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Back to the Future: Returning to Traditional Notions of Blight as a Way to Enforce a Ban on Kelo-Type Takings

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BACK TO THE FUTURE: RETURNING TO TRADITIONAL NOTIONS OF BLIGHT AS A WAY TO ENFORCE A BAN ON *KELO*-TYPE TAKINGS

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INTRODUCTION

In 1964, United States Supreme Court Justice Potter Stewart, when referring to what qualifies as hard-core pornography, coined one of the most famous legal phrases in America: "I know it when I see it."[1] This phrase applies equally today in the political and legal battles over what type of property qualifies as "blighted" — a designation making private property susceptible to government takings and redevelopment by another private party. Most definitions of blight are broad and subjective, which poses a threat to property owners nationwide.

Property rights historically have been accorded great respect in American law,[2] which is why the power of eminent domain – the power to take private property for public use with just compensation[3] – has been identified as the "despotic" power.[4] In one recent case, homeowners in Michigan fought against this despotic power when a county attempted to take their property and turn it into a "metropolitan park" to accommodate various private businesses.[5] In another recent case, homeowners in Connecticut fought to keep their land where the county attempted to take it and transfer it to a Pfizer Pharmaceutical Plant.[6] This redistribution of land between

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[1] Jacobellis v. State of Ohio, 378 U.S. 184 (1964).

[2] *See, e.g.*, Payton v. New York, 445 U.S. 573, 601 (1980) ("[R]espect for the sanctity of the home ... has been embedded in our traditions since the origins of the Republic."); Wilkinson v. Leland, 27 U.S. 627, 634 (1829) ("The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred.").

[3] *See* U.S. CONST. amend. V; MICH. CONST. art. X, § 2.

[4] *See* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 311 (1795); *see also* James W. Ely Jr., *Can the "Despotic" Power be Tamed*? *Reconsidering the Public Use Limitation on Eminent Domain*, 2003 A.B.A. PROB. & PROP. 31, *available at* http://www.abanet.org/rppt/publications/magazine/2003/nd/ely.html; Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 320 (1994).

[5] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 784 (Mich. 2004). Wayne County referred to this as the "Pinnacle Project." *Id*. This was a project to construct a business and technology park next to the Wayne County Metropolitan Airport that would house private businesses. *See id*. According to the Court, these private businesses would be pursuing their own "financial welfare." *Id*.; *see also* Alan T. Ackerman, *The Changing Landscape and Recognition of the Public Use Limitation: Is Hathcock the Precursor of Kelo*? 2004 MICH. ST. L. REV. 1041, 1056-57 (2004) (discussing the background of the *Hathcock* condemnation).

[6] *See* Kelo v. City of New London, 125 S.Ct. 2655 (2005).

private owners is frequently found to satisfy the public use clause of eminent domain in the state and federal constitutions as long as it is motivated by some economic factor enhancing the public welfare, such as an increase in tax revenues or jobs.[7] As a result, the public use limitation on the government's power of eminent domain, once vigorously enforced,[8] is now considered ineffective by many scholars.[9]

Three cases are repeatedly cited for the proposition that public benefits – such as economic development and alleviating blight – are valid "public uses" under the eminent domain doctrine: *Berman v. Parker*,[10] *Poletown Neighborhood Council v. City of Detroit*,[11] and *Hawaii Housing Authority v. Midkiff*.[12] In *Berman*, the United States Supreme Court held that the concept of public use is "broad and inclusive," and that a government's use of its police powers to eliminate blight is a valid public use, eloquently stating that communities should be "beautiful as well as sanitary."[13] Essentially, this removed the Court from reviewing statutory condemnations based on blight.[14] Relying partially on *Berman*, the Michigan Supreme Court in *Poletown* approved the use of eminent domain for purposes of economic development under the premise that it would provide "some benefit" to the public, such as providing more jobs or

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[7] *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); *Poletown*, 304 N.W.2d 455.

[8] *See* Donald J. Kochan, "*Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 65 (1998) (discussing that historical limits on the power of eminent domain).

[9] *See* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295 (2000) (stating that the judiciary has reduced the public use requirement "to an ineffectual safeguard of private property rights"); Camarin Madigan, *Taking for any Purpose*?, 9 HASTINGS W.– NW. J. ENVTL. L. & POL'Y 179, 192 (2003) (stating that the public use provision has become "toothless"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (stating that the public use limitation is a "dead letter"); Thomas Rose, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 359 (1983) (stating that the constitutional limitation of public use is not a significant obstacle; most takings are found by the courts to be for a public use).

[10] 348 U.S. 26 (1954).

[11] 304 N.W.2d 455 (Mich. 1981), reversed by County of Wayne v. Hathcock

[12] 467 U.S. 229 (1984).

[13] *See Berman*, 348 U.S. at 28-33. The Court determined that Congress' statute declaring that the whole territory of the District of Columbia was blighted satisfied the public use clause of eminent domain. *See id*. at 31.

[14] *Berman* was not binding on state courts because it hinged on the interpretation of the Federal Constitution. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 785 (Mich. 2004). However, it was influential because the Fifth Amendment's public use clause is substantially similar to the public use clauses in most state constitutions.

increasing the city's tax revenues.[15] Four years later, the U.S. Supreme Court followed suit in *Midkiff* when it upheld the transfer of private property to private entities to prevent the "social and economic evils of a land oligopoly."[16] Justice O'Connor renamed the public use requirement as a "public purpose" requirement, stating that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the public use clause."[17] Relying on *Berman, Poletown*, and *Midkiff*, a number of states have found that condemnations based on economic development and blight clearance satisfy the public use requirement of their eminent domain provisions.[18]

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[15] *See* Poletown, 304 N.W.2d 455, 459 (1981), overruled by County of Wayne v. Hathcock, 684 N.W.2d 765, 784 (Mich. 2004). Unlike *Berman*, though, Detroit did not argue that the area was a slum or blighted; instead, the city maintained that the public use limitation was fulfilled because a new manufacturing plant would benefit the public by providing more jobs and tax revenues. *See id.* at 457.

[16] *Midkiff*, 467 U.S. at 241-42.

[17] *Id*. at 241.

[18] For reliance on *Midkiff: See, e.g*., Post v. Dade County, 467 So.2d 758 (Fla. App. 1985) (citing *Midkiff* as support in its holding that the condemnation based on slum clearance and redevelopment is a valid public use); New Jersey Housing and Mortg. Finance Agency v. Moses, 521 A.2d 1307 (N.J. Super. Ct. App. Div. 1987) (citing *Midkiff* and holding that a shopping center is a "public purpose").

For reliance on *Berman*: *See, e.g*., City of Birmingham v. Tutwiler Drug Co., Inc., 475 So.2d 458 (Ala. 1985) (finding a valid public use and citing Berman for the proposition that review of a legislative judgment is "extremely narrow"); Department of Transp. v. Fortune Federal Sav. and Loan Ass'n, 532 So.2d 1267 (Fla. 1988) (citing *Berman* in holding that the purchase of more land than necessary in order to save state money was valid public purpose); City of Shreveport v. Chanse Gas Corp., 794 So.2d 962 (La. Ct. App. 2001) (citing *Berman* for support in stating that the court has an "extremely narrow" level of review of legislative judgments of public use); Courtesy Sandwich Shop v. Port of New York Auth., 12 N.Y.2d 379 (1963) (relying on Berman in holding that improving the Port of New York "is a public purpose supporting the condemnation of property for any activity functionally related to that purpose).

For reliance on *Poletown*: *See e.g*., Common Cause v. State, 455 A.2d 1, 24 (Me. 1983) (citing *Poletown* for the rule that economic development is a public purpose, and thereby holding that the project would benefit the public by reviving commerce and job opportunities, and therefore did not violate public use requirement); City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986) (holding that revitalizing deteriorating urban area and alleviating unemployment satisfied the public use limitation and citing *Poletown* for the proposition that proposals to condemn and transfer property from one private owner to another is justified on the ground that the economic benefit is a public use*)*; *Pappas*, 76 P.3d at 12 (holding that the condemnation was a public purpose and citing *Poletown* for the rule that when a project is intended to attack blight, by creating a significant increase in jobs in an area suffering from high unemployment, the relocation of one business to make way for a new business is a public purpose.); Maready v. City of Winston-Salem, 467 S.E.2d 615, 626 (N.C. 1996) (holding that tax favors to private companies satisfied the public purpose limitation on the power of taxation and citing *Poletown* for the rule that government expenditures for economic development incentives are constitutional); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 372 (N.D. 1996) (citing *Poletown* for the proposition that broad discretion is given to the legislature to use eminent domain for a variety of economic development purposes and finding that commercial growth satisfies the public use limitation).

