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WHERE DO WE GO FROM HERE?
STATES REVISE EMINENT DOMAIN LEGISLATION IN
RESPONSE TO KELO

I. INTRODUCTION

Picture yourself as Wilhelmina Dery, an eighty-eight-year-old woman whose entire life has centered around the family home. In that house, you were born, celebrated sixty wedding anniversaries with your husband, raised a family, and enjoyed the tranquility of retirement. Imagine the government commanding you to abandon your home. Wilhelmina Dery, along with other plaintiffs, decided to fight the government’s seizure of her land in the case of Kelo v. City of New London.1 The Supreme Court denied the plaintiffs’ claims, upholding the government’s taking of private property.2 Many Americans found the Kelo decision both surprising and alarming.3 Within one month of Kelo, twenty-one states introduced legislation seeking to curtail similar governmental actions.4

This Comment argues that Kelo did not drastically expand previous precedents.5 Rather, Kelo heightened state legislators’ awareness of the Constitution’s requirements, which indirectly fueled the states’ desires to enact more stringent statutes.6 Accordingly, this Comment predicts that Kelo will result in greater protections for property owners as states continue to pass legislation limiting the instances in which government may take private property.7

Part II of this Comment describes precedents predating Kelo, the Kelo decision itself, and state legislation in reaction to Kelo. Part III.B compares and contrasts state statutory enactments by evaluating their responsiveness to issues raised in Kelo, and Part III.C then analyzes the statutes’ applicability to local concerns. Finally, Part III.D predicts the long-term impact Kelo and subsequent legislation will have on property owners throughout the nation.

2. Kelo, 125 S. Ct. at 2665.
3. See infra notes 214-17 and accompanying text for a description of the public’s reaction to Kelo.
4. See infra Part II.E for a discussion of states’ reactions to Kelo.
5. See infra notes 184-96 and accompanying text for a discussion of Kelo’s adherence to past precedents.
6. See infra notes 197-223 and accompanying text for a step-by-step analysis of how Kelo will indirectly facilitate legislation that protects property owners.
7. See infra notes 197-223 and accompanying text for a discussion of how Kelo is motivating state legislatures to enact laws that extend beyond the limits of the Fifth Amendment to protect property rights.
II. OVERVIEW OF EXISTING LAW

A. Historical Developments in Governmental Exercises of Eminent Domain

The Fifth Amendment to the United States Constitution mandates that “private property [shall not] be taken for public use, without just compensation.”8 This provision is commonly referred to as the “Takings Clause.”9 The Takings Clause allows government to take private property only when two elements are satisfied: (1) the government must take the property for public use, and (2) the government must provide private citizens with adequate compensation.10 The drafters of the Fifth Amendment intended for the public use restriction and just compensation requirement to limit governmental power and protect personal liberty.11 Recent memories of British soldiers indiscriminately taking colonists’ property undoubtedly influenced the Fifth Amendment drafters.12 Both James Madison and Alexander Hamilton found it imperative to ensure the security of private property.13

Although the Fifth Amendment provided some private property protection, it originally limited only federal government actions, not state takings. The Supreme Court’s 1833 decision in Barron v. Mayor of Baltimore14 explicitly found that state laws could provide fewer private property protections than those embodied in the Fifth Amendment.15 In 1868, however, the newly enacted Fourteenth Amendment16 significantly curtailed the states’ taking powers by requiring states to adhere to the Takings Clause in the Fifth Amendment.17 Accordingly, the Supreme Court’s 1897 decision in Chicago, Burlington & Quincy Railroad Co. v. City of Chicago18 held that a state law allowing governmental takings of private property without just compensation

8. U.S. Const. amend. V.
12. Id.
17. See Chi., Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 241 (1897) (finding Takings Clause applicable to state governments through Fourteenth Amendment).
18. 166 U.S. 226 (1897).
violated the Due Process Clause of the Fourteenth Amendment and was, therefore, unconstitutional.19

B. Formative Supreme Court Decisions Defining “Public Use”

The Supreme Court historically has shown some deference to legislatures in determining what constitutes a public use under the Fifth Amendment. In the 1896 case of United States v. Gettysburg Electric Railway Co.,20 the Court found that “when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.”21 Based on this analysis, the Court determined that the creation of a national park in Gettysburg was a public use.22 The Court noted, however, that such deference would be less appropriate in situations where the government delegates its taking power to a private party.23

The Supreme Court reevaluated legislative eminent domain24 powers in Berman v. Parker.25 The Berman Court analyzed the District of Columbia Redevelopment Act of 1945,26 through which Congress sought to eliminate substandard housing and other blighted conditions.27 To attain its goals, the Act created the District of Columbia Redevelopment Agency and empowered it to exercise eminent domain powers.28 The plaintiff in Berman owned a nonblighted department store and contended that the Agency’s transfer of his property to a private developer was unconstitutional.29 The Court disagreed, finding Congress’s actions consistent with traditional state police powers.30 By concluding that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,” the Berman Court showed deference to

19. Id.
22. Id. at 683.
23. Id. at 680.
24. Eminent domain is the “[i]nherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.” BLACK’S LAW DICTIONARY 562 (8th ed. 2004).
27. Berman, 348 U.S. at 28.
28. Id. at 29.
29. Id. at 31.
30. Id. at 31-32. Police power is “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” BLACK’S LAW DICTIONARY 1196 (8th ed. 2004). The Berman Court, however, struggled with the extent of such power:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Berman, 348 U.S. at 32. Moreover, public “safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.” Id.
Congress’s authority.31 This view necessitates that the judiciary play an extremely limited role in deciding whether eminent domain power is being asserted for a legitimate public purpose.32 Accordingly, the Court concluded that Congress’s community redevelopment plan could be accomplished by redesigning entire sections of the community, rather than utilizing the “piecemeal approach” of establishing blight on each individual property within the community.33 The Court also concluded that public ownership is not necessary to effectuate a public purpose and, therefore, approved the transfer of the plaintiff’s property to a private developer.34

The Supreme Court provided yet a broader interpretation of public use in Hawaii Housing Authority v. Midkiff.35 The Midkiff case involved the Hawaii legislature’s passage of the Land Reform Act of 1967,36 which enabled real property to be taken from lessors and transferred to lessees.37 The legislature passed the Act in an effort to dissolve a land oligopoly—a condition created when a few private parties own most of the land.38 Although the government had not alleged that the properties in question were blighted, the Court declined to override the legislature’s judgment regarding what constituted a public use.39 The Court ultimately concluded that a public use exists whenever “the exercise of the eminent domain power is rationally related to a conceivable public purpose.”40 Under that test, the negative social and economic effects of a land oligopoly were sufficient to render the Act constitutional.41

31. Berman, 348 U.S. at 32.
32. Id.
33. Id. at 34.
34. Id. at 30-31, 35-36.
36. HAW. REV. STAT. ANN. §§ 516-1 to -204 (LexisNexis 2006).
37. Midkiff, 467 U.S. at 234.
38. Id. at 241-42.
39. Id. at 241.
40. Id.
41. Id. at 241-42.
C.  Lack of Uniformity Among States in Defining “Public Use”

State courts have differed significantly in their interpretation of “public use.” In particular, courts disagree over whether state law allows a government to use eminent domain to transfer property between private parties. Like the Supreme Court, some states defer to legislative decisions. In City of Duluth v. State, the Minnesota Supreme Court held that a city government could condemn a food processing plant and transfer the property to a private paper mill owner. The Duluth court concluded that the city’s goals of lessening unemployment and rejuvenating the urban area qualified as a public use. Likewise, in State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, the Kansas Supreme Court upheld a state statute providing that developing land into a “major tourism area” constituted a public use. Accordingly, the court found that the government could take 150 residential homes to erect a privately owned racetrack.

When explicitly confronted with the issue of whether economic development constitutes a public use, some state courts continue to apply a broad interpretation. For example, a Louisiana court held in City of Shreveport v. Chanse Gas Corporation that economic development was not an “overbroad” public purpose, thereby enabling the city to take private property to build a privately owned convention center and hotel. Similarly, in Prince George’s County v. Collington Crossroads, Inc. a Maryland court allowed private properties to be taken and transferred to privately owned business entities, labeling the expected economic development a sufficient public use.

