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## The Use and Abuse of Blight in Eminent Domain

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## THE USE AND ABUSE OF BLIGHT IN EMINENT DOMAIN

*Martin E. Gold & Lynne B. Sagalyn\**

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### INTRODUCTION

Blight findings have functioned as a cornerstone for condemnation takings since the severe urban decline in the middle of the twentieth century prompted governments at every level, throughout the country, to actively intervene in the real estate market. Elements of blight, and then the term itself, became a foundational basis for this governmental intervention. But using blight as a basis for that intervention has become increasingly controversial as its application has moved from slum clearance to urban redevelopment, then to economic development projects, and on to revenue enhancing projects—all the while its definition expanded. Immediately following the outcry over the U.S. Supreme Court’s decision in *Kelo v. City of New London*,<sup>1</sup> homeowners, business activists, and state politicians, or-

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1. 545 U.S. 469 (2005). In *Kelo*, the city of New London, acting through its development agency, approved a development plan to revitalize its ailing economy and initiated condemnation proceedings against owners of property (residential) that refused to sell. The Supreme Court said the City could not take petitioners’ land simply to confer a private benefit on a particular private party, but that the takings in this case did not “benefit a particular class of identifiable individuals.” The City, it observed, was trying to coordinate a variety

ganized to “reform” their state’s eminent domain statutes. A redefinition of blight became a top agenda item. Over its more than half century of use, blight had become a well-worn term of art. But its application to takings is subjective and malleable, so much so that it can now be said to be in the eyes of the beholder. When applied in the interests of curing slum conditions and remedying unsafe and unsanitary urban conditions, it generally functioned as intended. When applied for the purpose of initiating urban revitalization, it also functioned mostly as intended, but all too often with very negative consequences for the large numbers of low-income and minority households and businesses that were uprooted and displaced. But as its application has moved into other domains, including pure fiscal gain and competitive quests to retain and expand corporate facilities, it has been stretched and misused.

In this Article, we take a close look at the issue of blight, its use, and its abuse. In Part I, we briefly describe the origins of the use of blight, and discuss how, in the absence of a clear and unambiguous definition, the eminent domain statutes of the nation’s fifty states describe blight through multiple and very diverse criteria. Even prior to *Kelo*, several states enacted reforms aimed at curbing abuses arising from *tabula rasa* blight criteria, but these reforms did not change the highly subjective character of its determination. Part II is devoted to laying out a hierarchy of project uses and benefits. Eminent domain is a balance between government and public needs on the one hand and property owner rights on the other. By creating the hierarchy we can compare the amount of public benefits on the one hand and private benefits on the other in any project. This ladder of uses and benefits moves from pure public benefit at the top, down to nearly total private benefit at the bottom. Where a particular eminent domain taking falls along the spectrum of the hierarchy will depend upon its *ratio* of public benefits to private benefits. We hope that this will help create a useful perspective and tool to evaluate the usage of eminent domain and blight findings.

In Part III, we consider Columbia University’s expansion in Manhattanville and how the findings of blight there were assessed very differently by

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of commercial, residential, and recreational land uses, to form a greater whole. And although the City would not be opening the condemned land to general public use, the Court reaffirmed its long held view that public use is interpreted to mean “public purpose.” The promotion of economic development, it said, is a long-accepted governmental function, and there was no principled way of distinguishing economic development projects from the other public purposes recognized by the Court. Given the facts of the case, and the Court’s policy of deference to legislative judgments as to what public needs justify the use of the takings power, the takings in *Kelo*, it held, satisfy the Fifth Amendment. The condemnation in *Kelo* did not depend on a blight finding.

New York's Appellate Division and Court of Appeals. In Part IV, we discuss the extent to which the post-*Kelo* reforms enacted in forty-three states redefined blight; and, in Part V, we discuss how political and business forces have weakened and reduced efforts to enact serious reforms. In addressing abuses in the use of blight criteria, in Part VI, we look again at the reforms made in the post-*Kelo* era and focus on the creation of a better definition through the elimination of the most abused criteria and the use of quantification. Believing as we do that there are clear and compelling reasons for using the power of eminent domain for public purposes (and not just pure public use) our purpose is to see established thoughtfully crafted, objective, and measurable standards for the determination of blight.

### I. BLIGHT DETERMINATIONS: MORE FACILITATING THAN LIMITING

The idea was unconventional, and controversial, from the start. As a condition to be ameliorated by concerted government intervention, "blight" had to be invented.<sup>2</sup> The notion that certain physical, social, and economic conditions short of being a slum, though not yet a slum, only on the way to likely becoming a slum, presented a danger for cities and a threat to public health, safety, and general welfare evolved with time. It took more than thirty years for the concept of blight, blighting conditions, and blighted districts to become the underlying policy logic of urban redevelopment and the basis of positive findings for using eminent domain powers in pursuit of rebuilding the nation's central cities. The first step was taken in the 1920s and 1930s by the efforts of a few states<sup>3</sup> and then the federal government to clear slums and build public housing. This was followed by several pioneering state enabling acts in the 1940s<sup>4</sup> designed to attract private enterprise to rebuild urban areas. Then Title I of the 1949 Housing Act authorizing the federal urban renewal program codified the policy logic of tearing down slums and building middle- and upper-income housing and structures for commerce and industry as urban redevelopment strategy. To

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2. See ROBERT M. FOGELSON, *DOWNTOWN: ITS RISE AND FALL, 1880-1950*, at 317-80 (2001).

3. New York State led the way in 1926, and New Jersey followed shortly thereafter in 1929. In response to dire slum conditions (following the limiting lessons learned from tenement reform laws), New York's legislators established laws granting eminent domain powers to private developers in exchange for specific regulatory conditions. This led to the development of the Amalgamated Dwellings and Knickerbocker Village, among others, though this did not generate the scale of hoped for redevelopment. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 310 (2004).

4. Maryland, Minnesota, and Pennsylvania were among the first, yet by the end of World War II, about twenty states had passed enabling acts and more would follow. See FOGELSON, *supra* note 2, at 304.

promote their cause, the advocates of redevelopment, thinking long-term and tactically, framed blight as an economic drain on cities, not just a social liability. Blighted areas had to be razed because, redevelopment advocates reasoned, they are “incipient slums” and a threat to the fiscal solvency of the city.<sup>5</sup>

In his major treatise, the first comprehensive study of land values in a large city over an extended period of time, Homer Hoyt described blight as the natural result of economic and social change. Referring to a three-mile belt of land in Chicago extending from the center city, known as the “Loop,” which “was once an area of new and vigorous growth in 1873 and an obsolete and blighted area in 1933,” he laid out the economic consequences of decline:

Thus land in what is now known as the blighted area yielded an income and had prospects of enhancement in value due to absorption by industry that it does not have in 1933. Even in 1900, however, the returns from this class of property were capitalized at a high rate, so that the land values as whole had ceased to advance.<sup>6</sup>

Hoyt went on to cite the close proximity of the vice section, and of “the advancing line of industries and warehouses” to what once were fashionable residential sections that were sliding downward and losing their social prestige.<sup>7</sup> As a result of these changes in the pattern of the distribution of population and land values, Hoyt concluded that “blighted areas” were more difficult to reclaim because “obsolete improvements and diversified ownership” made them less competitive for redevelopment by market forces than new development on “tracts of virgin prairie” serviced by transit or commuter rail or accessible by automobile.<sup>8</sup> Large sections of the city, for example, the packing plants on the South Side as well as areas on the North Side and near West Side, “seem to offer few attractions for residential development, unless reclamation of the blighted areas is to be attempted on a grand scale.”<sup>9</sup>

The facilitating feature of “blight” was that it was hard to know precisely what it was and therefore hard to define, yet this very vagueness would make it *easy* to find. The phrases used in the 1930s to describe its conditions unsurprisingly resonate with typical contemporary statutory criteria,

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5. *Id.* at 349.

6. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO: THE RELATIONSHIP OF THE GROWTH OF CHICAGO TO THE RISE OF LAND VALUES, 1830-1933, at 202 (2000).

7. *Id.*

8. *Id.* at 362.

9. *Id.* at 363.

pre- and post-*Kelo*: areas where property values are decreasing; where buildings have become obsolete; where fundamental repairs are not being made; where high vacancies exist; where economic development has been substantially retarded or normal development frustrated; or, where taxes do not pay for public services. Commenting as early as 1918, a Philadelphian professional noted a blighted area “is a district which is not what it should be.”<sup>10</sup> Decades later, under Robert Moses’ urban renewal machine as well as in cities all across the nation, what constituted a blighted area remained open to argument and debate.

Whatever the actual merits, cities had good reasons to stretch the meaning of blight, as Bernard J. Frieden and Lynne Sagalyn explained in *Downtown, Inc.: How America Rebuilds Cities*:<sup>11</sup>

Federal regulations that emphasized clearing the most unlivable areas conflicted with other rules requiring local renewal agencies to sell their cleared sites to private developers for rebuilding. Few developers were willing to build in the heart of the slums. Cities such as Newark tried in the early years of the program to plan middle-income housing in some of the worst parts of the city, only to discover that no developers were interested. Soon city renewal directors were searching for “the blight that’s right”—places just bad enough to clear but good enough to attract developers.<sup>12</sup>

Because the federal government was picking up two-thirds of the cost to clear blighted and slum areas and write-down the cost of selling the land to developers,<sup>13</sup> it would not have been unreasonable to expect government bureaucrats or congressional legislation to define the specifics of the urban renewal program and exercise control over what local agencies did with the grant monies. Yet, Title I left these specifics to local governments and

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10. William C. Stanton, *Blighted Districts in Philadelphia*, in PLANNING PROBLEMS OF TOWN, CITY, AND REGION 76, 76 (1918).

11. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN INC.: HOW AMERICA REBUILDS CITIES* 23 (1989).

12. *Id.*

13. To make the financing task easier for cities, the federal government allowed them to pay their share by building public works to serve a project area. Under this option, the federal government would first share two-thirds of the cost of such items as new schools or street improvements for renewal projects, and second, accept these public works at full cost as part of a city’s required matching share. In this way a renewal agency could use public works to pay for its entire share of a project and many did. By 1968, the federal government was collecting only twelve cents of every local matching dollar in cash; the rest was all public works and similar credits. See FRIEDEN & SAGALYN, *supra* note 11, at 26-27. The political logic of this type of “costless” off-budget financing was a lesson cities took to heart in devising subsequent strategies to finance redevelopment once the federal government ended urban renewal in 1974. See Lynne B. Sagalyn, *Explaining the Improbable: Local Redevelopment in the Wake of Federal Cutbacks*, 56 J. AM. PLAN. ASS’N 429 (1990).

their redevelopment agencies, which were heavily influenced by downtown business interests and real estate developers. This coupling formed the basis of a formidable and enduring redevelopment alliance between government and business. Federalism likewise prevailed in the definition and determination of “blighted areas,” since the federal government deferred to the states, which enabled the redevelopment entities. As historian Colin Gordon noted in his inclusive analysis of the definitional character of blight, “most states, in fact, stopped short of defining blight and instead offered a descriptive catalogue of blighted conditions—often pasted verbatim from Progressive-era health or safety statutes.”<sup>14</sup> And as has been noted by several scholars parsing the statutes and definitional foundations of blight, the criteria necessary for positive findings of blight are broad in number; and “liberal,” “vague,” “ambiguous,” or open-ended and non-objective in determination.<sup>15</sup>

However diverse the criteria range across state statutes, they potently combine with broad discretionary powers given to local redevelopment authorities in determining blight. The table below shows the prevalence of blighting criteria. It is compiled from Hudson Hayes Luce’s analysis of the statutes in each of the fifty states and the District of Columbia, which groups the common characteristics of blight into twelve categories.<sup>16</sup>

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14. Gordon, *supra* note 3, at 312.

15. See, e.g., George Lefcoe, *Finding the Blight that’s Right for California Redevelopment Law*, 52 HASTING L.J. 991 (2000-2001) [hereinafter Lefcoe, *Finding the Blight that’s Right*]; Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389 (2001); Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895 (2006). For a discussion of blight and tax increment financing (TIF), see generally Gordon, *supra* note 3; George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TULANE L. REV. 1 (2008) [hereinafter Lefcoe, *After Kelo*]; George Lefcoe, *Redevelopment Takings After Kelo: What’s Blight Got To Do With It?*, 17 REV. L. & SOC. JUST. 803-51 (2008) [hereinafter Lefcoe, *Redevelopment Takings After Kelo*].

16. Luce’s analysis included Guam, Puerto Rico, and the Virgin Islands, which are omitted from discussion herein. See Luce, *supra* note 15.

**Table 1.** Pre-*Kelo* Incidence of Blight Criteria Across State Statutes (including District of Columbia).

Category	Category of Blight Criteria	Incidence in Statutes	
		No.	%
1	Structural Defects	51	100%
2	Health Hazards	49	96%
3	Faulty or Obsolescent Planning	43	84%
4	Taxation Issues	35	69%
5	Lack of Necessary Amenities (impacting health and safety)	34	67%
6	Condition of Title	31	61%
7	Character of Neighborhood	12	25%
8	Blighted Open Areas	12	24%
9	Declared Disaster Area	11	22%
10	Economic Use of Land	10	20%
11	Vacancies	9	18%
12	Physical or Geological Factors	7	14%

Source: Compilation by authors from Luce, *supra* note 15, at 397-402.

Several themes stand out: (1) Blight is commonly and intuitively defined by structural defects and health hazards in nearly every state statute. Insufficient light, air, ventilation, and access to utilities, all typically associated with necessary standards of living, are also included as blight criteria in two-thirds of the statutes. Condensed together, these criteria represent the police-power definition of blight, conditions that are a threat to public health and safety. (2) Planning features, whether faulty or obsolescent (including irregular or small-lot layout, insufficient street capacity, overcrowding, lot areas covered by buildings, and insufficient green spaces, parks, or recreational facilities), define a second broad category that all but eight statutes include as a condition of blight.<sup>17</sup> (3) Neighborhood character or the presence of blighted open areas (large areas of undeveloped or vacant land) are far less common as criteria of blight; only thirteen statutes<sup>18</sup> include neighborhood character, and only a different set of twelve<sup>19</sup>

17. The eight states are Connecticut, Indiana, Maryland, Michigan, New York, Pennsylvania, Virginia, and Wisconsin. *See id.* at 395.

18. Arizona, Arkansas, California, Connecticut, Indiana, Maine, Michigan, Montana, Nebraska, Nevada, Rhode Island, South Carolina, and Utah. *See id.* at 399-400 nn.80-92.



include blighted open areas as a determinant. (4) Criteria often cited for condemnation abuse—economic use of land<sup>20</sup> and vacancies<sup>21</sup> impacting private redevelopment efforts—are relatively infrequent as preconditions for a positive finding of blight; as of 2000, in only ten states (or twenty percent),<sup>22</sup> New York among them,<sup>23</sup> could the economic use of land qualify as a condition of blight; only nine<sup>24</sup> statutes admit vacancies as a qualifying condition. In contrast, taxation<sup>25</sup> and legal conditions<sup>26</sup> are far more common blight criteria—sixty-nine and sixty-one percent, respectively. Though the common practice is to show evidence of as many blighting factors as possible, all but five states<sup>27</sup> base a positive determination of blight *on the presence of a single blighting factor*. Moreover, only seven states,<sup>28</sup> according to another analysis include any quantification in their designation of what is a blighted area.<sup>29</sup>

What impact post-*Kelo* reform efforts would have on the statutory basis for positive findings of blight is discussed shortly, but the widely held consensus among scholars and practitioners alike prior to the ruling was that “blight,” as Gordon phrased it, “has lost any substantive meaning as either

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19. Alabama, District of Columbia, Idaho, Maine, Massachusetts, Mississippi, New Jersey, New Mexico, Pennsylvania, South Dakota, Vermont, and Wyoming. *See id.* at 400 nn.93-104.

