

BLIGHT ELIMINATION TAKINGS AS EMINENT DOMAIN ABUSE: THE GREAT LAKES STATES IN *KELO'S* PUBLIC USE PARADIGMS

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INTRODUCTION

The visceral response of elected officials and the body politic to the Supreme Court's *Kelo v. City of New London*¹ decision reflected a collective desire to limit the government's eminent domain authority. One week following the June 23, 2005, ruling, the House of Representatives passed a resolution, 365–33, expressing “disagree[ment] with the majority opinion in *Kelo*” and “reserv[ing to Congress] the right to address through legislation any abuses of eminent domain by State and local government in light of the ruling in *Kelo*.”² Opposition to eminent domain abuse in the wake of *Kelo* crossed party lines for the general public as well, with sixty-two percent of Democrats, seventy percent of Republicans, and seventy-four percent of independents supporting further limitations on the government's eminent domain authority.³

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

2. H.R. Res. 340, 109th Cong. (2005). Democratic Representative Maxine Waters (D-Cal.) and Republican Representative Tom DeLay (R-Tex.) called the ruling “the most un-American thing that can be done” and “a travesty,” respectively. Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.

3. Gary Andres, *The Kelo Backlash: Americans Want Limits on Eminent Domain*, WASH. TIMES, Aug. 29, 2005, at A21. *The Washington Times* called the ruling “a win for big government.” Editorial, *A Win for Big Government*, WASH. TIMES, June 24, 2005, at A20. *The Hartford Courant* declared it “dangerous and [a ruling that] should raise the hackles of all property owners.” Editorial, *A Sad Day for Property Rights*, HARTFORD COURANT, June 24, 2005, at A10. George F. Will noted that with *Kelo*, “[g]overnment became radically unlimited in seizing the very kinds of private property that should guarantee individuals a sphere of autonomy against government.” George F. Will, *Damaging “Deference,”* WASH. POST, June 24, 2005, at A31. While clearly reflecting the sentiment of the majority of Americans, opposition to the *Kelo* ruling was not universal. The *New York Times* editorial page called the ruling “a welcome vindication of cities’ ability to act in the public interest” and “a setback to the ‘property

Although troubled by the *Kelo* ruling, property rights advocates hoped that the decision would serve as an impetus for reforming American eminent domain practice. Grover Norquist, president of Americans for Tax Reform, called *Kelo* “manna from heaven” for property rights advocates because of its anticipated effect of galvanizing the property rights movement.⁴ *Kelo* does indeed present property rights advocates with the opportunity to limit the government’s eminent domain authority to its properly circumscribed role. To do so, however, property rights advocates must reject the legitimacy of not only economic development takings as were at issue in *Kelo*, but also blight elimination takings, which are less controversial and have largely escaped the ire of *Kelo*’s detractors.

This Note argues that American eminent domain practice is in need of an even more sweeping overhaul than is recognized or advocated by most of *Kelo*’s opponents. As the widespread opposition to *Kelo* reveals, most Americans agree that the government violates property rights when it condemns property for economic development purposes.⁵ Largely unnoticed and unaddressed in the nation’s post-*Kelo* debate over eminent domain, however, is the government’s violation of property rights when it uses its eminent domain authority to effectuate blight elimination.⁶

Part I of this Note provides the necessary context for understanding the *Kelo* decision, demonstrating that *Kelo* was not a radical departure from Supreme Court precedent but was a natural extension of the Court’s interpretation of the Fifth Amendment’s Public Use Clause in *Berman v. Parker*⁷ and *Hawaii Housing Authority v. Midkiff*.⁸ Part II relates the facts of *Kelo* and describes

rights’ movement, which is trying to block government from imposing reasonable zoning and environmental regulations.” Editorial, *The Limits of Property Rights*, N.Y. TIMES, June 24, 2005, at A22. Likewise, *The Washington Post* applauded the decision. Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30. District of Columbia Mayor Anthony Williams also hailed the ruling, calling it a “victory.” Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005, at A1.

4. *Property Rights and Eminent Domain: Hands Off Our Homes*, ECONOMIST, Aug. 20, 2005, at 21, 22 [hereinafter *Hands Off Our Homes*]. *Kelo* has prompted a flurry of legislative activity in Congress and the states. See Andres, *supra* note 3.

5. See *supra* note 3 and accompanying text.

6. A *blight elimination taking* occurs when eminent domain procedures are undertaken for the purpose of eliminating property deemed to be substandard. See, e.g., *Berman v. Parker*, 348 U.S. 26, 28 (1954).

7. *Id.* at 26.

8. 467 U.S. 229 (1984).

the respective interpretations of the Public Use Clause delineated in the *Kelo* majority opinion of Justice Stevens and in the *Kelo* dissents of Justice O'Connor and Justice Thomas (the three "public use paradigms" of the opinion).

Part III distinguishes the rationales of the *Kelo* dissents and argues for the superiority of Justice Thomas's public use paradigm (in which blight elimination takings are prohibited) over that of Justice O'Connor (in which blight elimination takings are permitted). Specifically, Part III explains that blight elimination is a legitimate government function under a state's regulatory authority as embodied in nuisance laws and other "police power" regulations, but not under a state's eminent domain authority. When states and localities eliminate blight through eminent domain, they endanger property rights in three ways. First, unlike when the government abates a nuisance under its regulatory authority, the government may seize blighted property through eminent domain without providing the owner time to address the violation and without regard for less intrusive means of eliminating the blight. Second, because even well-maintained properties often satisfy broad definitions of "blight" and can be transferred to private parties for development under a blight elimination rationale, the government can use blight elimination takings as a façade for economic development takings. Third, property that is in fact not blighted to meet even a broad definition of blight may be condemned simply because it happens to be near other properties that are blighted and thus falls within a larger redevelopment area.⁹

Part IV analyzes the understanding of the public use in the Great Lakes states to show that states have failed to afford their citizens the level of protection outlined in Justice Thomas's *Kelo* dissent. The analysis of the states in the Great Lakes region reveals first, that even those states that prohibit economic development takings permit blight elimination takings, and second, that the legislative responses to *Kelo* largely fail to address blight elimination takings.

This Note intends to demonstrate that the perspective reflected in Justice O'Connor's oft-cited *Kelo* dissent, which forbids economic development takings but authorizes blight elimination takings, is an inadequate basis for imposing limits on the government's eminent

9. For a more extensive description of the three dangers posed by blight elimination takings, see *infra* notes 58–66 and accompanying text.

domain authority. Rather, it is Justice Thomas's public use paradigm, in which both economic development takings and blight elimination takings are prohibited, that property rights advocates should adopt and champion. As Grover Norquist observed, *Kelo* presents property rights advocates with the opportunity to address the long-standing problem of eminent domain abuse. *Kelo* will never become the "manna from heaven"¹⁰ that he anticipated, however, if property rights advocates focus their opposition solely on economic development takings, thus excluding blight elimination takings from post-*Kelo* eminent domain reforms.

I. THE SUPREME COURT'S MODERN PUBLIC USE JURISPRUDENCE

The Fifth Amendment of the United States Constitution states: "nor shall private property be taken for public use, without just compensation."¹¹ As with the Bill of Rights as a whole, the restraints of the Fifth Amendment initially were not applied against the states.¹² With the subsequent incorporation of the Fifth Amendment via the Fourteenth Amendment, however, states became bound by the Fifth Amendment's public use requirement.¹³

In two seminal twentieth-century rulings, the Supreme Court adopted an expansive interpretation of the Fifth Amendment's Public Use Clause that served as the basis for the Court's validation of economic development takings in *Kelo*. In its 1954 *Berman v. Parker* decision, the Supreme Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945, which provided for the condemnation of "sub-standard housing and blighted areas" for

10. *Hands Off Our Homes*, *supra* note 4.

11. U.S. CONST. amend. V.

12. The Supreme Court once stated:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . .

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

13. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

redevelopment by private parties.¹⁴ Writing for a unanimous Court, Justice Douglas posited a very limited role for the judiciary in reviewing a legislative determination that a particular use is public in nature.¹⁵ The Court effectively equated “public use” with “public welfare” and found the “concept” to be “broad and inclusive,” representing values that “are spiritual as well as physical, aesthetic as well as monetary.”¹⁶ Considering it to be within the legislature’s authority “to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled,” the Court implied that the scope of the public use is equivalent to a state’s “police power” to regulate for the protection of the public health, safety, welfare, and morals.¹⁷ Only under such a broad interpretation of the Public Use Clause could the *Berman* Court sanction blight removal as a public use for Fifth Amendment purposes.¹⁸

Thirty years after *Berman*, Justice O’Connor delivered the Supreme Court’s 8–0 *Midkiff* decision, which upheld the constitutionality of a Hawaii law authorizing the condemnation of property owned by Hawaii’s “land oligopoly” and the subsequent sale of that property to tenants.¹⁹ Unwilling to engage in textual or historical analysis of the Public Use Clause, the Court announced its “starting point” for analyzing the constitutionality of the Hawaii law

14. *Berman v. Parker*, 348 U.S. 26, 28–31 (1954).

15. “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose is an extremely narrow one.” *Id.* at 32. Indeed, “*Berman* . . . and other similar decisions have encouraged a trend toward extreme ‘rational basis’ deference in public-use law” Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 881.

16. *Berman*, 348 U.S. at 33.

17. *Id.* at 32–33. A state’s “police power” is its power to regulate for “the protection of the health, safety, morals, and general welfare of the people and the conservation of resources.” 11 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 79.01 (Michael Allan Wolf ed., 2005).

18. *Berman*, 348 U.S. at 33–34. According to Richard Epstein of the University of Chicago Law School: “Once *Berman v. Parker* is on the books, the question remains whether any condemnation of land can be attacked for want of a public purpose.” RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 179 (1985). Or, in the words of Harvard University’s Jerold Kayden, *Berman* was the case “in which the Court virtually read out of existence the just compensation clause’s public use caveat.” Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th Century*, in *PRIVATE PROPERTY IN THE 21ST CENTURY* 31, 37 (Harvey M. Jacobs ed., 2004).

19. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231, 233, 241–42 (1984). Justice Marshall did not participate in the deliberations or ruling of the case. *Id.* at 231.

to be *Berman*.²⁰ The Court cited the Hawaii legislature's findings—that the extreme concentration of land ownership within the state distorted the housing market, caused land price inflation, and harmed the public welfare—to conclude that the deconcentration of land ownership was “a legitimate public purpose.”²¹ The Court explicitly declared what it had implied in *Berman*: “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”²² After *Midkiff*, the Constitution’s public use requirement was, in fact, “largely a truism.”²³

Together, “the *Berman-Midkiff* duo marked a turning point in eminent domain jurisprudence.”²⁴ In those two cases, the Supreme Court interpreted the Public Use Clause so broadly that economic development could arguably be deemed a public use; indeed, after *Berman* and *Midkiff*, the outcome of *Kelo* was foreseeable.

II. *KELO V. CITY OF NEW LONDON*

In its 5–4 *Kelo* decision, the Supreme Court ruled that economic development constitutes a public use under the Fifth Amendment.²⁵ Justice Stevens’s majority opinion, Justice O’Connor’s dissenting opinion, and Justice Thomas’s dissenting opinion represent three disparate interpretations and applications of the Public Use Clause.²⁶ Of these three public use paradigms, only the approach articulated by Justice Thomas adequately limits the government’s eminent domain authority.

