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Does Blight Really Justify Condemnation?

By Steven J. Eagle*

Abstract

This article asserts, contrary to existing law, that blight condemnation is inconsistent with the fundamental distinction between eminent domain, which arrogates private goods for public use, and the police power, which protects the public from harm. When conditions on a parcel constitute a threat to public health and safety, the landowner should be ordered to abate. If the owner is unable or unwilling to do so, the dangerous condition should be abated by government under its police power. The cost of abatement should be treated as a betterment assessment, which become a lien on the land and, if unpaid, should result in a foreclosure sale. Thereafter, the land could be redeveloped by the purchaser or its designee.

One practical result of abatement and foreclosure is that an owner has an incentive to abate, or to sell to a neighbor or redeveloper who would abate, perhaps in combination with abatement on other nearby parcels similarly situated. Should the parcel go through foreclosure, its redeveloper is selected through a transparent process of competitive bidding. This likely would reduce unjustified blight condemnation resulting from rent seeking manifested through political favoritism towards selected redevelopers. Also, re-channeling redevelopment through market actors would reduce grandiose and wasteful redevelopment schemes.

I. Introduction

This article is about “blight,” a vivid term used to describe conditions ranging from true dangers to the public health and safety, through obsolescent features reducing market value, to a scary pretext for the acquisition of land which is desired by others. While blackletter law pro-

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vides that the presence of blight justifies condemnation, this article claims categorically that “blight condemnation” is dubious at best, both in theory and practice. It further asserts that an alternative—abatement, foreclosure, and private revitalization—is more in accord with Constitutional requirements and more likely to produce transparent and efficacious outcomes. Because the article’s central claim applies to all blighting conditions, it assumes a context in which “blight” constitutes an imminent threat to public health or safety.

II. The Problematic Law of Blight Condemnation

The U.S. Supreme Court’s decision in *Kelo v. City of New London* reiterates that blight justifies condemnation,¹ as does the principal dissent.² The Court’s prior leading cases defining public use, *Berman v. Parker*,³ and *Hawaii Housing Authority v. Midkiff*,⁴ agree. *Berman* seemed to assume, without analysis, that urban renewal was a legitimate governmental activity and that, “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”⁵ Furthermore, “[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.”⁶ After quoting this language, *Midkiff* added “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”⁷ Whether because of deference to legislative judgment or because of an intuition that the legislative determination was sound, in neither *Berman*, nor *Midkiff*, nor *Kelo* did the Supreme Court consider the logic of condemnation for blight.

Only Justice Thomas, in his *Kelo* dissent, analyzed the constitutional bases of the police and eminent domain powers and asserted that they were separate and distinct:

¹ 545 U.S. 469, 485 n.13 (2005) (asserting that the goals of previous cases included, albeit were not limited to, blight removal).

² *Id.* at 500 (O’Connor, J. dissenting) (noting that in the Court’s earlier public use cases, “the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society”).

³ 348 U.S. 26 (1954).

⁴ 467 U.S. 229 (1984).

⁵ *Berman*, 348 U.S. at 32.

⁶ *Id.* at 33.

⁷ 467 U.S. at 240

Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, in sharp contrast to the takings power, which has always required compensation. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. In *Berman*, for example, if the slums at issue were truly “blighted,” then state nuisance law, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States’ police power conflates these two categories.⁸

Leading recent state cases that otherwise stringently limit condemnation for private redevelopment, *City of Norwood v. Horney*⁹ and *County of Wayne v. Hathcock*,¹⁰ also seemingly approved blight condemnation without independent analysis. In *Horney*, the Ohio Supreme Court noted its past approval of “the discrete act of removing blight,” since it “served to remove an extant health threat to the public.”¹¹ However, the court, now more weary of condemnation for redevelopment, drew the line at including in its ambit a vaguely characterized “deteriorating area.”¹² Similarly, the Supreme Court of New Jersey recently struck down the application of a redevelopment statute interpreted by the borough to allow redevelopment of “any property that is ‘stagnant or not fully productive’ yet potentially valuable for ‘contributing to and serving’ the general welfare.”¹³ As the court added, “[u]nder that approach, any property that is operated in a less than optimal manner is arguably ‘blighted.’”¹⁴

Illustrative of recent statutory limitations on blight, the California legislature recently amended the “Existence of blighted area; declaration and description” section of its Health and Safety Code to “restrict the statutory definition of blight and to require better documentation of local officials’ findings regarding the condemnations of blight.”¹⁵ Other states also have reformed their codes to tighten up blight definitions, including Kentucky and Utah.¹⁶ The Florida

⁸ *Kelo*, 545 U.S. at 519-20 (2005) (Thomas, J., dissenting) (internal citations omitted).

⁹ 853 N.E.2d 1115, 1143 (Ohio 2006).

¹⁰ 684 N.W.2d 765 (Mich. 2004).

¹¹ *Horney*, 853 N.E.2d at 377.

¹² *Id.* at 356.

¹³ *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 462 (N.J. 2007).

¹⁴ *Id.*

¹⁵ CAL. HEALTH AND SAFETY CODE § 33030(1)(e) (2007).

¹⁶ *See* KY. REV. STAT. ANN. § 99.720 (2007), and UTAH CODE ANN. § 17C-2-301 (2006).

Legislature has responded even more strongly by prohibiting the use of eminent domain in the “eliminat[ion of] nuisance, slum, or blight conditions,”¹⁷ while not “diminish[ing] the power of [localities] to adopt and enforce . . . ordinances related to code enforcement or the elimination of public nuisances [not involving] eminent domain.”¹⁸

Even though the definition of “blight” has been made more stringent in some states, the underlying concept of condemnation for blight remains accepted with minimal scrutiny. In *Hathcock*, the Michigan Supreme Court declared that its earlier *Poletown* decision,¹⁹ which upheld the condemnation of an entire ethnic neighborhood for retransfer to General Motors for the construction of a Cadillac assembly plant, constituted a “radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence.”²⁰ Nevertheless, *Hathcock* restated that the existence of blight would constitute a fact of “independent significance” that would justify condemnation of land without regard to how the land would be used thereafter.²¹ The court explained that an earlier decision, *In re Slum Clearance*,²² was based on the fact that the City of Detroit’s “controlling purpose in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was ‘incidental’ to this goal. . . . *Slum Clearance* turned on the fact that the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, was a public use.”²³

But, what is there about the “act of condemnation *itself*” that serves a public purpose? Undoubtedly, courts such as those in Michigan conflate the juridical act of arrogating title from the private owner to the government and the anticipated practical follow up—the elimination of unfit housing. But the two are quite severable. Government ownership does not itself change the

¹⁷ 2006 Fla. Sess. Law Serv. Ch. 2006-11 (H.B. 1567) (WEST), FL ST §73.014.

¹⁸ *Id.* at § 73.014 (1).

¹⁹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981).

²⁰ *Hathcock*, 684 N.W.2d at 787.

