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Sarah Domin*

Introduction

Many of the industrial capitals of America have shrunk from their historic prominence to become sparsely populated, depressed, and abandoned. Detroit, with its recent controversial Chapter 9 bankruptcy filing,[1] the largest municipal bankruptcy filing in American history, is a prime example of a "shrinking city."[2] Its population dropped from nearly two million in 1950 to around seven hundred thousand in 2010.[3] In the last decade alone, it has experienced a 25% population decline.[4] It

* J.D. Candidate, 2014. I would like to thank Professors Jay Krishnan and Jeffrey Stake for helping me develop this topic, offering me guidance in my research, and showing me the human side of property law.

1. Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles Into Insolvency*, N.Y. Times, July 18, 2013, http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=all&_r=0&pagewanted=print.

2. With its debt at the time of filing totaling approximately $20 billion, Detroit has both a larger population and higher debt than the two largest cities to file for municipal bankruptcy to date—Jefferson County, Alabama and Stockton, California. Matt Helms, Nancy Kaffer & Stephen Henderson, *Detroit Files for Bankruptcy, Setting Off Battles with Creditors, Pensions, Unions*, Detroit Free Press (July 19, 2013, 7:47 AM), www.freep.com/article/20130718/NEWS01/307180107.

3. *Michigan – Race and Hispanic Origin for Selected Large Cities and Other Places: Earliest Census to 1990*, U.S. Census Bureau (July 13, 2005), http://www.census.gov/population/www/documentation/twps0076/MItab.pdf (containing population statistics for 1970); *State & County QuickFacts: Detroit (City), Michigan*, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/26/2622000.html (last updated Jan. 7, 2010, 10:58 AM) (containing population statistics for 2010).

4. Katharine Q. Seelye, *Detroit Census Confirms a Desertion Like No Other*, N.Y. Times, Mar. 22, 2011, http://www.nytimes.com/2011/03/23/us/23detroit.html.

has the additional challenge of being an incredibly segregated metropolitan area, stemming largely from the riots of 1967.[5] Many white residents fled to the suburbs while black residents largely stayed within the city limits, where neighborhoods have fallen into sharp decline.[6] In the midst of Detroit's continuing struggle with its declining population and extreme segregation, proposals have arisen involving condemnations of sparsely populated areas to create more densely populated centers.[7] Such plans would involve the use of the government's eminent domain power, given by the Fifth Amendment and applied to federal, state, and local governments.[8]

Although already anticipating legal challenges to any municipal action, the city and several economic development initiatives maintain that relocation is the only way to solve the city's population problem.[9] The city has in the past put money into the neighborhoods that need it the most in an attempt to revive them, but many agree now that shrinking the city is the only way to save it.[10] Even before Detroit's bankruptcy filing, economic development plans in Detroit had begun to come to terms with the city's shrinking population and now proceed with a smaller Detroit in mind.[11] This Note will focus on the role that eminent domain will play in the enactment of such relocation and downsizing initiatives. The recent history of eminent domain challenges in the United States has focused largely on whether takings are motivated by a public use or public purpose.[12] Public use is a requirement for takings under the Fifth Amendment,[13] and most takings challenges are based on the argument that the motive was not a public use.[14]

An additional and central element of public use challenges to eminent domain exercises is blight. The ideas of "blight" and "slums" became salient during the New Deal era as governments attempted to revitalize and reshape urban areas

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5. *See* Coleman A. Young & Lonnie Wheeler, Hard Stuff: The Autobiography of Coleman Young 179 (1994); Thomas J. Sugrue, The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit (1996).

6. *See, e.g.*, Sugrue, *supra* note 5.

7. *See, e.g.*, Christine MacDonald, *Bing: I'll Move Some Residents*, Detroit News, Feb. 25, 2010, at A4.

8. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

9. *See* MacDonald, *supra* note 7.

10. *See id.* Mayor Bing is quoted as saying, "If we don't do it . . . this whole city is going to go down. I'm hopeful people will understand that." *Id.*

11. For a discussion of proposed uses for vacant land and plans to centralize neighborhoods, see The Detroit Works Project, Detroit Future City: Detroit Strategic Framework Plan 172–295 (2012), http://detroitworksproject.com/wp-content/uploads/2013/01/The-DFC-Plan.pdf.

12. *See* Kelo v. City of New London, 545 U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

13. U.S. Const. amend. V.

14. *E.g.*, *Kelo*, 545 U.S. at 496.

and remedy what urban planners saw as a "social liability" based on the social problems, crime, and disease associated with slums.[15] The Supreme Court has held blight eradication to be a valid exercise of eminent domain.[16] In the last fifty years, the Supreme Court has upheld takings that involve the transfer of private property to other private individuals or corporations, accepting the rationale that such transfers promote the goals of blight eradication and economic development.[17] However, scholars and judges alike have noted that "economic development" takings that target blighted areas fall disproportionately on poor, uneducated, and minority homeowners.[18] From 1949 to 1963, 63% of families displaced by urban renewal projects were "nonwhite" and of those displaced, 56% of nonwhites and 38% of whites had low enough income to qualify for public housing.[19] Indeed, in the City of Detroit, where the population was 82% black in 2010, it is unquestionable that any economic development takings would fall more heavily on blacks than on whites.[20]