The city of New London, Connecticut, was in the throes of economic decline when it embarked on a multimillion dollar development program in 1998. When the pharmaceutical company Pfizer announced that same year that it would construct a research

20. *Id.* at 239.

21. *Id.* at 232, 245.

22. *Id.* at 240.

23. Calvert G. Chipchase, Comment, *Lucas Takings: Why Investment-Backed Expectations Are Irrelevant when Applying the Categorical Rule*, 24 U. HAW. L. REV. 147, 151 n.28 (2001).

24. Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171, 181 (2005).

25. *Kelo v. City of New London*, 545 U.S. 469, 471, 485 (2005).

26. Justice Kennedy also authored a concurring opinion, but he focused on the standard of review applied to takings cases, not on the interpretation of the Public Use Clause. *Id.* at 490–93 (Kennedy, J., concurring).

facility in New London, the city targeted ninety acres near the proposed facility for development. The city also authorized the New London Development Corporation (“NLDC”), a private nonprofit organization assisting the city in its development plans, to exercise eminent domain in the city’s name.²⁷ Some of the landowners in the development area refused to sell their property, and the NLDC initiated condemnation proceedings with plans to transfer much of the condemned property to private parties.²⁸

A. Justice Stevens’s Majority Opinion

Justice Stevens stated in his majority opinion that the Supreme Court had “long ago rejected any literal requirement that condemned property be put into use for the general public” and that “when [it] began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”²⁹ Relying on its rulings in *Berman*³⁰ and *Midkiff*,³¹ and emphasizing that it owed “great respect . . . to state legislatures and state courts in determining local public needs,” the Court held that economic development is a “public use” within the meaning of the Fifth Amendment.³² The Court limited its holding to those cases in which the taking occurs as part of a development plan, for Justice Stevens noted that *Kelo* did not represent a case of “a one-to-one transfer of property, executed outside the confines of an integrated development plan.”³³ According to Justice Stevens, such a transfer “would certainly raise a suspicion that a private purpose was afoot” and could be addressed by the Court “if and when [it] arise[s].”³⁴

27. *Id.* at 472–75 (majority opinion). The development plan provided for the construction of, *inter alia*, a waterfront conference hotel, an urban village of restaurants and retailers, a riverwalk, eighty new homes, a new Coast Guard Museum, and an office complex. *Id.* at 474.

28. *Id.* at 475.

29. *Id.* at 480.

30. 348 U.S. 26 (1954). *See supra* text accompanying notes 14–18.

31. 467 U.S. 229 (1984). *See supra* text accompanying notes 19–23.

32. *Kelo*, 545 U.S. at 489–90.

33. *Id.* at 487.

34. *Id.*

B. *Justice O'Connor's Dissent*

In her dissenting opinion, joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas, Justice O'Connor recognized three classes of takings that comport with the Fifth Amendment's public use requirement: takings of property for transfer to public ownership (such as for use as roads and military facilities), takings of property for transfer to private entities that make the property available for use by the public (such as railroad and utility companies), and *takings that themselves serve a public purpose* "even if the property is destined for subsequent private use."³⁵

Contradicting what she had written twenty-one years earlier in *Midkiff*, Justice O'Connor rejected the notion that a state's police power is necessarily coterminous with the public use requirement.³⁶ She charged the majority with "wash[ing] out any distinction between private and public use of property—and thereby effectively [deleting] the words 'for public use' from the Takings Clause of the Fifth Amendment."³⁷ While she countered the majority ruling with provocative rhetoric, Justice O'Connor accepted the Court's twentieth-century eminent domain jurisprudence and distinguished the condemnations in *Kelo* from those in *Berman* and *Midkiff*.³⁸ Justice O'Connor stated that in the two prior cases "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."³⁹ In *Berman* and *Midkiff*, "a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."⁴⁰

According to Justice O'Connor, the *Kelo* condemnations violated the Fifth Amendment because the planned use of the property was not public in nature as defined by her first two categories of

35. *Id.* at 498 (O'Connor, J., dissenting).

36. *Id.* at 501. *See supra* text accompanying note 22.

37. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

38. Justice O'Connor did admit, however, that *Kelo's* "troubling result follows from errant language in *Berman* and *Midkiff*." *Id.* at 501.

39. *Id.* at 500.

40. *Id.* Justice O'Connor indicated that the takings in *Berman* and *Midkiff* fell under her third category of permissible takings. *Id.* at 498.

permissible takings and because the taking itself did not serve a public use under her third category. Although she dissented in *Kelo*, Justice O'Connor was unwilling to revisit the Court's modern public use jurisprudence and renounce her own opinion in *Midkiff*, concluding that while economic development takings are unconstitutional, takings that serve a public use through the removal of societal harm (such as blight elimination takings) are permissible.

C. Justice Thomas's Dissent

In his dissenting opinion joined by none of his fellow justices, Justice Thomas criticized the Court's modern public use jurisprudence, refusing both to equate "public use" with "public purpose" and to afford "almost insurmountable deference to legislative conclusions that a use serves a 'public use.'"⁴¹ Justice Thomas argued that "the most natural reading" of the Fifth Amendment's Public Use Clause is that it permits the government to condemn property only if either the government will actually own the property or if the public as a whole has the legal right to use it.⁴² Justice Thomas thus accepted Justice O'Connor's first two categories of permissible takings but refused to recognize her third category, namely, takings that serve an allegedly public purpose.⁴³ To reach his conclusion, Justice Thomas relied on the common understanding of the word "use" in the Founding era,⁴⁴ the contexts in which "use" and "general welfare" are utilized elsewhere in the Constitution,⁴⁵ the common law understanding of eminent domain,⁴⁶ the redundant nature of the Public Use Clause if "public use" is interpreted to mean

41. *Id.* at 513–14, 517 (Thomas, J., dissenting). "Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 506.

42. *Id.* at 508. An example of a taking within the second category would be condemnations for transfer to "common carriers," which are "quasi-public entities." *Id.* at 512–13.

43. *See supra* text accompanying note 35.

44. According to Founding-era dictionaries, "use" was understood to be equivalent to "employ." *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting).

45. In Article I, Sections 8 and 10 of the Constitution, the word "use" means "employ." *Id.* Furthermore, "the phrase 'public use' contrasts with the very different phrase 'general Welfare' used elsewhere in the Constitution. . . . The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope." *Id.* at 509.

46. At common law and in the understanding of the Framers, property was believed to be "a natural, fundamental right." *Id.* at 510. According to Blackstone, for example: "So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no,

“public purpose,”⁴⁷ and early American eminent domain practice.⁴⁸

Justice Thomas chastised the Court for rejecting “this natural reading” of the Public Use Clause “blindly, with little discussion of the Clause’s history and original meaning.”⁴⁹ He claimed that when the Court adopted its “public purpose” understanding of the Public Use Clause in the late nineteenth century, it “cited no authority . . . and did not discuss either the [Clause’s] original meaning or the numerous authorities that had adopted the ‘actual use’ test.”⁵⁰ He further claimed there to be “no justification” for the Court to give “almost insurmountable deference to legislative conclusions that a use serves a ‘public use,’” as the other provisions found in the Bill of Rights are not entitled to such deference.⁵¹ Justice Thomas countered the reasoning of both *Berman* and *Midkiff*, stating that in those two cases, the Court “erred by equating the eminent domain power with the police power of States.”⁵² He distinguished the state’s power of eminent domain from its authority to regulate property under its police power, noting that the common law provided for the elimination of blight through nuisance law.⁵³ According to Justice Thomas, neither economic development nor blight elimination constitutes a valid public use under the Fifth Amendment.

not even for the general good of the whole community.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *135 (cited in *Kelo*, 545 U.S. at 510 (Thomas, J., dissenting)).

47. Justice Thomas wrote:

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. . . . [A] taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry.

Kelo, 545 U.S. at 511 (Thomas, J., dissenting).

48. States, some of which were restricted by public use limitations in their own constitutions, largely exercised the power of eminent domain in a manner consistent with Justice Thomas’s understanding. *Id.* at 512–13. When “some early state legislatures tested the limits of their state-law eminent domain power,” the constitutionality of their actions “was a hotly contested question in state courts throughout the 19th and into the 20th century.” *Id.* at 513.

49. *Id.* at 514.

50. *Id.* at 515.

51. *Id.* at 517.

52. *Id.* at 519. As it did in *Berman*, the Court in *Kelo* ignored the fundamental distinction between the government’s power to *take* property and its power to *regulate* property. See *infra* text accompanying notes 55–59.

53. *Kelo*, 545 U.S. at 510 (Thomas, J., dissenting).

III. THE CRITICAL DISTINCTION BETWEEN THE *KELO* DISSENTS

Superficially, Justice O'Connor's dissent appears to be an eloquent defense of property rights. Her rationale, however, bears many similarities to the rationale of Justice Stevens's majority opinion, as both Justice O'Connor and Justice Stevens adopted a broad understanding of the Constitution's public use requirement.⁵⁴ The distinction between Justice O'Connor's and Justice Thomas's dissents is one that is too important for property rights advocates to ignore. Justice O'Connor's third category of permissible takings—takings that serve a public purpose through the removal of a societal harm such as blight—is not rooted in the Constitution or, arguably, even in Supreme Court precedent.⁵⁵ While blight elimination is a necessary government function, the authority to eliminate blight does not derive from the government's eminent domain power, but, as Justice Thomas stated in his dissent, from a state's police power embodied in its regulatory authority.⁵⁶ As Justice Thomas wrote, "[t]he question whether the State can take property using the power of eminent

54. Furthermore, Judge Richard A. Posner of the United States Seventh Circuit Court of Appeals complained that Justice O'Connor's dissent

would have been more convincing had she given some examples of actual, as distinct from imagined, abuses of the eminent domain power as exercised in modern urban redevelopment projects. She gave none, but merely — in typical lawyer's fashion — cited a few cases, a brief, and a single study that she made no attempt to evaluate despite its being an advocacy document of questionable objectivity. If this meager documentation signifies that abuse of the eminent domain power actually is infrequent . . . then it is hard for a pragmatist to become indignant about municipalities being allowed to continue using the power.

Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 96 (2005) (footnotes omitted).

55. Justice O'Connor's third category of permissible takings is, in the words of Justice Stevens, a "novel theory." *Kelo*, 545 U.S. at 486 n.16. According to Justice Stevens, the public purposes found in the Court's previous rulings were based "on a private party's *future* use of the concededly nonharmful property," not on the harmful nature of the property itself. *Id.* Loyola Law School's Gideon Kanner, however, calls Justice Stevens's assertion an "attempted denial of the obvious." Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 357 (2006).

