The Legislative Aftershocks of *Kelo*: State Legislative Response to the New Use of Eminent Domain

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THE LEGISLATIVE AFTERSHOCKS OF *KELO*: STATE LEGISLATIVE RESPONSE TO THE NEW USE OF EMINENT DOMAIN

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I. INTRODUCTION

On June 23rd, 2005, an earthquake shook the nation when the Supreme Court handed down its decision in *Kelo v. City of New London.*[2] In *Kelo*, the Court expanded the acceptable uses of eminent domain by allowing a city to take property for economic development purposes.[3] This groundbreaking event started several years before that with a severe decline in New London's economy and the passage of a state statute explicitly approving an expanded public use

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2. Kelo v. New London, 545 U.S. 469 (2005).
3. *Id.* at 489-90.

definition.[4] Nevertheless, the case would not have made it to the Supreme Court had several residents not stubbornly resisted the city's attempt to take their homes and property.[5]

The purpose of this note is to examine the legislative aftershocks of the Supreme Court's expansion of eminent domain. Part II will begin by discussing how the language of the Connecticut statute explicitly laid the groundwork for the upcoming earthquake. Specifically, the statute deals with public use in the form of economic development outside of, or in addition to, blighted areas.[6] Part II attempts to accurately frame the issues, including all relevant case facts and doctrinal factors involved in the Court's decision. Additionally, this portion will discuss the precise language the Supreme Court used in justifying its decision, and the potential precedential value of that language.[7]

Part III examines the post-*Kelo* wave of legislation from state sources. Since the late June 2005 decision, numerous bills have been proposed and passed across the nation.[8] States have proposed legislation ranging from establishing commissions to investigate new eminent domain consequences, to proposing constitutional amendments to prevent economic development from qualifying as a "public use."[9]

Taking together the language of the decision and the breadth of proposed bills, Part IV examines the particular language of many of the state statutes. Comparisons are drawn between urban and rural states. Language from various statutes indicates different motivating factors for state legislators in urban and rural states.[10] A survey of proposed statutes reveals rural states are more likely to propose conservative measures, while urban states are more likely to generate

4. *Id.* at 473; *See* CONN. GEN. STAT. § 8-186 (2007).

5. *Kelo*, 545 U.S. at 475.

6. CONN. GEN. STAT. § 8-186.

7. *See generally Kelo*, 545 U.S. 469 (discussing throughout language that will be important in future cases).

8. *See* Tresa Bladas, *States Ride Post-'Kelo' Wave of Legislation,* NAT'L L. J., Aug. 2, 2005, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1122899714395 [hereinafter Bladas]; *see also* Nat'l Conference of State Legislatures, *Eminent Domain: 2006 State Legislation*, http://www.ncsl.org/programs/natres/emindomainleg06.htm [hereinafter N.C.S.L.] (stating that as of May 2007, twenty-eight states have enacted legislation, and forty-four states have considered bills).

9. *See* Bladas, *supra* note 8; *see also* Kevin E. McCarthy, *Post*-Kelo *Eminent Domain Legislation in Other States,* OLR RES. REP., Sept. 6, 2005, http://www.cga.ct.gov/2005/rpt/2005-R-0662.htm [hereinafter McCarthy]; N.C.S.L, *supra* note 8.

10. *See generally* McCarthy, *supra* note 9 (comparing proposed bills of Alabama, California and other states in Table 1).

liberal provisions.[11] The ultimate conclusion of the article is that after all the aftershocks are over, there will be numerous versions of an individual's Fifth Amendment rights and numerous versions of what will constitute "public use" under the government's eminent domain powers.

II. THE GROUND WORK & THE EARTHQUAKE

A. *The Connecticut Statute*

On July 6th, 1967, the Connecticut legislature passed two statutes that would rock the face of America some thirty-eight years later.[12] The first statute declares that the "economic welfare of the state depends upon the continued growth of industry and business within the state."[13] Due to this dependence, the statute further allows a distressed municipality to assist in the development of local business and declares these efforts to be public uses or purposes.[14]

> [A city's] acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and . . . improv[ing] or demolish[ing] vacated commercial plants for industrial and business purposes and, *in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.*[15]

While section 8-186 laid the groundwork for giving distressed municipalities help through funding and declarations of public interest, it is section 8-193 that explicitly discusses the use of eminent domain.[16] Section 8-186, however, importantly made the "legislative determination" that assisting the distressed municipalities in rebuilding their industry and business was of "public interest."[17] This legislative determination was later upheld by the Connecticut Supreme

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11. *See* S.B. 76, 1st Spec. Sess. (Ala. 2005); S.B. 81, 1st Spec. Sess. (Ala. 2005); S.B. 5936, 228th Leg., Reg. Sess. (N.Y. 2005).
12. *See* 1967 Conn. Pub. Acts page no. 760, §§ 1, 8 (codified as amended at CONN. GEN. STAT. §§ 8-186, 8-193 (2007)).
13. CONN. GEN. STAT. § 8-186 (2007).
14. *Id.*
15. *Id.* (emphasis added).
16. CONN. GEN. STAT. § 8-193.
17. CONN. GEN. STAT. § 8-186.

Court.[18] The Connecticut Supreme Court further held that this "public interest" equals the important constitutional language of "public use."[19]

Section 8-193 expands section 8-186 by discussing the establishment of a re-development agency that would have authority to "purchase, lease, exchange or gift with the acquisition or rental of real property within the project area and real property and interests therein for rights-of-way and other easement to and from the project area."[20] Limitations are placed on the redevelopment agency by requiring approval of the local legislative body, such as a city council.[21] After receiving such approval, the agency may use the city's eminent domain powers and further transfer the property as they see fit within the bounds of the development plan.[22]

> The development agency may, with the approval of the legislative body and, of the commissioner . . . and in the name of [the] municipality, transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property in the project area to any person, in accordance with the project plan and such disposition plan as may have been determined by the commissioner.[23]

Other than the required general approval by the legislative body and the commissioner, there are no explicit limitations stated in the statute.[24] An implicit limitation deals with the development agency having necessary powers, such as eminent domain, as they are carrying out the development plans.[25] This language implicitly limits the re-development agency's authority in carrying out the development plans and projects.[26] Overall, this statute laid the foundation for the future events that would take place in New London because it gave the city the ability to use eminent domain solely for the purpose of economic development.

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18. *See* Kelo v. New London, 843 A.2d 500, 531 (Conn. 2004), *aff'd,* 545 U.S. 469 (2005).

19. *See id.* at 520 (holding that "economic development projects . . . that have public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use" doctrine).

20. CONN. GEN. STAT. § 8-193.

21. *Id.*

22. *Id.*

23. CONN. GEN. STAT. § 8-193(a).

24. *See id.*

25. *See id.*

26. *Id* at § 8-193(b).

B. *The Supreme Court's "Public Use" Precedent*

The Court's interpretation of the "public use" doctrine has progressed over the country's history from a literal reading to a more broad construction.[27] A literal reading is best exemplified by a test applied by some mid-19th century state courts.[28] The test determined that "use[] by the public" was the proper definition of "public use."[29] However, this interpretation changed only twenty years later in *Fallbrook Irrigation Dist. v. Bradley* when the Supreme Court held a broader and more natural interpretation of public use, stating a "public purpose" analysis was now appropriate.[30] The Court has continued to apply the broad test of "public purpose" since the late 19th century.[31]

Other important Supreme Court precedent discusses the application of the "public purpose" test. Specifically, the Court held this test was satisfied in *Berman v. Parker* for clearing out blighted areas of cities and towns.[32] In *Berman,* the Court determined that a redevelopment plan targeting a blighted area in Washington D.C. was sufficient to meet the public purpose test.[33] While the majority of this land was to be "devoted to such public purposes as streets, utilities, recreational facilities, and schools" the remainder of the land was to be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.[34] *Berman* is also an important precedent because the Court refused to look at the purpose of every parcel of land and instead looked at the overall public purpose of the urban renewal plan.[35]

The next influential eminent domain case is *Hawaii Housing Auth. v. Midkiff.*[36] This precedent is especially significant because it is one of the clearest examples of direct transfer of condemned property from one private party to another.[37] Despite the obvious nature of this taking, the Court rejected the Ninth Circuit's view that it was a "naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit."[38] This precedent is foundational because it reveals the Court's test for de-

27. *See, e.g.,* Kelo v. New London, 545 U.S. 469, 480 (2005) (discussing progression of the public use doctrine).
28. *See, e.g.,* Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 410 (1876).
29. *Id.*
30. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896).
31. *Kelo*, 545 U.S. at 479-80.
32. *See* Berman v. Parker, 348 U.S. 26 (1954).
33. *Id.* at 31-32.
34. *Id.* at 30.
35. *Id.* at 34.
36. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
37. *Id.* at 235.
38. Kelo, 545 U.S. at 481-82 (quoting Midkiff, 467 U.S. at 235).

termining if a taking is public in nature.[39] The Court stated "it is only the taking's purpose, and not its mechanics" that matter in determining public use.[40] Overall, it was the important precedents of *Fallbrook, Berman,* and *Midkiff* that positioned the Court to determine the legal questions in *Kelo.* In *Kelo,* the petitioners asked the Court to determine whether "a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[41]

C. *The Language of* Kelo *and Its Future Precedental Value*

After a hundred years of progressively expanding the use of eminent domain, the Supreme Court granted certiorari on a case that asked them to decide if using eminent domain for sheer economic revitalization was constitutional when the area involved was in no way blighted.[42] Before looking at the Court's decision, it is helpful to examine the underlying facts of the case.

