property from one or more individuals and give it to another or others," holding that a taking does not "lose it[s] public character merely because there may exist in the operation some feature of private gain, for if the public

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[128] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 776.

[129] *See* Urban Redevelopment Law, 35 PA. STAT. ANN. §§ 1701-47 (West 2003 & Supp. 2008) (repealed in part 2006).

[130] *Id.* § 1702(a).

[131] *Id.* § 1702(c).

[132] *Id.* § 1702(i).

[133] 54 A.2d 277, 282 (Pa. 1947).

good is enhanced it is immaterial that a private interest also may be benefited."[134]

Belovsky set a pattern of judicial deference to legislative determinations of blight in Pennsylvania. In a 1965 decision, the Pennsylvania Supreme Court put forth an extremely deferential standard which would be followed by Pennsylvania courts for decades.[135] The court held that "[t]he power of discretion over what areas are to be considered blighted is solely within the power of the [Redevelopment] Authority."[136] The *Crawford* court stated:

> [The] *only* function of the courts in this matter is to see that the Authority has not acted in bad faith; . . . has not acted arbitrarily; . . . has followed the statutory procedures in making its determination; and . . . to see that the actions of the Authority do not violate any of our constitutional safeguards.[137]

Other Pennsylvania decisions made it even easier for local governments to institute a finding of blight. For instance, a 1953 Pennsylvania Supreme Court case held that a finding of *any one* of the indicia of blight specified by the URL would be sufficient to certify an area as blighted.[138]

A 2003 case illustrates how Pennsylvania courts had come to apply these standards almost by rote. After the Pittsburgh Redevelopment Authority filed a declaration of taking on a piece of land, its owners filed suit, claiming among other things that their property was not blighted, but was being taken for private purposes, and thus illegitimately.[139] The trial court found that the Authority had acted in good faith and approved the taking, and the condemnees appealed to the Commonwealth Court.[140] That court simply quoted the key language from *Crawford*, and concluded that the Authority's exercise of its dis-

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[134] *Id.* at 282-83.

[135] *See* Crawford v. Redev. Auth. of Fayette County, 211 A.2d 866 (Pa. 1965); *see also* Simco Stores v. Redev. Auth. of Phila., 317 A.2d 610 (Pa. 1974); Arrington v. Urban Redev. Auth. (*In re* Condemnation), 822 A.2d 135 (Pa. Commw. Ct. 2003); *In re* Condemnation by Urban Dev. Auth., 544 A.2d 87 (Pa. Commw. Ct. 1988).

[136] *Crawford*, 211 A.2d at 868.

[137] *Id.* (emphasis added).

[138] Oliver v. City of Clairton, 98 A.2d 47, 51 (Pa. 1953) ("[F]or the Planning Commission to certify an area as blighted it is not necessary that each and every one of the conditions thus specified in the statute should exist . . . any one of them is sufficient to warrant certification and the adoption of a redevelopment project.").

[139] *In re* Condemnation by Urban Redev. Auth. of Pittsburgh, 822 A.2d 135, 137 (Pa. Commw. Ct. 2003).

[140] *Id.*

cretion should not be disturbed "in the absence of fraud or palpable bad faith."[141] Having established so deferential a standard, the court quickly brushed aside the condemnees' appeal, observing cursorily that

> [a] finding that a specific property is blighted is not necessary to support a condemnation proceeding if the property lies within a blighted area. Here, the evidence of record supports the conclusion that the designated area was blighted, and all agree that the property at issue lies within the perimeter of the blighted area. Therefore, a challenge to the taking on this issue has no merit.[142]

The court was equally curt in dealing with the *Kelo*-esque claim that the property was being taken in order to be used for private development. The court stated that because "the property will be used to eliminate blight and to create a tract of land that can be further development [sic] for residential use," it followed that "the property is being taken for a proper public purpose; therefore, it may be permitted to revert to private ownership when the public purpose is discharged."[143]

Prior to 2006, it is fair to say that Pennsylvania courts were, in fact, extremely deferential to governmental findings of blight. But how have they dealt with such findings since the post-*Kelo* reform law was passed? Have courts changed their behavior in response to the legislation? Several recent cases suggest that, regardless of the new statute, judicial approaches to designations of blight have not been altered significantly.

In 2008, the Pennsylvania Supreme Court considered *Mazur v. Trinity Area School District*, a case involving a local government finding of blight.[144] In its reasoning about the issue, the court leaned heavily on *Crawford*, in which the court had addressed "the role of the judiciary in a challenge to a local authority's determination of blight."[145] In *Mazur*, the court stated that *Crawford* "made clear" that "the courts have no right to substitute their discretion in place of the legislatively granted discretion of the [local redevelopment] Authority."[146] Writing two years after Pennsylvania's post-*Kelo* reform law had passed, the Pennsylvania Supreme Court reiterated *Crawford*'s holding that the question of whether a local government has justifiably exercised the