56. *Kelo*, 545 U.S. at 520 (Thomas, J., dissenting). Regulations "to prevent real threats of crime and disease to neighbors" are legitimate regulations under a state's police power. Claeys, *supra* note 15, at 916. Only when the government "restrain[s] the free use and control of property more than necessary for regulation" does a taking occur, and for a taking to be constitutional, the condemned property must be put to an actual public use. *Id.*

domain is therefore distinct from the question whether it can regulate property pursuant to the police power."⁵⁷

Distinguishing a state's authority to regulate under its police power from its authority to condemn under its eminent domain power is more than an issue of jurisprudential semantics, for commingling these two doctrines to permit blight elimination takings results in property rights violations. Whereas police power regulations entail the regulation of property in order "to prevent its use . . . in a manner that is detrimental to the public interest," eminent domain entails the actual *taking* of property because it is needed for a public use.⁵⁸ Blight elimination is a legitimate government function under a state's police power (so long as the regulation addresses tangible threats to society), but it is not a proper use of the government's eminent domain authority.⁵⁹

Justice O'Connor's public use paradigm, which prohibits economic development takings but permits blight elimination takings, presents three concrete threats to property rights. First, whereas states and localities must give owners of property in violation of police power regulations the opportunity to remedy the property's offending characteristic and then can only condemn the property if less intrusive measures are ineffective,⁶⁰ the government may seize blighted property through eminent domain without giving property

57. *Kelo*, 545 U.S. at 519 (Thomas, J., dissenting).

58. 1 NICHOLS ON EMINENT DOMAIN § 1.42, at 1-132 to 1-133 (Julius L. Sackman ed., rev. 3d ed. 2006). See also 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 247 (William S. Hein & Co., 3d ed. 1997) (1909); HENRY E. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN § 7 (Fred B. Rothman & Co. 1982) (1879).

59. Claeys, *supra* note 15, at 918. Of course, "if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain" and just compensation must be paid. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 58, § 1.42[1], at 1-157.

60. "When blighted properties encourage crime and disease, they create nuisances. The ordinary remedy for a nuisance is to abate the nuisance, not to take away the noxious user's land." Claeys, *supra* note 15, at 918. Nuisance is defined as "an 'unreasonable' activity or condition . . . that 'substantially' or 'unreasonably' interferes with [another's] use and enjoyment of his land." ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 414 (student ed. 1984). The Supreme Court has never clearly defined "a precise test for drawing the line between" regulations and takings. 11 POWELL, *supra* note 17, § 79.03[2]. Hence, "[t]he attempt to distinguish 'regulation' from 'taking' is the most haunting jurisprudential problem in the field of contemporary land-use law . . . [and] may be the lawyer's equivalent of the physicist's hunt for the quark." 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64.09 (Michael Allan Wolf ed., 2005) (quoting CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 875 (4th ed. 1989)). The complex subject of "regulatory takings" is beyond the scope of this Note.

owners the opportunity to eliminate the blight and without regard for less intrusive means of eliminating the blight.⁶¹ And, because it is irrelevant “if the property is destined for subsequent private use,” the condemned property may then be transferred to a private party for a private use.⁶²

Second, blight elimination can serve as a façade for economic development takings under Justice O’Connor’s approach. Because blight is given an extremely broad definition in many states, property that is not in fact blighted can be classified as blighted, condemned, and transferred to a private party for development.⁶³ Although a court might find a taking unconstitutional if a private purpose is patently driving the condemnation effort, actual motivation is often hard to discern. Indeed, a broad “definition of blight that can be used to justify condemnation is essentially equivalent to authorizing economic development takings.”⁶⁴

Third, with the advent of modern urban renewal programs, non-blighted property may be condemned simply because it happens to fall within a larger blighted area.⁶⁵ When such a taking occurs, property that is so pristine that it cannot be classified as “blighted” might still be condemned if it is included in a larger redevelopment zone because it is located near property that is blighted.⁶⁶

Under Justice O’Connor’s public use paradigm, owners of blighted and non-blighted property are subject to the threat of having their property condemned for private uses. Only under Justice Thomas’s paradigm are property owners given adequate protection from improper takings by the government. The nineteenth-century Michigan Supreme Court Justice Thomas Cooley articulated the common law view that blight elimination does not constitute a public use:

61. When the government condemns property without showing that “fines and prosecutions have failed, blight condemnations restrict more property rights than necessary for sound regulation and thus inflict regulatory takings. If the condemned properties go to private developers or businesses without common-carrier restrictions, they violate public-use limitations.” Claeys, *supra* note 15, at 919.

62. *Kelo*, 545 U.S. at 498 (O’Connor, J., dissenting).

63. See *infra* notes 107, 119, 126, and 182 and accompanying text.

64. Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock*, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1035.

65. MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949–1962*, at 188 (1964). See also *Berman v. Parker*, 348 U.S. 26, 34–35 (1954).

66. See *Berman*, 348 U.S. at 34–35.

It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, *all the unsightly places beautified, all dilapidated buildings replaced by new*; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone⁶⁷

By sanctioning blight elimination takings, Justice O'Connor's public-use paradigm is deficient in its protection of property rights. It is Justice Thomas's public use paradigm after which states should pattern their eminent domain statutes.

IV. THE PUBLIC USE REQUIREMENT IN THE GREAT LAKES STATES

Justice Stevens wrote in *Kelo* that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power," for the Court's authority "extends only to determining whether [New London's] proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment."⁶⁸ Or, as stated by Judge Posner, the *Kelo* Court "interpreted the 'public use' criterion of eminent domain broadly, but Congress and the states can deprive the interpretation of its significance by placing limits on the use of the eminent domain power."⁶⁹ After the *Kelo* ruling,

67. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 660 (The Lawbook Exch., Ltd. 5th ed. 1998) (1883) (emphasis added).

68. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005). "[S]tate exercise of eminent domain is valid under the federal Constitution as long as it does not violate any federal Constitutional provisions or amendments. This low federal Constitutional threshold of protection from state governmental interference with private property rights opens the door for both creativity and abuse." Arden Reed Pathak, Comment, *The Public Use Doctrine: In Search of a Limitation on the Exercise of Eminent Domain for the Purpose of Economic Development*, 35 CUMB. L. REV. 177, 177–78 (2004) (footnote omitted).

69. Posner, *supra* note 54, at 42. Judge Posner continued: "[T]he fact that a statutory power is upheld against constitutional challenge does not prevent the legislature from voluntarily curtailing the power." *Id.* Members of the Senate and House of Representatives responded to *Kelo* by proposing bills of their own. See, e.g., Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. §§ 2–3 (2005) (prohibiting economic development takings by the federal government and by state and local governments receiving federal funding for economic development); Private Property Protection Act of 2005, S. 1704, 109th Cong. (2005) (prohibiting federal funds from being used for economic development takings); Strengthening the Ownership of Private Property Act of 2005, H.R. 3405, 109th Cong. (2005) (prohibiting the

limitations on the government's eminent domain authority must originate in Congress, in the laws of state legislatures, or in state courts' interpretations of state constitutions.⁷⁰

As the following analysis of eminent domain law in the Great Lakes states reveals, states have failed to afford their citizens the level of protection outlined in Justice Thomas's *Kelo* dissent. Citizens in four of the states in the Great Lakes region (Illinois, Indiana, New York, and Pennsylvania) face the threat of both economic development takings and blight elimination takings, and these four states therefore fall within Justice Stevens's public use paradigm. Citizens in the four other Great Lakes states (Michigan, Minnesota, Ohio, and Wisconsin) face the threat of blight elimination takings but not economic development takings, and these four states consequently fall within Justice O'Connor's public use paradigm. Even states such as Michigan, Minnesota, Ohio, and Wisconsin that adhere to a more restrictive understanding of the public use than that of the Supreme Court have accepted the faulty "blight" distinction posited by Justice O'Connor. None of the states in the Great Lakes region has embraced Justice Thomas's understanding of the public use, which precludes takings for

provision of federal funds for economic development assistance to state or local governments that exercise eminent domain "to obtain property for private commercial development" or that fail "to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes"); H.R. 3315, 109th Cong. (2005) (withholding "community development block grant[s]" from state and local governments that allow takings for economic development purposes); H.R. 3058 § 949, 109th Cong. (2005) (Treasury, Transportation, and Housing and Urban Development Appropriations bill amendment prohibiting funds from being "used to enforce the judgment of the United States Supreme Court in the case of *Kelo v. New London*") (enacted as Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115 (2005)); Protection of Homes, Small Businesses, and Private Property Act of 2005, H.R. 3087, 109th Cong. § 3 (2005) (prohibiting economic development takings involving the use of federal funds by the federal government and by state and local governments); Protection of Homes, Small Businesses, and Private Property Act of 2005, H.R. 3083, 109th Cong. § 3 (2005) (identical proposal as H.R. 3087, introduced by a different representative); Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. § 3 (2005) (identical proposal as H.R. 3087, introduced in the Senate). A constitutional amendment proposed in the House of Representatives stated that "[n]either a State nor the United States may take private property for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project." H.R.J. Res. 60, 109th Cong. (2005).

70. In her dissent, Justice O'Connor stated that forcing "property owners [to] turn to the States . . . is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them." *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting).

both economic development and blight elimination purposes.⁷¹ Although there has been “a swift and dramatic backlash” to the *Kelo* ruling in the legislatures of the Great Lakes states, all of the ensuing statutory enactments and proposed bills encompass blight elimination as a public use.⁷² Only the proposed constitutional amendments in Indiana and New York reflect Justice Thomas’s vision of the government’s limited eminent domain authority.⁷³

A. States Within Justice Stevens’s Public Use Paradigm

1. Illinois

Illinois falls within Justice Stevens’s public use paradigm, as takings for economic development and blight elimination are permitted under Illinois statutes and case law. The Illinois Constitution states that “[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law.”⁷⁴ Illinois’s pre-*Kelo* statutory scheme authorized the broad exercise of eminent domain to appropriate blighted property.⁷⁵ On July 28, 2006, Illinois enacted the Equity in Eminent Domain Act, a sweeping consolidation and revision of Illinois’s various eminent domain statutes with an effective date of January 1, 2007.⁷⁶ The Act requires that the condemning authority demonstrate “by clear and convincing evidence” that a condemnation for “private ownership or control” is “(i) primarily for the benefit, use, or enjoyment of the

71. See *supra* Part II. The Great Lakes region is an appropriate selection for eminent domain analysis. First, as opposed to such ambiguous designations as the “Midwest,” the “South,” or the “Northwest,” those states touching one or more of the Great Lakes are easily identifiable: Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin. Second, the region as a whole has a rural-urban composition that is similar to that of the nation at large (a factor important for eminent domain inquiries). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 31 (125th ed. 2005).

72. Andres, *supra* note 3. Of course, “at the same time, the ruling has emboldened some cities to take property for development plans on private land.” Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1. Updated state-by-state lists of legislative efforts to curb eminent domain may be found on the Internet. See CASTLE COALITION, STATE LEGISLATIVE ACTIONS, <http://maps.castlecoalition.org/legislation.html> (last visited Mar. 14, 2007).

73. See *infra* notes 102–04, 121 and accompanying text.

74. ILL. CONST. art. I, § 15.

75. See, e.g., 65 ILL. COMP. STAT. ANN. 5/11-74.2 to -74.4 (West 2005); 315 ILL. COMP. STAT. ANN. 5/1 to 5/29, 30/1 to 30/36, 10/1 to 10/7 (West 1997).