"Decades of economic decline led a state agency in 1990 to designate the City [of New London, Connecticut] a distressed municipality."[43] Due to its economic condition, state and local officials began targeting New London, particularly the Fort Trumball area of the city, for economic revitalization.[44] In 1998, New London Development Corporation (NLDC) was reactivated, and it approved a plan to create Fort Trumball State Park.[45] Within a month, Pfizer, Inc. announced it would build a new research facility in the Fort Trumball area.[46] Subsequently, NLDC adopted a redevelopment plan to coincide with the new Pfizer plan.[47] With approval to execute the plan from state and city officials, condemnation proceedings were initiated in November of 2000.[48]

Nine petitioners owning fifteen properties resisted the City's attempts to take their homes.[49] The petitioners objected to the uses or the purposes of two of the eight parcels.[50] The breakdown of the parcels is as follows: Parcel 1 is for a conference hotel and a small urban village; Parcel 2 is for new residences and a

39. Midkiff, 467 U.S. at 244.
40. *Id.*
41. Kelo, 545 U.S. at 477.
42. *See* Kelo, 545 U.S. 469.
43. *Id.* at 473.
44. *Id.*
45. *Id.*
46. *Id.* at 474.
47. *Id.*
48. *Id.* at 475.
49. *Id.*
50. *Id.* at 475-76.

U.S. Coast Guard Museum; Parcel 3 is for research and development office space; Parcel 4A is for state park or marina support; Parcel 4B is for a marina and a river-walk; "Parcels 5, 6, and 7 will provide land for office and retail space, parking and water-dependent commercial uses."[51] Petitioners' land was located on Parcels 3 and 4A in the redevelopment plan.[52] There is no claim that any of the petitioners' properties were blighted in any way.[53]

Petitioners filed suit in the New London Superior Court in December of 2000 claiming a violation of the Fifth Amendment "public use" restriction.[54] The trial court issued a permanent restraining order against taking property in Parcel 4A (park support), but denied the claims for Parcel 3 (office space).[55] Both parties appealed to the Supreme Court of Connecticut.[56] The Connecticut Supreme Court upheld the state statute allowing economic revitalization takings;[57] however, the state supreme court overturned the lower court in part and held that takings in both parcels were not constitutional violations.[58] Three judges dissented from the state supreme court's decision.[59] Petitioners then appealed to the United States Supreme Court.[60]

In making its decision, the U.S. Supreme Court considered several separate but interrelated issues. The issues involved in the Court's analysis include the liberal definition of public use, its traditional deference to legislative decisions, the thoroughness and comprehensiveness of the New London development plan, and the limitedness of their judicial review.[61]

The first important issue the Court touched upon in the decision was the fact that New London's takings would be "executed pursuant to a carefully considered development plan."[62] The thoroughness of the plan is supported by the trial judge and the Supreme Court of Connecticut finding no evidence of an illegitimate purpose in the proposal.[63] Because no illegitimate purpose exists in this

51. *Id.* at 474.
52. *Id.* at 475.
53. *Id.*
54. *Id.*
55. *Id.* at 475-76.
56. *Id.* at 476.
57. *Id.*
58. *Id.* at 477.
59. *Id.*
60. *Id.*
61. *See generally id.* (citing factors discussed by the Court throughout the entire opinion and the conclusion).
62. *Id.* at 478.
63. *Id.*

plan, the public purpose served by the taking cannot be considered merely a pretext for the actual purpose of bestowing a private benefit on a private party.[64]

The Court next discusses the history and continued expansion of the term "public use."[65] Public use was initially defined as property being taken to be "used by the public."[66] However, since 1896, the court has repeatedly and consistently rejected the narrower definition of public use.[67] While the Court discussing the history of "public use" is not in itself precedential, it provides important background for the substantial deference that the Court gives to the legislature.

In several of its most important eminent domain cases, the Court has defined public purpose broadly to reflect its long standing policy of deference to legislative judgment.[68] Local governments often use this judgment to decide what public needs would justify the use of the takings power.[69] Importantly, the Court reaffirmed its rejection that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking.[70] The Court looked further into its history and noted that their "earliest cases in particular embodied a strong theme of federalism, emphasizing the great respect that we owe to state legislatures and state courts in discerning local public needs."[71]

In the spirit of legislative deference, the Court refused to look at the specific purpose of any one parcel.[72] Instead the Court followed *Berman* which stated, "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building."[73] Despite their decision not to piece-meal the analysis, the Court does focus on specific parcels when it bolsters its position that this is not a strict transfer of private property to a private owner.[74] The Court specifically discusses the fact that many private party beneficiaries are unknown, and therefore the plan cannot be targeted to benefit a

64. *Id.* at 477-78 (stating the general rule that the Court would not allow a city to take "petitioner's land for the purpose of conferring a private benefit on a particular private party").

65. *Id.* at 477.

66. *Id.* at 479.

67. *See, e.g., id.* at 480 n.10 (Footnote ten lists several cases upholding the expanded public use definition.).

68. *See id.* at 480-83 (discussing Berman, 348 U.S. 26; Midkiff, 467 US. 229; Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

69. *Id.*

70. *See id.* at 481-82 (citing Midkiff, 467 U.S. 229).

71. *Id.* at 482 (citing Hairston v. Danville & Western R.R. Co., 208 U.S. 598, 606-07 (1908)).

72. *Id.* at 484.

73. *Id.* at 481 (citing Berman, 248 U.S. at 35).

74. *Id.* at 478 n.6.

select class of people.[75] The Court appears to be addressing the concerns of those who fear this is a strict transfer from one private party to another, while still maintaining that this is not a factor to be considered in this case. To support their official decision not to piecemeal the analysis, the Court briefly mentions they have a limited scope of review in this area.[76]

The Court finds more support for legislative deference when examining the comprehensiveness of the plan.[77] The Court considered that the City was trying to "coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts."[78] Because of the various land uses the City is trying to coordinate, the Court noted it is appropriate to defer to the specific nature of the plan and the thorough deliberation that preceded its adoption.[79] Coupling the comprehensiveness of the deliberation and the redevelopment plan with the limited scope of review in this case, the Court again found it was appropriate to defer to the local government's legislative decision.[80]

To implement the redevelopment plan, New London chose to invoke a Connecticut statute that specifically authorized the use of eminent domain to promote economic development.[81] The combination of Connecticut Code sections 8-186 and 8-193, allow distressed municipalities to form redevelopment agencies and implement plans to assist their local economies by promoting economic rejuvenation.[82] While the Court does not explicitly discuss the constitutionality of the Connecticut statute, it does find that New London's plan "unquestionably serves a public purpose, [and therefore] the takings challenged here satisfy the public use requirement of the Fifth Amendment."[83]

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75. *See id.* (the Court stated: "[t]he record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant . . . tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront. And while the City intends to transfer certain of the parcels to a private developer in a long-term lease – which developer, in turn, is expected to lease the office space and so forth to other private tenant – the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A's* property to benefit the private interests of *B* when the identity of *B* was unknown." Kelo, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part) (internal quotations omitted)).

76. *Id.* at 484.

77. *See id.* at 483-84.

78. *Id.* at 483.

79. *Id.* at 484.

80. *See id.* at 483-84.

81. *Id.*

82. CONN. GEN. STAT. § 8-186, § 8-193 (2007).

83. Kelo, 545 U.S. at 484.

The Court based its conclusion largely on the fact that "[p]romoting economic development is a traditional and long accepted function of government."[84] Relying on its precedent and its traditional deference to legislatures in this area, the Court stated "[t]here is, moreover, no principled way of distinguishing economic development from . . . other public purposes . . . we have recognized."[85] Particularly relevant to the Court's decision about public purposes in *Kelo* is the Court's holding in *Berman*.[86] In this 1954 case, the Court first recognized removing urban blight as legitimate public use or public purpose.[87] The Court, in footnote thirteen of the *Kelo* decision, thoroughly discusses the natural extension between *Berman* and the present case.[88] The Court stated "[t]he public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future."[89] Specific to the case at hand, the Court extended the doctrine by saying that "[i]t is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight."[90]

Additionally, the Court relied on *Berman* to support its continual deference to legislative determinations.[91]

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[92]

This language is crucial to the Court's decision in *Kelo* because it laid the groundwork for going beyond the mere removal of blighted areas for purposes of sanitation.[93] Moreover, it allowed Congress, or a local legislative body, to determine if they desired to simply remove blight or to replace it with an aesthet-

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84. *Id.*
85. *Id.*
86. *See id.* at 486 (discussing Berman as important precedent for its current decision).
87. *See generally* Berman, 348 U.S. 26 (discussing the precedential value of the Court's holding).
88. *See* Kelo, 545 U.S. at 485 n.13.
89. *Id.* (emphasis added).
90. *Id.*
91. *Id.* at 481 (discussing the Court's prior decisions to allow Congress and its authorized agencies to make determinations that take into account a wide array of community values. Specifically, the Court deferred to legislative decision by stating it was "not for [the Court] to reappraise them [the value decisions].").
92. *Id.* (citing Berman, 348 U.S. at 33).
93. *See generally id.* (discussing the Court's reliance on *Berman* and it's expansion of the *Berman* holding).

ically pleasing area.[94] On its face, this choice appears to be similar to an election with one candidate because there is only one feasible choice for the legislators. The obvious choice in this situation is to make the area more aesthetically pleasing, thereby making a very visible demonstration of the legislators' accomplishments while in office. Despite this obvious choice, the Court deems legislative decisions such as the Connecticut statutes as reasonable and well thought out.[95]

Therefore, the Court used *Berman* to expand the public use doctrine by finding that legislative deference is appropriate even when they are going beyond mere removal of blight.[96] In support of this extension of the public use doctrine, the *Kelo* Court reaffirmed the precedent of *Ruckelshaus v. Monsanto Co.* by stating "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government. . . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[97] The same theme of legislative deference is also affirmed in another important case, *Hawaii Housing Auth. v. Midkiff*.[98]