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[141] *Id.* at 138 (quoting *Oliver*, 98 A.2d at 51).
[142] *Id.*
[143] *Id.*
[144] 961 A.2d 96 (Pa. 2008).
[145] *Id.* at 103.
[146] *Id.*

power to declare a property blighted and then acquire it via eminent domain "rests with the redevelopment authority—not with the courts."[147] The *Mazur* court then quoted the talismanic language from *Crawford*—that the "power of discretion over what areas are to be considered blighted is solely within the power" of the local Authority, and that "judicial review is proper when it is alleged that the redevelopment authority acted in bad faith or arbitrarily, failed to follow a statutory requirement, or violated a constitutional provision"—and stated that *Crawford* should be taken as having "continuing vitality" even after the passage of the state's post-*Kelo* reform law.[148]

After indicating that *Crawford* continues to supply the standard by which determinations of blight should be judicially reviewed, the court in *Mazur* observed that the *Crawford* holding "derived in essence from the constitutional doctrine of separation of powers."[149] It noted that "[courts] are not equipped to decide desirability [of legislation]; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature."[150] Interestingly, while *Crawford* has been cited in thirty-four appellate cases since it was handed down in 1965, it received its most thorough examination in 2008's *Mazur* decision.[151] Given the *Mazur* court's extensive consideration of *Crawford*, its explicit validation of *Crawford*'s "continuing vitality," and its emphasis on the poor position courts are in to assess the "desirability" of such legislative acts as a finding of blight, it seems plausible to conclude that the court was signaling its intention to stay out of the business of determining when a particular property is blighted, absent where extreme circumstances exist.[152]

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[147] *Id.* at 103-04.

[148] *Id.* at 104, 104 n.7.

[149] *Id.* at 104.

[150] *Id.* (quoting Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949)).

[151] *See* Westlaw, Citing References, Crawford v. Redev. Auth. of Fayette County (listing thirty-four "positive cases" which have cited *Crawford*, of which only *Mazur* receives the maximum four stars according to which a case is "examined," rather than merely "discussed," "cited," or "mentioned").

[152] There was a claim of bad faith in *Mazur*. The appellants alleged bad faith on the government's part because the government, prior to designating their property as "blighted," had identified the area as a "prime location for regional shopping and entertainment." *Mazur*, 961 A.2d at 106. However, the court dismissed this claim summarily, asserting that "[i]t is not necessarily inconsistent for a tract of land to be characterized both as blighted and as a prime location for regional shopping and entertainment." *Id.* In several other recent cases, Pennsylvania courts have rejected claims of bad faith in blight certifications. *See, e.g.*, *In re* Condemnation of Land for the

Even before Mazur, the Pennsylvania Supreme Court had adopted a similar stance in 2007, the year after the state's post-*Kelo* reform law was passed.[153] That case involved a certification of blight issued in 1968, thirty-six years before Philadelphia's Redevelopment Authority finally got around to taking the property in question.[154] While both the blight designation and the governmental taking occurred before the passage of Pennsylvania's new law, the court's approach to the facts of the case is instructive. The property was slated to be transferred to a coalition of several Catholic groups for use as a "faith-based" school, giving rise to a claim that transfer of the property to a religious entity violated the Establishment Clause of the First Amendment.[155]

Though the court's analysis centers on the Establishment Clause claim, it first considered the threshold question of whether the Redevelopment Authority had acted in bad faith in certifying the area as blighted. For this analysis, the court relied squarely on the venerable *Crawford* standard, asserting that review of the Authority's "certification of blight and subsequent taking is limited to a determination that the [Authority] has not acted in bad faith, has followed the statutory procedures, and has not violated any constitutional safeguards."[156] Relying on the authority of *Crawford*-era precedents, the court stated that "[p]ublic officials are presumed to have acted lawfully and in good faith until facts showing the contrary are averred, or in a proper case are averred and proved."[157]

Interestingly, the court segued from those deferential Pennsylvania precedents to a quotation from Justice Kennedy's concurrence in *Kelo*. The court approvingly cited Kennedy's assertion that courts, when assessing allegations that a taking was motivated by "impermissible favoritism to private parties," should act under "the presumption that the government's actions were reasonable and intended to serve a

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S. E. Ctr. Bus. Dist. Redev. Area #1, 946 A.2d 1143, 1147-48 (Pa. Commw. Ct. 2008) (holding that a property owner had failed to show that a certification of blight was in bad faith); York City Redev. Auth. v. Ohio Blenders, Inc., 956 A.2d 1052, 1064-65 (Pa. Commw. Ct. 2008) (rejecting what the court termed the "pure speculation and accusation" presented by property owners in an attempt to establish that a Redevelopment Authority acted with a "tainted motive").

[153] *See In re* Redev. Auth. of Phila., 938 A.2d 341 (Pa. 2007).

[154] *See id.* at 343-44.

[155] *Id.* at 344-46.

[156] *Id.* at 345.

[157] *Id.*

public purpose."[158] The court thus implied that Kennedy would also favor *Crawford*-style deference, and that he too would reject the presumption, found in the work of property rights advocates, that local officials are mere functionaries who collude with developers for private benefit.