In 2005, the U.S. Supreme Court interpreted the Federal Constitution as permitting takings based solely on economic development.[19] In *Kelo v. City of New London*,[20] the Court held that states can utilize their power of eminent domain to take property and transfer it to a private entity, under the premise that it will be put to a more economically productive use, as long as the state has engaged in a "comprehensive plan of development" for that property.[21] The decision triggered enormous public outcry, as many realized the effects of *Kelo*—most homes do not produce an economic benefit to the state and under *Kelo*, they can be taken and transferred to a more productive business entity.[22]

The Michigan Supreme Court has narrowed its definition of public use in *County of Wayne v. Hathcock*,[23] a case similar in facts to *Kelo*, but decided quite oppositely. *Hathcock* addressed whether building a "metropolitan park" for the Wayne County Metropolitan Airport was a public use.[24] The County justified the condemnation on the grounds that the park would create jobs, stimulate private investment, stop population loss, and support "development opportunities," invoking the twenty-five-year-old precedent of *Poletown*.[25] However, the *Hathcock* Court overruled *Poletown* and adopted a three-part test for determining when a taking for private-to-private transfer satisfies the public use requirement in the Michigan Constitution's eminent domain provision:

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[19] *See* Kelo v. City of New London, 125 S.Ct. 2655 (2005).
[20] 125 S.Ct. 2655 (2005).
[21] *Id*. at 2661-62
[22] *See, e.g.*, David Barron, *Eminent Domain is Dead Long Live Eminent Domain*, BOSTON GLOBE, April 16, 2006, at D1 (addressing the "widespread opposition" to Kelo and the threat of trading in homes to enhance the tax base); *Changes Needed to Halt Abuses*, PHILADELPHIA INQUIRER, Feb. 26, 2006 (stating that Americans were shocked that they could lose their homes to a Costco); John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1 (explaining the swift reaction nationwide to the Kelo decision).
[23] County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
[24] *See id*. at 784 (discussing the "Pinnacle Project," the title placed on County of Wayne's plan to build a "metropolitan park" that would house various private and public businesses).
[25] *Id.* at 775-76.

> (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains "subject to public oversight" after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.[26]

The Court explained that the third prong – when property is taken based on facts of "independent public significance" – applies when authorities condemn property for slum clearance or blight removal.[27]

Numerous states have recently reconsidered their eminent domain laws to provide greater protection to their citizens.[28] Today, some have either passed or, at the least, have proposed bills seeking to ban private-to-private takings based on economic development.[29] Throughout this paper, I will call these types of takings *Kelo*-type takings. At the same time, however, most states, like Michigan, still permit takings if the property has been determine blighted. This rule illustrates a tension between prohibiting *Kelo*-type takings while permitting takings for private-to-private transfer based on the all-inclusive concept of blight.

Determinations that blight removal is automatically a public use is risky considering what the outcome would have been in *Hathcock* if Wayne County had condemned the property based on a finding of blight. For instance, the land could have been "blighted" if local authorities had found it economically obsolete,[30] a standard that does not seem hard to meet when comparing a

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[26] *Id.* at 783.
[27] *Id*. (explaining that the "need to remedy urban blight for the sake of public health and safety" is a public use despite the fact that the property is subsequently transferred to a private entity). Similarly, in many states, slum and blight removal fulfills the public use provision in eminent domain. *See also* JAMES S. BURLING, AMERICAN LAW INSTITUTE, BLIGHT LITE, EMINENT DOMAIN AND LAND VALUE LITIGATION 43 (2003) (giving an outline of the blight statutes of all 50 states).
[28] *See* Broder, *supra* note 23 (explaining the swift legislative responses to *Kelo*); Castle Coalition Legislative Center, http://www.castlecoalition.org/legislation/index.html (detailing legislative responses).
[29] *See id*.; *infra* section II.
[30] *See* MICH. COMP. LAWS ANN. § 125.71 (West 1997) (declaring that large areas within the state have become blighted, and that the removal of these blighted areas is a public use); MICH. COMP. LAWS ANN. § 125.72(a) (West 1997) (stating that a blighted area is demonstrated by "such conditions as functional or economic obsolescence of buildings").

home to a "metropolitan park" or any other business entity for that matter.[31] If this had been the case, it is likely that the court would have permitted the taking.[32] Thus, the *Hathcock* Court's decision and states' responsive legislation seem hollow in their promise because they purport to ban condemnations for private-to-private transfer based solely on economic development, but the new "public use" test permits these transfers as long as the property is designated as "blighted." This tension will require courts and legislators to revisit this issue. In sum, *Hathcock* and states' responsive legislation to *Kelo* may not be the end of *Poletown* and *Kelo*.

As states propose new laws and courts narrow their interpretation of "public use" to prohibit *Kelo*-type takings, many have recognized that their state's current blight definitions would swallow these new laws. Section I of this paper discusses the changing interpretations of the public use clause from a narrow, property rights oriented view, to a broad view that would allow *Kelo*-type taking. Section II analyzes *Hathcock* and recent state and federal legislation prohibiting *Kelo*-type takings, explaining that the interpretation of public use is now slowly evolving back to a new limited view. Section III analyzes the problem that broad blight exceptions present as permitting a circumvention of these new prohibitions on *Kelo*-type takings. Section IV addresses recent state legislation that attempt to close this blight loophole by requiring the government to prove blight by clear and convincing evidence and shows that this standard will not work where there are broad blight definitions in place. Section V proposes that

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[31] *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), http://www.castlecoalition.org/publications/report/index.html. In Lakewood, Ohio, municipalities have declared the lack of a two-car attached garage, second bathtubs, and no central air conditioning as evidence of blight, relying on terms like "economic and functional obsolescence." *Id*. at 166. In 2002, the City Council approved a finding of blight under these terms so that local authorities could build a $100-million development with condominiums, restaurants, and retail stores in its place. *See id*. at 165-66.

[32] *See, e.g.*, Ellis v. City of Grand Rapids, 257 F. Supp. 564 (W.D. Mich. 1966) (holding that participation by a "sectarian" hospital as a redeveloper in an urban renewal project where property was found to be blighted is constitutional); In re City of Center Line, 196 N.W.2d 144 (Mich. 1972) (holding that because the "controlling purpose" of the city's urban renewal plan was to rehabilitate blighted area, fact that development would be by a private developer did not make the condemnation unconstitutional).

states re-define blight and go back to the more traditional notion by requiring a showing both physical and economic evidence of blight.

I. THE EVOLUTION OF EMINENT DOMAIN

A. Historical—The Narrow View

The Framers of the U.S. Constitution saw a close nexus between property rights and other personal liberties.[33] Although they recognized the need for the power of eminent domain, they created significant limitations on this power by requiring that the taking be for a public use and that just compensation be paid.[34] The Supreme Court, in its early decisions, ratified the Framers' views that property rights were connected to personal liberties.[35]

The states reflected this property rights oriented view in their own constitutions when they included the same limitations on their governments' eminent domain powers. Into the early 19th century, courts narrowly interpreted the public use requirement, finding the clause satisfied

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[33] *See* JAMES MADISON, PROPERTY (1792), reprinted in 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."). When the Federal Constitution was drafted, the writings of preeminent legal scholars, including John Locke and William Blackstone, on the importance of property rights were of particular influence. *See* Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 82 (2002); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569, 595-97 n.129 (2003).

[34] James W. Ely, Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, Nov./Dec. 2003 PROB. & PROP. 31, 32 (explaining that the constitutional framers "believed that security of property rights was necessary for the enjoyment of individual liberty" and, consequently, it is not surprising that they restricted the eminent domain power by adding the just compensation and public use requirements).

[35] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence."); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 358-59 (C.C.D. Pa. 1795) ("[I]t is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.").

in only a limited number of circumstances, such as where the government sought to build parks, roads, schools, and hospitals.[36]

B. Departing from the Narrow View

Courts have stated that the concept of public use has no precise meaning. Instead, it changes according to the changing needs of society.[37] In the mid-1900s, states began engaging in massive urban renewal campaigns that impacted eminent domain doctrines throughout the United States. These urban renewal campaigns significantly altered the public use clause by permitting the government to use their eminent domain powers for transferring property to private parties if the taking was to eliminate blight or slum areas. The public use clause quickly broadened again when the government's attempts to take property and transfer it to a private party were upheld where the transfer would provide some economic benefit to the community, such as an increase in jobs and tax revenue for the city.

1. *Urban Renewal*

The United States underwent intense urbanization and industrialization throughout the late ninteenth and early twentieth centuries. This not only transformed the American landscape, but also resulted in urban planning problems, including the encroachment of commercial and industrial properties on residential neighborhoods, inadequate public services, and substandard housing conditions.[38] The centers of large cities began to economically deteriorate.[39] Rapid

[36] *See* 2A NICHOLS ON EMINENT DOMAIN 7.02[3] (Julius Sackman ed., 3d ed. 1998); Kohl v. U.S., 91 U.S. 367 (1875) (listing examples of commonly recognized public uses justifying the use of eminent domain).
[37] *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence: An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).
[38] See ROBERT M. FOGELSON, DOWNTOWN: ITS RISE AND FALL, 1880-1950, 320 (Yale Univ. Press 2001)
[39] *See id*. at 319-20. In the 1930s, city authorities recognized the need for more roads leading into and out of cities to accommodate rapid population growth. *See id*. at 317. As these roads were built, the upper and middle classes moved away from the downtown area and into the suburbs, while the lower classes, who could not afford to move, remained in the city. *See id*. at 318. As smaller business districts arose in the peripheries of the cities, upper classes

population growth within these cities had resulted in shortages of adequate housing and unsanitary living conditions, especially among lower-income families.[40] As better roads were built beyond the city limits, upper-and middle-income families moved into the suburbs, leaving behind empty houses and high crime rates.[41] City authorities searched for ways to resolve this urban crisis, finding eminent domain to be a useful tool in the process.[42]

Local and state governments embarked on massive urban renewal campaigns that played a crucial role in the broadening of the public use clause. The campaigns focused on revitalizing cities through clearance and private redevelopment of large city areas. Many cities instituted urban renewal planning commissions dedicated to redevelopment. These commissions were frequently given power to intitiate eminent domain proceedings.

