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Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation

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POST-*KELO* EMINENT DOMAIN REFORM: A DOUBLE-EDGED SWORD FOR HISTORIC PRESERVATION

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I. INTRODUCTION

The preservation of historic structures provides communities across the nation with both a source of pride in our national history and a window through which to view that history. Governments' powers of eminent domain have long served as a tool for historic preservation; however, eminent domain also facilitates the destruction of historic structures. Thus, commentators have referred to eminent domain as a double-edged sword for historic preservation.[1] With the 2005 *Kelo v. City of New London* decision, the U.S. Supreme Court altered the field of permissible condemnations, validating governments' constitutional authority to condemn non-blighted neighborhoods for private redevelopment.[2] States

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1. *See* Adrian Scott Fine, *Eminent Domain: A Double-Edged Sword for Historic Preservation*, 39 F.J.: J. OF THE NAT'L TR. FOR HIST. PRESERVATION 22 (2005).

2. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005) (allowing the City of

responded by reining in their governments' condemnation powers.[3] With the dust from the states' legislative flurry seemingly settled, it appears that eminent domain still cuts both ways in the realm of historic preservation.

The Takings Clause of the Fifth Amendment requires the federal government to pay just compensation when it takes private property for a public use.[4] Since 1897, the Supreme Court has incorporated this requirement against the states through the Due Process Clause of the Fourteenth Amendment.[5] What constitutes a public use has evolved considerably over the years, with the general trend toward a steadily more inclusive definition.[6] The evolution hit a high point with the Supreme Court's *Kelo* decision. In an opinion penned by Justice John Paul Stevens, the *Kelo* Court held that the use of eminent domain to transfer non-blighted private property to a private industry in the name of economic redevelopment satisfied the public use requirement of the Takings Clause.[7] Justice Stevens noted, however, that though the federal Constitution permitted such transfers, "nothing . . . precludes any State from placing further restrictions on its exercise of the takings power."[8]

The public responded strongly to the Court's holding, with commentators nationwide decrying the decision as an affront to long-held notions of property rights.[9] The states quickly took heed, and within a matter of months, legislatures across the country were crafting new laws to rein in eminent domain.[10] As of 2009, thirty-six states have enacted such legislation.[11] When counted alongside the states that reformed eminent domain through popular referendum, at least forty-two of the nation's fifty states had engaged in eminent domain reform by 2009.[12]

The enactments vary in content and in strength.[13] Some added substantive reforms that narrowed eminent domain powers; others were

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New London, Connecticut, to use eminent domain powers to condemn private property for a private redevelopment effort).

3. *See infra* Part III.

4. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

5. U.S. CONST. amend. XIV; Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (incorporating the Takings Clause against the states).

6. For an overview of the historical progression of the public use clause, see Ellen Frankel Paul, *Public Use: A Vanishing Limitation on Governmental Takings*, 4 CATO J. 835 (1985).

7. *Kelo*, 545 U.S. at 489–90.

8. *Id.* at 489.

9. For discussion of the public reaction, see Michael Allan Wolf, *Hysteria Versus History: Public Use in the Public Eye*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 15, 15–17 (Robin Paul Malloy ed., 2008).

10. CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK 240–41 (2010).

11. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2105 (2009).

12. *Id.* at 2115–16 tbl.4.

13. *See generally* Julia H. Miller & Heather Amrhein, *State Legislation Addressing Eminent Domain and Regulatory Takings*, SM056 A.L.I.-A.B.A. 791 (2007).

merely procedural reforms that added hurdles to the process.[14] Numerous reforms ushered in changes to the definition of public use and to the definition of blight in regards to blight eradication as a public use.[15] All of the reforms had the basic goal of protecting private property owners from overreaching governments.[16] This Note will focus on the blight provisions and the effects these provisions will have on the goals of historic preservation.

A general trend of the reforms is to prohibit the use of eminent domain when the end result will be to transfer a condemned property to a private entity; however, many states carve out an exemption to the prohibition if the private-to-private transfer is not the ultimate goal but rather a means to achieve the goal of blight eradication.[17] Prior to *Kelo*, most states defined blight broadly.[18] As part of their post-*Kelo* reform efforts, approximately twenty states either narrowed the definition of blight or removed blight as a justification for private-to-private transfers.[19] A few states, including Florida and New Mexico, totally eliminated the use of blight as a rationale for eminent domain.[20] In each of these twenty states, historic buildings will be safer from condemnation than they were in the years prior to the post-*Kelo* reforms.[21]

Other states narrowed the definition of public use yet left their blight definitions so wide that condemning authorities could apply the label to almost any building.[22] As there is a correlation between a building's age and the likelihood it will be designated blight, many historic buildings in older neighborhoods remain at risk of condemnation in the name of blight removal. Some states specifically include factors such as age and

14. *See generally id*.

15. POWELL ON REAL PROPERTY § 79F.03[3][b][iv] (Michael Allan Wolf rev. online ed., LexisNexis 2009). In addition to these changes, the reforms increased public notice and hearing requirements, shifted to the government the burden of showing a public use and need, and added provisions for attorneys' fees, relocation assistance, additional compensation for residential condemnations, and opportunities for owner buy-back should the government not timely pursue the public use. *Id*.

16. *See generally* Miller & Amrhein, *supra* note 13.

17. *See generally id.*

18. Somin, *supra* note 11, at 2121.

19. *Id.* at 2138–46. Nineteen of the approximately twenty states narrowed the definition of blight. South Dakota did not alter its blight definition but eliminated it as a justification for private-to-private transfers. This substantially reduces a local government's incentive to designate a building as blighted. *Id.* at 2139.

20. *Id.* at 2138. One commentator has labeled Florida's reforms as "probably the most important post-*Kelo* legislative victory for property rights activists." *Id.* at 2139. For analysis and criticism of Florida's eminent domain reform, see generally Scott J. Kennelly, Note, *Florida's Eminent Domain Overhaul: Creating More Problems than It Solved*, 60 FLA. L. REV. 471 (2008).

21. Interestingly, historic homes may find themselves safer in Florida, a state that conjures up notions of newness and fast-track development, than they would be in many old colonial states. By some counts, nine of the thirteen original colonies have had either no reform or ineffective reform: Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, North Carolina, Rhode Island, and South Carolina. *See id*. at 2115 tbl.4.

22. *Id*. at 2120.

obsolescence in their blight definitions.[23] This further exacerbates the risk eminent domain poses to historic buildings. Due to the economic downturn, many local governments lack the finances to engage in costly condemnations. However, once the economy rebounds and municipal coffers are refilled, there is little to prevent abuse in the states with broad use of blight as an eminent domain justification.[24]

Despite eminent domain's risk to historic preservation, the practice benefits preservation as well. The Supreme Court validated historic preservation as a public use in the 1896 decision *United States v. Gettysburg Railway Co*.[25] Although specifically validating preservation of historic battlefields, later courts expanded the holding to validate condemnation for historic preservation in other contexts.[26] With judicial approval, governments have condemned both historic buildings[27] and parcels neighboring historic buildings to make way for accessory uses such as expanded parking[28] and museum space.[29]

Due to the high costs involved in taking title to historic buildings, preservation through regulation is far more common than preservation through eminent domain.[30] However, there are times when a landowner's

23. *See infra* notes 87–101 and accompanying text.

24. Further, as local governments continue to turn to creative financing schemes such as tax increment financing, there will be continuing pressure to replace older "blighted" areas with economic redevelopment that increases the tax base.

25. 160 U.S. 668, 681–83 (1896).

26. *See, e.g.*, Cordova v. City of Tucson, 494 P.2d 52, 53–54 (Ariz. Ct. App. 1972) (citing *Gettysburg Railway Co.* for the proposition that, "[I]t has long been established that a taking to preserve historic property represents a proper 'public use.'"); Flaccomio v. Mayor & City Council of Baltimore, 71 A.2d 12, 14 (Md. 1950) (upholding the taking of property near a historic landmark for the purposes of historic preservation); *In re* Acquisition of Real Prop. by Albany, 9 A.D.3d 551, 552–53 (N.Y. App. Div. 2004) (permitting the acquisition of property without a public hearing for the purpose of "emergency stabilization and historic preservation"); Lubelle v. City of Rochester, 145 A.D.2d 954, 954–55 (N.Y. App. Div. 1988) (upholding the taking of vacant lots and a historic building for the purpose of historic preservation); City of Tacoma v. Zimmerman, 82 P.3d 701, 703–07 (Wash. Ct. App. 2004) (upholding the acquisition of property with a historic building that had fallen into disrepair).

27. *See, e.g.*, *In re Acquisition of Real Prop. by Albany*, 9 A.D.3d at 551–53 (historic church).

28. *See Lubelle*, 145 A.D.2d at 954–55.

29. *See Flaccomio*, 71 A.2d at 12–14.