20. Economic use of land includes arrested economic development, stagnant or unproductive character of land, loss of population, and improvement in value of land by placement of development. One might also include in this category, physical and geological factors that would make development by private enterprise uneconomical and infeasible. *See id.* at 396.

21. Vacancies include vacant and abandoned buildings, vacant lots, low percentage of occupancy in buildings, and high turnover rate for leased properties. *See id.*

22. The ten states are Delaware, District of Columbia, Indiana, Kansas, Massachusetts, Nevada, New York, Oklahoma, Oregon, and Virginia. *See id.* at 401.

23. *See id.* The New York statute that is applicable to municipalities, according to Luce’s review, includes nine of the twelve blight criteria, omitting only faulty or obsolescent planning features, taxation issues, and condition of title. *See* New York Urban Development Corporation Act, N.Y. UNCONSOL. LAWS, §§ 6251-6285, 6260 (McKinney 2011).

24. Alabama, California, Delaware, District of Columbia, Maryland, Massachusetts, New Jersey, Pennsylvania, and South Carolina. *See* Luce, *supra* note 15, at 402 nn.128-36.

25. Taxation issues include unpaid *ad valorem* property taxes, special assessment liabilities exceeding the fair market value of the land, and insufficient tax revenues to cover the cost of services provided by the taxing authority. *See id.* at 395.

26. Condition of title factors include ownership of title vested in too many persons to allow economical development, title in the city or municipal government as a result of tax or other foreclosure, or inability to determine or find owner(s) of the land. *See id.*

27. The five states that require positive findings of more than one factor are Colorado, Kansas, Nebraska, South Carolina, and Utah. *See id.* at 403.

28. The seven states are Alabama, Arkansas, California, Massachusetts, Minnesota, Nebraska, and South Dakota. This will be discussed further *infra*.

29. Gordon, *supra* note 3, at 320 n.134.

a description of urban conditions or a target for public policy.”<sup>30</sup> Referring to its usage for tax increment financing, he went on to say that:

[B]light is less an objective condition than it is a legal pretext for various forms of commercial tax abatement that, in most settings, divert money from schools and county-funded social services. Redevelopment policies originally intended to address unsafe or insufficient urban housing are now more routinely employed to subsidize the building of suburban shopping malls.<sup>31</sup>

It was one thing for the policy logic of urban redevelopment to use blight as a condition precedent for condemnation. It was quite another for an off-budget financing strategy such as Tax Increment Financing (TIF) to appropriate liberal blight criteria and use it extensively as a basis for condemnation actions designed to enhance the fiscal fortunes of municipalities, as will be further discussed shortly.<sup>32</sup> Nowhere was this more common than in California after passage of the tax-cutting voter initiative, Proposition 13, in 1978, which capped taxes on real property at one percent of the full cash value, restricted annual increases of assessed value of real property to an inflation factor not to exceed two percent per year, and prohibited reassessment of a new base year value except for a change in ownership and completion of new construction.<sup>33</sup> Using TIF for fiscally-driven redevelopment projects was not, as Professor George Lefcoe has claimed, limited to California’s biggest and oldest cities.<sup>34</sup> California redevelopment agencies have declared prime sites in affluent cities (even the entire town of affluent Coronado) blighted. In a continuing critique, he explained that California’s statutory definition of blight:

[I]s not just about fairness to the owners of property taken. In California, redevelopment, particularly redevelopment intended to attract high volume retail, is a widely used way of boosting the city’s share of the state

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30. *Id.* at 307.

31. *Id.*

32. *See infra* text accompanying notes 91-104.

33. Proposition 13, officially named the People’s Initiative to Limit Property Taxation, added Article 13A to the California Constitution. Section 1(a) limits the tax rate for real estate: “The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.” The proposition decreased property taxes by assessing property values at their 1975-76 value (Section 2(a)) and restricted annual increases of assessed value of real property to an inflation factor, not to exceed two percent per year (Section 2(b)). It also prohibited reassessment of a new base year value except for change in ownership or completion of new construction (Section 2(a)).

34. *Id.*

sales tax and of sequestering property tax money that would have gone to the counties, school districts, and other taxing entities.<sup>35</sup>

Among those who looked long and hard at the definitional issues surrounding the policy uses and abuses of the blight standard, it is hard to find much optimism for the notion that significant abuse reform could be accomplished through a definition of “blight.” Crafting a definition that could break free of the risk of manipulation appeared elusive, however beneficial the intent.<sup>36</sup>

Prior to *Kelo*, several states had enacted reforms aimed at curbing abuses arising from *tabula rosa* blight criteria. These reforms included a rewording of the descriptive criteria in order to avoid the “double-counting” of similar factors (Illinois<sup>37</sup>), the addition of new descriptive criteria (Missouri<sup>38</sup>), a “check-list” formula (Illinois<sup>39</sup> and California<sup>40</sup>), and a tighter definition of eligible properties by restricting land eligible for designation as a blighted area (primarily wetlands, vacant lands, and agricultural land).<sup>41</sup> Yet these “reforms,” Gordon concluded:

[D]o not change the fact that judgments as to things like “obsolescence,” “dilapidation,” or “deleterious land uses” remain highly subjective. Moreover, blight remains a designation sought by developers, and hence shaped not by public purpose, but by private interests seeking public subsidies. Finally, state level reforms remained spooked by the prospect of interstate disadvantage . . . . Meaningful reform must address both the imprecision and ambiguities of existing blight definitions and the incentives to twist those definitions created by fragmented federal and metropolitan governance.<sup>42</sup>

## II. THE HIERARCHY OF USES

Since the Supreme Court decision in *Kelo v. City of New London*,<sup>43</sup> the nation has gone through a period of soul searching regarding the proper use

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35. Lefcoe, *Redevelopment Takings After Kelo*, *supra* note 15, at 820.

36. See Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 742 (2006). See generally Christopher S. Brown, Comment, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207 (2004).

37. Gordon, *supra* note 3, at 335 n.256 (citing 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(1) (2003) (amending 65 ILL. COMP. STAT. 5/11-74.4-3(a) (1999))).

38. See *id.* at 335 n.257 (citing S.B. 172, 92d Gen. Assemb., 1st Sess. § 99.805(7), (8) (Mo. 2003) (unenacted)).

39. See *id.* at 335, n.258. (citing 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(1) (1999)).

40. See *id.* at 335, n.259. (citing CAL. HEALTH & SAFETY CODE § 33031 (1999)).

41. See *id.* at 336, n.260.

42. See *id.* at 336-37.

43. 545 U.S. 469 (2005).

of the power of eminent domain. An essential question in this debate is “What is the right balance in eminent domain between governmental needs on the one hand and property owner rights on the other?”

There is little contention with respect to governmental needs when the use to which the property being taken is a pure or quintessential public use. “Pure Public Uses” would include modes of transportation that remain in governmental hands, such as highways, local streets, subways, light transit, airports, municipal docks and ports, reservoirs, water tunnels, sewer systems, public libraries, public schools, prisons, and police facilities. Pure Public Use would also include parks or other land that is owned by the government and open and accessible to the entire public at all times, even if a usage or entry fee is required.

Just below Pure Public Use are facilities with uses that directly benefit the general public and are owned by the public sector, including many in the use category just described, but are operated by private companies. Government owned utility systems and transportation facilities<sup>44</sup> that are developed and/or leased or licensed to private entities, or otherwise managed by them, fall into this category. Private prisons that are owned by the federal, state, or local government would be included here as well. They are not open to the public (though neither are public prisons) and are operated for a profit by private companies, but they serve a clear governmental purpose and payments come entirely from the government. Moreover, the government determines who is going to be a “user,” i.e., who is to be incarcerated.<sup>45</sup> Charter schools and other public schools managed by not-for-profit entities or private companies, likewise, would be included in this group. Government owned but privately operated sports facilities can also be put in this category. However, private pre-collegiate schools would not be included. Tuition is paid by private persons; the private school de-

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44. In *County of Wayne v. Hathcock*, 684 N.W.2d 765, 782 (Mich. 2004), the term “instrumentalities of commerce” is used. It is taken from Justice Ryan’s dissent in *Poletown Neighborhood Council v City of Detroit*, 410 Mich. 616, 665 (1981).

[T]he U.S. Supreme Court and courts in every state have upheld the use of eminent domain for acquiring property for laying railroad track. Likewise, courts accept the use of eminent domain for digging irrigation ditches and canals, piping oil, distributing artificial light and power, laying telephone wires, and laying coaxial cable and fiber optic lines.

Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based On Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 60 (2006).

45. In addition, such private prisons can be financed with tax-exempt bonds. See Ass’n of State Corr. Administrators, *ALTERNATIVES FOR FINANCING PRISON FACILITIES* 4 (1999), available at [http://www.asca.net/system/assets/attachments/2085/Alternatives\\_for\\_Financing\\_Prison\\_Facilities-3.pdf?1296161869](http://www.asca.net/system/assets/attachments/2085/Alternatives_for_Financing_Prison_Facilities-3.pdf?1296161869); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 383 n.81 (1996).

cides who shall gain entry, and although education has a general public benefit and purpose, the direct beneficiaries are not the public generally, but the students who attend (and their parents). We will return to a discussion of schools, at the university level, when we look at the public versus private benefits involved in the expansion of Columbia University.<sup>46</sup>

The next level down in our hierarchy of public uses is privately owned utilities. These are privately owned and run, but serve the public generally and are highly regulated by the government (through public service commissions) in order to assure adequate public service and fair rates. This “Utility Use” category includes electric utilities, gas utilities, regulated water companies, and telephone companies. Utility companies are not governmental authorities or public benefit corporations; they are private companies. They, therefore, cannot be considered a Pure Public Use, but their purpose is so clearly for the benefit of the general public that condemnation on their behalf has long been established as constitutional.<sup>47</sup> Condemnations for Utility Use, while not totally free from all criticism rarely are challenged as not for a public use.<sup>48</sup>

The second and third use groups, just described, each have private benefits. But it will be the ratio of public to private benefits that determines where on the hierarchy the use is placed. As we move downward, this “public vs. private benefit ratio” (as we will call it) will be decreasing. There may be some projects with both large public benefits and large private benefits, and some with small amounts of each. For the purposes of the hierarchy proposed here, however, it is not the absolute amount of public benefits that is determinative but rather the ratio between the public and private benefits that will determine its place in the hierarchy.

Just below takings on behalf of privately run utilities are takings for “economic development” projects. This “Economic Development Use” category is large, and needs to be divided into subcategories, which cover a spectrum of uses. The highest form of Economic Development Use includes projects which will have maximum use of facilities by the general public and would include uses mentioned above, but are more likely to include uses to be mentioned as we discuss the different types. They will

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46. See *infra* Part III.

47. See, e.g., *Bookhart v. Cent. Elec. Power Co-op.*, 219 S.C. 414, 420 (1951) (stating “The power of eminent domain usually is conferred by the legislature on electric light and power companies . . . and the erection, maintenance and operation of plants for generating electricity and distributing the same to the public for light, heat, or power ordinarily is regarded as a public use for which private property may be appropriated.”) (citation omitted).

48. “Traditionally, courts have concluded that the use of eminent domain for aggregating thin, continuous pieces of land for private utility operations is a public use even for the primarily private objectives of private parties.” Kelly, *supra* note 44, at 59-60.

create large numbers of jobs, substantially increase taxes (property, income and sales), and provide maximum public benefits. The best of these projects would also contain most or many of the following beneficial elements and procedural safeguards: (i) the initiating entity is the government; (ii) a careful plan for implementation is developed by the public sector and publicly vetted in accord with formal hearing procedures; (iii) the project could not be accomplished without condemnation (or the threat thereof); (iv) the private entities are selected in a carefully conducted competition governed under clear and publicly announced rules;<sup>49</sup> (v) the private entities that will receive land for redevelopment will be accountable to the public and the uses to which the land will be put will be adequately controlled by the public sector entity; and (vi) to the extent reasonably possible, there is adequate assurance that the project will be built in a timely fashion (and available remedies if it is not). Requiring an “auction” is not appropriate because the procedure utilizes a simple comparison of a single number (e.g., the bid price for a land parcel or a fixed price contract) when the comparisons will, in fact, be of a number of factors related to the public objectives of land disposition and development, each of which will be given a weighting in the evaluation as is done in requests for proposals. Although the government may turn the land and development opportunity over to one or more private entities to build and manage underground leases or deeds, typically a substantial number of stores and other facilities will be open for use by the general public. The companies to whom the land is conveyed (by deed or lease) most often are private developers, and the designs, construction, and uses would (ideally) be specified or approved by the governmental entity sponsoring the project using comprehensive provisions in the ground lease, or restrictive and affirmative covenants in the deed. One of the characteristic features of such dispositions is ongoing involvement of the governmental entity during the development process. This distinguishes these projects from both highest-bid auctions and regulatory interventions.<sup>50</sup> Remedies for failure to implement the proposed project in accordance with a schedule, or otherwise in a timely fashion (subject to needed *force majeure* exceptions), could include increased security deposits, de-designation for some or all parcels, liquidated penalties for lateness, loss of options, or a right to unwind project components.

Today, the “Economic Development Use” category can, and often does, include mixed-use complexes of residences, offices, hotels, retail stores,

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49. See Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193, 229 (1987).

50. See generally Lynne B. Sagalyn, *Public/Private Development: Lessons from History, Research, and Practice*, 73 J. AM. PLAN. ASS'N 7-22 (2007).

and shopping centers. Such large-scale projects, especially in downtown areas, would have been called urban renewal, slum clearance, or redevelopment projects in the past, especially if they were undertaken in underdeveloped or “blighted” areas. Urban renewal projects also included construction of government and civic buildings such as convention centers, hospitals, and educational buildings that are open to the public. As we have discussed, the use of the term “blight” grew out of debates about slum clearance and legislative efforts to enact a federal urban renewal program, but it remains a highly significant precondition in undertaking economic development projects in many states today.

The broad scope of potential uses in the Economic Development Use category today, in addition to those listed above, would also include movies, restaurants, activities for children, cultural activities, and other forms of entertainment, as well as, sports arenas and related facilities, convention centers, and even the occasional manufacturing facility, as in the case of the taking on behalf of General Motors in the infamous *Poletown* case.<sup>51</sup> Some are large and difficult to undertake. They require governmental assistance not just to assemble all the parcels (some of which may be public facilities) and eliminate holdouts, but also to add or rebuild infrastructure above and below ground (e.g., subways and pedestrian connections, utility systems, etc.). The Times Square/42nd Street project, for example, revived a significant section of midtown Manhattan and freed it from the grip of drugs and other crimes.<sup>52</sup> Other examples include Brooklyn’s MetroTech, and the original development of lower Manhattan’s World Trade Center.