76. Equity in Eminent Domain Act, 2006 Ill. Legis. Serv. 2740 (West).

public and (ii) necessary for a public purpose.⁷⁷ Furthermore, when property is condemned “for private ownership or control and if the primary basis for the acquisition is the elimination of blight,” then the condemning authority must prove by a preponderance of the evidence, *inter alia*: that acquisition of the property is necessary for a public purpose; that the property is located in a designated blighted area; and, if the taking is challenged by the property owner, that the designated area (but not the condemned property in particular) is actually blighted.⁷⁸ Under the Act, “[a]n acquisition of property primarily for the purpose of the elimination of blight is rebuttably presumed to be for a public purpose and primarily for the benefit, use, or enjoyment of the public.”⁷⁹ While the Act does place new conditions on the exercise of the state’s condemnation authority, it permits economic development takings so long as they are for a public benefit and public purpose, and it explicitly authorizes blight elimination takings.

Historically, Illinois courts have “viewed the public use standard in such a manner as to allow practically any taking” so long as some public benefit existed, and there was no “clear abuse of discretion.”⁸⁰ The Illinois Supreme Court has also deemed that the public use requirement “is not a static concept” but “is flexible, and . . . capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution.”⁸¹

Even prior to the passage of the Equity in Eminent Domain Act, the courts of Illinois considered the elimination of blight to be a public use: “[A]chievement of the redevelopment of slum and blight areas . . . constitutes a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment has been achieved.”⁸² Illinois courts consider economic development to be a public use as well. In *People ex rel. Urbana v. Paley*, for example, the Illinois Supreme Court declared “that the application of the public-

77. Equity in Eminent Domain Act § 5-5-5(c). There are several exceptions to the scope of this provision. See *id.* § 5-5-5(a-5), (a-10).

78. *Id.* § 5-5-5(d).

79. *Id.* § 5-5-5(c).

80. WILLIAM L. BROOM III ET AL., ILLINOIS EMINENT DOMAIN PRACTICE § 1S.2, at 1S-3 (Supp. 2004).

81. *People ex rel. Adamowski v. Chi. R.R. Terminal Auth.*, 151 N.E.2d 311, 314 (Ill. 1958).

82. *People ex rel. Gutknecht v. City of Chicago*, 121 N.E.2d 791, 795 (Ill. 1954) (quoting *Zurn v. City of Chicago*, 59 N.E.2d 18, 25 (Ill. 1945)). Blight *prevention* is also a public use. See *People ex rel. Urbana v. Paley*, 368 N.E.2d 915, 920 (Ill. 1977); *Gutknecht*, 121 N.E.2d at 794.

purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation," the court stated, "are also objectives which enhance the public weal."⁸³

The Illinois Supreme Court delineated the limits of the state's public use doctrine in its 2002 *Southwestern Illinois Development Authority* decision, holding that a redevelopment authority's condemnation of a non-blighted parcel and subsequent transfer of the parcel to a private racetrack for use as a parking lot violated the public use requirements of the United States and Illinois constitutions.⁸⁴ Although the court reaffirmed its position in *Paley* that economic development constitutes a public purpose,⁸⁵ it noted that a distinction between "public use" and "public purpose" "still exists and is essential to this case."⁸⁶ The court held the condemnation invalid because "members of the public are not the primary intended beneficiaries of this taking" and because the condemning authority, which had not made findings regarding the lack of parking, was acting merely at the behest of the racetrack owners.⁸⁷ "The power of eminent domain," the court concluded, "is to be exercised with restraint, not abandon."⁸⁸

Despite the restrictions enunciated in *Southwestern Illinois Development Authority* and the enactment of the Equity in Eminent Domain Act, Illinois falls within the paradigm of public use jurisprudence set forth in Justice Stevens's majority opinion in

83. *Paley*, 368 N.E.2d at 920–21.

84. *Sw. Ill. Dev. Auth. v. Nat'l City Envtl.*, L.L.C., 768 N.E.2d 1, 4–5, 7, 11 (Ill. 2002). For an extensive discussion of *Southwestern*, see Allen D. Roe, Case Note, *No Parking: The Public Use Doctrine in Eminent Domain: Southwestern Illinois Development Authority v. National City Environmental*, L.L.C., 768 N.E.2d 1 (Ill. 2002), 28 S. ILL. U. L.J. 505 (2004).

85. *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 9.

86. *Id.* at 8.

87. *Id.* at 10.

88. *Id.* at 11. One commentator noted:

Unfortunately, the [Illinois Supreme Court] did not provide guidance or a specific test to apply to future cases. . . . The court clearly did not object to all takings, but it is unclear how it would determine the boundaries of the eminent domain power and where it would draw the line between public and private use. What is significant is that it was willing to draw such a line rather than acquiesce to the legislature.

Benjamin D. Cramer, Note, *Eminent Domain for Private Development—An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 437 (2004) (footnote omitted).

Kelo. Economic development, even in the absence of blight, remains a valid public purpose in Illinois, and the reasoning of the *Southwestern* decision would not have precluded New London from exercising its eminent domain authority under the facts of *Kelo*.⁸⁹ Likewise, while the Equity in Eminent Domain Act “will make it more difficult for units of government in Illinois to use eminent domain to take private property for economic development,” such takings, along with blight elimination takings, are still permissible.⁹⁰ Thus, the Act is the paradigmatic example of an inadequate legislative response to the *Kelo* decision. Property rights advocates in Illinois should seek reforms that would render the state’s eminent domain laws consistent with Justice Thomas’s public use paradigm by prohibiting economic development takings and blight elimination takings *in toto*.

2. *Indiana*

Indiana also falls within Justice Stevens’s public use paradigm, although only due to a statutory exception to the state’s recently enacted prohibition on economic development takings. Article I, section 21 of the Indiana Constitution reads: “No person’s property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.”⁹¹ The Indiana legislature has liberally delegated eminent domain power throughout the state’s history. As early as 1927, the Indiana Supreme Court identified a litany of statutory delegations of the state’s eminent domain authority, including a number of delegations to private utilities and businesses.⁹² An Indiana law enacted on March 24, 2006, restricts takings for transfer to private parties “for a use that is not a

89. The Connecticut Supreme Court addressed the *Southwestern* decision at length in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *aff’d*, 545 U.S. 469 (2005). The Connecticut Supreme Court rejected the plaintiff’s contention that *Southwestern* “stands for the proposition that economic development is never a constitutionally valid public use,” stating that “the facts of *Southwestern* . . . merely demonstrate the far outer limit of the use of the eminent domain power for economic development.” *Id.* at 535. According to the Connecticut Supreme Court, the *Southwestern* court “did not strike the statute allowing the agency to use eminent domain; it merely assailed the agency’s exercise of that power within a particularly egregious set of facts.” *Id.*

90. See Illinois Farm Bureau, *Governor Approves Eminent Domain Limits – SB 3086* (Sen. Garrett/Rep. John Bradley), STATE HOUSE QUICK VIEW, July 28, 2006, http://www.ilfb.org/uploads/files/quickview-07-28-2006_12068.doc.

91. IND. CONST. art. I, § 21.

92. See *Fountain Park Co. v. Hensler*, 155 N.E. 465, 472 (Ind. 1927).

public use.”⁹³ In order for such a taking to be valid, the property must be blighted or subject to tax delinquency, and the condemnation must be “expected to accomplish more than only increasing the property tax base of a government entity.”⁹⁴ When such a taking occurs, the original property owner must be compensated 125% of fair market value for agricultural property and 150% of fair market value for a residence.⁹⁵ There is a key exception to this prohibition on takings for transfer to private parties, however, for parcels at least ten acres in size, not occupied by the owner as a residence, and located in a designated economic development area. A taking of such property is permitted if the condemnor acquires title to ninety percent of the economic development area and “the legislative body for the condemnor” authorizes the condemnation by a two-thirds vote.⁹⁶ This exception, while seemingly minor, allows economic development takings to continue to occur under certain circumstances.

Although the Indiana Constitution does not have a public use requirement, article I, section 21 has been interpreted to prohibit the taking of private property for a private purpose.⁹⁷ The Indiana Supreme Court interprets this implied public use requirement to be coterminous with the state’s police power, stating that the legislature has the authority to exercise its eminent domain powers “to protect

93. IND. CODE ANN. § 32-24-4.5-1(b)(3) (West Supp. 2006). Public use is defined as including the “possession, occupation, and enjoyment of a parcel of real property by the general public or a public agency for the purpose of providing the general public with fundamental services.” *Id.* § 32-24-4.5-1(a)(1). The term does not encompass “the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health.” *Id.* § 32-34-4.5-1(a)(3).

94. *Id.* § 32-24-4.5-7(2). The statute delineates the qualifying categories of blight. *Id.* § 32-24-4.5-7(1).

95. *Id.* § 32-24-4.5-8.

96. *Id.* § 32-24-4.5-11(a), (c). Even if all these criteria are met,

[t]he condemnor may not acquire a parcel of real property through the exercise of eminent domain under this section if the owner of the parcel demonstrates by clear and convincing evidence that: (1) the location of the parcel is essential to the viability of the owner’s commercial activity; and (2) the payment of damages and relocation costs cannot adequately compensate the owner of the parcel.

Id. § 32-24-4.5-11(e).

97. “Although the words ‘public use’ do not appear in the Indiana Constitution, it has always been held that private property can only be appropriated under the right of eminent domain when such appropriation is for a public use.” *Fountain Park*, 155 N.E. at 469. *See also* Pulos v. James, 302 N.E.2d 768, 771–72 (Ind. 1973); *Cont’l Enters., Inc. v. Cain*, 387 N.E.2d 86, 90 (Ind. Ct. App. 1978); *Great W. Natural Gas & Oil Co. v. Hawkins*, 66 N.E. 765, 768 (Ind. Ct. App. 1903).

public health, safety, morals, and welfare.”⁹⁸ Indiana case law unequivocally demonstrates that slum clearance and blight elimination are “public use[s] for which the power of eminent domain may be exercised.”⁹⁹ Furthermore, in upholding the constitutionality of the condemnation of a blighted area in *Hawley v. City of South Bend*, the Indiana Supreme Court implied that economic development is a public use as well.¹⁰⁰ While the blighted condition of the condemned property in *Hawley* justified the taking, the court stated that “the resale of the property to private enterprise under conditions in which the property will be developed into a shopping mall open to the public is clearly within the realm of a ‘public purpose.’ . . . In the case at bar, the proposed shopping mall is such a public purpose.”¹⁰¹ Of course, under Indiana’s new eminent domain statutory scheme, economic development alone does not *generally* justify a taking.

Because blight elimination is a public use under Indiana statute and Indiana Supreme Court precedent, and the new Indiana eminent domain law contains a significant exception to its prohibition on economic development takings, Indiana falls within Justice Stevens’s public use paradigm. While the new statute represents an improvement to Indiana’s eminent domain law, its allowance of economic development takings in certain circumstances and its authorization of blight elimination takings render it inadequate in protecting property rights. An amendment to the Indiana Constitution, introduced in the Indiana House of Representatives, provides that eminent domain may be exercised only for the purposes of: “(1) Public highways, roads, and streets. (2) Public transportation. (3) Railways. (4) Utilities. (5) Government owned and used buildings. (6) Public facilities for the general use of government or citizens.”¹⁰² The proposed amendment also prohibits the use of eminent domain for “increasing the tax revenue” and for “economic development.”¹⁰³ Assuming that the sixth designated purpose is narrowly construed, the proposed amendment is consistent with Justice Thomas’s

98. *Edwards v. Hous. Auth. of Muncie*, 19 N.E.2d 741, 744 (Ind. 1939).