30. In the state court opinion that preceded the U.S. Supreme Court's opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), New York's highest court reasoned that although preservation regulations are permissible in times of economic hardship, in times of affluence, eminent domain is certainly desirable and possibly mandatory. Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1278 (N.Y. 1977). Though affirming the court's holding, the U.S. Supreme Court did not address this aspect of the New York court's decision. The Supreme Court did, however, remove any doubt over the federal constitutionality of preservation regulations. *Penn Cent. Transp. Co.*, 438 U.S. at 138. In the years since this decision, local preservation ordinances have spread across the country. Estate of Tippett v. City of Miami, 645 So. 2d 533, 535 (Fla. 3d DCA 1994) ("At the time the Court issued *Penn Central*, all 50 states and more than 500 municipalities had enacted preservation laws. In 1992, local historic preservation ordinances numbered more than 1700." (internal citations omitted)). For an overview of the history and implementation of historic preservation ordinances, see NORMAN TYLER, TED J. LIGIBEL & ILENE

lack of fiscal resources or refusal to cooperate makes eminent domain the preferred option. Municipalities have used this option over the years and, on occasion, have transferred historic buildings to private entities with the means and interest to engage in rehabilitation.[31]

Condemnation has not always been the first line of attack.[32] In some instances, local governments first demanded landowners fix dilapidated historic structures. When the landowners refused, eminent domain ensued.[33] Though patently constitutional in light of the Supreme Court's *Gettysburg* decision,[34] the condemnations for preservation were more palatable to the community because they were coupled with the public use of blight eradication. This likely helped get the local community on board, an essential part of a successful eminent domain proceeding.

In several jurisdictions with strong post-*Kelo* reforms, it is questionable whether a public use of historic preservation coupled with blight eradication would pass state statutory or constitutional muster. In other jurisdictions, such schemes clearly would not pass muster unless the structure satisfied blight definitions that are now considerably more stringent than in years past. These laws restrict too greatly governments' ability to condemn historic structures for historic preservation. Jurisdictions with strong post-*Kelo* reform should modify their eminent domain statutes to more readily allow blight designations to justify eminent domain when the goal of the condemnation is to preserve a historic structure.

Conversely, in the weak reform jurisdictions, economic redevelopment condemnations are only slightly more difficult to effectuate than they were pre-*Kelo*. The new laws fail to provide historic structures adequate protection from the private developer's wrecking ball. Historic preservation proponents should advocate for stronger protection of historic

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R. TYLER, HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 155–88 (2d ed. 2009). *See generally* CONSTANCE E. BEAUMONT, NAT'L TRUST FOR HISTORIC PRESERVATION, A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES: SMART GROWTH TOOLS FOR MAIN STREET (2002), *available at* http://www.preservationnation.org/issues/smart-growth/additional-resources/toolkit_citizens.pdf.

31. *See In re Acquisition of Real Prop. by Albany*, 9 A.D.3d at 551–53 (permitting the acquisition of St. Joseph's Church). Though not discussed in the case, Albany transferred its newly acquired title to St. Joseph's Church to the private historic preservation organization Historic Albany Foundation. *February 2011 St. Joseph's Newsletter*, HISTORIC ALBANY FOUND., http://www.historic-albany.org/stjosephs.html (last visited May 9, 2011); *see also Cordova*, 494 P.2d at 54 ("The mere fact that the property will be leased to a private corporation or individual does not invalidate the condemnation."); *Zimmerman*, 82 P.3d at 704 ("The City plans to put the building 'into the hands of a successful bidder through a request for proposal to put the building back in to viable use.'" (external citation omitted)).

32. *See In re Acquisition of Real Prop. by Albany*, 9 A.D.3d at 552–53 (involving case where owner first ordered to vacate and make repairs); *Tacoma*, 82 P.3d at 703–04 (involving case where owner ordered to make repairs and issued several citations before initiation of condemnation proceedings).

33. *See In re Acquisition of Real Prop. by Albany*, 9 A.D.3d at 552–53; *Tacoma*, 82 P.3d at 703–04.

34. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 681–83 (1896).

buildings in these instances. Blight findings should not be permitted to justify the condemnation and destruction of historic structures for economic redevelopment unless the structures pose serious health and safety hazards. Unless the post-*Kelo* reforms are amended to better promote and protect historic preservation, these reforms, like eminent domain itself, represent a double-edged sword for historic preservation.

This Note will explore the various post-*Kelo* reforms and evaluate the likely ramifications on the historic preservation community. Part II summarizes the *Kelo* opinion and explains how the decision followed and extended the Court's public use jurisprudence in *Gettysburg Railway Co.* and *Berman v. Parker*.[35] Part III discusses and compares the various state eminent domain reforms enacted in the aftermath of *Kelo*, with a focus on the blight exemptions and the statutory redefinitions of blight. Part IV argues that as a building's age is a contributing factor to both its designation as blighted and to its designation as historic, statutory redefinitions of blight will impact a historic building's likelihood of being condemned. Part V discusses how courts expanded historic preservation as a valid public use and how the strong post-*Kelo* reforms limit the tools available to preservation groups to obtain dilapidated historic properties for restoration activities. For example, many local governments will be forced to rely solely on historic preservation goals in eminent domain initiatives, a less palatable tactic than coupling historic preservation with blight eradication. Part VI concludes that to serve the interests embodied by the post-*Kelo* reforms while also effectively preserving historic buildings, states with strong reforms should carve out an exception to the blight definitions. States should more readily allow disrepair and neglect to justify condemnations for historic preservation purposes, yet retain stringent blight definitions in all other regards. Conversely, to protect historic structures from *Kelo*'s loosening of the public use requirement, states with weak eminent domain reform should consider legislation making it more difficult to condemn and destroy buildings of historical significance.

II. THE JURISPRUDENCE OF PUBLIC USE: *UNITED STATES V. GETTYSBURG RAILWAY CO.*, *BERMAN V. PARKER*, AND *KELO V. CITY OF NEW LONDON*

A. United States v. Gettysburg Railway Co.

To appreciate *Kelo*, it is helpful to understand the Court's prior jurisprudence on what constitutes a public use. The recognition that historic preservation is a valid public use stems from the 1896 decision *United States v. Gettysburg Electric Railway Co.*[36] In *Gettysburg*, the U.S. Supreme Court scrutinized the condemnation of the Gettysburg battlefield.[37] The federal government condemned the lands to establish a

35. 348 U.S. 26 (1954).
36. *Gettysburg*, 160 U.S. at 681.
37. *Id.* at 679–80.

Gettysburg national military reservation.[38] In a unanimous decision penned by Justice Rufus Peckham, the Court addressed whether memorializing the historic battlefield satisfied the public use prong of the Fifth Amendment.[39] Answering in the affirmative, the Court announced the following:

> Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, . . . must be valid. . . . Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.[40]

Emphasizing the "national character and importance" of the historic site, the Court emphasized that "[n]o narrow view . . . of this proposed use should be taken."[41] This decision helped pave the way for courts to recognize increasingly broad understandings of public use.

B. Berman v. Parker

In the decades following *Gettysburg*, the Court's understanding of public use began to encompass the broader idea of public purpose. In the 1954 case *Berman v. Parker*,[42] the Court unanimously affirmed that the public purpose of blight eradication satisfied the public use prong of the Fifth Amendment.[43] The Court further emphasized that such eradication need not be piecemeal, but rather a city may condemn an entire area even if individual lots in that area are not themselves blighted.[44]

The challenged redevelopment in *Berman* was a plan to raze and redevelop a blighted neighborhood in Washington, D.C., that was home to 5,000 of the capital's residents.[45] The plan included construction of roads, schools, and various other public facilities as well as the conveyance of the remaining land to private parties for construction of low-income residential units.[46] The petitioner, the owner of a non-blighted department store in the condemned neighborhood, argued that his business should not be included in the redevelopment plan and that creating a "better balanced, more attractive community" did not constitute a valid public use.[47] Declining the store owner's plea to evaluate his business in isolation, the Court gave

38. *Id*.
39. *Id*. at 679.
40. *Id*. at 681–82.
41. *Id*. at 683.
42. 348 U.S. 26 (1954).
43. *Id.* at 33.
44. *Id*. at 34–35.
45. *Id*. at 30.
46. *Id*. at 34–35; *see also* Kelo v. City of New London, 545 U.S. 469, 480 (2005) (discussing the facts of the *Berman* decision).
47. *Berman*, 348 U.S. at 31.

deference to the local government's decision to redevelop the neighborhood as a whole.[48] Widely defining public use, the Court stated that "[t]he values [public use] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[49] *Berman*'s unanimous and sweeping opinion affirmed both the wide condemnation powers wielded by local governments and the constitutionality of using aesthetics as a public use.