Having enlisted both pre-*Kelo* Pennsylvania precedents and Kennedy's *Kelo* concurrence to establish that courts ought to presume that public officials act in good faith, the court observed cursorily that "[a]dditionally, in the instant case, the statutory procedures were followed, i.e., there was a plan, a public hearing, and approval by City Council."[159] This can hardly be the kind of probing analysis of governmental takings decisions which property rights advocates would like to see courts undertake. Instead, the court cited authorities which assert, in the abstract, that it is important to presume that public officials act in good faith, then noted in passing that certain formalities were observed in this particular case. Such analysis seems to suggest that as long as a public agency covers its bases by observing the correct formal procedures, the judiciary should be extremely loathe to overturn its decisions.

A recent decision of a lower appellate court in Pennsylvania indicates exactly this kind of hesitance to overturn redevelopment takings. In *Lawrence County*, the court found that an area had been improperly certified as blighted.[160] However, a close reading of the decision indicates that the court felt that it had no choice, given the record before it, but to find that the blight certification was improper.[161] The result of the case is one that property rights advocates can embrace. But the court's language and reasoning should give them pause, as the decision implies that so long as agencies observe certain legal formalities, Pennsylvania courts will not be inclined to look further.

In *Lawrence County*, the Commonwealth Court considered a lower court's finding that a group of condemnees had failed to establish bad faith with regard to a Redevelopment Authority's determination that their properties were maintained in economically undesirable uses.[162]

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[158] *Id.* (quoting Kelo v. City of New London, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring)).

[159] *In re* Redev. Auth. of Phila., 938 A.2d at 345.

[160] *In re* Condemnation by the Redev. Auth. of Lawrence County, 962 A.2d 1257, 1262 (Pa. Commw. Ct. 2008).

[161] *See id.* at 1261-62.

[162] *Id.* at 1260.

In their appeal, the condemnees argued that their properties were neither blighted nor located in a blighted redevelopment area, and that the lower court had "misinterpreted and misapplied" the state's eminent domain law in order to sustain the condemnation even though the Authority had "acted pretextually to condemn on behalf of . . . a private entity . . . for private economic benefit."[163]

The appellate court began its analysis by trotting out the *Crawford* standard, observing that "[r]eview of a certification of blight and subsequent taking is limited to a determination that the [redevelopment authority] has not acted in bad faith, not acted arbitrarily, has followed the statutory procedures, and has not violated any constitutional safeguards."[164] However, the court went beyond *Crawford* to note that Pennsylvania's post-*Kelo* reform law had imposed "stricter public use requirements than that imposed under the federal baseline" established by *Kelo*, and concluded that "proper construction" of the state's reform law "does not authorize the condemnation of property (lacking the ordinarily understood indicia of blight) . . . for purely economic development."[165]

The court considered a number of statements made by officials of the Redevelopment Authority, and concluded that the Authority had made it "perfectly clear that it considers the properties properly qualified for certification as a Redevelopment Area because they are maintained in economically undesirable uses insofar as they are not used for the permitted industrial purposes that represent the highest and best use."[166] The court pointed to the testimony summarized in the lower court's opinion, which, the court said, clearly indicated that the Redevelopment Authority "strongly perceived condemnees' properties as especially well-suited to serve the need for a . . . site that, when put to use by a large industrial business, would provide jobs and economic opportunity in the community."[167] Thus, the court concluded that the condemnation had only been authorized because "the residential use of condemnees' properties was considered an impediment to industrial development that would be more economically advantageous to the entire community."[168]

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[163] *Id.*

[164] *Id.*

[165] *Id.* at 1263.

[166] *Id.* at 1262.

[167] *Id.*

[168] *Id.*

Looking solely at the result, it would seem the exact kind of decision property rights advocates were hoping courts would arrive at following passage of the state's post-*Kelo* reform law. But a closer examination of the court's language suggests an outcome which might be more troubling to those who had hoped that Pennsylvania's new law would drastically alter condemnation practices in the state. The court proceeded to look very closely at the administrative record, highlighting statements made by local government officials which unambiguously demonstrated that the redevelopment was purely for economic reasons.[169]

For instance, the court observed that the Executive Director of the local Economic Development Corporation had testified that she considered the use of the properties to be economically undesirable because the "area was not being utilized to its full potential from an industrial standpoint."[170] Similarly, the court made a point of noting that the director of the Redevelopment Authority had asserted at a public hearing that "no physical condition of *any* property in the Redevelopment Area rendered the Area blighted, but that insofar as the Area is zoned for industrial uses, the present uses constitute an underutilization of property that could be put to more lucrative use."[171] The court then quoted the following exchange from the transcript of that hearing:

> Q: If you had not identified a chip manufacturing facility that you would like to place on this particular property, would you have any complaints about the existing use of the Whittaker and the Hamilton properties?
> A: As a Redevelopment Authority?
> Q: As a Redevelopment Authority.
> A: No.
> Q: So the driving force behind the whole thing, is somebody's desire to develop the property?
> A: Economic development activities.[172]

Having shown that local officials repeatedly and publicly asserted that the redevelopment was *only* for economic reasons, and that "no physical condition of *any* property" in the area contributed to the

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[169] *See id.* at 1264-65.

