

**PUBLIC STAND-OFF: THE WISCONSIN STATE
LEGISLATURE V. MILWAUKEE PUBLIC SCHOOLS AND
TAKINGS OF PUBLIC PROPERTY BY PUBLIC ENTITIES**

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I. INTRODUCTION

A virtual stand-off is occurring in the halls of vacant buildings of the Milwaukee Public School system (MPS). On one side stands the

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Wisconsin State Legislature and its leadership; on the other side stands MPS, its board of directors, and the Milwaukee Common Council. At stake is the education of thousands of Milwaukee children. Anxious observers include the governor, business groups, and teachers' unions. Everyone wonders how the stand-off will end.

Prior to 2011, although the City of Milwaukee owned all MPS properties, it “could not sell or lease any empty [MPS] building without approval from the Milwaukee Board of School Directors.”¹ After a December 2010 article in the *Milwaukee Journal Sentinel* reported that MPS was blocking several high-performing charter and voucher schools from purchasing its vacant buildings, “the state legislature passed 2011 Act 17 which [allowed] the Milwaukee Common Council to sell unused or underutilized buildings without MPS approval.”²

According to a 2015 report released by the Wisconsin Institute of Law and Liberty, at least seventeen MPS buildings were still vacant in January 2015, costing taxpayers over \$1.6 million to maintain over the previous three years.³ Despite interest from several high-performing private and public charter schools, MPS has allowed its unused buildings to sit empty for an average of seven years.⁴

Several schools with national reputations for successfully educating children in the Milwaukee area have expressed interest in purchasing MPS's unused buildings, only to see their applications or letters of intent rejected without explanation.⁵ In one instance, MPS turned down offers to purchase a vacant facility made by several private schools, stating it would instead enter into an agreement with a developer to turn the school into a residential and community center.⁶ At the time, critics accused MPS of quickly conceiving the

1. WIS. INST. FOR LAW & LIBERTY, INC., *MPS AND THE CITY OF MILWAUKEE IGNORE STATE LAW AND POLICY 1* (2013), <https://www.will-law.org/wp-content/uploads/2016/02/2013-09-05-WILL-Report-with-Exhibits-23.pdf>.

2. *Id.*

3. RICK ESENBERG ET AL., *WHY THE STATE OF WISCONSIN FORCED COCA-COLA TO SELL TO PEPSI: AN EXPLANATION OF THE STATE'S NEW REFORMS TO MILWAUKEE'S UNUSED SCHOOL BUILDINGS PROBLEM—AND WHY IT WAS NECESSARY* 4 (2015), <https://www.will-law.org/wp-content/uploads/2016/02/Why-Coca-Cola-Must-Sell-to-Pepsi.pdf>.

4. *Id.*

5. *See id.* at 4–8.

6. Erin Richards, *9 Months After Development Deal, Malcolm X Academy Remains Empty*, MILWAUKEE WIS. J. SENTINEL (July 30, 2014), <http://archive.jsonline.com/news/education/9-months-after-development-deal-malcolm-x-academy-remains>

idea to prevent a competing private school from expanding.⁷ The community center never came to fruition, but MPS still had to pay over \$500,000 to the developer.⁸

Often, one of the most significant obstacles for expanding schools is finding affordable facilities that meet their needs. In June 2016, the Walton Family Foundation announced that it had committed \$250 million for the sole purpose of assisting urban charter schools in gaining access to facilities.⁹ In its statement announcing the commitment, the Foundation said that finding suitable spaces for charter schools “is the biggest barrier to creating high-quality educational options for children and families.”¹⁰

To most observers, the state of affairs for education in Milwaukee is disturbing, particularly for African American students. While 98% of school districts in the state of Wisconsin met or exceeded expectations according to the latest performance data released by the Wisconsin Department of Public Instruction, MPS was the only district that failed to meet expectations.¹¹ Only thirty schools in MPS met or exceeded expectations, which meant over two-thirds of MPS students attended substandard schools.¹² Although the graduation rate for white students in Wisconsin has risen as high as 93% in recent years, the overall graduation rate for African American students in Wisconsin has hovered around 61%.¹³

-empty-b99320209z1-269243081.html.

7. Erin Richards, *MPS Splits with Malcolm X Developer but Still Owes Fees*, MILWAUKEE WIS. J. SENTINEL (Sept. 23, 2014), <http://archive.jsonline.com/news/education/mps-splits-with-malcolm-x-developer-but-still-owes-fees-b99356741z1-276412281.html>.

8. Bobby Tanzilo, *MPS Details Malcolm X Settlement for City Committee*, ONMILWAUKEE (Oct. 8, 2014), <https://onmilwaukee.com/raisemke/articles/malcolmxzoning.html>.