C. Kelo v. City of New London

Half a century after *Berman*, the Supreme Court granted certiorari in *Kelo* "to determine whether a city's decision to take property for the purpose of economic redevelopment satisfies the 'public use' requirement of the Fifth Amendment."[50] The redevelopment plan at issue sought to take the economically distressed Fort Trumbull area of New London, Connecticut, and replace it with a revitalized downtown and waterfront area.[51] Specifically, the plan sought to raze the existing homes and replace them with a Pfizer pharmaceutical research facility, a state park, a museum, a pedestrian "riverwalk," a waterfront conference hotel, and the sundry retail shopping and restaurants that would presumably follow such development.[52] None of the Fort Trumbull structures targeted for condemnation were blighted.[53]

Affirming the plan as a valid public use, the five-member majority emphasized that the plan was not designed to benefit particular individuals.[54] At the time the plan commenced, the identity of the future anchor facility was unknown; Pfizer did not enter the negotiations until later in the process.[55] Accordingly, the Court commented that "[i]t is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown."[56]

The Court emphasized that the city had carefully planned the details of the redevelopment.[57] As such, the city deserved deference to pursue the plan it thought best would achieve the municipal goals of urban revitalization, job creation, and an increased tax base.[58] The Court denied that the holding would permit the taking of one's property to give to another solely because the latter's use would produce more tax revenue.[59]

48. *Id*. at 35.
49. *Id*. at 33.
50. *Kelo*, 545 U.S. at 477.
51. *Id*. at 473–74.
52. *Id*.
53. *Id*. at 475.
54. *Id*. at 478.
55. *Id*. at 478 n.6.
56. *Id*.
57. *Id*. at 483.
58. *Id*. at 483–84.
59. *Id*. at 486–87.

The Fort Trumbull plan was well-reasoned and comprehensive;[60] the Court would address more suspicious transfers if and when they arose.[61]

Writing for a four-member dissent, Justice Sandra Day O'Connor distinguished the Court's takings precedent[62] and argued that the *Kelo* holding surpassed constitutional limits and endangered property owners nationwide.[63] She highlighted that in both *Berman* and the 1984 decision *Hawaii Housing Authority v. Midkiff*,[64] condemnations that transferred title to private parties remedied preexisting harms—the eradication of blight in *Berman* and the eradication of a housing market oligopoly in *Midkiff*.[65] In contradistinction, there was no preexisting harm remedied by *Kelo*'s Fort Trumbull redevelopment plan.[66] To O'Connor, the *Kelo* Court's decision introduced a "specter of condemnation [] over all property," a scenario where "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton," just because the latter could be said to be a more efficient and lucrative use.[67] Though the dissenters could not gain a majority, their words resoundingly reflected the sentiments of the nation's citizens and the state legislatures.

III. POST-*KELO* EMINENT DOMAIN REFORM AND THE NARROWING OF THE BLIGHT EXEMPTION

At least forty-two states have acted on Justice Stevens' observation that nothing prevents states from imposing public use requirements more stringent than those of the Fifth Amendment.[68] Twenty-nine states enacted reform by the end of 2006, a mere year and a half after the Court issued *Kelo*.[69] Much commentary has been written on the reforms, with authors

60. *Id*. at 483–84.

61. *Id*. at 487.

62. *Id*. at 500 (O'Connor, J., dissenting).

63. *Id*. at 494.

64. 467 U.S. 229 (1984).

65. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting). In *Midkiff*, a unanimous U.S. Supreme Court validated the use of eminent domain to break up land oligopoly in Hawaii, allowing Hawaii to condemn leased properties and to force the owners to convey fee title to the long-term tenants. 467 U.S. at 241–45.

66. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

67. *Id*. at 503. Also in *Kelo*, Justice Clarence Thomas filed a separate dissent, in which he advocated a return to the view that a public use is only one where either the government actually uses the property or else gives the public the right to use the property. *Id*. at 521 (Thomas, J., dissenting).

68. As of 2009, the eight states that have not enacted reform are Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Washington. Somin, *supra* note 11, at 2115–16 tbl.4. Though Washington altered its eminent domain law, the change was unrelated to *Kelo* and thus is not included as a post-*Kelo* reform. *See id*. at 2115 n.64.

69. The states that enacted reform in 2005 and 2006 are, in chronological order: Delaware, Alabama, Texas, Ohio, South Dakota, Utah, Idaho, Indiana, Kentucky, Wisconsin, Georgia, West Virginia, Maine, Nebraska, Vermont, Pennsylvania, Florida, Kansas, Minnesota, Tennessee, Colorado, New Hampshire, Alaska, Missouri, Iowa, Illinois, North Carolina, Michigan, and California. HAAR & WOLF, *supra* note 10, at 240–41.

opining on matters such as the reforms' impacts on the poor,[70] the impacts on tax increment financing schemes,[71] the impacts on environmental causes,[72] the impacts on urban revitalization schemes,[73] and the general effectiveness of the reforms in regards to the statutory redefinitions of blight.[74] This Part draws much from the analysis that has been done on the statutory redefinitions of blight and summarizes the findings on the effectiveness or ineffectiveness of the various reforms.

One of the most comprehensive analyses of the post-*Kelo* reforms is by Professor Ilya Somin.[75] Somin's findings closely mirror those published by the property-rights public interest group Castle Coalition.[76] Of the forty-two states that have enacted eminent domain reform, Somin argues that twenty-two have been largely ineffective in restricting eminent domain abuse.[77] Whether intentionally drafted for governments to maintain flexibility or whether a result of poor draftsmanship, these twenty-two reforms may do little to prevent government abuse of eminent domain.[78] Under these reforms, historic properties could easily be designated as blighted. As the reforms often exempt blighted properties from the ban on condemnation for economic redevelopment, the states with widely defined blight statutes leave private property at risk of being condemned and transferred to other parties in the name of economic redevelopment.[79]

Research shows that sixteen states have enacted post-*Kelo* reforms that use definitions of blight that are either exactly the same or very similar to the pre-*Kelo* definitions of blight.[80] Ten of the states define blight in regards to impediments to "sound growth" or factors contributing to "economic or social liability."[81] Though many of these states' statutes list

70. *See generally* Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007).

71. *See generally* George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45 (2008).

72. *See generally* Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623 (2006).

73. *See generally* Lynn E. Blais, *Urban Revitalization in the Post-*Kelo *Era*, 34 FORDHAM URB. L.J. 657 (2007).

74. *See generally* Will Lovell, *The* Kelo *Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609 (2007); Somin, *supra* note 11.

75. Somin, *supra* note 11.

76. CASTLE COALITION: CITIZENS FIGHTING EMINENT DOMAIN ABUSE, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* (2010), *available at* http://www.castlecoalition.org/about/component/content/2412?tasl=view. The Castle Coalition is a project affiliated with the Institute for Justice, the property rights group that represented Susette Kelo before the Supreme Court.

77. Somin, *supra* note 11, at 2105.

78. *See id.*

79. *See id.* at 2120.

80. *Id.* at 2121.

81. *Id.* at 2121–22. The ten states are: Alaska, ALASKA STAT. ANN. § 18.55.950(2) (West 2010); Colorado, COLO. REV. STAT. ANN. § 31-25-103(2) (West 2010); Missouri, MO. ANN. STAT. § 100.310(2) (West 2010); Montana, MONT. CODE ANN. § 7-15-4206(2) (West 2010); Nebraska,

factors that must be considered, and in some instances aggregated, to determine an impediment to "sound growth" or an "economic or social liability," these phrases are such malleable constructs that condemning authorities could frame most any situation to satisfy them.[82] The six remaining states have blight definitions that, though worded differently, could easily be construed to bring in almost any building.[83] Two additional states have blight definitions narrower than the previously discussed sixteen, yet still broad enough to bring in buildings whose blight designations are of questionable veracity.[84] In addition to these eighteen states, Somin argues that at least four additional states have ineffective post-*Kelo* reforms.[85] Though ineffective for reasons other than their blight provisions, these states' reforms still allow substantial governmental discretion in exercising eminent domain.[86]

A step beyond Somin's analysis shows that thirteen of the twenty-two states with weak post-*Kelo* reforms include "age" or "obsolescence" as factors contributing to a blight finding: Montana, Nebraska, North Carolina, Ohio, West Virginia, Illinois, Nevada, Maine, Tennessee, Rhode Island, Iowa, Wisconsin, and Maryland. Illinois includes "obsolescence" but not "age," and defines "obsolescence" in a way that makes abuse less likely than in other states.[87] However, the blight definition in general is still

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NEB. REV. STAT. ANN. § 18-2103(11) (West 2010); North Carolina, N.C. GEN. STAT. ANN. § 160A-503(2) (West 2010); Ohio, OHIO REV. CODE ANN. §§ 1.08, 303.26(E) (West 2010); Texas, TEX. LOC. GOV'T CODE ANN. § 374.003(3) (West 2010); Vermont, VT. STAT. ANN. tit. 24, § 3201(3) (West 2010); and West Virginia W. VA. CODE ANN. § 16-18-3(c)–(d) (West 2010). Somin, *supra* note 11, at 2122–23.