In addition to all of the important precedential language that the Court adopted, it specifically rejected other equally important verbiage. Most obviously, the Court outright refused to adopt a new bright-line rule that economic development does not qualify as public use.[99] The Court also rejected the alternative suggested by the petitioners that for takings of this kind, courts should require a "reasonable certainty that the expected public benefits will actually accrue."[100] The Court's rejection of this "reasonable certainty" test is based largely on the fact that the standard would directly upset the Court's traditional legislative deference.[101] The *Kelo* Court held that an enhanced standard of review would be detrimental in eminent domain cases because "[o]rderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all parties be established before new construction can be commenced."[102] Furthermore, "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."[103]

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94. *Id.* at 485 n.13.
95. *Id.* at 481.
96. *See id.* at 485 n.13 (*see generally* footnote thirteen and its discussion of *Berman*).
97. *Id.* at 486 (citing Berman, 348 U.S. at 33-34).
98. Midkiff, 467 U.S. at 244.
99. Kelo, 545 U.S. at 486-87.
100. *Id.* at 487.
101. *See id.* at 487-88.
102. *Id.* at 488.
103. *Id.*

In rejection of both the bright line rule and the heightened standard of review, the Court refused to consider a hypothetical where a city was "transferring citizen *A's* property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes."[104] The Court rejected this hypothetical because it was not the facts directly presented by the petitioners.[105] Despite their refusal to consider this hypothetical, the Court commented that "such an *unusual* exercise of government power would certainly raise a suspicion that a private purpose was afoot."[106]

The last important language discussed in the majority's opinion is that "nothing in our opinion precludes any State from placing further restricting on its exercise of the takings power."[107] In further discussion, the Court refers to its decision, its precedent, and the Constitution as a federal baseline that may be built upon by State statutes and State constitutional amendments.[108] The majority points out in explicit language in the last few paragraphs of the decision that states can further restrict and narrow the use of eminent domain in their jurisdictions.[109]

Important language can also be found in Justice O'Connor's dissent. Opponents of the majority's decision will likely use Justice O'Connor's words to support overturning the decision. In her dissent, Justice O'Connor purports a theory that government may only transfer property to a private party when the property is inflicting an "affirmative harm on society."[110] O'Connor discusses many of the same values and precedential cases upon which the majority focuses.[111] When reviewing the *Berman* and *Midkiff* decisions, she importantly points out that "[i]n both cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society – in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."[112]

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104. *Id.* at 486-87.

105. *Id.* at 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.").

106. *Id.* (emphasis added).

107. *Id.* at 489.

108. *See id.* (citing CAL. HEALTH & SAFETY CODE §§ 33030-33037 (West 1999), which prohibits a city from taking land for economic development purposes that is not in blighted areas).

109. *See id.*

110. *Id.* at 500 (O'Connor, J., dissenting).

111. *See generally* Kelo, 545 U.S. at 494-505 (O'Connor, J., dissenting) (citing the fact that the dissent focuses on many of the same cases and factors, but comes to a completely different conclusion).

112. *Id.* at 500 (citing Berman v. Parker, 348 U.S. at 28-29 and Hawaii Hous. Auth. v. Midkiff, 467 U.S. at 232).

> And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harm . . . was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.[113]

Based on this precedent, O'Connor disagrees with the majority's extension of the public use doctrine to include the ownership or condition of property that is not affirmatively causing societal harm.[114] She goes on to suggest that the majority holding means that any private land owner is subject to a taking as long as there are some incidental or secondary public benefits to be gained by transferring the land to another private party.[115] In contradiction to the majority's holding, O'Connor suggests that an appropriate public use in non-public facility cases would be to take only the land that demands demolition of the current structures to eliminate the societal harm.[116] As an example of her definition of a valid public use, O'Connor cites the blighted neighborhood in *Berman* where 64.3 percent of the buildings were beyond repair.[117] In this example, O'Connor finds a legitimate public purpose in eliminating the health and safety concerns that were caused by the deteriorating neighborhood.[118]

In response to her "harmful property use" standard, the majority discussed this theory in one of its footnotes.[119] In its discussion, the majority attempts to discredit O'Connor's reading of *Berman* and *Midkiff*.[120] Specifically, the Court stated "[i]n each [important precedential] case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken."[121] The Court revealed its attempt to sidestep O'Connor's arguments when it disclosed its focus while examining precedent.[122] "By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause."[123] The Court fails to discuss how focusing on the future justifies taking of a non-public facility's property that is neither blighted, nor causing any affirmative societal harm.[124] The majority con-

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113. *Id.* (citing Berman, 348 U.S. at 28-29, and Midkiff, 467 U.S. at 232).
114. *See id.* at 501.
115. *See id.*
116. *See id.* at 500.
117. *Id.* at 498 (citing Berman, 348 U.S. at 30).
118. *Id.* at 498-99.
119. *Id.* at 486 n.16 (majority opinion).
120. *See id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *See id.* (noting the lack of specifics in the Court's argument that the focus should be on the *future* use, instead of on the *current* use of the condemned property. This discussion does not deal with the category of takings that involves public facilities, parks, or highways.).

cludes its criticism of the O'Connor argument by stating that the narrower standard confuses "the *purpose* of a taking with its *mechanics,*" a mistake the Court had warned of before.[125]

While the Court took the time and space in its decision to respond to O'Connor's opinion, it did not concretely address the specifics of the dissent.[126] For instance, the Court fails to discuss why in non-public facility takings it focuses on the future use of the land rather than the current use.[127] This focus appears to go against the Court's important non-public facility takings precedent.

In its discussion of *Berman*, the Court focused on the fact that the whole neighborhood was *currently* blighted.[128] Additionally, the Court looked at the comprehensive plan to both eliminate blight and beautify this portion of the city.[129] In *Berman*, the beautification of the city and transfer to private parties was a secondary benefit when compared with eliminating an area that was causing danger to both public safety and health.[130]

Midkiff is another example where the Court focused on the *current* harm of the property to the public.[131] In that case, the Court attempted to break up a current land oligopoly by taking the property from the lessors and transferring it to the lessees.[132] While this taking had an incidental future benefit to the lessees, the main purpose of the taking was to prevent "skewing [of] the State's residential fee simple market, inflating land prices, and injuring [of] the public tranquility and welfare."[133]

Despite this precedent, the majority believes that focusing on the property's *future* use in non-public facility cases is appropriate.[134] Justice O'Connor takes issue with this expansion when she pointedly states there is no social harm claimed in this case.[135] O'Connor concludes based on the past precedent of focusing on the *current* harm, as well as the requirement that affirmative social harm must result from the current state of the property, the taking in this case cannot be justified.[136] O'Connor finds little credibility in the majority's argument that the public use standard is satisfied when there is some public aspect to the

125. *Id.* (citing its decision in Midkiff, 467 U.S. at 244).
126. *See generally id.* (noting lack of discussion of specifics in footnote sixteen).
127. *See id.*
128. *Id.* at 480 (citing Berman, 348 U.S. 26).
129. *Id.*
130. *Id.*
131. *Id.* at 481-82 (citing Midkiff, 467 U.S. 229) (emphasis added).
132. *Id.* at 499 (O'Connor, J., dissenting) (citing Midkiff, 467 U.S. at 232).
133. *Id.*
134. *Id.* at 486 n.16.
135. *Id.* at 500 (O'Connor, J., dissenting).
136. *See id* at 500-01 (emphasis added).

whole plan, even though certain parcels are directly transferred between private parties.[137]

In addition to her argument that social harm is required, O'Connor argues that legislative deference should be limited.[138] Specifically, O'Connor contends it is wholly inappropriate for the elected legislature to be the only body deciding what constitutes a public or private benefit.[139]

> But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.[140]

Due to a higher standard of social harm, the limited legislative deference, and the need for public use to be a direct benefit of the takings, Justice O'Connor concludes that the Public Use Doctrine was not satisfied in this case.[141]

III. THE POST-*KELO* LEGISLATION WAVE

A. *Constitutional Amendments v. State Statutes*

After the Court released the *Kelo* decision on June 23rd, 2005, numerous states proposed a flurry of bills, and over half the states passed legislation in response.[142] These bills range in their purpose and language, but the vast majority ban state or local government from using eminent domain for economic development purposes.[143] While the majority of the bills have a common theme of restricting eminent domain procedures, the bills and enacted laws take a variety of forms, from constitutional amendments, to short-term moratoriums, to legislative studies.[144]

Although the main debate among the states centers on what constitutes the most effective language for a proposed act, there is also contentious debate

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137. *See id.* at 501.

138. *Id.* at 497.

139. *Id.* (citing Cincinnati v. Vester, 281 US. 439, 446 (1930)).

140. *Id.*

141. *See id.* at 505.

142. *See* Bladas, *supra* note 8 (stating that from late June to early August 2005, twenty-eight states proposed over seventy bills); *see also* N.C.S.L., *supra* note 8 (stating that as of May 2007, twenty-eight states have enacted legislation, and forty-four states have considered bills).

143. *See generally* McCarthy, *supra* note 9 (discussing numerous bills from several states).

