# Balancing Blight: Using the Rules Versus Standards Debate to Construct a Workable Definition of Blight

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*The Supreme Court's controversial 2005 decision in* Kelo v. City of New London *held that states could use their power of eminent domain to condemn private property and transfer it to private developers for the purpose of economic development. In the aftermath of this decision, states rapidly amended their eminent domain laws in an effort to strike an appropriate balance between protecting private property rights and promoting the greater good through beneficial redevelopment. In large part, these reforms prohibited the exercise of eminent domain if the public purpose supporting the taking was economic development. However, the efficacy of these reforms at protecting individual property rights was undercut by broad exceptions for blight clearance, which the Supreme Court held a constitutional public purpose in its 1954 decision in* Berman v. Parker. *In many states, blight is defined according to vague and subjective criteria that make it possible to label almost any property as blighted. This Note uses the traditional legal debate over rules versus standards to propose a framework for defining blight. Specifically, it explores the pros and cons of rules and standards, as well as simplicity and complexity, in lawmaking. Applying the arguments in favor of each within the context of eminent domain, this Note argues that defining blight with the framework of a "complex rule" will allow states to properly balance the interests in protecting individual property rights and promoting the greater good.*

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## I. INTRODUCTION

On November 9, 2009, the pharmaceutical giant Pfizer announced that it was closing down its operations in New London, Connecticut.[1] In closing, Pfizer left behind its 750,000 square-foot headquarters and "an adjacent swath of barren land."[2] Four years earlier, this barren tract had been "the crux of an epic battle over eminent domain"[3] that culminated with the Supreme Court's decision in *Kelo v. City of New London*.[4] By a five to four majority, the Court held that local governments could use their power of eminent domain to take private property, including homes, to promote economic development.[5] Thus, the decision paved the way for this now barren plot of land to be cleared of dozens of homes,[6] many of which had been there for decades,[7] so that an urban village consisting of a "waterfront conference hotel, a marina, housing, and commercial and office space" could be built.[8] This never materialized, however, because the private development firm holding the exclusive rights to develop the land was unable to secure financing.[9]

Coming "after a long period of relative dormancy in the field of eminent domain,"[10] *Kelo* sparked a tremendous public backlash from critics who accused the government of "abusing its power of eminent domain by taking homes and small businesses from the

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1. *See* Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, Nov. 13, 2009, at A1.
2. *Id.*
3. *Id.*
4. 545 U.S. 469 (2005).
5. *See id.* at 483–85.
6. McGeehan, *supra* note 1.
7. Kelo v. City of New London, 843 A.2d 500, 511 (Conn. 2004).
8. *See Kelo*, 545 U.S. at 474; David Moberg, *Imminent Domination*, IN THESE TIMES (Oct. 12, 2005), http://www.inthesetimes.com/article/2340/imminent_domination.
9. Katie Nelson, *Conn. Land Taken from Homeowners Still Undeveloped*, BREITBART, Sept. 25, 2009, http://www.breitbart.com/article.php?id=D9AU92VG0&show_article=1. Susette Kelo, the lead plaintiff in *Kelo*, moved across the Thames River to Groton, Connecticut. *Id.* After the Supreme Court's decision in *Kelo*, she sold her New London property to the state for $442,000, and sold her house for one dollar to a preservationist who moved it two miles away. *Id.* The pink house still stands in its new location as "a bright-pink symbol of the divisive dispute that drew so much attention to New London." McGeehan, *supra* note 1.
10. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 493 (2006).

less affluent or less powerful and transferring them to big corporations."[11] In the midst of this public backlash, states rushed to amend their eminent domain laws to prevent future takings like the one at issue in *Kelo*.[12] However, while many states passed eminent domain reform bills declaring that economic development was not a valid public use for the exercise of eminent domain, many of these bills were undermined by broad exceptions for blight clearance,[13] which the Supreme Court had held was a public use in its 1954 decision *Berman v. Parker*.[14]

While blight, in common parlance, connotes poverty, especially urban poverty,[15] it is "rarely defined with any precision."[16] As a result, in many states, blight clearance can be used as a backdoor to condemn private property that would otherwise be condemned on an economic development rationale.[17] Thus, many post-*Kelo* reforms have done little to quell the fears of critics that the power of eminent domain "has been abused, overused, and sold to the highest-bidding special interest . . . ."[18]

Ultimately, the efficacy of post-*Kelo* reforms in protecting property owners against eminent domain abuse hinges on how states define blight. This Note approaches the challenge of defining blight from the perspective of the traditional legal debate over rules versus standards. Part II begins by outlining the history of eminent domain and blight in the United States. Part III then re-characterizes the struggle to define blight as a choice between "complex standards," "simple rules" and "complex rules," and examines states that have implemented each kind of definition. Lastly, Part IV argues that blight should be defined in the

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11. Moberg, *supra* note 8.

12. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2102 (2009) ("The Kelo backlash probably resulted in more new state legislation than any other Supreme Court decision in history.").

13. *See infra* notes 75–82 and accompanying text.

14. 348 U.S. 26 (1954).

15. *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 370 (2007).

16. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 305–06 (2004).

17. *See* Dana, *supra* note 15, at 370 ("State statutory definitions of blight are in large measure very vague, and allow for a wide range of fully occupied residences and economically viable businesses to be designated as part of a blight district."); Somin, *supra* note 12, at 2120 (describing broad blight exceptions as "by far the most common factor undermining the potential effectiveness of post-*Kelo* reform laws").

18. Cohen, *supra* note 10, at 495.

framework of a "complex rule," which will allow state governments to protect individual property rights without undermining the potential beneficial uses of eminent domain.

## II. THE HISTORY OF BLIGHT

### A. BLIGHT CLEARANCE AS A PUBLIC USE

Eminent domain is the "ancient"[19] and "inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."[20] In the United States, the government's power of eminent domain derives from the Fifth Amendment of the United States Constitution, which states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[21] The Fifth Amendment applies to state governments through the Fourteenth Amendment.[22] Thus, both federal and state governments must satisfy two requirements — "public use" and "just compensation" — in order to exercise the power of eminent domain.[23]

While the Supreme Court has provided a reasonably clear definition of "just compensation," holding that it is equivalent to market value,[24] a precise definition of "public use" has proven more elusive.[25] In addition to traditional public uses of property such as "schools, roads and other public works" that involve the

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19. Anthony Seitz, Comment, *The Property Rights Protection Act: An Overview of Pennsylvania's Response to* Kelo v. City of New London, 18 WIDENER L.J. 205, 206 (2008).

20. BLACK'S LAW DICTIONARY 601 (9th ed. 2009).

21. U.S. CONST. amend. V.

22. *See* U.S. CONST. amend XIV, § 1; Olga Kotlyarevskaya, *"Public Use" Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development*, 5 CONN. PUB. INT. L.J. 197, 199–200 (2006).

23. Kotlyarevskaya, *supra* note 22, at 200.

24. *Olson v. United States*, 292 U.S. 246, 255 (1934) (holding that just compensation requires the payment in money of the "market value of the property at the time of the taking . . . ."). Fair market value has remained the federal legal standard for just compensation since *Olson*. *See* James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 938–40 (2006).

25. *See* Kotlyarevskaya, *supra* note 22, at 200–01 ("While the 'just compensation' requirement is fairly clear, the courts have yet to agree on the precise meaning of the term 'public use.'").

public actually using the property,[26] the Supreme Court has long adhered to an expansive interpretation in which "public use" requires only a "public purpose" or "public benefit."[27] Nevertheless, the Supreme Court has repeatedly stated that the government does not have the power to take property from one individual and give it to another for a use that is purely private."[28] As early as 1798, the Supreme Court described such takings as "against all reason and justice."[29]

Despite prohibiting purely private takings, however, the Supreme Court has upheld the use of eminent domain in situations where private property is taken from one private party and given to another, so long as the private benefit is incidental to a public purpose.[30] In *Berman v. Parker*, the Supreme Court in 1954 explicitly confirmed that blight clearance is one such public purpose.[31] *Berman* involved a massive redevelopment project in the District of Columbia that "would lead to the reconstruction of almost the entire southwest quadrant of the city."[32] Pursuant to the District of Columbia Redevelopment Act of 1945,[33] Congress made a "legislative determination" that the acquisition of certain property was necessary to clear "substandard housing and blighted areas" which were "injurious to the public health, safety, morals, and welfare."[34] After acquisition, the District of Columbia slated some of the taken property to be "leased or sold to private entities to facilitate the project."[35] The plaintiff, a department store owner, challenged the taking on the bases that his property was not slum housing, and that it was unconstitutional for the

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26. Theodore C. Taub, *Post*-Kelo *State Constitutional and Legislative Reforms*, SN005 A.L.I.-A.B.A. 531, 539 (2007).

27. Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 331–32 (2010); *see also* Mount Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established.").

28. *See* Cohen, *supra* note 10, at 494.

29. Calder v. Bull, 3 U.S. 386, 388 (1798).

30. *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Cohen, *supra* note 10, at 494, 515.

31. 348 U.S. at 33–34.

32. Wendell E. Pritchett, *The Public Menace of "Blight": Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 41 (2003).

33. District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790 (1946).

34. *Berman*, 348 U.S. at 28.