9. Emma Brown, *Walton Family Foundation Commits \$250 Million for New Charter School Facilities*, WASH. POST (June 28, 2016), <https://www.washingtonpost.com/news/education/wp/2016/06/28/walton-family-foundation-commits-250-million-for-new-charter-school-facilities/>.

10. *Id.*

11. Erin Richards, *88% of Schools, 98% of Districts Make Grade in Report Cards*, MILWAUKEE WIS. J. SENTINEL (Sept. 16, 2014), <http://archive.jsonline.com/news/education/88-of-schools-98-of-districts-make-grade-in-report-cards-b99352167z1-275218351.html>.

12. *See id.*

13. Annysa Johnson & Kevin Crowe, *Wisconsin's Graduation Rate Gap Widens to Largest in U.S.*, MILWAUKEE WIS. J. SENTINEL (Oct. 23, 2015), <http://archive.jsonline.com/news/education/wisconsins-graduation-rate-gap-widens-to-largest-in-us>

In fact, Wisconsin has the worst education gap in the country, with African American students far behind the achievement levels of their white classmates.¹⁴

Under Wisconsin law, “[p]ublic education is a fundamental responsibility of the state,”¹⁵ and the impact of MPS’s poor performance is felt far beyond the city limits of Milwaukee. According to the MacIver Institute, in 2011, high school dropouts burdened Wisconsin taxpayers with an estimated \$503 million in additional incarceration, Medicaid, and lost income tax costs—approximately \$170 million in incarceration costs, \$150 million in increased Medicaid costs, and \$183 million in lost income tax.¹⁶ MPS is the state’s largest school district, and over half of MPS’s budget is funded by the state.¹⁷

In 2015, the Wisconsin legislature passed another law addressing MPS’s unused buildings, which forced Milwaukee to sell unused and underutilized school buildings to public charter schools and private schools.¹⁸ Despite the new law, MPS leadership and the Milwaukee Common Council resisted and delayed placing these properties on the market, arguing that there was a lack of community input and due process in passing the new law.¹⁹

MPS has also resisted efforts by the legislature to address the district’s poorest performing schools.²⁰ An additional component of

-b99601248z1-336334851.html.

14. Molly Beck, *National Report Card: Wisconsin’s Achievement Gap Worst in Nation*, WIS. ST. J. (Nov. 8, 2013), http://host.madison.com/wsj/news/local/education/local_schools/national-report-card-wisconsin-s-achievement-gap-worst-in-nation/article_82406e47-5738-5e95-9cb0-78aee1e14254.html (comparing reading and math scores between white and African American fourth- and eighth-graders in Wisconsin); accord Johnson & Crowe, *supra* note 13.

15. WIS. STAT. ANN. § 118.01(1) (West, Westlaw through 2017 Act 6).

16. Christian D’Andrea, *The High Costs of High School Dropouts in Wisconsin*, MACIVER INST. (Apr. 22, 2013), <http://www.maciverinstitute.com/2013/04/the-high-costs-of-high-school-dropouts-in-wisconsin/>.

17. STEPHEN Q. CORNMAN, NAT’L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2013–14 (FISCAL YEAR 2014) 8 (2017), <https://nces.ed.gov/pubs2016/2016303.pdf>.

18. See WIS. STAT. ANN. § 119.61(3).

19. See Patrick Marley & Annysa Johnson, *Scott Fitzgerald: Legislature May Cut MPS Funding*, MILWAUKEE WIS. J. SENTINEL (June 30, 2016), <http://archive.jsonline.com/news/statepolitics/scott-fitzgerald-legislature-may-cut-mps-funding-b99754320z1-385092671.html>.

20. *Id.*

the legislation passed in 2015 was an effort to deal with persistent problems in MPS by creating a “turnaround” district that would develop plans to dramatically improve up to five of MPS’s poorest performing schools.²¹ MPS officials rejected the proposed plan and offered an alternative plan, but the MPS plan was criticized by many as drastically watered-down and not in alignment with the new law.²²

In light of MPS’s continued efforts to challenge legislative intent, lawmakers must decide which options are best to make progress and address some of the educational problems in Milwaukee. The legislature could pass additional legislation that would further restrict MPS’s ability to bypass or delay legislative intent. The state could also sue the city and MPS to force compliance. However, both of these options would likely involve several months of wrangling in the court system or debate in the state legislature before the buildings are sold and begin to be used for the education of Milwaukee students.

Another option, albeit controversial, might be available to the state. Could the legislature use the state’s power of eminent domain to take control of unused MPS buildings and turn them over to high-performing private and charter schools to educate Milwaukee’s children? While eminent domain remains a controversial tool of governmental entities to acquire property, it presents attractive options to consider, despite its potentially divisive public policy considerations.