The size and variety of uses in economic development projects make them difficult to categorize. The categories and hierarchy proposed here starts with maximum public use and maximum public benefit (through containment of the use and procedural elements outlined above) and then slides down from there. Lesser amounts of public benefit and greater amounts of private benefit should (at least in theory) tend to lead to more opposition to the project, more lawsuits, and more scrutiny on the part of the courts. But without a framework in the common or statutory law to work from, the courts have had little basis upon which to distinguish these (complex) projects, one from the other. They lack determinants with which to draw lines or provide safeguards. This is not a simple sliding scale; yet from one end of it to the other, there is a huge difference in the ratios of public to private benefits, which the law could do well to reflect.

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51. See *Poletown Neighborhood Council v City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

52. See generally LYNNE B. SAGALYN, *TIMES SQUARE ROULETTE: REMAKING THE CITY ICON* (2001).

Process and procedure becomes especially important to creating foundational principles for these projects. For example, the degree to which the government approaches a project with a “carefully considered development plan” that has been created without a private company already chosen, or in mind, can become a factor in finding or not finding a public purpose.<sup>53</sup> The government’s development of a plan, internally from its own staff and resources, is good evidence of a public purpose. Perhaps that is why in the majority and concurring opinions in *Kelo* together, the words “plan” and “planning” are mentioned nearly fifty times, as noted by Nicole Garnett.<sup>54</sup> But it is not always possible to prepare a plan with such purity. To test interest and practicality it may be necessary to talk to, and solicit feedback from, the private sector, especially those who are most able to judge the practical economic feasibility of a government plan. Such contacts can be invaluable, but if condemnation is going to be needed, government officials need to recognize that such private sector involvement may create risk. For the more input the private entities provide, the more likely the plan will reflect *their* thinking and needs, and this may skew the final plan toward a few such private parties, and possibly just one of them. The more tilt in that direction, the greater the appearance of a private purpose, with the public purposes being called mere “pretext” and the taking, “pretextual.” A problem with claims that the public benefits are serving as a “pretext”<sup>55</sup> for the true purpose (i.e. benefits to private entities)<sup>56</sup> is that economic development projects are almost never so black or white as this term and the term “pretextual” suppose. Courts trying to apply this dichotomy will have to put each project into one of two boxes. But, the vast majority of the projects they will be analyzing will not fit because they will contain quantities of both public and private benefits. So notwithstanding the Supreme Court saying in *Kelo* that a showing of pretext is a valid basis for a public use challenge,<sup>57</sup> it will be very difficult to make much use of this concept. The *Kelo* Court seems to accept this when it also says “Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.”<sup>58</sup> Also, practically speaking, a highly specialized

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53. See *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

54. Nicole S. Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 444 (2007).

55. Such an allegation was made in *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008), but was dismissed by the Second Circuit.

56. See Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 *SUP. CT. ECON. REV.* 173, 174 (2009).

57. “Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” *Kelo*, 545 U.S. at 478.

58. *Id.* at 485.



plan with unique requirements might result in fewer bidders or greater entanglement with the preferred private entities, particularly in the absence of very carefully established procedures and safeguards for the selection of the developers.

In *Kelo*, plaintiffs alleged that the role of the private pharmaceutical company, Pfizer, whose research facility would constitute a major component of New London's plan, turned it into a project with a private purpose.<sup>59</sup> The Justices of the Supreme Court struggled with Pfizer's role, and to a lesser extent with that of the developer, Corcoran Jennison. The Court found that the developer's role came relatively late, but that Pfizer's interest appeared at the outset. Justice Kennedy, in concurring, observed that the developer was chosen out of a group of applicants, and also found that benefiting Pfizer did not appear to be the primary motivation of the proposal.<sup>60</sup> In fact, though, Pfizer's interest in developing a Pfizer facility predated the project.<sup>61</sup> Justice Thomas, in his dissenting opinion, found the New London plan to be "suspiciously agreeable to the Pfizer Corporation."<sup>62</sup> The majority, however, ultimately deferred to the trial court's finding that there was "no evidence of an illegitimate purpose" and concluded that the plan was not adopted to "benefit a particular class of identifiable individuals."<sup>63</sup>

After the case was decided, a Freedom of Information Act request by the New London newspaper *The Day* showed that the condemnations were taken "in large part as a result of extensive Pfizer lobbying of state and local officials" in connection with its offer to build a new headquarters in New London.<sup>64</sup> We can only speculate if this would have made any difference had it been fully known to the five Justices who decided in favor of New London.

Moving down the hierarchy within the Economic Development Use group would be projects where the *initiative* is a joint one between the government and a developer. The government or the developer may have had the initial idea for the development. The developer might be interested due to the location and/or because the project is geared to their special capacity and experience. The developer may also be, or become, interested because of the government assistance that it believes is available. This description

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59. *Id.*

60. *Id.* at 492.

61. *Id.* at 473.

62. *Id.* at 506 (Thomas, J., dissenting).

63. *Id.* at 478 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

64. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 236 (2007); Ted Mann, *Pfizer's Fingerprints on the Fort Trumbull Plan*, THE NEW LONDON DAY, Oct. 16, 2005.

fits the Atlantic Yards project in Brooklyn, a multi-billion dollar, twenty-two acre project in downtown Brooklyn that includes large amounts of housing and retail space, a new basketball arena, and public open space. The project was originally conceived by Bruce Ratner and his Forest City Ratner Companies and was driven by them. It was then assisted by the New York State Urban Development Corporation, which does business as the Empire State Development Corporation (ESDC), and turned it into a jointly managed project. The Second Circuit noted this origin and compared the case to New London's project, saying "unlike in *Kelo*, the Atlantic Yards Project was allegedly proposed in the first instance by Ratner himself."<sup>65</sup> But the Second Circuit, rather than trying to determine how the Supreme Court, post-*Kelo*, would have come out on these facts, instead focused on two public purpose factors, both of which the appellants had conceded: first, that the Project targets a long-blighted area, and second, that the Project had substantial public benefits in the form of a publically-owned arena (for an NBA basketball team), public open space, substantial affordable housing, and improvements to the mass transit system. It played down the private benefits to Ratner by finding that appellants "failed to allege any specific examples of illegality" or "any specific illustration of improper dealings between Mr. Ratner and the pertinent government officials."<sup>66</sup> On the charge that the private benefits and pretext were worse than in *Kelo* because Ratner proposed and drove the whole Project, the Second Circuit cited New York law: "However, here, New York long ago decided by statute not to restrict the ESDC's mandate to those 'projects in which it is the prime mover.'"<sup>67</sup>

It then rejected the request of appellants for a "full judicial inquiry into the motivation" of officials who supported the Project as being "an exercise as fraught with conceptual and practical difficulties as with state-sovereignty, and separation-of-power concerns."<sup>68</sup> The Second Circuit also noted that in New York the removal of blight is a fully separate leg upon which public purpose can be based, without regard to the uses to be made of the site. The court cited its own decision in the Times Square project case,<sup>69</sup> to state the same principle illustrated by *Berman* and *Rosenthal*, that

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65. *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008).

66. *Id.*

67. *Id.* (quoting N.Y. UNCONSOL. LAW § 6252 (McKinney 2007) (directing the ESDC to "encourage[e] maximum participation by the private sector of the economy"); *E. Thirteenth St. Cmty. Ass'n v. N.Y. State Hous. Fin. Agency*, 218 A.D.2d 512, 513 (N.Y. App. Div. 1995)).

68. *Id.* at 63.

69. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45 (2d Cir. 1985).

“the redevelopment of [a] blighted area,” *even standing alone*, represents a “classic example of a taking for a public use.”<sup>70</sup> It thereby joined other New York decisions that place New York in an even more favorable position for government exercise of eminent domain power than *Berman* and *Kelo* would.<sup>71</sup>

Whether the initial idea is from the government or the private sector, New York State and New York City agencies may decide to use a joint approach with the private sector because their projects are heavily site specific and often (at least in New York City) need to be shoe-horned into a dense and already developed location. This is done also because of the time and costs involved in the many steps that need to be surmounted in the approval process. Having a developer in tow helps craft a detailed project and make it adequately specific for full environmental review under the State Environmental Quality Review Act (SEQRA) and City Environmental Quality Review (CEQR). The Environmental Impact Statements (EIS) required by these laws cost many hundreds of thousands of dollars and can go over a million dollars, so it helps to have a deep-pocket entity committed to a project early on that can foot the bill. A draft EIS is needed before the City Uniform Land Use Review Process (ULURP) can start, a process that generally takes half a year or longer. The City or State may also solicit the City’s planning department jointly with the developer to obtain zoning changes needed for the proposed project.

Consequently, where the original idea comes from is not as important as how the idea is used, and what the results turn out to be. The project may be improved with input from private entities. It may become more likely to be successful, and it may also be better able to obtain necessary financing. It might also include more components that make it operate better. So the number of contacts between the public and private sectors may not always be evidence of contrivance or the bending of all benefit toward the private sector. The key is the project itself, i.e., the ratio of public benefits to private sector benefits. In economic development projects, private sector companies or developers almost always play a role. But we must assess whether the facilities to be built are just for the use and benefit of those same companies? In this regard, the relative inclusion of public uses, open space, recreational facilities, and better public transportation connections do count; and retail space counts more than general office space, and both are likely to generate more public benefits than would a facility for a single company.

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70. *Id.* at 46.

71. The Supreme Court denied the petition for writ of certiorari. *See Goldstein v. Pataki*, 554 U.S. 930 (2008).

So located somewhat further down the Economic Development Use ladder (offering fewer public benefits and containing less than all of the elements listed above) are projects where the initiative comes from a private company and it seeks to build a new facility solely for itself. To get governmental assistance, the company will typically offer more jobs than currently exist and/or a better tax base once the project is completed. The company may threaten to leave the city if it does not receive the assistance and/or subsidies it seeks. In some cases these elements may be combined. Big box location projects and single manufacturer expansion projects are such examples. The General Motors plan in *Poletown* is also a good example. In the *Poletown* case, Detroit was threatened by General Motors relocating one of its factories out of the City unless the City provided it with a site for a new factory.<sup>72</sup> The City, fearful of the loss, condemned several hundred acres in a residential area known as Poletown to satisfy GM's requirements. The City used eminent domain to assemble that site following approval of the Project by the Michigan Supreme Court. A thousand homes and businesses were lost. And in the end, the factory GM built generated fewer jobs and less revenue than had been predicted by the City.<sup>73</sup> Subsequently the Michigan Supreme Court reversed itself and overruled *Poletown*.<sup>74</sup>

Relying entirely on the test used in the *Poletown* dissent and describing their decision as a return to the law as it existed before *Poletown*, the Michigan Supreme Court found the application of eminent domain unconstitutional because: (1) the condemnations were not strictly necessary for the realization of the public benefit as is the case with privately built roads or railroads; (2) the private entity that would receive the condemned land was not sufficiently accountable to the public for the use of the land; and (3) there were no other facts of "public significance," such as blight elimination, which justified the takings as a public use.<sup>75</sup>

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72. *Poletown Neighborhood Council v City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981).

73. See Somin, *supra* note 64, at 194-95.

74. Because *Poletown's* conception of a public use – that of "alleviating unemployment and revitalizing the economic base of the community" has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, § 2 [of the Michigan constitution] cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled.

*Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

75. See *id.* at 770-71.

In *Yonkers Community Development Agency v. Morris*,<sup>76</sup> the New York Court of Appeals reviewed the question of whether a taking by the Community Development Agency of Yonkers for the expansion of the Otis Elevator Company was for a public purpose. Otis was chosen as the sponsor before any public hearings were held. Otis had also indicated it would leave Yonkers if suitable land was not found for its expansion. The condemned land was adjacent to Otis' existing facilities. The City had signed an agreement with Otis before the condemnation of the land. The court explained that given Otis's ongoing economic importance to the community, these actions should be regarded as "mere irregularities cured by the fact that the hearings were actually held."<sup>77</sup> The court also found unremarkable the fact that Otis would get the condemned land for a price which is "a fraction of that paid to the defendants and the other owners in condemnation."<sup>78</sup>

The Community Development Agency maintained that the land taken was substandard. Land found to be blighted or substandard, the court said, can be taken for urban renewal projects in New York without there being a separate public purpose "just as it would be if it were taken for a public park, public school or public street."<sup>79</sup> On the other hand, the court noted "if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant."<sup>80</sup>

When it turned to the question of whether blight data or facts supporting the determination had been provided, incredibly enough, it found that none had been provided:

Here, other than the agency's bare pleading of its "substandard" finding, it provided no further data as to the condition of the area, except for the general statement that at least 50% of the structures in the area are "substandard," a figure which, as defendants point out, did no more than coincide with the figure found in an earlier comprehensive city plan . . . . The agency has not indicated in any manner the grounds upon which it concluded that the land is presently substandard.<sup>81</sup>

Yet, the court held for the condemning Agency. Their basis for so holding was that the condemned landowners did not adequately raise the issue

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76. 37 N.Y.2d 478 (1975).

77. *Id.* at 482.

78. *Id.* at 483.

79. *Id.* at 482.

80. *Id.*

81. *Id.* at 484-85.

of the “quality of the land taken” although it conceded that they did state that it was “not substandard.” The court asserted that the landowners “subordinated” the substandard issue to their argument that benefitting a large manufacturer, Otis Elevator, was not a public purpose. This was probably done because there were no facts or data that they could dispute, and because they were aware that agency findings of blight were not subject to court reversal.<sup>82</sup> Because of their “subordination of a valid issue” and because the taking had already occurred, the court held that the defendants were not entitled to relief.<sup>83</sup>

We believe that this decision should no longer be followed. The project originated with one company, albeit an important one to the City, solely for its own benefit, together with a threat to leave the City if it did not get its way. In addition, it received substantial land price subsidies. If the Court was relying on job creation for finding public purpose, it failed to show any: no job data is provided. The word “jobs” is not mentioned even once in the decision. What the court said on this point (in one of its many “if we assume” sentences) is:

Therefore, if we assume that the land here involved was substandard, as found by the Yonkers City Council and its Planning Board, it would be no defense to its condemnation that Otis openly expressed a desire to acquire it to assure its own continued economic viability in Yonkers. It would not then be necessary, as a precondition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis.<sup>84</sup>

Since they subsequently conclude that there was in fact was no support for the Agency’s claim of blight, the assumption does not hold, and it would therefore be necessary (in the court’s own words) “as a precondition to the taking” to show that the public benefit outweighs the private benefit. But there is no such showing, nor any discussion of the matter. Even the court’s simple reference to retention of Otis as an increased employment “opportunity” is not supported with a single sentence. And, the concept of accountability to the public for the use of the land (included in the Michigan Supreme Court’s decision in *Hathcock* discussed above) which here would require some level of assurance of actual job creation (through e.g., binding agreements and penalties) appears to have been beyond the horizon of thought in the development of the Project or the thinking of the court.

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82. The landowners thought they would have to lose on the blight issue because of the “omnipotence” they believed urban renewal agencies had with respect to it. *Id.* at 486.

83. *Id.* at 487.

84. *Id.* at 482.

The facts in this 1975 case do not provide the minimum ratio of public to private benefits needed for constitutionality.

Toward the bottom of our hierarchy are: (1) so-called one-to-one transfers in which a single company benefits to the disadvantage of another individual corporation through the help of the government; (2) projects done solely to obtain a tax benefit with no meaningful change in use or other significant public benefit; and (3) tax increment financings (TIF).

