

## Blue Wave, Red Wave

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A blue wave swept the country on Tuesday with the Democrats achieving a majority in the House, gains in the Senate, and new strength in many of the states. The chant heard from coast-to-coast was one for change.

At the same time, a red wave, a property rights and eminent domain tsunami, swept across 10 states. Generated by the aftershocks of the *Kelo v. New London* decision by the U.S. Supreme Court in 2005 upholding the taking of private property for private economic development, this red wave of legislation and initiatives wiped out a substantial portion of the power of eminent domain. Remarkably, the most extreme initiative in terms of its reach and potential impact, California's Proposition 90, failed.

We need to know about this red wave and assess its impact over the coming months and years because like earthquake aftershocks, we are going to see copycat legislation and initiatives in other states. Some of these red wave changes in the law will prove workable and generally beneficial, while others will ultimately be repealed or amended beyond recognition when the proponents and supposed beneficiaries come to find that the legislation has counter-intuitive and unintended consequences.

Here is a synopsis of what happened recently and on Tuesday:

Arizona's Proposition 207, a citizen initiative prohibiting the use of eminent domain for private economic development and enhancing compensation including that for regulatory takings, passed 65% to 35%.

California's Proposition 90, a citizen initiative restricting eminent domain and providing compensation for public regulation reducing the value of real estate, failed 52% to 47%.

Florida's HJR 1569, a constitutional amendment passed by the legislature prohibiting transfers of private property taken by eminent domain to a person or private entity except when the legislature allows exceptions by three-fifths vote, passed 69% to 31%.

Georgia's HR 1306, a constitutional amendment passed by the legislature requiring approval of any eminent domain by the elected governing authority of the county or city and limiting the use of eminent domain to the elimination of harm, passed 82% to 18%.

Idaho's Proposition 2, a citizen initiative prohibiting eminent domain for private economic development and providing compensation for regulatory takings, failed 25% to 75%.

Louisiana's Act 851, a constitutional amendment passed by the legislature prohibiting the use of eminent domain for economic development, enhancement of tax revenue, or a benefit only incidental to the public, was passed by the general electorate on September 30, 2006.

Michigan's Proposal 06-4, a constitutional amendment passed by the legislature prohibiting the use of eminent domain for the purpose of economic development or enhancement of tax revenues, passed 80% to 20%.

Nevada's State Question No. 2, a constitutional amendment proposed by citizen initiative prohibiting the use of eminent domain for private economic development and enhancing compensation was passed 63% to 37% and if it passes again in the 2008 general election, it becomes law.

New Hampshire's Question No. 1, a constitutional amendment passed by the legislature prohibiting the use of eminent domain for private development or other private use, passed 86% to 14%.

North Dakota's Measure No. 2, a constitutional amendment proposed by citizen initiative to prohibit the use of eminent domain for economic development, including an increase in tax base, tax revenues, employment, or general economic health, passed 68% to 32%.

Oregon's Measure 39, a citizen initiative to amend the state statutes to prohibit the use of eminent domain for private economic development, passed 67% to 33%.

South Carolina's Amendment 5, a constitutional amendment passed by the legislature prohibiting the use of eminent domain to the purpose or benefit of private economic development, passed 86% to 14%.

Washington's Initiative 933, modeled after Oregon's Measure 37, would limit land use rules that reduce the value of property, failed 58% to 42%.

In *Kelo v. New London*, the U.S. Supreme Court invited exactly this type of state-level reformulation of eminent domain laws: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the police power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised."

The implementation of similar laws involving takings has been problematic. Those of you who are from the states which have just enacted new laws will want to follow closely the process by which they become operational. Those of you from other states where such laws have not been proposed -- don't be surprised if you see some copycat legislation as a result of the 2006 Election Day red wave.