35. Cohen, *supra* note 10, at 511. *See also Berman*, 348 U.S. at 30.

government to condemn his property and then transfer it to a private agency.[36]

The Supreme Court rejected the plaintiff's challenge, holding that eliminating "[m]iserable and disreputable housing conditions" was within Congress's "police powers," and thereby satisfied the public use requirement.[37] In reaching this conclusion, the Court exhibited extreme deference to Congress as the legislative body with the authority to exercise police powers over the District of Columbia.[38] Rather than attempting to trace the "outer limits" of the police power,[39] the Court instead held that the definition of police power was itself a legislative determination.[40] Therefore, it followed that "if those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[41]

Once the Court concluded that a public purpose had been established, it further held that "the means of executing the project are for Congress and Congress alone to determine."[42] Therefore, it did not matter to the Court whether the plaintiff's property was itself blighted because Congress had the authority to "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis."[43] Similarly, that the plaintiff's property was ultimately to be transferred to private entities did not invalidate the taking because it was within Congress's discretion to determine whether the public end would be "as well or better served through an agency of private enterprise than through a department of government."[44]

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36. *Berman*, 348 U.S. at 31.
37. *Id*. at 31–32.
38. *Id.*
39. *Id.* at 32 (stating that "[a]n attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts.").
40. *Id.*
41. *Id.* at 33.
42. *Id.*
43. *Id.* at 34.
44. *Id.* at 33–34.

## B. THE *KELO* DECISION: ECONOMIC DEVELOPMENT AS PUBLIC PURPOSE

While in *Berman* the Supreme Court upheld a private-to-private taking on the grounds that any resulting private benefit was ancillary to the public purpose of blight clearance, in its 2005 decision *Kelo v. City of New London*, the Court, by a five to four vote, upheld a private-to-private taking that did not involve blighted property.[45] Instead, the public purpose supporting the taking was economic development.[46]

In *Kelo*, the City of New London, Connecticut, which had been suffering through "[d]ecades of economic decline,"[47] had approved an economic development plan involving a "ninety-acre parcel of land known as the Fort Trumbull area."[48] The city designated the New London Development Corporation ("NLDC") as "its development agent in charge of implementation."[49] The NLDC intended that the plan capitalize on the arrival of a $300 million Pfizer research facility that was to be built on a site adjacent to

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45. 545 U.S. 469 (2005).

46. *See id.* at 483–84 ("Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was successfully distressed to justify a program of economic rejuvenation is entitled to our deference.").

47. *Id.* at 473. Specifically, in 1990 a state agency designated New London as a "distressed municipality." *Id.* "In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1500 people. In 1998, the City's unemployment rate was nearly double that of [Connecticut], and its population of just under 24,000 residents was at its lowest since 1920." *Id.*

48. Kotlyarevskaya, *supra* note 22, at 207. The Fort Trumbull area is located on a peninsula jutting into the Thames River. *Id.* at 207 n.59. "The Fort Trumbull area is composed of approximately 115 privately owned properties and thirty-two acres of land that the naval facility had occupied in the past." *Id.*

49. *Kelo*, 545 U.S. at 475; Kotlyarevskaya, *supra* note 22, at 207. The NLDC is a private non-profit entity, established to help New London plan its economic development. Kotlyarevskaya, *supra* note 22, at 207. Connecticut law allows a municipality to designate a non-profit development corporation as its development agency. *See* CONN. GEN. STAT. § 8-188 (2005) ("Any municipality which has a planning commission is authorized, by vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency . . . ."). Connecticut law also authorizes the NLDC to exercise the power of eminent domain. *See* CONN. GEN. STAT. § 8-193(b)(1) ("The development agency may, with the approval of the legislative body in accordance with this subsection, and in the name of the municipality, acquire by eminent domain real property located within the project area . . . .").

Fort Trumbull.[50] The redevelopment plan was to create, among other improvements, a waterfront conference hotel, an urban village with restaurants and shops, a marina, new residences, a Coast Guard Museum, and office and retail space.[51] In total, the redevelopment aimed "to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city . . . ."[52]

To assemble the land required for the redevelopment, the NLDC purchased property from willing sellers, and planned to use the power of eminent domain to secure the remainder of the required property.[53] To this end, the NLDC initiated condemnation proceedings against Susette Kelo and other property owners in the redevelopment area.[54] There were no allegations that any of the properties targeted for taking were blighted or in poor condition.[55] Instead, the NLDC condemned the properties "only because they happen to be located in the development area."[56]

Kelo and eight other property owners sued the city, arguing that the taking of their properties violated the "public use" requirement of the Fifth Amendment.[57] Specifically, the property owners urged the adoption of a "new bright-line rule that economic development does not qualify as a public use" because "using eminent domain for economic development impermissibly blurs the boundary between public and private takings."[58] The Supreme Court disagreed, affirming that the "public use" requirement is satisfied when the taking serves a "public purpose."[59] Noting that "economic development is a traditional and long-accepted function of government," the Court found that the rede-

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50. *Kelo*, 545 U.S. at 473–74.

51. *Id.* at 474.

52. *Id.* at 473 (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004) (internal quotation marks omitted)).

53. *Kelo*, 545 U.S. at 472; *see also supra* note 49 and accompanying text.

54. *See Kelo*, 545 U.S. at 472; Kotlyarevskaya, *supra* note 22, at 208.

55. *See Kelo*, 545 U.S. at 475.

56. *Id*.

57. *Id.* at 475–76. *See also* Kotlyarevskaya, *supra* note 22, at 208 (noting that "Kelo had lived in the Fort Trumbull since 1997, made extensive improvements to her house, and prize[d] its water view. Other owners who were challenging the NLDC's action were born in the Fort Trumbull and had lived there for their entire lives." (internal citations omitted)).

58. *Kelo*, 545 U.S. at 484–85.

59. *Id*. at 479–80.

velopment plan "unquestionably serves a public purpose."[60] Therefore, even though the city of New London was not confronted with the need to clear blight, the Court held that the "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[61]

### C. WIDESPREAD DISAGREEMENT WITH THE *KELO* MAJORITY

Although *Kelo* was consistent with *Berman* in its deference to legislative determinations and its broad interpretation of the public use requirement, the decision was nonetheless controversial.[62] In dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, expressed grave concerns about the breadth of the majority's holding.[63] According to O'Connor, "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process."[64] Thus, in O'Connor's view, "[t]he specter of condemnation hangs over all property" because "who among us can say she already makes the most productive or attractive possible use of her property?"[65] Making the decision even more troubling to O'Connor was that the

> fallout from [*Kelo*] will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the gov-

60. *Id*. at 484.
61. *Id*. at 483.
62. *See* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 726 (2006).
63. *See generally Kelo*, 545 U.S. at 494–505 (O'Connor, J., dissenting).
64. *Id*. at 494. Justice O'Connor illustrates her point with a series of troubling examples. According to O'Connor, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at 503.
65. *Id.*

> ernment now has license to transfer property from those with fewer resources to those with more.[66]

Justice O'Connor's concerns are legitimate.[67] Allowing private parties to indirectly use the state's power of eminent domain "systematically advantages large market players," such as real estate developers and corporations, over individuals with fewer resources whose property is targeted for a taking.[68] Because local governments are susceptible to the influence of wealthy private developers who may promise more jobs and tax revenue, "private parties can use their superior legal sophistication and financial resources to co-opt the eminent domain process" for their private advantage.[69] In addition, eminent domain has historically imposed a "disproportionate impact on racial and ethnic minorities . . . the economically disadvantaged and [the] elderly."[70]

The impassioned public reaction to *Kelo* fell almost entirely in line with Justice O'Connor's position. Two national surveys from

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66. *Id*. at 505.

67. *See, e.g.*, Cohen, *supra* note 10, at 547–49; Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 34–41 (2006); Moberg, *supra* note 8.

68. Kelly, *supra* note 67, at 39–41.

69. *Id.* Moreover, under financing schemes such as tax increment financing (TIF), "developers can avoid paying taxes, as well as avoid paying full price for newly acquired property." *Id.* at 38 n.188. *See generally* Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213 (2005) (defining tax increment financing and tracing its history). "In *Kelo*, for example, the private beneficiary of the state's use of eminent domain negotiated a ninety-nine year lease with the redevelopment corporation for one dollar per year." Kelly, *supra* note 67, at 37. Basic principles of supply and demand dictate that when a private party can acquire a good at less than full cost, it will demand the good "to a socially excessive degree." *Id.* at 38. By combining TIF with the government's power of eminent domain, "private developers can benefit from the state's use of eminent domain without bearing any of the attendant costs." *Id.* As a result, private developers "have a socially perverse incentive to capture the eminent domain process for their own advantage." *Id*.; *see also* Tomme, *supra*, at 215 ("When a city condemns private property for a TIF development only to turn it over to a private developer, the government action becomes suspect and raises constitutional and public policy issues.").