This raises the question of the availability of challenges for discrimination based on race. Legally, an equal protection challenge will only be sustained if there is proof that the state acted with a discriminatory intent; evidence of a discriminatory effect alone is insufficient.[21] Though disparate impact may sometimes serve as proof of a discriminatory intent, in eminent domain cases evidence of blight will almost always represent a strong enough state interest to satisfy strict scrutiny.[22] However, although the takings themselves may be justified by the interest in economic development, relocation and redevelopment could be guided by restrictions which put into place an affirmative-action-based plan to ensure that displaced minority residents are resettled into integrated areas with good schools, affordable but satisfactory housing, and diverse populations in terms of race and socioeconomic status. A plan like this would further the government's interest in promoting racial and ethnic diversity, held to be permissible in the context of both higher and lower education so long as the program is narrowly tailored to achieve this end.[23] The remedial effect of an affirmative-action-based resettlement program would mitigate the discriminatory effects of economic development takings, and the combined

15. Edward G. Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 Geo. L.J. 1027, 1030–31 (2008).

16. *Berman*, 348 U.S. at 26.

17. *See supra* note 12 and accompanying text.

18. *See, e.g.*, *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting) (citing several studies and articles on this disproportionate effect).

19. Bernard J. Frieden & Lynne B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 28 (1989).

20. Compare Detroit's high proportion of black residents with Michigan's mere 14%. *State & County QuickFacts: Detroit (City), Michigan*, *supra* note 3.

21. *See* Washington v. Davis, 426 U.S. 229 (1976).

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

23. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003).

taking and resettlement would achieve the dual goals of economic revitalization of blighted areas and population diversity. By making efforts to resettle displaced homeowners in a deliberate fashion, the city would make a great leap towards a more permanent alleviation of its segregation problem, providing more stability for the city's future after a long and bitter history of racial tension.[24]

The central argument of this Note is that government takings for the purposes of economic development and blight eradication that fall heavily on minority populations should be allowed for their economic benefit so long as they are carefully tailored to improve racial diversity in the outcome. In spite of their disproportionate impact on poor, uneducated, and minority homeowners, takings for blight eradication should not be restricted in cities like Detroit, where eminent domain is a useful and necessary tool for state and municipal governments to overcome the effects of declining industries and flight from the cities. Rather, eminent domain and subsequent urban development tactics should be used in a race-conscious way to promote racial and economic diversity in traditionally segregated urban centers, which is a permissible goal under the affirmative action jurisprudence of the Supreme Court.[25]

Part I of this Note will outline a brief history of recent eminent domain jurisprudence, as well as a history of de facto racial segregation in Detroit. Part II will highlight some of the existing remedies and other proposed solutions to limit economic development takings and discuss their shortcomings as applied to this situation. Part III will argue that the reasoning from the Supreme Court's affirmative action cases should be applied to post-condemnation redevelopment projects in order to remedy the disparate impact of such takings on minorities. This Note will briefly conclude by reviewing the proposed structure and functionality of a successful redevelopment and reintegration program.

I. History of the Doctrine

A. Recent History of Economic Development Takings in the United States

A recent line of cases illustrate the Supreme Court's practice of extreme deference to legislative findings of blight and the need for the use of eminent domain for economic development purposes. However, in reality, this economic development often involves invoking the eminent domain power to take private property from homeowners and transfer it to another private entity, which is known as a "public-private" taking because the government assigns property taken for a public use to a private recipient.[26] The Court's broad interpretation of public purpose allows this

24. For more information on Detroit's history of racial tension, see generally Sugrue, *supra* note 5.

25. *See* discussion *infra* Part I.C.

26. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument*

type of transfer because any private development can be said to serve the public purpose of bettering the community's aesthetic appeal or overall economic well-being.

The first case establishing broad judicial deference to a public-private taking was *Berman v. Parker*.[27] In that case, the City of Washington, D.C. condemned private property pursuant to the District of Columbia Redevelopment Act of 1945, and several homeowners sought to enjoin the condemnation.[28] The Court held that it was within the discretion of the legislature to take into account aesthetic considerations and public health when exercising its eminent domain power.[29] Congress' power over the affairs of the District of Columbia is what is traditionally known as the police power, and the Court held that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[30] Therefore, the Court set the precedent of deferring to what the legislature determines to be a public purpose, as the legislature is better set up to make those determinations based on legislative findings and extensive studies.[31]

The Court affirmed *Berman* in 1984 in *Hawaii Housing Authority v. Midkiff*.[32] The *Midkiff* case involved Hawaii's Land Reform Act of 1967, which was enacted by the state legislature for the purpose of reducing the concentration of land ownership in Hawaii, where land had been concentrated in the hands of a few land oligarchs for centuries.[33] The Land Reform Act allowed the Hawaii Housing Authority, after a petition by lessees and public hearings on whether it would serve the public purposes of the Act, to condemn single-family residential lots on larger tracts of land and sell the land titles to applicant lessees in order to break up the land monopoly.[34]

In determining whether a public use or purpose was served, the Supreme Court began by noting that the statute "unambiguously provides" that the condemnation power is for a public use and purpose.[35] The Court then followed its reasoning in *Berman*, holding that the state legislature, as the representative of its constituents, was constitutionally justified in channeling the will of the Hawaiian people,[36] and that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[37] Once it upheld the legislative judgment that a public purpose was served, the Court found that the scheme put in place by the Act

for Banning Economic Development Takings, 29 HARV. J.L. & PUB. POL'Y 491, 493–94 (2006).