States were aided in their urban renewal efforts by the Federal Government in the *United States Housing Act of 1937,*[43] which sought to address substandard housing conditions throughout the country.[44] This federal recognization of urban decline marked the beginning of large public housing projects that quickly became the hallmark of urban renewal.[45] The Act provided funding to local governments to build public housing, but required that slum housing be

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shopped in and visited downtown areas less often. *See id*. This resulted in severe declines in downtown economic prosperity. *See id*.

[40] *See* In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 496 (Mich. 1939) (stating that the continued crowding and unsanitary conditions in Detroit caused the city council to undergo major housing project); s*ee also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 22 (2003) (stating that increased vacancies, a rise in taxes, and more housing regulations devastated urban landlords throughout the United States, producing support for a "large-scale redevelopment of urban areas).

[41] *See* FOGELSON, *supra* note 54 at 322 (stating that authorities feared that the conditions of downtown areas would "destroy the whole society").

[42] *See* In re Brewster, 289 N.W. 493, 496 (Mich. 1939) (stating that the continued crowding and unsanitary conditions in Detroit caused the city council to undergo major housing project).

[43] 42 U.S.C. § 1437 (2004)

[44] *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L. J. 305, 310-11 (2004) (stating that the United States Housing Act gave private interests incentive to redevelop urban areas).

[45] *See* In re Jeffries, 11 N.W.2d 272, 274 (1943) (city condemned 633 structures via eminent domain in order to build better housing in their place).

demolished prior to any construction.[46] Thus, it was necessary for state legislators to pass "enabling legislation" to permit the use of eminent domain for slum clearance when an owner declined to sell.

The Housing Act's impact on eminent domain doctrines throughout the United States was considerable. The number of urban housing projects substantially increased in both size and scope after the Act.[47] Throughout the United States, legislation gave municipalities the power of condemnation to improve not only housing but also all conditions detrimental to the public peace, health, safety, morals, and welfare.[48] Property owners questioned whether condemning property to clear private property with the intention of transferring the property to private developers was indeed a public use.[49]

The concept of slums arose out of these urban planning problems. President Hoover defined the term in the 1930s as a "residential area where the houses and conditions of life are of such a squalid and wretched character . . . [that they have] become a social liability to the community."[50] City authorities searched for ways to to remedy the "slum" areas and concurrently resolve the urban crisis. Their answer came from the state's eminent domain powers.[51]

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[46] *See* Gordon, *supra* note 45, at 310-311.
[47] *See id*.
[48] *See* Act of January 9, 1934, No. 18, 1933 Mich. Pub. Acts 46.
[49] *See, e.g.,* Ellis v. City of Grand Rapids, 257 F. Supp. 564 (W.D. Mich. 1966) (property owner sued to enjoin city from pursuing economic renewal plan where owner's property was not blighted but was surrounded by blighted area and court held that city could properly include); *In re* City of Center Line, 196 N.W.2d 144 (Mich. 1972) (finding that because blight was the "controlling purpose," condemnation was valid even with subsequent transfer to private entity); Sinas v. City of Lansing, 170 N.W.2d 23 (Mich. 1969) (elimination of urban blight by city is an adequate justification for exercise of power of eminent domain, even where acquisition is followed by sale to private individuals).
[50] PRESIDENT'S CONFERENCE ON HOME BLDG. & HOME OWNERSHIP, REPORT OF THE COMM. ON BLIGHTED AREAS & SLUMS 1 (1931).
[51] *See In re* Brewster Street Housing Site, 289 N.W. 493, 496 (1939) (stating that the continued crowding and unsanitary conditions in Detroit caused the city council to undergo major housing project).

States employed the power of eminent domain to take "slum" property and transfer it to a new private owner for redevelopment and renewal. The first attempts at urban renewal were upheld by courts on the ground that condemnations based on slum removal were related to the traditional "police power" objectives, i.e. improving the public health, safety, and welfare.[52] Although local authorities subsequently transferred the property to a private entity for development, this was recognized as incidental to the "controlling purpose" of slum clearance.[53] In one case, the Court even took judicial notice that "razing [ ] unsanitary dwellings tends to diminish the potentialities of epidemics, crime and waste, and that the destruction of slums at their focal centers prevents the spread of crime and disease to uninfected areas and enhances the physical and moral values of surrounding communities."[54]

The U.S. Supreme Court reviewed the constitutionality of federal urban renewal attempts in 1954. The decision proved very persuasive among state courts.[55] The *Berman* Court considered the constitutionality of Congress' legislation that declared the whole territory of the District of Columbia blighted and authorized the removal of this "blight."[56] This legislation, reviewed under the Federal Constitution, was found valid under the legislature's police power.[57] Under the police power, the Court deferred to the legislature's judgment in determining whether the taking was for the public use: "[w]hen the legislature has spoken, the public interest has been

[52] *See id*. at 335-36 (stating that all presumptions are in favor of the constitutionality of the condemnation and citing cases in different states who agree).
[53] *See In re* Slum Clearance in City of Detroit, 50 N.W.2d 340 (Mich. 1951) (upholding the condemnation because the public purpose of slum clearance is the one controlling purpose of the condemnation).
[54] *In re* Edward J. Jeffries Homes Housing Project, City of Detroit, 11 N.W.2d 272 (Mich. 1943) (holding that the public use requirement of eminent domain was met when the City condemned a housing project on the basis of slum clearance).
[55] *See* cases cited *supra* note 19.
[56] *See* Berman v. Parker, 348 U.S. 26, 28 (1954).
[57] *See id*. at 31-32. Because the legislature is the "main guardian of the public needs to be served by social legislation," the Court stated that the "role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Id*. at 32.

declared in terms well-nigh conclusive."[58] The Court upheld the condemnation, even though the property was transferred to private developers.[59] It concluded that the public use requirement in the Fifth Amendment is fulfilled when the property taken eliminates the "blighted areas that tend to produce slums."[60] The concept of blight and Berman's impact on it is discussed more fully *infra* section III.

2. *Economic Development*

In 1981, the Michigan Supreme Court decided one of the most influential eminent domain cases ever.[61] In *Poletown*, the Court authorized the City of Detroit's use of eminent domain in the condemnation of private property for subsequent transfer to a private manufacturing company.[62] The city argued that a new manufacturing plant would benefit the public by providing more jobs and increasing tax revenues.[63] Notably, the city did not base its use of eminent domain on blight removal or slum clearance. Instead, it relied on Michigan's *Economic Development Corporations Act*,[64] which declared that "programs to alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce are essential public purposes."[65]

The Court determined that condemnations based on economic benefits satisfied the public use clause under the state's eminent domain provision.[66] Nevertheless, it acknowledged that this holding could be subject to abuse by local authorities and, therefore, it provided that

[58] *Id*. at 32.
[59] *See id*. at 33-34.
[60] *Id*. at 35.
[61] *Poletown*, 304 N.W.2d 455, 465 (1981) (overruled by County of Wayne v. Hathcock, 685 N.W.2d 765 (Mich. 2004)) (Ryan, J., dissenting) (stating that in 1981, Michigan had 14.2% unemployment, the city of Detroit was at 18% unemployment, and unemployment among black citizens was at 30%).
[62] *See id.* at 459-60
[63] *See id.* at 458.
[64] *See id.*
[65] *Id*.
[66] *Id*. at 459.

takings based upon economic development would be subject to "heightened scrutiny."[67] Although this was an attempt to give some protection to property owners, in effect, the heightened scrutiny standard was nothing more than a "fig leaf of legal protection."[68] *Poletown*'s holding served to be easily manipulated and enabled private companies and developers to acquire land in areas that were economically favorable to business.[69]

In his dissent, Justice Ryan strongly criticized the Court's decision, describing it as "jeopardiz[ing] the security of all private property ownership."[70] The Justice analyzed the history of the public use clause[71] and concluded that "public benefit" is not the same as "public use."[72] According to Justice Ryan, the condemnation was the response "of a desperate city administration" trying to please "a giant corporation willing and able to take advantage" of this opportunity."[73]

Soon after the Michigan Supreme Court decided *Poletown*, the U.S. Supreme Court decided another eminent domain case centered on the public use clause.[74] In *Hawaii Housing Authority v. Midkiff*, the Court decided whether the state of Hawaii could permissibly take private lands and redistribute them to other private landowners in order to "reduce the social and economic evils of land oligopoly."[75] The land in question was a large portion of the Hawaiian Islands owned by a very small number of owners.[76] According to the state, this concentrated land ownership skewed its residential fee simple market, inflated land prices, and injured "the