²¹ *Id.* at 782-83.

²² 50 N.W.2d 340 (1951).

²³ 684 N.W.2d at 783.

nature of slum housing,²⁴ blight can be rehabilitated under private ownership, and, as advocated here, blight abatement might be followed by foreclosure rather than by condemnation.

This article asserts that the constitutional basis and practical justification for the condemnation of “blighted” land remain tenuous. Common law remedies of nuisance abatement, followed by foreclosure, together would provide a more sound doctrinal framework and practical basis for effective neighborhood revitalization. These arguments suggest the need for a critical reevaluation of existing doctrine holding that blighted conditions justify the exercise of eminent domain. Furthermore, regarding blight as a common law problem subject to common law remediation augurs in favor the remedies advocated here.

The problem of inappropriate condemnation for blight was exacerbated by *Kelo v. City of New London*.²⁵ Although *Kelo* involved the condemnation of unblighted parcels, it reiterated the Supreme Court’s precedents asserting that blight condemnation is permissible. Also, by holding that condemnation for subsequent retransfer for private revitalization satisfies the Fifth Amendment’s Public Use Clause,²⁶ *Kelo* granted the Court’s imprimatur to increased and energetic use of blight condemnation. While it certainly is possible that the popular backlash to *Kelo* will result in an overall reduction in the use of eminent domain for redevelopment,²⁷ that backlash will inure to the benefit of owners of residential parcels much more than commercial ones. Furthermore, it will inure to the benefit of landowners possessing personal characteristics with which the majority of voters in the jurisdiction readily could identify, as opposed to those to whom less favorable characteristics are ascribed.²⁸

²⁴ See Michael H. Schill, *Distressed Public Housing: Where Do we Go from Here?*, 60 U. CHI. L. REV. 497 (1993) (arguing that the problems found in public housing can better be remedied by demolishing the projects and providing tenants with housing vouchers to be used in privately owned housing).

²⁵ 545 U.S. 469 (2005).

²⁶ U.S. CONST., Amend V (“nor shall private property be taken for public use, without just compensation.”).

²⁷ See, e.g., Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1880 (2007) (asserting that the consequent “public backlash, when translated into the actions of legislators, local public officials, and state and lower federal courts, will probably have a greater impact on the future use of eminent domain than the Court’s decision in *Kelo*.”).

²⁸ See, e.g., Dean Allen Floyd II, *Irrational Basis: The Supreme Court, Inner Cities, and the New “Manifest Destiny,”* 23 HARV. BLACKLETTER L.J. 55, 78-79 (2007) (asserting that “those made most vulnerable

Since *Kelo* was decided in 2005, legislators and commentators have debated extensively whether the federal and state laws and judicial decisions define “blight” too broadly or provide insufficient scrutiny of claims that blight condemnations are primarily pretexts for private benefit.²⁹ In any event, discerning which blight condemnations are pretextual and which are not is apt to be unavailing. As Justice O’Connor noted in her *Kelo* dissent, “[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”³⁰

The reexamination of the condemnation for blight doctrine that is advocated here has some resemblance to the reexamination by the Supreme Court of its “substantially advances” regulatory takings formulation in *Lingle v. Chevron U.S.A.*³¹ There, the Court revisited its earlier declaration, in *Agins v. City of Tiburon*,³² that “government regulation of private property ‘effects a taking if [such regulation] does not substantially advance legitimate state interests’”³³ Justice Sandra Day O’Connor, speaking for the *Lingle* Court, observed that, although the phrase had become “ensconced” in its takings jurisprudence by the “simple repetition of a phrase”,³⁴ “substantially advance” was not a takings test, but rather was a due process test.³⁵ In the process, the Court clarified that landowners’ takings and due process claims both are legitimate, albeit each independent of the other.³⁶

by [*Kelo*] are inner city residents rather than suburban dwellers. In many cities, these residents are poor, members of minority groups, or often both. They are also usually the segment of the local population that has the least influence in the political process. . . . *Kelo* may, in effect, accelerate the gentrification process in inner cities and exacerbate many of the social problems that America has suffered for years.”)

²⁹ Pretextuality was of particular concern to Justice Kennedy. Although joining in the 5-4 *Kelo* majority, he separately warned 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.” *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., Concurring).

³⁰ *Kelo*, 545 U.S. at 502 (O’Connor, J., dissenting).

³¹ 544 U.S. 528 (2005).

³² 447 U.S. 255 (1980).

³³ *Lingle*, 544 U.S. at 531 (quoting *Agins*, 447 U.S. at 260).

³⁴ *Id.* at 531-32.

³⁵ *Id.* at 540.

³⁶ *Id.* at 545-48.

The gravamen of *Lingle* easily can be expressed in simple language: What does the efficacy of a regulation have to do with whether the regulation works a taking? The gravamen of the reexamination proposed here similarly is simple: Why would government want to assume ownership of blight? Once it is clear that blight essentially is a problem for the police power and nuisance law, the issue becomes: Does a political mechanism for alleviating blight work better than a system in which market forces also have a chance to operate? After concluding that “blight” is not something taken for public use, the article examines whether public nuisance law, as buttressed by the police power, is sufficient to alleviate the harm resulting from blighted conditions.

This article proposes that owners be served orders to abate dangerous conditions, and, should they fail to comply, that the State could abate and impose corresponding betterment assessments upon them. Should the owners not pay the assessments, their lands could be foreclosed upon. Finally, the article discusses how the foreclosure remedy is more apt to provide realistic revitalization, and to avoid the rent seeking and grandiose schemes often associated with sweeping condemnation and subsequent private revitalization.

In the wake of *Kelo*, there is considerable debate as to whether “blight” should be defined broadly, so as to include factors affecting urban redevelopment such as obsolescence, even at the risk of making the “blight” restriction meaningless and encouraging rent seeking behavior.

Justice O’Connor’s *Lingle* opinion, by resolving some of the conflation of takings and due process jurisprudence, was a significant step towards the rectification of those two distinct concepts. The sobriquet “blight condemnation” is a prime candidate for rectification, since it is ancient wisdom that referring to a problem by its proper name is the first step towards understanding and resolving it.³⁷ In *Berman*,³⁸ and *Midkiff*,³⁹ on the other hand, the Supreme Court assumed that the Public Use Clause was, respectively, a means to achieve police power objectives

³⁷ CONFUCIUS, THE ANALECTS bk. XIII, at 171-72 (A. Waley trans. 1938) “If language is incorrect, then what is said does not concord with what was meant; and if what is said does not concord with what was meant, what is to be done cannot be effected.” *Id.* See also Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 350 (2006) (observing that our failure to perform such rectification has an adverse effect on civic values and scientific judgments, and makes legislation and subsequent court judgments unjust).

³⁸ *Berman v. Parker*, 348 U.S. 26 (1954).