99. *Alanel Corp. v. Indianapolis Redev. Comm’n*, 154 N.E.2d 515, 522 (Ind. 1958). *See also Murray v. City of Richmond*, 276 N.E.2d 519, 523 (Ind. 1971) (quoting *Alanel*, 154 N.E.2d at 522).

100. *See Hawley v. City of South Bend*, 383 N.E.2d 333, 341 (Ind. 1978).

101. *Id.*

102. H.R.J. Res. 0004, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006).

103. *Id.*

understanding of the public use requirement. Thus, passage of the proposed constitutional amendment would place the state within Justice Thomas's public use paradigm. Unlike the current flawed legislation, the proposed constitutional amendment represents a promising means of restricting eminent domain abuse and an adequate limitation on the government's eminent domain authority. Because it would prohibit both economic development takings and blight elimination takings, for property rights advocates in Indiana, the amendment's passage would make *Kelo* the very "manna from heaven" that Grover Norquist described.¹⁰⁴

3. *New York*

New York, like Illinois and Indiana, falls within Justice Stevens's public use paradigm. Article I, section 7 of the New York Constitution provides: "Private property shall not be taken for public use without just compensation."¹⁰⁵ New York's statutory scheme authorizes the exercise of eminent domain to redevelop "blighted areas which threaten the economic and social well-being of the people of the state."¹⁰⁶ The definition of "blighted area" includes those areas containing "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."¹⁰⁷

"Public use" is construed very broadly under New York statutes. New York's Eminent Domain Procedure Law, for example, provides that "public use," "public benefit," and "public purpose" are analogous,¹⁰⁸ and when a New York court reviews the selection of a parcel of land for condemnation, it considers whether "a public use, benefit or purpose will be served by the proposed acquisition."¹⁰⁹

104. See *Hands Off Our Homes*, *supra* note 4.

105. N.Y. CONST. art. I, § 7.

106. N.Y. GEN. MUN. LAW § 970-b (McKinney 1999).

107. *Id.* § 970-c(a). Also included in the definition of "blighted area" are those areas containing "a predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy." *Id.* The Appellate Division of the New York Supreme Court justified a taking for the construction of a new headquarters for the *New York Times* by finding the Times Square area of Manhattan to be "blighted." *W. 41st St. Realty, L.L.C. v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 123 (N.Y. App. Div. 2002).

108. N.Y. EM. DOM. PROC. LAW § 103(A), (G) (McKinney 2003).

109. *Id.* § 207(C)(4).

Historically, the New York courts have interpreted the New York Constitution's public use requirement in a broad manner. As early as 1837, the New York Court of Appeals recognized that eminent domain could be exercised even if there is only "an evident utility on the part of the public."¹¹⁰ The New York courts, like the courts of many other states in the Great Lakes region, construe the public use requirement so broadly that it resembles the scope of the state's police power.¹¹¹

New York courts recognize blight elimination as a public use. In its 1953 *Kaskel v. Impellitteri* decision, for example, the New York Court of Appeals declared "slum clearance" to be "a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital."¹¹² Hence, "the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary."¹¹³

The New York Court of Appeals has used this broad conception of blight to justify condemnations that are de facto economic development takings. In *Cannata v. City of New York*, it upheld a New York law that authorized cities to condemn economically unproductive areas regardless of whether the areas were actually blighted.¹¹⁴ The court found the area at issue to be "substandard" because it was "predominantly vacant" and "poorly developed and organized."¹¹⁵ The court thus permitted the condemnation for the

110. *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 14 (N.Y. 1837).

111. See *N.Y. City Hous. Auth. v. Muller*, 1 N.E.2d 153, 155 (N.Y. 1936) (explaining that when there is "a substantial menace to the public health, safety, or general welfare," eminent domain is appropriate so long as "the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil"); *Kearney v. City of Schenectady*, 325 N.Y.S.2d 278, 280 (N.Y. App. Div. 1971) ("A public purpose or public use may generally be defined as a purpose or use necessary for the common good and general welfare of the people of the municipality."); *Bronx Chamber of Commerce, Inc. v. Fullen*, 21 N.Y.S.2d 474, 481 (N.Y. Sup. Ct. 1940) ("A use is considered public when it affects the public generally, or any number thereof as such and not as individuals, or is for public benefit, utility or advantage or to develop the natural resources of a locality in view of the general welfare.").

112. *Kaskel v. Impellitteri*, 115 N.E.2d 659, 669 (N.Y. 1953).

113. *Id.* at 670. New York courts often use the broader term "substandard" in place of "blight." See *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331 (N.Y. 1975).

114. *Cannata v. City of New York*, 182 N.E.2d 395, 396-97 (N.Y. 1962).

115. *Id.* at 397.

erection of “new industrial development.”¹¹⁶ Likewise, in *Yonkers Community Development Agency v. Morris*, a challenge to a taking failed even though the property owners asserted that their property was not substandard and that the property was to be taken for a private purpose, namely, the expansion of an industrial plant.¹¹⁷ The court noted that a “liberal rather than literal definition of a ‘blighted’ area [is] now universally indorsed by case law.”¹¹⁸ According to the court, blight entails such factors as “irregularity of the plots,” “inadequacy of the streets,” “diversity of land ownership making assemblage of property difficult,” “traffic congestion,” and “pollution,” and “can encompass areas in the process of deterioration or threatened with it.”¹¹⁹ With its broad interpretations of “blight” and “substandard,” the New York Court of Appeals has upheld condemnations that are essentially economic development takings. Lower New York courts have explicitly upheld takings on economic development rationales.¹²⁰

Due to the New York Court of Appeals’ broad interpretations of “public use” and “blight” and the lower New York courts’ explicit authorization of economic development takings, New York falls within Justice Stevens’s public use paradigm. A constitutional amendment has been proposed in the New York Assembly that would significantly restrict the exercise of eminent domain within the state. The proposed amendment provides that “private property may be taken only when necessary for the possession, occupation, and enjoyment of land by the public at large, or by public agencies,” and prohibits takings “for use by private commercial enterprise[s]” other

116. *Id.*

117. *Yonkers*, 335 N.E.2d at 330.

118. *Id.* at 332.

119. *Id.*

Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to “slums” as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.

Id. at 330.

120. New York’s Supreme Court Appellate Division, for example, has ruled that job creation, infrastructure development, and economic stimulation are public purposes. *See Vitucci v. N.Y. City Sch. Constr. Auth.*, 735 N.Y.S.2d 560, 562 (N.Y. App. Div. 2001); *In re Fisher*, 730 N.Y.S.2d 516, 517 (N.Y. App. Div. 2001); *Sunrise Props., Inc. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d 841, 842 (N.Y. App. Div. 1994).

than “privately owned common carriers and public utilities.”¹²¹ If the phrase “enjoyment of land by the public at large” is interpreted strictly, passage of the amendment would place New York within Justice Thomas’s public use paradigm. Other bills have been proposed in the Senate and Assembly of New York that would impose restrictions on the state’s eminent domain power, but none of them adequately protects property rights.¹²² As with the proposed constitutional amendment in Indiana, the amendment proposed in the New York Assembly would prohibit both economic development takings and blight elimination takings and thus represents an opportunity for property rights advocates to limit a state’s eminent domain authority in a manner consistent with Justice Thomas’s public use paradigm.

4. *Pennsylvania*

Pennsylvania is the fourth and final state in the Great Lakes region that falls within Justice Stevens’s public use paradigm. Article I, section 10 of the Pennsylvania Constitution reads: “nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.”¹²³ Under Pennsylvania’s longstanding Urban Redevelopment Law, the state and localities have sweeping authority to condemn blighted property.¹²⁴ On May 4, 2006, Pennsylvania enacted the Property

121. A.B. 660, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

122. *See, e.g.*, S.B. 5938, 2005 Leg., 228th Reg. Sess. (N.Y. 2005) (restricting the use of eminent domain power to “public projects”); S.B. 5936, 2005 Leg., 228th Reg. Sess. (N.Y. 2005) (restricting the exercise of economic development condemnations to blighted areas); A.B. 8865, 2005 Leg., 228th Reg. Sess. (N.Y. 2005) (requiring “the local government [to] hold a vote to determine whether or not to condemn . . . property” for use by a private developer); A.B. 9144, 2005 Leg., 228th Reg. Sess. (N.Y. 2005) (requiring the unanimous approval of a local government board followed by permissive referendum); A.B. 9117, 2005 Leg., 228th Reg. Sess. (N.Y. 2005) (imposing requirements, but not prohibitions, on urban redevelopment and renewal condemnations of non-blighted areas).

123. PA. CONST. art. I, § 10. This provision is rooted in clause 7 of the Declaration of Rights of Pennsylvania’s 1776 constitution. Pennsylvania inserted the just compensation requirement in 1790 after the ratification of the United States Constitution, forming the language that exists today. *See United Artists’ Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 616 (Pa. 1993).

124. 35 PA. STAT. ANN. § 1702(a), (i) (West 2003). The statutory definition of blight is extremely broad, and the unfairness of Pennsylvania’s blight certification process has been criticized:

[T]he entire scheme for the certification of an area as blighted is weighted against the landowners [and business owners] in favor of the condemnor, leaving the

Rights Protection Act,¹²⁵ which explicitly authorizes blight elimination takings and defines “blight” broadly.¹²⁶ For an entire area to be declared blighted and condemned, a majority of the properties must meet the statutory definition of blight.¹²⁷ The Act also provides that, subject to a number of exceptions, “the exercise by any condemner of the power of eminent domain to take private property in order to use it for private enterprise is prohibited.”¹²⁸ Exceptions include property that is blighted,¹²⁹ property to be transferred to “a private enterprise that occupies an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area,”¹³⁰ and property to be developed as a low-income or mixed-income housing project.¹³¹ While these exceptions by no means swallow the rule, they do undermine it.

The Pennsylvania Supreme Court has held blight elimination to be a public use under the Pennsylvania Constitution. The court upheld the constitutionality of the Urban Redevelopment Law in 1947, ruling that the elimination of blight is, in fact, a public use.¹³² The court indicated its willingness to extend its interpretation of the public use requirement to include economic development in its 1970 *Bruce Avenue* decision, in which the court considered “whether promoting the existence of [a] shopping center is a public purpose.”¹³³ Although it remanded the case, the Pennsylvania Supreme Court suggested it might recognize the public nature of such a use.¹³⁴ The court reasoned that when a city argues “that the public interest will be promoted through the tax revenues the center will generate, through

Redevelopment Authority “with unbounded, unfettered and limitless discretionary power to appropriate and condemn as dilapidated . . . as large an area as they believe can be made more prosperous.”

In re Condemnation by the Urban Redev. Auth., 594 A.2d 1375, 1390–91 (Pa. 1991) (Larsen, J., dissenting) (emphasis added) (alterations in original) (quoting Cass Plumbing & Heating Co. v. PPG Indus., 416 A.2d 1142, 1150 (Pa. Commw. Ct. 1980) (Blatt, J., dissenting)).