70. Kelly, *supra* note 67, at 40–41. The history of eminent domain shows a pattern of discrimination against racial and ethnic minorities. *Id.* at 40. In fact, urban renewal projects and the displacement of African-Americans were so intertwined that they have been called "negro removal" projects. *See* Cohen, *supra* note 10, at 548; Nicole Garnette, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 952–53 (2003); Kelly, *supra* note 67, at 40. Specifically, between 1949 and 1963, 63% of all families displaced by urban renewal whose race was known were nonwhite, and of these families, 56% of nonwhites and 38% of whites had incomes low enough to qualify for public housing. *Id.* at 40 n.197.

the fall of 2005 revealed that 81% and 95% of respondents opposed the Court's decision in *Kelo*.[71] The decision was opposed by "77% of men, 84% of women, 82% of whites, 72% of African-Americans, 80% of Hispanics. . . . 79% of Democrats, 85% of Republicans, and 83% of Independents."[72] The public opposition was also quite deep, with 63% of respondents indicating that they "not only disagreed with the decision, but . . . did so 'strongly.'"[73] In fact, a Wall Street Journal survey found that protecting "private property rights" was the number one legal issue that concerned the public after *Kelo*.[74]

## D. THE BLIGHT EXCEPTION

In the midst of the overwhelming public opposition to *Kelo*, many state legislatures acted quickly to amend their states' eminent domain laws.[75] In the months immediately following *Kelo*, thirty-eight states considered more than ninety-eight bills that aimed to limit the scope of eminent domain.[76] By the fall of 2006, twenty-four states had enacted legislation in response to *Kelo*,[77] and by November 2009, nineteen more states had enacted post-*Kelo* reforms.[78]

Many of these reforms facially precluded the sort of taking that was at issue in *Kelo* by either specifying that economic development was not a public use under state law, or by outlawing private-to-private takings.[79] However, the effectiveness of these

71. Somin, *supra* note 12, at 2109.
72. *Id.* at 2109–10.
73. *Id*. at 2110.
74. John Harwood, *Poll Shows Division on Court Pick*, WALL ST. J., July 15, 2005, at A4; *see also* Alberto Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561, 595–96 (2008).
75. *See supra* note 12.
76. Sandefur, *supra* note 62, at 727.
77. *See id*.
78. *See* McGeehan, *supra* note 1.
79. *See, e.g.*, ALASKA STAT. § 09.55.240(d) (2011) ("The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes."); MO. ANN. STAT. § 523.271(1) (2006) ("No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes."); NEV. REV. STAT. ANN. § 37.010(2) (2007) ("Notwithstanding any other provision of law and except as otherwise provided in this subsection, the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another private person or entity."); *see*

reforms in actually preventing *Kelo*-style takings hinges largely on how the state legislatures defined blight.[80] Because blight clearance, even without an economic development motive, is itself a "public use" under the Fifth Amendment,[81] a broad definition of blight can have the effect of allowing economic development takings to persist under the name of blight takings.[82]

State legislatures have varied in how they handle blight post-*Kelo*, with ten states redefining blight according to specific criteria,[83] and two states, Florida[84] and New Mexico,[85] prohibiting blight takings altogether. However, as of early 2009, eighteen state legislatures have enacted post-*Kelo* reform laws whose effects are largely undermined by broad and subjective definitions of blight "that make it possible to include almost any property in that category."[86] For example, in Colorado, Missouri, Montana, Nebraska, North Carolina, Ohio, Texas, Vermont, and West Virginia, blight is defined to include any obstacle to "sound growth" or an "economic or social liability."[87] Because any obstacle to economic development could be considered an "economic or social liability," such a definition of blight is broad enough to justify almost any taking that would otherwise be permissible on an economic development rationale.[88] Such broad definitions of blight are "by far the most common factor undermining the potential effectiveness of post-*Kelo* reform[s],"[89] and do little to ease Justice

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*generally* Lopez, *supra* note 74, at 591–96 ("[L]egislatures did not enact reforms that gutted the power of eminent domain; they opted for measures that took a more middle-of-the-road approach by barring the specific exercises of eminent domain that incited the anti-*Kelo* public outcry."); Somin, *supra* note 12, at 2115–43 (surveying post-*Kelo* reforms in place as of June 2009).

80. *See* Somin, *supra* note 12, at 2120–31.

81. *See supra* notes 37–42 and accompanying text.

82. *See* Somin, *supra* note 12, at 2120 ("By far the most common [type of ineffective post-*Kelo* reform] are laws that forbid takings for economic development but in fact allow them to continue under another name, such as 'blight' or 'community development' condemnations.").

83. *Id.* at 2139–43. Alabama, Georgia, Idaho, Indiana, Michigan, New Hampshire, Virginia, Wyoming, Pennsylvania and Minnesota are the ten states that have coupled bans on economic development takings with more restrictive definitions of blight. *See id.*

84. FLA. STAT. § 73.014 (2006)

85. Act of Apr. 3, 2007, 2007 N.M. Laws 3873, ch. 330, § 3-18-10(B)(3) (codified in scattered sections of N.M. STAT).

86. *See* Somin, *supra* note 12, at 2120–38.

87. *See id.* at 2122–24.

88. *See id.* at 2124.

89. *Id.* at 2120.

O'Connor's concerns that eminent domain will be used by the politically powerful to exploit the politically weak.[90]

The procedures for making and reviewing blight determinations raise further concerns for property owners. Typically, a state legislature confers the power of eminent domain upon development agencies (which can be public or private corporations), individuals, or even foreign corporations.[91] These development agencies are unelected and unaccountable to the public.[92] But, as *Berman* illustrates, because blight declarations are considered legislative determinations, they enjoy considerable deference from the courts, even when made by development agencies.[93] In many states, "judicial review is generally limited to a procedural review"[94] that places the burden on the "property owner to show that the governing body's decision was arbitrary, or induced by fraud, collusion, or bad faith."[95] Satisfying this burden can be very expensive for property owners, who may need to personally commission blight studies.[96] As a result, property owners can rarely prevail absent a showing of corruption.[97]

## E. THE BENEFITS OF EMINENT DOMAIN

Although broad blight exceptions can dramatically undermine the efficacy of post-*Kelo* reforms in their ability to protect property owners against eminent domain abuse, it does not necessarily follow that blight should be narrowly defined. The power of emi-

90. *See supra* notes 63–70 and accompanying text.

91. *See* Kotlyarevskaya, *supra* note 22, at 202.

92. *See id.*; Lavine & Oder, *supra* note 27, at 339, 371.

93. *See* Kotlyarevskaya, *supra* note 22, at 202–03; Lavine & Oder, *supra* note 27, at 339; George Lefcoe, *Redevelopment Takings after* Kelo*: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 812 (2008) (describing the purpose of judicial review in condemnation cases as "simply to consider plausible allegations that the taking reeks of cronyism, corruption or favoritism, and that it is devoid of redeeming features serving the public good."); Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing upon the Land?*, 74 MO. L. REV. 301, 318 (2009) ("In most states . . . the blight finding . . . will stand, absent a showing in court that the decision is 'so arbitrary and unreasonable as to amount to an abuse of the legislative process.'" (quoting Tierney v. Planned Indus. Expansion Auth. of Kansas City, 742 S.W.2d 146, 150 (Mo. 1987) (en banc))).

94. *See* Lowenstein, *supra* note 93, at 318.

95. *Id*.

96. *Id.*

97. *See id.* at 304 (stating that "[u]nder the current deferential standard, judicial review of a blight declaration is rarely more than a rubber stamp of the finding."); *see also* Sandefur, *supra* note 62, at 725.

nent domain has tremendous potential as a tool for the "greater good."[98] For example, eminent domain can be used for "beneficial takings" which facilitate development of many important projects, such as hospitals, museums, and sports arenas.[99] Similarly, eminent domain can have a profound impact in redeveloping economically disadvantaged areas.[100]

Eminent domain's importance as a tool for facilitating beneficial takings and meaningful redevelopment in economically disadvantaged areas derives from its ability to combat hold-out problems[101] in "thin markets," where "the property for a proposed project is scarce or uniquely suited to the project."[102] Typically, prior to the use of eminent domain, officials of a condemning agent use the implicit or explicit threat of eminent domain to acquire property through voluntary transfers.[103] Absent eminent domain, landowners in thin markets would have an incentive to hold out for a premium because they control "rare and essential commodit[ies]."[104] In those scenarios, socially useful projects may not be completed without eminent domain because the hold-out problem would make acquisition costs prohibitively expensive.[105] For example, in the 1980s, the New York State Urban Development Corporation sought to redevelop Times Square in New York[106] in response to "rampant crime, physical blight and social problems that plagued the area."[107] Because the area consisted of sixty separately owned, small and underutilized lots, the redeve-

98. *See* Taub, *supra* note 26, at 535.

99. *See* Cohen, *supra* note 10, at 565; Scott J. Kennelly, Note, *Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved*, 60 FLA. L. REV. 471, 482–83 (2008).

100. *See* Lowenstein, *supra* note 93, at 304.

101. *See* Cohen, *supra* note 10, at 534.

102. *See id.* at 496–98, 534.

103. *Id.* at 565–66.

104. *Id.* at 534–35.

105. *See id*; Moberg, *supra* note 8 ("[E]ven though eminent domain should be the last resort, it is often necessary to avoid a single hold-out from blocking a worthy public purpose.").

106. *See* Nasim Farjad, Note, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 FORDHAM L. REV. 1121, 1132–33, 1159–60 (2007).

107. Jeffrey D. Friedlander, *Eminent Domain in the City: From Metrotech to 42nd Street*, N.Y. L.J., Mar. 28, 2005, at 3.

lopment would have been nearly impossible without the use of eminent domain.[108]

Since redevelopment, Times Square has been transformed from a "showcase for urban decay and blight"[109] to a major tourist destination, which, in the 2003–2004 season, attracted 11.6 million people to Broadway shows.[110] The area is now home to many apartment complexes, theaters, media companies, law firms and financial services companies, and many restaurants and other locally owned shops.[111] Additionally, the Times Square revitalization has resulted in the generation of jobs and increases in tax revenues.[112] "According to a 2007 economic impact report released by the Times Square Alliance, the Times Square revitalization has resulted in . . . $1.1 billion in annual tax revenues for New York City and $1.3 billion in annual tax revenues for New York State."[113]

Scenarios like the redevelopment of Times Square illustrate that any changes to definitions of blight must be careful not to preclude such beneficial uses of eminent domain. Defining blight thus "presents a difficult balancing problem for [state] legislators,"[114] because any definition of blight "should be objective and specific enough that it can be applied consistently but not so stringent that it would strangle redevelopment in economically disadvantaged areas," or preclude other beneficial takings.[115]

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108. *Id.* During the 2005 State Senate Judiciary Committee hearings on eminent domain, New York City Corporation Counsel Michael Cardozo stated that, without eminent domain "Times Square would have remained the crime-infested 'national showcase for urban decay and blight' that it was in the 1970s." Farjad, *supra* note 106, at 1160 (quoting John Caher, *Existing State Law Protects Property Owners, Experts Say*, N.Y. L.J., Oct. 19, 2005, at 1 (recounting Cardozo's speech)).