[170] *Id.* at 1264 (quoting Linda Nitch, who was the Executive Director of the Lawrence County Economic Development Corporation and a member of the County Planning Commission at the time the Commission certified the Redevelopment Area).

[171] *Id.* (quoting James Gagliano, Jr., who was the County's Planning Director and the Director of the Redevelopment Authority).

[172] *Id.*

blight designation, the court's hand was effectively forced.[173] It concluded that the area was improperly certified as blighted, while emphasizing that the "only apparent criteria used to determine the economic undesirability of the uses was the comparison with the intended industrial uses and the conclusion based on that comparison that the properties in the Area could be put to a more lucrative use."[174] The court went on to state that "[*t*]*he record leaves no room for any conclusion* that the properties in the Area specifically inflict any affirmative harm on the community due to the physical condition or the use of those properties."[175]

Given that property rights advocates presume that "creative local governments" will always be ready and able to contrive pretextual reasons for taking property, this opinion must be an occasion for concern.[176] The opinion suggests that when Pennsylvania courts are faced with blatant declarations that a condemnation is "only" for economic reasons, they will have no choice but to find a violation of the state's post-*Kelo* reform law. However, as property rights advocates would likely point out, any clever lawyer should be able to read between the lines of the court's opinion and infer that local officials could avoid such a result if they only refrain from giving courts the kind of "smoking gun" contained in the record here. Through its extensive quotation of official statements which made clear that economic use was the sole reason for the condemnation, and through its emphatic assertion that it did not have room for any other conclusion, the court can be seen as tacitly signaling that it would have reached a different conclusion if local officials had only uttered the right words.

These post-*Kelo* cases suggest that property rights advocates were wrong to suppose that, thanks to the passage of "model" legislation, they had achieved a "near total victory" over "eminent domain abuse."[177] Before *Kelo*, Pennsylvania courts were indeed highly deferential to governmental determinations of blight, following *Crawford* and its rule that courts should confine their scrutiny to reviewing whether agencies act with bad faith, in violation of the Constitution, or the like. But even after *Kelo* and the passage of a meaningful reform law, Pennsylvania courts have continued to maintain their fidelity to the deferen-

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[173] *Id.*

[174] *Id.* at 1265.

[175] *Id.* (emphasis added).

[176] Somin, *The Limits of Backlash*, *supra* note 37; *see also* Epstein, *supra* note 83.

[177] Hoare, *supra* note 118, *see also* 50 STATE REPORT CARD, *supra* note 4.

tial *Crawford* standard. And when they have overturned a finding of blight, it is in terms which should give property rights advocates, dubious as they are of the motivations of local government officials, little hope for the future.

C. *California Passed Five Eminent Domain Reform Laws in 2006, Which Were Uniformly Reviled by Property Rights Advocates*

California passed a group of five *Kelo*-reform laws in 2006.[178] The first of them required that redevelopment plans contain a description of the agency's program to acquire land by eminent domain, and set time limits on certain aspects of such plans.[179] The second revised the conditions under which an area may be characterized as "blighted,"[180] while the third required the government to pay the plaintiff's litigation expenses if a court finds that the government had failed to offer the plaintiff a reasonable amount of compensation for his land.[181] The fourth bill specified that property taken for a "public use" could only be used for the particular purpose stated in the "resolution of necessity" authorizing the taking, unless the governing body authorized a different use of the property by a two-thirds vote.[182] The final bill required that a disclosure statement announcing which properties are within the territory covered by a redevelopment plan must be publicly filed within sixty days after the adoption of such a plan.[183]

Property rights advocates were contemptuous of these reform laws. In 2007, the Coalition dismissed the five eminent domain bills which were signed into law in California the previous year as "a waste of paper."[184] It lamented that "[n]o meaningful reform was seriously considered" by California in the immediate aftermath of *Kelo*, and

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[178] *See* S.B. 53, 2005-2006 Leg., Reg. Sess. (Cal. 2006); S.B. 1206, 2005-2006 Leg., Reg. Sess. (Cal. 2006); S.B. 1210, 2005-2006 Leg., Reg. Sess. (Cal. 2006); S.B. 1650, 2005-2006 Leg., Reg. Sess. (Cal. 2006); S.B. 1809, 2005-2006 Leg., Reg. Sess. (Cal. 2006).

[179] Cal. S.B. 53 (setting a time limit of twelve years from the adoption of the redevelopment plan for commencement of eminent domain proceedings, a time limit of twenty years on the financing of such projects, and a time limit of thirty years on the "effectiveness" of the project, while also providing for measures to extend those limits).

[180] Cal. S.B. 1206.

[181] Cal. S.B. 1210.

[182] Cal. S.B. 1650. It also required the government to use the taken property within ten years or to sell it, unless the governing body decides by a two-thirds vote to retain the property, and gives the original owner a right of first refusal to purchase the property back.

[183] Cal. S.B. 1809.