³⁹ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

or “coterminous” with them.⁴⁰ Justice O’Connor later conceded, albeit in dissent, that this “errant language” in *Berman* and *Midkiff* conflated the police power and the takings power, since “the takings in those cases were within the police power *but also* for ‘public use.’”⁴¹

This article contends that the courts likewise have conflated the police power to effect abatement of blight with the power of eminent domain for public use.

III. The Metaphor of Blight and Its Symbiosis With Condemnation

The metaphor of “blight” has a powerful allure—so much so as to make it seem self evident that government may take blighted property by eminent domain.⁴² This section of the article examines the blight metaphor’s sources and consequences. The underlying metaphor of disease, of course, is not new. Even during the Founding period, invocations of disease in the body politic was popular.⁴³ “Blight” serves as the metaphor for disease not only of the parcel, but of the neighborhood and the city as well.

A. “Blight” is a Metaphor Strengthening Government and Redevelopment

While it is conventional to state that the presence of blight results in condemnation, it is more likely that the availability of condemnation results in “blight.” That process is described by Professor Wendell Pritchett:

To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city. To make the case for renewal programs, advocates contrasted the existing, deteriorated state of urban

⁴⁰ See *supra* text associated with notes 5-7.

⁴¹ *Kelo v. City of New London*, 545 U.S. 469, 501 (2005) (O’Connor, J., dissenting) (emphasis added).

⁴² See e.g. *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983); *City of Phoenix v. Superior Court, Maricopa County*, 671 P.2d 387 (Ariz. 1983); *Mayor of Baltimore v. Chertkof*, 441 A.2d 1044 (Md. 1982); *Aposporos v. Urban Redevelopment Comm’n of City of Stamford*, 790 A.2d 1167 (Conn. 2002), *Arvada Urban Renewal Authority v. Columbine Professional Plaza Ass’n, Inc.*, 85 P.3d 1066 (Colo. 2004).

⁴³ See, Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 HARV. L. REV. 1832, 1845 (1997).

areas with the modern, efficient city that would replace them. Urban revitalization required the condemnation of blighted properties and the transfer of this real estate to developers who would use it more productively.

By elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a reconceptualization of property rights. One influential understanding of property defines it as a bundle of rights, the most important being the rights to occupy, exclude, use, and transfer. In the urban renewal regime, blighted properties were considered less worthy of the full bundle of rights recognized by American law. Property owners in blighted areas were due government-determined fair value for their holdings, while tenants were grudgingly given relocation assistance, but they were not entitled to undisturbed possession. When landowners attempted to fight the condemnation of their properties, state supreme courts from Washington to Maine gave their blessing to the use of eminent domain for urban renewal. In 1954, in *Berman*, the United States Supreme Court also approved the use of eminent domain for such purposes, opening the door to an era of urban reconstruction that continues today (although the nature and scope of urban renewal efforts has since evolved).⁴⁴

In *Berman v. Parker*, the Supreme Court declared, that “[t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole.”⁴⁵

The analogy to the contagious disease model is apt, since, in a medical context, the autonomy that vindicates the power of individual patients to make health decisions might be forced to yield to the treatments prescribed by public authorities to fight contagion.⁴⁶ Just as surgery, in the form of demolition, might excise tissue apt to spread disease, so might prophylactic measures head it off in the first place. In the opinion granting the Supreme Court’s imprimatur to comprehensive zoning, *Village of Euclid v. Ambler Realty Co.*,⁴⁷ Justice Sutherland referred to

⁴⁴ Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 3-4 (2003) (internal citations omitted).

⁴⁵ 348 U.S. 26, 34 (1954).

⁴⁶ See, e.g., Roger B. Dworkin, *The Human Genome Project’s Implications for Autonomy, Respect, and Professionalism in Medical Genetics*, 7 JAHRBUCH FUR RECHT UND ETHIK [ANN. REV. LAW & ETHICS] 118-19 (1999) (explaining that because genetic health questions affect more than just the “target” person, true autonomy is not practical) (cited in Roger B. Dworkin, *Getting What We Should from Doctors: Re-thinking Patient Autonomy and the Doctor-Patient Relationship*, 13 HEALTH MATRIX 235 (2003)).

⁴⁷ 272 U.S. 365 (1926).

the presence of commercial activities in residential neighborhoods resulting in “contagion”⁴⁸ and “nervous disorder.”⁴⁹

With particular reference to apartment houses, it is pointed out [by commissions and experts] that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.⁵⁰

Indeed, a biographer has attributed the categorical endorsement of zoning in *Euclid* by Sutherland, who generally was a staunch supporter of contract and property rights,⁵¹ to his overriding fear of overpopulation and of urban congestion.⁵²

To take the disease analogy one step further, just as excision of diseased tissue is followed by an aesthetically pleasing reconstruction of the afflicted area by plastic surgery, so is the removal of blight followed by reconstruction of the neighborhood. It was claimed that the massive injection of government plans and funding would make the area attractive and productive, precisely as the Nirvana fallacy would suggest.⁵³

B. The Blight Metaphor as Reducing Private Property Rights

In addition to increasing government entitlement, the metaphor of “blight” as “disease” decreases private rights. Professor Pritchett states that property rights become “less worthy” of

⁴⁸ *Id.* at 392.

⁴⁹ *Id.* at 394.

⁵⁰ *Id.*

⁵¹ *See, e.g.,* *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (invalidating minimum wage for women in the District of Columbia as violative of freedom of contract and due process).

⁵² JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 126-27, 166, 242-43 (1951).

⁵³ The Nirvana fallacy refers to the proclivity to view externalities and other market failures critically and to juxtapose them with government regulations that simply are assumed to be optimal. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) (noting comparisons between “a state of laissez faire and some kind of ideal world”); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969). “This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements.” *Id.* at 1.

recognition.⁵⁴ A more direct way of explaining their partial expropriation is to say that property rights were converted, from rights protected by a property rule to rights protected only by a liability rule.⁵⁵ Rather than protecting owners' rights in their parcels of use, exclusion of others, and alienation, Government now may take the "blighted" parcels, subject only to the payment of incomplete compensation⁵⁶ and compliance with an extremely broad post-*Kelo* public use test.⁵⁷ While owners still must be accorded due process of law, some Circuit Courts of Appeals have vitiated this requirement by deeming it violated only by government overreaching that "shocks the conscience."⁵⁸ A more meaningful standard for due process review would accord landowners recourse to arbitrary property deprivations as well as property takings.⁵⁹

The blight metaphor also subtly undermines the integrity of the condemnee's parcel. In *Penn Central Transportation Co. v. City of New York*,⁶⁰ Justice Brennan disregarded individual property rights in a parcel in favor of a "parcel as a whole" approach.⁶¹ Once individual use, exclusion, and transfer rights were simmered together, the ensuing ad-hoc, multifactor test, gave maximum discretion to officials and judges, just as the knowing and wise healer was given discretion in ministering to the diseased body. The physician attempting a cure holds the fate of individual cells to be secondary. In the same manner, the blight metaphor impels the judge review-

⁵⁴ Pritchett, *supra* note 44, at 4.