109. Caher, *supra* note 108.

110. Farjad, *supra* note 106, at 1159–60.

111. *Id.* at 1169.

112. *Id*. at 1160.

113. *Id*. Additionally, according to the report, while Times Square accounts for just 0.1% of New York City's area, it accounts for 5% of the City's jobs. *Id*. (quoting Press Release, Times Square Alliance, Times Square Alliance Announces Results of Latest Report on Economic Contribution of Times Square to NYC Economy (May 9, 2007), *available at* www.timessquarenyc.org/media/documents/economicrelease.pdf).

114. Lowenstein, *supra* note 93, at 304.

115. *See id.*; *see also* Taub, *supra* note 26, at 535 ("As states struggle to find the proper balance between the greater good contemplated in propagating a public use and the concept of protecting private property rights, which is so fundamental to the American psyche, a new body of post-*Kelo* law is developing.").

## III. THE RELATIONSHIP OF BLIGHT TO THE RULES VERSUS STANDARDS DEBATE

The extent to which laws should be formulated as rules or as standards "has received substantial attention from legal commentators."[116] This Part explores the utility of the rules versus standards debate to state legislatures struggling to define blight by re-characterizing the choice between protecting individual property rights and providing for government flexibility as a choice between rules and standards. Part III.A outlines generally the arguments in favor of rules and the arguments in favor of standards. Part III.B then explores the implications of the rules versus standards debate on blight definitions by categorizing current blight definitions as complex standards, simple rules or complex rules. This analysis demonstrates that fashioning a blight definition that strikes the proper balance between individual property rights and government flexibility requires state legislators to determine the extent to which their state's blight definition should be promulgated as a rule or as a standard.

### A. RULES VERSUS STANDARDS

#### 1. *Traditional Arguments*

Professor Hans-Bernd Schafer defines rules as "legal commands that differentiate legal from illegal behavior in a comprehensive and clear manner."[117] In contrast, standards are "general legal criteria that are unclear and fuzzy and require complicated judicial interpretation."[118] For example, a speed limit of sixty-five miles per hour whose violation leads to a $100 dollar fine is a rule, whereas a law requiring drivers to drive at a reasonable speed is a standard.[119] As this example shows, with rules the law is given content ex ante by the legislature or rule-making body, since the precise speed limit is specified before an individual is

116. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992).

117. Hans-Bernd Schäfer, *Rules Versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries*, 14 SUP. CT. ECON. REV. 113, 116 (2006).

118. *Id.*

119. *See id*.

accused of speeding.[120] On the other hand, with standards the law is given content ex post, usually by the judiciary.[121] Thus, the choice between rules and standards involves the extent to which a legal command and its specific contours should be determined in advance by a rule-making body or left to courts to interpret.[122]

Whether a law should be given content ex ante or ex post involves multiple considerations. The primary benefit of rules over standards is that rules have lower enforcement and compliance costs than standards.[123] With precise rules, enforcement costs are low "because legal decisions are less complicated and because citizens are more certain whether or not they are complying with the rule and therefore in a legal dispute are more likely to settle out of court."[124] In contrast, applying standards in practice often generates significant enforcement costs for judges, who must determine what the standard means and whether a defendant has complied with the standard.[125] Compliance can also be costly for citizens who may need to conduct research or consult a lawyer to determine whether they are in compliance with a standard.[126] However, because the content of standards is generally determined ex post, standards have lower specification costs than rules.[127] For example, promulgating the standard requiring drivers to drive at a "reasonable speed" hardly generates any initial cost at all, while specifying a speed limit entails research to determine where a speed limit should be set and why.[128] Thus, overall, the cost of specifying a rule is initially greater than for a

120. *See* Kaplow, *supra* note 116, at 559–62.

121. *See id.* at 559–60 ("Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*.").

122. *See id.* at 561–562.

123. *See* Schäfer, *supra* note 117, at 116–17.

124. *Id.* at 117.

125. *Id*.

126. Schäfer uses the Norwegian Pollution Control Act (NPCA) as an example to show the enforcement and compliance costs of standards. *Id.* The NPCA was created "to avoid unreasonable and unnecessary pollution." *Id*. Applying this standard generates significant costs for judges, who must determine what conduct is "unreasonable" and "unnecessary." *Id*. This standard also creates compliance costs for polluters who must determine how they need to behave in order to avoid producing "unreasonable and unnecessary pollution." *Id*.

127. *Id*.

128. *See id*. For another example, promulgating the "unreasonable and unnecessary" standard found in the Norwegian Pollution Control Act "is extremely easy and does not generate any initial cost at all." *Id*.

standard, but a rule results in savings when individuals and courts must determine how the law applies to specific behavior.[129]

2. *Levels of Complexity*

It is commonly asserted that rules tend to be over-inclusive and/or under-inclusive relative to standards, because "rules limit the range of permissible considerations whereas standards do not."[130] But rules are only systematically over-inclusive or under-inclusive relative to standards when the rule is less complex than the standard to which it is being compared.[131] Both rules and standards can be either simple or complex.[132] For example, a standard that makes driving at an excessive speed illegal may be simple if the only factor an adjudicator is allowed to consider under the standard is the condition of the road.[133] The standard can be made more complex by allowing the adjudicator to consider more factors — such as time and safety considerations — in deciding whether the speed in a particular case is excessive.[134] Similarly, a rule governing speed limits can be simple if it specifies a single speed limit above which driving is illegal.[135] Alternatively, this rule could be made complex if it instead specified a plethora of different speed limits for different vehicle types, roads, weather conditions and traffic densities.[136]

Because rules and standards can both be simple or complex, legislators drafting legal commands must also consider the level

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129. *See* Kaplow, *supra* note 116, at 562–63; Schafer, *supra* note 117, at 117–18.

130. *See* Kaplow, *supra* note 116, at 588–89.

131. *Id.* at 586–593.

132. *See id.* at 586–93. Kaplow outlines a method for determining the precise "rule equivalent to the standard" for any possible standard. *See id.* at 586. To make this determination, for any standard, "consider the actual outcomes that would arise for all possible cases." *Id*. Then, "define the rule equivalent to the standard' . . . as that rule which attaches the same outcomes to these cases." *Id.* When a standard is then compared to the rule equivalent to the standard, the rule cannot be over-inclusive or under-inclusive relative to the standard. *Id.*

133. *See id.* at 566.

134. *See id*.

135. *See id.* at 565.

136. *See id*. Those skeptical as to whether rules can be as complex as standards should consider the Internal Revenue Code. *See id*. at 566. It is unlikely that a standard requiring individuals to pay "their appropriate share of the federal government's revenue needs" would generate a more complex body of law than the rules found in the Internal Revenue Code in terms of the number of factors considered and the intricacy of those factors. *Id.*

of complexity that is desirable when they determine whether a rule or a standard is preferable.[137] Otherwise, they may adopt a standard to govern certain behavior when in fact a rule would be optimal, or vice versa.[138] The appropriate level of complexity depends in large part on the costs of over- and under-inclusiveness.[139] Where the costs of over- and under-inclusiveness are high, rational policymakers will favor complexity over simplicity.[140] Allowing adjudicators to consider more factors provides more flexibility in situations where the legislature is unable to predict all possible scenarios in which the rule would apply.[141] The costs of over- and under-inclusiveness depend on the type of behavior being governed by the law.[142] For example, the costs of over- and under-inclusiveness in death penalty legislation or legislation curtailing freedom of speech are likely to be high because of the gravity and finality of erroneous executions and the high value of free speech in our society.[143]

## B. THE RANGE OF STATE EMINENT DOMAIN LAWS

The debate over rules versus standards provides a useful framework with which to analyze blight definitions. Applying the vocabulary from Part III.A, current blight definitions can largely be categorized as complex standards, simple rules, or complex rules.[144] This Part explores the implications of the rules versus

137. *See generally id.* at 586–96.

138. *See id*. at 589–90. For example, consider a legislature determining which one of two potential laws should govern certain behavior. The two options the legislature is considering are a complex standard or a simple rule. If the complex standard is preferable, it may be that complexity is preferable to simplicity, or a standard is preferable to a rule, or both. *Id*. If the advantage of the complex standard derives from its complexity and not its promulgation as a standard, then it may be that a complex rule is actually the optimal choice. *Id*. Thus, if the legislature only considers a complex standard and a simple rule, by neglecting to consider both what level of complexity is optimal and whether the law should be promulgated as a rule or as a standard, it may choose to implement standards in cases where rules should govern. *See id*.

139. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73–75 (1983).

140. *See id.* at 74–75.

141. *See id.* at 73–75. Interestingly though, even complex standards can be over- and under-inclusive because their "vagueness invites misinterpretation." *Id.* at 73.

142. *See id*.

143. *See id.* at 75.

144. I have found no states that define blight with what could be classified as a simple standard.

standards debate on blight definitions by analyzing blight definitions in each of these categories. The blight definitions in New York, Florida and Pennsylvania are examined as paradigmatic examples of each category. For each state, the analysis begins by explaining why its blight definition is paradigmatic of a complex standard, a simple rule or a complex rule. Then, each state's definition is analyzed to determine its ability to protect property rights without crippling the beneficial uses of eminent domain. The analysis shows that while complex standards provide property owners with the least protection by allowing condemning agents to stretch the meaning of blight to fit many different circumstances,[145] they consequently allow the government the most flexibility in using eminent domain to confer meaningful benefits on society. Simple rules, on the other hand, provide the most protection to property owners, but threaten to strangle redevelopment. In the middle are complex rules, which can protect property owners by limiting the definition of blight to objective criteria that cannot be easily manipulated, but still allow the government to condemn property for the purpose of blight clearance under certain circumstances.