[184] 50 STATE REPORT CARD, *supra* note 4, at 9.

warned that the state's "abusive redevelopment statutes continue to leave all property owners at risk."[185] In 2008, the Coalition released another report devoted entirely to California's "abuses of eminent domain," claiming that California "is one of the states most in need of real eminent domain reform."[186]

A particular concern of the Coalition is that California's redevelopment laws employ an overbroad definition of blight. The Coalition asserted that "local governments across California, assisted by deferential courts, [have] expanded the definition of blight."[187] It claimed that the blight factors set forth by California's Community Redevelopment Law are phrased in "completely subjective and vague terms," rendering them "essentially meaningless."[188] On the Coalition's view, "virtually any well-maintained home or business or other piece of property . . . could be declared blighted using these worthless standards."[189]

Somin offered a similarly dismissive assessment of California's post-*Kelo* reform laws. He remarked that none of the five bills passed in 2006 "even comes close to forbidding condemnations for economic development," and was especially critical of Senate Bill 1206, which on his view established a definition of blight which is still "broad enough to permit the condemnation of almost any property that local governments might want to take for economic development purposes."[190] He asserted that because the text of the law leaves such key terms as "viable use" undefined, "local officials will have broad discretion to designate areas as they see fit," and complained that the statutory language "puts no meaningful restrictions on blight designations."[191] On Somin's view, the failure of the California legislature to do anything more than enact a few "almost completely ineffective" reforms was largely due to the desire of legislators to "look good while not upsetting anyone."[192]

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[185] *Id.* The "report card" assigned California a D-, making it one of only four states to receive that grade (the eight states which didn't pass *any* reform law at all received an F). *Id.* at 56.

[186] CALIFORNIA SCHEMING, *supra* note 73, at 1.

[187] *Id.* at 2.

[188] *Id.* at 3.

[189] *Id.*

[190] Somin, *The Limits of Backlash*, *supra* note 37, at 2131.

[191] *Id.* at 2132.

[192] *Id.* at 2166 (quoting Steven Miller, who was the Vice President for Policy of the Nev. Policy Research Inst.).

Sandefur agreed that California is "one of the leading abusers of eminent domain in America."[193] He argued that the five bills passed in 2006 "do virtually nothing to secure the property rights of Californians."[194] According to Sandefur, California's "legal definition of 'blight' is so vague that virtually any property can be declared 'blighted' and seized through eminent domain," while the post-*Kelo* reform laws "do[ ] little to fix this problem," as the new standards they enact are so "vague" that "blight" will mean "whatever the government says it means."[195]

D. *California's Courts Tended to Scrutinize Legislative Findings of Blight Closely Prior to the Reform Laws, and Did the Same After They Were Passed*

Property rights advocates focused their attention on the text of the five reform bills passed in California, and had little to say about the way the California judiciary approaches these issues. The Coalition didn't even allude to California's courts in the excoriation of the state's reform laws set forth in its report card.[196] In its later report on California, however, the Coalition briefly discussed three California cases dealing with blight and redevelopment. In all of these cases, as the Coalition acknowledged, the courts took a dim view of transfers of "blighted" property to a different private owner.[197] In the first case, a California appellate court that approved a blight designation emphasized that it was the combination of "practically all the blight conditions" mentioned in the statute which permitted the use of the redevelopment law, and stated that "agencies and courts both should be chary of the use of the act unless . . . there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance."[198] The court insisted that the redevelopment power "never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan."[199] In

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[193] Sandefur, *The "Backlash" So Far*, *supra* note 89, at 751.

[194] Timothy Sandefur, *Gov. Schwarzenegger Signs Mealy-Mouthed Property Rights Protection (Part 1 of 5)*, Pacific Legal Foundation on Eminent Domain, Sept. 29. 2006, http://eminentdomain.typepad.com/my_weblog/2006/09/gov_schwarzeneg.html.

[195] Timothy Sandefur, *Gov. Schwarzenegger Signs Mealy-Mouthed Property Rights Protection (Part 2 of 5)*, Pacific Legal Foundation on Eminent Domain, Sept. 29. 2006, http://eminentdomain.typepad.com/my_weblog/2006/09/gov_schwarzeneg_1.html.

[196] *See* 50 STATE REPORT CARD, *supra* note 4, at 9.

[197] CALIFORNIA SCHEMING, *supra* note 73, at 2.

[198] Redev. Agency of S.F. v. Hayes, 266 P.2d 105, 127 (Ct. App. 1954).

[199] *Id.*

the second case noted by the Coalition, the California Supreme Court invalidated a blight taking while asserting that "[o]ne man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well designed."[200] And in the third case, a California appellate court also invalidated a blight taking with the admonishment that the state's redevelopment law is "not simply a vehicle for cash-strapped municipalities to finance community improvements."[201]

Despite the results in these cases, and what the Coalition described as a "number of [other] appellate decisions [which are just] as good," the Coalition opined that "deferential courts" had helped local governments in California to "expand[ ] the definition of blight," making the law more "open to manipulation by those who seek to abuse the power of eminent domain for private gain."[202] But just how deferential *have* California courts been to findings of blight?