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[67] *Id*. at 459-60.
[68] Adam Mossoff, *Foreword to The Death of Poletown: The Future of Eminent Domain and Urban Development after* County of Wayne v. Hathcock, 2004 MICH. ST. L. REV. 837, 842 (2004) (discussing the impact of *Poletown* in jurisdictions throughout the United States).
[69] *See infra* Part V.
[70] *Poletown*, 304 N.W.2d at 465 (Ryan, J. dissenting).
[71] *See id.* at 472-75.
[72] *Id*. at 480 (stating that a public benefit was an "insufficient condition for the existence of a public use").
[73] *Id*. at 481.
[74] Hawaii Housing Authority v.Midkiff, 467 U.S. 229 (1984).
[75] *Id.* at 231.
[76] *See id*. at 232.

public tranquility and welfare."[77] To remedy this situation, the state decided to employ its power of eminent domain to break up the estates of the larger landowners by requiring them to sell land that they leased to others.[78]

The Court recognized that the main question involved interpretation of the public use requirement, and whether it permitted a state to take property and transfer it to a private entity to remedy the economic evils of a land oligopoly. Relying partly on *Berman*, the Court held that the state's actions were constitutional.[79] According to the Court, the state's police powers enabled it to take this property, and when the purpose is legitimate and not irrational, the Court will not invalidate the taking.[80]

Relying on *Berman*, *Poletown*, and *Midkiff*, a number of states have found that condemnations based on economic development and slum clearance satisfy the public use requirement of their eminent domain provisions.[81] As a result, municipalities have increasingly condemned property for subsequent transfers to private entities merely to improve a city's economic standing or to redevelop an urban area.

3. *Kelo v. City of New London*[82]

The debate over whether economic development is a public use has recently reached its zenith in *Kelo v. City of New London*, a Supreme Court case involving facts strikingly similar to the facts in *Poletown*. Like the City of Detroit's decision to take private property and transfer it to the General Motors Corporation, the City of New London, Connecticut decided to take private

[77] *See id.* at 232.
[78] *See id.* at 233.
[79] *See id.* at 241.
[80] *See id.* at 242-43.
[81] *See supra* note 19.
[82] 125 S.Ct. 2655 (2005).

property and transfer it to Pfizer Pharmaceutical Company.[83] The city based this action on the area's need for revitalization and the possibility that a major corporation, in this case Pfizer, would create jobs, general tax revenue for the city, and, generally, "build momentum for the revitalization" of the area.[84] Like *Poletown*, the taking in *Kelo* was based solely on the desire of economic development.

Kelo was the first time that the Supreme Court has ever taken an official stance on whether taking private property for subsequent transfer to another private entity, based solely on economic development, is a valid public use. In a five-to-four decision, the Court upheld the taking and declared that, in this particular instance, economic development is a public use.[85] According to the Court, this decision reflects its "longstanding policy of deference to legislative judgments" regarding eminent domain,[86] which stems from *Berman* and *Midkiff*.

Although the Court upheld the use of eminent domain for economic development in *Kelo*, it appeared to emphasize the need to look at the facts of each takings case. In *Kelo*, the city's actions were authorized under a state statute that specifically permitted the use of eminent domain for economic development. In addition, the city had adopted a "comprehensive plan of development," and had conducted a "thorough deliberation" of the plan of development.[87] According to the Court, these actions proved that the city's condemnation decision was entitled to deference and appeared to sway the Court to its ultimate decision in favor of the city.

However, the four dissenting justices opined that the Court's review of the City's actions was inadequate. Justice O'Connor wrote that the majority's holding "washed out" the distinction

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[83] *See id.* at 2658-59.
[84] *See id.* at 2659. The majority opinion states that the City has underwent "[d]ecades of economic decline," has been designated as a "distressed municipality," and has had a major employer close its doors and move away within the last ten years. *See id.* at 2658. The opinion also states that the unemployment rate was double that of the State and that its population was declining. *See id.* at 2658.
[85] *See id.*
[86] *See id.* at 2663.
[87] *See id.* at 2665.

between private use and publice use, effectively deleting the public use clause from the Fifth Amendment.[88] The dissenting judges all agreed that the Court's decision to permit the condemnation based solely on economic development would likely pose problems in the future.

II. PROHIBITING TAKINGS FOR ECONOMIC DEVELOPMENT

Many state and federal courts, including the US Supreme Court, have held that *Kelo*-type takings are a valid public use that satisfy the eminent domain requirements in the federal and state constitutions.[89] This, however, is slowly changing. In a recent decision, the Michigan Supreme Court blocked an attempt to employ eminent domain for economic development.[90] The Court held that takings based solely on economic development are contrary to the public use clause of the eminent domain doctrine.[91] Many state and federal legislatures have recently proposed bills that would purport to prohibit *Kelo*-type takings.[92]

A. County of Wayne v. Hathcock

Twenty-three years after *Poletown*, the Michigan Supreme Court unanimously overruled the oft-criticized decision.[93] In *Hathcock,* the Court declared that justifying "the exercise of eminent domain solely [based on] the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."[94] In *Hathcock,* the county planned

[88] *See id.* at 2671.
[89] *See supra* note 19.
[90] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 785 (Mich. 2004).
[91] *See id.*
[92] *See supra* note 29.
[93] *Poletown* has been cited as one of the most controversial decisions in Michigan jurisprudence, and one of the most significant decisions in the nation on the subject of eminent domain in the years following *Berman*. *See, e.g.*, City of Detroit v. Vavro, 442 N.W.2d 730, 731 (Mich. App. 1989) ("In any event, as much as we would wish the Supreme Court to overrule *Poletown,* we are compelled to apply it until they do so."); Jones, *supra* note 10, at 295 (stating that *Poletown* "reduced the public use requirement to an ineffectual safeguard of private property rights).
[94] *Hathcock*, 684 N.W.2d at 482.

to build a "metropolitan park" onto an airport by using its eminent domain powers to take the necessary amount of property. Property owners filed suit, arguing that because the park would house various private business, it was a private-to-private transfer and contrary to the public use clause of the state's eminent domain provisions.

The Court reviewed its state's public use jurisprudence and concluded that condemnations for subsequent transfer to private entities satisfy the public use clause of Michigan's constitutional eminent domain provision only when they "[p]ossess[ ] one of the three characteristics in pre-1963 case law identified by Justice Ryan" in his *Poletown* dissent.[95] In this case, the Court held that the taking did not pass constitutional muster because the park was not for "instrumentalities of commerce," would not remain accountable to the public, and was not condemned based on "facts of independent public significance."

The third prong of the Court's three-part test provides that the government can transfer land to a private entity if the land is condemned based on "facts of independent public significance."[96] According to the Court, "need to remedy urban blight for the sake of public health and safety" is a paradigmatic example of this prong.[97] The Court explained that, when authorities seek to

[95] *Id*. at 781 As noted earlier, the Court found that condemnations for purposes of transferring property to a private entity will satisfy the public use clause if they involve "public necessity of the extreme sort otherwise impracticable." *Id*. (quoting *Poletown*, 304 N.W.2d at 675 (Ryan, J., dissenting)) This, the Court explained, occurs when eminent domain is used to build "highways, railroads, canals, and other instrumentalities of commerce." *Id*. In these situations, the condemnation requires "collective action" in order to avoid hold-out tactics among property owners who refuse to sell their "land for any amount less than fifty times its appraised value." *Id*. at 781-82. Further, the Court found that if the private entity remains "accountable to the public in its use of that property," the transfer to the private entity satisfies the public use clause. *Id*. at 782. This requires that the public have some "measure of control" over the subsequent use of the property. *Id*. For example, when eminent domain is used to build a petroleum pipeline owned by a private corporation, and that corporation "pledge[s] itself to transport in interstate commerce" and operate "pursuant to directions" from the state, the public has control over the property. *Id*. (citing Lakehead Pipe Line Co. v. Dehn, 64 N.W.2d 903 (1954)).
[96] *Id*. at 783.
[97] *Id*.

remove blight, "the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land . . . satisf[ies] the Constitution's public use requirement."[98]

In her partial concurrence and partial dissent, Justice Weaver was not convinced that the majority's three-part categorization of the public use clause would be effective.[99] For example, Justice Weaver explained that it is "easy to imagine how the people's limit on the exercise of eminent domain might be eroded" when authorities condemn property based on "facts of independent public significance."[100] She further explained that, under this categorization, a municipality could effortlessly stretch blight designations and declare any property blighted for the sole purpose of transferring the property to another private entity.[101]

The policy underlying the decision in *Hathcock* has been recognized in a limited number of other states as well.[102] In those states, courts have ruled that permitting private-to-private transfers based on economic benefits gives local authorities a blank check in their powers of eminent domain.[103] Those that have banned *Poletown* and *Kelo*-type uses of eminent domain