The first group in this category, one-to-one transfers, engenders many lawsuits; and it is more likely that the courts will put their collective feet down here because there is relatively little public benefit and in a number of cases a strong appearance, or reality, of private benefit. This is particularly true when the benefited company has an alternative that does not require eminent domain. For example, in *99 Cents Only Stores*<sup>85</sup> and *Southwestern Illinois Development Authority (SWIDA)*,<sup>86</sup> the courts found other reasonable options to be available, and held both takings to be unconstitutional. In the first case, *99 Cents Only*, Costco wished to expand one of its stores and demanded that the redevelopment agency condemn a leasehold interest to provide for the expansion. The district court found that Costco could have expanded on its own by simply going in another direction.<sup>87</sup> In the *SWIDA* case, a racetrack sought to expand, at the expense of a neighbor's recycling facility, so it could have more land for parking. The court found that the construction of a garage by the racetrack would solve its private need and that eminent domain was not available.<sup>88</sup> There are many other cases with the same result.<sup>89</sup>

The most typical cases in the second group, tax-enhancement projects, include projects that assist the development of big box retail stores like Wal-Mart, Costco, Home Depot, and large drug stores and could be called "big box projects" or "suburban mall projects." The local municipality's purpose is principally to increase property and sales taxes. However, some communities assist the big box builders out of fear that if they do not get the store in their jurisdiction, the store will move to a neighboring town, provide no benefits and do harm to the smaller stores in town that will find

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85. *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

86. *Sw. Ill. Dev. Auth. (SWIDA) v. Nat'l City Envtl.*, 768 N.E.2d 1 (Ill. 2002).

87. *See 99 Cents Only Stores*, 237 F. Supp. 2d at 1129.

88. *See SWIDA*, 768 N.E.2d at 10.

89. *See, e.g., Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (granted a preliminary injunction blocking the use of condemnation for development of a discount retailer, expected to be Costco, at the expense of church seeking to build a 4,700 seat auditorium with surrounding buildings); *Baily v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003).

it difficult to compete. In addition to condemning land for the store, sometimes the municipality uses condemnation powers to construct connecting exits and entrances to the nearest highways in order to facilitate the increased road traffic that will be generated. One of the worst examples of overreach in the tax-enhancement category comes out of a project in a middle-class suburb of Cleveland named Lakewood. In an attempt to enhance its taxes, Lakewood officials and developers agreed to develop a shopping mall and an upscale residential facility. A blight finding was required to acquire properties in a portion of the project area with owner-occupied homes. To be able to make the finding, homes without three bedrooms, an attached two-car garage, and central air-conditioning could be declared blighted. Legal and political battles ensued, and the town in a ballot initiative finally put an end to the whole project.<sup>90</sup>

In the third group, TIF projects, the local public development agency issues bonds to create improved infrastructure or facilities within a designated district. Condemnation is used to facilitate a private-enterprise development and these new improvements generate increasing property taxes that are used to pay both interest and principal on the bonds. The municipality does not receive the property taxes generated by the project until the bonds are completely paid off, but neither will it need to use any of its own on-budget financial resources for the project. These projects are controversial for several reasons, including the segregation of property tax revenues for one bond issuance, and the conveyance of land to a private firm or firms for narrow economic development purposes. While the bond proceeds help create infrastructure improvements, the improvements are generally targeted toward the private betterments.<sup>91</sup>

Local governments have strong incentives to undertake TIF projects.<sup>92</sup> TIF projects involve little or no direct financial risk for the local government (which has generally no legal obligation to repay the debt unless it has contractually obligated itself) and because the debt does not, in most states, count against local debt limits, they can increase the share of tax revenues dedicated to their municipal purposes. The TIF may also leverage federal dollars. If a finding of blight is required, it is typically under a statute that has a broad definition of blight.<sup>93</sup> In fact, in TIF statutes, the

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90. See Pritchett, *supra* note 15, at 911-12; see also Blaine Harden, *In Ohio, A Test for Eminent Domain: Rights vs. Renewal at Stake in Case*, WASH. POST, June 22, 2003, at A03; Bert Gall, *Beating Bogus 'Blight' in Lakewood, Ohio*, 13 LIBERTY & L., Apr. 2004, [http://www.ij.org/publications/liberty/2004/13\\_2\\_04\\_b.html](http://www.ij.org/publications/liberty/2004/13_2_04_b.html).

91. See generally Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URBAN ECON. 306-28 (2000).

92. See Gordon, *supra* note 3, at 315; Lefcoe, *After Kelo*, *supra* note 15, at 59-64.

93. See Lefcoe, *After Kelo*, *supra* note 15, at 59.



“states definition of blight are so broad and vague that they could apply to practically every neighborhood in the country.”<sup>94</sup> Goshorn, Gordon, and Lefcoe cite the Missouri and Ohio statutes as good examples of such statutes.<sup>95</sup> The Missouri statute, for example, includes unsanitary and unsafe conditions, the existence of conditions that endanger property by fire or other causes, or retards the provision of housing accommodations, or constitutes an economic or social liability or a menace to public health, morals, or welfare.<sup>96</sup> The Ohio statute includes age of the building, obsolescence, incompatible land use relationships, and excessive dwelling unit density.<sup>97</sup> Both include “inadequate street layout.” Statutes like these are written to allow blight findings to be made easily, so projects can be authorized. In addition, compliance with the statutory definition is left to the same agencies that form and administer the TIF.<sup>98</sup>

California initiated the use of TIFs in the early 1950s to generate matching funds for federal urban renewal projects when voters turned down local bond initiatives.<sup>99</sup> Economic pressures then pushed the vast majority of states to enact their own TIF statutes, and after the federal government shut down its urban renewal program in 1974, TIF grew dramatically in importance to become the dominant means by which cities funded their urban revitalization and economic development ambitions.<sup>100</sup> Though the linkage between an area’s TIF potential and its blight was usually weak, TIF statutes nevertheless would draw heavily on “blight” findings. Older statutory definitions of blight based on public health, safety, and welfare taken from urban contexts were expanded to accommodate the new economic development projects with concepts like insufficient tax generation, slow economic growth, and under-utilization of the land, as in the Missouri and Ohio statutes.<sup>101</sup> In the process, blight requirements were converted from restrictive standards into very broad standards so as to intentionally facilitate these projects and any condemnations that might be required. Local governments beguiled by the prospect of capturing federal grants or a larg-

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94. *Id.* (citing Dana Berliner, *The Condemnation Landscape Across the Country Post Kelo*, in ALI-ABA COURSE OF STUDY: EMINENT DOMAIN AND LAND-VALVE LITIGATION, 433, 439 (2007)).

95. Gordon, *supra* note 3, at 314; Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919, 922-26 (1999); Lefcoe, *After Kelo*, *supra* note 15, at 59-61.

96. MO. ANN. STAT. § 99.805(1) (2008).

97. OHIO REV. CODE ANN. § 1728.01 (2001).

98. See Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 722-25.

99. See Gordon, *supra* note 3, at 313; Goshorn, *supra* note 95, at 925.

100. See Goshorn, *supra* note 95, at 925; Sagalyn, *supra* note 13, at 429-41.

101. See Gordon, *supra* note 3, at 314, 318; Goshorn, *supra* note 95, at 929-30.

er tax base have every incentive to define blight expansively.<sup>102</sup> Local officials and developers and other private enterprises, in close working relationships, have made good use of these expansive, vague statutes<sup>103</sup> and court review has been minimal, with rejections being the rare exception.<sup>104</sup>

### III. BLIGHT AND PUBLIC PURPOSE IN COLUMBIA'S EXPANSION IN MANHATTANVILLE

The planned condemnation of land to create a third campus for Columbia University in the Manhattanville section of Harlem was held to be constitutional by the New York Court of Appeals,<sup>105</sup> reversing a decision of the Appellate Division<sup>106</sup> that held it to be unconstitutional. Columbia's main campus in Morningside Heights, Manhattan, is surrounded by intense development which effectively walls the campus and prevents expansion. Columbia has been seeking to expand and add to its research and graduate school programs. Without this growth, it and the State believe, it cannot maintain its position as one of the leading educational and cultural institutions in the world.<sup>107</sup> Columbia's square footage per student, at three hundred twenty-six gross square feet per student, is lower than any of its peer institutions.<sup>108</sup>

To assist Columbia, the Empire State Development Corporation (ESDC), acting for the State of New York on the seventeen-acre Project, authorized the Project under its General Project Plan as both a "land use improvement project," which required a finding of blight, and as a "civic project," which required no finding of blight. As a result, the Appellate Division had to grapple with two major issues. One was the finding of blight, and the other was whether the use of eminent domain for a single educational entity is for a public purpose. The focus under the "civic project" basis for authorization was whether the use of eminent domain for the sole benefit of Columbia University, a private institution of higher learning and research, was a public purpose. On this issue, the Appellate Division firmly held no:

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102. See Gordon, *supra* note 3, at 315; see also Goshorn, *supra* note 95, at 923.

103. Gordon, *supra* note 3, at 315.

104. Gordon, *supra* note 3, at 323; Sandefur, *supra* note 98, at 725.

105. *Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235 (2010).

106. *Kaur v. N.Y. State Urban Dev. Corp.*, 72 A.D.3d 1 (N.Y. App. Div. 2009).

107. See generally N.Y. STATE URBAN DEV. CORP. D/B/A EMPIRE STATE DEV. CORP., COLUMBIA UNIVERSITY, UNIVERSITY EDUCATIONAL MIXED-USE DEVELOPMENT, LAND USE IMPROVEMENT & CIVIC PROJECT GENERAL PROJECT PLAN (2008).

108. *Id.* at 10.

The use of eminent domain should also be rejected on the grounds that Columbia's expansion is not a "civic project." . . . The petitioners correctly contend that within the definition of Unconsolidated Laws § 6253 (6)(d) (UDCA § 3 [6][d]), a private university does not constitute facilities for a "civic project." . . . Here, Columbia is virtually the sole beneficiary of the Project. This alone is reason to invalidate the condemnation especially where, as here, the public benefit is incrementally incidental to the private benefits of the Project.<sup>109</sup>

The Court of Appeals in *Kaur* had a very different view of the value of the University's expansion. In connection with the Appellate Division's determination that the expansion of a private university does not qualify as a "civic purpose," the Court of Appeals found that, "[t]his conclusion [of the Appellate Division] does not have statutory support. Indeed, there is nothing in the statutory language limiting a proposed educational project to public educational institutions."<sup>110</sup> The Court of Appeals went on to argue that:

The proposed Project here is at least as compelling in its civic dimension as the private [Atlantic Yards] development in *Matter of Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.* 874 N.Y.S.2d 414 (1st Dept 2009)). Unlike the Nets basketball franchise, Columbia University, though private, operates as a nonprofit educational corporation. Thus, the concern that a private enterprise will be profiting through eminent domain is not present. Rather, the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community. Indeed, the advancement of higher education is the quintessential example of a "civic purpose" (*see Cornell Univ. v Bagnardi*, 68 NY2d 583, 593 (1986) (recognizing that schools, both public and private, "serve the public's welfare and morals")). It is fundamental that education and the expansion of knowledge are pivotal government interests. The indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and academic research.<sup>111</sup>

The argument being made is that benefiting a not-for-profit educational corporation is not benefiting private *enterprise*, therefore the use of eminent domain for such an institution is not for a private purpose. Education and the generation of knowledge are "government interests," thus making their expansion a public purpose. The degree to which the general public benefits from the expansion of a renowned university obviously depends on one's own values and perception of what such universities do. Yet it

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109. *Kaur*, 72 A.D.3d at 20.

110. *Kaur*, 15 N.Y.3d at 258.

111. *Id.*

should be accepted by most everyone that a public university would be more deserving of the application of eminent domain for an expansion than would be the case for a private college or university. To make findings of public purpose for the Project as a whole more certain, the Project, as the Court of Appeals noted, also includes two acres of “park-like and landscaped space,” upgrades to transit infrastructure, financial assistance to a small new park on Hudson River, and the creation of a large number of construction and permanent jobs—calling these “civic benefits.”<sup>112</sup>

We have already noted that the removal of blight in New York is itself a public purpose and can therefore be the sole basis for the use of eminent domain. Since *Yonkers*,<sup>113</sup> the courts have recognized blight as an independent basis for condemnation on the grounds that:

[T]he removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain. It has been deemed a “public use” within the meaning of the State Constitution’s Takings Clause at least since *Muller*,<sup>114</sup> and is expressly recognized by the Constitution as a ground for condemnation.<sup>115</sup>

Blight determinations in New York by the ESDC are not based on a strict definition provided by its statute,<sup>116</sup> but on case law. The application and practice is quite expansive. The expansive result is not all that dissimilar to that with TIF statutes that have extremely broad definitions of blight.<sup>117</sup>

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112. *See id.*

113. *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478 (1975).

114. *In re N.Y.C. Hous. Auth. v. Muller*, 270 N.Y. 333 (1936).

115. *Goldstein v. N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 524 (2009).

116. New York Urban Development Corporation Act, N.Y. UNCONSOL. LAWS, §§ 6251-6285, 6260. For a land use improvement project, the Corporation must find:

- 1) That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality;
- 2) That the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto;
- 3) That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole.

*Id.* at § 6260(c)(1)-(3).

117. In *Yonkers*, the Court of Appeals established the following palette of possibilities for findings of blight in New York:

Many factors and interrelationships of factors may be significant. These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered

Abetting and encouraging this loose approach is the deference given by the courts to the definitions and determinations made by the condemning agencies. New York courts generally cite the State Constitution<sup>118</sup> to take the position that, “[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise.”<sup>119</sup>

But in Columbia’s Manhattanville project, the Appellate Division undertook a thorough review of the ESDC blight findings. The Appellate Division was able to find language in prior cases to support a review by it of the ESDC findings:

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useless, prevention being an important purpose. It is “something more than deteriorated structures. It involves improper land use. Therefore its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic.”

*Yonkers*, 37 N.Y.2d at 483 (quoting John F. Cook, *Battle Against Blight*, MARQ. L. REV. 444, 445 (1960)). The courts in New York rely on this language in the absence of a codified definition of blight. Kaitlyn Piper, Note, *New York’s Fight Over Blight: The Role of Economic Underutilization in Kaur*, 37 FORDHAM URB. L.J. 1149, 1157 (2010).

118. “Subject to the provision of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for . . . the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.” N.Y. CONST. art. XVIII, § 1 (amended 1965). New York’s General Municipal Law has its own definitions:

(a) “*Blighted area*” means an area within a municipality in which one or more of the following conditions exist: (i) a predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people; and

(g) “*Project area*” means an area of a community that is a blighted area, the redevelopment of which is necessary to effectuate the purposes of this article. A project area need not be restricted to buildings, improvements or lands that are detrimental or inimical to the public health, safety or welfare, but may consist of an area in which such conditions predominate and adversely affect the entire area. A project area may include lands, buildings or improvements which are not detrimental or inimical to the public health, safety or welfare, but whose inclusion is found necessary by the municipality for the effective redevelopment of the area of which they are a part. All lands, buildings or improvements included in a project area shall be necessary for effective redevelopment and shall not be included for the purposes of obtaining the allocation of tax increment revenue without clear justification for their inclusion. A project area shall not include land utilized for agricultural production.

N.Y. GEN. MUN. LAW § 970-c(a), (g).

119. *Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235, 253 (2010).