⁵⁵ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁵⁶ *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (explaining that "[c]ompensation in the constitutional sense" is less than full compensation to individual property owners due to "relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs").

⁵⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁵⁸ In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), which involved government liability stemming from a high-speed police chase, the Supreme Court stated that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 845-46. Some Circuit Courts of Appeals have applied the standard to due process claims based on alleged property deprivation. *See, e.g.*, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (2003); *Torromeo v. Town of Fremont*, 438 F.3d 113 (1st Cir. 2006); *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006).

⁵⁹ For elaboration, *see* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. ____ (No. 4, forthcoming 2007).

⁶⁰ 438 U.S. 104 (1978).

ing the efforts of the local official and redeveloper to cure the city of its ills and, in so doing, to treat property rights as secondary.

The constitutional measure of “just compensation” constitutes inadequate compensation, unless one assumes the landowner simply a holdout, which both is the classic justification for eminent domain,⁶² and an unjustified assumption in the case of landowners whose subjective value of their parcels exceeds both fair market value and the proffered condemnation award.⁶³ In any event, the lack of full compensation prevails even for undisputedly legitimate takings, such as for highways or forts.

The fact that the standard measure of compensation is offered for blight takings suggests some lack of faith in the blight-as-disease metaphor. In a case literally involving blight, *Miller v. Schoene*,⁶⁴ the Supreme Court upheld the uncompensated destruction of a valuable stand of cedar trees in order to protect a nearby orchard from the blight of cedar rust, a fungus that lived in the cedars without causing them harm. Since they imperiled far more economically important fruit orchards nearby, the cedars were deemed a nuisance.⁶⁵ When their owners failed to abate the cedar rust by destroying the trees, the state did it for them.⁶⁶ *Miller v. Schoene* is a nuisance case, a case of blight upon the land.

In the case of condemnation for blight, the term “blighted land” suggests that “blight” is an intrinsic characteristic of the land, rather than a condition upon of the land that constitutes a public nuisance.

⁶¹ *Id.* at 130-31.

⁶² *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986) (noting that “[i]f even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.”)>

⁶³ *See, e.g.*, Somin Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 204 (2007) (distinguishing the “strategic holdout” who merely wants a higher price from the “sincere dissenter.”).

⁶⁴ 276 U.S. 272 (1928).

⁶⁵ *Id.* at 280.

⁶⁶ Notably, the statute provided the owners with notice of the finding that cedar rust on their lands would injure nearby orchards, and the opportunity to challenge those findings or to destroy the trees themselves. *Id.* at 278.

IV. Why Should a Determination of “Blight” Justify Condemnation?

There is no theoretical basis for “blight condemnation” as such, since the essential distinction between the police power and that of eminent domain is that the former is employed to eradicate harms to the community, and the latter is used to arrogate beneficial property to the State for the use of the public.

The elimination of blight has long been the traditional justification for the use of eminent domain in takings for redevelopment,⁶⁷ and condemnation remains heavily utilized for this purpose.⁶⁸ Undoubtedly, takings for “blight” has its appeal in limiting some unnecessary takings while, at the same time, permitting government to use eminent domain as “a tool for eliminating pockets of poverty.”⁶⁹ Over time, however, “blight” has become so broadly defined as to become indistinguishable from “conditions on the land that might benefit from some sort of improvement.” Aside from definitional problems, however, is the more fundamental question of why the removal of blight, as such, justifies eminent domain.

A. Blight and Moral Blameworthiness

Professors Thomas Merrill and Henry Smith have suggested that public reaction against *Kelo v. City of New London* has been so strong because of the same “basic moral intuition” that says that “intentional trespass or theft is wrong.”⁷⁰ Thus, the owner of a Motel 6 who neither agreed in advance to its seizure, nor done anything wrong that would justify condemnation in

⁶⁷ See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954). “Miserable and disreputable housing conditions [do more than] spread disease and crime and immorality. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn.” *Id.* at 32-33.

⁶⁸ See, e.g., *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 11 (Nev. 2003); *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330-31 (N.Y. 1975); *AAAA Enters., Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 553 N.E.2d 597, 600 (Ohio 1990); *Charleston Urban Renewal Auth. v. Courtland Co.*, 509 S.E.2d 569, 577-78 (W. Va. 1998). See also, Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 (quoted in text associated with *supra* note 124).

⁶⁹ Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1437 (2006).

⁷⁰ Merrill & Smith, *supra* note 27, at 1882.

retribution, suffers “what looks like prima facie immoral conduct-coercion of the innocent.”⁷¹ However, Merrill and Smith add that most opponents of *Kelo* would countenance the taking of the Motel 6, providing that it is blighted.

Why might condemning blighted property for economic development be acceptable, whereas condemning nonblighted property is not? Because the owner of blighted property has permitted his property to deteriorate below a level of quality considered minimally acceptable within the relevant community. The owner of blighted property is morally blameworthy in a way that the owner of nonblighted property is not, namely because the owner of blighted property is imposing harm on neighboring properties. The taking of blighted property, therefore, can serve as an appropriate collective response to harm-causing or immoral behavior, which is consistent with general intuitions about corrective justice.

While the observation that an owner whose use of land constitutes a nuisance is more blameworthy than an innocent owner is correct, it does not justify condemnation. Corrective justice, in the case of nuisance, generally takes the form of abatement and damages. A court may enjoin a nuisance, order the removal of items on the land constituting a nuisance, and order the award of damages for the past effects of a nuisance.

In some cases, the nuisance might have arisen out of spite, intentional disregard of the rights of others. In other cases, nuisance might arise from a confusion about the respective rights of the parties. Coupled with these, the landowner causing or harboring the nuisance may be bereft of the means to abate it, for morally blameworthy or innocent reasons. Nuisance law is equipped to deal with each of these possibilities. In addition, the moral benefit conferred by eminent domain in the alleviation of blight must surely be tempered by the realization that condemnation for retransfer for economic development favors the powerful over the weak⁷² and over members of minority groups.⁷³

Were one to reify the nuisance-generating condition as a characteristic of the land itself, as opposed to its resulting from the owner’s acts of commission or omission upon the land, it

⁷¹ *Id.* at 1883.

⁷² *Kelo v. City of New London*, 545 U.S. 469, 505 (O’Connor, J., dissenting). “The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.” *Id.*

⁷³ *Id.* 522 (Thomas, J., dissenting) (noting that “[u]rban renewal projects have long been associated with the displacement of blacks.”).

would be logical to treat the land as a deodand, which would be forfeit in expiation of its own wrong.⁷⁴ Now, shorn of its religious roots, the deodand takes the form of civil forfeiture, often justified as a penalty for carelessness.⁷⁵

Abatement and damages rectify the harm caused by the owner who commits or tolerates a nuisance. Destruction of structures, trees, and similar features of the land might be necessary for abatement. Civil forfeiture is alive and well as a sanction for criminal conduct.⁷⁶

Nevertheless, it hardly is clear why the destruction of an owner's idiosyncratic value, and nothing else, is an appropriate sanction for blight. Since the owner subject to blight condemnation receives fair market value, the sanction of deprivation of idiosyncratic value would fall primarily on those least morally blameworthy. Those with a rich network of friends and civic involvements would feel most keenly the deprivation of sentimental value in their homes. Likewise, merchants with good reputations and efficient operations would suffer most from the loss of customer goodwill in their familiar locations and the loss of highly customized facilities for their operations. Transient residents and unsuccessful merchants would suffer least.