144. *See generally id.*; Bladas, *supra* note 8 (discussing drafts of constitutional amendments and proposed state statutes); *see also* N.C.S.L., *supra* note 8.

about what the proper form of the bill should be.[145] Several states' representatives and senators have rallied behind the idea of constitutional amendments.[146] A few state legislatures have successfully passed constitutional amendments that are now subject to voter approval.[147] In addition to the support constitutional amendments are receiving from state legislators, some private citizens are taking it upon themselves to campaign for their adoption.[148] Jeremy Hopkins, an attorney from Virginia, succinctly summarized the rationale behind a constitutional amendment over a proposed bill:

> Legislation falls short of providing permanent protection for property owners for three reasons. First, what the [Virginia] General Assembly ("Assembly") gives today, it can easily take away tomorrow. Second, the Assembly's prior record proves it cannot be trusted to protect property owners. Third, with regard to eminent domain, Virginia's Constitution presently allows the Assembly to define the limits of its own power. A constitutional amendment provides enduring protection because, unlike legislation, which the Assembly can easily change, the Assembly cannot change a constitutional amendment without the people's consent. Only a majority of the voters can change protections placed in Virginia's Constitution.[149]

While part of Hopkins' argument is specific to Virginia's legislative history, he outlines a common fear that a state statute can be continuously restricted until it is effectively meaningless.[150] Dana Berliner from the Institute for Justice seconds the conclusion that a constitutional amendment is the most effective way to nullify the *Kelo* decision: [151]

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145. *See, e.g.,* Jeremy P. Hopkins, *Virginia's Response to Kelo: Constitutional Amendment or Legislation?*, VIRGINIA VIEWPOINT, Sept. 2005, http://www.virginiainstitute.org/viewpoint/2005_09_6.html [hereinafter *Hopkins*]. *See also,* Bladas, *supra* note 8.

146. *See* McCarthy, *supra* note 9 (stating that several states have proposed constitutional amendments in their state legislatures); Bladas, *supra* note 8 (discussing specific senators who were circulating proposed constitutional amendments from states such as Ohio).

147. H.J. Res. 1569, 2006 Sess. (Fla. 2006); H.R. 1306, 2005-06 Legis. Sess. (Ga. 2006); S.B. 1, 2006 Legis., Reg. Sess. (La. 2006); H.B. 707, 2006 Legis., Reg. Sess. (La. 2006); C.A.C.R. 30, 2006 Legis., Reg. Sess. (N.H. 2006); S.B. 1031, 116th Legis., Reg. Sess. (S.C. 2006). *See also* N.C.S.L., *supra* note 8.

148. *See* Hopkins, *supra* note 145; Bladas, *supra* note 8.

149. Hopkins, *supra* note 145.

150. *See generally id.*; *see also* Bladas, *supra* note 8 (quoting Alan Ackerman, a Michigan attorney, who stated "[l]egislation will never be given full force in effect. It will be cut at and chipped away at. . . . There is such pressure by the large institutions that over a period of time they somehow move courts toward a reading or an analysis that is very limiting for the property owner.").

151. Bladas, *supra* note 8.

> [She] asserts that states must be vigilant in their efforts to reform eminent domain laws. "There are going to be states that just can't bear to give up the power and try to use cosmetic changes instead of actually doing anything,". . . . While Berliner encourages legislators to draft bills that spell out exactly what eminent domain can and cannot be used for, she said a constitutional amendment is probably the most effective measure. Berliner said, "legislators tend to get swayed by a particularly enticing project" and could eventually change the law. A constitutional amendment is more binding.[152]

Despite the arguments in favor of a constitutional amendment, many states continue to believe legislation will be more effective, thinking that it is significantly easier to pass legislation than ratify a constitutional amendment.[153] While legislators are not explicitly making arguments that a state statute is more effective than a constitutional amendment, the sheer number of bills being proposed and enacted support an implication that statutes are sufficiently effective in nullifying *Kelo*.

B. *The Language Debate: Conservative, Moderate, or Liberal?*

Even though there is debate about the proper form of legislation, the language of some constitutional amendments mirrors the language proposed in acts and statutes.[154] Some of these similarities come from proposed acts and proposed constitutional amendments within the same state, while some amendments mirror bills from completely different states.[155] The common theme among the proposed bills appears to be limiting government's ability to use eminent domain for the primary purpose of economic development.[156] Despite this similar goal, there are substantial differences in the language and motivations of the bills and statutes proposed limiting *Kelo*.[157]

A comparison of the substantive language of some of the proposed statutes is helpful in examining common ideas and differences as well as determin-

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152. *Id.* (quoting Dana Berliner from the Institute for Justice).

153. *See* Hopkins, *supra* note 145 (stating that "[o]nly a majority of voters can change [add or subtract] protections placed in [the] Virginia[] Constitution," whereas standard legislation can be added or eliminated at anytime by the Virginia General Assembly).

154. *See generally* McCarthy, *supra* note 9 (discussing numerous bills from several states).

155. *Compare* H.J. Res. 11, 79th Leg., 2d Spec. Sess. (Tex. 2005), *with* H.B. 15, 79th Leg., 2d Spec. Sess. (Tex. 2005), *and* S.B. 91, 2005 Leg., 1st Spec. Sess. (Ala. 2005), *with* H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005).

156. *See* McCarthy, *supra* note 9.

157. *Id.*

ing the potential success of those acts.[158] Categorization of these proposed and enacted statutes is also helpful in observing the political and cultural forces at work.[159] For purposes of this comparison, the statutes and bills will be categorized as being strict (giving little deference to the local government), moderate (having some deference), and lenient (with a large amount of legislative deference).[160] This comparison will examine both proposed and enacted statutes as a means to gauge the entire legislative response to *Kelo*.

The strictest legislation proposed or enacted consists of statutes having the most stringent accountability measures for local government.[161] This legislation typically eliminates deference to state and city officials.[162] Some of the strictest legislation includes language such as: there will be no taking or condemnation unless there is express legislative approval; there will be no use of eminent domain if there would be a direct transfer to a private party; there will be no use of eminent domain to increase the tax base or to create jobs; there will be a local vote or city council vote required before the condemnation process can be started; there will be strict prohibition against taking residential property; and there will be a complete moratorium on eminent domain for a year for non-blighted areas.[163] There is a 2006 statute that also should be considered strict

158. The following will include a comparison of sample proposed and enacted statutes, and is not intended to be a comprehensive discussion of all anti-*Kelo* legislation.

159. *See* Bladas, *supra* note 8 (discussing examples of cultural or political influences, such as in California, where some of the strictest legislation has been proposed, but not yet passed).

160. These categories were designated by the author after surveying a sample of state statutes and bills, and were created solely for comparative purposes in this Note.

161. *See generally* McCarthy, *supra* note 9.

162. *Id.*

163. *See* S.J. Res. 6, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (This bill would eliminate municipality's authority to use eminent domain without a specific grant from the legislature.). *Compare* H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2006), *with* H.J. Res. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (legislation would forbid direct transfer to private party for private benefit or private economic gain). *See* A.B. 8865, 228th Leg., Reg. Sess. (N.Y. 2005); A.B. 9015, 228th Leg., Reg. Sess. (N.Y. 2005); S.B. 5938, 228th Leg., Reg. Sess. (N.Y. 2005) (proposed legislation that would impose required voting procedures by either public or local government entities); OHIO REV. CODE ANN. §§ 19.2-19.7 (West 2007) (this 2005 enacted law enforced a complete moratorium on the use of eminent domain during the 2006 calendar year when it was an unblighted area and the primary purpose of was economic development). *See, e.g.*, S.B. 91, 2005 Leg., 1st Spec. Sess. (Ala. 2005) (Alabama constitutional amendment designed to prohibit private development solely to increase the tax base or create new jobs); H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005). Similar language may be found in other bills and reflects an attempt to set a precedent that the creation of jobs does not satisfy the public use requirement. *See also,* A.B. 4392, 211th Leg., Reg. Sess. (N.J. 2005); S.B. 2739, 211th Leg., Reg. Sess. (N.J. 2005) (these bills specifically list protections for residential property, either as a whole, from being condemned under redevelopment law, or when it meets applicable housing codes. While numerous bills proposed across the country mention the

because it requires, at the state level, that a property owner be reimbursed 150 percent of the fair market value of a property when it is a principal residence.[164] Additionally, all constitutional amendments should be included in the strictest legislation category because they are permanent measures to counteract the *Kelo* decision.[165]

Numerous proposed acts and enacted laws could be categorized as moderate measures. From the language of this type of legislation, it is clear that legislators are attempting to compromise between the government and private property interests.[166] Sample language from these bills includes: no economic development is allowed unless it is a secondary effect for public use; land owners have the right to repurchase their land should no public use be utilized; public purpose must not simply be a pre-text; a government entity list the purpose of the taking at least six months before the taking; and a taking must be an essential public purpose and not an expanded use of the term.[167] The Iowa statute enacted in 2006 is a model moderate measure because it incorporates many of the moderate ideas.[168] In summary, the Iowa statute limits private enjoyment of the land to a secondary effect, requires that 75 percent of the land is blighted before being condemned, prohibits economic development strictly for tax revenue or employ-

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protection of private property, these New Jersey bills are different because they specifically mention residential property). *See generally* McCarthy, *supra* note 9.

164. IND. CODE § 32-24-4.5-8(2)(A) (2007).

165. *See* Hopkins, *supra* note 145.

166. *See, e.g.*, DEL. CODE ANN. tit. 29, §§ 9503, 9505(15) (2007). Delaware requires a six month advance statement of public purpose use which would allow the government to continue to use eminent domain powers for public use but protects private property by forcing the municipality to say in advance the purpose of the taking.

167. *See id.* (law requires stating public purpose six months in advance either in planning document, at a public hearing or in a published report by the government entity); *see also* IDAHO CODE ANN. § 7-701A (2007) (enacted statute that forbids transfers based on a mere pre-text, for transfer to a private entity or for economic development); TEX. PROP. CODE ANN. § 2206 (2007) (forbidding a takings when the public use is a mere pretext to confer a private benefit on a particular private party, but the statute fails to define pretext or set out a test to determine if an objective is a mere pretext); A.C.A. 22, 2005-06 Leg., Reg. Sess. (Cal. 2005) (constitutional amendment that includes a reversion or repurchase clause should the condemned property not be utilized for a public use); H.B. 12, 79th Leg., 2d Spec. Sess. (Tex. 2005) (stating that economic development must be a secondary to the public purpose of "municipal community development"); A.C.R. 255, 2004-05 Leg., Reg. Sess. (N.J. 2005) (proposed act allows eminent domain use for "essential public purposes only"). *See generally* McCarthy, *supra* note 9.