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[98] *Id*.
[99] *See id*. at 797 (Weaver, J., concurring) (stating that the categorization is "better suited to articles in law journals that have no force of law than it is to judicial opinions").
[100] *Id.* (Weaver, J., concurring).
[101] *See id.* (stating that a municipality "could declare the lack of a two-car garage to be evidence of blight," or "justify condemning a small brake repair business so that the property can be used for a hardware store").
[102] *See* Southwestern Illinois Development Authority v. National City Environmental, *L.L.*C., 768 N.E.2d 1, 8-9 (Ill. 2002) (stating that, although the term public use is "flexible," it does not "equate to unfettered ability to exercise takings beyond constitutional boundaries"); Casino Reinvestment Development Authority v. Banin, 727 A.2d 102, 111 (NJ Super. Ct. Law Div. 1998) (stating that when property is taken through the use of eminent domain and transferred to a private developer, there are no assurances that the public interest will be protected).
[103] *See, e.g*., Daniels v. The Arena Plan Comm'n of Allen County, 306 F.3d 445, 466 (7th Cir. 2002) ("The public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if a landowner chooses to use his property in a beneficial, but not mandated, manner."); 99 Cents Only Stores v. Lancaseter Redev. Agency, 237 F. Supp. 2d 1123, 1129-30 (D. C.D. Cal. 2001) (concluding that a condemnation to satisfy "private expansion demands" of major retailer violated the public use requirement); Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003)(finding that the construction of a large retail store did not satisfy public use); *Southwestern Illinois Development Authority*, 768 N.E.2d at 8 (Ill. 2002) (stating that, because every lawful business incidentally creates some positive economic growth, the use of eminent domain can not be justified solely on the basis of economic development and therefore a parking garage structure did not satisfy the public use requirement); *Casino Reinvestment*, 727 A.2d at 111 (finding that hotel development project proposed by hotel operator was not a public use); Georgia Dept. of Transp. v. Jasper County, 586 S.E.2d 853 (S.C., 2003) (Proposed marine terminal projected an economic benefit, but was not a public use to justify eminent domain); Dickgieser v.

continue to allow condemnations for private-to-private transfer on the basis of urban blight removal.[104] In classifying blight removal as a public use, the intent to protect property owners from *Poletown*-type abuses of eminent domain is, in the words of Justice Weaver, "less certain."[105]

B. State and Federal Leglisation

The *Hathcock* decision and the public outcry from *Kelo* sparked numerous state and federal bills on the subject.[106] In 2005, the Federal Government proposed a bill attempting to eliminate *Kelo*-type takings, i.e. private-to-private transfers based solely on economic development. The Private Property Rights Protection Act denies federal economic assistance to any state or governmental entity that uses the power of eminent domain for private-to-private transfers based on economic development.[107] The Act states that Congress specifically found that the Supreme Court's *Kelo* decision increases the threat of eminent domain abuse, especially in rural areas.[108] The Act also declares that Congress has a duty to protect rural Americans' property rights.[109]

Many state legislatures have proposed bills prohibiting *Kelo*-type takings after the massive public outcry from the potential affects of the *Kelo* decision.[110] However, most of these bills contain exceptions in the case of blighted properties, where, if the government determines

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State, 76 P.3d 288 (Wash. App. Div. 2003) (finding that no taking occurred in inverse condemnation case because logging on state land that channeled water on adjoining property was not a public use).

[104] *See, e.g.*, Bailey v. Myers, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (stating that slum or blight removal is a factor considered in determining whether taking is for private or public use); Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton, 851 A.2d 685 (N.J. 2004) (stating that blight removal is a public use).

[105] *Hathcock*, 684 N.W.2d at 797 (Weaver, J., concurring) Justice Weaver stated that the majority's three part categorization approach to public use made the "intended protections from . . . encroachments on protected rights less certain because it moves away from the constitutional text." *Id.*

[106] *See supra* note 29.

[107] H.R. 4128, 109th Cong. (2005).

[108] H.R. REP. NO. 109-262, at § 7(a) (2005).

[109] H.R. REP. NO. 109-262, at § 7(b) (2005).

[110] *See supra* note 29.

that a property is blighted because it is economically underdeveloped, the government can transfer the property to another private party.[111] Critics say that this creates a loophole for governments to engage in *Kelo*-type takings because these types of takings can be disguised under the blight exception, especially where the definitions of blight include property that is "economically obsolete."[112]

III. THE BLIGHT EXCEPTION AS SWALLOWING THE RULE

Throughout the United States, local governments often clash with citizens over what constitutes a blighted area.[113] Broad statutory definitions of blight combined with limited judicial review have resulted in blight designations that many citizens disagree with. When governments transfer this property to a private company, which commonly happens, property owners claim a violation of the public use clause of the eminent domain doctrine.

A. Background on Urban Blight

The concept of blight arose out of the problems caused by America's rapidly transformed landscape and officials' attempts at slum removal. By the mid-twentieth century, most officials acknowledged the existence of slums. However, these officials continued to search for a justification to revitalize those urban areas that were economically or socially problematic, but had not yet risen to the deterioration level of a slum.[114]

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[111] *See id*.

[112] *See* Ashley J. Furhmeister, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171 (2005) (stating that blight criteria should be carefully defined to prevent a blight loophole to economic development)

[113] *See In Ohio, A Test For Eminent Domain*, WASH. POST, June 22, 2003, at A03; Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. CIN. L. REV. 207 (2004).

[114] *See* 2A NICHOLS ON EMINENT DOMAIN §2.51561[1] (3d rev. ed. 1975) (stating that blight is slum prevention, by eliminating the areas that tend to produce slums); MABEL WALKER, URBAN BLIGHT AND SLUMS 5 (1938) (defining blight as "[a]n area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition"); *see*

Blight provided officials with justification to remedy economically and socially declining areas. It was conveniently defined more broadly than "slum," and was often viewed as the "disease or cancer" that created slums.[115] Courts upheld condemnations based on blight removal on the ground that they were related to the traditional "police power" objectives, i.e. improving the public health, safety, and welfare.[116] Although local authorities subsequently transferred the property to a private entity for development, this was recognized as incidental to the "controlling purpose" of slum clearance.[117] In one case, the Court even took judicial notice that "razing [ ] unsanitary dwellings tends to diminish the potentialities of epidemics, crime and waste, and that the destruction of slums at their focal centers prevents the spread of crime and disease to uninfected areas and enhances the physical and moral values of surrounding communities."[118]

States quickly declared that blight removal fulfilled the "public use" clause of their eminent domain provisions.[119] Legislatures acknowledged the existence of "substandard and insanitary areas"[120] and determined that these conditions impaired "the economic value of large areas, infecting them with economic blight." Further, legislatures declared that clearing these areas was "necessary for the public welfare; [and] are public uses and purposes for which private property may be acquired."[121] When litigation between the affected parties ultimately reached

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also Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 18 (2003) (discussing the discovery of blight).

[115] Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 310 (2004).

[116] *See id*. at 335-36 (stating that all presumptions are in favor of the constitutionality of the condemnation and citing cases in different states who agree).

[117] *See In re* Slum Clearance in City of Detroit, 50 N.W.2d 340 (Mich. 1951) (upholding the condemnation because the public purpose of slum clearance is the one controlling purpose of the condemnation).

[118] *In re* Edward J. Jeffries Homes Housing Project, City of Detroit, 11 N.W.2d 272 (Mich. 1943) (holding that the public use requirement of eminent domain was met when the City condemned a housing project on the basis of slum clearance).

[119] *See* MICH. COMP. LAWS ANN. § 125.902 (West 1997).

[120] § 125.902

[121] § 125.902

their respective courts, the condemnations were approved and the legislation was largely upheld as constitutional.[122]

1. *The U.S. Supreme Court Holds that Blight Satisfies Public Use*

In 1954, Congress declared that the whole D.C. area would be replanned and redeveloped because of its "obsolete lay-out . . . substandard housing[,] and blighted areas."[123] Congress embarked on this massive urban redevelopment campaign by utilizing its eminent domain powers to condemn property of owners who would not voluntarily sell. Additionally, Congress emphasized its preference of "private enterprise over public agencies in executing the redevelopment plan," and declared that this exercise of the eminent domain power was a public use.[124]

An owner of a department store located within this urban renewal area brought suit, objecting to the government's condemnation efforts.[125] The store owner urged that because the project would redevelop the land for private uses, it violated the public use provision in the Federal Constitution.[126] The case went in front of the U.S. Supreme Court.

The Court reviewed the constitutionality of this legislation, and its decision was persuasive throughout the nation.[127] The Court decided that the legislation, under the Federal Constitution, was valid under the legislature's police power.[128] The Court largely deferred to the

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[122] *See In re* Brewster Street Housing Site, 289 N.W. 504 (Mich. 1939)(stating that "[t]he power of eminent domain may be lawfully resorted to when authorized by the legislature to take the property of private individuals for purposes justifiable only under the police power of the State"). The *Brewster* Court also stated that at least 30 states had enacted identical legislation and in every instance where the legislation was challenged, it was upheld by courts. *See id*.