B. Means – Ends Analysis

In his classic study of the Public Use Clause,⁷⁷ Professor Thomas Merrill wrote of the “illogic” of the Court's declaration that “the ‘public use’ requirement of the Taking Clause is “coterminous with the scope of a sovereign's police powers”⁷⁸

The illogic of the Court's statements disappears, however, once one recognizes

⁷⁴ See *Calero-Toledo v. Pearson Yacht Leasing Co.* 416 U.S. 663, 680-81 (1974) (explicating the origins of the deodand in Biblical and pre-Judeo-Christian practices, and citing OLIVER WENDELL HOLMES, *THE COMMON LAW* c. 1 (1881) for its explanation that this reflected the view that the instrument of death was accused and that religious expiation was required.).

⁷⁵ *Id.* at 681 (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* *300).

⁷⁶ See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998) (upholding forfeiture of \$15,000, in addition to \$5,000 fine and term of probation, where individual had lawfully possessed \$357,144 in cash but had not reported it when embarking on international flight, and where government had sought forfeiture of entire amount).

⁷⁷ U.S. CONST., Amend V (“nor shall private property be taken for public use, without just compensation.”).

⁷⁸ Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 69-70 (1986).

that the police power, like eminent domain, can also refer to the question of proper governmental ends, rather than means. This is clearly what Justice Douglas meant in *Berman* when he said that the police power ‘is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.’ He was not saying that government could freely employ any means of achieving slum clearance, and with it choose either compensation or noncompensation. Instead, he was saying that slum clearance is a permissible end of government. The Court’s recent decisions echo this notion. ‘Police power’ is here synonymous with the extent to which government may constitutionally regulate private activity. It defines those issues with which government may properly concern itself. The Court’s statements again indicate that the permissible ends principle cuts across all means of resource acquisition, and that one should, for the sake of analytical clarity, keep questions of ends and means distinct.⁷⁹

Professor Merrill’s statement seems correct, but capable of distillation to the principle that exercises of both the police and eminent domain powers must bear such a relationship to a legitimate power of government so as to not deprive the property owner of substantive due process. Admittedly, the contemporary standard for adjudging such deprivations is fairly minimal.⁸⁰ Likewise, Justice Holmes was correct when he noted:

“Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power.”⁸¹

Sometimes, however, the state may not resort to the police power to reduce the height of a building, and must resort to eminent domain.⁸² Furthermore, potential takings problems regarding height, setback, and similar restrictions are vitiated by the doctrine of reciprocity of advan-

⁷⁹ *Id.* at 70.

⁸⁰ *See, supra*, notes 58-59 and associated text.

⁸¹ *Pennsylvania Coal Co., v. Mahon*, 260 U.S. 393, 418 (1922).

⁸² *See, e.g., McCarran International Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (ordinance granting permanent permission to fly over land at altitude below 500 feet deprived owner of physical possession and constituted a per se taking).

tage, under which the corresponding restrictions on neighbors benefit a given owner so as to provide compensation in kind.⁸³

The condemnation of blighted property, in and of itself, does not meliorate a danger to the public health, safety, or welfare by remediating the blight. To be sure, the government officials who order condemnation contemplate that remediation will be the next step—likely engaged in by a transferee redeveloper. But, if the condemnation process would make it less likely that there would be remediation than would result from using the alternative advocated here,⁸⁴ condemnation does not advance the public interest.

Finally, it might be that the municipality’s real objection to private mediation is that it did not want to settle for a mere safe-and-sound neighborhood at reasonable cost. Rather, it wanted to use the redevelopment as a catalyst for enhancing the amenities, employment, and tax base of the entire city. Such a taking might or might not be valid under the relaxed standards of *Kelo v. City of New London*,⁸⁵ but it is not a taking for blight.

C. The Harm-Benefit Distinction Applied to Blight and Condemnation

In *Lucas v. South Carolina Coastal Council*,⁸⁶ Justice Scalia sketched a progression from earlier Supreme Court characterizations that “harmful or noxious” property uses could be proscribed without compensation, to more recent cases expanding upon the “full scope” of the police power.⁸⁷ He reasoned that the latter cases were better understood as “resting not on any supposed ‘noxious’ quality of the prohibited uses,” but rather on their role in advancing legitimate governmental interests.⁸⁸ Stating that “the distinction between ‘harm-preventing’ and ‘benefit-

⁸³ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1987).

⁸⁴ See *infra* Part V.

⁸⁵ 545 U.S. 469 (2005).

⁸⁶ 505 U.S. 1003 (1992).

⁸⁷ *Id.* at 1022 (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)).

⁸⁸ *Id.* at 1023.

conferring' regulation is often in the eye of the beholder,"⁸⁹ he asserted in its place the requirement that a restriction depriving the owner of all economic use of the parcel "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁹⁰

Of course, the "background principles" to which Scalia referred were based on nuisance, as that concept of harmful behavior was incorporated in property law. As I have suggested elsewhere, the real function of the "background principles" refinement was to create a doctrine akin to a sea anchor, so as to prevent the legislature from changing property rights principles precipitously.⁹¹

While the background principles rule thus is not too different than harm-benefit, the harm-benefit distinction has been utilized, after *Lucas*, in at least three Court of Federal Claims cases, decided by three different judges. In *Alde, S.A. v. United States*,⁹² the court restated the traditional rule:

There is a difference between government action that constitutes an exercise of the police power and action that constitutes a compensable taking. If the Government acts to secure a benefit for the public, a taking arises. Government action taken to prevent harm to the public is an exercise of the police power.⁹³

Alde was quoted with approval in *Gahagan v. United States*.⁹⁴

In *Florida Rock Industries v. United States*,⁹⁵ the court observed:

There is little dispute that the purpose of the regulatory action of permit denial was to enhance the water and ecological system of the United States and south Florida in particular by preserving more wetlands. *It was to benefit the public, not prevent Florida Rock from doing any harm.* . . . Unlike the traditional nuisance case where the government prevents what the citizen had no right to do under the common law, here the activity was perfectly permissible until the permit was denied. Florida Rock's activity posed no health or safety

⁸⁹ *Id.* at 1024.

⁹⁰ *Id.* at 1029.

⁹¹ See Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 399 n.337 (1998).

⁹² 28 Fed. Cl. 26 (Fed. Cl. 1993).

⁹³ *Id.* at 33-34.