82. Somin, *supra* note 11, at 2124.

83. *Id.* at 2125–38. The states are: Illinois, 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a) (West 2010); Nevada, NEV. REV. STAT. ANN. §§ 37.010(1)(q), 279.388(1) (West 2010); Kentucky, KY. REV. STAT. ANN. § 99.340(2) (West 2010); Maine, ME. REV. STAT. ANN. tit. 30-A, § 5101(2) (West 2010); Tennessee, TENN. CODE ANN. § 13-20-201(a) (West 2010); and Rhode Island, R.I. GEN. LAWS ANN. § 42-64.12-1 (West 2010). Somin, *supra* note 11, at 2125–38. However, Nevada has passed a referendum that will eventually add substantial protection against eminent domain. *Id.* at 2126.

84. Somin, *supra* note 11, at 2129. Iowa defines blight in regards to "deteriorated structures" and "excessive and uncorrected deterioration of site." *See* IOWA CODE ANN. § 6A.22(2)(b)(i) (West 2010) (discussed in Somin, *supra* note 11, at 2129–30). These phrases could be interpreted liberally if the Iowa courts so choose. *Id.* Wisconsin's statute gives a broad definition of blight but then adds extra protection for single family homes. *See* WIS. STAT. ANN. § 32.03(6)(a) (West 2010) (discussed in Somin, *supra* note 11, at 2130–31).

85. Somin questions the effectiveness of reform efforts in California, Connecticut, Delaware, and Maryland. Somin, *supra* note 11, at 2131–34.

86. *Id*. (discussing CONN. GEN. STAT. ANN. §§ 8-193(b)(1), 8-124-25 (West 2010); DEL. CODE ANN. tit. 29 § 9505(15) (West 2010); MD. CODE ANN. REAL PROP. § 12-105.1(a) (West 2010); S.B. 1206, § 2(b)(1), 2005–06 Reg. Sess. (Cal. 2006) (codified in scattered sections of CAL. HEALTH & SAFETY CODE § 33000 (West 2010)), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1201-1250/sb_1206_bill_20060929_chaptered.pdf).

87. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-3(a)(1)(b) (West 2010) (defining "obsolescence" as "[t]he condition or process of falling into disuse. Structures have become ill-suited for the original use").

quite broad.[88] Like Illinois, Tennessee includes "obsolescence" but not "age,"[89] as does Maryland in its constitutional definition of "blighted area."[90] However, "obsolescence" is not defined further in either of these instances.[91] Nevada's definition includes both "age" and "obsolescence,"[92] as do the definitions of Maine,[93] Rhode Island,[94] Montana,[95] North Carolina,[96] Ohio,[97] West Virginia,[98] Iowa,[99] and Wisconsin.[100] None of these states further qualifies what constitutes "age" or "obsolescence," thereby facilitating broad subjectivity on the part of local governments wishing to pursue condemnations. Nebraska includes "age," but not "obsolescence," specifically stating that a contributing factor is that "the average age of the residential or commercial units in the area is at least forty years."[101] This use of age as a blight factor seems particularly egregious, both setting a low threshold in number of years and allowing that threshold to be satisfied by the age of buildings other than the targeted building. Nine of the twenty-two states with broad blight definitions list neither age nor obsolescence as factors contributing to a blight finding: Colorado, Missouri, Texas, Vermont, Delaware, Connecticut, California, Kentucky, and Alaska.[102]

Not all scholars agree that the reforms in these twenty-two states are so clearly ineffectual. Professor Michael Allan Wolf's scholarship is much less critical of the reforms, demonstrating that in states such as Colorado, Missouri, and Wisconsin, the reforms may have more substance than Somin's research indicates.[103] In Colorado, for example, the condemning authority must rationalize the condemnation by clear and convincing evidence, whereas in Missouri, the condemnation must "be supported by

88. *Id.* § 5/11-74.4-3(a)(1).

89. TENN. CODE ANN. § 13-20-201(a) (West 2010).

90. MD. CONST. art. III, § 61.

91. *See* MD. CONST. art. III, § 61; TENN. CODE ANN. § 13-20-201(a) (West 2010).

92. NEV. REV. STAT. ANN. §§ 37.010(1)(q), 279.388(1)(a)(4) (West 2010).

93. ME. REV. STAT. ANN. tit. 30-A, § 5101(2)(A)(1) (West 2010).

94. R.I. GEN. LAWS ANN. § 45-31-8(6)(i) (West 2010).

95. MONT. CODE. ANN. § 7-15-4206(2)(a) (West 2010). The statute combines the two and lists "age obsolescence" as a factor. *Id*.

96. N.C. GEN. STAT. ANN. § 160A-503(2) (West 2010).

97. OHIO REV. CODE ANN. § 1.08(B)(2)(b) (West 2010).

98. W. VA. CODE ANN. § 16-18-3(d) (West 2010).

99. IOWA CODE ANN. § 6A.22(2)(b)(ii) (West 2010).

100. WIS. STAT. ANN. § 32.03(6)(a) (West 2010).

101. NEB. REV. STAT. ANN. § 18-2103(11)(ii) (West 2010).

102. *See* ALASKA STAT. ANN. § 18.55.950(2) (West 2010); COLO. REV. STAT. ANN. § 31-25-103(2) (West 2010); CONN. GEN. STAT. ANN. §§ 8-193(b)(1), 8-124-25 (West 2010); DEL. CODE ANN. tit. 29, § 9505(15) (West 2010); KY. REV. STAT. ANN. § 99.340(2) (West 2010); MO. REV. STAT. ANN. § 100.310(2) (West 2010); TEX. LOC. GOV'T CODE ANN. § 374.003(3) (West 2010); VT STAT. ANN. tit. 24, § 3201(3) (West 2010); S.B. 1206, § 2(b)(1), 2005–06 Reg. Sess. (Cal. 2006) (codified in scattered sections of CAL. HEALTH & SAFETY CODE § 33000 (West 2010)), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1201-250/sb_1206_bill_ 20060929_ chaptered.pdf.

103. POWELL ON REAL PROPERTY, *supra* note 15, § 79F.03[3][b][iv].

substantial evidence."[104] In Wisconsin, the blight definition is followed by language stating that a single dwelling unit is not blighted "unless . . . at least one of the following applies: 1. The property is not occupied by the owner [or the owner's family;] 2. The crime rate in, on, or adjacent to the property is at least 3 times the crime rate in the remainder of the municipality . . . ."[105] Though perhaps not saving the statutes, these provisions show a total dismissal of the statutes' effectiveness may not be appropriate.

As opposed to the above-discussed reforms, Somin found that twenty states have enacted reforms that significantly restrain governments' condemnation powers.[106] In states such as New Mexico and Florida, blight eradication has in effect been removed from the arsenal of eminent domain justifications.[107] Utah eliminated the blight justification pre-*Kelo*.[108] South Dakota, Kansas, Alabama, Georgia, Idaho, Indiana, Michigan, New Hampshire, Virginia, Wyoming, Pennsylvania, Minnesota, Arizona, Louisiana, Oregon, and North Dakota have all enacted legislation or passed constitutional referendums that limit condemnations that transfer properties to private parties.[109] Except for South Dakota, each of these states has similarly narrowed the blight definition.[110] Though retaining its previous definition, South Dakota's elimination of private-to-private transfers removes the incentive for local governments to make a blight finding, thus accomplishing the same goal as the states that narrowed the blight definition.[111] Nevada's blight statute still defines the term broadly; however, a state referendum has been passed that will narrow the justifications for eminent domain in the years to come.[112] South Carolina also passed an eminent domain referendum, though the amendment's effect is unclear.[113] Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Washington have not enacted any post-*Kelo* reforms.[114]

104. COLO. REV. STAT. ANN. § 38-1-101(2)(b) (West 2010); MO. ANN. STAT. § 523.261 (West 2010), *discussed in* POWELL ON REAL PROPERTY, *supra* note 15, § 79F.03[3][b][iv].

105. WIS. STAT. ANN. § 32.03(6)(a) (West 2010), *discussed in* POWELL ON REAL PROPERTY, *supra* note 15, § 79F.03[3][b][iv]. Wolf's analysis of post-*Kelo* reform in states such as West Virginia and California is likewise less critical than is Somin's. POWELL ON REAL PROPERTY, *supra* note 15, § 79F.03[3][b][iv].

106. Somin, *supra* note 11, at 2138–48.

107. *Id.* at 2138.

108. *Id*.

109. *Id*. at 2138–46.

110. *Id*.

111. *Id*. at 2139.