[E]ven where the law expressly defines the removal or prevention of 'blight' as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such determination should be spelled out." (Quoting from *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 484 (1975), appeal dismissed 423 U.S. 1010 (1975). Furthermore, "[c]arefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so." (Quoting from *Yonkers*, 37 N.Y.2d at 485; see *Matter of City of Brooklyn [Long Is. Water Supply]* 143 N.Y. 596, 618 (1894), *affd* 166 U.S. 685 (1897) ("But whether the use, for which the property is to be taken, is a public use, which justifies its appropriation, is a judicial question; upon which the courts are free to decide").<sup>120</sup>

Once they had determined that they had standing to review the findings, they dove in with gusto, providing a judicial view of blight findings not generally seen in New York, stating "the blight designation in the instant case is mere sophistry. It was utilized by ESDC years after the scheme was hatched to justify the employment of eminent domain, but this Project has always primarily concerned a massive capital project for Columbia."<sup>121</sup>

Instead of deferring to the State Constitution and prior court decisions in New York thereon, they analyzed *Kelo*, comparing the facts in the two cases and picking up on Justice Kennedy's language in his concurring opinion in *Kelo*.

Justice Kennedy specifically acknowledged that, "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." Although he declined to conjecture as to what sort of case might justify a more demanding standard of scrutiny, beyond finding the estimated benefits there not "de minimis," it was the specific aspects of the New London planning process that convinced him to side with the majority in deference to the legislative determination.<sup>122</sup>

Then they compared the two projects for favoritism and the degree to which the projects were driven by and controlled by the beneficiary of the condemnation:

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120. *Kaur*, 72 A.D.3d at 10.

121. *Id.*

122. *Id.* at 13 (quoting *Kelo v. City of New London*, 545 U.S. 469, 493 (2005)).

The contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic. Initially, it must be noted that unlike Fort Trumbull, Manhattanville or West Harlem as a matter of record was not in a depressed economic condition when EDC [New York City Economic Development Corporation] and ESDC embarked on their Columbia-prepared and-financed quest. The 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning. Again, it bears repeating that the only purportedly unbiased or untainted study that concluded that Manhattanville was blighted, and thus in need of redevelopment, was not completed until 2008: the point at which the ESDC/Columbia steamroller had virtually run its course to the fullest.<sup>123</sup>

The Appellate Division found that since the sole purpose of the State and City's assistance to the project was to provide for the University's expansion, they were acting to implement a private purpose:

Indeed, Columbia underwrote *all* of the costs of studying and planning for what would become a sovereign-sponsored campaign of Columbia's expansion. This expansion was not selected from a list of competing plans for Manhattanville's redevelopment. Indeed, the record demonstrates that EDC committed to rezoning Manhattanville, not for the goal of general economic development or to remediate an area that was "blighted" before Columbia acquired over 50% of the property, but rather solely for the expansion of Columbia itself. . . . The record shows no evidence that ESDC placed any constraints upon Columbia's plans, required any accommodation of existing or competing uses, or any limitations on the scale or configuration of Columbia's scheme for the annexation of Manhattanville.

Thus, the record makes plain that rather than the identity of the ultimate private beneficiary being unknown at the time that the redevelopment scheme was initially contemplated, the ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit. The record discloses that every document constituting the plan was drafted by the preselected private beneficiary's attorneys and consultants and architects, from the General Project Plan, the Special District Zoning Text, the City Map Override Proposal, and the Land Use Restrictions to all phases of the environmental review. Even the blight study on which ESDC originally proposed to base its findings was prepared by Columbia's consultant AKRF, nominally retained by ESDC for the purpose, but which retention and use by ESDC was roundly condemned by this Court in *Tuck-It-Away I*.<sup>124</sup>

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123. *Id.* at 14-15.

124. *Id.*

Although the private entity was in fact never hidden in the Manhattanville project, the overall private purpose and self-serving findings of blight merge and were nearly fused in the view of the court:

Having committed to allow Columbia to annex Manhattanville, the EDC and ESDC were compelled to engineer a public purpose for a quintessentially private development: eradication of blight. . . . This conduct continued when ESDC authorized AKRF to use a methodology biased in Columbia's favor. Specifically, AKRF was to "highlight" such blight conditions as it found, and it was to prepare individual building reports "focusing on characteristics that demonstrate blight conditions." This search for distinct "blight conditions" led to the preposterous summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.

No rationale was presented by the respondent for the wholly arbitrary standard of counting any lot built to 60% or less of maximum FAR as constituting a blighted condition. To the contrary, the New York City Department of City Planning uses a 50% standard to identify "underbuilt" lots . . . . The difference between AKRF's 60% standard and the petitioners' "no blight" study's 40% standard is the difference between 39% of the area and 20% of the area being counted as underutilized.<sup>125</sup>

They not only rejected the blight findings in the instant case, but also the whole idea that takings can be based on underutilization since that transforms blight removal from being the elimination of harmful social and economic conditions to affirmatively requiring the ultimate commercial development of all property.<sup>126</sup> They concluded that the taking on behalf of Columbia was not for the public's benefit but for the benefit of "a private elite education institution" and that this conflicts with *Kelo* on virtually every level, thereby rendering the taking unconstitutional.<sup>127</sup>

In New York, however, the Court of Appeals has the final say, and it slammed the Appellate Division and pulled the rug out from under its de-

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125. *Id.* at 16-17.

126. *See id.* at 18-20 (citing *Gallentin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007)) ("under that approach, any property that is operated in a less than optimal manner is arguably 'blighted.' If such an all-encompassing definition of 'blight' were adopted, most property in the State would be eligible for redevelopment"); *In re Condemnation by Redevelopment Auth. of Lawrence Cnty.*, 962 A.2d 1257, 1265 (Pa. 2008), *appeal denied*, 973 A.2d 1008 (Pa. 2009)); *Kaur*, *supra* note 105, at 19.

127. *Kaur*, 72 A.D.3d at 20.



terminations. The Court of Appeals held that a court may only substitute its own judgment for that of the legislative body authorizing the project when such judgment is “irrational or baseless.”<sup>128</sup>

Thus given our precedent, the de novo review of the record undertaken by the plurality of the Appellate Division was improper. On the “record upon which the ESDC determination was based and by which we are bound,”<sup>129</sup> it cannot be said that ESDC’s finding of blight was irrational or baseless. Indeed, ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site . . . . Accordingly, since there is record support—“extensively documented photographically and otherwise on a lot-by-lot basis”<sup>130</sup> . . .— for ESDC’s determination that the Project site was blighted, the Appellate Division erred when it substituted its view for that of the legislatively designated agency.<sup>131</sup>

This “irrational or baseless” standard would appear to be even more difficult to establish than the “arbitrary and capricious” standard otherwise used for review of governmental and agency decisions in New York State which, itself, is very difficult to show.<sup>132</sup> This means that effectively there is no review of blight findings in New York.

#### IV. ATTEMPTED REFORMS

In the majority opinion in *Kelo v. City of New London*, Justice Stevens sent a clear message to states that the opportunity to reform the statutory and procedural aspects of eminent domain belonged to them. “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>133</sup> State legislatures wasted little time in responding to the immediate and passionate backlash following the U.S. Supreme Court’s decision upholding the economically depressed City of New London’s exercise of its eminent domain powers in the furtherance of economic development. Although blight had not been an issue in *Kelo* because the City did not predicate its taking of Susette Kelo’s property and that of her neighbors on that basis, the intensity and broad-

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128. *Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235, 254 (2010).

129. *Id.* at 254 (citing *In re Levine v N.Y. State Liq. Auth.*, 23 N.Y.2d 863, 864 (1969)).

130. *Id.* at 255.

131. *Id.*

132. This latter review standard is known as an Article 78 review. N.Y. C.P.R.L. 78.

133. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

based, nonpartisan character of the backlash sent a direct signal to state legislators that this was the time to take action on the issue.<sup>134</sup>

The Institute for Justice (IJ), a nonprofit, libertarian public interest law firm dedicated to advocacy of property rights and, in the case of eminent domain, prohibition of its use for private development, represented Kelo throughout the nearly four and a half years of litigation and promoted model legislation through its “nationwide grassroots activism project.” The Castle Coalition, which organizes efforts to obtain eminent domain reforms.<sup>135</sup> Its main objective has been to promote the elimination of statutory authority for the use of eminent domain powers for economic development through state constitutional amendments. However, as an alternative to a partial repeal of statutory authority, the IJ has advocated for tightening statutory definitions of blight as well as specific procedural reforms that it believes would “discourage the abuse of eminent domain . . . (1) allowing a former owner to regain ownership of condemned property if the government fails to use it within a given period of time; (2) time limits on blight or redevelopment designations; [and] (3) attorneys fees for condemnees challenging the validity of takings.”<sup>136</sup>

In the aftermath of the U.S. Supreme Court’s decision, forty-three states enacted post-*Kelo* reforms, and all but one (Rhode Island, which did not act until 2008) did so relatively quickly, within two years of *Kelo*. Immediately following the June 23, 2005 decision, legislators in five states (Alabama, Delaware, Michigan, Ohio, and Texas) took action; in 2006, another twenty-seven followed suit; and in 2007, ten more.<sup>137</sup> Only seven states, in addition to the District of Columbia, have not enacted any reforms—Arkansas,<sup>138</sup> Hawaii, Massachusetts, Mississippi,<sup>139</sup> New Jersey, New

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134. See generally Lynne B. Sagalyn, *Positioning Politics: Kelo, Eminent Domain and the Press*, in *LAND AND POWER: THE IMPACT OF EMINENT DOMAIN ON URBAN COMMUNITIES*, 49, 49-74 (Timothy N. Castano ed., 2008).

135. THE CASTLE COALITION, <http://www.castlecoalition.org> (last visited Apr. 18, 2011).

136. *Model Language for State Statutes Limiting Eminent Domain Abuse*, THE CASTLE COALITION, <http://www.castlecoalition.org/survivalguide/310?task=view> (last visited Apr. 18, 2011).

137. See Table 2, *infra*.

138. In the case of Arkansas, a court decision had already ruled that eminent domain could not be used when the primary purpose of the taking is tax enhancement via economic development. Elaine B. Sharp & Donald Haider-Markel, *At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision*, 38 *PUBLICUS: J. FEDERALISM* 556, 563 (2008).

139. In the case of both Mississippi and Oklahoma, pre-*Kelo* state constitutional language restricted private-to-private takings. *Id.* at 571 n.3. Constitutional amendments in both Mississippi and Oklahoma also have made the determination of the character of the use a matter of judicial review, without regard to legislative assertion that the use is public. *EMINENT*

York, and Oklahoma.<sup>140</sup> These post-*Kelo* “reforms” vary widely, and the extent to which they constitute symbol or substance is an empirical question.<sup>141</sup> The Castle Coalition graded each state on a scale from “A” to “F” following an analysis of each state’s legislation, placing heavy emphasis on whether the legislation placed effective restrictions on blight and the uses of eminent domain for economic development and on whether the reform was effectuated through a constitutional amendment.<sup>142</sup>

As a condition for condemnation, twenty-three of the forty-three post-*Kelo* legislative “reforms” made explicit exceptions to their prohibitions if the exercise of eminent domain is intended to address or eradicate “blight.”<sup>143</sup> These exceptions were not without qualification, however. Commonly, qualification took the form of a detailed, specific definition of the term that sometimes narrowed the criteria and sometimes did very little to make it more restrictive. As Lynn E. Blais has noted, “these states have uniformly adopted language limiting the exception [for blight] in an attempt to preclude the exception from swallowing the rule,”<sup>144</sup> i.e., the remainder of the law’s requirements.

What were the most significant reforms to the states’ open-ended blight criteria? Which states significantly redefined blight criteria in ways that presumptively narrowed its applications, and which notably did nothing to reform blight criteria, nor made other reforms that would have made the use of condemnation more restrictive? And what can explain the differences in state actions?

Taken as a whole, the post-*Kelo* legislation reflects a spectrum of approaches to reforming “blight” as a precondition to takings. One approach was to eliminate blight as a condition for condemnation takings, pure and

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DOMAIN LAW FIRMS, <http://eminentdomainlawfirms.com/national-content.cfm/Article/34196/Constitutional-Or-Statutory-Definitions.html> (last visited Jan. 25, 2011).

140. See *supra* note 136.

141. See generally Sharp & Haider-Markel, *supra* note 138; Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo* (Ill. Law & Econ. Research Papers Series, Research Paper No. LE07-037, 2008).

142. Morriss, *supra* note 141, at 14.

143. The blight exemption numbers tallied by Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 674 n.112 (2007), are as of November 2006. Between December 2006 and January 2011, ten additional states passed eminent domain legislation and Utah rolled back its pre-*Kelo* eminent domain legislation in 2007. See *infra* Table 2. To bring the data on blight exemptions current, to January 2011, we consulted the National Conference of State Legislatures, which gives bill summaries of eminent domain legislation passed by year and then reviewed the bill specifics. NAT’L CONF. OF STATE LEGIS., <http://www.ncsl.org> (last visited Apr. 18, 2011). See *supra* note 135 and *infra* Table 2; see also Edward J. López et al., *Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 REV. OF LAW & ECON. 101 app. (2009).

144. Blais, *supra* note 143, at 674.

simple. Removing a finding of blight as pre-condition may address the problems relating to its application and the negative psychological effects of being labeled as blighted, but it does not reduce the use of eminent domain; rather, it removes one of the required conditions to its use thereby making use easier. Perhaps that is why only two states went in that direction: Florida, which banned all blight condemnations, even those that occur in areas that would meet a “strict” definition of that term,<sup>145</sup> and New Mexico, which removed the power of eminent domain from the State’s Metropolitan Redevelopment Code and no longer allows condemnations based on blight, except for a condition known as “antiquated platting.”<sup>146</sup> Utah, which Somin and Blais cite as the one pre-*Kelo* exception that had removed the power of eminent domain from redevelopment agencies, rolled back that law in 2007,<sup>147</sup> with an exception for blight, which brings the total to twenty-four of forty-four (fifty-five percent).

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145. See H.B. 1567, 108th Reg. Sess. (Fla. 2006) (signed into law May 11, 2006); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2138 (2009).

146. A “plat” is a plan or map of a specific land area. “Antiquated platting” is a premature subdivision that “occurs when a property owner divides his land into lots for sale with no intent to actually develop or construct something on the lots.” ANNEXATIONS, ANTIQUATED PLANNING & ADDRESSING ELEMENT, [http://ci.rio-rancho.nm.us/documents/Development%20Services/Vision%202020%20ICP/Vision%202020%20ICP%20\(Nov.%202010\)/3-A](http://ci.rio-rancho.nm.us/documents/Development%20Services/Vision%202020%20ICP/Vision%202020%20ICP%20(Nov.%202010)/3-A) (last visited Apr. 7, 2011). New Mexico is an interesting case, politically. In response to the *Kelo* decision, then Governor Richardson established a Task Force to study whether legal protections were needed in New Mexico to limit or prohibit the use of eminent domain for economic development purposes. The Task Force was comprised of twenty-two members, public and private sector experts in the area of eminent domain and commercial and economic development, as well as representatives from small and rural communities and state and local government. By a split vote, ten to seven, the Task Force concluded that eminent domain powers should not be used to promote economic development, a recommendation that subsequently was enacted by state legislators. H.B. 393, 48th Leg., 2007 Reg. Sess. (N.M. 2007). Yet in a minority recommendation, seven members of the Task Force who would have retained this authority explained that they were concerned that the recommendation to remove eminent domain authority from the Metropolitan Redevelopment Act would “unduly restrict the ability of local governments to remedy conditions that limit economic development and growth.” GOV. RICHARDSON’S TASK FORCE ON THE RESPONSIBLE USE OF EMINENT DOMAIN BY STATE AND LOCAL GOVERNMENTS, FINAL REPORT 23 (Nov. 14, 2006). They favored procedural protections that tightened the definition of blight and slum areas, increased notice and hearing requirements, and required relocation and transition assistance, in addition to other adjustments in the redevelopment law.