168. *See* IOWA CODE §§ 6A.4, 6A.21-23, 6B.2B, 6B.3, 6B.14, 6B.33, 6B.42, 6B.45, 6B.54-58, 6B.60-61, 28F.11, 327I.7(4), 330A.8, 346.27, 364.4, 389.3, 403.2, 403.5-7, 403A.3, 403A.20, 422.7, 422.35, 422.73, 468.128, 468.366 (2007).

ment, provides for public notice before condemnation proceedings and includes a five year buy-back provision.[169]

Additionally, there are statutes that may be categorized as lenient in their attempts to keep the government accountable, or that appear to give continued deference to States and municipalities. These statutes or subsections of bills may be works of compromise, but they also represent the underlying notion that States are generally hesitant to yield large amounts of power.[170] Lenient legislation includes language that specifies exceptions to use eminent domain for economic development purposes in blighted areas; allows current or future pet projects to be exempt from the ban on economic development; and that states the private purpose of economic development is not sufficiently clear unless it is known who all of the private beneficiaries will be.[171] A Texas bill reflects an issue addressed by the Court in *Kelo*.[172] The Supreme Court and the authors of the bill agree that all private beneficiaries must be identified before the taking is excluded under the public use standard.[173] This statute is a prime example of deference to local government in that it dismisses the idea that private development can be established by a group of beneficiaries when the government knows that all beneficiaries will be private parties, yet only some of the beneficiaries can be named.[174]

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169. *See generally id.*

170. *See* Bladas, *supra* note 8 (quoting Dana Berliner of the Institute for Justice who stated: "[t]here are going to be states that just can't bear to give up the power and try to use cosmetic changes instead of actually doing anything").

171. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); OHIO REV. CODE ANN. §§ 19.2-19.7 (2007); TEX. PROP. CODE ANN. § 2206 (Vernon 2007); A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005); H.D.R. 4634, 2004-05 Leg., Reg. Sess. (Mass. 2005); S.B. 5936, 228th Leg., Reg. Sess. (N.Y. 2005); H.B. 15, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005). All of these proposals and laws contain an automatic exception for having economic development motivations in blighted areas. *See also* TEX. PROP. CODE ANN. § 2206 (2005) (proposal that allows automatic exception for the new Dallas Cowboys stadium and other specified projects. Interestingly, this bill has not yet been passed); Tex. H.B. 16 (proposed statute has four clauses where the first clause prohibits the use of eminent domain if it would "confer[] a private benefit on a *particular private party* through the use of the property" (emphasis added). This language indicates that all of the specific private parties must be known in advance before a taking will be banned.). *See generally* McCarthy, *supra* note 8.

172. *See* Tex. H.B. 16; *see also* Kelo, 545 U.S. at 478 n.6.

173. *See* Tex. H.B. 16.

174. *See id.*

IV. STATUTORY TRENDS FROM URBAN & RURAL STATES

A. *Spectrum of Statutes: Comparison of Conservative, Moderate, and Liberal Language*

As discussed in the previous section, the proposed state statutes and constitutional amendments can be categorized as strict, moderate, or lenient depending on how much they attempt to limit the government's eminent domain powers. The specific language and clauses in these statutes can further be categorized as conservative (or anti-private development), moderate (or a compromise between private development and private property rights), or liberal (or pro-commercial development).[175] In classifying specific language, these categories coincide with the previously mentioned categories.[176] The classifications generally coincide as follows: strict and conservative, moderate and a compromise of interests, and liberal and lenient.

After categorizing the bills, it is helpful to analyze the type of state that produced the statutes. This examination reveals general trends, such as rural states being more likely to include conservative or anti-commercial development in their proposed and enacted statutes.[177] Evaluating statutes from urban states reveals a trend of more liberal language, such as automatic exceptions for urban renewal and redevelopment of blighted areas.[178]

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175. These categories were designated for the sole purpose of comparison in this Note. The classifications were created after surveying numerous state statutes. Not every post-*Kelo* bill will be discussed. Instead, a sample of statutes will be analyzed.

176. *See* discussion *supra* at III.B.

177. *See, e.g.*, S.B. 76, 2005 Leg., 1st Spec. Sess. (Ala. 2005); S.B. 81, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

178. *See, e.g.*, S.B. 5936, 28th Leg., Reg. Sess. (N.Y. 2005).

179. For purposes of Section IV of this Note, the following states will be discussed: Alabama, California, Delaware, Florida, Georgia, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas. These states were chosen because they constitute a variety of states that had proposed legislation to counteract the *Kelo* decision. This factor was crucial in choosing states because the comparison will be their status as rural, mixed, or urban, as well as the language of their bills. This comparison will be used to develop general trends between state culture and the liberalness or conservativeness of bill language.

180. The above-listed states will be evaluated based on these factors to form general conclusions. However, there will likely be exceptions to any general trend, or alternative explanations for specific state language.

B. *Defining Rural v. Urban: Which States Fit Where?*[179]

Before looking more closely at general trends, it is helpful to define the terms rural and urban. For purposes of this note, the following factors were considered in determining rural and urban states: median income for a family of four; major state industries; and population distribution.[180] The states will be broken into three categories for this section: rural, mixture of rural and urban ("mixed"), and urban.

Breaking down these factors reveals that rural states typically have median family incomes within the range of mid $50,000s to low $60,000s.[181] Additionally, these states draw their major income from agriculture, mining, chemical manufacturing, automobiles, and raw materials.[182] Rural states also contain very few of the largest cities or most populated regions in the country.[183] Based on these factors, the following states appear to fit into the definition of rural: Alabama, Georgia, Michigan, Ohio, and Tennessee.[184]

One variation to these trends is Michigan's median family income of $71,542.[185] While the median income in this state is substantially higher than other states in the category, Michigan draws its industry primarily from manufacturing and mining.[186] Furthermore, none of the U.S.'s most populated cities or regions are in Michigan and this large state has a population of only 10.1 million people.[187] Another exception to this category is that the Atlanta area of Georgia is the ninth largest regional area in the country.[188] Despite this, Georgia relies

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181. *See* U.S. CENSUS BUREAU, MEDIAN FAMILY INCOME (IN 2005 INFLATION-ADJUSTED DOLLARS) (2005) [hereinafter MEDIAN FAMILY INCOME].

182. *See, e.g.*, Encyclopedia.com, Alabama, http://www.encyclopedia.com/SearchResults.aspx?Q=Alabama [hereinafter *Alabama*] (last visited Sept. 9, 2007) (stating the major industries found in the state).

183. *See* U.S. CENSUS BUREAU, POPULATION DISTRIBUTION IN 2005 (2005), http://www.census.gov/population/pop-profile/dynamic/PopDistribution.pdf [hereinafter POPULATION DISTRIBUTION] (listing the ten largest cities in the US as of 2000 and 2005 and the largest regional areas such as the New York-New Jersey tri-state area).

184. *See* MEDIAN FAMILY INCOME, *supra* note 181; *Alabama*, *supra* note 182 (stating the major industries found in the state); *see also* POPULATION DISTRIBUTION, *supra* note 183.

185. *See* POPULATION DISTRIBUTION, *supra* note 183.

186. Encyclopedia.com, Michigan, http://www.encyclopedia.com/doc/1B1-372054.html [hereinafter *Michigan*] (last visited Sept. 10, 2007).

187. *See* POPULATION DISTRIBUTION, *supra* note 183; *see also* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005 (2005), http://www.census.gov/popest/states/tables/NST-EST2005-01.xls [hereinafter ANNUAL ESTIMATES].

188. *See* POPULATION DISTRIBUTION, *supra* note 183.

heavily on manufacturing of textiles and agriculture for its state income.[189] Moreover, Georgia's median family income is only $64,427 per year.[190]

In the next category, mixed states, the median family income usually ranges from the high $50,000s to the high $70,000s.[191] These states draw their income from a mixture of finance, commerce, technology, manufacturing, mining, and agriculture.[192] Moreover, several of the most populated cities are located in these states such as Chicago, Houston, Philadelphia, San Antonio, and Dallas.[193] Therefore, the following states appear to be a mixture of rural and urban: Illinois, Minnesota, Pennsylvania, and Texas.

A variation to this classification is the median family income for Texas of only approximately $57,511.[194] Despite this lower median income, Texas contains three of the most populated cities in the nation,[195] and has a substantial mix of industry within its state.[196]

Finally, the urban states have a median family income range of high $60,000s to high $80,000s.[197] The major industries for these states are commerce, finance, technology, and transportation.[198] These states contain several of the most populated cities and metropolitan regions in the country, such as Los

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189. Britannica.com, Georgia – The Economy, http://www.britannica.com/eb/article-78381/Georgia [hereinafter *Georgia*] (last visited Sept. 10, 2007).

190. *See* MEDIAN FAMILY INCOME, *supra* note 181.

191. *Id.* (listing the 2005 median income for a family of four from Illinois, Texas, Pennsylvania, and Minnesota).

192. *See, e.g.*, Britannica.com, Illinois – The Economy, http://www.britannica.com/eb/article-78641/Illinois [hereinafter *Illinois*] (last visited Sept. 11, 2007).

193. *See* POPULATION DISTRIBUTION, *supra* note 183.

194. *See* MEDIAN FAMILY INCOME, *supra* note 181.

195. *See* POPULATION DISTRIBUTION, *supra* note 183.

196. *See* Britannica.com, Texas – The Economy, http://www.britannica.com/eb/article-79033/Texas [hereinafter *Texas*] (last visited Sept. 11, 2007) (stating the major industries found in the state).

197. *See* MEDIAN FAMILY INCOME, *supra* note 181.