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42. Compare, e.g., Molly, Inc. v. County of Onondaga, 770 N.Y.S.2d 542, 544 (App. Div. 2003) (determining that proposed taking was not “in excess of what is necessary to effect the purported public purposes” so long as county showed that private party required entire parcel and taking was “rationally related to a conceivable public purpose”), with, e.g., County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004) (determining that a county’s intended transfer of condemned properties to private parties was “wholly inconsistent with the common understanding of ‘public use’ at the time our Constitution was ratified”).

43. Compare, e.g., Molly, 70 N.Y.S.2d at 1419 (allowing county to transfer property from one private owner to another), with, e.g., Hathcock, 684 N.W.2d at 787 (finding county could not transfer property between private parties).

44. See, e.g., Prince George’s County v. Collington Crossroads, Inc., 339 A.2d 278, 288 (Md. 1975) (respecting county’s decision to achieve economic development by transferring property among private parties); City of Duluth v. State, 390 N.W.2d 757, 773 (Minn. 1986) (refusing to invalidate city’s decision to transfer property from food processing company to private paper mill owner).

45. 390 N.W.2d 757 (Minn. 1986).
46. Duluth, 390 N.W.2d at 773.
47. Id. at 763.
49. Tomasic, 962 P.2d at 553-54.
50. Id. at 564.
52. Chanse Gas, 794 So.2d at 971, 981.
54. Prince George’s County, 339 A.2d at 288.
In contrast, many other state courts do not defer to the legislature but instead employ a narrower interpretation of public use. In *County of Wayne v. Hathcock*, the Michigan Supreme Court found that a county’s transfer of private property from one private owner to another to build a business and technology park was not an adequate public use. The court further held that county action to transfer property among private parties is justified only if (1) extreme public necessity requires the taking, (2) the private entity will remain accountable to public oversight, or (3) the location is selected primarily due to public concerns (such as blight).

Similarly, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, the United States District Court for the Central District of California held that under California law a city could not enable a Costco store’s expansion by taking property belonging to a 99 Cents Only Store. The court found that enabling the store’s expansion was a private purpose and that efforts to prevent possible future blight did not constitute a public purpose. A New Jersey court also found a public purpose was lacking in *Casino Reinvestment Development Authority v. Banin*, where the Development Authority sought to transfer private property in Atlantic City to Trump Plaza Associates for a hotel development project.

South Carolina state courts apply the most stringent public use test and prohibit the government from exercising eminent domain powers unless the property will be directly and consistently used by the public. In *Karesh v. City Counsel of City of Charleston*, the South Carolina Supreme Court held that the city could not transfer private properties to a developer for erecting a hotel, convention center, parking garage, and retail shops. The court reasoned that “[t]he guarantee that the public will enjoy the use of the facilities, so necessary to the public use concept, is absent.” Accordingly, the court concluded that the developer’s promise to make the buildings accessible to the public was insufficient to constitute public use.

57. *Hathcock*, 684 N.W.2d at 788.
58. Id. at 783.
60. 99 Cents, 237 F. Supp. 2d at 1131.
61. Id.
63. *Casino*, 727 A.2d at 111.
64. 247 S.E.2d 342 (S.C. 1978).
66. Id. at 345.
67. Id.
D. Kelo Expands the Meaning of “Public Use”

1. Majority Opinion

On June 23, 2005, the Supreme Court evaluated whether the City of New London, Connecticut, had properly exercised eminent domain powers within the scope of the Takings Clause. The Kelo case arose after the city approved a development plan designed to create jobs, increase tax revenues, and revitalize the city’s downtown and waterfront areas. Pfizer Inc., a pharmaceutical company, had decided to build a large research facility beside the Fort Trumbull area of the city and the city expected Pfizer to bring new businesses and aid redevelopment. The city designated a nonprofit private entity, the New London Development Corporation, to implement the development plan. Importantly, the city gave the corporation the power to both purchase property and acquire property through eminent domain. Nine Fort Trumbull homeowners, who refused to sell their properties, brought the Kelo case. The plaintiffs argued that taking their nonblighted properties failed the Fifth Amendment’s public use requirement because the city planned to transfer the properties to other private owners.

The Supreme Court began its analysis in Kelo by stating the rule that “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.” The Court continued, however, by explaining that the government may transfer property between private parties where future use by the public is its primary goal, such as when land is transferred to a railroad or common carrier. Since neither of these bright-line rules applied to the Kelo situation, the Court further stated that eminent domain powers exercised mainly to benefit a private party would be unconstitutional. In applying this standard to Kelo, the Supreme Court found that the city created the development plan to benefit the public generally, rather than a specific group of private entities. The Court found the city’s development plan persuasive evidence of an underlying public purpose.

Although the Supreme Court recognized that most of the condemned land would neither be used by the general public nor directly provide services to the public, the Court deferred to the city government’s determination that economic development

69. Id. at 2658.
70. Id. at 2659.
71. Id.
72. Id. at 2660.
73. Kelo, 125 S. Ct. at 2660.
74. Id.
75. Id. at 2661.
76. Id.
77. Id.
78. Kelo, 125 S. Ct. at 2665.
79. Id.
qualifies as a public use. The Supreme Court found no meaningful distinction between economic development and other public purposes. The Court reasoned that “public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” Thus, the Court refused to adopt a categorical rule excluding economic development from constituting a public use. The Supreme Court also rejected the argument that takings for economic development should require a reasonable certainty that the intended public benefits will occur. Finally, the Court refused to question the city’s judgment regarding the need to take nonblighted properties in order to effectively implement its redevelopment plan.

2. States Retain Power to Limit Exercises of Eminent Domain

Although the Supreme Court’s holding broadly interpreted the Fifth Amendment’s public use requirement, the Court explicitly noted that states may further restrict the eminent domain powers of state and local governments. The Court recognized that some states already have laws which restrict public use to a narrower scope. Moreover, the Court acknowledged that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.” Accordingly, the Court gave states the power to alter their constitutions and statutes in conformity with local determinations regarding eminent domain.

3. Forceful Dissent

Four justices, including Chief Justice William Rehnquist, dissented from the majority’s opinion in Kelo. The dissent viewed Kelo as a dangerous precedent because it makes all property subject to being “upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public.” The dissenting justices also criticized the majority’s extreme deference to legislatures, noting the need for a judicial check regarding what constitutes public use. The dissent

80. Id. at 2668.
81. Id. at 2665.
82. Id. at 2664.
83. Kelo, 125 S. Ct. at 2665.
84. Id. at 2667.
85. Id. at 2668.
86. Id.
87. Id.
88. Kelo, 125 S. Ct. at 2668.
90. Kelo, 125 S. Ct. at 2671 (O’Connor, J., dissenting).
91. Id.
92. Id. at 2673.
quoted poignant language from Calder v. Bull,93 where the Court found that a law allowing government to take private property and transfer it to another private owner is “against all reason and justice,” adverse to the “great first principles of the social compact,” and therefore an unlawful abuse of legislative authority.94 Finally, the dissenters voiced a social concern, namely that the majority’s decision benefits those with great influence and power, while victimizing low-income communities.95

E. State Legislation Limits Kelo’s Impact

While the Supreme Court’s decision in Kelo was pending, Utah and Nevada enacted legislation restricting the scope of state and local government eminent domain powers. The legislatures in both states predicted that the Court would uphold New London’s taking for economic development purposes and wanted to enact statutes that would diminish the Kelo decision’s impact on their state law.96 Within one month of the Kelo decision, twenty-one states and Congress introduced statutes seeking to limit governments’ exercise of eminent domain.97 Within three months, Alabama, Texas, and Delaware enacted legislation protecting the rights of private property owners.98

1. Legislation Enacted Immediately Before Kelo

a. Utah

On March 21, 2005, approximately three months prior to the Supreme Court’s decision in Kelo, Utah Governor Jon Huntsman signed a bill into law limiting state and local governments’ eminent domain powers.99 The statute amended Utah’s redevelopment law by prohibiting all takings by redevelopment agencies,100 except the taking of property located within a designated “project area.”101 The statute also lists

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93. 3 U.S. 386 (1798).
95. Id. at 2677.
96. See infra notes 112-15, 130-45 and accompanying text for a discussion of the legislative intent in Utah and Nevada.
98. See infra Part II.E.2 for a discussion of the statutes passed in Alabama, Texas, and Delaware.
100. Utah’s amended redevelopment statute defines “agency” as:
[A] separate body corporate and politic . . . that is a political subdivision of the state, that is created to undertake or promote urban renewal, economic development, or community development, or any combination of them . . . and whose geographic boundaries are coterminous with: (a) for an agency created by a county, the unincorporated area of the county; and (b) for an agency created by a city or town, the boundaries of the city or town.