147. H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007).

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**Table 2.** Treatment of “Blight” in Post-*Kelo* Reform Legislation.

State	Date Reform Enacted	Reform With Blight Exemption	Definitional Blight Reform	Blight Procedural Reform
Alabama	2005	Yes	Narrowed	
Alaska	2006	Permitted		
Arizona	2006 (CI)	Yes	Tightened / Slum Condition	PBP / CCE
Arkansas	No Reform			
California	2006	Permitted	Somewhat Narrowed	Checklist
Colorado	2006	Yes		CCE
Connecticut	2007	Permitted		
Delaware	2005/2009	Permitted	Narrowed	
Florida	2006 (CA)	No		
Georgia	2006	Yes	Tightened / Objective Factors	PBP / Checklist
Hawaii	No Reform			
Idaho	2006	Permitted		
Illinois	2006	Yes		
Indiana	2006	Yes	Narrowed	
Iowa	2006	Yes		PBP (75%) / CCE
Kansas	2006	Yes	Narrowed	PBP
Kentucky	2006	Yes		
Louisiana	2006	Yes	Narrowed	PBP
Maine	2006	Yes		
Maryland	2007	Permitted		
Massachusetts	No Reform			
Michigan	2005/2006 (CA)	Yes		PBP / CCE
Minnesota	2006	Yes <sup>+</sup>	Narrowed	
Mississippi	None			
Missouri	2006	Yes		PBP (preponderance)
Montana	2007	Permitted	Optics	
Nebraska	2006	Permitted		
Nevada	2007 (CI)	Permitted		PBP (66.7%)
New Hampshire	2006	Permitted	Narrowed	
New Jersey	No Reform			
New Mexico	2007	No		
New York	No Reform			
North Carolina	2006	Yes		PBP

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North Dakota	2007 (CI, CA)	No		
Ohio	2005/2007	Yes	Somewhat Tightened	PBP (70%)
Oklahoma	No Reform			
Oregon	2006 (CI)	Yes	Narrowed	PBP
Pennsylvania	2006	Yes <sup>++</sup>	Narrowed	
Rhode Island	2008	Permitted		
South Carolina	2006	Yes	Narrowed	PBP
South Dakota	2006	No		
Tennessee	2005	Permitted		
Texas	2005	Yes	Broadened	
Utah	2007 (Roll-back)	Yes		
Vermont	2006	Yes		
Virginia	2007	Permitted	Narrowed	PBP
Washington	2007	Permitted		
West Virginia	2006	Yes		PBP
Wisconsin	2006	Yes	Greater Protection	PBP
Wyoming	2007	No	Narrowed	PBP

+ Exempts 2,000 TIF districts.

++Exempts First-Class Cities (Philadelphia), Second-Class Cities (Pittsburgh, Scranton).

Sources: THE CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* (2007), available at [http://www.castlecoalition.org/pdf/publications/report\\_card/50\\_State\\_Report.pdf](http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf); Blais, *supra* note 143, at 671-73; López et al., *supra* note 143; Somin, *supra* note 64; NAT'L CONF. OF STATE LEGIS., *supra* note 143 (selected state statutes).

A second, more common approach, was to legislate a redefinition of blight that tightened or narrowed the pre-*Kelo* blight standards to those generally conforming to a police-powers rationale, that is, a condition that poses a threat, is detrimental to or an actual danger to public health and safety, or is unfit for human habitation. Fifteen states followed this path (Alabama, Arizona, Delaware, Georgia, Indiana, Kansas, Louisiana, Minnesota, New Hampshire, New Mexico, Oregon, Pennsylvania, South Carolina, Virginia, and Wyoming), though Minnesota<sup>148</sup> and Pennsylvania<sup>149</sup>

148. In the case of Minnesota, the new restrictions exempt the State's more than 2000 TIF districts, many of which are in the Twin Cities of St. Paul and Minneapolis, for up to five years. S.F. 2750, § 22, 84th Leg., Reg. Sess (Minn. 2006).

149. In the case of Pennsylvania, the new restrictions exempt areas in "a city of the First or Second Class," which under Pennsylvania law includes Philadelphia (the only "First

made geographic exceptions that, in effect, significantly restrict the scope of the redefinition's impact. Five other states (i.e., California,<sup>150</sup> Montana,<sup>151</sup> Ohio,<sup>152</sup> Tennessee,<sup>153</sup> and Wisconsin<sup>154</sup>) only somewhat narrowed the criteria for a positive finding of blight. In addition, some states (California<sup>155</sup> and Georgia<sup>156</sup>) took a checklist approach, requiring the presence of several criteria for a positive finding of blight, though this did not change the reality that only a few states (seven of the fifty) have legislated such a requirement.

This is not what might be called strict "blight" reform, that is, substantively rewritten blight definitions that limit all condemnations to where there is documented evidence that the property meets *objective* blight or slum standards: that it is unfit for human habitation, creates a threat to health, safety, infant mortality, or creates a threat of crime or disease and that condemnation is necessary to wipe out the blight.<sup>157</sup> Redefining the criteria for a finding would represent substantive reform, however modest in some cases, but without in-place measurable, objective standards (as in Georgia<sup>158</sup>), "blight" determinations remain elusively subjective and, open to abuse in the absence of other procedural safeguards or statutory or judicial standards of heightened scrutiny. Some states (Arizona,<sup>159</sup> Colorado,<sup>160</sup> Iowa,<sup>161</sup> and Michigan<sup>162</sup>) now require "clear and convincing evidence" of blight, though this does not appear to eliminate the subjective nature of the assessment.

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Class" city), Pittsburgh (the only "Second Class" city), and Scranton (the only "Second Class-A" city), among others that were certified as blighted under the urban redevelopment law on or before its effective date, until the end of 2012. H.B. 2054, ch.2, § 203, B.4, B.5, Reg. Sess. (Pa. 2006).

150. S.B. 1206, § 3, 2006 Leg. (Cal. 2006). California enacted a package of five post-Kelo eminent domain reform bills. S.B. 53, 1206, 1210, 1650, 1809, 2005-2006 Reg. Sess. (Cal. 2006).

151. S.B. 41, 60th Leg., Reg. Sess. (Mont. 2007); S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

152. S.B. 167, 126th Gen. Assemb. (Ohio 2005).

153. S.B. 3296, 104th Leg., Reg. Sess. (Tenn. 2006).

154. A.B. 657, 2005-2006 Leg. (Wis. 2006).

155. See *supra* note 150.

156. H.B. 1313, 2005-2006 Leg., Reg. Sess. (Ga. 2006).

157. See Eric R. Clayes, *That 70s Show: Post-Kelo Eminent Domain Reform and the Administrative Law Revolution*, 46 SANTA CLARA L. REV. 867 (2006).

158. See *supra* note 156.

159. Proposition 207 (Ariz. 2006).

160. H.B. 1411, 65th Gen. Assemb., Reg. Sess. (Colo. 2006).

161. H.F. 2351, 81st Gen. Assemb., Reg. Sess. (Iowa 2006).

162. H.B. 5060, S.B. 693, 93d Leg., 2006 Reg. Sess. (Mich. 2006).

A third approach, followed somewhat less frequently, was to narrow the basis for blight findings to parcel-by-parcel determination as opposed to area-wide determination, thereby reducing the possibility that areas without a preponderance of blighted structures would be subject to blight takings. Sixteen states (Arizona,<sup>163</sup> Georgia,<sup>164</sup> Iowa,<sup>165</sup> Kansas,<sup>166</sup> Louisiana,<sup>167</sup> Michigan,<sup>168</sup> Missouri,<sup>169</sup> Nevada,<sup>170</sup> North Carolina,<sup>171</sup> Ohio,<sup>172</sup> Oregon,<sup>173</sup> South Carolina,<sup>174</sup> Virginia,<sup>175</sup> West Virginia,<sup>176</sup> Wisconsin,<sup>177</sup> and Wyoming<sup>178</sup>) enacted this type of reform, and ten coupled parcel-by-parcel determination with a redefinition of blight. The varied response to reining in the elusiveness of “blight” standards through a tighter set of qualifying criteria when coupled with a parcel-by-parcel determination raises an internal conflict of sorts. As George Lefcoe notes, “a blight definition protective of property owners must shield unblighted properties from the threat of condemnation, while a blight norm meant to limit economic development to areas that desperately need rejuvenation must be predicated on an area-wide basis and include unblighted properties necessary for a successful economic development effort.”<sup>179</sup>

Several post-*Kelo* statutes maintained the status quo on “blight” by retaining pre-existing definitions of blight (Illinois,<sup>180</sup> Kentucky,<sup>181</sup> and Maine<sup>182</sup>) or leaving in place blight definitions that include areas where obstacles to “sound growth” or conditions that constitute an “economic or social liability” exist (Alaska,<sup>183</sup> Colorado,<sup>184</sup> Missouri,<sup>185</sup> Nebraska,<sup>186</sup> North

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163. *See supra* note 159.

164. *See supra* note 156.

165. *See supra* note 161.

166. S.B. 323, 2006 Leg., Reg. Sess. (Kan. 2006).

167. S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

168. *See supra* note 162.

169. H.B. 1944, 2006 Leg., Reg. Sess. (Mo. 2006).

170. A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007).

171. H.B. 1965, 2005 Gen. Assemb., Reg. Sess. (N.C. 2006).

172. *See supra* note 152.

173. Meas. 39, 2006 Gen. Election (Or. 2006).

174. S.B. 1031, 116th Leg., 2d Reg. Sess. (S.C. 2006).

175. H.B. 2954, 2007 Leg., Reg. Sess. (Va. 2007).

176. H.B. 4048, 77th Leg., Reg. Sess. (W. Va. 2006).

177. *See supra* note 154.

178. H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

179. Lefcoe, *After Kelo*, *supra* note 15, at 3-4.

180. S.B. 3086, 2006 Gen. Assemb., Reg. Sess. (Ill. 2006).

181. H.B. 508, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006).

182. L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006).

183. H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

184. *See supra* note 160.



Carolina,<sup>187</sup> Ohio,<sup>188</sup> Texas,<sup>189</sup> Vermont,<sup>190</sup> and West Virginia<sup>191</sup>).<sup>192</sup> Other post-*Kelo* legislative actions did not explicitly address blight criteria (Maryland, North Dakota, Rhode Island, and Washington).

These legislated blight “reforms” do not equally represent changes in policy. Consider, for example, the use of economic criteria (#10 from Luce’s categorization<sup>193</sup>), widely considered to be the basis on which condemnation for slum clearance moved from a physical and social set of conditions to the “blight that’s right.”<sup>194</sup> States that eliminated pre-*Kelo* “economic use” criteria by explicitly enacting blight conditions confined to public health and safety criteria were far fewer in number, six (Delaware,<sup>195</sup> Indiana,<sup>196</sup> Kansas,<sup>197</sup> Nevada,<sup>198</sup> Oregon,<sup>199</sup> and Virginia<sup>200</sup>), than the twenty states that in one way or another narrowed blight criteria. Another example relates to the taking of nonblighted properties. State legislation also only modestly cut back on the use of area or neighborhood criteria in the determination of blight: only five of the thirteen states that in pre-*Kelo* statutes permitted blight criteria categorized as “character of the neighborhood” made changes post-*Kelo* that required redefined blight to conform to police-power criteria and/or enacted a requirement for parcel-by-parcel determination (Arizona,<sup>201</sup> Indiana,<sup>202</sup> Michigan,<sup>203</sup> Nevada,<sup>204</sup> and South Carolina<sup>205</sup>). Eight other states using the same “character of neighborhood” criteria made no such adjustments.

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185. *See supra* note 169.

186. L.B. 924, 99th Leg., 2d Sess. (Neb. 2006).

187. *See supra* note 171.

188. *See supra* note 152.

189. S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

190. S.B. 246, 2005-2006 Leg. (Vt. 2006).

191. *See supra* note 176.

192. *See Somin, supra* note 145, at 2122-25.

193. Luce, *supra* note 15.

194. HOYT, *supra* note 6.

195. S.B. 7, 145th Gen. Assemb. (Del. 2009).

196. H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

197. *See supra* note 166.

198. *See supra* note 170.

199. *See supra* note 173.

200. *See supra* note 175.

201. *See supra* note 159.

202. *See supra* note 196.

203. *See supra* note 162.

204. *See supra* note 170.

205. *See supra* note 174.

As a condition justifying condemnation, the changes relating to blight fell way short of the reform movement's ambitions<sup>206</sup> because the legislative efforts to reform the subjective criteria determinative of positive findings did little to alter the expansive permissiveness under which private property in most states can still be condemned as "blighted." It is, remarked Somin, the common factor "undermining the potential effectiveness of post-*Kelo* reform laws."<sup>207</sup> Yet as Lefcoe reminds us in another expansion of his analysis of redevelopment,

definitions of blight traditionally have served four related, yet distinct functions: (1) a planning justification for planning intervention in city building; (2) to delineate the precise boundaries of the areas requiring redevelopment; (3) to convince conservative judges in the 1930s and 1940s that local implementation of federal program[s] like public housing and urban renewal were simply extensions of the common law of nuisance abatement; and (4) to justify the taking of private property by eminent domain for re-sale to private developers.<sup>208</sup>

That "blight" has proven to be an enduring policy foundation for condemnation, whether undertaken under the name of slum clearance, economic development, or urban revitalization, speaks volumes about the political realities of its appeal as a highly malleable concept. A large and strong coalition of mutual interests supports redevelopment. Though they have not been as openly vocal in the policy battles over eminent domain as proponents of property rights, city officials, redevelopment agencies, urban planners, real estate consultants and attorneys, developers, and environmental interest groups have proven to be quite successful at limiting state legislative reform of eminent domain statutes that would curb the ability of government officials to push forward growth-oriented projects, as noted above in the case of Pennsylvania.<sup>209</sup> Working through back channels and legislative amendments and revisions to weaken the proposed reforms affords greater political protection than overt opposition to such high-profile legislation. Of course, depending upon perspective, these political pressures either undermined reform or left cities, especially those older urban centers, with the potential to use condemnation powers for projects of public purpose. Wherever one falls on the spectrum of opinion regarding eminent domain takings, the political durability of blight's broad-based policy justification presents a lesson in the limits of legislative reform.

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206. See Somin, *supra* note 145, at 7-17.

207. *Id.* at 17.

208. Lefcoe, *Redevelopment Takings After Kelo*, *supra* note 15, at 818.

209. Property Rights Protection Act, 26 PA. CONS. STAT. ANN. § 204 (West 2008).

## V. CONFLICTING POLITICAL FORCES

The backlash to *Kelo* caught the attention of state legislators, yet state legislatures responded in diverse ways, as evident in the blight-definition reform discussion above. Whereas data on the backlash showed that the *public* did not support eminent domain powers as a vital tool for economic development, the same cannot be said for state and local government *officials*.<sup>210</sup> How we understand the post-*Kelo* politics of eminent domain reform is critical to understanding how to interpret legislative results that have been an intense topic among academic scholars since the 2005 U.S. Supreme Court *Kelo* decision. Whereas the legal commentary has been heavy and steady, analyses of the political dimension have been almost as sparse as systematic, empirical evidence on eminent domain abuse. Two empirical studies and the reports of state task forces<sup>211</sup> set up to study the issue shed insight into the role of political factors in shaping reform outcomes.