1. *Complex Standards: Blight in New York*

Most states' blight definitions take the form of complex standards that allow redevelopment agencies and courts to consider a vast laundry list of factors which "are left undefined or defined so broadly as to give little guidance as to the actual conditions to which they refer."[146] New York's definition of blight is one such example.

New York has not made any changes to its eminent domain law in the years since *Kelo*.[147] Interestingly, while the New York State Constitution includes language largely identical to that found in the Fifth Amendment,[148] the New York Court of Appeals,

145. *See* Dana, *supra* note 15, at 381.

146. Lowenstein, *supra* note 93, at 309; *see also* Dana, *supra* note 15, at 370–71; Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. REV. 177, 197–98 (2007).

147. Lavine & Oder, *supra* note 27, at 334; Taub, *supra* note 26, at 538–39.

148. Lavine & Oder, *supra* note 27, at 340 (stating that "Article 1, section 7 of the New York State Constitution includes language mostly identical to the Fifth Amendment, requiring both a public use and just compensation.").

New York's highest court, has never explicitly held that economic development satisfies the public use requirement of the New York State Constitution.[149] Nonetheless, "New York has repeatedly been singled out as having some of the most 'condemnation friendly' courts" and for having a legislature that "has been reluctant to implement prohibitory measures to curb its broad interpretation of the public use requirement."[150] Much of this criticism derives from New York's flexible definition of blight,[151] through which the Court of Appeals has "upheld takings that draw close to, and sometimes blur, the line between economic development and blight reduction . . . ."[152]

New York's authority to clear blighted areas derives from its Constitution, which authorizes the state legislature to clear areas that are "substandard or insanitary."[153] Although a "substandard or insanitary area" is defined in the New York General Municipal Law, the definition provided is circular.[154] Section 502 provides that a "substandard or insanitary area" is "interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area."[155] "Blighted area" is further defined in Section 970-c of the General Municipal Law as an area exhibiting one or more of the following conditions: "(i) a predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people."[156]

New York's definition of blighted and "substandard or insanitary" areas is paradigmatic of a complex standard. As with standards generally, New York's blight definition is given content ex

149. Alexander D. Racketa, Note, *Takings for Economic Development in New York: A Constitutional Slam Dunk?*, 20 CORNELL J.L. & PUB. POL'Y 191, 196 (2010).
150. Farjad, *supra* note 106, at 1122.
151. *See id.* at 1150.
152. Racketa, *supra* note 149, at 197.
153. N.Y. CONST. art. XVIII, § 1.
154. Lavine & Oder, *supra* note 27, at 299 n.66.
155. N.Y. GEN. MUN. LAW § 502(4) (McKinney 2011); Kaitlyn L. Piper, Note, *New York's Fight Over Blight: The Role of Economic Underutilization in* Kaur, 37 FORDHAM URB. L.J. 1149, 1157 (2010).
156. GEN. MUN. LAW § 970-c(a).

post by redevelopment agencies and courts.[157] In fact, counsel for the Empire State Development Corporation ("ESDC"), a quasi-public entity frequently charged with making blight determinations in New York,[158] "has admitted that the board has no objective standards for blight."[159] The standard is complex because by failing to mandate specific criteria that must be considered in making blight determinations, it enables condemning agents to consider a multitude of subjective factors.[160]

Two recent New York Court of Appeals decisions, *Goldstein v. New York State Urban Development Corp*.[161] and *Kaur v. New York State Urban Development Corp*.,[162] illustrate both the ex post method by which New York's definition of blighted and "substandard or insanitary areas" are given content, and the multitude of factors redevelopment agencies consider when making blight determinations. *Goldstein* concerned the Atlantic Yards redevelopment project in Brooklyn's Prospect Heights neighborhood, which was to be undertaken by private developer Forest City Ratner ("FCR").[163] The Atlantic Yards Project involved the construction of a new arena for the National Basketball Association's New Jersey Nets franchise, the reconfiguration and modernization of the Vanderbilt Yards rail facilities, and the construction of numerous high-rise buildings.[164] The plaintiffs challenging the

157. *See supra* Part III.A.1.

158. *See* Lavine & Oder, *supra* note 27, at 288 (describing the ESDC as a "quasi-public entity with significant redevelopment powers"); Piper, *supra* note 155, at 1157–58. Quasi-public corporations such as the ESDC are authorized to declare property "substandard or insanitary" by the New York State Constitution and the New York General Municipal Law. *See* N.Y. CONST., art. XVIII, § 2 (permitting the legislature to "grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities"); N.Y. GEN. MUN. LAW § 74 (McKinney 2011) ("A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.").

159. Lavine & Oder, *supra* note 27, at 298–99. More specifically, "[a]t a public hearing in 2010, counsel to ESDC acknowledged that the board does not have any checklist of criteria for blight, and that board members have no special qualifications regarding the determination of blight." *Id*. at 299 n.66.

160. *See supra* notes 131–136 and accompanying text.

161. 921 N.E.2d 164 (N.Y. 2009).

162. 933 N.E.2d 721 (N.Y. 2010).

163. *See Goldstein*, 921 N.E. at 165–66; Lydia E. DeWitt, Case Note, Goldstein v. New York State Urban Development Corp. *and* Kaur v. New York State Urban Development Corp., 42 URB. LAW 477, 477 (2010).

164. *Goldstein*, 921 N.E.2d at 166.

proposed exercise of eminent domain were "property owners whose homes and businesses were condemned as part of the redevelopment area."[165] The ESDC had approved the condemnation of the plaintiffs' property "upon findings that the area in which the project [was] to be situated [was] 'substandard or insanitary.'"[166]

The plaintiffs did not debate the ESDC's blight findings with respect to more than half of the project area, which was located in an area that the City had previously designated as the Atlantic Terminal Urban Renewal Area ("ATURA").[167] However, to the south of ATURA was a roughly two block area that was within the redevelopment footprint but had never been designated as blighted prior to the unveiling of the Atlantic Yards Project.[168] It took thirty-one months[169] after the Atlantic Yards project was first announced for the ESDC to conclude that the area possessed "sufficient indicia of actual or impending blight to warrant [its] condemnation for clearance and redevelopment . . . ."[170] The ESDC based its determination on studies conducted by Allee, King, Rosen & Fleming ("AKRF"), an environmental consulting firm that had previously been hired by FCR.[171] In conducting the blight study, AKRF relied on criteria such as "underutilization, cracked sidewalks, and overgrown weeds."[172]

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165. DeWitt, *supra* note 163, at 477.

166. *Goldstein*, 921 N.E.2d at 166.

167. *Id*.

168. *Id*. More specifically, "[t]he neighborhoods surrounding the Atlantic Yards site are predominantly . . . low and midrise, with high-rise buildings across broad Atlantic Avenue." *See* Lavine & Oder, *supra* note 27, at 291. At its western border, the site is "adjacent to Brooklyn's biggest transit hub." *Id*. "[T]he railyards are located in a more than forty-year-old urban renewal area that extends to the north." *Id*. at 291–92. However, "the site abuts or is in close proximity to several historic districts and vibrant residential neighborhoods." *See id*.

169. Lavine & Oder, *supra* note 27, at 298.

170. *Goldstein*, 921 N.E.2d at 166.

171. Lavine & Oder, *supra* note 27, at 312–14. AKRF began working for FCR as a consultant in June 2003, and "accepted a no-bid contract from ESDC in September 2005 to produce the [environmental impact statement] and blight study. *Id.* at 312. AKRF terminated its relationship with FCR prior to its hiring by ESDC, but "FCR was still responsible for paying its bills." *Id.* "Whether or not the relationships among ESDC, FCR and AKRF amounted to actionable conflicts of interest, it is apparent that their interests were inexorably commingled." *Id.* at 312–13.

172. *Id*. at 298–99. Ironically, on one lot, "a mural protesting the use of eminent domain was even considered to be evidence of blight." *Id.* at 299.

The plaintiff property owners argued that the blocks at issue were not in fact blighted.[173] In rejecting the property owners' challenge, the Court of Appeals approved an expansive definition of blight and showed great deference to the ESDC's findings.[174] The Court of Appeals acknowledged that "the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling" which were held to be substandard during the Great Depression, when the New York Constitution was amended to authorize the clearance of "substandard and insanitary" areas.[175] Nonetheless, the *Goldstein* court maintained that it has "never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court . . . responded in the midst of the Great Depression."[176] Thus, despite noting that "[i]t is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight,"[177] the court found that this difference only amounted to "another reasonable view of the matter" and, as such, was insufficient to overrule the ESDC's determination.[178] According to the court, "only where there is no room for reasonable difference of opinion as to whether an area is blighted" may judges overturn a blight determination by a legislatively designated agency.[179]

The Court of Appeals' reasoning in *Kaur* followed the same rationale as that in *Goldstein*. In *Kaur*, the ESDC had issued a determination that it should use its power of condemnation to clear seventeen acres of privately owned property in the Manhattanville section of West Harlem to make room for the expansion of

173. *Goldstein*, 921 N.E.2d at 171.
174. *See id*. at 171–73.
175. *Id.* at 171. The Court of Appeals first approved the taking of property on the grounds that it was substandard in N.Y.C. Hous. Auth. v. Muller, 1 N.E.2d 153 (1936), where it stated that "[t]he menace of the slums in New York City has long been recognized as serious enough to warrant public action." *Id.* at 155. The decision in *Muller* prompted the adoption of article XVIII of the New York Constitution, which declares clearing substandard and insanitary areas to be constitutionally permissible. *See Goldstein*, 921 N.E.2d at 171.
176. *Goldstein*, 921 N.E.2d at 171.
177. *Id.* at 172.
178. *See id*.
179. *Id*.