198. *See* Britannica.com, California – The Economy, http://www.britannica.com/eb/article-79252/California [hereinafter *California*] (last visited Sept. 11, 2007) (stating the major industries found in the state); Britannica.com, Florida – Industry, http://www.britannica.com/eb/article-783558/Florida [hereinafter *Florida*] (last visited Sept. 11, 2007); COLUMBIA ENCYCLOPEDIA, DELAWARE (2007), http://www.encyclopedia.com/printable.aspx?id=1E1:Delawar.st [hereinafter *Delaware*]; COLUMBIA ENCYCLOPEDIA, NEW JERSEY (2007), http://www.encyclopedia.com/printable.aspx?id=1E1:NewJer [hereinafter *New Jersey*] (last visited Aug. 30, 2007); BRITANNICA CONCISE ENCYCLOPEDIA, MASSACHUSETTS (2007), http://encyclopedia.com/printable.aspx?id=1B1:371481 [hereinafter *Massachusetts*] (last visited Aug. 30, 2007); COLUMBIA ENCYCLOPEDIA, NEW YORK (2007), http://www.encyclopedia.com/printable.aspx?id [hereinafter *New York*] (last visited Aug. 30, 2007).

Angeles, San Diego, San Jose, and the New York tri-state area.[199] For this comparison, the traditionally urban states include California, Delaware, Florida, Massachusetts, New Jersey, and New York.

An exception to this standard is Florida's median family income of only $62,269.[200] Despite this lower income, Florida's major industries include technology, military defense, and tourism.[201] Space and military technology are very important to Florida's income compared to the influence of mining and manufacturing in rural states.[202] Additionally, Florida has a state population of 17.7 million, one of the largest in this comparison group.[203] A factor that may explain Florida's lower median family income is the state's large elderly population.[204] Because many elderly individuals are not at the height of their lifetime income, the median family income could be substantially lower when considering a large population on a fixed income.

Another variation is that several of the largest cities and metropolitan areas are in the mixed category as well as the urban category.[205] However, the urban states draw most of their income from more advanced industries, such as commerce, finance, technology, research and development, and technology manufacturing (such as in Silicon Valley).[206] Since several of these states are financial and technology centers of the country and world, they fit into a slightly different category.[207]

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199. *See* POPULATION DISTRIBUTION, *supra* note 183.

200. *See id.*

201. *See Florida*, *supra* note 198.

202. *See, e.g., id.*

203. *See* ANNUAL ESTIMATES, *supra* note 187 (according to the U.S. Census Bureau, Florida's state population is fourth behind California, Texas, and New York in a group of fifteen comparison states).

204. *See* U.S. CENSUS BUREAU, ESTIMATES OF THE RESIDENT POPULATION BY SELECTED AGE GROUP FOR THE UNITED STATES AND STATES AND FOR PUERTO RICO: JULY 1, 2004 (2005), *available at* http://www.census.gov/popest/states/asrh/tables/SC-EST2004-01Res.pdf [hereinafter ESTIMATES OF THE RESIDENT POPULATION] (listing Florida's population of 65 and over in 2004 as 2.9 million, thereby making an elderly segment of society 16.4 % of the overall population).

205. *See* POPULATION DISTRIBUTION, *supra* note 183; ANNUAL ESTIMATES, *supra* note 187.

206. *See* sources cited *supra* note 198.

207. *See, e.g.*, *California*, *supra* note 198; *New York*, *supra* note 198.

C. *Comparing Proposed* Kelo *Bills & Traditional Roles of States*

1. *Conservative Statutes*

In examining some of the conservative language espoused in the post-*Kelo* bills, there is an underlying tone of distrust for the local government as well as distrust of large commercial developers.[208] Specifically, Alabama has proposed a statute that would prohibit municipalities from condemning property "for the purpose of commercial retail development."[209] Other Alabama and Texas bills and statutes contain similar language regarding a prohibition on commercial or retail development.[210] This anti-commercial development language coincides with sentiments that can be found in rural societies that are heavily dependent upon agriculture, mining, and manufacturing for their economy.

Another conservative measure is a bill completely banning the use of eminent domain without an express grant of authority from the state legislature.[211] If passed, the Ohio legislation would strip away the deference given to local municipalities for eminent domain use, whether or not such use is related to economic development.[212] Florida proposed a similar provision in a constitutional amendment that was approved by the state legislature to appear on the voter ballot.[213]

If approved, this constitutional amendment would require a three-fifths vote by both houses of the Florida Legislature before private property could be condemned and directly transferred to another private entity.[214]

Animosity towards using eminent domain to increase tax revenue or create jobs also appears to be a condemnation goal prohibited by many of the post-*Kelo* bills and statutes. Numerous states have proposed and passed legislation to limit a local government's ability to use the takings clause in this way.[215]

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208. *See* S.B. 76, 2005 Leg., 1st Spec. Sess. (Ala. 2005); S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

209. Ala. S.B. 76.

210. *See* TEX. PROP. CODE ANN. § 2206 (Vernon 2007); S.B. 68, Leg. 1st Spec. Sess. (Ala. 2005); S.B. 81, Leg., 1st Spec. Sess. (Ala. 2005). *See generally* McCarthy, *supra* note 9.

211. *See* S.J. Res. 6, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

212. *See id.* (noting that the language of this statute strips the power of eminent domain from the local government for any purpose, even public facilities or public utilities).

213. H.J. Res. 1569, 2006 Legis., Reg. Sess. (Fla. 2006) (noting that Florida is categorized as an urban state which enacted a moderate statute, but proposed a strict constitutional amendment. In general, constitutional amendments have been categorized as conservative measures in this article.).

214. *Id.*

215. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007) (Alabama is categorized as a rural state proposing and passing conservative measures.); FLA. STAT. § 73.013 (2007) (Florida is an

These statutes are phrased in various manners including to "bar municipalities from condemning property to . . . increase the municipality's tax base,"[216] to "bar the use of eminent domain if the taking . . . is to raise revenue,"[217] or to prohibit "turning it [private property] over to private individuals, corporations, or other entities" solely to increase tax revenue or create jobs.[218]

An additional conservative law that was passed in 2006 by the Alabama legislature prohibits acquisition through condemnation of non-blighted property for redevelopment purposes without the consent of the owner.[219] The final clause of this bill is somewhat paradoxical by requiring the consent of an owner before his land can be condemned and taken from him.[220] This consent provision usurps the very power given to states and cities to take private land by restricting the condemnation power granted to local governments.[221] This provision is a prime example of the distrust of local government that exists in many rural states.

Michigan also demonstrated an ability to pass a strict statute in 2006.[222] A unique provision of Michigan's legislation requires that the state pay the property owner 125 percent of the fair market value of the land if that property was the principal residence of its owner.[223]

Most of these conservative measures were proposed or enacted by rural or mixed states, such as Alabama, Georgia, Michigan, Ohio, Pennsylvania, Tennessee, and Texas.[224] Some of the most conservative post-*Kelo* bills were pro-

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urban state that has enacted a moderate statute that prohibits condemnation for tax revenue, but the statute has standard exceptions for public utilities, public functions, and for private use when it is incidental to public use.); GA. CODE ANN. §§ 8, 22, 23, 36 (2007) (Georgia is categorized as a rural state passing conservative measures and proposing conservative constitutional amendments.); S.B. 91, 2005 Legis., 1st Spec. Sess. (Ala. 2005); S.B. 881, 2005-06 Leg., Reg. Sess. (Pa. 2005) (Pennsylvania is categorized as a mixed state proposing conservative measures.); H.B. 2413, 104th Gen. Assem., Reg. Sess. (Tenn. 2005) (Tennessee is a rural state passing and proposing both conservative and moderate measures.); H.B. 2420, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 2426, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005) (Texas is categorized as a mixed state proposing a range of bills, but passing a conservative statute narrowing the definition of public use).

216. H.B. 2059, 2005-06 Leg., Reg. Sess. (Pa. 2005).

217. Tex. H.B. 16.

218. Ala. S.B. 91.

219. ALA. CODE §§ 24-2-2, 24-3-2 (2007).

220. ALA. CODE § 24-3-2(d) (2007).

221. *See* ALA. CODE § 24-2-2 (2007).

222. MICH. COMP. LAWS § 213.23 (2007).

223. *Id.* at § 3(5).

224. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); GA. CODE ANN. §§ 8, 22, 23, 36 (2007) (amended by H.B. 1313); MICH. COMP. LAWS § 213.23 (2006); H.J. Res. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005); S.B. 1385, 2005-06 Leg., Reg. Sess. (Pa. 2005); H.B. 2413, 104th

posed and enacted by mixed states, which reflects the impact of the agricultural, manufacturing, or mining industries in these state economies.[225] Traditionally, rural states have had more conservative ideologies and would subsequently propose and pass some of the most conventional statutes. Therefore, the category of conservative bills/laws and the category of rural states generally coincide when examining the post-*Kelo* bills.[226]

A factor that plays into this trend of rural states passing conservative legislation, and exhibiting distrust of local government, is the mindset of having less disposable income, performance of more physical labor, and closer proximity to the poverty line. After the *Kelo* decision, it appears the distrust of local government has been strengthened by the Supreme Court's approval of residential landowners losing their property to large private companies.[227] An anti-commercial sentiment is also apparent in these proposals when looking at the specific language of no "commercial retail development."[228]

The one surprising exception to the trend of rural and mixed states generating conservative measures is Florida's proposed constitutional amendment.[229] A potential explanation for this amendment may be found again in Florida's large elderly population and the politically conservative tradition of older generations.

2. *Moderate Measures*

The moderate measures contain some similar language to the conservative measures; however, they are often slightly more deferential to local government.[230] The moderate legislation has taken the form of prohibiting *private* development or *private* benefit or transfer to a *private* owner.[231] Numerous states

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Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 15, 79th Leg., 2d Spec. Sess. (Tex. 2005). *See generally* McCarthy, *supra* note 9 (discussing numerous bills from several states).