In California, courts employ a standard under which they will only overturn findings of blight if there is a lack of "substantial evidence" supporting the finding.[203] However, as one commentator has observed, even though "all California courts claim to apply the substantial evidence test in blight challenges," courts in fact employ a "range of approaches."[204] Some courts take a more permissive approach, under which a showing of an "abuse of discretion" is required before a blight finding will be overturned.[205] Other courts go the other way, and effectively substitute their own "independent judgment" for that of the agency.[206]

Prior to *Kelo*, California courts considered blight findings in connection with redevelopment on a number of occasions. Unlike in Pennsylvania, there is no clear and one-sided pattern to the outcomes

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[200] Sweetwater Valley Civic Ass'n v. City of Nat'l City, 555 P.2d 1099, 1103 (Cal. 1976) (quoting *Hayes*, 266 P.2d at 116).

[201] Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265, 279 (Ct. App. 2000). For a discussion of this case, see *infra* text accompanying notes 219-34.

[202] CALIFORNIA SCHEMING, *supra* note 73, at 2.

[203] *See* Fosselman's, Inc. v. City of Alhambra, 224 Cal. Rptr. 361, 363 (Ct. App. 1986); *see also* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1010 (2001).

[204] Lefcoe, *supra* note 203, at 1010.

[205] *Id.* at 1011.

[206] *Id.* (asserting that some California courts, responding to "[d]ecades of overreaching by redevelopment agencies," will scrutinize blight claims with "deep skepticism").

of these cases. Sometimes, California courts have overturned blight certifications; sometimes, the courts have upheld them. What is common to the California opinions regarding findings of blight, however, is that the courts pay close attention to the data adduced to support the finding. Whereas Pennsylvania courts have generally contented themselves with a cursory approach in such cases, the California decisions embody a much more painstaking analysis of the particular facts introduced into evidence by local officials to justify their claims of blight.

A typical pre-*Kelo* case in which a California court upheld a blight finding is *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*.[207] The court began by stating that an area, to be found blighted under California law, must satisfy four criteria: it must be "predominantly urbanized"; must be characterized by one or more statutorily defined conditions of physical blight; must also be characterized by one or more statutorily defined conditions of economic blight; and must be affected by a significant cumulative effect of physical and economic blight.[208] The court then observed that the record "need only establish one condition each of physical and economic blight."[209]

The court noted that its role in reviewing a decision validating a redevelopment plan "is a limited one," and observed that it "is not the appellate court's place to . . . exercise its own independent judgment."[210] In support of this stance, the court cited California precedent approving of an appellate court's "refusal to reweigh the evidence" in such cases.[211] However, despite this assertion that a court's proper role is a "limited" one, the court in *San Franciscans* did not rest with a conclusory announcement that substantial evidence of blight had been found. Instead, it engaged in a careful analysis of the record to demonstrate that there really was "sufficient substantial evi-

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[207] 125 Cal. Rptr. 2d 745 (Ct. App. 2002).

[208] *Id.* at 776. In particular, the "cumulative effect of physical and economic blight" must be "so prevalent and so substantial" that it causes a "reduction" or "lack" of "proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be reasonably expected to be reversed or alleviated by private enterprise or government action, or both, without redevelopment." *Id.* at 776.

[209] *Id.* at 777.

[210] *Id.*

[211] *Id.* (quoting *In re* Bunker Hill Urban Renewal Project 1B of Cmty. Redev. Agency of L.A., 389 P.2d 538, 550 (Cal. 1964)).

dence of both physical and economic blight to support" the government's blight finding.[212] The court described and assessed the agency's survey report, which "carefully analyzed each of the 12 individual buildings in the Project area, exhaustively documenting its particular physical and structural deficiencies and specific adverse conditions."[213] It also discussed other "exhaustive analyses" contained in the record which supported a finding of physical blight, including the fact that "nine of the 12 buildings under consideration—75 percent—are in a seriously deteriorated condition, with significant physical deficiencies that render them unsafe and unhealthy for occupancy by workers and the public."[214] The court observed that the record was "replete with evidence of *economic* blight," noting that most of the project area "consists of dilapidated, derelict, vacant and/or underutilized buildings . . . [which] are economically obsolete because their physical plan is inappropriate for modern commercial or retail use. Even if commercially viable, they would in any event require large rehabilitation expenditures to make them usable."[215]

Although the case featured an appellant brief which, according to the court, did not "cite *any* evidence in the record to contradict the finding of blight," but merely "in conclusory fashion" offered "lay opinions that none of the evidence of blight in the record satisfies the [requirements of California law]," the court did not simply dismiss the appellants' arguments out of hand.[216] Instead, the court reviewed aspects of the administrative record which supported the finding of blight and which had been ignored by the appellants and the *amici curiae* that supported them.[217] The court also carefully weighed the precedents cited by the appellants, and explained in detail why they were "clearly distinguishable" from the current case.[218]

This kind of approach—in which the court declines to issue cursory judgments, and insists on carefully examining the evidence in the record before reaching its conclusion—is also characteristic of California cases in which findings of blight have been overturned. A typical case of this sort is *Beach-Courchesne v. City of Diamond Bar*.[219] The case

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[212] *Id.* at 777-80.
[213] *Id.* at 777.
[214] *Id.* at 778.
[215] *Id.* at 779-80.
[216] *Id.* at 780.
[217] *See id.* at 783.
[218] *Id.* at 781-82.
[219] 95 Cal. Rptr. 2d 265, 279 (Ct. App. 2000).