Columbia University.[180] The ESDC's determination of blight, just as in *Goldstein*, was based on findings in a blight report prepared by AKRF.[181] However, AKRF's finding of blight in this case was based on different criteria than in *Goldstein*.[182] Specifically, in *Kaur*, AKRF documented "structural conditions, vacancy rates, site utilization, property ownership, and crime data."[183] In addition, for each building in the redevelopment area, AKRF documented "physical and structural conditions, health and safety concerns, building code violations, underutilization, and environmental hazards."[184] While the Appellate Division in *Kaur* expressed grave concern over the divergent criteria used by AKRF in *Goldstein* and *Kaur,*[185] the New York Court of Appeals disagreed, stating that "blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."[186] Instead, "blight or 'substandard or insanitary areas' must be viewed on a case-by-case basis."[187] As in *Goldstein*, the *Kaur* court found no more than a reasonable difference of opinion as to the blight finding, and thus upheld the ESDC's determination.[188]

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180. *See* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 724–25 (N.Y. 2010). Specifically, the expansion project "contemplates a new urban campus . . . consist[ing] of 16 new state-of-the-art buildings, the adaptive reuse of an existing building and a multi-level below grade support space." *Id.* The project is to be approximately 6.8 million gross square feet in size, and "provides for the creation of about two acres of publicly accessible open space, a retail market along 12th Avenue and widened, tree-lined sidewalks." *Id.* The new buildings will house "teaching facilities, academic research centers, graduate student and faculty housing, and an area devoted to services for the local community." *Id.* Columbia University "will exclusively underwrite the cost of this [p]roject and not seek financial assistance from the government." *Id.*

181. *See id*. at 726.

182. *See* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 14 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010); DeWitt, *supra* note 163, at 479.

183. *See Kaur*, 933 N.E.2d at 726.

184. *Id*.

185. *See Kaur*, 892 N.Y.S.2d at 14 (stating that "[t]he differences between the blight studies in *Develop Don't Destroy, (Brooklyn)* for Atlantic Yards and in the instant case, both performed by the same consultant, highlight the unconstitutional application of [New York's blight definition]."); DeWitt, *supra* note 163, at 479 ("In proving the inconsistent application of the statute, the court noted that even though the same company conducted the blight studies for both the Columbia Project and the Atlantic Yards Project, different criteria were used to establish blight. The court then held that the use of such arbitrary and subjective standards deprived owners of fair notice as to the blighted status of their property, thereby violating their right to due process.").

186. *See Kaur*, 933 N.E.2d at 732–33.

187. *Id*.

188. *Id*. at 731 (noting that "it cannot be said that ESDC's finding of blight was irrational or baseless.").

*Goldstein* and *Kaur* demonstrate how a blight definition paradigmatic of a complex standard fails to protect property owners against the possibility of eminent domain abuse. By defining "blighted" and "substandard or insanitary" areas circularly, instead of with readily measurable, objective criteria, the New York legislature enabled courts to construe these definitions broadly.[189] The expansive definitions of these terms adopted by the New York Court of Appeals in cases like *Goldstein* and *Kaur* has resulted in an "'ad hoc and selective enforcement'" which fails to notify property owners ex ante as to whether their property may be blighted.[190] The *Goldstein* court even acknowledged that "[i]t may be that the bar has now been set too low — that what will now pass as 'blight' . . . should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses."[191] Nonetheless, the court upheld the taking at issue reasoning that any changes to the definitions of blighted and "substandard or insanitary" areas are for the legislature to make.[192]

Despite these drawbacks, a "low bar" to a finding of blight is conducive to the beneficial uses of eminent domain.[193] Over the past century, New York has been able to effectively attack land use problems that had resulted in urban poverty, such as bringing together small lots under different ownership.[194] There are several prominent examples of the successful use of eminent domain in New York City, such as the Times Square example[195] discussed in Part II, and the takings needed to construct the World Trade Center in the 1960s and the Lincoln Center for the Performing Arts in the 1950s and 1960s.[196]

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189. *See* Lavine & Oder, *supra* note 27, at 340–41 (stating that New York courts have "allowed the definition of blight to grow to encompass vacant land and land that could be put to more valuable uses").

190. *See Kaur*, 892 N.Y.S.2d at 14 (quoting City of Norwood v. Horney, 853 N.E.2d 1115, 1145 (Ohio 2006)).

191. Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 172 (N.Y. 2009).

192. *See id*. at 172–73.

193. *See generally* Farjad, *supra* note 106.

194. *Id. at* 1156–57.

195. *See generally id*. at 1168–71.

196. *Id.* at 1160–62. Former Dean of Fordham University School of Law and current Georgetown Law Center Dean William Treanor "has written that the revitalization of the 'Lincoln Center neighborhood, a world cultural center and one of the most powerful engines of New York's economy . . . illustrates how urban renewal plans that wisely use private developers and nonprofit organizations can transform local economies and invigo-

### 2. *Simple Rules: Florida's Ban on Blight Takings*

When blight is defined as a simple rule, it has the opposite effect as when it is defined as a complex standard. While simple rules potentially provide the clearest protection to property owners, they also run the risk of strangling state governments' ability to use eminent domain for beneficial redevelopment.

Florida enacted one of the nation's strongest post-*Kelo* eminent domain reform bills in 2006.[197] Florida Statute Section 73.013 prohibits the state or a redevelopment entity from conveying condemned property to a natural person or private entity unless ten years have passed since the condemnation of the property.[198] Section 73.013 effectively eliminates *Kelo*-style condemnations for private commercial development because it would force condemning agencies to wait ten years before they would be able to transfer the property to private developers.[199] Additionally, Section 73.014 makes clear that the power of eminent domain may not be exercised "to take private property for the purpose of preventing or eliminating slum or blight conditions."[200] Section 73.014 also eliminates a potential loophole to its prohibition on blight condemnations by further clarifying that eliminating a public nuisance is "not a valid public purpose or use for which private property may be taken by eminent domain . . . ."[201]

Florida's blanket prohibition on blight condemnations is a straightforward example of a simple rule.[202] The Florida legislature made an advance determination of when specific conduct — blight takings — should be allowed, and decided that such con-

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rate city life.'" *Id.* at 1161 (quoting William M. Treanor, *On My Mind: Upper West Side Story*, FORBES.COM, Nov. 16, 2005, http://www.forbes.com/2005/11/16/oped-eminent-domain-cx_wmt_1116domain.html.).

197. *See* Sandefur, *supra* note 62, at 762.

198. FLA. STAT. § 73.013 (2006). There are a few limited exceptions to this general rule that serve to allow takings for traditional public uses. Sandefur, *supra* note 62, at 762. For example, property can be transferred to natural persons or private entities when the property is to be used in providing common carrier services, if the property is conveyed to a public utility, if the property is used for providing public infrastructure, or if the condemning authority no longer needs the land for the purpose for which it was condemned and the owner is given the opportunity to repurchase. FLA. STAT. § 73.013 (2006).

199. *See* FLA. STAT. § 73.013 (2006).

200. *Id.* § 73.014.

201. *See id*.

202. *See supra* Parts III.A.1–2.

duct is never permissible.[203] Thus, the only issue for an adjudicator in determining the validity of a taking under Florida Statute Section 73.014 is the factual question of whether the public purpose underlying the taking is blight clearance.[204] If a court makes such a finding, then the taking is simply prohibited by Section 73.014.[205] No further inquiry into whether the property is "truly blighted"[206] or whether the blight determination is "irrational or baseless"[207] is necessary.[208]

For example, in *City of Hollywood Community Redevelopment Agency v. 1843, LLC*, the City of Hollywood Community Redevelopment Agency ("CRA") sought to condemn a parcel of land with a one-story commercial building as part of a community redevelopment plan.[209] The CRA's stated public purpose for condemning the parcel of land was "the redevelopment of a blighted area."[210] Because the taking at issue in *1843* pre-dated the passage of Sections 73.013–14, the District Court of Appeal was unable to simply invalidate the taking.[211] Instead, the *1843* court was required to determine whether the condemning authority presented "some evidence" for the taking.[212] If the condemning authority met this burden, the court was required to uphold the taking "in the absence of illegality, bad faith or gross abuse of discretion."[213] However, as Associate Judge Lisa Davidson acknowledged in her separate opinion, had Florida's current eminent domain law applied, the "some evidence" and "bad faith" determinations would be un-

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203. *See* FLA. STAT. § 73.014; *see also supra* notes 117–122 and accompanying text.

204. *See* FLA. STAT. § 73.014; Kaplow, *supra* note 116, at 559–60 ("[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator.").

205. *See* FLA. STAT. § 73.014.

206. *See* Lowenstein, *supra* note 93, at 332.

207. *See* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 731 (N.Y. 2010).

208. In Florida, no formal definition of blight is even necessary for the purposes of eminent domain, because regardless of how blight is defined, takings for its clearance are prohibited by the simple rule in place.

209. 980 So.2d 1138, 1139 (Fla. Dist. Ct. App. 2008).

210. *Id.* at 1141.