225. *See* discussion *supra* pp. 22-23; *New York*, *supra* note 198.

226. *See* ALA. CODE §§ 11-47-170, 11-80-1; Ohio H.J. Res. 10; Pa. S.B. 1385; Tenn. H.B. 2413; Tex. H.B. 15. *See generally* McCarthy, *supra* note 9.

227. Kelo, 545 U.S. at 489. *See, e.g.*, sources cited *supra* note 226.

228. S.B. 76, 2005 Legis., 1st Spec. Sess. (Ala. 2005).

229. H.J. Res. 1569, 2006 Legis. Sess. (Fla. 2006); FLA. CONST. art. X, § 6(c) (as amended in 2006).

230. *See, e.g.*, H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005) (stating a prohibition on "the exercise of the power of eminent domain for private ownership or control, including for economic development, unless it is specifically and expressly authorized by law").

231. *See* MINN. STAT. ANN. § 117.025 (2007); OHIO REV. CODE ANN. §§ 19.2-19.7 (2007); 26 PA. CONS. STAT. ANN § 204 (2007); TENN. CODE ANN. §29-17-102(b) (2007); TEX. PROP. CODE ANN. § 2206 (Vernon 2007); H.B. 102, 2005 Leg., 1st Spec. Sess. (Ala. 2005); H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); Ill. H.B. 4091; H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2006); H.B. 5078, 93rd Leg., Reg. Sess. (Mich. 2006); H.B. 117, 2005 Leg., 1st Spec. Sess. (Minn. 2005); H.B.

have proposed or passed statutes containing these prohibitions including Alabama, Florida, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, Tennessee, and Texas.[232] Other states have used a similar idea of limiting private development, but have chosen to frame their legislation in the language of "public purposes only."[233] Because the definition of public purpose has been expanded so drastically by the Court in *Kelo*,[234] some states have been hesitant to use this language. However, Minnesota, New Jersey, and Tennessee have specifically made attempts to define or limit the scope of this term.[235] Minnesota has defined the term "public use" as the possession, occupation, ownership or enjoyment of the property by the general public.[236] Additionally, Minnesota inserted a provision in its statutes that stipulates that the public benefit of economic development does not in and of itself constitute a public use.[237] New Jersey has used the term to limit eminent domain to "essential public purposes" only.[238] Tennessee used conservative language to define public purpose to bar the use of eminent domain solely or principally to improve tax revenue, the tax base or promote economic development.[239] Even though the language used in these three pieces of legislation is different on the surface, the three approaches are quite similar in that one set of statutes uses negative language to state that economic development or an increase in tax revenue is not a public use, while the other bill states in positive language that only limited public purposes are permitted.[240]

123, 2005 Leg., 1st Spec. Sess. (Minn. 2005); A.B. 8865, 228th Leg., Reg. Sess. (N.Y. 2005); H.J. Res. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005); H.B. 2420, 104th Gen. Assem., Reg. Sess. (Tenn. 2005). *See generally* McCarthy, *supra* note 9.

232. *See* MINN. STAT. § 117.025 (2006); OHIO REV. CODE ANN. §§ 19.2-19.7 (2005); TENN. CODE ANN. § 29-17-102(b) (2006); TEX. PROP. CODE ANN. § 2206 (Vernon 2005); Ala. H.B. 102; Fla. H.B. 1567; Ill. H.B. 4091; Mich. H.B. 5060; Mich. H.B. 5078; Minn. H.B. 117; Minn. H.B. 123; N.Y. A.B. 8865; Ohio H.J. Res. 10. *See generally* McCarthy, *supra* note 9.

233. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); MINN. STAT. § 117.025 (2007); A.C.R. 255, 211th Leg., Reg. Sess. (N.J. 2005); H.B. 2426, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

234. Kelo, 545 U.S. at 489.

235. *See* MINN STAT. §§ 117.025, 117.075 (2007); N.J. A.C.R. 255; Tenn. H.B. 2426.

236. MINN. STAT. § 117.025.

237. *Id.* at § 117.025(11)(b).

238. *See* N.J. A.C.R. 255.

239. H.B. 2426, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

240. MINN. STAT. §§ 117.025, 117.075, 117.52 (2007); A.C.R. 255, 211th Leg., Reg. Sess. (N.J. 2005); Tenn. H.B. 2426. *Compare* H.B. 102, 2005 Leg., Spec. Sess. (Ala. 2005), *and* H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005), *and* H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2005), *and* H.B. 5078, 93rd Leg., Reg. Sess. (Mich. 2005), *and* H.B. 117, 2005 Leg., 1st Spec. Sess. (Minn. 2005), *and* H.B. 123, 2005 Leg., 1st Spec. Sess. (Minn. 2005), *and* A.B. 8865, 228th Leg., Reg. Sess. (N.Y. 2005), *and* H.R.J. Res. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005), *and* OHIO REV. CODE ANN. §§ 19.2-19.7 (West 2005), *and* TENN. CODE ANN. §29-17-102(b) (West

Another moderate approach requires that a specific public purpose be stated for the condemned land before the taking can occur.[241] Delaware explicitly requires in its statute that the public purpose be stated at least six months in advance of the taking in either (1) a certified planning document, (2) at a public hearing held specifically to address the taking, or (3) in a published report of the acquiring agency.[242] This approach appears to hold the government accountable in fairly concrete terms, but still allows deference to government because it does not expressly state a definition of public purpose or limit the scope of this term.[243] A similar approach found in New York requires a local vote by government officials (the city council) or the public to approve any private or industrial development of condemned property.[244] A city council vote is an effort to make the government officials meet a threshold of accountability and not push the condemnation decision off on a redevelopment agency.[245]

These moderate bills have been proposed and passed by a range of rural, mixed, and urban states including Alabama, California, Delaware, Florida, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas.[246] Importantly, many of the states that are analyzed in this com-

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2007) *and* TEX. PROP. CODE ANN. § 2206 (Vernon 2007), *with* ALA. CODE §§ 11-47-170, 11-80-1 (2007), *and* A.C.R. 255, 211th Leg., Reg. Sess. (N.J. 2005), *and* Tenn. H.B. 2426. *See generally* McCarthy, *supra* note 9.

241. *See* DEL. CODE ANN. tit. 29, §§ 9303, 9305 (2007); A.C.A. 22, 2005-2006 Leg., Reg. Sess. (Cal. 2005); S.B. 221, 143rd Gen. Assem., Reg. Sess. (Del. 2005).

242. DEL. CODE ANN. tit. 29, § 9505.

243. *See* DEL. CODE ANN. tit. 29 §§ 9303, 9305 (2007) (These statutes set up concrete thresholds that an acquiring agency must meet, but do not expressly prohibit the use of eminent domain for economic development, or private party transfer, as long as those thresholds are met.).

244. *See* A.B. 8865, 228th Leg., Reg. Sess. (N.Y. 2005); A.B. 9015, 228th Leg., Reg. Sess. (N.Y. 2005); S.B. 5938, 228th Leg., Reg. Sess. (N.Y. 2005).

245. *See, e.g.*, N.Y. A.B. 8865; N.Y. A.B. 9015; N.Y. S.B. 5938 (some local government officials were forcing the redevelopment agency to absorb the criticism for the condemnation decision so that officials could maintain their political careers and not be criticized for an economic development taking.).

246. *See* DEL. CODE ANN. tit. 29 §§ 9303, 9305 (2007); MINN. STAT. §§ 117.025, 117.075, 117.52 (2007); OHIO REV. CODE ANN. §§ 19.2-19.7 (West 2007); TENN. CODE ANN. § 29-17-102 (2007); TEX. PROP. CODE ANN. § 2206 (Vernon 2007); 102, 2005 Leg., Spec. Sess. (Ala. 2005); A.C.A. 22, 2005-2006 Leg., Reg. Sess. (Cal. 2005); H.B. 1567, 2006 Sess. (Fl. 2006); FLA. STAT. ch. 73.013 (2006); 2005 Ill. Laws 1055; H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2005); H.B. 117, 2005 Leg., 1st Spec. Sess. (Minn. 2005); A.C.R. 255, 211th Leg., Reg. Sess. (N.J. 2005); N.Y. A.B. 8865; H.R.J. Res. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005); S.B. 881, 2005 Legis. Sess. (Pa. 2005); H.B. 2420, 104th Gen. Assem., Reg. Sess. (Tenn. 2005). *See generally* McCarthy, *supra* note 9.

parison proposed moderate measures.[247] This trend can be explained by the fact that moderate bills are a compromise between deference to local government and private property rights. Because these factors are at play in every state (whether rural, mixed, or urban) moderate bills are bound to be proposed by states in every category. Several of the moderate statutes were proposed by mixed states, which reflect the variety of interests that their legislators must consider when coming to these middle-ground compromises.[248]

3. *Liberal Bills*

The liberal portions of post-*Kelo* bills can be defined as those clauses which give complete deference to local government or make automatic exceptions to the ban on using eminent domain for economic development purposes.[249] These liberal provisions have taken two forms; the first makes an exception for urban renewal or for economically redeveloping blighted areas.[250] States that have proposed or passed blight exceptions include Alabama, California, Florida, Georgia, Illinois, Massachusetts, New Jersey, New York, and Texas.[251] Standard language from these types of provisions bars the taking of private property "for private economic development unless the property is a blighted area . . . ."[252]

Despite the appearance that all categories of states have proposed or passed these statutes, it is important to note that Alabama, Florida, and Georgia have all narrowed the definition of "blighted" in their statutes.[253] Alabama and Georgia have redefined "blighted" by emphasizing characteristics that are detrimental to public health and safety,[254] whereas Florida has abandoned the term

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247. The following states were considered for Part IV of this Note: Alabama, California, Delaware, Florida, Georgia, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas.