112. NEV. REV. STAT. ANN. §§ 37.010(1)(q), 279.388(1) (West 2010); *see* Somin, *supra* note 11, at 2126.

113. Somin, *supra* note 11, at 2145–46.

114. *Id*. at 2115–16 tbl.3.

IV. THE EFFECTS OF THE BLIGHT EXEMPTIONS ON HISTORIC PRESERVATION

The post-*Kelo* eminent domain reforms will produce varied implications for the governments that wield condemnation powers, the citizens whose property governments desire, and the citizens who are affected by the condemnation of their neighbors' properties. As there is a correlation between a building's age and the likelihood it will be designated blight, the reforms with narrowed definitions or use of blight will result in greater protection for buildings of historic significance. However, in the many states that enacted post-*Kelo* reforms with broadly defined blight exemptions for redevelopment condemnations, older buildings of historic significance remain at risk.

Over the years, historic buildings have often been condemned or targeted for condemnation by governments wielding eminent domain powers.[115] Condemnation plans in the historic downtowns of Pittsburgh and Baltimore led to inclusion of the areas in the National Trust for Historic Preservation's list of America's Eleven Most Endangered Historic Places.[116] While these condemnation plans were eventually dropped,[117] older homes and churches in the Poletown neighborhood of Detroit, Michigan, were permanently lost in the early 1980s when razed to make way for a General Motors plant.[118] In the 1950s, the historic West End neighborhood of Boston was razed and replaced with high rise apartments.[119] Other examples of historic buildings and neighborhoods destroyed by eminent domain include the Block 37 neighborhood of Chicago[120] and Nardi's Bakery and Deli in East Hartford, Connecticut.[121] Each of these demonstrates a condemnation that would be more difficult to effectuate in jurisdictions with strong post-*Kelo* reform.

These condemnations occurred in the pre-*Kelo* world, when most jurisdictions could condemn buildings for economic redevelopment without first making a blight finding. However, contrary to the expectations of those who clamored for eminent domain reform in the aftermath of *Kelo*, condemnations such as these could still easily occur in

115. In addition to local governments, authorities at the state and federal level wield condemnation powers as well. However, as the majority of land control and planning is at the local level, eminent domain is more often a tool of local government.

116. Fine, *supra* note 1, at 24.

117. *Id*.

118. *See generally* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). For commentary about the Poletown neighborhood, see James Kelly, *The Last Days of Poletown*, TIME, Mar. 30, 1981, http://www.time.com/time/printout/0,8816,922498,00.html#.

119. For a photographic history of the West End urban renewal project, see Joseph Soares, *Urban Renewal in Boston: The West End and Government Center*, WAKE FOREST UNIV. (Feb. 7, 1997), http://www.wfu.edu/sociology/sociallifeofcities/urban/urban.html.

120. REDEVELOPMENT WRECKS: 20 FAILED PROJECTS INVOLVING EMINENT DOMAIN ABUSE, THE CASTLE COALITION, INSTITUTE FOR JUSTICE 3 (2006), *available at* http://www.castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf.

121. *Id*. at 6.

the many jurisdictions with easily satisfied blight exemptions in their eminent domain reforms. As noted by Professor J. Peter Byrne, "Most American cities today contain vibrant historic districts that not long ago were considered blighted."[122] In jurisdictions that allow broad blight definitions to justify condemnations for economic redevelopment, local governments risk losing valuable historic resources to short-sighted development plans.

Further exacerbating the risks faced to historic buildings is the inclusion of terms such as "age" and "obsolescence" as factors contributing to blight. As noted in Part III, thirteen of the twenty-two states with weak post-*Kelo* reforms include either "age" or "obsolescence" in their blight definitions.[123] One commentator notes the ease in which governments may find blight conditions satisfied: "Enthusiasts of historic preservation must cringe upon being informed that the age of a building suffices to classify it as blighted. . . . As for obsolescence, any structure more than a few years old could be labeled obsolescent if it lacks features found in newer structures."[124] Another commentator observes that using age to designate an older building as blighted seems contrary to the goals of historic preservation:

> [F]or a building to be eligible for listing in the National Register of Historic Places it must be [] more than fifty years old or be of such historical or architectural importance as to be listed earlier. . . . Declaring older areas that are eligible or listed on the National Register as blight and subject to [] potential clearance seems contrary to Federal and Local Historic Preservation laws and programs. . . . [B]ecause age is not an indicator of whether an area may place a substantial burden on municipal growth, it should not be included as a determining factor.[125]

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122. J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 141 (2005). Other commentators note that, "Economic development takings may also come at the expense of historic preservation if historic buildings are located in areas targeted for condemnation." Somin & Adler, *supra* note 72, at 646.

123. *See supra* Part III.

124. *See* Lefcoe, *supra* note 71, at 61–62.

125. Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. CIN. L. REV. 207, 226–27 (2004). If the blight removal is part of a federally funded or licensed redevelopment project, § 106 of the National Historic Preservation Act mandates that the federal agency "take into account" the impacts on buildings listed for or eligible for listing on the National Register:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The

It is arguable whether age should be disregarded altogether as a blight-contributing factor; however, it is indisputable that giving it much weight in determining blight works against the interests of preservation.

Including imprecise and over-inclusive terms in blight definitions leads to broad exemptions from the post-*Kelo* ban on private-to-private condemnations and has negative consequences for the preservation of the community. Such definitions give condemning authorities the green light to use blight eradication as a pretext to removing valuable and irreplaceable historic buildings.

V. EMINENT DOMAIN AS AN EFFECTIVE TOOL FOR HISTORIC PRESERVATION

Notwithstanding the danger eminent domain poses to historic preservation, it can also be a powerful tool to promote preservation and to save buildings of historic significance. Typically, the goals of preservation can be met without seizing title to a structure. A commentator describes the goal of historic preservation:

> [T]he end can be achieved by condemning those elements of the *ius utendi* relating to the owner's right to choose a design for the structure. The interest so acquired would be a negative easement . . . . Such limited condemnation is thought preferable by many preservationists and architects, not only because it is less expensive than condemnation of the fee, but also because it preserves the property as a "living" thing rather than as an embalmed museum piece.[126]

At times, however, a property's deterioration, its extraordinary public significance, or the owner's inability or refusal to cooperate may make eminent domain the preferred option.

When the condemned property is of incontrovertible significance, such as a historic battlefield,[127] the condemnation will be less controversial. However, condemnation of property with only local significance may

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> head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (codified as amended at 16 U.S.C. § 470f (2006)). As it is not uncommon for a large redevelopment project to involve federal funds or require federal licensure, § 106 is often a relevant factor in condemnations of older neighborhoods for redevelopment. An example can be found in *WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979), where the Department of Housing and Urban Development (HUD) helped fund a New England urban renewal project that included plans to demolish buildings eligible for listing on the National Register. *Id.* at 314–15. HUD's involvement implicated § 106, and the court enjoined the buildings' demolition until the agency complied with the Act. *Id.* at 319–27.

126. Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 727–28 (1963).

127. *E.g.*, United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679–83 (1896).

arouse more contention. If the public use of historic preservation could be coupled with an additional public use, such as blight eradication, it would be more palatable to the local community. Such two-part justifications have been used in the past.[128] In the states with strong post-*Kelo* reform, these justifications may prove problematic.

A. *The Expansion of Historic Preservation as a Valid Public Use*

Courts subsequent to *Gettysburg* could have restricted their holding to historic battlefields, yet they did not do so. In the century since *Gettysburg*, a line of state court decisions ratified condemnations for historic preservation.[129] In *Penn Central Transp. Co. v. New York City*,[130] the U.S. Supreme Court ratified a historic preservation ordinance that resulted in a partial condemnation of a historic structure."[131] Though addressing regulation rather than condemnation of the fee, *Penn Central*'s acceptance of New York's historic preservation ordinance could be seen as a tacit endorsement of the post-*Gettysburg* cases that affirmed condemnations of buildings for historic preservation.

New York state courts have affirmed condemnations for historic preservation on several occasions.[132] In the lower court opinion for *Penn Central*, the New York Court of Appeals affirmed the trial court's decision that New York's landmark preservation provisions were not unconstitutional and that the Penn Central Transportation Company had not been deprived of its property without due process of law.[133] The court stated, "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even

128. *See, e.g.*, Cordova v. City of Tucson, 494 P.2d 52, 52–53 (Ariz. Ct. App. 1972); *In re* Acquisition of Real Prop. by Albany, 9 A.D.3d 551, 552 (N.Y. App. Div. 2004); City of Tacoma v. Zimmerman, 82 P.3d 701, 702–07 (Wash. Ct. App. 2004).