In an empirical analysis designed to explain the variation in state reform efforts, Andrew P. Morriss<sup>212</sup> argues that the reason for the variation in reform responses across the nation is rationally tied to differences in the costs of reform to state legislators in enacting anti-*Kelo* restrictions on eminent domain powers. Since such restrictions would curb a politically useful means of distributing resources to supporters, the following expectations would hold: (1) strong interest groups would impose greater costs to legislators; (2) strong opponents of reform also would increase costs to legislators; (3) an expanding economic pie would generate more opportunities for rewards and for change, and decrease costs to legislators; and (4) when the legislature is restricted in raising taxes or the economy is not growing, the constraints imposed on legislators would be greater. Morriss' findings are

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210. State officials are as much a part of this constituency as local officials because when the latter do not have the powers and economic aids they turn to their colleagues in state government for help.

211. Seven states set up either a task force or study commission on eminent domain: Connecticut (ROBERT S. POLINER, OFFICE OF OMBUDSMAN FOR PROP. RIGHTS, GOODWILL STUDY: REPORT TO THE JUDICIARY COMM. PLANNING & DEVELOPMENT COMM. (2008)); Indiana (IND. LEGIS. SERVS. AGENCY, FINAL REPORT OF THE INTERIM STUDY COMM. ON EMINENT DOMAIN (2005)); Missouri (STATE OF MISSOURI, FINAL REPORT AND RECOMMENDATIONS OF THE MISSOURI EMINENT DOMAIN TASK FORCE (2005)); Ohio (LEGIS. TASK FORCE OF THE STATE OF OHIO, FINAL REPORT OF THE TASK FORCE TO STUDY EMINENT DOMAIN (2006)); New Mexico (GOV. RICHARDSON'S TASK FORCE REPORT, *supra* note 146); Oklahoma (the Joint Task Force on Eminent Domain never submitted a report due to the 2006 Oklahoma Supreme Court decision in *Board of County Commissioners of Muskogee County. v. Edward L. Lowery*, 136 P.3d 639 (2006)), and Washington (ATT'Y GEN. OF WASH., EMINENT DOMAIN TASK FORCE, FINAL REPORT (2009)).

212. See generally Morriss, *supra* note 141.

suggestive of the political story behind the observed legislative results of eminent domain reform. Based upon a multivariate analysis of forty-eight state responses,<sup>213</sup> Morriss found that: (1) spending and revenue restrictions make substantive reforms less likely; (2) legislatures in growing states were more likely to adopt reforms than legislatures in stagnant or declining states; (3) the impact of politics is important in one dimension: as Republican legislative strength increases, adoption of substantive reform becomes more likely; and (4) measures of ideological climate were not important to explaining the variation in state responses.<sup>214</sup>

A study by Elaine B. Sharp and Donald Haider-Merkel, which also sought to explain the considerable variation by which legislators restricted the power of eminent domain following *Kelo*, similarly found a lack of compelling evidence that citizens' backlash and demand for change shaped post-*Kelo* legislative actions.<sup>215</sup> Rather, their results emphasize the importance of organized interests at the state level and the role of populist or grassroots activism in the politics of eminent domain reform. "Eminent domain reform" they conclude:

[A]ppears to have some of the features of a populist uprising—one that is reactive to a history of presumably controversial eminent domain takings and one that has had greater legislative success in states where the absence of the expertise and resources associated with professionalized development of issue solutions leaves an opening for grass roots activism to be more influential.<sup>216</sup>

Insight into the political process of reform can be found in a portrait of the deliberations of the Missouri General Assembly in its attempted reform of the state's eminent domain statute, as documented by Professor Dale A. Whitman in a legislative memoir.<sup>217</sup> Just five days after the *Kelo* decision, then-Governor Matt Blunt announced the formation of a task force to examine "the use of eminent domain, especially when the proposed public use of the property being acquired is not directly owned or primarily used

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213. In some instances, states responded more than once.

214. *Id.* at 35-41.

215. Sharp & Haider-Markel, *supra* note 138.

216. *Id.* at 569.

217. Whitman, *supra* note 36, at 721. A long-time property law professor, Whitman had been asked to serve as a consultant by the Burlington Northern-Santa Fe Railroad to track and analyze the legislation on eminent domain that was to be considered in the 2006 legislative session. After being assured that when speaking to legislators and their staff that he would be expressing his own independent views and not expressing those of the railroad, he agreed and spent about twenty-two hours in the State Capital meeting with legislators and staff members. The Missouri House of Representatives had just adopted H.B. 1944, and it was ready to be sent to the Senate.

by the general public.”<sup>218</sup> The Governor’s task force did not take the “radical” step of recommending that eminent domain no longer be available for urban redevelopment efforts. Nor did it endorse a citizen proposed initiative for a constitutional amendment that would have called for an all-out ban on the use of condemnation powers for private-to-private transfers. Rather, its actions reflected a conscious determination not to stifle urban regeneration and growth that would have been highly detrimental to urban redevelopment efforts.<sup>219</sup>

A number of bills relating to eminent domain were filed in the 2006 session of the Missouri General Assembly, but only one received serious attention: H.B. 1944.<sup>220</sup> After quick passage in the House of Representatives, the bill arrived in the Senate, where, Whitman reports, it was greeted with much less enthusiasm:

There seemed to be a fairly widespread view among likely Senate handlers that the bill represented considerable political risk. Since nearly any provision that was attractive to the Farm Bureau and property rights advocates seemed likely to be opposed by the real estate development community and the governments of the state’s major cities, a close association with the bill evidently seemed to many senators a “no-win game.”<sup>221</sup>

Serious and creative leadership, skillful negotiation of compromise, and deft drafting of modifications would be needed for the House bill to pass the Senate. Two issues stand out for the purposes of this Article: deliberations over a redefinition of blight and the making of blight determinations on a parcel-to-parcel basis. In both cases, the results to date conform to the “political clashes” noted above. Among legislators as well as the Governor-appointed Task Force, Whitman noted, there was no enthusiasm to take on the job of redefining “blight” despite the fact that the statutory definitions were recognized as definitively vague.<sup>222</sup> When it came to reform, pragmatism prevailed. “Redefining blight was widely regarded as a morass that could consume huge resources of time and energy with very little payoff. Even the Eminent Domain Task Force concluded that ‘a complete overhaul of the blight definition is not obtainable.’”<sup>223</sup> On the question of whether every parcel in a redevelopment project must be blighted as the Senate Committee bill had said, that chamber’s leader on the bill, Senator

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218. *Id.* at 742.

219. *Id.* at 730.

220. *Supra* note 169.

221. *Id.* at 732.

222. *Id.* at 735-43.

223. *Id.* at 742.

Chris Koster, presented a compromise in a substitute bill. His language provided that:

[T]he condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a *preponderance* of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.<sup>224</sup>

While the language of the compromise—“preponderance”—was “somewhat ambiguous,” Whitman noted that it was “mutually acceptable and would seldom be a barrier to actual redevelopment projects.”<sup>225</sup> Other states have used a similar approach but with thresholds that are a little higher. The trend since *Kelo* has been to move the percentage required higher. In assessing the legislative effort on blight reform, Whitman concluded that:

[T]he blight provisions of the final legislation did very little harm to redevelopment, but neither did they do much to clean up abuses. Landowners were placed in a better procedural posture when they sought to challenge findings of blight, but they could point to very little in the bill that improved their substantive chances of success.<sup>226</sup>

While expressing disappointment in the fact that blight was not redefined and that reform did not address the lack of serious judicial review of local determinations of blight, Whitman concluded that outside groups viewing these results from afar might well discount the extreme difficulty legislators and legal experts faced in finding a legal solution, as distinct from a political solution, to this problem.<sup>227</sup> The General Assembly left the determination of what is a legitimate or illegitimate taking to the political process, which Whitman concluded may still be the best venue for these determinations:

[W]hen a taking is authorized that offends local sensibilities broadly, the political repercussions on the decision-makers are apt to be most immediate and direct. . . . Indeed, it is somewhat ironic that conservatives, who usually argue against centralization of political power and who favor local autonomy, have taken the view in the eminent domain controversy of 2005-06 that property owners need protection from local government by an “activist” Supreme Court.<sup>228</sup>

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224. S.S. H.B. 1944, § 523.274 (cited in Whitman, *supra* note 36, at 742 (emphasis added)).

225. Whitman, *supra* note 36, at 742.

226. *Id.* at 743.

227. *Id.* at 765.

228. *Id.* at 765.

Lynn E. Blais, a strong supporter of the availability of eminent domain for economic development projects, is critical of the post-*Kelo* modifications that have been made to eminent domain statutes:

Overall, the post-*Kelo* eminent domain statutes overwhelmingly share two characteristics: they limit the use of eminent domain to transfer private property from one owner to another for economic development purposes and they make exceptions to that prohibition for the eradication of blight. These two components, taken together, are unlikely to meaningfully limit the ability of state and local governments to pursue urban revitalization projects. They are very likely, however, to channel such projects in ways that make them less effective, less efficient, and dramatically less fair.<sup>229</sup>

She believes that the increased application and use of a blight requirement will “require local governments to wait until a city area is in substantial decline (i.e. blighted) before engaging in revitalization projects.”<sup>230</sup> This, she believes, will make it more difficult and costly to involve private developers in revitalizations because more projects will be forced into poor and minority areas.<sup>231</sup> Is she correct? And is this an incidental effect of these changes, or was it one of the purposes of the changes made post-*Kelo*?

*Berman v. Parker*<sup>232</sup> was a unanimous decision approving the use of condemnation for urban renewal that raised little outcry. The decision in *Kelo*, more than fifty years later, approved a more limited condemnation and imposed more requirements, yet the vote was only five to four in favor and a huge outcry followed. Is this because the Supreme Court, and the nation as a whole, has become more conservative and more protective of property rights than it was at the time *Berman* was decided? Or is it because there is stronger and more vocal opposition to condemnations of private homes in white suburban communities than there is to takings in poor and minority areas of large cities like Washington D.C.? Remember, there was no requirement for blight findings in *Kelo*. To this comparison we should also add the perception held by opponents of the project in *Kelo*, and then the decision in *Kelo*, that the New London project had a relatively low public versus private benefit ratio.

Much of the *Kelo* outcry, according to at least one expert on blight and redevelopment, Wendell E. Prichett, may have come from the fact that the pattern of eminent domain use has dramatically changed over this time period, with a large number of condemnations occurring in suburban areas. “Put simply, eminent domain has received more attention over the past year

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229. Blais, *supra* note 143, at 676.

230. *Id.* at 685.

231. *Id.* at 685-87.

232. 348 U.S. 26 (1954).

(i.e. 2005) because the people involved in these disputes are middle-class suburban homeowners and small businessmen, particularly those in older, built-out suburbs.”<sup>233</sup> If this is the underlying socio-economic foundation of the backlash, then the post-*Kelo* legislative reforms that narrowed the definition of blight probably served this class of voters while also curbing a few of the more egregious abuses arising from the term’s breadth. As the history of urban renewal projects in the post-World War II era make clear, poor and minority communities suffered disproportionately from the wholesale clearance of blighted neighborhoods, and many people, including Blais, now oppose the use of condemnation where it has that result.<sup>234</sup> “Making ‘blight’ a precondition for economic development takings,” as Columbia Law School Professor Thomas A. Merrill noted in testimony before the U.S. Senate Committee on the Judiciary, “seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities.”<sup>235</sup> As we have shown, those living in poor and minority areas in large- and medium-sized cities received no similar benefit from the post-*Kelo* legislative modifications.

## VI. CREATING BETTER SAFEGUARDS

The *Kelo* backlash motivated many legislatures to enact reform laws that would provide better protection to property owners, in particular, homeowners, facing condemnation actions, and toward that end, as we discussed earlier, a number of state legislatures have tried to find ways to alter requirements relating to findings of blight. Some states have amended their laws to restrict or prohibit condemnation of individual parcels that are

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233. Prichett based his conclusion on a review of articles on eminent domain disputes following *Kelo* during the four-month period of June 1, 2005 to September 30, 2005. Of the fifty separate disputes uncovered from searches on Lexis, Westlaw, and American newspapers, twenty-four were located in suburban areas. Prichett, *supra* note 90, at 909 n.62. On the character of the backlash see, Janice Nadler et al., *Government Takings of Private Property: Kelo and the Perfect Storm* (Nw. U. Sch. of Law, Pub. Law and Legal Theory Series, Paper No. 07-05, 2008). Nadler, Diamond, and Patton analyzed reactions of citizens as revealed in several polls taken after the decision and found that the type of property being taken—a business, a home, or vacant land—shapes the level of support for the use of eminent domain powers, as does the proposed use for the property, whether it is to be taken for a school, a shopping center, or high-value homes. While poll data indicated a “vigorous and apparently uniform response to *Kelo*,” the authors conclude that this “should not be confused with what is actually a more nuanced public evaluation” and not a wholesale rejection of the legitimacy of eminent domain. *Id.* at 23.

234. FRIEDEN & SAGALYN, *supra* note 11, at 27-37.

235. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14-16 (2005) (statement of Thomas W. Merrill).



themselves not blighted. North Carolina previously allowed redevelopment agencies to take unblighted properties if two-thirds of the buildings within the area were blighted. But now each individual parcel to be taken must be evaluated and determined to be blighted.<sup>236</sup>

Georgia's redevelopment law now requires that all property to be taken must be blighted.<sup>237</sup> In addition, the public agency undertaking a condemnation is now required to give "notice in writing to the property owner regarding specific harm caused by the property and [the] owner has failed to take reasonable measures to remedy the harm."<sup>238</sup>

Minnesota has altered its law to require that each building to be taken be determined to be structurally substandard "unless there is no feasible alternative to the taking of the parcels on which the buildings are located in order to remediate the blight and all possible steps are taken to minimize the taking of buildings that are not structurally substandard."<sup>239</sup> It is not yet clear how the "no feasible alternative" language will be interpreted. If it means only the equivalent of no reasonable alternative, it may not turn out to mean much.

A prohibition against taking unblighted parcels could serve to limit one unfortunate tendency: the tendency to expand the size of redevelopment districts. The larger the area, the easier it will be to find more examples of blight. If the number of citations of examples of blight is all that counts in finding an area blighted, rather than the *degree of blight*, unblighted parcels can easily be included, and the larger the area, the better.<sup>240</sup> The desire to include developable areas, together with ones capable of showing blight, not only leads toward larger areas, but also leads to strangely shaped districts, shapes which Colin Gordon refers to appropriately as "gerrymandered." In drawing the boundaries, the areas that are most intensely blighted may be avoided in order to better assure an ability to develop the chosen zone. In TIFs, large, developable areas will capture more of the property growth potential and increased taxes. For government officials and municipal bond underwriters, the larger area means a safer bet that the TIF district will be able to pay off the bonds. Hence the expression: "the blight that's right."<sup>241</sup> A striking confirmation of this is the nearly one hundred percent growth in the size of TIF districts in California, to over

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236. N.C. GEN. STAT. § 160A-515 (2007). See generally Carolyn A. Pearce, *Forcing Urban Redevelopment To Proceed "Building by Building": North Carolina's Flawed Policy Response to Kelo v. City of New London*, 85 N.C. L. REV. 1784, 1790 (2007).