[123] Berman v. Parker, 348 U.S. 26, 28 (1954).

[124] *Id*. at 29

[125] *See id*. at 31.

[126] *See id*. at 31.

[127] *See* cases cited *supra* note 19.

[128] *See Berman*, 348 U.S. at 31-32. Because the legislature is the "main guardian of the public needs to be served by social legislation," the Court stated that the "role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Id*. at 32.

legislature's judgment in determining whether the taking was for the public use: "[w]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,"[129] thereby extracating any judicial review of condemnations based on urban renewal efforts. The Court upheld the condemnation, even after acknowledging that the property was transferred to private developers.[130] It concluded that the public use requirement in the Fifth Amendment is fulfilled simply when property is taken to eliminate the "blighted areas that tend to produce slums," and that any private interests that are served as a result are unimportant to the inquiry.[131]

This interpretation of the "public use" definition, and the concomitant judicial deference given to legislative determinations of what is a "public use," supported states in their attempts to use eminent domain as a tool for urban redevelopment projects. As courts nationwide largely removed themselves from reviewing the use of eminent domain to take land for urban renewal, the definition of blight was even more broadly construed.[132] As one sociologist explained, the definition of blight is that "this land is too good for these people."[133]

B. Broad Statutory Definitions of Blight that Permit the use of Eminent Domain for Private Uses

Hathcock's "facts of independent public significance" exception exists because, according to the Court, "the act of condemnation itself, rather than the use to which the land would eventually be put, [is] a public use." This exception is dangerous because broad blight definitions that go beyond the traditional understanding of blighted or slum property would permit exactly what *Hathcock* and many recent state legislation want to ban—*Kelo*-type

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[129] *Id*. at 32.
[130] *See id*. at 33-34.
[131] *Id*. at 35.
[132] *See* cases cited *supra* note 19; *see also* 2a NICHOLS ON EMINENT DOMAIN §7.2[2] (3d rev. ed. 1975) (discussing the broad view of public use as distinguished from the narrow view).
[133] SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 31 (1965).

takings. Blight definitions provide local governments with a considerable amount of discretion and creativity when determining whether an area is blighted and has led to frequent disagreements between property owners and governments over what constitutes a blighted area.[134] Although broad definitions of blight are beneficial in that they give officials discretion in determing which areas should be revitalized and also give officials the ability to override objections of a few landowners in large urban renewal projects, the potential for abuse inherent in such discretionary authority is motive to narrow blight definitions.

A few real-world examples accentuate the problem of broad blight definitions. In Ohio, a city council has determine a neighborhood blighted because houses in the neighborhood do not have attached garages or central air-conditioning.[135] If a Court agreed, then the city would be allowed to take the property and even transfer it to another private party. In Michigan, a city council has determined a thirty-five acre neighborhood surrounding Michigan State University blighted because it contains numerous rental properties (mostly for students that attend the University) that the council considers undesirable and its property values are not rising fast enough.[136] The city has plans to transfer this property to private developers to rebuild it into a mixture of housing, retail, and commercial centers.[137]

While these examples may be extreme, they exemplify the potential for abuse of broad blight definitions and the resulting ability to circumvent any attempt by a city to ban *Kelo*-type takings. If neighborhoods are blighted because the houses do not have central air-conditioning

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[134] *See* Steven Greehut, *The Blight of Eminent Domain, The Freeman: Ideas of Liberty*, Sept. 2002, at 8, available at http://www.fee.org; Blain Harden, *In Ohio, A Test for Eminent Domain*, WASH. POST, June 22, 2003, at A03; Sam Staley, *Wrecking Property rights*, REASON, Feb. 2003, at 32.
[135] *See* Eminent Domain—Being Abused?-CBS News, http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml (July 4, 2004).
[136] *See* Shikha Dalmia, *Blight Loophole Could Allow Cities to Grab Homes, Land*, DET. NEWS, Nov. 3, 2005.
[137] *See id*.

or the property values are not rising fast enough, it is easy to see how neighborhoods nationwide could be designated as blighted and transferred to a more profitable company. If blight exists because the property is "economically underutilized" or "economically obsolete," then it is difficult to imagine any property as being safe from condemnation when comparing it to the economic benefits of a corporation. [138]

IV. IS A HEIGHTENED STANDARD OF PROOF A SOLUTION?

Out of the many proposed bills banning *Kelo*-type takings, a few legislatures have recognized the need to address the potential loophole that arises from a broad definition of blight.[139] This potential for abuse is enhanced because a majority of courts review municipalities' blight designations under deferential standards of review, such as "arbitrary or capricious," "clear error," or "abuse of discretion."[140] A few states have recently proposed bills that would increase the standard of reviewing blight designations.[141]

Three states have bill proposals that attempt to fix the problem by placing the burden on the condemnor to show blight by clear and convincing evidence.[142] In Michigan, the legislature has

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[138] *See, e.g.,* ALA. CODE § 11-99-1 (1975) (economically distressed); FLA. STAT. ANN. § 163.335 (West 2000) (economically distressed); KAN. STAT. ANN. § 17-4743 ("contributing little to the tax income of the state and its municipalities")**;** N.H. REV. STAT. ANN. § 205:1 (impairing "economic values"); McKinney's Private Housing Finance Law § 11-a(impairing economic growth); OKLA. ST. ANN. tit. 11, § 38-102 (property that "retards sound economic development"); 35 PA. CONS. STAT. § 1702 (harmful to the "economic well-being").

[139] *See* Castle Coalition, Legislative Center, http://www.castlecoalition.org/legislation/index.html.

[140] *See* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389 (2000).

[141] *See* Castle Coalition Legislative Center, http://www.castlecoalition.org/legislation/index.html (detailing all federal and state proposed bills regarding eminent domain).

[142] In Michigan, the state legislature has passed a proposed constitutional amendment that requires a condemnor to show clear and convincing evidence of blight. *See* S. J. Res. E, 93rd Leg. (Mich. 2005). In Arizona, a proposed bill states that a takng creates a presumption that it is for a private use, and the burden is on the condemnor to show by clear and convincing evidence facts rebutting the presumption. *See* H.R. 2002, 47th Leg. (Ariz. 2006). In Missouri, a proposed bill would modify the laws relating to eminent domain and "blighted areas" to specifically state that economic underutilization shall not be a valid factor in determining blight. In addition to the current definition of blight, this section requires that the property in question satisfy the following criteria: 1. The property is in an area of high unemployment; and 2. The property is one with low fiscal capacity; and 3. The area containing the redevelopment area is characterized by low income. The section also makes the determinations of blight or

proposed and passed a constitutional amendment that would require the state to prove by clear and convincing evidence that the property that is being condemned based on blight is truly blighted.[143] In Arizona, the legislature similarly proposed a constitutional amendment creating a presumption that all takings based on blight are for a private use, and places the burden on the condemnor to rebut this presumption by clear and convincing evidence.[144] A bill in Missouri would modify the state's statutory definition of blight, prohibiting "economic underutilization" from being a factor in determining blight, and requiring the condemnor to prove by clear and convincing evidence the sufficiency of its findings of blight.[145]

A. Clear and Convincing Evidence—The Burden

The function of any standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[146] Three standards of proof are generally recognized by courts.[147] The least demanding standard, employed in civil cases, is the "preponderance of the evidence" standard. Preponderance of the evidence exists where the jury is satisfied that the probability of the correctness of the evidence is greater than fifty percent, i.e. that it is more likely than not that the plaintiff has a right to recover.[148] An intermediate threshold is the "clear and convincing" standard, which is reserved to protect particularly important interests in a

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conservation area a quasi-judicial function, attaching the rights of procedural due process to affected landowners and requiring the governing body to issue findings of fact and conclusions of law displaying clear and convincing evidence for the sufficiency of such finding of blight or conservation area. The findings of fact may be reviewed, de novo, at the request of any owner of property deemed blighted.. *See* S.B. 560, § 99.805, 93rd Gen. Assem. (Miss. 2006).

[143] *See* S. J. Res. E, 93rd Leg. (Mich. 2005).

[144] *See* H.R. 2002, 47th Leg. (Ariz. 2006).

[145] *See* S.B. 560, § 99.805, 93rd Gen. Assem. (Miss. 2006).

[146] In re Winship, 397 U.S. 358, 370 (1970).

[147] Price v. Symsek, 988 F.2d 1187, 1191 (Fed. Cir. 1993).