125. No. 2006-35, 2006 Pa. Legis. Serv. 103 (West) (to be codified at 26 PA. CONS. STAT. §§ 201–07).

126. *Id.* § 205(b).

127. *Id.* § 205(c).

128. *Id.* § 204(a).

129. *Id.* § 204(b)(5).

130. *Id.* § 204(b)(2)(iii).

131. *Id.* § 204(b)(7).

132. *Belovsky v. Redev. Auth. of Phila.*, 54 A.2d 277, 282, 285 (Pa. 1947).

133. *In re Bruce Ave.*, 266 A.2d 96, 99 (Pa. 1970).

134. *Id.*

the jobs the center will create and through the convenient shopping facilities that will be made available to area residents,” the burden is on the challenging party “to prove a private rather than a public purpose.”¹³⁵ This burden, the court noted, “is a heavy one.”¹³⁶

Granted, the Pennsylvania Supreme Court refuses to allow the state and its subdivisions to exercise eminent domain for the benefit of a limited number of individuals,¹³⁷ and a lower Pennsylvania court invalidated a taking because the government delegated its condemnation power to a private developer.¹³⁸ Despite these limitations, Pennsylvania is very permissive in its public use jurisprudence, as the Pennsylvania Supreme Court considers blight elimination to be a public use under the Pennsylvania Constitution and indicated in its *Bruce Avenue* ruling that economic development may constitute a public use.¹³⁹ Likewise, the Property Rights Protection Act is permissive in its authorization of blight elimination takings and contains significant exceptions to its prohibition on economic development takings.¹⁴⁰ Because economic development takings will continue to occur in Pennsylvania, the state falls within Justice Stevens’s public use paradigm.¹⁴¹ While property rights advocates in Pennsylvania should welcome the recently-enacted limitations on economic development takings, the Property Rights Protection Act is another example of an inadequate legislative response to the *Kelo* decision. Property rights advocates in

135. *Id.*

136. *Id.*

137. “[T]he public [must] be the primary and paramount beneficiary” of a taking. *In re Forrester*, 836 A.2d 102, 105–06 (Pa. 2003) (quoting *Bruce Ave.*, 266 A.2d at 99) (holding that opening a private road for an individual does not constitute a public use).

138. *Condemnation of 110 Wash. St.*, 767 A.2d 1154, 1160 (Pa. Commw. Ct. 2001).

139. *Bruce Ave.*, 266 A.2d at 99. The Pennsylvania Supreme Court “has continually turned to federal precedent for guidance in its ‘taking’ jurisprudence, and indeed has adopted the analysis used by the federal courts.” *United Artists’ Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 616 (Pa. 1993).

140. The exceptions to the prohibition on economic development takings in Pennsylvania are more expansive than those of Indiana. *See supra* note 96 and accompanying text.

141. Condemnation activity in the state confirms Pennsylvania’s permissive approach to eminent domain. In a five-year span, there were more than 2600 reported condemnations benefiting private parties and ten reported development projects involving condemnations for private benefit. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 173 (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (noting that “Pennsylvania has been a hotbed of eminent domain controversy”).

Pennsylvania should seek more meaningful limitations of the government's eminent domain authority.

B. *States Within Justice O'Connor's Public Use Paradigm*

1. *Michigan*

Because Michigan permits blight elimination takings but prohibits economic development takings, the state falls within Justice O'Connor's public use paradigm. Under the Michigan Constitution, "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."¹⁴² An amendment to the Michigan Constitution approved by voters in November of 2006 prohibits takings "for transfer to a private entity for the purpose of economic development or enhancement of tax revenues" and requires owners of condemned homes to be compensated with at least 125% of the property's value.¹⁴³ Michigan is thus the only state in the Great Lakes region in which economic development takings are explicitly prohibited in the state constitution.

Section 213.23 of the Michigan Compiled Laws provides that public corporations and state agencies are "authorized to take private property necessary for a public improvement or for the purposes of [their] incorporation or for public purposes within the scope of [their] powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose."¹⁴⁴ The Michigan Supreme Court has ruled that this statute would allow the government to exercise even broader eminent domain powers than is permitted under the public use clause of the Michigan Constitution.¹⁴⁵ Other Michigan statutes allow municipalities to condemn property for "the

142. MICH. CONST. art. X, § 2.

143. *Id.* The amendment had previously been approved by the Michigan House and Senate. S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005).

144. MICH. COMP. LAWS ANN. § 213.23 (West 2005). "Public corporations" under the statute "include all counties, cities, villages, boards, commissions, and agencies made corporations for the management and control of public business and property." "State agencies" under the statute "include all unincorporated boards, commissions and agencies of the state given by law the management and control of public business and property, and the office of governor or a division thereof." *Id.* § 213.21.

145. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004).

rehabilitation of blighted areas¹⁴⁶ and blight prevention.¹⁴⁷ Furthermore, municipalities may condemn property for commercial and industrial development,¹⁴⁸ as well as for transfer to a local development financing authority for economic development purposes.¹⁴⁹ A law enacted in 2006 prohibits takings for transfer to private parties unless the planned use of the land is “governmental” in nature.¹⁵⁰ The statute expressly permits takings for transfer to private parties when “the property is selected on facts of independent public significance or concern, including blight.”¹⁵¹

In a sweeping recognition of the state’s eminent domain authority, the Michigan Supreme Court ruled in its 1981 *Poletown* decision that property could be condemned and transferred to General Motors for the construction of an assembly plant under section 213.23, reasoning that the creation of jobs and an increased tax base constituted a “public use.”¹⁵² Equating “public use” with “public purpose,” the court found “the public benefit . . . so clear and significant” that the condemnation satisfied the requirements of the Michigan Constitution.¹⁵³

In its landmark *County of Wayne v. Hathcock* decision, however, the Michigan Supreme Court overruled *Poletown*, holding that the condemnation of land for development by private parties as a business and technology park violated the Michigan Constitution.¹⁵⁴ According to the court, the public use requirement of the Michigan Constitution must be interpreted in light of “the common

146. MICH. COMP. LAWS ANN. § 125.73 (West 2006).

147. *Id.* §§ 125.941, 125.944.

148. *Id.* § 125.1622.

149. *Id.* § 125.2159.

150. Act of Sept. 20, 2006, Mich. Legis. Serv. 1272, § 3(2) (West) (to be codified as amended at MICH. COMP. LAWS § 213.23(3)).

151. *Id.* § 3(2)(c).

152. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458–59 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

153. *Id.* For more than two decades, *Poletown* “stood as both the most visible symbol of eminent domain abuse and as a precedent justifying nearly unlimited power to condemn private property.” Somin, *supra* note 64, at 1006. Not surprisingly, critics of *Poletown* “have spanned the political spectrum. Conservatives object to government coercion and disrespect for private property in service of speculative claims about the public good. Liberals object to the exercise of government authority on behalf of the powerful and at the expense of the powerless.” Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 223 (2004) (footnotes omitted).

154. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004).

understanding of those sophisticated in the law at the time of [the Constitution's] ratification."¹⁵⁵ Under this purported original understanding model, the court identified three scenarios in which condemned property may be transferred to a private party: (1) when there is an extreme public necessity such as the construction of roads, canals, and other instruments of commerce; (2) when the transferred property remains subject to public control; and (3) when "the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land . . . satisfy the Constitution's public use requirement."¹⁵⁶ The *Hathcock* court's third category of permissible transfers of condemned property to private parties corresponds with Justice O'Connor's third category of permissible takings, and both encompass blight elimination as a public use. Indeed, the Michigan Supreme Court stated that "[t]he primary example of a condemnation in this vein is . . . condemnation of blighted housing and its subsequent resale of those properties to private persons."¹⁵⁷

By concluding in *Hathcock* that economic development is not a public use, the Michigan Supreme Court removed the state from Justice Stevens's public use paradigm. However, because the *Hathcock* court explicitly provided for blight elimination takings, Michigan remained within the public use framework of Justice O'Connor.¹⁵⁸ The constitutional amendment approved in 2006 enshrined the principles of *Hathcock* in the Michigan Constitution,

155. *Id.* at 782.

156. *Id.* at 781–83.

157. *Id.* at 783. *Accord In re Brewster St. Hous. Site*, 289 N.W. 493, 496–97 (Mich. 1939). This third category "conflates sound public-use principles with sound regulatory-takings principles in the same manner as *Berman*. . . Like *Berman*, *Hathcock* does not distinguish different government actions depending on how the government acts." Claeys, *supra* note 15, at 914–15. In her *Hathcock* concurrence, Justice Weaver joins the decision but offers her own reasoning and likewise criticizes the *Hathcock* majority's third category of permissible transfers of condemned property to private parties. *Hathcock*, 684 N.W.2d at 797 (Weaver, J., concurring in part, dissenting in part) ("If, instead of the common understanding of 'public use,' future courts rely on 'facts of independent public significance' to determine whether a condemnation is for a 'public use,' then it is easy to imagine how the people's limit on the exercise of eminent domain might be eroded.").

158. While *Hathcock* "clearly invalidates purely economic takings, it . . . will not limit takings available and created by valid exercises of the police power, i.e. . . . blight clearance." Alan T. Ackerman, *The Changing Landscape and Recognition of the Public Use Limitation: Is Hathcock the Precursor of Kelo?*, 2004 MICH. ST. L. REV. 1041, 1066–67. Furthermore, "[o]nly time will tell whether *Hathcock*'s exceptions end up restoring *Poletown* by swallowing the rule." Somin, *supra* note 64, at 1039.

for it states that “private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment.”¹⁵⁹ Blight elimination continues to serve as a public use under both the *Hathcock* ruling and the amended Michigan Constitution. Property rights advocates in Michigan should not be satisfied with the prohibition of economic development takings but should seek changes to the state’s eminent domain laws that are consistent with Justice Thomas’s public use paradigm.

2. *Minnesota*

Although Minnesota formerly fell within Justice Stevens’s public use paradigm, recent changes to the state’s eminent domain law place the state within Justice O’Connor’s paradigm. The Bill of Rights of the Minnesota Constitution states: “Private property shall not be taken, destroyed or damaged for public use without just compensation.”¹⁶⁰ The state’s eminent domain statutory scheme was formerly very permissive,¹⁶¹ but on May 19, 2006, a bill was enacted that provides property owners substantial protection from eminent domain abuse.¹⁶² Most significantly, the law prohibits takings that are based solely on “[t]he public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.”¹⁶³ Blight elimination remains a “public use” under the law,¹⁶⁴ but the definition of “blighted area” is restricted to an area “that is in urban use” and in which “more than 50 percent of the buildings are structurally substandard.”¹⁶⁵ Structures within a designated blighted area that are not themselves substandard may not be condemned “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

159. MICH. CONST. art. X, § 2.

160. MINN. CONST. art. I, § 13.

161. *See, e.g.*, MINN. STAT. ANN. §§ 465.01, 469.101(4), 469.012(1g) (West 2001 & Supp. 2006).

162. Act of May 19, 2006, ch. 214, 2006 Minn. Laws 195 (codified as amended at MINN. STAT. ANN. § 117 (West Supp. 2006)).