237. GA. CODE ANN. § 22-1-1 (2006).

238. *Id.* § 22-1-1(1)(A)(iii).

239. MINN. STAT. ANN. § 117.075 (West 2008).

240. Gordon, *supra* note 3, at 320-27.

241. Lefcoe, *Finding the Blight that's Right*, *supra* note 15, at 995.

eight hundred acres, following the approval of Proposition 13 and its tight limits on property taxes which we discussed earlier.<sup>242</sup> When TIF district lines are deliberately drawn to include unblighted parcels ripe for development that are likely to be the first to be redeveloped and, thus, the most immediate source of increments for repaying the bonds, officials can be said to be engaging in what we would call “TIF gerrymandering.”<sup>243</sup>

It must be remembered, however, that blocking the taking of individual, unblighted parcels in a large project area (which is otherwise generally blighted and a good candidate for an appropriate economic development project) can render the project too costly or otherwise impossible to implement. While based on a simple, understandable principle (“if it ain’t blighted, don’t take it”), such an approach to the problem is probably too simplistic, and potentially counterproductive—effectively throwing the baby out with the bath water. North Carolina, prior to *Kelo*, allowed takings of parcels that were “necessary or incidental” to a project in which at least two-thirds of the buildings were of a blighted character.<sup>244</sup> In 2006 they amended the law to move away from the concept of a “blighted area” to that of a “blighted parcel.”<sup>245</sup> But this change according to commentators, will curtail the ability of planners to efficiently address redevelopment, forcing programs to move on a “lot by lot, building by building” basis.<sup>246</sup> Blais makes a similar point.<sup>247</sup> We agree. In the Times Square Project certain properties were omitted from the taking intentionally (notably, a hotel and an office building), but having to omit all small sites that were not blighted would have prevented the acquisition of the critical mass required for the Project as a whole. This was true in the Atlantic Yards Project as well.

Another approach being taken is to shift the burden of proof on unblighted parcels to the government. An example of this can be found in West Virginia where the legislature has authorized property owners who wish to challenge a taking to go directly to the circuit court to get a review determining if any unblighted property to be taken is “necessary” for the

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242. See Gordon, *supra* note 3, at 327.

243. Lefcoe provides one such example where a redevelopment agency stretched the boundaries of an existing project area to encompass a purely private development of about twenty-five acres about to be built. See Lefcoe, *After Kelo*, *supra* note 15, at 64-65 (discussing *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 199-200 (Cal. Ct. App. 1977)). Their plan was to make use of two projects in their TIF that were already underway to generate about \$126,000 in annual tax revenues. See *id.* at 65.

244. See Pearce, *supra* note 236, at 1789-90.

245. See N.C. GEN. STAT. § 160A-515 (2006).

246. Pearce, *supra* note 236, at 1790-91 (discussing *Berman v. Parker*, 348 U.S. 26, 35 (1954)).

247. See Blais, *supra* note 143, at 684-85.

project, and to require the agency to show that with respect to the project *each* of the following is true:

(1) That the project cannot proceed without the condemnation of the private property at issue;

(2) That the private property shown not to be blighted cannot be integrated into the proposed project or program once the slum and blighted area surrounding such property is taken and cleared;

(3) That the condemnation of the unblighted property is necessary for the clearance of an area deemed to be slum or blighted;

(4) That other alternatives to the condemnation of the unblighted property are not reasonably practical;

(5) That every reasonable effort has been taken to ensure that the unblighted property and its owners have been given a reasonable opportunity to be included in the redevelopment project or plan without the use of eminent domain;

(6) That no alternative site within the slum and blighted area is available for purchase by negotiation that might substitute as a site for the unblighted property;

(7) That the redevelopment project or plan could not be restructured to avoid the taking of the unblighted property;

(8) That the redevelopment project or plan could not be carried out without the use of eminent domain; and

(9) That there is specific use for the unblighted property to be taken and a plan to redevelop and convert the unblighted property from its current use to the stated specific use basically exists.<sup>248</sup>

To allow unblighted parcels to be taken in order to facilitate a larger project, but still add better protection against excessively easy or abusive findings of blight, Pennsylvania has created a comparatively more detailed definition of blight that focuses on the characteristics of individual properties.<sup>249</sup>

In some states, the courts have elevated powers to review agency determinations as a safeguard, or a way of limiting certain condemnations. Five states are generally recognized for their heightened judicial scrutiny in eminent domain cases.<sup>250</sup> The five states are Arizona, Delaware, Georgia, Michigan, and Texas.<sup>251</sup> Their expanded level of review appears to have come from the courts themselves rather than from acts of the state legisla-

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248. W. VA. CODE ANN. § 16-18-6A (West 2006). *See also* Blais, *supra* note 143, at 676.

249. *See* 26 PA. CONS. STAT. ANN. § 205 (West 2008). *See also* Lefcoe, *After Kelo*, *supra* note 15, at 58.

250. *See* Sharp & Haider-Markel, *supra* note 138, at 563.

251. *See id.* at 571 n.1.

ture. Ohio is another one. In 2006, the Ohio Supreme Court held in *City of Norwood v. Horney*<sup>252</sup> that Ohio courts must apply heightened scrutiny when reviewing statutes that regulate the use of eminent domain powers.<sup>253</sup> The Ohio Supreme Court decided that “rote deference” to municipalities was not a proper judicial standard and that it did not comport with appropriate separation of powers.<sup>254</sup> It concluded its opinion in *City of Norwood* by finding that the Norwood Code’s definition of “deteriorating area” was a “standardless standard” that merely “recites a host of subjective factors that invite ad hoc and selective enforcement” and it held that the use of “deteriorating area” as a standard for determining whether private property is subject to appropriation was “void for vagueness.”<sup>255</sup>

Such review by courts may provide a level of scrutiny that limits clear abuses, and could raise the requirements for finding blight. But we question whether judges can ever undertake the level of effort, or possess the amount of knowledge, that would be needed to produce a balanced set of sophisticated criteria and standards required for a good definition of blight. But, as we have seen in the New York Appellate Division’s decision in *Kaur*, a heightened level of scrutiny in the review of governmental findings of blight can be an eye opener and a potential control over an otherwise unregulated ability to make findings, and would in *Kaur* have produced a different outcome if it had been the final decision.

A better way to combat these unfortunate dynamics and control expansive, overreaching determinations of blight, without excluding unblighted parcels needed for the project, could be achieved by changing the requirements away from strings of citations of examples of blight, and replacing it with a definition crafted by experts in the field that excludes the most abused components and requires finding *the degree* of blight, and showing a *minimum level of blight*. This will require statutes with smart standards and at least some degree of objective quantification.

Some standards currently used should be excluded. One that cries out for such elimination (or very strict control) is “underutilization”<sup>256</sup> because

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252. 853 N.E.2d 1115 (Ohio 2006).

253. *See id.* at 1143; *see also* Nicholas M. Gieseler & Steven Geoffrey Gieseler, *Strict Scrutiny and Eminent Domain after Kelo* 21-22 (Pacific Legal Foundation, Program of Judicial Awareness, Working Paper, No. 09-005, 2009).

254. *Horney*, 853 N.E.2d at 1137-39. It also found that the analysis by the Supreme Court of Michigan in, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo*, were the better models for interpreting its own Constitution. *Horney*, 853 N.E.2d at 1141.

255. *Id.* at 1145-46.

256. *See generally* Piper, *supra* note 117 at 1166-72, 1188-91.

that standard can pick up every parcel that could be built out further (under its current floor area ratio) or rebuilt to a higher and better use. Also every property that has air rights or development rights that have not been sold could be condemned using this criteria. At a minimum, a clear level of substantial underutilization, quantifiable on a per-parcel basis, would need to be set for this to make sense,<sup>257</sup> together with a required percentage of parcels that must be found to be “underutilized” at that level. Such an approach would more likely mean that deteriorated conditions are truly present, not just homes whose zoning has changed over time, or whose owners prefer less-than-maximum-size structures.

Another candidate for total elimination would be the “age” of structures, by itself, without regard to conditions. Age can also correlate with quality and architectural distinctiveness and conflicts with the legislated value of preserving historic buildings. Using age as an eligibility criterion for making buildings subject to potential clearance goes against the logic of federal and local preservation laws and programs that were, in fact, “a response to the urban renewal and blight elimination programs of the 1950s and 1960s.”<sup>258</sup> To be eligible for the National Register of Historic Places, a building has to be at least fifty years old, or have historical or architectural importance that is exceptional.<sup>259</sup> Even under state and local historic and preservation laws, new buildings are rarely made landmarks. In New York City, “pre-war building” means a pre-World War II residential structure but it is also synonymous with space, quality, and higher value.

The concepts of “future” and “potential” blight should also be eliminated; they are even more subjective than finding blight on a current basis. If it requires finding that the area is in relative decline, then half the parcels in the country could be found to be in decline *relative* to the other half. If finding that the parcels are in decline in any absolute, measureable way is required, then it does not matter how new or valuable the property currently is. Despite the flaws in using future blight as criteria, California appears to be one of the few states where the concept has been rejected.<sup>260</sup>

As previously mentioned, only seven states currently have any quantification requirements in their laws.<sup>261</sup> But the quantification in these jurisdictions is so limited, it does not address the problem: their laws generally

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257. The Appellate Court in *Kaur* thought a 40 percent or lower Floor Area Ratio (FAR) would work as a standard. *Kaur v. N.Y. State Urban Dev. Corp.*, 72 A.D.3d 1, 19 (N.Y. App. Div. 2009).

258. Brown, *supra* note 36, at 226.

259. National Historic Preservation Act, 16 U.S.C. § 470-470x-6 (2006).

260. *See* 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1130-31 (C.D. Cal. 2001); Gordon, *supra* note 3, at 328.

261. *See* Gordon, *supra* note 3, at 320 n.134.

only require that some *percentage* of the *properties* in the designated area be found to be blighted *for the area* to be designated as blighted. The findings within the qualifying parcels remain based solely on broad subjective determinations. To correctly do what we propose, a panel of experts from the fields of sociology, economics, criminology, city planning, engineering, and architecture would have to carefully select appropriate, objective standards and criteria, and then, where possible, determine minimum levels that must be found. Currently, the definitions, if any, are left to politicians, and “findings” are left to agencies based on data provided by environmental consulting firms, who know they have been hired to try to show the existence of blight, and to lawyers, who have the same motivation and purpose. They have no required standards that have to be met. They work from the findings in prior projects, ones that previously satisfied judicial review (which, as we have seen in *Kaur*, may be effectively non-existent), and put together a string of examples and data in a way that makes a case. There are few, if any, factors that they are *required* to assess, and no factors they are required to *exclude*.<sup>262</sup>

Each state wishing to reform its blight criteria would have to have the governor, working perhaps with or through an independent academic, professional body, or civic organization (to limit business, political, and activist influence) appoint the panel of experts. The blight standards proposed by the panel would then be subject to public review and comment before being sent to the legislature for enactment into law. The legislature could empower the executive branch to develop the definition and provide it with the power of law, or the legislature could be required to vote “yes” or “no” on the proposed standards without amendments.<sup>263</sup> To the extent there is a need for or value in having variations in the standards geographically within a state, the experts would be in a good position to provide that. The results will of course vary from state to state, as have state laws and reforms to date, and the quantification aspects will differ widely, as they should.

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262. Colorado requires a finding of only one of its blight factors for a finding of blight that is not contested; a finding of four factors is required if the property taken will be owned by the public sector and a finding of five factors of blight is required if the property is transferred to private entities under urban removal. COLO. REV. STAT. ANN. §§ 31-25-103(2)(1) (2005), 31-25-105.5(2) (2004). As a result of this requirement, a local authority must meet a greater standard where the appearance of favoritism to a private individual is the highest. Brown, *supra* note 36, at 225.

263. Such an approach has been used by Congress and the President for military base closings. Governor Cuomo of New York has proposed the use of executive branch panels to shield the legislature from votes on public health care modifications and cuts, to set requirements for state chartered banks, and to effectuate prison closings. Jacob Gershman, *Cuomo Reaches for Power*, WALL ST. J., Feb. 18, 2011, at A15-16.

Since this has never been done to our knowledge, it may be best to ask that these blight definition panels, try to keep it simple. However, this is not simple stuff. It is, for example, conceivable, and would in fact be quite reasonable, to have the panels provide standards containing alternative minimums, i.e., lower minimums in one category (e.g. the theft rate) if the rate found in second category (e.g., murder or rape rate) is higher.<sup>264</sup> Finding that there are mice or rats, even if the frightening phrase “infestations” is included, would not be sufficient. The entire Upper West Side of Manhattan has enough mice for it to be found to be blighted on that basis. Some greater amount of data would be needed. Nor would simply finding that there are “tax delinquent” properties be sufficient. There would have to be municipal liens for failure to pay taxes, or municipal takings, in excess of a specified dollar amount or percentage of the property value, accumulated over a set period of time. As the New York Appellate Division in *Kaur* said, if one can count things like unpainted block walls or loose awnings “virtually every neighborhood in the five boroughs will yield similar instances of disrepair . . . .”<sup>265</sup> Variations in the quantification would also be a way to address regional differences within the state.

If the state can come up with a good set of standards, then it might also consider taking the standards to an even higher level of meaningful application; it could provide stricter requirements for uses that have public-to-private benefit ratios at the low end of the public purpose hierarchy (as offered in this Article or as established by the state). So for example, “Level 1 Blight Standards” (the least stringent) would be applicable to the highest types of Economic Development Uses, and the most stringent standards (say Level 3) would be required for low-end undertakings such as one-to-one transfers, pure tax enhancement projects, and TIF projects. A high standard should also apply to cases where removal of blight is the sole public purpose. This as we have seen is allowed in New York.<sup>266</sup> This could also be applied to economic development projects containing small public to private benefit ratios. These should require more demanding standards than those having high public to private benefit ratios.

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264. The crime rate as a whole could be a quantitative condition provided it is clearly defined. In Wisconsin, for a property to be found to be blighted the crime rate on that property must be three times, or more, the average crime rate in the city where the property is located. See 2006 Wis. Sess. Laws 233.

265. *Kaur v. N.Y. State Urban Dev. Corp.*, 72 A.D.3d 1, 17 (N.Y. App. Div. 2009).

266. Under present law, if found to be blighted, buildings can be taken and cleared to land bank or to pave it over.

**CONCLUSION**

The issue of blight and eminent domain has been extensively written about, sometimes in considerable detail. Even though the *Kelo* decision did not turn on the issue of blight, it triggered a national debate and substantial additional literature, about the use and abuse of eminent domain, and it also stimulated state legislatures to enact a series of statutory reforms. The permissive, expansive use of the blight concept has blurred the line between proper use and abuse, especially when the power of condemnation is exercised for economic development purposes. Over time, this extremely loose practice has undermined the use of blight findings as a basis for condemnation. Our exploration here has led us to see the need to impose reason and rigor on an essential subject matter that has evolved without any. There has been little to no thoughtful discipline applied as the definition of blight has grown and its “finding” expanded. If blight is to continue to be a condition and a cornerstone for condemnations, urban renewals, or economic development undertakings, it needs serious alteration. In the absence of any real definition or standards, it will continue to serve more as an expensive foil for projects sought by developers and government officials, than as a screen filtering out lands that should be left alone.