211. *Id.* at 1144 n.1 (Davidson, J., concurring in part and dissenting in part). Although Florida Statute Sections 73.013–14 were codified before the District Court of Appeal's decision in *1843*, they do not apply retroactively. *Id*. Thus, they were inapplicable to this case because the redevelopment agency sought to condemn the property prior to their codification. *Id*. There are no more recent decisions which interpret Sections 73.013–14.

212. *Id.* at 1142 ("In order to meet its initial burden, the condemning authority need present only 'some evidence' of reasonable necessity.").

213. *Id.*

necessary and the taking would be overturned because Sections 73.013–14 entirely prohibit local governments from taking property and transferring it to private developers for the purpose of the elimination of blight.[214]

Florida's simple rule approach to blight determinations provides property owners with maximum protection against eminent domain, as it forecloses any possibility of blight being used as a backdoor for takings whose real purpose is economic development.[215] Thus, it is not surprising that property rights activists tout Florida's post-*Kelo* reforms as "some of the best protection in the nation for homes, businesses and houses of worship that formerly could have been condemned for private development."[216] However, providing such protection to property owners severely undercuts the state's ability to use eminent domain for the "greater good" of society.[217] Any takings necessary for the construction of such beneficial projects are precluded by Florida's ban on condemnations for blight clearance and private-to-private takings whenever the resulting structures are to be privately owned.[218] Thus, the takings that made Lincoln Center and Times Square possible in New York would have been prohibited if Florida's current eminent domain law governed, because those takings "wisely" involved the transfer of private property to private developers.[219]

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214. *See id.* at 1144 n.1.

215. *See supra* note 17 and accompanying text.

216. *50 State Report Card: Tracking Eminent Domain Reform Legislation Since* Kelo, CASTLE COALITION: CITIZENS FIGHTING EMINENT DOMAIN ABUSE (July 16, 2009), http://www.castlecoalition.org/about/component/content/2412?task=view.

217. *See supra* notes 98–100 and accompanying text.

218. *See* Cohen, *supra* note 10, at 565 ("Provisions barring the use of eminent domain in order to transfer private property to private ownership or control would have the effect of preventing *Kelo*-type takings. But unless they include exceptions, such laws are overbroad: They also would prohibit benign and even beneficial takings. For example, such laws would prevent the use of eminent domain to facilitate construction of a performing arts center, sports arena, not-for-profit hospital, or museum if, as would likely be the case, any one of these were to be owned or controlled by a non-public entity."); Kennelly, *supra* note 99, at 482–83.

219. *See* Treanor, *supra* note 196. *See also* Cohen, *supra* note 10, at 565; Kennelly, *supra* note 99, at 482–83; *supra* notes 100–108 and accompanying text.

### 3. *Complex Rules: Blight in Pennsylvania*

Several states have enacted post-*Kelo* reforms that are less sweeping than Florida's complete ban on blight takings[220] but nonetheless seek to meaningfully limit the circumstances in which property can be declared blighted.[221] In these states, condemning agents can still consider a number of factors in determining whether property is blighted;[222] however, unlike a complex standard, the factors are clear and objective.[223] Thus, this sort of blight definition most closely resembles a complex rule.

Pennsylvania's blight definition is perhaps the clearest example of the complex rule paradigm.[224] In response to *Kelo*, Pennsylvania enacted the Property Rights Protection Act ("PRPA") in 2006.[225] Section 204 of the PRPA explicitly eliminates *Kelo*-style private development takings, stating that "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited."[226] However, the PRPA includes a few specific exceptions to its general ban on economic development takings.[227] One of these exceptions is blight, which the PRPA redefined post-*Kelo*.[228] Under the PRPA, a "single unit of property" can be declared blighted only if it satisfies one of twelve listed factors.[229] Unlike with complex standards, however, the factors listed in the PRPA are clear and objective,[230] thereby supplying content to Pennsylvania's blight definition ex ante. One scholar described the PRPA's blight definition as exemplary because "[e]very line of the Pennsylvania definition of blight answers the 'why me' question by pointing to curable defects in the property taken."[231]

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220. *See* Lopez, *supra* note 74, at 592.
221. *See* Dana, *supra* note 15, at 365; Lopez, *supra* note 74, at 594–95; *supra* note 83 and accompanying text.
222. *See* Dana, *supra* note 15, at 365.
223. *See* Lavine & Oder, *supra* note 27, at 334; Somin, *supra* note 12, at 2139–43.
224. *See* Lefcoe, *supra* note 93, at 819–20.
225. 26 PA. CONS. STAT. §§ 201–07 (2006).
226. *Id.* § 204.
227. *See id*. Among these exceptions are when the condemnee consents to such a taking and when the taking is for a "public utility or railroad," or "common carrier." *See id*.; *see also* Sandefur, *supra* note 62, at 761; Seitz, *supra* note 19, at 227–30.
228. *See* Seitz, *supra* note 19, at 231–37.
229. § 205.
230. *See* Seitz, *supra* note 19, at 231–37.
231. Lefcoe, *supra* note 93, at 819.

Specifically, many of the factors listed in the PRPA work to limit the definition of blight to circumstances where property presents a danger to public health and safety.[232] For example, a residence may be designated as blighted if it is a "dwelling which, because it is dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by statute or an applicable municipal code, has been designated by the agency responsible for enforcement of the statute or code as unfit for human habitation."[233] Similarly, a structure is blighted if it "is a fire hazard or is otherwise dangerous to the safety of persons or property."[234] Even those factors in the PRPA that do not explicitly deal with health and safety remain clear and objective, such as the factor establishing that "an unoccupied property which has been tax delinquent for a period of two years" can be designated as blighted.[235]

Although "[t]he Pennsylvania courts have yet to review any cases implicating the PRPA" in practice,[236] comparing the PRPA to Pennsylvania's pre-*Kelo* blight definition reveals how the PRPA's blight definition is more likely to protect property owners. Prior to the PRPA, Pennsylvania's blight definition was paradigmatic of a complex standard, in that it allowed consideration of a number of vague and flexible factors, such as "faulty street or lot layout, or economically or socially undesirable land uses."[237] As in New York,[238] under such a definition, "Pennsylvania's law allowed

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232. *See* Sandefur, *supra* note 62, at 761.

233. § 205(b)(3).

234. *Id.* § 205(b)(4).

235. *Id.* § 205(b)(7).

236. Patricia Salkin, *The* Kelo*-Effect in New York, New Jersey and Pennsylvania: Assessing the Impact of* Kelo *in the Tri-State Region* 25 (Albany Law Sch. Research Paper No. 09-06), *available at* http://ssrn.com/abstract=1028893.

237. Urban Redevelopment Law, 35 PA. STAT. ANN. § 1702 (West 2003), repealed by Property Rights Protection Act, 26 PA. CONS. STAT. §§ 201–207 (2006); Seitz, *supra* note 19, at 215, 222. More specifically, under the Urban Redevelopment Law, an area became blighted

> because of the unsafe, unsanitary, inadequate or over-crowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses.

35 PA. STAT. ANN. § 1702 (West 2003), repealed by Property Rights Protection Act, 26 PA. CONS. STAT. §§ 201–207 (2006).

238. *See supra* notes 190–192 and accompanying text.

condemnation of virtually any area for private development by labeling it blighted."[239] By replacing "vague and subjective" considerations with more concrete and objective considerations, the PRPA's blight definition limits the exercise of eminent domain to areas with "real, objective, concrete harm to the public."[240] Thus although the government is still allowed to act against "environmental hazards, dilapidated buildings, nuisances such as 'crack houses,' or land that accumulates trash or disease-carrying vermin, [the PRPA] eliminate[s] the government's ability to redistribute property for private profit."[241]

In contrast with the simple rule approach to blight definitions like in Florida, the PRPA's blight definition does not entirely preclude beneficial redevelopment.[242] The government retains the authority to condemn property if it meets any of the criteria listed in the PRPA.[243] Moreover, not all of the criteria listed in the PRPA are equally objective. For example, the PRPA allows for a finding of blight if the property "is regarded as a public nuisance at common law."[244] Because nuisance has become "one of those extraordinarily shapeless doctrinal areas in the law of property,"[245] the government perhaps has more flexibility in trying to prove that property is a public nuisance than it would in trying to prove that property has been unoccupied and tax delinquent for two years.[246]

In addition, the PRPA includes several safety valves to ensure that its definition is not overly preclusive of redevelopment.[247] One such safety valve is that the PRPA's blight definition applies only to a "single unit of property."[248] However, if an area consisting of multiple units of property is blighted, a condemnor may clear the whole area, even unblighted units, under certain cir-

239. S. 190-30, 2006 Reg. Sess., at 1552 (Pa. 2006); *see also* Seitz, *supra* note 19, at 236.
240. S. 190-30, 2006 Reg. Sess., at 1552 (Pa. 2006); *see also* Seitz, *supra* note 19, at 236.
241. Sandefur, *supra* note 62, at 761.
242. *See id*.
243. *See id*.
244. 26 PA. CONS. STAT. § 205(b)(1) (2006).
245. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 579 (1988).
246. § 205.
247. *See* Lefcoe, *supra* note 93, at 819–20.
248. § 205(b).

cumstances, such as when a majority of the units of property in a given area are blighted and these units represent a majority of the geographical area.[249] Thus, the PRPA has set up a system for dealing with potential holdout problems.[250] Another safety valve is an exception making the PRPA inapplicable in Pittsburgh or Philadelphia until 2012 for areas that were certified as blighted on or before the effective date of the PRPA.[251] This exception has the effect of excluding Pittsburgh and Philadelphia, where many of the state's "most extensive private-to-private takings" have occurred, from the PRPA's restrictions until 2012.[252]

## IV. BLIGHT SHOULD BE DEFINED AS A COMPLEX RULE

Part III illustrated how the choice between government flexibility and individual property rights can be re-characterized as a choice between complex standards, simple rules and complex rules. This Part argues that state legislatures should opt to define blight with a complex rule. Part IV.A argues that a definition resembling a rule is preferable to a definition resembling a standard, and Part IV.B argues that such a rule should be complex rather than simple.