163. MINN. STAT. ANN. § 117.025(11)(b) (West Supp. 2006) (originally enacted as Act of May 19, 2006, ch. 214, 2006 Minn. Laws 195).

164. *Id.* § 117.025(11).

165. *Id.* § 117.025(6).

substandard.”¹⁶⁶ The law requires a condemnor to demonstrate by a “preponderance of the evidence” that a blight elimination taking “is necessary and for the designated public use.”¹⁶⁷ Finally, the law exempts from the coverage of the aforementioned restrictions certain takings that occur prior to February 2, 2008, pursuant to a tax increment financing plan.¹⁶⁸ Because the tax increment financing exception is extremely narrow and exists for a limited time only, it does not defeat Minnesota’s placement within Justice O’Connor’s public use paradigm.

In its *Houghton* ruling in 1920, the Minnesota Supreme Court equated the public use requirement in the Minnesota Constitution with “public purpose” and stated that the creation of residential areas constitutes a public use.¹⁶⁹ Adopting a “flexible” interpretation of the Minnesota Constitution’s public use requirement, the court reasoned that the meaning of the public use “changes from time to time.”¹⁷⁰ Applying this expansive interpretation of the public use, the Minnesota Supreme Court has upheld the condemnation of blighted property for transfer to private parties planning to put the property to ostensibly more desirable uses.¹⁷¹

Blight was not a precondition for economic development takings in Minnesota prior to the enactment of the 2006 legislation, however.

166. *Id.* § 117.027(1).

167. *Id.* § 117.075(1)(b).

168. 2006 Minn. Laws sec. 22(b).

169. State *ex rel.* Twin City Bldg. & Inv. Co. v. *Houghton*, 176 N.W. 159, 160–62 (Minn. 1920). The property at issue in *Houghton* was not blighted, and the case involved restrictions upon building in a designated area rather than an outright transfer of condemned property to a private entity. *Id.* at 160. The *Houghton* ruling came just five years after Minnesota voters rejected a proposed constitutional amendment to permit condemnation of private property for the erection of drainage ditches. See Nick Dranias, *Eminent Domain Abuse in Minnesota*, BENCH BAR OF MINN., Aug. 2005, at 19, 20.

170. *Houghton*, 176 N.W. at 161. The *Houghton* court quoted as support for its ruling a Massachusetts decision, which held that aesthetic enjoyment constitutes a public use. *Id.* at 162 (quoting *Commonwealth v. Boston Adver. Co.*, 74 N.E. 601, 602 (Mass. 1905)).

171. For example, in *Housing & Redevelopment Authority v. Greenman*, 96 N.W.2d 673 (Minn. 1959), the property was condemned for transfer to a private party for the construction of residences, commercial buildings, and other facilities. The court found the condemned property to be “seriously blighted in terms of practically every index.” *Id.* at 678 n.4. More recently, in *City of Oak Grove v. Orttel*, No. A04-1183, 2005 Minn. App. LEXIS 573, at *1–2 (Minn. Ct. App. 2005), the Minnesota Court of Appeals approved a condemnation of property for the creation of a senior residential facility because the area was blighted. See also *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), *aff’d by an equally divided court*, 641 N.W.2d 885 (Minn. 2002).

In *City of Minneapolis v. Wurtele*, for example, the Minnesota Supreme Court found that the condemnation of property within a development district for construction of a shopping mall served a public purpose when the property, though not blighted, “was currently stagnant and unproductive because of lack of proper utilization and lack of investment,” and when the redevelopment plan would create new jobs and generate substantial revenue.¹⁷² In its *City of Duluth v. State* ruling six years later, the court interpreted *Wurtele* to permit economic development takings: “[In *Wurtele*], [a] public purpose was recognized because there was evidence that the construction of the mall would create permanent and temporary employment, generate retail sales, and increase the tax base of the city.”¹⁷³ The *Duluth* court also cited with favor other appellate courts that had “determined that proposals to condemn and transfer property from one private owner to another are justified on the ground that the economic benefit that results is ‘public’ in nature.”¹⁷⁴ Under the *Wurtele* and *Duluth* standards, it was not necessary that property condemned as part of an economic development plan be blighted for the “public purpose” to be served.¹⁷⁵

The passage of the aforementioned eminent domain law in 2006 shifted Minnesota from Justice Stevens’s public use paradigm to Justice O’Connor’s public use paradigm.¹⁷⁶ Although not wholly

172. *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 390 (Minn. 1980). The *Wurtele* court emphasized the trial court’s findings that the project would create nearly 6000 permanent jobs, generate between \$2.1 and \$5.3 million in annual real estate taxes, and attract over 12,000 new residents. *Id.* For a discussion of the definition and nature of “public purpose” under Minnesota’s eminent domain law, see 18 Dunnell Minnesota Digest, *Eminent Domain* § 2.01 (4th ed. 1993).

173. *City of Duluth v. State*, 390 N.W.2d 757, 763 (Minn. 1986).

174. *Id.* at 763 n.2. Although the property at issue in *Duluth* had been classified as “marginal” under a broad and subsequently repealed statute, the court emphasized that the mall would revitalize the area and create employment opportunities. *Id.* at 763, 768 & n.4, 769 (referencing MINN. STAT. ANN. § 458.17 (West 2001) (repealed 1987)). See also DEBORAH A. DYSON, MINN. HOUSE OF REPRESENTATIVES RESEARCH DEP’T., EMINENT DOMAIN: PUBLIC USE, <http://www.house.leg.state.mn.us/hrd/pubs/clssemntdom.pdf> (last visited Mar. 14, 2007).

175. See also *Walser Auto Sales*, 630 N.W.2d 662.

176. John M. LeFevre, a Minneapolis attorney who represents cities, stated that the *Kelo* ruling would not alter eminent domain law in Minnesota. Barbara L. Jones, *U.S. High Court’s ‘Kelo’ Case Doesn’t KO State’s Condemnation Procedures*, MINN. LAWYER, July 4, 2005, at 1. Likewise, “Minneapolis attorney Leland J. Frankman, who handles eminent domain cases, agreed that *Kelo* will not have a significant impact in Minnesota because the state is already one of the most liberal in the country when it comes to finding a public purpose.” *Id.* The recently enacted eminent domain law will significantly curtail eminent domain abuse in the state.

satisfactory in its protection of property rights, the law prohibits economic development takings and imposes significant conditions on the exercise of the state's eminent domain authority for blight elimination purposes. Because blight elimination takings are still permitted, however, the new law does not fully reflect Justice Thomas's understanding of the government's limited eminent domain authority. Property rights advocates in Minnesota should continue to advance legislation that limits the state's eminent domain authority in an even more significant manner.

3. *Ohio*

Ohio clearly falls within Justice O'Connor's public use paradigm, for the Ohio Supreme Court recently held that economic development takings, but not blight elimination takings, violate the Ohio Constitution.¹⁷⁷ The Ohio Constitution states that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare" and that compensation "assessed by a jury" shall be paid when private property is "taken for public use."¹⁷⁸ Under Ohio statute, eminent domain may be exercised by a board of county commissioners as part of a "county renewal project."¹⁷⁹ Furthermore, certain "impacted cities," "in order to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of [the] city, may appropriate . . . real estate" for development and improvement.¹⁸⁰ A city qualifies as an "impacted city" by, *inter alia*, having a state-certified community development program aimed at eliminating "slums and urban blight."¹⁸¹ The statutory definition of a "blighted area" is so broad that it includes factors such as "inadequate street layout," "incompatible land uses or land use relationships," and

177. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141–42 (Ohio 2006).

178. OHIO CONST. art. I, § 19. Thus, "an owner of property holds title to that property subject to a perpetual optional right of his government to acquire that property for public use on the payment of full compensation in money." *Rothwell v. Linzell*, 127 N.E.2d 524, 531 (Ohio 1955).

179. OHIO REV. CODE ANN. § 303.38 (West 2005).

180. OHIO REV. CODE ANN. § 719.011 (West 1994).

181. *Id.* § 1728.01(C)(1)(b).

conditions that “are detrimental to the public health, safety, morals and general welfare.”¹⁸²

The subservience of property rights to the “public welfare” in the Ohio Constitution and the broad definition of blight in the state’s statutory scheme are reflected in the public use jurisprudence of the Ohio courts. Ohio courts have long interpreted the public use requirement to be equivalent to the state’s police power for advancing “the public health, convenience, or welfare.”¹⁸³ In its 1953 *State ex rel. Bruestle v. Rich* decision, the Ohio Supreme Court ruled that the “public welfare” clause and the public use requirement of article I, section 19 of the Ohio Constitution are coterminous, claiming that the drafters of the Ohio Constitution “regarded property taken for ‘the public welfare’ as property ‘taken for public use.’”¹⁸⁴ The court could not believe that:

anyone [would] seriously contend that the elimination of slum and other conditions of blight and provisions against their recurrence would not be conducive to the public welfare and a public purpose, and that the use of property in doing that would not be a use for a public purpose.¹⁸⁵

The Ohio Supreme Court has also stated that “given the importance of urban redevelopment, there is reason to give the definition of ‘blighted area’ a liberal interpretation.”¹⁸⁶

In July of 2006, the Ohio Supreme Court ruled in *Norwood v. Horney* that economic development takings, but not blight elimination takings, violate the Ohio Constitution.¹⁸⁷ In *Norwood*, appellants’ neighborhood had been designated for redevelopment pursuant to an agreement between the city and a developer, and the city of Norwood

182. *Id.* § 1728.01(E). See Christopher S. Brown, Comment, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 208 (2004) (describing Ohio’s “very broad and often murky definition of blight”). Indeed, blight “is such a malleable term of art that [it] is whatever the local government or redevelopment agency wants it to be.” *Id.*

183. *Lake Erie & W. R.R. v. Comm’rs of Hancock County*, 57 N.E. 1009, 1010 (Ohio 1900).

184. *State ex rel. Bruestle v. Rich*, 110 N.E.2d 778, 786 (Ohio 1953).

185. *Id.* at 787. See also *Blakemore v. Cincinnati Metro. Hous. Auth.*, 57 N.E.2d 397, 401 (Ohio Ct. App. 1943).

186. *AAAA Enters. v. River Place Cmty. Urban Redev. Corp.*, 553 N.E.2d 597, 600 (Ohio 1990).

187. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141–42 (Ohio 2006).

sought to condemn appellants' property in order to transfer it to the developer for the construction of apartments, condominiums, office and retail space, and public-parking facilities.¹⁸⁸ At trial, the city claimed that its use of eminent domain was proper because the neighborhood was a "deteriorating area" as defined by a Norwood city ordinance, and the trial court deferred to the city council's determination.¹⁸⁹

The Ohio Supreme Court in *Norwood* reaffirmed its prior authorizations of blight elimination takings, noting that "[a]lmost all courts, including this one, have consistently upheld takings that seized slums and blighted or deteriorated private property for redevelopment, even when the property was then transferred to a private entity, and continue to do so."¹⁹⁰ The court held, however,

that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of [the Ohio Constitution]. In light of that holding, any taking based solely on financial gain is void as a matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community.¹⁹¹

188. *Id.* at 1124–25.