[148] *See* Metropolitan Stevedor Co. v. Rambo, 521 U.S. 121 (1997).

limited number of civil cases.[149] Finally, the "beyond a reasonable doubt" standard is employed when determining guilt in a criminal prosecution, and is the toughest burden to meet.[150]

The clear and convincing standard places the risk of an erroneous factual decision of blight on the government instead of the property owner. It is normally used to protect particularly important individual interests that have more than monetary value, reflecting a "fundamental assessment of the comparative social costs . . . of erroneous factual determinations."[151] Courts have found this intermediate standard to be appropriate in cases involving civil commitment,[152] libel,[153] deportation,[154] and denaturalization,[155] along with cases involving property rights, such as zoning classifications,[156] patent invalidity,[157] and water rights disputes.[158] It is a burden imposed on a party out of constitutional or policy considerations,[159] and has been defined as requiring a "high probability of truth" [160] or producing a "firm belief or conviction" in the mind of the factfinder that an allegation is true.[161]

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[149] *See* Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261, 262 (1990).
[150] *See* U.S. v. Booker, 543 U.S. 220 (2005).
[151] Price v. Symsek, 988 F.2d 1187, 1192 (1993) (finding that the clear and convincing standard must be used in determining priority of invention).
[152] *See* Addington v. Texas, 441 U.S. 418, 433-32 (1979) (court found the clear and convincing standard appropriate to decide whether appellant was mentally ill and required hospitalization for his own welfare).
[153] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (finding that, in action by private individual against licensed radio station for defamation, clear and convincing standard was appropriate).
[154] *See* Woodby v. INS, 385 U.S. 276 (1966)
[155] *See* Schneiderman v. United States, 320 U.S. 118 (1943).
[156] *See, e.g.*, Meyers v. City of Baton Rouge, 185 So. 2d 278 (La. Ct. App. 1st Cir. 1966); State ex rel. Thomas v. Ludewig, 116 Ohio App. 329, 187 N.E.2d 170 (1st Dist. Butler County 1962); Cushman v. City of Racine, 39 Wis. 2d 303, 159 N.W.2d 67 (1968); City of Greeley v. Ells, 186 Colo. 352, 527 P.2d 538 (1974); Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 468 P.2d 290 (1970); Tomasek v. City of Des Plaines, 64 Ill. 2d 172, 354 N.E.2d 899 (1976).
[157] *See* Price v. Symsek, 988 F.2d 1187, 1195 (1993)
[158] *See* Colorado v. New Mexico, 467 U.S. 310 (1984).
[159] *See id.*
[160] *See* Cross v. Ledford, 120 N.E.2d 118 (Ohio 1954)
[161] *See* In re Martin, 538 N.W.2d 399 (Mich 1995). "Evidence is 'clear and convincing' when it produces in mind of trier of fact firm belief or conviction as to truth of allegations sought to be established, evidence so clear, direct, weighty, and convincing as to enable factfinder to come to clear conviction, without hesitancy, of truth of precise facts in issue." *Id*.

The clear and convincing standard is applied in a variety of cases involving eminent domain. Usually, it is a burden placed on the property owner who is challenging the taking to overcome a presumption that the condemnation is valid.[162] While the condemnor may have an initial burden to show that the proposed taking is reasonable, most courts have expressed extreme deference toward the condemning authority in its decisions to employ the power of eminent domain. [163] The new standards created by Michigan, Arizona, and Missouri would change this deferential standard of review and place most of the burden at the outset on the state or municipality.

Although this heightened standard is likely the correct standard to use when dealing with important interests such as property rights, it is difficult to apply to the currently broad blight definitions. It will lead to one of two extremes. First, because most definitions of blight broadly permit economic considerations to be the sole factor in blight determination, even under a clear and convincing standard, the government could engage in *Kelo*-type takings if they can clearly and convincingly prove that the property is economically substandard. The second extreme is

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[162] *See* Matter of Egg Harbor Associates, 94 N.J. 358, 374 (1983) (holding that "[t]he burden of demonstrating that a taking has occurred lies upon the party alleging that the state action is unconstitutional. Proof must be by clear and convincing evidence."); Village of Wheeling v. Exchange Nat. Bank of Chicago, 572 N.E.2d 966,972, (Ill. App. Ct. 1991) (The property owner must establish by clear and convincing evidence that the ordinance is arbitrary and unreasonable and bears no substantial relation to the public health, safety or welfare.); State Highway Comm. v. Crossen-Nissen Co., 400 P.2d 283, 285 (1965) (The condemnor's choice is given great weight and will not be overturned except on clear and convincing proof that the decision was excessive or arbitrary); Rudder v. Wise County Redevelopment and Housing Authority, 249 S.E.2d 177, 178 (Va. 1978) (Condemnor's finding that area was blighted was presumptively correct, and burden was upon property owners to show by clear and convincing evidence that the finding was arbirary and unwarranted).

[163] *See* Norwood v. Horney, 830 N.E.2d 381, 388-89 (Ohio App. 2005). In Norwood, the court stated that "[t]he Ohio Supreme Court requires that we give the definition of "blighted area" a liberal interpretation." *Id*. Once a legislative determination of blight has been made, "courts are required to and should be zealous in giving such determination by the city great weight." *Id.*

> "We will not substitute our judgment for that of the legislative body of the city in an area appropriate for legislative determination. Nor will we interpose, without clear and convincing reason to do so, our authority between council and the citizens of the city to frustrate a determination and plan so adopted. Our role in determining whether governmental power has been exercised for a public purpose is an extremely narrow one."

Id.; *see also* City of Fairbanks v. Metro Co. 540 P.2d 1056, 1058 (Alaska 1975). "We hold today that in general condemnation proceedings . . . once the condemnor has presented sufficient evidence to support a finding that a particular taking is 'reasonably requisite' for the effectuation of the authorized public purpose for which it is sought, particular questions as to the route, location, or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice, or arbitrariness." *Id*.

the ending of all attempts to remedy blighted property because of the difficulty, expense, and time intensity in proving a broad concept by clear and convincing evidence. Neither of these extremes are acceptable.

B. Requiring Heightened Standard of Proof Might Still Permit *Kelo*-type Takings

Broad blight definitions might still permit *Kelo*-type takings, even under the clear and convincing standard. When blight is defined in terms such as property that is "economically obsolete," "deteriorated," or "overcrowded," the clear and convincing standard would be easy to meet, yet would still permit *Kelo*-type takings under the guise of blight. In *Kelo*, the City of New London could have blighted the property, and the taking might have been upheld under the heightened standard of proof because the blight definition broadly included economic factors.

In *Poletown*, the Michigan Supreme Court created a heightened standard of review of private-to-private takings, and still upheld a taking for private to private transfer based solely on economic benefits.[164] This heightened standard proved to be ineffective in subsequent cases because it essentially required clear and convincing proof of any public benefit, which, at that time, meant anything that bolstered the economy.[165] Similarly, the clear and convincing standard as applied to currently broad blight definitions will not have the intended effect of prohibiting *Kelo*-type takings.

C. Requiring Heightened Standard of Proof Might Lead to More Public Ownership of Property or Quash all Efforts of Eliminating Blight

Requiring the government to prove blight by clear and convincing evidence if it plans to transfer the property to a private party could also result in increased public ownership of property, or even an end of all efforts to remedy blight. The difficulty in applying the clear and convincing standard to a broad concept creates confusion and uncertainty. Instead of expending

[164] *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634-35 (1981) (overruled by County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)).
[165] *See*, *e.g.*, Tolksdorff v. Griffith, 626 N.W.2d 163, 167-69 (Mich. 2001) (invalidating legislation that allows condemnation of limited amounts of property in order to build roads for the benefit of landlocked property owners); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 643-46 (Mich. 1993) (invalidating taking of two apartment complexes for the benefit of a cable television company); City of Center Line v. Chmelko,, 416 N.W.2d 401, 402, 404-407 (1987) (invalidating condemnation of "two parcels of property" in order to facilitate expansion of a "local car dealership").

time and money on determining what evidence will satisfy a heightened burden of proof, officials will either forego transferring property to private entities and instead transfer only to public entities, or forego using eminent domain altogether on "blighted" property.

The increased time and money involved in proving blight designations by clear and convincing evidence might result in the government foregoing all efforts to transfer blighted property to private entities and instead transferring it to public entities. This might result in public ownership of a large amount of urban property, if the city has the funds to provide just compensation to property owners. Further, this newly created public property could, in the future, be leased or even sold to private entities!

Requiring the clear and convincing standard of proof might also end any attempts at remedying blighted property. This is especially true where cities do not have the money to acquire the property itself and would have had to rely on private entities to finance these projects.

V. REQUIRING BOTH PHYSICAL AND ECONOMIC BLIGHT: BACK TO TRADITIONAL NOTIONS

If states narrow their definitions of blight it will close the blight loophole around the ban on *Kelo*-type takings and will also give municipalities more certainty in their blight condemnations. Specifically, states should require that the government show objective evidence of both physical and economic blight. This will still give municipalities the power of eminent domain over truly blighted property even if it chooses to transfer the property to a private entity and will also strengthen the ban on *Kelo*-type takings by prohibiting blight designations based solely on economic factors.

1. *Traditional Notion of Blight—Both Physical and Economical Evidence*

As previously discussed, broad definitions of blight are vulnerable to creative expansion. This is at odds with definitions of blight in early blight cases of the 1940s and 50s, where governments' designations of blighted areas were more closely aligned to the traditional, layperson's notion of blight.[166] This traditional notion of blight included high crime, dilapidated, and disease infested neighborhoods, combined with substandard economic conditions.

Berman exemplifies this traditional notion of blight that existed in the mid-twentieth century. In *Berman*, the property was characterized by "[m]iserable and disreputable housing conditions," where "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating."[167] The neighborhood in *Berman* more closely fit the layperson's notion of blight than today's blight designations, where property is condemned because houses lack attached garages or central air conditioning.