27. 348 U.S. 26 (1954).
28. *Id.* at 28.
29. *Id.* at 32–33.
30. *Id.* at 32.
31. *Id.* at 33.
32. 467 U.S. 229 (1984).
33. *Id.* at 232–34.
34. *Id.* at 233–34.
35. *Id.* at 236.
36. *Id.* at 239–44 (citing Berman v. Parker, 348 U.S. 26 (1954)).
37. *Id*. at 242.

was constitutional because it was rationally related to serving that end.[38]

The most recent and controversial case where the Court again affirmed and expanded on the public use concept in *Berman* and *Midkiff* was *Kelo v. City of New London*.[39] The City of New London, Connecticut, condemned several homes in a waterfront area where the New London Development Corporation had proposed developing a new "urban village" that included businesses, a conference hotel, restaurants, shopping, public walkways, a state park, new residences, and a renovated marina.[40] Several homeowners whose properties were in the development area sued to enjoin the project,[41] claiming that economic development did not qualify as a public use under the Fifth Amendment and arguing that the Court should require a "reasonable certainty" that the projected public benefits would actually accrue.[42] Significantly, the Court noted that there was "no allegation that any of these properties [were] blighted or otherwise in poor condition; rather, they were condemned only because they happen[ed] to be located in the development area."[43] The Court followed *Berman* and *Midkiff* in holding that the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[44]

These three cases represent the Court's progression toward an ever-broadening definition of what serves as public use, by expanding the requirement to "public purpose" and by deferring to the legislatures on any proposal that might be rationally related to serving any purported benefit to the public. There are two ways for courts to interpret the phrase "public use" in the Fifth Amendment. A narrow interpretation holds that public use means "for use by the public." Under a narrow interpretation, a taking is for "public use" only if the public actually has the right to use the land or if it is owned by the government, such as public parks and roads.[45] Under the broad view, public use is anything that enhances the public welfare, more accurately described as "public purpose" than "public use."[46] The broad view is almost universally accepted in American jurisprudence and allows land taken for a "public purpose" to be transferred to private individuals or corporations so long as there is some demonstrable benefit to the public welfare.[47] In many cases, the benefit to be accrued need not actually be proved by any empirical data, as courts will generally defer to legislative allegations of a future benefit.[48] In the aforementioned line of cases, the

38. *Id*.
39. 545 U.S. 469 (2005).
40. *Id*. at 474.
41. *Id.* at 475.
42. *Id*. at 487.
43. *Id*. at 475.
44. *Id*. at 483.
45. *See* Cohen, *supra* note 26.
46. *Id.* at 494.
47. *Id*.
48. *See* Kelo v. City of New London, 545 U.S. 469, 499 (2005). The Court emphasized

Supreme Court firmly established its reliance on a broad view of "public use" and increasingly expanded what it considered to be acceptable rationales and public benefits to justify economic development takings.[49] While this progression was occurring at the Supreme Court level, the Michigan Supreme Court demonstrated a new level of deference to the Michigan legislature in its own highly controversial case.

B. Michigan Eminent Domain Jurisprudence

The most infamous economic development takings case in Michigan, and possibly throughout the nation, was *Poletown Neighborhood Council v. City of Detroit*.[50] A neighborhood association and several individual residents of the Poletown neighborhood brought suit against the city after it announced it would condemn the entire neighborhood to allow General Motors to build a new plant.[51] The city argued that the jobs the plant would allegedly create constituted a public purpose that would benefit the city.[52] The Michigan Supreme Court was incredibly deferential, accepting potential, unproven job creation as a legislative rationale for forcing an entire neighborhood of private homeowners to sell their private property.[53] Vigorous criticisms of this decision include the fact that there was no showing of blight in the area and, unlike the neighborhood in *Berman*, there was no showing that there were aesthetic or health benefits to be gained by condemning the land for private development.[54] The only public need to be served was boosting a somewhat strained economy.[55]

In fact, following the condemnation of the Poletown neighborhood and the erection of the new General Motors plant, the actual number of jobs created fell far

that "[b]ecause courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts deciding on what is and is not a governmental function and . . . invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *Id.* (O'Connor, J., dissenting) (citation omitted) (internal quotation marks omitted).

49. For example, in *Kelo*, Justice O'Connor asserted in her dissent that "the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public . . . . Thus, if . . . . predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power." *Id.* at 501.

50. 304 N.W.2d 455 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

51. *Id.* at 457.

52. *Id.* at 458.

53. *Id.* at 459.

54. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 Mich. St. L. Rev. 859, 860.

55. *Id.*

short of that estimated by the legislature in approving the taking.[56] The Michigan Supreme Court in *Poletown*, followed by numerous Michigan Court of Appeals cases, emphasized that its holding did not even require the new owner of the land to proceed with the project that was used to justify condemnation.[57] The entire neighborhood was displaced and the only real beneficiary of the taking was General Motors. This was hardly the widespread economic benefit promised by the city in its justification for the condemnation action.

Poletown set the precedent for extreme judicial deference in economic development cases and reinforced the trend toward using a broad, rather than a narrow, interpretation of public use. Though a Michigan case, it set influential precedent for state and federal courts until it was overruled in 2004.[58] This broad interpretation also meant that courts declined to apply heightened scrutiny when land was condemned for transfer to a private entity.[59] Any purported economic benefit was deemed sufficient to justify a taking and subsequent transfer to private hands, with little to no showing of proof that anyone apart from the private recipient would benefit from the transfer.