involved the city of Diamond Bar, an "affluent suburban community" in Los Angeles County which had "a median income of about $66,000 per year, average home prices exceeding $300,000, and a relatively low crime rate."[220] However, commercial uses occupied "a mere 2 percent of the city's land area,"[221] and city officials were concerned that most of the city's residents shopped for retail merchandise outside of the city.[222] In the midst of a recession that was severely affecting the city's commercial and industrial areas, Diamond Bar officials decided that for the city to receive enough money in property taxes to pay for the cost of municipal services, it would be forced either to restrict housing to extremely expensive units or to bring about better uses of its corporate and industrial areas.[223] The city council opted for the latter approach, and in 1997 approved a redevelopment project pursuant to a finding that the project area suffered from physical and economic blight.[224]

The court reviewed the city's blight finding, using the "substantial evidence" test, to determine whether the project area really was "predominantly urbanized and blighted."[225] It observed that California precedents assert that redevelopment "never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan,"[226] and that the "concededly desirable goal of improving an area" is nonetheless "insufficient by itself to justify use of the extraordinary powers of community development."[227] It then carefully reviewed the record, determining that while substantial evidence showed that the area was in fact "predominantly urbanized," there was no support for a "finding of physical blight under any theory."[228] The court spent almost ten pages reviewing every statutory definition of blight that might conceivably apply to the area, and found that claims of blight under each were unsupported or infirm.[229] For instance, the court considered the city's finding that 27

[220] *Id.* at 268.

[221] *Id.*

[222] *See* Lefcoe, *supra* note 203, at 1012. **R**

[223] *See id.* at 1013.

[224] *Beach-Courchesne*, 95 Cal. Rptr. 2d at 269.

[225] *Id.* at 269-70.

[226] *Id.* at 270 (quoting Sweetwater Valley Civic Ass'n. v. City of Nat'l City, 555 P.2d 1099, 1103 (Cal. 1976)).

[227] *Id.* (quoting Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 202 (Ct. App. 1977)).

[228] *Id.* at 272.

[229] *See id.* at 272-79.

percent of the buildings in the project area exhibited "conditions of defective design."[230] The court determined that the city, in its ordinance which declared the finding of blight, had failed to identify specific buildings which suffered from these conditions; that it did not specify the basis of its findings; and that it neglected to show "how such conditions have hindered the economically viable use of these unidentified properties."[231] The court complained that it had been given "only generic reasons."[232] It then looked to the redevelopment agency's report which the city council had relied upon, and offered the following critique of the field survey used in that report:

> The field survey data consisted of a list of the parcels in the project area, in a grid format, with boxes to be checked off for categories such as chipped or peeling paint, defective design, incompatible use, substandard design and inadequate parking. The field survey was performed from the sidewalk or public rights-of-way, with the surveyor's conclusions reduced to a series of boxes checked off on a grid. Thus, at the end of the day, the raw data in the administrative record consists of a series of checkmarks reflecting the field surveyor's ultimate conclusions. The field surveyor's bald conclusions do not amount to tangible proof which can be scrutinized in a meaningful way.[233]

Not satisfied with this level of scrutiny, the court went on to contrast the city's findings with contradictory statements made in the city's 1995 general plan, and commented on other aspects of this alleged criterion of blight which, the court found, lacked adequate specification.[234]

A reading of California appellate cases prior to *Kelo* in which findings of blight were reviewed shows no clear pattern in terms of outcome. Some courts have overturned blight findings, while other courts have upheld them.[235] The only pattern is a methodological one.

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[230] *Id.* at 275 (discussing CAL. HEALTH & SAFETY CODE § 33031(A)(2) (West 2008), which covers conditions which "prevent or substantially hinder the viable use or capacity of buildings or lots," including "buildings of substandard, defective, or obsolete design or construction given the present general plan, zoning, or other development standards.").

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *See id.* at 275-76. For further discussion of the case, see Lefcoe, *supra* note 203, at 1013-17.

[235] For other cases in which California courts have overturned findings of blight, *see, e.g.*, Graber v. City of Upland, 121 Cal. Rptr. 2d 649 (Ct. App. 2002) (affirming a trial court's overturning of a blight ordinance because of a lack of substantial evidence that a project area was "predominantly urbanized" and physically blighted), *and* Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency, 98 Cal. Rptr. 2d 334 (Ct. App. 2000) (holding that no substantial evidence existed in the record to justify a finding

Whatever result they arrive at, California courts tend to look closely and thoroughly at the evidence supporting a finding of blight. A court which is inclined to defer to the evidence of blight produced by a local government can find precedents to support the view that the judicial branch should only play a limited role, and that courts should not reweigh the evidence.[236] On the other hand, a court which concludes that the evidence of blight in the record is wanting can find precedents to justify a more active role for the judiciary.[237]