129. *See, e.g.*, *Cordova*, 494 P.2d at 53–54 (citing *Gettysburg* for the proposition that, "[I]t has long been established that a taking to preserve historic property represents a proper 'public use.'"); Flaccomio v. Mayor & City Council of Baltimore, 71 A.2d 12, 14 (Md. 1950) (upholding the taking of property near a historic landmark for the purposes of historic preservation); *In re Acquisition of Real Prop. by Albany*, 9 A.D.3d at 552–53 (permitting the acquisition of property without a public hearing for the purpose of "emergency stabilization and historic preservation"); Lubelle v. City of Rochester, 145 A.D.2d 954, 954–55 (N.Y. App. Div. 1988) (upholding the taking of vacant lots and a historic building for the purpose of historic preservation); Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1278–79 (N.Y. 1977) (upholding a regulation that prohibited the construction of buildings upon a significant landmark); Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 810 (S.C. 1970) ("The validity of condemnation for parks, public squares, historical sites or monuments has been established in many instances.").

130. 438 U.S. 104 (1978).

131. *Id.* at 147 n.10 (Rehnquist, J., dissenting).

132. *See* Wechsler v. N.Y. State Dep't of Envtl. Conservation, 564 N.E.2d 660, 661 (N.Y. 1990) (allowing acquisition for the "over-all goal of preservation"); *Penn Cent. Transp. Co.*, 366 N.E.2d at 1278–79 (upholding a regulation that prohibited the construction of buildings upon a significant landmark); *Lubelle*, 145 A.D.2d at 954 (upholding the taking of vacant lots and a historic building for the purpose of historic preservation).

133. *Penn Cent. Transp. Co.*, 366 N.E.2d at 1273.

required."[134] However, when eminent domain is not a viable option because of a city's financial distress, schemes preserving historic properties while keeping them in private hands are likewise legitimate.[135] This opinion signaled a ringing endorsement of eminent domain for historic preservation, demonstrating not only that historic preservation is a valid public use, but at least in New York, it may be favored over other options.

The state again validated historic preservation as a public use in *Lubelle v. City of Rochester*.[136] In *Lubelle*, the City of Rochester used its eminent domain power to take the historic Hoyt-Potter House along with two adjoining vacant lots.[137] Lubelle asserted that the condemnation of the vacant lots for parking was "excessive and thus unconstitutional, and that the entire taking will not serve a public use."[138] The court disagreed, holding that condemnation of the lots was "rationally related to a conceivable public purpose" and that "there is no dispute that historic preservation serves a public purpose."[139] The court further noted that whether the rehabilitation was worth the cost was a legislative decision, and thus, it would not be second-guessed by the courts.[140]

A third New York validation of condemnation for preservation came in *Wechsler v. New York State Department of Environmental Conservation*.[141] In *Wechsler*, the New York Court of Appeals affirmed the condemnation of 1,067 acres of the Neversink River Gorge.[142] The court emphasized the "great natural beauty" and "historical[] significance" of the land.[143] The condemning agency reasoned that the acquisition would be "consistent with the over-all goal of preservation."[144] The court found this to be a public use and validated the agency's actions.[145]

Courts across the country have come to conclusions similar to those of the New York courts. In *Flaccomio v. Mayor and City Council of Baltimore*,[146] the Court of Appeals of Maryland affirmed a decision allowing the taking of a house to expand the Star Spangled Banner Flag House in Baltimore.[147] The contested property bordered the house where Mary Pickersgill made (or started to make) the flag that inspired Francis Scott Key to write the Star Spangled Banner.[148] Baltimore needed the adjoining property to make room for a museum, and the court, relying on

134. *Id*. at 1278.
135. *Id*.
136. 145 A.D.2d 954 (N.Y. App. Div. 1988).
137. *Id*. at 954.
138. *Id*.
139. *Id*.
140. *Id*.
141. 564 N.E.2d 660 (N.Y. 1990).
142. *Id*. at 661.
143. *Id*.
144. *Id*.
145. *Id*. at 661–62.
146. 71 A.2d 12 (Md. Ct. App. 1950).
147. *Id*. at 14–15.
148. *Id*. at 12–13.

Gettysburg, validated the action: "The purpose for which the City of Baltimore is attempting to acquire the small tract of land involved in this case is similar in many respects to the purpose which actuated the Government of the United States to acquire the battle field of Gettysburg."[149]

In *Timmons v. South Carolina Tricentennial Commission*,[150] the Supreme Court of South Carolina cited both *Flaccomio* and *Gettysburg* in upholding the condemnation of a parcel to be used in South Carolina's tricentennial celebration.[151] The lot stood in the same block as the antebellum Hampton-Preston mansion.[152] During the celebration, the state needed the lot for parking; after the celebration, the state needed the lot to expand the mansion's gardens.[153] The court stated that "[h]istorical . . . purposes are recognized public uses" and validated the state's condemnation.[154]

B. *The Coupling of Historic Preservation with Blight Eradication*

Governments have at times justified condemnations by coupling the public use of historic preservation with the public use of blight eradication. Although the added component of blight eradication is not necessary to constitutionally justify a condemnation for preservation, it likely makes the condemnation more palatable to the local community. The added justification of blight removal may be most beneficial in cases where the desired building is historical but may not have the same level of significance as Gettysburg or the Star Spangled Banner Flag House, or the same clout as a state's tricentennial celebration. Local governments have used this technique in cities such as Tucson, Arizona;[155] Tacoma, Washington;[156] and Albany, New York.[157] In each of these instances, the local governments transferred the newly acquired fee or leasehold interests to non-governmental entities that would be better stewards of the historic buildings.

In *Cordova v. Tucson*, the City of Tucson condemned Maria Cordova's historic building as part of the Pueblo Center Redevelopment Project No. Arizona R-8.[158] The project followed a finding that parts of downtown Tucson were blighted or slum areas and that "redevelopment of such area is necessary in the interests of the public health, safety, morals, and welfare of the residents of the City of Tucson."[159] Noting the historic value of

149. *Id.* at 14.
150. 175 S.E.2d 805 (S.C. 1970).
151. *Id.* at 813.
152. *Id.* at 810.
153. *Id.* at 810–11.
154. *Id.* at 813.
155. Cordova v. City of Tucson, 494 P.2d 52, 53 (Ariz. Ct. App. 1972).
156. City of Tacoma v. Zimmerman, 82 P.3d 701, 702–07 (Wash. Ct. App. 2004).
157. *In re* Acquisition of Real Prop. by Albany, 9 A.D.3d 551, 551–53 (N.Y. App. Div. 2004).
158. *Cordova*, 494 P.2d at 52–53.
159. *Id.*

Cordova's building, the city chose not to raze it but rather preserve the building and retain title.[160] The city planned to lease the building to the Tucson Art Center, where it would be integrated into an art complex showcasing art, historic buildings, and gardens.[161]

Though within the designated blight area, Cordova contested the city's condemnation of her property.[162] She argued that no public use justification existed to condemn her property: (1) it was not slum; (2) it was not to be razed; and (3) it was to be leased to a private corporation.[163] Notwithstanding these assertions, the Arizona Court of Appeals found the condemnation furthered a public use and affirmed the city's actions.[164]

The court stated that the pertinent question was not whether Cordova's building was slum but rather whether the building was in a statutorily defined slum area.[165] As the building was in such an area, the court found no merit in Cordova's first argument.[166] The court likewise found no merit in Cordova's second argument, stating "condemning authorities are to be praised, rather than damned, for excepting from the bulldozer's path buildings and sites of historic and cultural significance."[167] Citing both *Gettysburg* and *Flaccomio*, the court reiterated that historic preservation is a public use and that the city was on firm ground in promoting such use in its redevelopment plan.[168] Lastly, the court noted that leasing the condemned property to a private corporation was not incompatible with the project's designation as a public use.[169]

Many of the court's rationales for upholding the condemnation would not pass muster in a jurisdiction with strong post-*Kelo* reform. The conclusion that leasing to a private corporation does not negate the public use is no longer definitive in those jurisdictions that statutorily narrowed

160. *Id*. at 53.

161. *Id*. at 53–54.

162. *Id*. at 52–53.

163. *Id*. at 53. Cordova also argued that the inclusion of her property was unjustified because it was located in a block of the redevelopment district that was set apart geographically and had been treated differently from the remainder of the district. *Id*.

164. *Id*. at 54.

165. *Id*. at 53. Like many of the blight definitions described in Part III of this Note, Arizona used a broad definition of slum or blight. Arizona Statutes § 36-1471(18) defined "slum area" as

> an area of which a majority of the structures are residential, or an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes . . . is detrimental to the public health, safety, morals and welfare.

ARIZ. STAT. § 36-1471(18) (1972).

166. *Cordova*, 494 P.2d at 53.

167. *Id*. The court also found no merit in the argument that the building's location and special treatment made inclusion in the redevelopment area unjustified. *Id*.

168. *Id*. at 53–54.