When the Michigan Supreme Court overruled *Poletown*,[60] it left many optimistic that the state supreme court had finally taken a turn towards a narrower interpretation of public purpose.[61] In *County of Wayne v. Hathcock*, the court found that the proposed condemnation did not meet the public purpose requirement when the county sought to improve and expand Detroit Metropolitan Airport, which would have required the condemnation of nineteen parcels of private land directly south of the airport.[62] The Federal Aviation Administration had begun a project to abate noise complaints around airports by purchasing neighboring properties through voluntary sales.[63] The county eventually acquired approximately 500 acres of non-

56. Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1012. For background information on the resistance from the community, see Jeanie Wylie, Poletown: Community Betrayed (1989).

57. Somin, *supra* note 56.

58. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 522 (2005); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 327–73 (N.D. 1996); City of Toledo v. Kim's Auto & Truck Serv., Inc., No. L–02–1318, 2003 WL 22390102, at *4 (Ohio Ct. App. Oct. 17, 2003).

59. *See, e.g.*, State *ex rel*. Tomasic v. Unified Gov't of Wyandotte Cnty., 962 P.2d 543 (Kan. 1998) (approving condemnation of private property for an automobile race track as part of development of a tourist area); Hous. & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002) (approving condemnation of an automobile dealership for transfer of the land to Best Buy).

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

61. *See, e.g.*, Krier & Serkin, *supra* note 54, at 860.

62. *Hathcock*, 684 N.W.2d at 770.

63. *Id.*

adjacent properties south of the Detroit Metropolitan Airport, and sought to acquire the remaining properties through the eminent domain power, proposing to put the land to use for the construction of a large business and technology park.[64] The court found that this proposed public use fell short of the constitutional requirement, striking down the condemnation and overruling its infamous *Poletown* decision.[65]

Scholars celebrated the *Hathcock* decision as a move toward a narrower interpretation of public use and greater judicial scrutiny of economic development takings.[66] Though the tentative, large-scale condemnation plans in the City of Detroit are expected to provoke legal backlash,[67] the ensuing legal battle would not be a true test of *Hathcock*'s influence over judicial interpretation of economic development takings in that the proposal does not, as of yet, involve a transfer to a private beneficiary.[68] At the very least, *Hathcock*'s holding means that the Michigan Supreme Court has become more sensitive to public use challenges and can be expected to scrutinize economic development takings more carefully in the future.

C. Affirmative Action

This section will provide a brief overview of the case law on affirmative action programs. In general, the Supreme Court has allowed states to implement affirmative action programs for two reasons: to remedy past discrimination by the state or society, and to achieve diversity in public schools.[69] However, the Court has made clear that such programs must be incredibly specific both in terms of the goals to be attained and in terms of the discrimination to be remedied. Rigid tailoring requirements and the prohibition on the use of race quotas provide an impressive challenge for states and state agencies seeking to engage in affirmative action.

i. Achieving Diversity in Schools

One of the permissible ends for which states may implement affirmative action programs is that of achieving diversity in schools.[70] This rule applies in

64. *Id.*
65. *Id.*
66. *See, e.g.*, Adam Mossoff, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock, 2004 Mich. St. L. Rev. 837, 839.
67. *See* MacDonald, *supra* note 7.
68. City officials have not yet made statements about what would be done with the condemned land. Rather, the mayor is currently focusing on facilitating the flow of residents from distressed neighborhoods into more heavily populated, well-serviced areas. *See, e.g.*, Cecil Angel, *To Survive, Detroit Must Prune Its Weakest Limbs*, Detroit Free Press, May 22, 2012, at A9.
69. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
70. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722–25 (2007).

all public schools, both in lower[71] and higher education.[72] In *Gratz v. Bollinger*, the Supreme Court further distinguished between acceptable and unacceptable means of attaining diversity.[73] Programs whereby universities set racial quotas are impermissible,[74] whereas affirmative action programs, such as the University of Michigan's program in *Grutter*, that take racial and ethnic diversity into account as one of the many factors considered by an admissions board, but also consider life experiences, grades, and other qualifications, are permissible.[75]

The *Parents Involved* case is the leading case in the realm of lower education, in which the Seattle public school system had attempted to achieve diversity by busing minority students to schools outside of their district.[76] The Court found diversity to be a compelling government interest, but ultimately overturned its decision because it found that the program was not narrowly tailored enough to its end; the city could have achieved diversity through other means and the program was only minimally effective towards achieving that end.[77] Following *Parents Involved*, schools may use racial balancing strategies only if there is no other way to achieve diversity without blatant classification based on race.[78]

ii. Remedying Past Discrimination

The second type of affirmative action attempts to remedy past discrimination by state or private actors by offering benefits to an identified class of people against whom such discrimination was directed. It is more difficult for this type of program than a diversity program to meet judicial scrutiny.[79] Affirmative action may only be used to remedy identified discrimination if the provider of the benefit, rather than society generally, discriminated against the group in a way that has been proven by findings in court, by the legislature, or by an agency with legislative mandate.[80] In *Regents of the University of California v. Bakke*,[81] the respondent, a white