189. *Id.* at 1126. The City of Norwood defines "deteriorating area" as follows:

[A]n area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area, but which, because of incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangements, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate or is in danger of deteriorating into a blighted area.

NORWOOD, OHIO, ORDINANCES § 162.02(c) (2006), as quoted in *Norwood*, 853 N.E.2d at 1125 n.5. The Norwood Code includes a separate definition of a "[s]lum, blighted or deteriorated area," which the trial judge concluded appellants' neighborhood did not satisfy. See *Norwood*, 853 N.E.2d at 1126; NORWOOD, OHIO, ORDINANCES § 163.02(b).

190. *Norwood*, 853 N.E.2d at 1135. According to the court, its decisions in *AAAA Enterprises* and *Bruestle* "properly employed an elastic public-use analysis to promote eminent domain as an answer to clear and present public-health concerns, permitting razing and 'slum clearance.'" *Id.*

191. *Id.* at 1142. The Ohio Supreme Court expressed its agreement with "the analysis by the Supreme Court of Michigan in *Hathcock*, 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*." *Id.* at 1141 (citation omitted). As the court noted, "[i]n addressing the meaning of the public-use clause in Ohio's Constitution, we are not bound to follow the United States Supreme

The court proceeded to declare the phrase “deteriorating area” in the Norwood ordinance void for vagueness and an unconstitutional standard for takings “because it inherently incorporates speculation as to the future condition of the property into the decision on whether a taking is proper rather than focusing that inquiry on the property’s condition at the time of the proposed taking.”¹⁹² The court concluded that “[b]ecause Norwood may not justify its taking of appellants’ property on either the basis that the neighborhood was deteriorating or on the basis that the redeveloped area would bring economic value to the city, there is no showing that the taking was for public use.”¹⁹³

The *Norwood v. Horney* opinion definitively places Ohio within Justice O’Connor’s public use paradigm, and there is no proposed legislation in Ohio that would more significantly curtail eminent domain activity than did the *Norwood* ruling. Property rights advocates in Ohio may be prone to mistake *Norwood* for the “manna from heaven”¹⁹⁴ that they desired. While *Norwood* represents an improvement of Ohio’s eminent domain law, Ohio property rights advocates should seek the prohibition of both economic development takings and blight elimination takings.

4. *Wisconsin*

Wisconsin is the fourth and final state in the Great Lakes region to fall within Justice O’Connor’s public use paradigm. Under the Wisconsin Constitution, “[t]he property of no person shall be taken for public use without just compensation.”¹⁹⁵ Wisconsin law

Court’s determinations of the scope of the Public-Use Clause in the federal Constitution.” *Id.* at 1136.

192. *Id.* at 1146.

193. *Id.* In its opinion, the court cited a variety of authorities articulating the importance of property rights. Ohio, for example, “has always considered the right of property to be a fundamental right.” *Id.* at 1129. Furthermore, “[t]he rights related to property, i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.” *Id.* at 1128 (citation omitted). “In light of these Lockean notions of property rights,” the court stated, “it is not surprising that the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual’s ‘inalienable’ property rights.” *Id.* at 1129.

194. See *Hands Off Our Homes*, *supra* note 4.

195. WIS. CONST. art. I, § 13.

authorizes almost all Wisconsin governmental entities¹⁹⁶ and many private corporations¹⁹⁷ to exercise the power of eminent domain. Cities with a population of 150,000 or more may exercise eminent domain for “slum elimination,” “blighted area redevelopment,” and “any other municipal purposes.”¹⁹⁸ On March 30, 2006, a law was enacted prohibiting condemnations of non-blighted property “if the condemnor intends to convey or lease the acquired property to a private entity.”¹⁹⁹

The definition of “public use” in Wisconsin is more restrictive than the definition adopted by the courts of most of the other Great Lakes states. As the Wisconsin Supreme Court stated in 1870: “It appears, then, that the public use consists in the possession, occupation and enjoyment of the land itself by the public, or public agencies, and not in any incidental benefits or advantages which may accrue to the public from enterprises of this nature.”²⁰⁰ In 1954, the Wisconsin Supreme Court affirmed its commitment “to the strict construction of public use” and cited with favor another court’s restrictive interpretation of the public use:

“[P]ublic use,” in our Constitution, means a more intimate relationship between the public and an item of property which has been acquired under the power of eminent domain than is denoted by terms such as “public benefit” and “public utility.” “Public use” demands that the public’s use and occupation of the property must be direct. . . . It must be the public which will use and occupy the property upon its acquisition.²⁰¹

196. See WIS. STAT. ANN. § 32.02 (West Supp. 2006). See generally RICHARD A. LEHMANN ET AL., LAND USE PLANNING AND EMINENT DOMAIN IN WISCONSIN (1997).

197. Such private corporations include railroads, telecommunications corporations, private utilities, and oil and gas companies. WIS. STAT. ANN. § 32.02.

198. WIS. STAT. ANN. § 32.51(1) (West 2006). The term “city” in the statute refers to “1st class cit[ies],” which are defined elsewhere as “cities of 150,000 population and over.” *Id.* § 32.50; WIS. STAT. ANN. § 62.05(1)(a) (West 2000).

199. Act of Mar. 30, 2006, No. 233, 2005 Wis. Sess. Laws 915 (codified at WIS. STAT. ANN. § 32.03(6) (West Supp. 2006)).

200. *Whiting v. Sheboygan & Fond Du Lac R.R.*, 25 Wis. 167, 195 (1870) (emphasis omitted).

201. *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362, 372–73 (Wis. 1954) (emphasis omitted) (quoting *Foeller v. Hous. Auth. of Portland*, 256 P.2d 752, 766 (Ore. 1953)).

Despite this restrictive definition, Wisconsin courts are very deferential to legislative determinations regarding whether or not a proposed use is public in nature.²⁰²

Blight elimination constitutes a public use in Wisconsin. Wisconsin's Blight Elimination and Slum Clearance Act²⁰³ provides for the creation of redevelopment authorities with the power to acquire blighted areas through the exercise of eminent domain.²⁰⁴ Non-blighted property may be condemned along with blighted property so long as acquisition of the non-blighted property is "reasonably necessary" for redevelopment of the larger targeted area.²⁰⁵ Furthermore, once a slum is condemned, it may subsequently be sold to private entities, and "[t]he fact that the property may not long remain in the ownership of the city does not in itself indicate that the use will not be a public use and that the city may not be invested with the power of eminent domain in acquiring it."²⁰⁶

Despite Wisconsin's sweeping statutory grants of condemnation power to governmental entities and private corporations, the courts' restrictive interpretation of the public use and the new law prohibiting condemnations of non-blighted property for transfer to private parties bar takings solely for economic development purposes. Because the Wisconsin courts consider blight elimination to be a public use, however, Wisconsin falls within Justice O'Connor's

202. *See* Chi. & Nw. Ry. v. Morehouse, 87 N.W. 849, 851 (Wis. 1901) (noting that "the determination of whether a particular use shall be deemed public . . . is for the legislature; and its judgment, when expressed, is deemed to be beyond question by any judicial tribunal if there is any reasonable ground to support it"); Ford v. Chi. & Nw. R.R., 14 Wis. 609, 617 (1861) (noting that "[t]he propriety of taking property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as may be prescribed").

203. WIS. STAT. ANN. § 66.1333 (West Supp. 2006). The Blight Elimination and Slum Clearance Act represents "a legislative determination that the acquisition, clearance, and redevelopment of blighted areas is a public use." *Grunwald v. Cmty. Dev. Auth. of W. Allis*, 551 N.W.2d 36, 41 (Wis. Ct. App. 1996). Indeed, the Wisconsin legislature, "by terms of the statute itself . . . has found and declared that the acquisition of property in such areas by eminent domain for the purposes of eliminating [blight] and to prevent recurrence . . . are public uses and purposes for which property may be acquired [by eminent domain]." *David Jeffrey Co.*, 66 N.W.2d at 371 (emphasis omitted).

204. WIS. STAT. ANN. § 66.1333(5)(a)(3) (West Supp. 2006).

205. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 288 N.W.2d 85, 92-93 (Wis. 1980).

206. *David Jeffrey Co.*, 66 N.W.2d at 375. In fact, the subsequent "sale and leasing of the land to private interests is incidental to the accomplishment of the primary purpose [of blight clearance]." *Id.*

public use paradigm.²⁰⁷ Property rights advocates in Wisconsin should seek to enshrine in Wisconsin law an understanding of the public use that comports with Justice Thomas's public use paradigm, in which economic development takings and blight elimination takings are prohibited.

C. *Summary of Findings from the Great Lakes States*

The analysis of the understanding of the public use in the Great Lakes region reveals that even accounting for the laws enacted in response to the *Kelo* ruling, four states (Illinois, Indiana, New York, and Pennsylvania) fall within Justice Stevens's public use paradigm and four states (Michigan, Minnesota, Ohio, and Wisconsin) fall within Justice O'Connor's public use paradigm. Furthermore, all of the *proposed legislation* in the Great Lakes states is representative of either Justice Stevens's or Justice O'Connor's public use paradigm. None of the Great Lakes states affords its citizens proper protection from eminent domain abuse, and only the proposed constitutional amendments in Indiana²⁰⁸ and New York²⁰⁹ reflect Justice Thomas's public use jurisprudence.

CONCLUSION

Kelo was not produced in a jurisprudential vacuum. Rather, it was a logical extension of the Court's prior rulings in *Berman* and *Midkiff* and reflected an understanding of the public use that is exemplified in the statutes and court decisions of half of the Great Lakes states. The wave of public revulsion²¹⁰ to the *Kelo* ruling is welcome, but property rights advocates should seek legislative responses that fully address the errors of modern public use jurisprudence. Indeed, Grover Norquist's "manna from heaven" has yet to fall for property rights advocates in any of the Great Lakes states. The government's use of its eminent domain authority for economic development purposes is unacceptable. Also objectionable,

207. Takings for private benefit in Wisconsin are very rare. Between 1998 and 2002, there was only a single reported condemnation with private benefits. BERLINER, *supra* note 141, at 215.

208. See *supra* notes 102–04 and accompanying text.

209. See *supra* note 121 and accompanying text.

210. See *Hands Off Our Homes*, *supra* note 4.

however, is the government's use of its eminent domain authority for blight elimination. While the state has the authority to regulate property under its police power, owners of blighted property must be given the opportunity to conform with regulatory standards before their property is condemned, and blighted property should be condemned only if there are no less restrictive means available for eliminating the blight. The abolition of blight elimination takings would also prevent a broad definition of blight from enabling a state to use blight elimination as a facade for economic development takings and would prevent the condemnation of non-blighted property that happens to fall within a larger redevelopment area.

Most Americans agree that laws embodying Justice Stevens's public use paradigm do not adequately protect property rights.²¹¹ However, property rights advocates must recognize and educate their fellow citizens and elected officials that laws embodying Justice O'Connor's public use paradigm also fail to protect property rights adequately because they sanction blight elimination takings. Of *Kelo's* three public use paradigms, only Justice Thomas's paradigm adequately protects, in the words of Blackstone, the "sacred and inviolable rights of private property."²¹²

211. See *supra* note 3 and accompanying text.

212. 1 BLACKSTONE, *supra* note 46, at *135.