UTAH CODE ANN. § 17C-1-102(3) (Supp. 2006).
101. Id. § 17C-1-206.
several prerequisites that must be met before an agency can adopt a project area plan. For example, an agency may not propose a project area plan unless the project area has a planning commission and has adopted a general development plan. The agency must also request advice from the planning commission, conduct a public hearing regarding the plan, consult with the State Board of Education and other taxing entities, draft guidelines enabling property owners to participate in the redevelopment, and have the plan approved by the appropriate legislative body. In addition, Utah’s statute requires the completion of a blight study. An agency may not approve a redevelopment plan if the blight study occurred more than one year prior to the approval date.

Utah’s amended redevelopment statute not only limits the circumstances in which the government may adopt a redevelopment plan, but it also imposes additional requirements for board approval. The board must state in a written document that (1) a specific public need exists, (2) the redevelopment plan will accomplish the intended public purpose, (3) the plan’s implementation is economically possible, and (4) the board previously found blight within the project area. Utah’s statute further provides that if an agency wants to enlarge the project area, the proposed enlargement must obtain approval as if it constituted an entirely new plan.

Finally, Utah’s statute imposes strict requirements on what areas qualify as blighted. Under the statute, an area is blighted if it exhibits four or more factors showing that the area’s present condition “substantially impairs the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic liability or is detrimental to the public health, safety, or welfare.”

102. Id. § 17C-2-102.
103. Id. § 17C-2-102(2).
104. Id. § 17C-2-102(1).
105. UTAH CODE ANN. § 17C-2-101(1)(b).
106. Id. § 17C-2-102(3).
107. Id. § 17C-2-106.
108. Id.
109. Id. § 17C-2-110(2).
110. See UTAH CODE ANN. § 17C-2-303(1)(a) (requiring showing of health or safety hazard in at least a majority of property government proposes to take).
111. Id. § 17C-2-303(1)(a)(iv). The factors indicating blight include the following:
   (A) . . . substantial physical dilapidation, or defective construction of buildings or infrastructure; or significant noncompliance with current building code, safety code, health code, or fire code requirements or local ordinances;
   (B) unsanitary or unsafe conditions in the proposed project area that threaten the health, safety, or welfare of the community;
   (C) environmental hazards, as defined in state or federal law, that require remediation as a condition for current or future use and development;
   (D) excessive vacancy, abandoned buildings, or vacant lots within an area zoned for urban use and served by utilities;
   (E) abandoned or outdated facilities that pose a threat to public health, safety, or welfare;
   (F) criminal activity in the project area, higher than that of comparable nonblighted areas in the municipality or county; and
Utah’s eminent domain legislation resulted from national controversies, local concerns, and necessary compromises. In formulating the statute, Utah legislators discussed the upcoming *Kelo* case and scorned New London’s taking for economic development purposes. Realizing that the Supreme Court would soon rule on the scope of eminent domain under the Fifth Amendment, Utah legislators made a conscious decision that a political body, not the courts, should determine the taking powers of state and local governments. Utah legislators also expressed local concerns, namely that redevelopment projects diverted money from schools and other entities that ordinarily receive tax dollars.

b. Nevada

On June 14 and 17, 2005, a few days before the *Kelo* decision, Nevada enacted two pieces of legislation restricting eminent domain powers of state and local governments. The legislation amended Nevada’s eminent domain statute by requiring that an entity wanting to acquire property must negotiate in good faith with the property owner and attempt to make an agreement before requesting that a state government agency use eminent domain to seize the property for redevelopment. Likewise, the amended statute mandates that an agency may not exercise eminent domain for redevelopment unless it previously negotiated with the property owner, provided a written offer of compensation, allowed the owner thirty days to accept the offer, and supplied the owner with the appraisal report that served as the basis for the compensation offer. Nevada’s statute also sets forth strict prerequisites for establishing blight, requiring the presence of at least four separate indicators.

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113. Id. (Feb. 25, 2005); see also Amie Rose, Court Expands Power to Seize Property, DAILY HERALD (Provo, Utah), June 24, 2005, at A1 (quoting Utah State Representative John Dougall’s reference to *Kelo* as “huge mistake”).

114. Audio Tape, supra note 112 (Feb. 25, 2005).

115. Id. (Feb. 18, 2005); see also Kersten Swinyard, Changes in RDAs Could Aid Cities, DESERET MORNING NEWS (Salt Lake City, Utah), Aug. 29, 2005, at A1 (explaining process through which redevelopment agencies take tax monies from other entities).


117. Id.

118. Id. § 279.388. The factors indicative of blight are the following:

(a) The existence of buildings and structures, used or intended to be used for residential, commercial, industrial or other purposes, or any combination thereof, which are unfit or unsafe for those purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime because of one or more of the following factors:

1. Defective design and character of physical construction.

2. Faulty arrangement of the interior and spacing of buildings.

3. Inadequate provision for ventilation, light, sanitation, open spaces and recreational facilities.

4. Age, obsolescence, deterioration, dilapidation, mixed character or shifting of uses.

(b) An economic dislocation, deterioration or disuse.
Moreover, an agency may not exercise eminent domain unless it finds that the property is necessary to the redevelopment plan “most compatible with the greatest public good and the least private injury.”\(^{119}\) In addition, a legislative body may not adopt a redevelopment plan unless displaced individuals are supplied with comparable housing.\(^ {120}\) Once an agency deems the taking necessary, however, the agency’s finding is not subject to judicial review unless there is evidence of bribery or fraud.\(^ {121}\)

Nevada’s amended eminent domain statute mandates that before an agency takes a nonblighted property using eminent domain, it must determine that two-thirds of the properties in the proposed redevelopment area are blighted.\(^ {122}\) The statute also strictly limits the circumstances in which an agency may use eminent domain to obtain a property or group of adjacent properties more than forty acres in size for “open-space use.”\(^ {123}\) Before the government may take such an area of property for open-space use, the agency must provide a written offer of compensation, negotiate in good faith for at least two years, confirm the necessity of taking each acre, agree to dedicate the area to open-space use for at least fifty years, and find that the use of each property will conform to the applicable project plan.\(^ {124}\) Nevada’s statute further specifies what constitutes good faith negotiations by requiring the agency to provide a written offer that includes an appraisal report, specific description of each acre’s intended use, and detailed reasons for needing each acre.\(^ {125}\) The agency must also try to engage in good faith negotiations at least once a month throughout the two-year period.\(^ {126}\) The

\(^{119}\) Id. § 279.471(3)(d).


\(^{121}\) Id. § 279.471(4).

\(^{122}\) Id. § 279.471(1).

\(^{123}\) Id. § 37.039(1). Nevada’s statute defines “open-space use” as “use of property: (1) to promote the conservation of open space and the protection of other natural and scenic resources from unreasonable impairment, or (2) to protect, conserve or preserve wildlife habitat.” Id. § 37.039(3)(c).


\(^{125}\) Id. § 37.039(2)(a).