⁹⁴ 72 Fed. Cl. 157, 162 (2006)

⁹⁵ *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (Fed. Cl. 1999).

risk. The government made a permissible policy choice that this land should benefit the public's supply of wetlands.⁹⁶

While the case law and substantial body of scholarship regarding harm-benefit and *Lucas* are worthy of study, for present purposes it is important to note that the universe of condemnation cases involving hard-core blight is one in which traditional principles of nuisance law always will be applicable.⁹⁷

D. The Importance of the Distinction Between Condemnation and Foreclosure

Although the local government might wind up the owner of a blighted parcel under either condemnation or abatement and foreclosure, there is an important difference between the two.⁹⁸ In the case of condemnation, remediation would occur through the actions of government entities and their selected redevelopers. On the other hand, acquisition of property at tax sales is open to all.

Owners with equity generally prefer to refinance or to arrange a private sale, since motivated sellers and their real estate agents typically obtain a higher price than would be the case at a foreclosure sale, which, by definition, could not be expected to bring fair market value.⁹⁹ Po-

⁹⁶ *Id.* at 40 (emphasis added).

⁹⁷ In addition to imminent dangers to public health and safety, the laundry-list definitions in many state redevelopment laws have included elements such as “diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land” and the like. *See* Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004). To the extent that these statutes define blight as departures from practices that would result in the land being put to its economic highest and best use, their proper application is through eminent domain.

⁹⁸ *See infra* Part V.

⁹⁹ Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445, 479 (1994) (noting that “fair disposition prices are lower than fair market value due to the forced nature of the foreclosure sale.”). *See also*, BFP v. Resolution Trust Corp., 511 US. 531 (1994) (noting that, at least pertaining to mortgage foreclosure sales as reviewed in bankruptcy proceedings, Congress might not have expected sale prices to constitute fair market value). Also, to the extent that their is post-remediation value in a mortgaged parcel, the lender could acquire it before a forced sale, or at the sale, by bidding in the debt. Unlike the situation involving remediation of environmental hazards, the cost of remediation of blighted structures should be fairly predictable.

tential purchases, of course, would take the cost of remediation into account and would offer only bids net of those costs.¹⁰⁰

Likewise, courts generally have taken costs of remediation into account in determining “just compensation,” either as part of the general inquiry into fair market value,¹⁰¹ or on a threshold showing that contamination is a relevant factor.¹⁰² The setting aside of an escrow for the cost of remediation is a common approach.¹⁰³ “What would be unfair would be to value the property as if remediated and allow the condemnee to withdraw that enhanced amount without a withholding to secure the transactional costs.”¹⁰⁴

While an escrow might alleviate the problem of undetermined owner liability under government remediation statutes and the possibility of contribution by other potentially responsible parties,¹⁰⁵ it assumes that there is a direct correspondence between alleviation of blight and fair market value. But various methods of dealing with blight may be equally effective in abating the nuisance, while producing much different effects on value in the eyes of possible purchasers. Economic development and the alleviation of blight each affects the other. This, too, augurs against a “one size fits all” approach, and in favor of the determination of optimal economic development by market actors who would be obligated to eliminate blight, but who would do so in the context of maximizing the overall value of the project.

The initial notice provided by the government of impending blight abatement foreclosures in a neighborhood would trigger a process whereby the owners inclined to reap the improved value of their properties could motivate their neighbors to participate, or to buy them out. This method of proceeding not only is conceptually more correct with regard to respect for prop-

¹⁰⁰ *See, e.g.,* Matter of Northville Indus. Corp. v. Board of Assessors of Town of Riverhead, 531 N.Y.S.2d 592, 594 (N.Y. App. 1998) (“it is reasonable to assume that a knowledgeable buyer [would demand an] abatement in the purchase price.”).

¹⁰¹ *See, e.g.,* Redevelopment Agency v. Thrifty Oil Co, 5 Cal. Rptr. 2d 687, 689 n.9 (1992). *See also,* CAL. CIV. PROC. CODE § 1263.720.

¹⁰² *See, e.g.,* Finkelstein v. Dept. of Transportation, 656 So.2d 921, 922 (Fla. 1995).

¹⁰³ *See* 7A NICHOLS ON EMINENT DOMAIN § 13B.03(4) (Patrick J. Rohan & Melvin A. Reskin eds.3d ed.2002).

¹⁰⁴ Housing Auth. of New Brunswick v. Suydam Investors, L.L.C. 826 A.2d 673, 688 (N.J. 2003).

erty rights and the essential difference between the takings and police powers, but has another important benefit that is germane to the subject of this article. Neighboring landowners whose property is subject to remediation and foreclosure would have an incentive to band together to undertake satisfactory repairs. Also, their lenders and buyers specializing in distressed property would have incentive to refinance or arrange a transfer of ownership to facilitate private remediation. This might be an especially attractive option, since lenders most generally acquire property at foreclosure.¹⁰⁶

It is true that the availability of private rehabilitation might thwart government efforts to repackage land into parcels it deems of ideal size, or to create what it deems optimal new structures or uses. In those states that countenance condemnation for retransfer for private economic development, distressed parcels still might be acquired for idealized economic redevelopment through eminent domain. However, the presence of newly-energized groups of landowners advocating for strong property rights protection, together with generally more sophisticated and wealthier distressed property buyers and lenders, now could exercise countervailing power in those states that have not already tightened requirements for blight condemnation.¹⁰⁷

The plausible plans for private redevelopment of such groups would demonstrate the land's true value. Their political power in the community would be many times that of isolated and often undercapitalized owners. This would give them a meaningful ability to militate for the adoption of redevelopment plans in which they are included and to resist plans under which they lose all assembly and other value of the blighted parcels to outsiders. Even if their efforts do not culminate in acquisition, they might result in higher condemnation awards.

¹⁰⁵ See, e.g., The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000).

¹⁰⁶ See Janet A. Flaccus, *Pre-Petition and Post-Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court*, 51 ARK. L. REV. 25, 52 (1998) (noting that the lender is the "typical buyer" at foreclosure, bidding in their mortgage debt or less, and profiting on half of their subsequent resales).

¹⁰⁷ See *supra* notes 15-18 and associated text.

E. Blight and the Police Power

In *Mugler v. Kansas*,¹⁰⁸ the U.S. Supreme Court declared that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”¹⁰⁹ Under its police power, government is empowered to abate nuisances, and this includes the use of demolition, where necessary.¹¹⁰ However, the owner must be afforded the opportunity to obtain judicial review of the order declaring the property a nuisance.¹¹¹

Many cases hold that it must inform the owner of the need for remediation.¹¹² Should the owner be unwilling or unable to abate the nuisance within a reasonable time, Government may remediate itself.¹¹³ However, consistent with the police power goal of such actions being abatement, the owner has the right to remediate. In *Johnson v. City of Paducah*,¹¹⁴ the Kentucky Supreme Court reached a similar holding, which an appellate court subsequently characterized as stating that “the property owner should have been afforded the opportunity to repair or demolish, that the failure to give the owner the choice was arbitrary; that absolute power over a person’s property exists nowhere in a republic.”¹¹⁵ Other courts have reached similar results.¹¹⁶ The

¹⁰⁸ 123 U.S. 623 (1887) (upholding prohibition statute depriving brewery owner of substantial value).