169. *Id*. at 54.

the definition of public use post-*Kelo*. Many jurisdictions would recognize a public use if, like in *Tucson*, the private corporation benefited the public.[170] However, the *Tucson* court felt no need to draw such a distinction. In some post-*Kelo* jurisdictions, even transfers to private corporations benefitting the public are forbidden.[171] For example, in South Dakota, "No county, municipality, or housing and redevelopment commission . . . may acquire private property by use of eminent domain: (1) For transfer to any private person, nongovernmental entity, or other public-private business entity."[172] Laws such as this would prevent cities in Tucson's situation from preserving historic buildings unless the buildings remained with the government.

Further, some states with strong post-*Kelo* reform would not allow the condemnation of a non-blighted building solely because it fell within a district where other buildings were blighted.[173] For example, since the 2006 voter approval of Proposition 207, condemning authorities in Arizona must "establish by clear and convincing evidence that each parcel is necessary to eliminate a direct threat to public health or safety caused by the property in its current condition."[174] In 1972, however, Arizona's permissive eminent domain laws did not hamstring the state with such limitations. Accordingly, the *Tucson* court validated the condemnation and with it the city's efforts to promote art and historic preservation in the downtown area.

Thirty-two years after *Tucson*, the appellate division of the Supreme Court of New York validated another coupling of blight eradication with historic preservation in the case of *In re Acquisition of Real Property by City of Albany*.[175] There, the city's Department of Fire Emergency and Building Services notified the owner of the former St. Joseph's Church that the building was "unsound and structurally unstable."[176] The owner ignored the city's demand to vacate the premises and fix the deficiencies.[177] Accordingly, the city barricaded the church and carried out emergency repairs to "prevent further structural deterioration and catastrophic failure."[178] The city then commenced eminent domain proceedings for "emergency stabilization and historic preservation."[179]

The church owner protested the city's designation of the church as deteriorated; however, the court ruled against the church owner in this

170. *See, e.g.*, FLA. STAT. § 73.013 (2010); *see also* Miller & Amrhein, *supra* note 13 (referencing Florida's statutes and noting that it exempts situations "where private use is incidental to a public project" from the ban on conveyances to private parties).

171. *See, e.g.*, S.D. CODIFIED LAWS § 11-7-22.1 (West 2010).

172. *Id.*

173. *See, e.g.*, Miller & Amrhein, *supra* note 13, at 794–95 (discussing ARIZ. STAT. § 12-1132 (2010)).

174. ARIZ. STAT. § 12-1132.

175. 9 A.D.3d 551, 552–53 (N.Y App. Div. 2004).

176. *Id.* at 551–52.

177. *Id.* at 552.

178. *Id.*

179. *Id.*

regard.[180] Noting that the condemning authority has broad discretion in defining a public purpose,[181] the court affirmed that the condemnation complied with New York's laws and police powers.[182]

Following its condemnation, the City of Albany transferred St. Joseph's Church to the private Historic Albany Foundation.[183] In the years following its acquisition, the organization worked to stabilize and refurbish the historic church.[184]

Like the transfer in *Tucson*, the transfer of St. Joseph's Church to a private organization, based in part on the church's blight designation, would raise questions in some jurisdictions with strong post-*Kelo* eminent domain reform. The public nature of the private corporation would pass muster under most, but not all, post-*Kelo* reforms. However, the use of blight to condemn the building would be a hurdle in many jurisdictions and a block against condemnation in others.

In the same year as the *Albany* decision, the Court of Appeals of Washington affirmed the City of Tacoma's coupling of blight eradication with historic preservation to justify the condemnation of the Old Elks Temple on Broadway.[185] In *Tacoma v. Zimmerman*,[186] the city found the Old Elks Temple to be derelict and issued numerous requests that the owners, Ronald and Steffi Zimmerman, make the requisite repairs.[187] The Zimmermans' refusal to respond and the accumulation of over $1,000 in fines triggered the city's right to issue a certificate of complaint and to commence condemnation proceedings.[188]

Under the Tacoma Municipal Code, the issuance of a certificate of complaint authorizes the government to either take title to the property or demolish it.[189] Eminent domain is limited to situations where "the property undergoing the Derelict Building Procedure is *of sufficient value to be repairable*."[190] The Zimmermans argued that it would be more economical to demolish the building and replace it with a new structure;[191] the city argued that the temple's historic and aesthetic value warranted preservation.[192] Though the court agreed with the Zimmermans' contention that the requisite value was economic value rather than historic or aesthetic value, the court ruled that the city could gauge economic value by looking past the individual building and to the aims of the historic district as a

180. *Id*. at 552–53.

181. *Id*. at 553 (citing *In re* Rafferty v. Town of Colonie, 300 A.D.2d 719, 723 (N.Y. App. Div. 2002)).

182. *Albany*, 9 A.D.2d at 553.

183. *See February 2011 St. Joseph's Newsletter*, *supra* note 31. The Web site has a wealth of information about the history of the condemned church as well as the ongoing restoration project.

184. *See id.*

185. City of Tacoma v. Zimmerman, 82 P.3d 701, 702–07 (Wash. Ct. App. 2004).

186. 82 P.3d 701.

187. *Id*. at 702–03.

188. *Id*. at 703.

189. *Id*.

190. *Id*. at 705 (citing the local ordinance) (emphasis in original).

191. *Id*. at 702–03.

192. *Id*. at 705.

whole.[193] The court stated:

> Whether an action is "economical" depends on whether the City's reasons for pursuing a project justify the project's economic cost to the City. In enacting an ordinance allowing the City to acquire the building through negotiation or eminent domain, the City cited the historic and cultural value of the building . . . . But, from the City's perspective, the value of the building also encompasses its relationship to the other buildings in the area and the district as a whole. This "district" view of value, economic and otherwise, is more expansive than that of the owner of a single building. And it is a necessary and proper perspective from which a city, as opposed to an individual landowner, may assess economic value.[194]

Thus, the court found the city was justified in choosing to preserve rather than to destroy the Old Elks Temple.[195]

Like in *Tucson* and *Albany*, the plan in *Tacoma* did not foresee retaining title in the city.[196] The plan in *Tacoma* did not even foresee transferring title to a quasi-public entity such as a historic preservation foundation[197] or an art center.[198] The plan in *Tacoma* sought to transfer title to a successful bidder.[199] This sort of conveyance is even more in line with the private-to-private transfers that states found so offensive when drafting post-*Kelo* eminent domain reforms. Such measures, though in some instances beneficial to historic preservation, will be forbidden in many states with strong post-*Kelo* reform.

A further similarity to *Tucson* and *Albany* can be found in *Tacoma*'s eminent domain justifications based on a blight designation.[200] In fact, the city's condemnation *hinged* on the blight designation.[201] The city commenced eminent domain based on the state statute and municipal ordinance permitting condemnations of blighted properties.[202] The *Tacoma* court noted that the separate statute permitting eminent domain for historic preservation qualified the power by noting that governments may not reach

193. *Id*. at 706.

194. *Id*.

195. *Id*. at 707.

196. *Id*. at 704.

197. *See February 2011 St. Joseph's Newsletter*, *supra* note 31; *see generally In re* Acquisition of Real Prop. by Albany, 9 A.D.3d 551 (N.Y. App. Div. 2004) (upholding the condemnation of the historic St. Joseph's Church).

198. *See* Cordova v. City of Tucson, 494 P.2d 52, 54 (Ariz. Ct. App. 1972).

199. *Tacoma*, 82 P.3d at 704. The court cited the city as "nam[ing] tax abatement and historic tax credits as examples of ways the City could make a development project be financially worthwhile to a prospective developer." *Id*.

200. *Id*.

201. *Id*.

202. *Id*.

buildings they would not otherwise be permitted to condemn.[203] Therefore, the court held that "until the Zimmermans allowed the property to decline into a blighted state, the City could not acquire it."[204] In the post-*Kelo* world, the absence of historic preservation as a stand-alone justification for eminent domain would put even more emphasis on the blight definition used in proceedings to condemn historic structures.

The condemnations affirmed in *Tucson*, *Albany*, and *Tacoma* would arouse greater judicial scrutiny in the jurisdictions that enacted strong post-*Kelo* reform. Blight designations, conveyances to private parties, and condemnations of non-blighted structures in blighted neighborhoods are all old tools that could pose hurdles to present condemnations for preservation in jurisdictions with strong post-*Kelo* reform. If a building is truly blighted, most jurisdictions with strong reforms would still allow the building to be condemned for economic redevelopment. However, governments in these jurisdictions will find it harder to save historic buildings that, though not per se blighted, are neglected and in danger of losing their historic integrity. Further, in states such as Florida, New Mexico, and Utah that have effectively eliminated blight as an eminent domain justification, even truly derelict historic buildings will be more difficult to condemn in the name of preservation.[205] In this respect, the post-*Kelo* eminent domain reforms may have eliminated a powerful tool for the preservation community.