\(^{126}\) Id. § 37.039(2)(b).
amended statute also requires agencies to further compensate a business owner for loss of goodwill127 where applicable.128 Finally, the statute provides that if the government wants to sell the property within fifteen years of acquiring it, the previous owner has a right of first refusal and may repurchase the property at the fair market value, which is described as an amount not exceeding the proportional amount paid by the government.129

The legislative history of the statutory amendments clarifies the interests and concerns underlying the statutes.130 First, the legislators were aware of state and local government “abuses” of eminent domain powers throughout the country.131 Nevada legislators believed the city’s action in Kelo was a wrongful taking of land from a private party because the city transferred the land to another private party.132 New London’s exercise of eminent domain for the purpose of increasing jobs and providing economic development particularly troubled the legislators.133 During her testimony before the Senate Committee on Judiciary, Janine Hansen, a representative of both the Nevada Eagle Forum and the Nevada Committee for Full Statehood, bluntly expressed displeasure with New London transferring private property to Pfizer by saying, “Manufacturing Viagra is not the public use our founders had in mind when they wrote eminent domain into the U.S. Constitution.”134 In fact, the Nevada legislature expressly used Kelo as a backdrop as to why Nevada’s statute should mandate written offers, good faith negotiation, fair appraisals, just compensation, and significant blight in order to take private property.135

Nevada’s newly enacted legislation also resulted from statewide concerns.136 In one instance, Evans Creek LLC, a Nevada company, purchased 1,000 acres of land outside Reno with the intent to build houses.137 After several powerful people living in the area complained about the development, Washoe County decided to use eminent

127. Under the amended statute, “goodwill” means “the component of value attributed to the reputation, loyal customer base, ability to attract new customers and location of a business.” Id. § 37.111(2).
128. Id. § 37.111(1). Compensation for loss of goodwill is required where:
(a) The condemnation causes the business to be dissolved and the business cannot be relocated for reasons beyond the control of the owner, including, without limitation, the unavailability of a new franchise or when the value of the business is inextricably tied to the unique location of the property being condemned; and (b) The owner of the business has a property interest in the property acquired pursuant to [Nevada’s eminent domain statute].
NEV. REV. STAT. ANN. § 37.111(1).
129. Id. § 37.270(1)(b).
130. See Minutes of the S. Comm. on Jud., 2005 Leg., 73d Sess. 12-13 (Nev. Apr. 6, 2005) [hereinafter Apr. 6 Minutes of S. Comm. on Jud.] (explaining that improper uses of eminent domain powers both nationwide and statewide led Nevada to refine its takings legislation).
131. Id. at 12; Minutes of the S. Comm. on Jud., 2005 Leg., 73d Sess. 10 (Nev. Apr. 15, 2005) [hereinafter Apr. 15 Minutes of S. Comm. on Jud.].
132. Apr. 6 Minutes of S. Comm. on Jud., supra note 130, at 12.
133. Id.
136. Apr. 6 Minutes of S. Comm. on Jud., supra note 130, at 12.
137. Id. at 13.
domain to take the one thousand acres.\textsuperscript{138} Although the county claimed the area was needed for open space and a wildlife habitat, no plans or reports documented any such need.\textsuperscript{139} Development by Evans Creek would have helped Reno meet its increased need for housing.\textsuperscript{140} Instead, the county’s action benefited affluent neighboring landowners at the expense of other taxpayers.\textsuperscript{141}

Nevada legislators also expressed concern about an incident in Las Vegas.\textsuperscript{142} For a section of Las Vegas with declining gaming revenues, the city hired a consortium of casinos, called the Fremont Street Experience, and sought to exercise eminent domain over several nonblighted properties.\textsuperscript{143} The Fremont Street Experience intended to restore gaming revenues by revitalizing casinos in the area.\textsuperscript{144} Legislators disliked the Nevada Supreme Court’s decision to uphold the city’s action and responded by enacting legislation that required a substantial finding of blight before a taking could occur.\textsuperscript{145}

2. States Quickly Enact Legislation After \textit{Kelo}

\textit{a. Alabama}

After the \textit{Kelo} decision, Alabama was among the first states to enact legislation limiting the eminent domain powers of state and local governments.\textsuperscript{146} Alabama Governor Bob Riley signed the bill into law on August 3, 2005, after the proposed amendments to Alabama’s eminent domain statute passed unanimously in a special session of the Alabama Legislature.\textsuperscript{147} First, the amended statute explicitly prohibits any Alabama state, county, or municipal authority from using eminent domain to transfer private property for “purposes of private retail, office, commercial, industrial, or residential development.”\textsuperscript{148} Second, the statute prohibits municipalities or counties from taking private property for the primary purpose of increasing tax revenues.\textsuperscript{149} Third, the amendments mandate that a government cannot transfer private property to any “person, nongovernmental entity, public-private partnership, corporation, or other business entity.”\textsuperscript{150} The statute does allow state and local governments to use eminent domain to transfer blighted properties in redevelopment areas to other private entities.\textsuperscript{151} Alabama’s amended statute provides a buyback provision, requiring that if

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\item \textsuperscript{138} Id. at 13, 18.
\item \textsuperscript{139} Id. at 18.
\item \textsuperscript{140} Id. at 16.
\item \textsuperscript{141} Apr. 6 Minutes of S. Comm. on Jud., supra note 130, at 16.
\item \textsuperscript{142} Id. at 14.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 15.
\item \textsuperscript{146} Donald Lambro, \textit{Alabama Limits Eminent Domain}, \textsc{Wash. Times}, Aug. 4, 2005, at A1.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} \textsc{Ala. Code} \S\S\ 11-47-170(b), 11-80-1(b) (LexisNexis Supp. 2005).
\item \textsuperscript{149} Id. \S\S\ 11-47-170(b), 11-80-1(b).
\item \textsuperscript{150} Id. \S\S\ 11-47-170(b), 11-80-1(b).
\item \textsuperscript{151} Id. \S\S\ 11-47-170(b), 11-80-1(b). Alabama’s amended eminent domain statute does not explain what
property is taken by eminent domain but never put to public use, the property must first be offered to the previous owner.152 Finally, the statute sets the buyback price as equal to the price the government paid for the property, less any income and transaction taxes paid by the previous owner.153

Alabama’s statutory amendments originated in a senate bill containing a clear statement of legislative intent.154 The Alabama Legislature explained that statutory modifications were necessary because of the opening Kelo left to state legislatures to restrict the government’s power to take private property through eminent domain.155 The statement of legislative intent further explained that it intended the statutory amendments to eliminate governments’ power to use eminent domain to transfer property from one private party to another, except in extremely limited circumstances.156 When Governor Riley signed the legislation, he said that the statute constitutes blight, but a preexisting Alabama statute defines “blighted areas” as “property that contains any of the following factors”:

1. The presence of structures, buildings, or improvements, which, because of dilapidation, deterioration, or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision for ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy.
2. The existence of high density or population and overcrowding or the existence of structures which are fire hazards or are otherwise dangerous to the safety of persons or property or any combination of the factors.
3. The presence of a substantial number of properties having defective or unusual conditions of title which make the free transfer or alienation of the properties unlikely or impossible.
4. The presence of structures from which the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.
5. The presence of excessive vacant land on which structures were previously located which, by reason of neglect or lack of maintenance, has become overgrown with noxious weeds, is a place for accumulation of trash and debris, or a haven for mosquitoes, rodents, or other vermin where the owner refuses to remedy the problem after notice by the appropriate governing body.
6. The presence of property which, because of physical condition, use or occupancy, constitutes a public nuisance or attractive nuisance where the owner refuses to remedy the problem after notice by the appropriate governing body.
7. The presence of property with code violations affecting health or safety that has not been substantially rehabilitated within the time periods required by the applicable codes.
8. The presence of property that has tax delinquencies exceeding the value of the property.
9. The presence of property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

Id. § 24-2-2(1).
152. ALA. CODE §§ 11-47-170(c), 11-80-1(c).
153. Id.
155. Id.
156. Id.
resulted from the “misguided” *Kelo* decision.157 According to Riley, Alabama’s statute restores the pre-*Kelo* protections against eminent domain abuse.158 Riley confidently stated that “Alabamians can rest assured that their homes, farms, business[es] and other private property are safe from being seized by government for a shopping center, or a factory, an office building or new residential development.”159

b. Texas

On September 1, 2005, Texas Governor Rick Perry signed legislation limiting governmental use of eminent domain to benefit private parties or achieve economic development.160 The legislation amended Texas’s eminent domain statute by prohibiting government entities from taking property under the pretext of public use, when in reality the property is meant to confer a private benefit.161 The amended statute also states that private property may not be taken for economic development purposes.162 Private property may be taken, however, if the primary purpose is the elimination of an “existing affirmative harm on society from a slum or blighted area,” and economic development is merely a secondary purpose.163 Finally, Texas’s statutory amendments authorize courts alone to determine whether the government complied with the takings provisions of the statute, without requiring any deference or presumptions.164

The *Kelo* decision instigated the formation of Texas’s statute.165 Texas legislators saw the Supreme Court’s decision in *Kelo* as a liberal view of what constitutes public use, and in response, promulgated a conservative statute by limiting takings for economic development purposes.166 Accordingly, the legislature sought to prohibit the use of eminent domain to “build hotels, restaurants or any [other] free market enterprises.”167 The legislators believed that the government should rely on the free market, rather than eminent domain, to develop commercial entities.168

159. Lambro, *supra* note 146 (quoting Governor Riley).
161. Id. § 2206.001(b)(2).
162. Id. § 2206.001(b)(3).
163. Id. Texas’s amended eminent domain statute does not explain what constitutes blight, but a preexisting Texas statute defines “blighted area” as the following:

> [A]n area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.