71. *See id.*
72. *Grutter*, 539 U.S. at 325.
73. 539 U.S. 244, 270–71 (2003).
74. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–20 (1978).
75. *Grutter*, 539 U.S. at 327 (referencing *Bakke*, 438 U.S. at 313–14).
76. *Parents Involved*, 551 U.S. at 711–14.
77. *Id.* at 722–24.
78. *Id.* at 735. The majority noted, "This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent." *Id.* at 729.
79. *See, e.g.*, Jared M. Mellott, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 Wm. & Mary L. Rev. 1091, 2006 (noting that while *Grutter v. Bollinger* greatly expanded diversity affirmative action programs, programs based on remedying past discrimination still meet with very stringent judicial scrutiny).
80. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
81. 438 U.S. 265 (1978).

male, sued for admission to the Medical School of the University of California at Davis, claiming that he was denied equal protection when the admissions board had admitted a minority student in his place in an attempt to fill an illegitimate race quota.[82] The Court held that although the University of California was allowed to use race as a factor in admissions when the university had discriminated against African Americans in the past, the use of racial quotas to achieve its remedial goal was impermissible and not narrowly tailored enough to meet the permissible end.[83]

Remedial affirmative action programs have been attempted in contexts outside of higher education, but still meet with difficulty when challenged in court. For example, in *City of Richmond v. J.A. Croson Co.*, the city council of Richmond, Virginia created a program requiring contractors receiving jobs from the city to set aside a certain percentage of their subcontracting jobs for minority subcontractors.[84] In the past, only a slight fraction of jobs had been given to minority subcontractors, despite the city being made up of 50% blacks.[85] The Court held that cities may enact programs to remedy the effects of past discrimination against a certain group, but the program was struck down in this case because the city itself had not discriminated; it was attempting to remedy past discrimination by private contractors who refused to hire minority subcontractors.[86] Had the city itself created the disparity, as had the University of California in *Bakke*,[87] it would be allowed to enact a program that was narrowly tailored to remedy the hiring discrepancy.

iii. Recent Affirmative Action Jurisprudence

The Supreme Court recently issued its opinion in the *Fisher v. University of Texas at Austin* case, in which the Court crystallized its prior decisions on affirmative action programs, essentially boiling all the jurisprudence down to the tailoring requirement.[88] The Court upheld its decisions in *Bakke*, *Gratz*, and *Grutter*,[89] which stand for the proposition that all affirmative action programs should be subjected to strict scrutiny, and remanded the case to the Fifth Circuit with instructions to examine closely whether the University of Texas had proven that its program was "narrowly tailored to obtain the educational benefits of diversity."[90] The case was received with mixed reactions, leaving the general public unclear as to whether or not it raised the constitutional bar for universities attempting to justify affirmative

82. *Id.* at 276–78.
83. *Id.* at 316–317.
84. 488 U.S. at 477.
85. *Id.* at 479–80.
86. *Id.* at 480, 498.
87. Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
88. 133 S. Ct. 2411 (2013).
89. *Id.* at 2412.
90. *Id.* at 2421.

action programs.[91]

Justice Ginsburg dissented in *Fisher*, disagreeing both with the Court's decision to remand the case and with the more general belief that race-neutral measures should be used to increase racial diversity.[92] She urged the Court that candor was preferable to camouflage whenever government actors attempt to remedy overt past discrimination.[93] For now, however, universities must continue to veil their attempts to increase diversity in elaborate disguises.[94]

For the purposes of this Note, the *Fisher* decision will be taken as merely reinforcing the tailoring requirement for affirmative action programs. Though it is clear that more affirmative action jurisprudence is on its way, this Note will rely on the doctrine as it currently stands, post-*Fisher*.

II. Current Remedies and Proposed Solutions to Discriminatory Takings

A. Constitutional Challenges

There are multiple ways eminent domain plaintiffs challenge discriminatory takings under the U.S. Constitution. Since the problem involves racial discrimination, one option is to challenge a taking under the Equal Protection Clause of the Fourteenth Amendment.[95] Alternatively, affected property owners could claim that their due process is violated by the taking.[96] These types of challenges have not yet been made successfully, but some scholars propose them as a way to block takings whose primary effect falls on minorities.[97]

Another way to challenge a taking is under the Fifth Amendment, which provides a remedy (just compensation) and also a requirement (public use).[98] Most eminent domain challenges are based on the public use requirement and claim that the taking was not motivated by a valid public use or public purpose. Under

91. *See, e.g.*, Linda Greenhouse, *The Cost of Compromise*, N.Y. Times, July 10, 2013, http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise.

92. *Fisher*, 133 S. Ct. at 2433–34 (Ginsburg, J., dissenting).

93. *Id.*

94. New affirmative action cases have been filed for the fall term, including one from Michigan: *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *cert. granted,* 133 S. Ct. 1633 (2013).

95. U.S. Const. amend. XIV, § 1.

96. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

97. *See, e.g.*, Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of* Olech's *Class of One*, 55 Loy. L. Rev. 697 (2009).

98. U.S. Const. amend. V.

Berman,[99] *Midkiff*,[100] and *Kelo*,[101] the Supreme Court has shown that plaintiffs have a formidable burden to prove that a public benefit is not likely to flow from the taking, but *Hathcock* might indicate a trend toward more scrutiny of states' intentions and findings of economic benefit to flow from an eminent domain action.[102]

i. Due Process and Equal Protection Claims

Many proposed solutions involve making due process or equal protection claims. However, the courts have never extended the protection of due process or equal protection to eminent domain challenges. The nature of these constitutional challenges is incompatible with an eminent domain challenge, both because they require a strict scrutiny analysis and because there is already an explicit textual remedy built into the Fifth Amendment.