248. *See, e.g., Illinois*, *supra* note 192 (stating the major industries found in the state).

249. *See, e.g.*, TEX. PROP. CODE ANN. § 2206 (Vernon 2007); A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005) (discussing automatic exceptions for urban renewal and pet projects).

250. *See* S.B. 2739, 211th Leg., Reg. Sess. (N.J. 2005) (providing an exception for urban renewal by stating that eminent domain cannot be used to condemn legally occupied residential property that meets applicable housing codes).

251. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); ALA. CODE §§ 24-2-2, 24-3-2 (2007); FLA. STAT. § 73.013 (2007); GA. CODE ANN. §§ 8, 22, 23, 36 (2007); A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.B. 3086, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 4634, 184th Leg., Reg. Sess. (Mass. 2005); S.B. 2739, 211th Leg., Reg. Sess. (N.J. 2005); N.Y. S.B. 5936; H.B. 15, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005). *See generally* McCarthy, *supra* note 9.

252. Mass. H.B. 4634.

253. ALA. CODE §§ 24-2-2, 24-3-2 (2007); FLA. STAT. §. 73.013 (2007); GA. CODE ANN. §§ 8, 22, 34, 36 (West 2007).

254. *See* ALA. CODE §§ 24-2-2, 24-3-2; GA. CODE ANN. § 8, 22, 23, 36.

"blighted" and opted to describe the former blighted exception in terms of removal for public safety and health.[255] Two other bills have also defined "blighted"[256] and one statute requires that such an area also be covered by a redevelopment plan.[257] Despite six statutes and bills defining or limiting the blighted exception, there is still a lack of specificity in the vast number of these exceptions.[258] From this vagueness, it is clear that these statutes are giving the local government discretion to determine what neighborhoods are blighted and at what time they are blighted.

Not surprisingly, the majority of states that have proposed a blighted exception are either urban or mixed states.[259] Urban states obviously contain many of the largest cities and regions in the country; therefore it is consistent with their states' interests to include these urban renewal exceptions.[260] The mixed states that have proposed these provisions have similar interests to consider because they also contain several of the largest cities and areas in the country.[261] The states that are aberrations in this category are Alabama and Georgia.[262] However, Alabama contains several smaller cities that may also require urban renewal from time to time, and Georgia contains Atlanta, which is a city of significant size.[263]

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255. *See* FLA. STAT. § 73.013.

256. *See* N.J. S.B. 2739; N.Y. S.B. 5936.

257. ALA. CODE §§ 11-47-170, 11-80-1 (2007).

258. *See* A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.B. 3086, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 4634, 184th Leg., Reg. Sess. (Mass. 2005); H.B. 15, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.B. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005) (noting the lack of a precise definition of "blighted" and lack of minimum threshold measures to ensure consistency in these types of takings).

259. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); Cal. A.B. 590; Mass. H.B. 4634; S.B. 2739, 211th Leg., Reg. Sess. (N.J. 2005); S.B. 5936, 228th Leg., Reg. Sess. (N.Y. 2005); Tex. H.B. 15; Tex. H.B. 16 (Note that many of the statutes containing a blight exception have been previously categorized as conservative or moderate legislative measures. These previous conclusions still stand because the conservative measures contain provisions narrowly defining blight, and the blighted provisions are the portions of the moderate measures demonstrating deference to local government. Therefore, even though some of these statutes have been slotted into other categories for the bill as a whole, these blighted exceptions are liberal provisions in the bill.). *See generally* McCarthy, *supra* note 9.

260. *See* POPULATION DISTRIBUTION, *supra* note 183 (listing the ten largest cities in the US as of 2000 and 2004 and the largest regional areas).

261. *See id.*

262. *See* ALA. CODE §§ 11-47-170, 11-80-1 (2007); ALA. CODE §§ 24-2-2, 24-3-2 (2007); GA. CODE ANN. §§ 8, 22, 23, 36 (2007) (Alabama and Georgia were previously defined in this comparison as rural states based on population distribution, median family income, and major state industries); *see also* POPULATION DISTRIBUTION, *supra* note 183; MEDIAN FAMILY INCOME, *supra* note 182; Alabama, *supra* note 189; Georgia, *supra* note 189.

263. *See* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR INCORPORATED PLACES IN ALABAMA, LISTED ALPHABETICALLY: APRIL 1, 2000 TO JULY 1, 2005

Additionally, neither Alabama nor Georgia proposed an automatic blighted exception. Instead, both states more narrowly defined what constitutes blight.[264]

The second type of liberal provision is an exception for pet projects, or provisions that allow the legislature to give authorization for specific instances of economic development.[265] While these provisions are not very common among the comparison states, the notion of allowing pet projects only weakens the overall strength of any statute.[266] Additionally, other states who have yet to propose or pass bills may use this type of exception as model language for their own statutes.[267] The two states in this comparison that have used this type of liberal provision include Illinois and Texas.[268] While both of these states are categorized as mixed, together they contain four of the largest cities in the country.[269] Based on these large urban populations, and the subsequent varieties of interests, it is not unexpected that some liberal proposals would be generated by these states.

Overall, it appears that many of the states which included liberal provisions in their bills were urban and mixed states containing large cities, or rural states with medium sized cities, or a series of smaller cities.[270] Therefore, a gen-

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(2005), http://www.census.gov/popest/cities/tables/SUB-EST2005-04-01.xls (listing the following Alabama city populations as the largest cities within the state: Birmingham, estimated population of 242,000; Mobile, estimated population of 198,000; and Montgomery, estimated population of 201,000); U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: ATLANTA, GEORGIA (2003), http://quickfacts.census.gov/qfd/states/13/1304000.html (listing that Atlanta had an estimated population of 423,019 in 2003).

264. *See generally* ALA. CODE §§ 24-2-2, 24-3-2 (2007); GA. CODE ANN. § 8, 22, 23, 36 (2007).

265. *See* TEX. PROP. CODE ANN. § 2206 (Vernon 2005) (quoting a special exception for the new Dallas Cowboy stadium); *see also* H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005) (discussing the legislature's ability to give authorization for the use of eminent domain for economic development).

266. *See* TEX. PROP. CODE ANN. § 2206 (This statute does not specify every instance that would fit into the exception and may be subject to expansion in the future.); *see also* Bladas, *supra* note 8 (paraphrasing Texas attorney Jim Bradbury who noted that "despite the outcry over the *Kelo* decision, there has been no attempt . . . to halt plans for a new Dallas Cowboys football stadium, which is being built through the use of eminent domain." Bradbury also predicted that many states and cities would prevent new eminent domain statutes from stopping local projects.). The Texas exceptions for certain pet projects are prime examples of state and city interests resulting in liberal provisions. Allowing several pet projects or using general language that allows the legislature to make the determination in the future may permit the law to become overrun with exceptions.

267. Comparisons for this Note have only focused on bills from fifteen states, whereas it is possible that up to thirty-five other states will adopt this liberal language.

268. *See* TEX. PROP. CODE ANN. § 2206 (Vernon 2007); H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

269. *See* POPULATION DISTRIBUTION, *supra* note 183.

270. *See id.*

eral trend can be discerned that the most liberal post-*Kelo* bills were proposed and enacted by the largest urban populations.[271]

V. CONCLUSION: THE AFTERMATH AND ASKING WHAT'S LEFT

Prior to June 23rd, 2005, Supreme Court precedent and Connecticut statutes had laid the groundwork for a major change in private property rights.[272] As the Court handed down its decision in *Kelo*, it expanded the definition of public use as well as a local government's ability to use eminent domain for non-traditional purposes.[273] Now, armed with the ability to use eminent domain to increase their tax base and create jobs, local governments took quick action to make use of this precedent.[274] Conversely, more than half the states have proposed bills to nullify the effect of *Kelo*.[275] This legislation ranges from use of conservative language, by strictly limiting local government power, to the use of liberal language in giving the government complete deference.

An analysis of these bills and statutes, makes it clear that conservative language and strict bills are more frequently generated by states who are either rural, or have mixed rural and urban populations. There are also several bills using moderate measures to compromise between government and individual interests. The moderate measures are proposed by a variety of rural, mixed, and urban populations. The moderate bills reflect a true sense of compromise between various values, interests, and backgrounds. Additionally, several statutes contain liberal provisions which give the government a large amount of discretion and which provides protection for certain pet projects. These liberal provisions are more frequently proposed by urban states.

Despite general trends that arise between conservative language and rural states, and liberal language and urban states, it is clear that after *Kelo* there will be more than fifty different versions defining the scope of eminent domain. There is no longer a consistent version of a person's Fifth Amendment rights. Instead, what remains is a murky aftermath of what was once a prized fundamental constitutional right to property. The dissenting Justices captured the effect of the *Kelo* earthquake when they argued, "[i]f such 'economic development' tak-

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271. *See id.*

272. *See generally* CONN. GEN. STAT. §§ 8-186, 8-193 (2007); Berman, 348 U.S. at 31; Midkiff, 467 U.S. 229.

273. *See generally* Kelo, 545 U.S. 469.

274. *See* Bladas, *supra* note 8 (discussing five communities that moved forward within in a few days of the *Kelo* decision to take advantage of their new eminent domain powers).

275. *See id.* (stating that at least twenty eight states have proposed *Kelo* bills).

ings are for 'public use,' any taking is, and the Court has erased the Public Use Clause from the Constitution."[276]

This decision has effectively erased property rights as they previously existed in the Constitution and across the country. The *Kelo* decision leaves all citizens asking the same questions: "What property rights do I now have?" "Will those rights ever be protected?" and "Will my home be taken for some legislator's 'pet project?'"

276. Kelo, 545 U.S at 506 (Thomas, J.J., dissenting).