166. *Id.*
168. *Id.*
Texas legislators also disliked the idea of displacing long-term residents.\textsuperscript{169} Legislators feared that using eminent domain for economic development purposes would likely result in residents not receiving adequate replacement value for their homes.\textsuperscript{170}

Although the statutory amendments limit the scope of the government’s eminent domain powers, Texas legislators intended to enable localities to improve blighted areas.\textsuperscript{171} For example, Representative Woolley confirmed that the abandoned Mercantile Bank complex in downtown Dallas would constitute a “blighted area” under the new legislation.\textsuperscript{172} Likewise, Representative Corte emphasized that the statute would not prohibit cities from fighting blight in the form of crime-ridden areas.\textsuperscript{173}

\textsuperscript{169} \textit{Id.} at 185.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 181, 184.
\textsuperscript{173} \textit{Id.} at 184.
c. Delaware

On July 21, 2005, Delaware Governor Ruth Ann Minner signed a bill that amended the state’s eminent domain statute by prohibiting state and local government agencies from acquiring property using eminent domain, except for a “recognized public use.”174 In addition, the amendments require that the public use be described at least six months before any condemnation proceeding commences.175 The description must occur either in a certified planning document, public hearing, or published agency report.176 Finally, the legislation mandates that if condemnation proceedings are abandoned or judged unattainable by taking, then the governmental agency must pay the property owner an amount that the court decides will adequately reimburse the owner for attorney’s fees, appraisal fees, and engineering fees in connection with the proceeding.177

After Kelo, Delaware State Senator Robert Venables rushed the amendments through the House and Senate in only four days.178 The law enables governments to exercise eminent domain only in instances of “clear public use.”179 Venables believed that under Kelo a potential increase in the tax base, without more, would justify invoking eminent domain powers for “public use.”180 In addition, Delaware State Senator David McBride expressed concern that Kelo permitted governments to take private property “under the guise of economic development” in violation of land ownership principles.181 Finally, both Senators Venables and McBride believed that, absent state legislation, Kelo would enable state and local governments to take farmlands for private development.182

III. DISCUSSION

The Supreme Court’s decision in Kelo v. City of New London183 and many states’ subsequent enactment of eminent domain legislation raises four important questions. First, will Kelo’s holding increase governments’ exercise of eminent domain? This discussion argues that Kelo ultimately will decrease takings because most states will respond by passing legislation limiting governments’ exercise of eminent domain. Second, do recently enacted state eminent domain statutes respond to issues addressed in Kelo? This discussion analyzes several ways in which state legislation stemmed from the majority’s holding and the dissent’s concerns. Third, does state eminent domain

175. Id.
176. Id.
177. Id. § 9503.
179. Id.
180. Id.
181. Id. (quoting Senator McBride).
182. Id.
legislation address local needs? This discussion explains how state legislators have tailored their eminent domain statutes to target specific problems their constituents face. Finally, what will be the consequences of \textit{Kelo} and resulting state legislation? This discussion predicts how the evolving eminent domain jurisprudence will affect both private homeowners and the legal system.

A. Will \textit{Kelo} Increase or Decrease the Number of Governmental Takings?

On its face, the holding in \textit{Kelo} provides governments with broad eminent domain powers because it was the first Supreme Court decision to find that takings for economic development purposes were constitutional.\footnote{See \textit{Falls}, supra note 13, at 356-68 (using precedents to highlight \textit{Kelo}’s issue of first impression).} A closer analysis of its holding, however, shows that \textit{Kelo} is not a major deviation from prior Supreme Court precedents. When compared to \textit{Berman v. Parker},\footnote{348 U.S. 26 (1954).} and \textit{Hawaii Housing Authority v. Midkiff},\footnote{467 U.S. 229 (1984).} \textit{Kelo} only slightly increases governmental takings powers.\footnote{See \textit{infra} notes 188-93 and accompanying text for a discussion of the findings from \textit{Berman} and \textit{Midkiff}, on which the \textit{Kelo} Court relied.}

Before deciding \textit{Kelo}, the Supreme Court held, in \textit{Berman}, that a government could take a nonblighted property if overall blight existed in the surrounding area.\footnote{\textit{Berman}, 348 U.S. at 31-32, 35.} Specifically, \textit{Berman} concluded that a government could take property without finding blight on each individual parcel.\footnote{\textit{Id.} at 34-35.} In approving transfers to a private developer, \textit{Berman} further established that public ownership was not necessary to establish a constitutional public purpose.\footnote{\textit{Id.} at 30, 35-36.} \textit{Midkiff}, decided twenty years before \textit{Kelo}, further expanded the eminent domain powers provided in \textit{Berman}.\footnote{\textit{Midkiff}, 467 U.S. at 231-32, 241 (approving takings absen any finding of blight); \textit{Berman}, 348 U.S. at 34-35 (allowing government to take without finding blight on each property).} The \textit{Midkiff} Court found it constitutional for a government to take private property and transfer it to another private owner, even if there was absolutely no finding of blight.\footnote{\textit{Id.} at 241 (approving transfers to private developer).} The \textit{Midkiff} Court explicitly deferred to the state legislature’s decision that the negative social effects of a land oligopoly justified the takings.\footnote{\textit{Id.} at 241 (approving transfers to private developer).}

Considering the broad eminent domain powers provided by \textit{Berman} and \textit{Midkiff}, it is unlikely that \textit{Kelo} will result in the abusive government takings its critics suggest are inevitable after that decision. \textit{Kelo}’s failure to require blight did not expand eminent domain powers because both \textit{Berman} and \textit{Midkiff} upheld takings without finding blight.\footnote{\textit{Id.} at 241 (approving takings absent any finding of blight); \textit{Berman}, 348 U.S. at 34-35 (allowing government to take without finding blight on each property).} In addition, \textit{Kelo}’s conclusion that property need not be transferred to a public owner was firmly based in the \textit{Berman} and \textit{Midkiff} decisions.\footnote{\textit{Id.} at 241 (approving transfers to private developer).} Finally, \textit{Kelo}’s
deference to legislative decision making was also the approach taken in *Berman* and *Midkiff*.196

Although *Kelo* was the first instance where the Supreme Court upheld the constitutionality of takings solely aimed at producing economic development, state and local governments had taken private property for economic development purposes for many years prior to *Kelo*.197 Although neither *Berman* nor *Midkiff* focused on economic development, many state and local governments acted under the assumption that the United States Constitution permitted takings based on economic development.198 For example, the city of Shreveport, Louisiana, transferred private properties to a developer to build a privately owned hotel.199 Shreveport justified the takings solely on the economic development grounds of increased jobs and tax revenues.200 Similarly, Prince George’s County in Maryland took properties of private businesses in order to build a privately owned industrial park, based purely on expected economic development.201

State and local governments nationwide were engaging in takings for economic development purposes before *Kelo*; therefore, it is unlikely that *Kelo* will increase governments’ use of eminent domain. A study conducted by the Institute for Justice and the Castle Coalition indicated that between 1998 and 2002, state and local governments filed or threatened more than 10,000 condemnations where property was to be transferred to private parties.202 Economic development provided the basis for many of these takings.203 Therefore, *Kelo* merely verbalized the constitutional standard that many state and local governments had been operating under for many years.

In fact, *Kelo*’s provision granting state legislatures the power to enact statutes restricting eminent domain indicates that *Kelo* may result in fewer takings.204 The majority in *Kelo* correctly recognized that different geographic areas have varying eminent domain needs.205 The majority made a prudent decision by explicitly recognizing state legislatures’ power to limit *Kelo*’s scope.206 This pronouncement clarifies that states can enact statutes to protect property owners against perceived

196. *Midkiff*, 467 U.S. at 241-43 (explicitly deferring to state legislature’s determination that land oligopoly justifies takings); *Berman*, 348 U.S. at 31-32 (deferring to legislative decision to take nonblighted department store).