VI. CONCLUSION

The *Kelo* decision led to considerable speculation about the probable effects on historic preservation. Shortly after *Kelo*, National Trust for Historic Preservation Vice President and general counsel Paul Edmondson stated that, "[I]t is important to acknowledge that eminent domain is a tool that can be used to promote historic preservation, but on the other hand to acknowledge that it can harm . . . (often in the guise of eliminating 'blight')."[206] State preservation groups, both before and after *Kelo*, made

203. *Id.* at 704 n.6.

204. *Id.*

205. *See supra* notes 105–07 accompanying text.

206. *See* Memorandum from Paul Edmondson, Vice President & Gen. Counsel, Nat'l Trust for Historic Preservation, Some Thoughts About the *Kelo* Decision for Members of the Historic Preservation Community 4 (Aug. 2, 2005), *available at* http://www.preservationnation.org/issues/transportation/additional-resources/kelo-eminent-domain-nthp-commentary.pdf. Edmondson continued that,

> It is incumbent on preservationists to be active in promoting the former and opposing the latter. From either perspective, legislative reforms that would eliminate the tool in its entirety——to end any use of eminent domain to promote economic development——should not be necessary to correct abuse, but reforms designed to increase transparency, encourage community involvement in planning, and increase attention to protecting neighborhood character would go a long way in helping to ensure that the tool is not misused.

Id. (emphasis in original).

similar observations on eminent domain and historic preservation.[207] In the wake of the post-*Kelo* reforms, eminent domain will likely continue to cut both ways for historic preservation. Legislators will need to find creative solutions to balance the needs of property rights advocates who oppose condemnation for economic redevelopment with the needs of the preservation community that strives to restore and protect historic structures in disrepair.

In the states with weak eminent domain reform, historic preservation advocates should lobby to narrow or eliminate the post-*Kelo* blight exemptions to the ban on economic redevelopment condemnations so that they do not apply to historic sites. Section 106 of the National Historic Preservation Act already mandates that federal agencies "take into account" the impacts on historic buildings if federal funding or licensure is involved in a condemnation project.[208] If states went a step further, historic buildings could be protected regardless of whether a project has federal involvement.

Rather than solely "tak[ing] into account" the condemnation's effects on a historic building, preservation advocates in states with weak post-*Kelo* reform should push for language barring the use of blight as a justification for economic redevelopment condemnations of buildings listed on or eligible for listing on a historic preservation register where such condemnations threaten the destruction of those sites. Drafters of such a statute could adopt Florida's broad prohibition against blight eradication as an eminent domain justification, replacing Florida's reference to "private property"[209] with the National Historic Preservation Act's reference to "any district, site, building, structure, or object that is included in or eligible for

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207. *See* Gregory B. Paxton, *Georgia Trust for Historic Preservation Asks 'Where Does Eminent Domain Fit Into the Preservation Puzzle?,'* GA. TRUST, http://www.georgiatrust.org/news/preservation_issues/eminent_domain.php (last visited Apr. 15, 2011) ("While eminent domain has often been used to eliminate historic buildings in disrepair, long-term vacant parcels have often resulted. Condemnation also can be—and has been—used to protect historic resources."); *see also Eminent Domain: Good or Bad for Historic Places?*, CONN. TRUST FOR HISTORIC PRESERVATION, http://www.cttrust.org/1855?highlight=cpn (last visited Apr. 15, 2011). Commentators have also made similar observations. *See, e.g.*, Fine, *supra* note 1, at 22–26. Commentators have also discussed eminent domain as a double-edged sword when viewed from the perspective of the environmental community. *See* Somin & Adler, *supra* note 72, at 665.

> From an environmental perspective, eminent domain is a two-edged sword. It can be used to provide environmental public goods and preserve undeveloped land. At the same time, however, it can also be used to condemn farms, extinguish conservation easements, subsidize unsound development, and pave the way for suburban expansion into the countryside.

Id.

208. National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (codified as amended at 16 U.S.C. § 470f (2006)).

209. *See* FLA. STAT. § 73.014(2) (2010). Florida's statute states, "[T]he state, any political subdivision . . . , or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions." *Id.*

inclusion in the National Register."[210] The language could be expanded to include structures listed on or eligible for listing on state and local registers. Thus, the statute could read:

> The state, any political subdivision, or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take any district, site, building, structure, or object that is included in or eligible for inclusion in any federal, state, or municipal register for historic preservation for the purpose of preventing or eliminating slum or blight conditions.

The state would want to allow condemnations if the purpose were preservation rather than economic redevelopment. Therefore, the drafters would need to follow this provision by stating,

> Notwithstanding this prohibition, a condemning authority may exercise the power of eminent domain to take a district, site, building, structure, or object that is included in or eligible for inclusion in any federal, state, or municipal register for historic preservation if the stated goal of the condemnation is the historic preservation of the condemned property.

Amending a state's weak eminent domain statute in this regard would protect historic buildings from shortsighted redevelopment plans yet would minimize the protestations of legislators unwilling to hamstring the state's condemnation powers.

Conversely, in the states with strong eminent domain reform, historic preservation advocates should press legislatures to allow more flexibility in condemnations for preservation of buildings listed on or eligible for listing on national, state, or local registers for historic preservation. Statutes could be amended to allow for condemnations in order to preserve buildings that fall short of meeting stringent blight definitions but fail to maintain their historic integrity. Stringent blight definitions could apply in all other situations.

This could be accomplished by inserting language after a state's strict blight definition that allows for more leniency when the structure is a historic building. For example, a state's statute could first define blight in regards to stringent factors such as where a building "constitutes a public nuisance," "is unfit for human habitation," or "is otherwise dangerous to the safety of persons or property."[211] The statute could then draw language from the National Historic Preservation Act and from a weakly reformed state statute and provide,

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210. § 106, 80 Stat. at 917.

211. *E.g.*, IND. CODE ANN. § 32-24-4.5-7 (West 2010); Somin, *supra* note 11, at 2140 n.187 (discussing the Indiana provision).

> Notwithstanding this general definition of blight, a district, site, building, structure, or object that is included in or eligible for inclusion in any federal, state, or municipal register for historic preservation that is targeted for condemnation for preservation will constitute blight for purposes of eminent domain if, by reason of dilapidation, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, it is detrimental to the safety, health, morals, or welfare of the community.[212]

Another way to provide a more lenient definition of blight for preservation of historic buildings would be to modify the factors that must be aggregated to support a blight finding. Colorado's blight statute, though arguably a weak effort at reform, is illustrative of a statute that defines "blight" as an aggregate of factors that could be modified if the targeted structure were historic.[213] The statute defines blight as an area that "by reason of the presence of at least four of the following factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare . . . ."[214] The statute then lists eleven factors to consider, including things such as whether the proposed condemnation includes "[s]lum, deteriorated, or deteriorating structures," "[a p]redominance of defective or inadequate street layout," "[f]aulty lot layout in relation to size, adequacy, accessibility, or usefulness," or "[u]nsanitary or unsafe conditions."[215] This statute could be amended to better facilitate the goals of historic preservation by adding the following language:

> Notwithstanding this provision, if the proposed condemnation is a district, site, building, structure, or object that is included in or eligible for inclusion in any federal, state, or municipal register for historic preservation, and if the purpose of the proposed condemnation is historic preservation, the presence of only three of the aforementioned factors is sufficient to satisfy a finding of blight.

Rather than adding this provision, another means to facilitate condemnations for preservation would be to add a twelfth factor to be considered: "The proposed condemnation is a district, site, building, structure, or object that is included in or eligible for inclusion in any federal, state, or municipal register for historic preservation, but only if the purpose of the proposed condemnation is historic preservation." Amending

212. This provision combines language from § 106 of the National Historic Preservation Act, § 106, 80 Stat. at 917, with language drawn from Tennessee's blight definition, TENN. CODE ANN. § 13-20-201(a) (West 2010).

213. COL. REV. STAT. ANN. § 31-25-103 (West 2010).

214. *Id.* § 31-25-103(2).

215. *Id.* § 31-25-103(2)(a)–(d).

post-*Kelo* reforms in any of these regards could minimize the protestations of property rights advocates while adding crucial protection to historically significant buildings. Unless the strong post-*Kelo* reforms are reanalyzed in light of the needs of preservation, the same states that have added a layer of protection to historic buildings may have stripped a layer of protection as well.

As the law stands, the post-*Kelo* reforms both facilitate and hinder historic preservation. In the states with weak reform, historic buildings remain at risk of shortsighted condemnations for economic redevelopment. However, governments in these states retain wide powers to condemn historic buildings for historic preservation. In the states with strong reform, the condemnation of older neighborhoods in the name of economic redevelopment will be harder to effectuate than it was pre-*Kelo*. However, it will be harder to save historic buildings that are not blighted yet are neglected and falling into disrepair. Eminent domain remains a double-edged sword for historic preservation.