The first problem with equal protection challenges is the Supreme Court's application of strict scrutiny in equal protection cases.[103] In order to satisfy strict scrutiny, the state must show that it had a compelling interest, and that its action was narrowly tailored to further that interest.[104] In economic development takings cases, the state almost always has a compelling interest in improving blighted or dangerous urban areas, and the condemnation is a narrowly tailored mean.[105] After *Hathcock*, states might be more restricted in plans that involve transfer of condemned land to a private entity, but so long as they put forth some plausible evidence that the plan will lead to some improvement in the area that could conceivably benefit the public, they will have satisfied the tailoring requirement.

Another problem facing both equal protection and due process claims is that the Fifth Amendment already provides a remedy for takings: just compensation. *Albright v. Oliver* held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[106] In this case, the remedy provided (just compensation) must be the guide for analyzing eminent domain challenges, and the Court should be reluctant to extend due process protection to eminent domain challengers when the Fifth Amendment already requires just compensation as a remedy for an eminent domain taking. Plaintiffs in these cases are

99. Berman v. Parker, 348 U.S. 26 (1954).
100. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
101. Kelo v. City of New London, 545 U.S. 469 (2005).
102. *See* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).
103. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995).
104. *Id.*
105. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).
106. Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

already awarded just compensation as a remedy for the taking, so there is no reason they require the additional relief of monetary damages for a due process violation. Just compensation makes the plaintiff whole by compensating for the loss of the property, therefore awarding additional damages on top of compensation for the property would be an unfair windfall for the plaintiff.

ii. Public Purpose Challenges

The typical strategy for making a constitutional challenge to eminent domain takings is to argue that the taking does not serve a valid public purpose, as required by the Fifth Amendment. This was the theory relied on in all the major eminent domain cases.[107] The problems facing these types of challenges are courts' acceptance of the broad view of public use, and courts' policy of extreme deference to legislatures in the exercise of eminent domain. As discussed above, courts have not interpreted the "public use" requirement so narrowly as to limit states to takings where the land will actually be held open to the public.[108] Rather, they have accepted the more general "public purpose" requirement, which allows land taken by eminent domain to be transferred to private corporations and businesses, so long as the transfer serves the general purpose of improving the economic prosperity of the area.[109] Even with the relative improvement anticipated under *County of Wayne v. Hathcock*,[110] public use challenges are still unlikely to prevail unless the asserted benefit will truly only accrue to a private individual or corporation. Even if this private benefit is empirically proven to be the likely outcome, courts are still hesitant to second-guess legislative findings because legislatures are far better equipped than courts to make such determinations.[111]

B. Statutory Limitations

Many other proposed solutions involve statutory limitations on state exercise of the eminent domain power.[112] However, there are several problems with this type of limitation: that they can only bind state, not federal, government; that they generally include an exception for blight; and that complete or partial bans on economic development takings exclude the use of a very effective government tool for increasing land use efficiency and redeveloping cities for legitimate purposes that

107. *E.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); 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).

108. Cohen, *supra* note 26, at 493–94.

109. *See Kelo*, 545 U.S. at 485.

110. 684 N.W.2d 765.

111. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954).

112. *See*, *e.g.*, Cohen, *supra* note 26; Imperatore, *supra* note 15.

will provide a public benefit.

Complete and partial bans on economic development takings generally work by amending state constitutions or enacting new state laws. Many states already have such legislation in place, usually a partial ban with an exception for blight.[113] Many argue for complete bans at the state level on any exercise of the eminent domain power by a state for the purpose of economic development.[114] However, these types of legislative enactments are only able to prevent takings by states and cities, while the federal government is free to condemn and take land based on its own findings of economic development or any other public purpose to be served.

Additionally, even at the state level complete or partial bans on economic development usually include an exception for blight.[115] This exception renders irrelevant any limitation because states can justify condemnations by a showing that blight either currently exists or is likely to occur in the neighborhood in the future.[116] By merely offering evidence that a neighborhood is on its way to becoming a slum or that blight will occur, states are free to condemn private property and award it to private developers, meaning that any statutory limitation is essentially powerless.

Lastly, and most importantly for the purposes of this Note, attempting to deprive states of their eminent domain power for the purposes of economic development places serious limitations on an incredibly effective tool that the Constitution gives to state and federal governments, consistent with American property law's focus on efficiency.[117] In cities like Detroit, where a shrinking population continues to create ever-larger abandoned urban areas and dangerously low population density,[118] state and municipal governments can and should exercise their eminent domain power to consolidate and redistribute land to promote efficiency and avoid a dangerous political vacuum.

III. Affirmative Action as the Solution for the Discriminatory Impact of Economic Development Takings

Two different types of affirmative action models were discussed in Section II of this Note. They will be analyzed separately as applied to the case of economic development takings in the City of Detroit, though in practice aspects of both models might be used in a unified plan for diversification. The diversity model is desirable

113. See, for example, Michigan's eminent domain compensation provision, Mich. Const. art. X, § 2.

114. *See* Cohen, *supra* note 26.

115. Imperatore, *supra* note 15, at 1038–89.

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

117. For an economic efficiency analysis of property law, see Richard A. Posner, Economic Analysis of Law ch. 3 (8th ed. 2011).