### A. BLIGHT SHOULD BE DEFINED EX ANTE

The key factor in determining whether a legal command should be promulgated as a rule or as a standard is the extent to which the legal command should be resolved ex ante or ex post.[253] The lower enforcement and compliance costs which arise when

249. *Id.* § 205(c).

250. *See supra* notes 101–108 and accompanying text.

251. § 203(b)(4) (The PRPA does not affect "[t]he exercise of eminent domain within a city of the first or second class in areas that were certified, on or before the effective date of this chapter, as blighted under section 2 of the act of May 24, 1945 (P.L. 991, No. 385), known as the Urban Redevelopment Law. This paragraph shall expire December 31, 2012.").

252. *See* Somin, *supra* note 12, at 2141–42. Some commentators, such as George Mason University School of Law Professor Ilya Somin, believe that this exception undermines the scope of the PRPA. *See id.* Pittsburgh and Philadelphia are by far the state's largest urban areas, and also the sites of many of the state's "most extensive private-to-private takings." *Id.*

253. *See supra* notes 117–122 and accompanying text.

the content of a legal command is resolved ex ante[254] dictate that blight should be defined with a rule.

As Part II.C explained, allowing private parties to use the state's power of eminent domain systematically advantages large market players, such as real estate developers and corporations, over existing owners with fewer legal and financial resources.[255] Defining blight with a standard works to further disadvantage existing owners because uncertainty in the law makes it costlier for them to understand and exercise their rights.[256] Frequently, owners of targeted property are unaware of the condemnation process or their rights under blight definitions and state takings law more generally.[257] Even if they are aware, moreover, they may lack the resources to wage a protracted legal battle.[258] Therefore, many property owners threatened with eminent domain opt to sell their property to the government before eminent domain is even exercised.[259]

Defining blight as a rule mitigates this disparity in bargaining power because compliance costs under a rule are lower than under a standard.[260] Rules are more easily explained and understood than standards, "putting [existing property owners] on notice as to the limits of the government's power."[261] Precisely because rules can be explained more easily, litigation costs under a rule are also likely to be lower than under a more ambiguous standard.[262] Therefore, defining blight with a rule instead of a standard makes it easier for existing property owners to know when to resist offers of condemning agents made under the threat

254. *See supra* Part III.A.
255. *See supra* notes 123–126 and accompanying text.
256. *See* Cohen, *supra* note 10, at 566.
257. *See id.* at 565–66. According to surveys compiled by the Saint Consulting Group, a firm that sponsors surveys on land use policy, 87% of Americans are unaware of the condition of post-*Kelo* reform in their state. Somin, *supra* note 12, at 2158. Moreover, ignorance about state post-*Kelo* reform cuts across gender, racial, and political lines. *Id.* at 2156. Eighty-five percent of men and 90% of women were ignorant about the condition of post-*Kelo* reform, as well as 82% of African Americans, 89% of whites, and similar numbers of Democrats and Republicans. *Id.*
258. *See* Cohen, *supra* note 10, at 565–66.
259. *Id.* at 536–38.
260. *See id.* at 566; s*ee also supra* notes 123–129 and accompanying text.
261. *See* Cohen, *supra* note 10, at 566.
262. *See id*.

of eminent domain and to "muster the resources to defend their property in court."[263]

In addition to its effect on bargaining power, defining blight with a rule is more consistent with "basic moral intuition."[264] While eminent domain can be exercised to take private property in circumstances where the property owner has not acted wrongfully, such as when the government must condemn property to construct a post office, "the state ordinarily does not coerce individuals to give up their discrete property rights unless they have done something wrong, such as default on a loan or commit a crime."[265]

After *Kelo*, state governments have the authority to deprive individuals of property rights simply because someone else can make better use of their property.[266] Whether the current owner had done anything wrong was irrelevant.[267] When blight is used as a pretext to justify takings that would otherwise be justified on an economic development rationale, the same problem arises. Blight definitions that authorize the "condemnation of virtually any area for private development by labeling it blighted"[268] allow states to use their coercive powers to deprive individuals of their property rights under circumstances where the individual may not be worthy of any blame.[269] Defining blight with a rule is more consistent with "basic moral intuition," even if property may still sometimes be taken in circumstances where the property owner is otherwise blameless,[270] because the rule itself points to "curable defects in the property taken," which works to limit the exercise of eminent domain to blameworthy parties.[271] For example, under Pennsylvania's blight definition, if property constitutes a "public nuisance," then the owner of the blighted property is imposing

263. *See id*.
264. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1882 (2007).
265. *Id*. at 1882–83.
266. *See id*.
267. *See id*.
268. S. 190-30, 2006 Reg. Sess., at 1552 (Pa. 2006).
269. Merrill & Smith, *supra* note 264, at 1882–83.
270. For example, when non-blighted property is cleared because it is part of an otherwise blighted area, the property owners of the non-blighted property are blameless. *See supra* notes 248–250.
271. *See* Lefcoe, *supra* note 93, at 819.

harm on neighboring properties.[272] The taking of this blighted property, therefore, "can serve as an appropriate collective response to harm-causing or immoral behavior, which is consistent with general intuitions about corrective justice."[273]

## B. BLIGHT DEFINITIONS SHOULD BE COMPLEX: THE COSTS OF OVER- AND UNDER-INCLUSIVENESS ARE HIGH

Having determined that a rule is preferable to a standard for the purposes of defining blight, the next question is whether a simple rule is preferable to a complex rule.[274] Complexity is desirable when the costs of over- and under-inclusiveness are high.[275] These costs are likely to be high in the exercise of eminent domain, and thus a complex rule is the optimal framework with which to define blight.

The costs of over- and under-inclusiveness in the area of eminent domain are likely to be high because the beneficial uses of eminent domain have tremendous value to society.[276] As the example of Times Square makes clear, the use of eminent domain can bring about increased tax revenue, increased employment, reductions in crime, and overall neighborhood revitalization.[277] A simple rule like Florida's, which couples a ban on private-to-private takings with a ban on using blight clearance as a public use, precludes virtually any such beneficial use: the rule precludes the condemnation of languishing property that is of no benefit to the public, and prohibits condemned property from being transferred to private developers who might be the best entities for redevelopment.[278] Therefore, the under-inclusiveness of the Florida rule may result in large social costs.[279]

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272. *See supra* note 244 and accompanying text; Merrill & Smith, *supra* note 264, at 1883.

273. *See* Merrill & Smith, *supra* note 264, at 1883.

274. *See supra* notes 130–143 and accompanying text.

275. *See supra* notes 130–143 and accompanying text.

276. *See supra* notes 98–115 and accompanying text.

277. *See supra* notes 106–115 and accompanying text.

278. *See supra* notes 197–219 and accompanying text.

279. On the contrary, a simple rule approach to blight may also be over-inclusive. An example would be a rule stating that "all property is blighted and may be condemned." This rule would have large social costs because of the high value of individual property rights in American society. *See, e.g.,* Michael Bindas et al., *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 GONZ. L. REV. 1, 7 ("The impor-

In contrast, as Pennsylvania's blight definition demonstrates, a complex rule gives state legislatures several ways to combat the problem of over- and under-inclusiveness.[280] First, the legislature has control over determining what factors can be used to determine blight, and therefore can control precisely how narrowly blight should be defined.[281] Second, complex rules can account for hold-out problems by calling for special considerations when areas which are to be redeveloped contain both blighted and non-blighted property.[282] Lastly, complex rules can permit for the different treatment of different parts of a state, thereby making resort to eminent domain easier in those parts of a state, such as cities, where redevelopment may be particularly necessary and where eminent domain may be an essential tool for redevelopment.[283]

## V. CONCLUSION

"Blight has always been, and often still is, a loosely defined concept that is ill-suited to serve as a meaningful check on the government's power of eminent domain. However, this objection is certainly surmountable."[284] This Note argues that in defining blight, a complex rule provides state legislatures with the best framework for overcoming this objection, because a complex rule allows state legislatures to supply content to blight definitions ex ante without undermining their ability to mitigate problems of over- and under-inclusiveness. As a result, complex rules afford state legislatures the best method of minimizing the possibility of eminent domain abuse and protecting highly valued private

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tance of private property as a fence to liberty was a key component of the American constitutional and common law traditions that extended from the time of the American Revolution . . . ."); Keith M. Babcock, *Condemnation 101: Fundamentals of Condemnation Law and Land Valuation*, SN042 A.L.I.-A.B.A. 83, 85 (2008) ("The paramount importance of private property is so fundamental in this country that its protection is expressly guaranteed in the United States Constitution."). This Note does not explore these sorts of rules in more detail because no state has implemented this sort of rule. Instead, states have used simple rules to limit the discretion of redevelopment agencies. *See supra* Part III.B.2–3.

280. *See supra* notes 248–252 and accompanying text.
281. *See supra* notes 224–235 and accompanying text.
282. *See supra* notes 248–250 and accompanying text.
283. *See supra* notes 248–252 and accompanying text; Salkin, *supra* 236, at 25–26.
284. Goodin, *supra* note 146, at 198.

property rights without precluding the use of an "important tool that, when necessary and appropriate, can be used to further redevelopment goals."[285]

285. Salkin, *supra* note 236, at 39.