197. See supra notes 42-54 and accompanying text for a discussion of states that used eminent domain for economic development purposes prior to *Kelo*.

198. See Falls, supra note 13, at 362-65 (explaining instances where states used broad interpretations of *Berman* and *Midkiff* to justify takings for economic development).


200. Id.

201. See Prince George’s County v. Collington Crossroads, Inc., 339 A.2d 278, 288 (Md. 1975) (finding Prince George’s County’s taking justified by expected economic development).


203. Id.

204. See supra Part II.D.2 for a discussion of the majority’s recognition that states may enact legislation restricting eminent domain in accordance with local needs.


206. See id. at 2668 (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”).
takings abuses. Such delegation by the Supreme Court is not uncommon. For example, several state law protections surpass the Federal Constitution’s free speech rights, lawful search requirements, and death penalty restrictions.

Armed with the Supreme Court’s acknowledgment that states can enact statutes limiting state and local governments’ exercise of eminent domain, it is likely that almost every state will amend its takings legislation. Within one month of the *Kelo* decision, twenty-one states and Congress had either introduced eminent domain statutes or announced plans to introduce legislation or constitutional amendments. The statutes enacted by Utah, Nevada, Alabama, Texas, and Delaware indicate that most new statutes will restrict governmental takings powers, rather than reaffirm the broad *Kelo* standard. Every state considering new eminent domain legislation is seeking to limit governments’ exercise of eminent domain.

Although businesses probably will lobby state legislatures to broadly allow economic development takings, voters will pressure state legislatures to protect their property rights. The public has overwhelmingly expressed disapproval of *Kelo*. Instant Internet polls conducted by MSNBC and CNN indicate almost unanimous opposition to takings for private development. The public outcry has turned into action as homeowners form grassroots campaigns to express their views to state legislators. Membership in the Institute for Justice’s Castle Coalition, a national organization of citizens working to restrict eminent domain, has almost tripled in response to *Kelo*.

Legislators probably will enact statutes limiting takings because landowners can significantly influence the political process. As a group, landowners comprise a large

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207. See generally Harvard Law Review Association, *supra* note 89 (explaining various contexts where Supreme Court allowed states to legislatively enact greater protections).

208. *Id.* at 1401-04, 1370-73, 1383-84.

209. See Ackerman, *supra* note 10, at 1054 (encouraging states to provide greater protections for property owners).

210. Institute for Justice, *supra* note 97, para. 5; see also Lambro, *supra* note 146 (listing states currently considering new takings legislation).

211. See *supra* Part II.E for a discussion of recently enacted eminent domain statutes restricting instances in which government may take private property.

212. See Institute for Justice, *supra* note 97, para. 5 (listing states considering new takings legislation or constitutional amendments); Lambro, *supra* note 146 (same).

213. See Gallagher, *supra* note 9, at 1855-56, 1867-68 (advocating political process and noting that property owners are an influential class able to lobby legislators in favor of their interests).

214. See Institute for Justice, *supra* note 97, para. 2 (noting that polls conducted by several major universities demonstrated nearly unanimous opposition to takings for private development and support for statutes limiting eminent domain); Lambro, *supra* note 146 (predicting that eminent domain will be major electoral issue in 2006).

215. Institute for Justice, *supra* note 97, para. 4; see Lambro, *supra* note 146 (noting that polls conducted by several universities demonstrated nearly unanimous voter support for statutes limiting eminent domain).


218. See Gallagher, *supra* note 9, at 1855-56, 1867-68 (noting that property owners are influential class capable of lobbying legislators in favor of their interests).
enough percentage of constituents to influence legislative decision making. Landowners can lobby for their interests and elect legislators who favor eminent domain restrictions. Because takings usually displace many landowners, large numbers of similarly situated property owners can organize to prevent governments’ abuse of eminent domain.

Legislators will likely respond to their constituents’ requests by passing statutes restricting governmental eminent domain powers. This restrictive legislation will, in turn, decrease the instances in which a government may take private property. Therefore, by incentivizing states to enact legislation restricting eminent domain, Kelo’s broad holding will indirectly result in fewer takings.

B. How Does State Legislation Respond to Issues Raised in Kelo?

State statutes passed immediately before and after Kelo provide more exacting standards for defining public use than the Supreme Court’s. States such as Utah, Nevada, Alabama, Texas, and Delaware viewed the Kelo definition of public use as providing overly broad eminent domain powers, and therefore enacted legislation to curtail possible abuses. Importantly, state legislatures tailored the statutes to specifically address both the majority’s findings and the dissenters’ concerns in Kelo.

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219. Id.
220. Id.
221. Id. at 1868.
222. See supra Part II.E for a discussion of how some states already have restricted eminent domain.
223. See supra Part II.E for a discussion of how legislators in several states intended that eminent domain legislation would ultimately decrease instances when takings may occur.
224. See supra Part II.E for a discussion of how state statutes define public use more definitively.
225. See supra Part II.E for a discussion of how states enacted legislation in opposition to Kelo.
1. Development Plan

The *Kelo* majority found that the existence of a redevelopment plan, “adopted to benefit a particular class of identifiable individuals,” is one factor indicating proper use of eminent domain.\(^{226}\) *Kelo* did not explain, however, the procedure for constructing a proper redevelopment plan. Several states believed that redevelopment plans should be precisely formulated to ensure that private property will not be taken absent a clearly demonstrated public use.\(^{227}\) Therefore, states passed legislation embracing *Kelo’s* finding that redevelopment plans are important indicators of a permissible taking.\(^{228}\) Nevertheless, states went further by establishing specific criteria for redevelopment plans.\(^{229}\)

For example, in following the *Kelo* majority’s finding, Utah’s statute provides that the presence of a development plan may be considered in determining the propriety of exercising eminent domain.\(^{230}\) Utah’s statute goes beyond the *Kelo* majority, however, by outlining several distinct steps that must be completed before a redevelopment plan is officially approved.\(^{231}\) First, a planning commission must adopt a general development plan.\(^{232}\) Second, the redevelopment agency must construct a specific project area plan.\(^{233}\) The compilation of the project area plan must involve consultation with the planning commission, the State Board of Education and other taxing entities, and private property owners.\(^{234}\) Finally, the plan must be approved by the appropriate legislative body.\(^{235}\) Utah legislators enacted this rigorous process of creating redevelopment plans because they viewed *Kelo’s* vague development plan requirement as open to abuse.\(^{236}\)

Delaware also enacted additional requirements relating to redevelopment plans.\(^{237}\) Delaware’s statute provides that a redevelopment plan must be articulated at least six months before any private property is taken for a specified public use.\(^{238}\) In addition, Delaware’s statutory amendments require the government to communicate the public use via a certified planning document, a public hearing, or a published agency report.\(^{239}\) Therefore, Delaware’s amended statute upholds *Kelo’s* determination that a

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\(^{226}\) 125 S. Ct. at 2662 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

\(^{227}\) See supra Part II.E for a discussion of how state statutes have outlined both procedures for creating a development plan and required plan provisions.

\(^{228}\) Id.

\(^{229}\) Id.


\(^{231}\) Id.

\(^{232}\) Id. § 17C-2-102(2).

\(^{233}\) Id. § 17C-2-102(1).

\(^{234}\) Id.

\(^{235}\) Utah Code Ann. § 17C-2-102(1).

\(^{236}\) See supra notes 113-14 and accompanying text for a discussion of how Utah legislators predicted *Kelo’s* outcome and enacted statutory amendments to guard against possible abuses.


\(^{238}\) Id.

\(^{239}\) Id.
redevelopment plan is important but provides additional timing and documentation standards for describing the proposed public use.

2. Blight

Kelo deemphasized the importance of finding blight before allowing a government to exercise eminent domain.240 The majority clearly held that New London could take nonblighted homes.241 States have reacted to Kelo’s disregard of blight by passing statutes which make a finding of blight pivotal in deciding whether eminent domain is permissible.242 For example, Texas’s statute prohibits the government from taking private property for economic development purposes unless the economic development is secondary to eliminating blight.243 By prohibiting takings unless blight is present, Texas’s statutory amendments directly challenge the holding in Kelo.