118. *See also supra* text accompanying notes 3–4.

because the city has a long history of de facto segregation,[119] yet because the disparity was not caused by the city, the city will not be permitted take affirmative steps to remedy it. The city may, however, determine that racial and ethnic diversity is a desirable quality in residential neighborhoods—and by default, in school systems—and may then implement affirmative action programs designed to achieve diversity on all levels, provided that such programs do not consider race as the only factor in designing new models for housing projects.

Alternatively, if the city condemns certain neighborhoods and creates relocation plans, the city may employ remedial affirmative action programs that are aimed at remedying the discriminatory impact of the city's action in condemning primarily black neighborhoods. Such a program might involve preferential treatment for minorities in relocating displaced residents and in designing new housing projects, or in qualifying for housing assistance. Due to the fact that the city itself will have knowingly taken discriminatory action in its exercise of eminent domain, this type of program has a better chance at surviving judicial scrutiny than the one in *Richmond v. Croson* for example,[120] in which the city took action to remedy discrimination by private actors.[121] Here, the city will be remedying its own discriminatory action of forcing primarily minority residents out of their homes in order to carry out urban development plans.

Lastly, the city could avoid affirmative action altogether and instead implement social programs intended to improve racial integration and offer advantages to city residents in need, regardless of race. Given the racial makeup of the city, this type of program would in practice benefit black residents, but would be racially neutral in its description. This type of program would have an advantage in holding up against equal protection challenges, but a disadvantage in terms of taxpayer support, as its implementation and administration would probably require raising additional revenue in the city or county.

All three programs have their relative merits and weaknesses. Nevertheless, at least one of these programs or a combination of elements thereof should be enacted in the City of Detroit because its extreme segregation has long been a problem. Acting in the wake of large-scale condemnations and the municipal bankruptcy filing,[122] the city would be able to use a strategically advantageous time for the city to address this problem, because such condemnations would both necessitate the need for alternative housing projects to accommodate displaced residents and mark a large step towards breathing new life into previously limited urban renewal efforts.

119. *See also supra* text accompanying notes 5–6.
120. 488 U.S. 469 (1989)
121. *Id.* at 480.
122. *See also supra* text accompanying notes 1–2.

A. Diversity Affirmative Action: Using the Public School Model

Attaining diversity is a permissible reason for implementing affirmative action programs in public school systems.[123] Though current case law on diversity affirmative action deals primarily with public schools and universities, there is no reason why such programs should not be extended to public housing or urban development programs. If cities were able to show an effort to strive for racial diversity without merely using race quotas, they could plan future developments in such a way that promotes racial integration in neighborhoods, such as building mixed-income-level housing developments.

One risk of this type of program is that the city might subject itself to an equal protection challenge for using socioeconomic status as a proxy for race in its attempt to achieve racial diversity.[124] However, mixed-income-level housing is virtually a necessity in a city like Detroit, where the goal is to consolidate population and dwellings, and therefore such arguments should not hold much weight. If the city goes forward with its plan to condemn underpopulated neighborhoods and increase population density by relocating residents in certain concentrated urban areas, any attempt at diversity affirmative action would likely be overshadowed by the more general urban development project. However, it is useful to discuss plans in terms of diversity affirmative action to open the possibility of addressing the segregation problem as well as the population problem.

New downtown housing projects would likely attract some wealthy residents from the suburbs looking to live in a new, thriving downtown, but in its effort to attain racial and economic diversity the city should ensure that there are mixed-income-level developments, and should take care to encourage minorities displaced by condemnations to occupy these new residences. Integrating housing will be more difficult than integrating public schools and universities, where the school may use its discretion in its admissions to create a diverse student body when a large group is vying for a limited number of spaces. However, because many residents will be displaced from their homes following the condemnations, the city can offer them opportunities to live in mixed neighborhoods, by promoting new housing developments or by offering aid in relocating to racially diverse neighborhoods.

One way to increase diversity is to reserve some units in each building for low-income occupants, as was recently done in some of Chicago's housing projects.[125] The mixed-income strategy is the city's attempt to "lure people of varying

123. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

124. See, for example, Geduldig v. Aiello, 417 U.S. 484 (1974), in which the state disability insurance system excluded pregnant individuals from coverage, and pregnant status became a proxy for gender. The Court found that the Equal Protection Clause was not violated, but the holding was superseded by the subsequent Pregnancy Disability Act of 1978, amending Title VII of Civil Rights Act of 1964. 42 U.S.C. §§ 2000e(k), 2000e-2 (2006).

125. *See, e.g.*, Will Doig, *Chicago's Housing Experiment*, SALON (Sept. 1, 2012, 1:00 PM),

means into single developments."[126] If a city like Chicago, with its already large, well-settled population, is attempting to encourage economic integration through mixed-income housing projects, the effect of such a strategy could be even greater in a city like Detroit, where people will be relocating to densely populated urban centers when they are forced out of their low-occupancy neighborhoods. A certain level of scarcity could create the competitiveness needed to encourage people to vie for spots in such mixed-income housing projects, without allowing it to reach such an extreme level as compared to the 227,000 people who are on the waitlist for vacancies in New York City's public housing projects.[127] Fortunately, Detroit does not have the shortage of space that exists in New York City, but instead has space that can be put to good use to create more centralized housing in a new, smaller downtown that will attract people of diverse racial and socioeconomic backgrounds.