¹⁰⁹ *Id.* at 665.

¹¹⁰ *See, e.g.*, *Solly v. City of Toledo*, 218 N.E.2d 463 (Ohio 1966) (holding reasonable necessity of demolition as abatement of nuisance an issue for jury); *Hill v. City of Bethlehem*, 909 A.2d 439 (Pa. Cmwlth. 2006) (demolition of building in danger of imminent collapse an exercise of police power rather than eminent domain).

¹¹¹ *See, e.g.*, *Friend v. Brankatelli*, 482 N.E.2d 1284, 1285 (Ohio App. 1984); *D&M Financial Corp. v. City of Long Beach*, 38 Cal.Rptr.3d 562 (2006) (demolition of property before mailed notice reached owner violative of procedural due process).

¹¹² *See, e.g.*, *Freeman v. City of Dallas*, 242 F.3d 642, 653 (5th Cir. 2001); *People v. McKendrick*, 468 N.W.2d 903, 909 (Mich. Ct. App 1991).

¹¹³ *See supra* Part 0.

¹¹⁴ 512 S.W.2d 514 (1974).

¹¹⁵ *Washington v. City of Winchester*, 861 S.W.2d 125 (Ky. App. 1993).

¹¹⁶ *See, e.g.*, *Village of Lake Villa v. Stokovich*, 810 N.E.2d 13 (Ill. 2004); *Hawthorne S. & L. Ass’n v. City of Signal Hill*, 23 Cal.Rptr.2d 272 (Cal. App. 1993); *Shaffer v. City of Atlanta*, 154 S.E.2d 241 (Ga. 1967).

owner's right to cure exists even if government authorities regard rebuilding as economically inefficient.¹¹⁷

When, as a result of the owner's failure to abate, government does so, it removes a condition that might render the land unusable, and might subject the landowner to civil or criminal liability. Since government abatement thus would enhance the land's value, the removal of blight is a legitimate basis for a betterment assessment. Such an assessment would constitute a lien upon the property. Should the owner fail to pay, the lien could be enforced through foreclosure sale in the same manner as other unpaid real estate tax or assessment. Should the government acquire the land by bidding in its debt (the abatement assessment) it would acquire the parcel for the cost of its prior remediation.

One might ponder why localities have not used nuisance law as a way of acquiring ostensibly blighted parcels without having to pay any compensation? Indeed, as a logical matter, the failure of the landowner to remediate blight strongly suggests that the landowner, or the combined landowner and mortgagee, have no financial equity or subjective value in the parcel after taking the cost of remediation into account. Only where an owner is forced to convey non-blighted land in the midst of a blighted neighborhood for the purpose of comprehensive revitalization of that neighborhood, as was the case in *Berman v. Parker*,¹¹⁸ is it likely that the owner will have substantial value.

V. Blight Abatement and Foreclosure as a Substitute for Condemnation

This article advocates that blight be remediated through abatement. The mechanical process for abatement of blight presents no particular legal difficulty. The city can demand that the owner abate,¹¹⁹ and can abate itself should the owner be unwilling or unable to do so.¹²⁰ In turn,

¹¹⁷ See *Herrit v. Code Management Appeal Board of City of Butler*, 704 A.2d 186 (Pa. Commw. Ct. 1997) (holding ordinance denying owner of unsafe building the opportunity to repair where costs exceeded 100% of property's appraised value to be facially unconstitutional).

¹¹⁸ 348 U.S. 26 (1954).

¹¹⁹ See *Meyer v. Jones*, 696 N.W.2d 611, 615 (Iowa 2005); *Rental Prop. Owners Ass'n of Kent County v. City of Grand Rapids*, 566 N.W.2d 514, 522 (Mich. 1997).

funds that the city expends on abatement satisfy the owner's abatement obligation, and thus enhance the value of the property such as to justify a betterment assessment.¹²¹ Should the assessment be unpaid, the city may foreclose upon it just as it could institute foreclosure for other unpaid taxes and assessments.¹²²

A. The Public Choice Dimension of “Blight”

While urban renewal through the 1970s is associated with massive demolition and rebuilding of city neighborhoods, the more recent wave of urban revitalization has emphasized a high volume of private projects that individually possess much smaller footprints. These functionally stealth projects collectively attracted little attention until the late 1990s. A widely-noted 1998 account in the *Wall Street Journal* served as a catalyst, pointing out that, although condemnation has been a “device used for centuries to smooth the way for public works such as roads, and later to ease urban blight,” it recently “has become a marketing tool for governments seeking to lure bigger businesses.”¹²³ A follow-up story declared:

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren't tracked nationally, but even retailers themselves acknowledge that the explosive growth in the formal in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.¹²⁴

Likewise, an account by a leading advocacy group asserted with concern that from 1998 through 2002 there were over 10,000 condemnations with ensuing use of the land by private par-

¹²⁰ See 696 N.W.2d 611, 615; *City of Panama City v. Head*, 797 So. 2d 1265, 1267 (Fla. Dist. Ct. App. 2001).

¹²¹ See *City of Paterson v. Fargo Realty Inc.*, 415 A.2d 1210, 1214 (N.J. Dist. Ct. 1980); *People ex rel. Camil v. Buena Vista Cinema*, 129 Cal.Rptr. 315, 317 (Cal. Ct. App. 1976).

¹²² See, e.g., *In re Foreclosure of Liens for Delinquent Land Taxes*, 226 S.W.3d 250, 252 (Mo. Ct. App. 2007).

¹²³ Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 (quoting Jeffrey Finkle, head of the Council for Urban Economic Development in Washington, D.C.).

¹²⁴ Starkman, *supra* note 68.

ties in the United States.¹²⁵ In addition, Professor Nicole Steele Garnett has discussed this phenomenon:

Both practical experience and economic theory demonstrate why the government's ability to bypass the market, and therefore avoid holdouts and other land assembly problems, makes eminent domain an attractive "incentive" to offer to private companies. The potential beneficiaries have a substantial incentive to engage in rent seeking to secure the benefit of this bypass This incentive only increases if the government is willing to transfer title to a private beneficiary at below-market prices—or along with an attractive package of tax incentives. A basic lesson of public-choice theory is that governments respond to connected insiders' demands and discount the needs of unorganized individuals. This reality undercuts Fischel's prediction that public outcry resulting from forced displacements will limit the instances of "cases that flirt with the borderlines of public use," by forcing reputation-minded public officials to "respond[] to the potential for inefficiency and unfairness in using eminent domain." Even if the targets of the government wrecking ball have the high stakes that give them an organizational advantage over disconnected taxpayers, they will not necessarily be able to turn elected officials' eyes away from the prize offered by a well-heeled developer promising economic salvation. This is especially true if elected officials believe that they are locked in a prisoners' dilemma with other locations, making it practically impossible to be the first to cry "chicken" in the incentive game.¹²⁶

Thus, once local governments begin down the slippery slope of condemnation for competitive economic purposes, they may find it difficult to stop for fear that they will no longer be competitive.¹²⁷ Logically, "arms races" that ratchet up subsidies for urban redevelopment ought to be deterred by the Dormant Commerce Clause,¹²⁸ since subsidies for domestic companies have the same economic effect as discriminatory treatment directed against out-of-state compa-

¹²⁵ DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 2 (2003), available at <http://www.castlecoalition.org/publications/report/index.html>. The book was published under the aegis of the libertarian advocacy group Institute for Justice, which represented Mrs. Kelo.