Some states found Kelo’s disregard of blight unfavorable, yet handled the problem differently than Texas. Unlike Texas, Utah and Nevada do not categorically require blight before a government exercises eminent domain. Where the government cites blight as the reason for the taking, however, both Utah and Nevada do provide stringent standards for proving blight. These standards far outweigh any consideration given to blight in Kelo. For example, section 17C-2-303 of Utah’s statute requires a finding of at least four specific factors indicating hazards to municipal growth, availability of housing, economic liability, or public health and safety.244 In addition, the statute explicitly enumerates the factors which can demonstrate blight.245 Similarly, Nevada’s statutory amendments do not allow a taking based on blight unless the government can show four separate factors, explicitly listed in the statute, establishing blight.246 In addition, Nevada’s statute prohibits taking nonblighted property unless the government can show that two-thirds of the area is blighted.247

241. Id.
244. UTAH CODE ANN. § 17C-2-303 (Supp. 2006).
245. Id. See supra note 111 for the list of factors that can demonstrate blight in Utah.
247. Id. § 279.471(1).
3. “Reasonable Certainty” of Success

The majority in Kelo refused to require that a taking could only happen if a “reasonable certainty” existed that the expected public benefits would occur, and several states passed statutes in direct opposition to this aspect of Kelo. For example, Utah’s statute prohibits a government from exercising eminent domain unless evidence demonstrates that the redevelopment plan will accomplish its intended purpose. Nevada’s statute imposes a stricter test, which requires proof that the redevelopment plan is “most compatible with the greatest public good and the least private injury.” Delaware’s statutory amendments provide that if evidence demonstrates that the redevelopment plan will not effectuate its public purpose, the government must repay private property owners for all expenses incurred in connection with the redevelopment plan. Finally, Alabama’s statute mandates that if property acquired by eminent domain is not put to its intended public use, the government must give the previous owner the opportunity to redeem the property. In addition, Alabama’s statute sets the buyback price as equal to the amount paid by the government, less any redevelopment-related expenses paid by the previous owner. These states have enacted legislation requiring guarantees of the redevelopment project’s success, in opposition to the majority in Kelo. Specifically, states created the safeguards to deter impulsive legislative decisions with few public benefits.

4. Increased Tax Revenues

In Kelo, the Supreme Court did not explicitly rule on whether a redevelopment plan primarily designed to increase tax revenues would justify a government’s use of eminent domain. Nevertheless, some states disliked even the possibility that private homes could be taken solely to increase the amount of tax money the government would collect. Therefore, Alabama’s amended statute includes a provision explicitly stating that a government cannot take private property with the primary purpose of increasing tax revenues. Delaware’s statutory amendments likewise are meant to prohibit the use of eminent domain where an increased tax base is the only justification for the taking.

253. Id.
254. Institute for Justice, supra note 97, para. 5.
255. See supra Part II.E for a discussion of how legislators in several states intended to pass statutes prohibiting future increased tax revenues from justifying takings.
257. Redden, supra note 178. See supra notes 178-80 and accompanying text for a discussion of how the sponsor of Delaware’s amended eminent domain statute, Delaware State Senator Robert Venables, intended that the amendments would prohibit takings to facilitate increased tax revenues.
5. Stealing from the Poor to Benefit the Rich

Justice O’Connor’s dissent in _Kelo_ notes that the beneficiaries of the majority’s decision will be citizens with “disproportionate influence and power in the political process.” Accordingly, Justice O’Connor believes _Kelo_ will make it easier for a government to take private property from people with few resources. Justice Thomas’s dissent also notes that poor communities are unlikely to put property to its best use as defined by the government. Therefore, Justice Thomas concludes that _Kelo_’s broad allowance of takings will harm those with the least political power. Justice Thomas further states that the Supreme Court should actively protect, not affirmatively injure, such minorities.

Like the dissenters in _Kelo_, legislators in several states believed that the majority opinion lacked adequate protections for property owners in lower socioeconomic groups. For example, Delaware legislators believed that _Kelo_ was insufficient to prevent a government from transferring private property from low-income residents to corporations or developers. Accordingly, the overarching legislative intent behind Delaware’s statutory amendments was recognizing and preventing inequitable transactions merely disguised as needed economic redevelopment.

Alabama legislators strongly echoed the _Kelo_ dissenters’ concern that economic redevelopment takings would harm average taxpayers while benefiting rich individuals and businesses. Alabama’s statute prohibits a government agency acting with primarily an economic redevelopment purpose from using eminent domain to transfer private property to any nongovernmental business or person for any private commercial or residential use.

Like Alabama, Nevada legislators feared that takings for economic redevelopment purposes were subject to abuse. Legislators in Nevada believed that _Kelo_ did not provide enough restraints to prevent powerful private entities from convincing government to take working-class residents’ property. Therefore, Nevada enacted statutory amendments that provide that government cannot exercise eminent domain for redevelopment purposes unless it has negotiated in good faith with the property owner, provided a written compensation offer, and supplied an appraisal report.

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259. _Id._
260. _Id._ at 2687 (Thomas, J., dissenting).
261. _Id._ at 2686-87.
262. _Id._ at 2687.
263. Redden, _supra_ note 178. See _supra_ notes 179-82 and accompanying text for a discussion of Delaware legislators’ comments regarding the need for additional eminent domain legislation in light of _Kelo_.
264. Redden, _supra_ note 178.
265. Lambro, _supra_ note 146. See _supra_ notes 154-59 and accompanying text for a discussion of the legislative intent behind Alabama’s statute, particularly in reaction to _Kelo_.
267. _Apr. 6 Minutes of S. Comm. on Jud., supra_ note 130, at 12-13; _Apr. 15 Minutes of S. Comm. on Jud., supra_ note 131, at 10. See _supra_ notes 130-45 and accompanying text for a discussion of the legislative history leading to the passage of Nevada’s statutory amendments.
268. _Apr. 6 Minutes of S. Comm. on Jud., supra_ note 130, at 12-13.
corresponding to the compensation offer.269 The negotiation and compensation requirements in Nevada’s statute provide added protections to ensure that a government does not unjustly take the homes of working class residents.

6. Displacing Residents

In his dissenting opinion, Justice Thomas criticizes the majority in *Kelo* for inadequately considering the effects that takings have on displaced families.270 Justice Thomas suggests that governmental eminent domain powers should be more strictly construed in order to limit instances where families are forced to move.271 The legislation passed by several states echoes Justice Thomas’s viewpoint. For example, Nevada’s statutory amendments provide that a redevelopment plan may not be adopted unless it contains a relocation plan whereby displaced families receive comparable housing.272

Texas legislators worried that displaced families would not find comparable housing and that low-income residents would not receive fair compensation.273 Texas’s amended statute addresses these concerns by prohibiting takings solely for economic redevelopment purposes, unless to eliminate an existing affirmative harm on society from slum or blighted areas, thereby narrowing the instances in which a taking may occur.274 Texas’s statute sharply deviates from the majority’s position in *Kelo*; rather, it addresses Justice Thomas’s concern about people being unnecessarily forced to move for the economic benefit of a private entity.275 Texas legislators’ concern that owners would not receive fair compensation also mirrors Justice Thomas’s view.276 Justice Thomas’s dissent explains that fair market value is often inadequate to compensate families for the subjective value of their homes.277 By strictly limiting the circumstances in which private property may be taken, Texas’s statutory amendments aim to reduce the number of situations in which people may be inadequately compensated.

C. How Does State Eminent Domain Legislation Address Local Concerns?

*Kelo*’s explicit provision allowing state legislatures to restrict governmental takings has had the positive effect of enabling states to tailor eminent domain legislation to local needs. For example, Delaware legislators feared that, under *Kelo*, a

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271. Id.
272. NEV. REV. STAT. ANN. § 279.586(1)(e).
273. Id., supra note 167, at 185. See supra notes 165-73 and accompanying text for a discussion of the legislative history leading to Texas’s amended eminent domain statute, particularly regarding displacing families.
274. TEX. GOV’T CODE ANN. § 2206.001(b)(3) (Vernon 2005).
275. Id. § 2206.001(b); see also *Kelo*, 125 S. Ct. at 2686-87 (Thomas, J., dissenting) (explaining problematic consequences which likely will result from *Kelo’s* holding).
277. Id. at 2686.
government could take open farmlands for residential and commercial development. 278 Delaware addressed this concern in its amended statute, which focuses on assuring public use when property is taken for development purposes. 279 Therefore, the statute prevents a government from transferring farmlands to private developers.