Indeed, returning to a traditional notion of blight that existed in the mid-twentieth century would be consistent with current judicial opinions and state bills attempting to prohibit *Kelo*-type

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[166] *See, e.g.*, County of Riverside v. City of Murrieta, 76 Cal.Rptr.2d 606 (Cal. App. 1998) (stating that "true blight is expressed by the kind of dire inner-city slum conditions described in the [1964] *Bunker Hill* case: unacceptable living conditions of 82 percent; unacceptable building conditions of 76 percent; crime rate of double the city's average; arrest rate of eight times the city's average; fire rate of nine times the city's average; and the cost of city services more than seven times the cost of tax revenues"); Kaskel v. Impellitteri, 115 N.E.2d 659, 661 (N.Y. 1953) (The Court found blight where 20% of the land was occupied by dwellings more than sixty years old, 7% of the site is covered by hotels and rooming houses, 34% of the land is covered by parking lots, and 39% is occupied by nonresidential structures and, although the buildings are not as dilapidated as those discribed in novels, there is ample evidence that the area is "substandard and insanitary" by modern tests. The Court also stated that "[o]ne can conceive of a hypothetical case where the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary, in which case, probably, the conditions for the exercise of the power would not be present."); Oliver v. City of Clairton, 98 A.2d 47 (Pa. 1953) (finding that blight existed where over 50% of the dwelling units were substandard of slum quality, lots were not of adequate width, over 90% of the land was vacant, and the area was both socially and economically undesirable**);** Foeller v. Housing Authority of Portland, 256 P.2d 752 (Or. 1953) (finding that blight existed where houses were substandard, residential and factor structures disadvantaged those who lived in the area, there was heavy traffic passing through the area, and the area had a bad record for crime, fires, juvenile dependency and delinquency).

[167] *See* Berman v. Parker, 348 U.S. 26 (1954).

takings. The Michigan Supreme Court in *Hathcock* supported returning to original public use jurisprudence when it based its three factor test on pre-1963 jurisprudence.[168] Current proposed state bills seeking to ban *Kelo*-type takings are also a signal to return to mid-twentieth century public use jurisprudence.[169]

2. *Requiring Objective Evidence of Physical and Economic Blight*

The main problem with current blight definitions is that they permit blight designations based solely on economic factors, which turns blight into a loophole around the ban on *Kelo*-type takings. Removing all economic factors from the definition of blight would ensure that municipalities could not utilize eminent domain for purely economic development purposes, but would also remove a key objective factor in determining whether an area is truly blighted. Since blighted areas tend to be economically substandard, among other things, economic criteria are important in blight designations. Therefore, although economic factors cannot be the only set of factors relied on in blight designations, they do hold some credence.

Economic factors combined with objective physical indicators of blight will ensure that property is not determined blighted solely for economic development purposes while fulfilling the traditional, layperson's notion of blighted property. At least one state currently requires both physical and economic evidence of blight. In California, areas are blighted only if they feature at least one of four "physical" conditions, and at least one of five "economic" conditions.[170] This requirement has resulted in a number of blight rejections, but has upheld an equal number,

[168] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 781 (Mich. 2004).
[169] *See supra* section IV.
[170] *See* CAL. HEALTH & SAFETY CODE § 33031 (West 1999)

permitting the government to utilize eminent domain for private to private transfer where an area is truly blighted.[171]

3. *Objective Physical Indicators of Blight*

Returning to the traditional notion of blight by requiring both physical and economic evidence of blight will ensure that bans on *Kelo*-type takings are fully effected, putting teeth back into the public use limitation on the state's power of eminent domain. Requiring that the government show physical evidence of blight will ensure that property is not taken solely for economic development purposes. These physical indicators of blight, however, must be objectively based to promote confidence in the law and remove the "I know it when I see it" attitude.

Current blight definitions include subjective physical factors that are vague and in conflict with traditional notions of blight. Factors such as "building obsolescence" and "incompatible land use" are easily manipulated and do not comport with traditional notions of

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[171] *See* Blue v. City of Los Angeles, 41 Cal. Rptr. 3d 10 (Cal. App. 2006) (upholding blight designation where project area had high vacancy rates, low lease rates, residential overcrowding); Evans v. City of San Jose, 27 Cal. Rptr. 3d 675 (Cal. App. 2005) (upholding blight designation because record demonstrated that redevelopment was necessary, private enterprise had little incentive to invest in the blighted area, government action alone could not reverse all blight conditions, and aggregations of smaller parcels required assistance of public sector and redevelopment agency); San Franciscans Upholding the Downtown Plan v. City & County of San Fransisco, 125 Cal. Rptr. 2d 745 (Cal. App. 2002) (upholding blight designation because city engaged in exhaustive analyses, the environmental impact report (EIR) and redevelopment agency's report provided substantial evidence to satisfy the finding of physical blight, all but one of the major buildings in redevelopment area were built in or before 1955, nine of the 12 buildings were in a seriously deteriorated condition, with significant physical deficiencies that rendered them unsafe and unhealthy for occupancy by workers and the public, and at least eight of the 12 buildings were susceptible to collapse in event of a moderate to strong earthquake).
See Graber v. City of Upland, 121 Cal. Rptr. 2d 649 (Cal. App. 2002) (striking down blight designation because definitions of "deficient" and "deteriorated" as used in field survey of structures in redevelopment project area were overbroad for purposes of finding that the structures were physically blighted, and thus evidence was insufficient to support finding that the area suffered from physical blight, although survey identified 85.5% of the structures in the area as deficient and 7.2% as deteriorated); Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency, 98 Cal. Rptr. 2d 334 (Cal. App. 2000) (striking down blight designation because building survey did not establish that buildings were unsafe or unhealthy and no evidence quantiifed how physical conditions rendered the use of buildings economically nonviable); Beach-Courchesne v. City of Diamond Bar (95 Cal. Rptr. 2d 265 (Cal. App. 2000) (striking down blight designation because not a single structure was identified by city as being unsafe or unhealthy, only one of 250 buildings in project area was identified as being in need of extensive rehabilitation, and consultant who drafted blight assessment report referred only to potential health and safety considerations).

blight.[172] Requiring governmental officials to show building obsolescense through direct, objective factors would promote certainty for both property owners and government officials.[173]

Objectively based physical indicators of blight are those that are not subject to manipulation by government officials and are specifically linked to the underlying blight condition. Such factors include dilapidated buildings, buildings that are fire hazards, buildings with sanitation problems, and abandoned buidlings. Those buildings that present a real danger to the public's health and safety, such as those with structural instability, would comport with a layperson's notion of blight. Abandoned buildings present a danger to the public's health and safety as well because they tend to attract crime into the area and provide no return benefits to the community. Buildings that are environmentally contaminated would also comport with the layperson's notion of blight.

States need to prevent the prospect of private investment to be the driving factor behind blight designations. Property should be deemed blighted because it would traditionally be considered blighted. Requiring objective evidence of both physical and economic blight before a government can designate a property as blighted and transfer the property to another private party will ensure that the primary reason for the taking is blight removal. This will require states to adjust their current blight definitions.

VI. CONCLUSION

The interpretation of the public use clause is currently undergoing transformation as a result of the political and legal battles over whether economic development is a public use and

[172] *See* Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. CIN. L. REV. 207, 226-231 (2004).

[173] *See also* Thaddeus L. Pitney, *Loans, and Takings, and Buildings—Oh My!: A Necessary Difference Between Public Purpose and Public Use in Economic Development*, 56 SYRACUSE L. REV. 321 (2006) (discussing that "eminent domain proceedings to pursue economic development goals should be limited to instances where there is a demonstrable direct public use").

what qualifies as "blighted" property. The Supreme Court's decision in *Kelo* has incited intense opposition to takings for private-to-private transfer based solely on economic development (*Kelo*-type takings). Courts and legislatures have narrowed the public use clause in their search to prohibit *Kelo*-type takings. The next step that some states have already initiated is to close the loophole that broad blight definitions create in this rule.

States have attempted to close this loophole by requiring the government to prove blight by clear and convincing evidence. This heightened standard, however, will likely lead to two extreme problems. First, *Kelo*-type takings might still occur because broad blight definitions permit economic factors as the sole criteria of blight. This is a problem because even proving that a property is economically deteriorated by clear and convincing evidence will still permit economic development takings. On the other extreme, municipalities' efforts of remedying blighted property might be quashed because many do not have the time or money to engage in lengthy evidence finding tasks to meet a heightened standard of proof. Because most cities would not have the budget to purchase the property and transfer it to a public entity, it will be increasingly difficult to fix property that is truly blighted. Because of these problems, the clear and convincing standard is unworkable for protecting property interests and for remedying property that is truly blighted.

In this paper, I propose a return to traditional notions of blight by requiring objective evidence of both physical and economic blight. This will ensure that the ban on *Kelo*-type takings is effected and that the government will still have the power to remedy truly blighted areas. This will require that states amend their statutory blight definitions.