¹²⁶ Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 958-59 (2003) (citing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS 74-77 (1995)).

¹²⁷ See MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 15, 17-21 (2004) (noting that a modeled game between two aggressive nations, each preferring, in order, that only it had weapons, that neither nation had weapons, and that both had weapons, would reach the least desired outcome, in a classic prisoner's dilemma situation).

¹²⁸ See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt.*, 127 S. Ct. 1786, 1792 (2007). ("Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute").

nies.¹²⁹ However, the Supreme Court has stated that “[d]irect subsidization of domestic industry, does not ordinarily run afoul of this prohibition.”¹³⁰ In the seminal case of *West Lynn Creamery, Inc. v. Healy*,¹³¹ the Court simply declined to entertain the incongruity: “We have never squarely confronted the constitutionality of subsidies, and we need not do so now.”¹³²

Largely in response to the Supreme Court’s 2005 decision in *Kelo v. City of New London*,¹³³ scholars are reconsidering the importance of eminent domain and public use.¹³⁴ As one commentator put it:

Because private actors can use eminent domain to acquire land costlessly for their own objectives, these actors have an incentive to engage in excessive takings. Second, potential private beneficiaries can exploit disparities in legal and financial resources to obtain the state's condemnation authority. Indeed, while the primary beneficiaries of private takings tend to be real estate developers and corporations, the primary victims of these takings tend to be the economically disadvantaged, the elderly, and racial and ethnic minorities.¹³⁵

B. The Benefits of Foreclosure-Based Private Redevelopment

Blight condemnation typically leads to the transfer of the land to a private developer for revitalization. Even if the selection of the redeveloper employs staff determinations or is based on objective criteria, it is difficult to escape the presumption that the selection of such a sensitive and lucrative task is in some measure political.¹³⁶

Private remediation following foreclosure, on the other hand, would result not from political involvement, but through purchase at a foreclosure sale. All interested parties would be

¹²⁹ See, e.g., Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998). “Because such bounties typically are made available only to in-state operations, they appear on their face to abridge the ‘prohibition against discriminatory treatment of interstate commerce.’” *Id.* at 968 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977)).

¹³⁰ *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988).

¹³¹ 512 U.S. 186 (1994).

¹³² *Id.* at 199 n.15.

¹³³ 545 U.S. 469 (2005).

¹³⁴ See, e.g., Pritchett, *infra* note 44; Kanner, *infra* note 37.

¹³⁵ 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, 7-8 (2006).

able to bid on the sale. Since the impetus to bid would be the possibility of profitable remediation, the buyer would have every incentive to eliminate the blight in the most economically effective way. This would put a premium on smaller projects rather than grandiose ones. The benefits of bottom-up, small scale economic development were celebrated in the seminal study of urban growth, *The Death and Life of American Cities*.¹³⁷ Her concerns about the harm resulting from top-down eminent domain urban renewal led the author of that work, Jane Jacobs, to file an amicus brief on behalf of the landowners in *Kelo v. City of New London*.¹³⁸

While the owners of individual blighted parcels are likely not to possess individually the wherewithal for remediation, it is more likely that a group of neighbors would be able to pool their resources for this purpose, or to sell their lands to a developer who could undertake the necessary abatement. The fact that the developer would obtain the assembled aggregate parcel often would make it more readily usable. If the private owners could not readily agree on a scheme for assembly, it might be feasible to obtain legislation permitting a supermajority of them to bind the others in a joint sale or redevelopment, pursuant to the plan to privatize neighborhood zoning suggested by economist Robert H. Nelson.¹³⁹ While the present author disagreed with Nelson's thesis in the past, on the ground that anything short of a unanimity requirement deprived individual owners of their property rights,¹⁴⁰ the plan seems preferable to the use of eminent domain followed by retransfer for private redevelopment, in which case the owners lose all of the assembly value of their parcels.

Even where eminent domain is employed, there are devices that would ensure landowners participation in redevelopment. One such plan resembles the Ninth Circuit's 1989 decision in

¹³⁶ See *supra* Part V.A.

¹³⁷ JANE JACOBS, *THE DEATH AND LIFE OF AMERICAN CITIES* (1961). See also, JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS* (1984).

¹³⁸ *Kelo v. City of New London*, No. 04-108, Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, 2004 WL 2803191 (December 3, 2004).

¹³⁹ See, e.g., Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).

¹⁴⁰ Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905 (1999).

Barancik v. County of Marin.¹⁴¹ The owners of land in a blighted area would obtain “Transfer of Development Rights” that would have to be purchased by redevelopers. In essence, the owners of blighted land would lose their strategic bargaining power as possible holdouts while being compensated with rights tradable in a market.¹⁴²

Finally, a statute might be enacted to provide existing owners with rights to participate in the post-condemnation renewal plans. Such a law is on the books in California,¹⁴³ although in practice obtaining rights under it has proved elusive.¹⁴⁴

VI. Conclusion

This article has explored issues such as why government subsidizes the abatement of blight by employing eminent domain, and the public choice problems inherent in the political selection of redevelopment targets and redevelopers.¹⁴⁵ The practical conflation of blight removal and other redevelopment goals increases the possibility of unfair and inefficient outcomes. An alternate policy of abatement and foreclosure would add transparency and efficacy to the process, as well as restore the principle that condemnation is used to acquire for the public those things that are beneficial, and the police power used to abate on behalf of the public those things that are deleterious.

¹⁴¹ 872 F.2d 834 (9th Cir. 1989).

¹⁴² *Id.* at 835.

¹⁴³ West’s Ann. Cal. Health & Safety Code § 33339 (requiring that redevelopment agency plans provide for owner participation but not rely on that participation, adopt and publish owner participation rules; give preference to business owners to reenter that same redevelopment area, possess alternative plans in the case that the owners do not participate, and act in good faith to allow owner participation).

¹⁴⁴ *See, e.g.,* In re Bunker Hill Urban Renewal Project 1B of Community Redevelopment Agency of City of Los Angeles, 389 P.2d 538 (Cal. 1964).

¹⁴⁵ *See* *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (admonishing that a “plausible accusation of impermissible favoritism to private parties” should be treated as “serious”).