Diversity in neighborhoods generally creates more stability in cities,[128] and the City of Detroit should strive for diversity as it makes its own efforts to revitalize a depressed city. The past few decades should be enough evidence that the increasing segregation in the city is not the way to stability. Increasing diversity in order to improve living conditions and recreate a vibrant urban center is certainly a compelling interest that the city should strive to advance, and narrowly tailored, race-conscious measures may be the best means of achieving that end.

B. Remedial Affirmative Action

Because economic development takings have been shown to fall more heavily on minorities,[129] the city could make a case for using remedial affirmative action in its relocation or redevelopment programs. In using such a program, the city would be remedying the discriminatory effects of its own action—its exercise of the eminent domain power—rather than the effects of a history of discrimination and segregation by society at large.

Though the greater evil to be remedied is the de facto segregation of the city and its metropolitan area, states may only take steps to remedy de jure, not de facto, segregation.[130] Since the city itself did not create the segregation, it may not make race-based classifications in its attempt to remedy the type of segregation that exists today. Therefore, any remedial action must be directed toward the discriminatory impact of economic development takings that will occur during the downsizing

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http://www.salon.com/2012/09/01/chicagos_bold_experiment.

126. *Id.*

127. *See* Mireya Navarro, *On Public Housing Wait List, Position Unknown*, N.Y. Times, July 23, 2013, at A1.

128. *See, e.g.*, Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. Rev. 1175 (2009).

129. *See* Imperatore, *supra* note 15.

130. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

project, not at the long-established racial division of the city.

C. Social Programs

Despite the controversy surrounding affirmative action programs, they are appealing to the tax base at large because they focus costs in a way that other social programs do not.[131] However, when condemnations are known to have a disparate impact on minorities, putting money into social programs that benefit minorities, it might be argued, is part of the just compensation required by this sort of taking.

One type of social program that could be employed advantageously to remedy the disparate effects of economic development takings is to replace condemned neighborhoods with mixed-income-level housing.[132] This would promote diversity in urban areas and avoid the problem of replacing blighted areas with neighborhoods likely to fall into blight again in the future. This strategy has been successfully employed in Paris, France and its suburbs, for example, where the French government has lowered property taxes in middle class neighborhoods where they introduced low-income housing projects.[133] Neighborhoods that refuse the housing projects are subjected to higher taxes than those that allow the projects.[134] This scheme has been a successful way to diversify both neighborhoods and school systems. Had they confined the affordable housing projects to separate, low-income neighborhoods, the French cities would have perpetuated the problem by creating further socioeconomic segregation, which plagues American urban centers such as Detroit.

This is similar to some proposals involving diversification in public housing initiatives,[135] but it differs from other proposals in that it does not involve blocking discriminatory takings. Banning economic development takings in a place like Detroit would allow the dual problems of underpopulation and racial segregation to continue as before. Several neighborhoods are so low in population and so dilapidated that the only remaining option is condemnation.[136]

This is precisely the type of race and socioeconomic status conscious solution that should be applied in places like Detroit, where condemnations have been made necessary by blighted and under-populated neighborhoods that create the risk

131. *See* Jarrod D. Reece, Note, *Revisiting Class-Based Affirmative Action in Government Contracting*, 88 WASH. U. L. REV. 1309, 1321 (2011) (arguing that class-based affirmative action should be seen as a cost-saving measure to the state in its role as a social program provider).

132. Imperatore, *supra* note 15.

133. *See, e.g.*, David le Blanc & Anne Laferrère, *The Effect of Public Social Housing on Households' Consumption in France*, 10 J. HOUS. ECON. 429, 431 (2001).

134. *Id.*

135. *See* Imperatore, *supra* note 15.

136. MacDonald, *supra* note 7.

of a political vacuum, and yet are likely to fall more heavily or exclusively on racial and socioeconomic minorities.[137] It is difficult to see how a categorical ban on economic development takings would help in a situation such as this one, because the low population density and lack of upkeep are risk factors for increased crime and further decline.[138] The city must be allowed to condemn such neighborhoods, but only while also addressing the burden on minorities.

By using race-conscious measures in planning replacement housing to accommodate residents of the condemned neighborhoods, the city would not be merely remedying the burden on minorities, as in *Regents of the University of California v. Bakke*,[139] but could also take positive steps toward alleviating the flight and subsequent segregation that caused the disparity in the first place, as in the public schools cases.[140]

Conclusion

Though many have argued for banning economic development takings due to their disparate impact on minorities, the City of Detroit will need to use this tool to effectuate its prospective downsizing plans. An absolute ban would prevent an important effort to consolidate the city's shrinking population into more densely populated urban areas, and leave the city with the sprawling, sparsely populated neighborhoods that make it up today. With the ability to condemn little-used neighborhoods, and consciously and deliberately plan the building and resettlement of more centralized, concentrated neighborhoods, the city would have the additional opportunity to remedy the longtime racial segregation of the city. Integrative housing plans could be formulated either as an attempt to diversify the population, or as a remedy for the disproportionate burden of the condemnations on minority residents. Either way, this would be a timely way for the city to address this longstanding issue as it attempts to revitalize its downtown and regain its place among the important, diverse urban centers of America.

137. *See* Ben Beckman, Note, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 Clev. St. L. Rev. 387 (2010); Imperatore, *supra* note 15.

138. Beckman, *supra* note 137, at 395–96.

139. 438 U.S. 265 (1978).

140. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).