On the contrary, Nevada legislators believed development was necessary to accommodate population growth. 280 Therefore, Nevada’s amended statute restricts when a government may take private property for “open-space use.” 281 The statutory amendments specifically address a recent incident in which powerful individuals persuaded a county to use eminent domain to take property from a residential developer. 282 As a result, Nevada’s statute mandates that a government may not take property for “open-space use” unless it provides both a description of each acre’s intended use and detailed reasons for needing each acre. 283 The government must also make a good faith effort to negotiate with the property owner and such negotiation attempts must occur once a month for two years. 284 Accordingly, Nevada’s amended statute encourages the state’s development goals.

D. What is the Future of Eminent Domain in the United States?

State statutes in response to Kelo will likely produce numerous positive consequences. Two significant positive consequences include decreased eminent domain litigation and increased tailoring of eminent domain statutes to address local concerns. The diverse state legislation, however, probably will have the negative consequence of weakening uniformity among states’ takings laws.

As states respond to Kelo’s invitation to enact statutes limiting eminent domain, each state will formulate more precise tests for determining when a taking is permissible. 285 Legislation with detailed standards will increase certainty regarding when a violation has occurred. 286 Such certainty should decrease the overall amount of eminent domain litigation. 287 With more precise tests, parties should more clearly understand the jurisdiction’s eminent domain law; therefore, fewer takings disputes should require adjudication by the courts.

Litigation is especially likely to decline if states follow the examples of the Utah and Nevada statutes, which provide detailed definitions of statutory terms such as

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278. See Redden, supra note 178 (summarizing concerns expressed by Delaware state senators).


280. Apr. 6 Minutes of the S. Comm. on Jud., supra note 130, at 12-13.


282. See supra notes 136-41 and accompanying text for a description of the Evans Creek incident.


284. Id.

285. See supra notes 204-23 and accompanying text for a discussion of how Kelo will encourage states to enact legislation outlining specific criteria necessary to constitute a permissible taking.

286. See Falls, supra note 13, at 373, 378 (discussing benefits of state legislatures enacting detailed statutes restricting eminent domain).

287. Id.
“economic development” and “blight.” For example, Utah’s statute mandates that an area may not be considered “blighted,” and therefore subject to eminent domain, unless four or more factors clearly demonstrate blight. Importantly, the Utah statute specifically enumerates the factors which indicate blight, and the statute explicitly regards this list as all-inclusive. Therefore, takings litigation in Utah should occur less often because both parties can consult the statute’s precise language to determine if the taking is permissible. On the contrary, states who fail to define statutory terms precisely may experience significant litigation regarding the interpretation of unclear words and phrases.

Furthermore, Kelo’s invitation to enact legislation will enable states to incorporate local concerns into eminent domain statutes. States will likely follow the examples of Utah, Delaware, and Nevada in tailoring legislation to state-specific problems and needs. States’ abilities to target local concerns likely will result in statutes that create an adequate balance between property owners’ desire for security and governments’ need to accomplish some public goals using eminent domain. Therefore, state-specific statutes will likely provide more appropriate guidelines than if Kelo had adopted a nationally applicable, bright-line rule.

Despite the positive effects of Kelo’s inducement that states pass statutes limiting eminent domain powers, there may also be negative consequences. States will enact grossly divergent legislation, stemming from distinct national and local concerns, leading to a lack of uniformity in takings laws among the states. Indeed, the statutes promulgated in Utah, Nevada, Alabama, Texas, and Delaware demonstrate backlash against different aspects of the Kelo majority’s opinion. Moreover, the statutes that have already been enacted focus on different local concerns. As states enact diverse legislation, the lack of uniformity among states’ eminent domain laws will increase. This lack of uniformity is problematic because the security of private property ownership will vary significantly between states. Indeed, it seems counterintuitive and perhaps a violation of horizontal equity that the parameters of an important right, such as property ownership, may deviate greatly across state lines. Both Berman and

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288. See supra notes 111 and 118 for the text of Utah and Nevada’s statutory provisions precisely defining “blight.”
290. Id.
291. See supra Part III.C for a discussion of how Utah, Delaware, and Nevada enacted eminent domain statutes addressing local concerns.
292. Id.
293. See Gallagher, supra note 9, at 1867 (explaining that state legislatures are best places to determine appropriate scope of eminent domain).
294. Id.
295. See supra Part III.B for a discussion of how states enacted legislation addressing different issues raised in Kelo.
296. See supra Part III.B for a discussion of the statutes of Utah, Nevada, Texas and Delaware.
297. See supra Part III.C for a discussion of how statutes incorporated state-specific concerns.
298. See Falls, supra note 13, at 374 (arguing that property ownership is fundamental right, the scope of which should be decided at national level, rather than varying among states).
299. Id.
Midkiff explicitly noted, however, that determinations regarding the scope of eminent domain fall squarely within a state legislature’s exercise of its police power, and therefore, it is not improper for the extent of property owners’ security to vary between states. Furthermore, property law has traditionally been state driven, relying primarily on each state legislature’s decisions and discretion.

As states have just begun to amend eminent domain statutes in response to Kelo, it is currently unclear what legislative scheme will most effectively balance the governmental interest in redevelopment with individuals’ private property ownership rights. The next decade will resemble an eminent domain experiment as each state tests the method it thinks best to serve its own needs. Successful legislation not only will balance individual rights, but also will be administrable and tailored to local needs. As Kelo was a close decision, barely claiming a five justice majority, changes in the Court’s composition could result in decisions which refine or alter Kelo. Regardless, the proper scope of eminent domain will continue to be debated in legislatures throughout the country.

300. See supra note 30 for a definition of “police power.”
302. See Hulsebosch, supra note 89, at 716 (noting that property law is creation of state legislation).
303. See Institute for Justice, supra note 97, paras. 5, 12 (explaining that nearly half the states and Congress have introduced legislation limiting eminent domain in various ways); Lambro, supra note 146 (discussing different ways in which states are considering changing their eminent domain laws).
304. See Gallagher, supra note 9, at 1867 (arguing that effective state legislation will adhere to constituents’ concerns and balance needs of government and landowners).
305. See Institute for Justice, supra note 97, paras. 5, 12 (noting that new eminent domain legislation has been introduced in approximately half the states and Congress); Lambro, supra note 146 (noting that Congress and over half the states have begun considering changes in takings laws).
IV. CONCLUSION

At first glance, *Kelo v. City of New London*\(^{306}\) appears to dramatically expand the circumstances in which a government may exercise eminent domain.\(^{307}\) Closer analysis, however, reveals that the Supreme Court had previously upheld takings involving the transfer of nonblighted land to private parties.\(^{308}\) Moreover, *Kelo’s* refusal to categorically invalidate economic development takings is encouraging legislatures to enact statutes targeting state-specific concerns.\(^{309}\) Accordingly, states are protecting property owners by passing detailed legislation restricting governmental takings.\(^{310}\) Nearly half the states have introduced eminent domain statutes seeking to narrow the situations where a government may take private property for economic development purposes.\(^{311}\) Although *Kelo* allows a government to broadly exercise eminent domain, state laws overwhelmingly are limiting *Kelo’s* scope and application. Therefore, the years following *Kelo* likely will be characterized by increasing legal protections for property owners. In any event, it is unlikely that *Kelo* will result in the abusive government takings its critics suggest are inevitable.

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\(^{306}\) 125 S. Ct. 2655 (2005).

\(^{307}\) See *supra* Part II.D for a discussion of *Kelo’s* holding.

\(^{308}\) See *supra* Part III.A for a discussion of *Kelo’s* relationship to the *Berman* and *Midkiff* precedents.

\(^{309}\) See *supra* Part III.C for a discussion of how legislation addresses state and local issues.

\(^{310}\) See *supra* Part II.E for a discussion of state statutes restricting governmental takings.

\(^{311}\) See *supra* Part II.E for a discussion of statutes narrowing the use of eminent domain.

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