In the years since *Kelo*, California courts have assessed blight findings several times. While the courts haven't yet had occasion to consider the state's post-*Kelo* reform laws, their methodological approach—i.e., consistently taking a hard look at blight findings—is the same after *Kelo* as it was before. In a 2007 case, for instance, a court considered a finding of blight based on the "existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership."[238] The court, after looking closely at the report on which the blight finding was based, undertook an analysis of what it might mean for lots to be of "irregular form and shape" or of "inadequate size."[239] After inquiring into the meaning of the word "irregular" and the legislative intent behind that portion of the statute, the court concluded that the "determination that the rectangular lots in the project area were of irregular form and shape [was] based on an erroneously broad interpretation of

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that a project area was characterized by any of the statutory conditions that cause blight). For other cases in which California courts have upheld findings of blight, *see, e.g.*, Evans v. City of San Jose, 27 Cal. Rptr. 3d 675 (Ct. App. 2005) (evaluating a report which was used to support a finding of blight, and finding that it supplied substantial evidence for the finding), *and* Morgan v. Cmty. Redev. Agency, 284 Cal. Rptr. 745 (Ct. App. 1991) (finding substantial evidence of blight in an area in which, among other things, there was "a need for housing due to overcrowding, but 86 percent of the residential parcels [were] below the threshold size for development," the "reported crime rate for the project area [was] double the citywide rate," and at least "36 percent of the single-family residences show[ed] deferred maintenance [while] an additional 27 percent require[d] moderate to heavy rehabilitation.").

[236] *See supra* text accompanying notes 210-11.

[237] *See, e.g.*, *Friends of Mammoth*, 98 Cal. Rptr. 2d at 350 (noting that California law "has established factors to be considered in determining whether an area is blighted, and it is the court's role to ensure those factors are taken into account," and observing that "the courts are required to be more than rubber stamps for local governments." (quoting Emmington v. Solano County Redev. Agency, 237 Cal. Rptr. 636, 640 (Ct. App. 1987)).

[238] Neilson v. City of Cal. City, 53 Cal. Rptr. 3d 143, 145 (Ct. App. 2007).

[239] *Id.* at 148, 151-53.

the statute."[240] On that basis, the court overturned the finding of blight.[241]

In another recent case, a court upheld a finding of blight based on close scrutiny of the particular facts found in the record.[242] The court considered a record that indicated "50 percent of the buildings in the project area are deemed to be in need of at least moderate rehabilitation, and 13 percent require either extensive rehabilitation or are dilapidated."[243] As the court observed, the report on which the finding of physical blight was based included detailed "maps showing the condition of each building and parcel in the project area."[244] The court noted that the plaintiffs did not even "dispute the report's characterization of any particular building in the project area," making the court's ruling on that issue a straightforward one.[245] The court also looked closely at the issue of economic blight, and quoted numerous specific facts from the record which supported the finding.[246]

While advocates of property rights were dismissive of California's post-*Kelo* reform laws, and especially dismissive of the state's blight statute, it is unclear that the reform laws were necessary.[247] Far from being blindly deferential to local governments, California courts have on numerous occasions overturned findings of blight, thereby blocking redevelopment projects. Unlike Pennsylvania courts, which both before and after *Kelo* straightforwardly applied a line of precedents calling for extreme deference to local government findings of blight, California's courts follow no fixed line of precedent conditioning the outcome of such cases. Instead, the state's courts adhere to a tradition of paying close attention to the specific claims made in a finding of blight to determine whether they constitute "substantial evidence" for the finding.

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[240] *Id.* at 153.

[241] *Id.*

[242] *See* Blue v. City of L.A., 41 Cal. Rptr. 3d 10 (Ct. App. 2006).

[243] *Id.* at 26.

[244] *Id.*

[245] *Id.* at 27.

[246] *See id.* at 28 (citing, among other factors, the facts that "storefront and stand-alone retail buildings [in the project area] sold for 45 percent less and mixed-use buildings sold for 59 percent less than competing small retail buildings in Los Angeles" and that the area's "overall office vacancy rate is 27 percent, higher than any of the other competing areas").

[247] *See supra* Part III.C.

Conclusion

The U.S. Supreme Court's decision in *Kelo v. City of New London* gave rise to a torrent of outrage over the Court's seeming disregard for property rights. The case led to the passage of numerous state laws intended to regulate more tightly the exercise of eminent domain by local governments. The case also energized the property rights movement, which worked to get new and "effective" state laws passed. Property rights advocates criticized states which either failed to reform their laws, or which passed laws that were deemed "ineffective."

In this Note, I have argued that the property rights critique of post-*Kelo* reform laws is flawed, inasmuch as it focuses almost exclusively on the text of reform legislation and fails to take into account the ways in which various courts have interpreted their states' eminent domain laws. The property rights movement has paid scant attention to judicial approaches to eminent domain questions, because it presumes that courts are invariably deferential to local governments when considering such questions. By looking at how courts in two states have actually dealt with one crucial aspect of eminent domain—the findings of blight which must be made before redevelopment projects can go forward—I have suggested that blanket generalizations about how courts always behave in such situations are mistaken. But without paying closer attention to the particular ways courts actually address these issues, it is impossible to accurately gauge either the necessity or the effectiveness of post-*Kelo* reform laws.