Asked what options the legislature would consider to ensure MPS compliance with the 2015 law directing the district to sell unused property, exasperated Senate Majority Leader Scott Fitzgerald stated, “I wouldn’t take anything off the table when it comes to MPS.”²³

Could eminent domain be on the table?

II. BACKGROUND ON EMINENT DOMAIN

Black’s Law Dictionary defines eminent domain as the “inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable

21. See WIS. STAT. ANN. §§ 119.9001–.9004.

22. See Marley & Johnson, *supra* note 19.

23. *Id.*

compensation for the taking.”²⁴ *Kelo v. City of New London*²⁵ is considered the seminal U.S. Supreme Court case involving the use of eminent domain to transfer land from one private owner to another private owner.

In *Kelo*, after Pfizer Inc. announced plans to build a \$300-million research facility in New London, Connecticut, the City of New London initiated a development plan for ninety acres in the surrounding area to capitalize on the arrival of the Pfizer facility and the new commerce and economic development it was expected to generate.²⁶ Essential to the development plan was acquiring property through eminent domain.²⁷ The city successfully negotiated the purchase of most of the real estate in the area, but negotiations with the owners of fifteen of the necessary properties failed.²⁸ The remaining property owners sued the city, claiming that “the taking of their properties would violate the ‘public use’ restriction of the Fifth Amendment.”²⁹

With no assertion that any of the properties were blighted or otherwise in poor condition, the Court held that the city’s exercise of eminent domain authority in furtherance of economic development satisfied the public use requirement.³⁰ It reasoned that, because of the comprehensive nature of the plan and “thorough deliberation that preceded its adoption,” the plan served a public purpose.³¹

The dissenting justices had significant concerns about the precedent set by *Kelo*.³² Specifically, Justice Sandra Day O’Connor feared that “[a]ny property may now be taken for the benefit of [other] private part[ies],” which likely have disproportionate influence and power in the political process.³³ In a separate dissent, Justice Clarence Thomas’s primary concern was the Court’s apparent shift from the Fifth Amendment’s “public use” clause to a

24. *Eminent Domain*, BLACK’S LAW DICTIONARY (10th ed. 2014).

25. 545 U.S. 469 (2005).

26. *See id.* at 473–74.

27. *See id.* at 475.

28. *Id.*

29. *Id.*

30. *Id.* at 489–90.

31. *Id.* at 484.

32. *See id.* at 494–505 (O’Connor, J., dissenting); *id.* at 505–23 (Thomas, J., dissenting).

33. *Id.* at 505 (O’Connor, J., dissenting).

“public purpose” test.³⁴ He argued, “the most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.”³⁵

The Court’s decision sparked significant backlash. Outraged state legislatures across the country fast-tracked legislation to restrict the ability of government agencies to take private property.³⁶ Even President George W. Bush issued an executive order restricting the federal government’s use of eminent domain.³⁷

A few years after *Kelo*, the doctrine of eminent domain took another twist. Following the financial crisis of 2007–2008 and the related problems with subprime mortgages, some local governments in states with the most severe declines in housing values attempted to use what has been termed “reverse eminent domain” to seize underwater mortgages.³⁸ Although this approach, like conventional eminent domain, involves the government taking private property and giving it to another private entity for some public use, it is often called *reverse* eminent domain because instead of the government removing people from their homes, homeowners remain in their houses, and part of the property of banks (the value of the mortgage) is taken.³⁹

Banks, as well as the Federal Housing Finance Agency, have expressed several concerns regarding the use of eminent domain for this purpose.⁴⁰ One of the major concerns is the potentially chilling

34. *Id.* at 506 (Thomas, J., dissenting).

35. *Id.* at 508.

36. Associated Press, *Bush Limits Eminent-Domain Seizures*, WASH. POST (June 24, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/23/AR2006062301722_pf.html.

37. *Id.*

38. *See, e.g.,* Carrie B. Reyes, *Reverse Eminent Domain Facts and Fiction*, FIRST TUESDAY J. (May 12, 2004), <http://journal.firsttuesday.us/reverse-eminent-domain-facts-and-fiction/35969>.

39. *See* Les Leopold, *Our Most Powerful Weapon Against Wall Street? The Rise of Reverse Eminent Domain*, ALTERNET (Dec. 15, 2013), <http://www.alternet.org/economy/our-most-powerful-weapon-against-wall-street-rise-reverse-eminent-domain> (giving examples of reverse eminent domain and of people using reverse eminent domain to remain in their homes).

40. *See FHFA to Cities: Don't Abuse Eminent Domain*, REALTORMAG (Aug. 12, 2013), <http://realtormag.realtor.org/daily-news/2013/08/12/fhfa-cities-dont-abuse-eminent-domain> (discussing the Federal Housing Finance Agency’s statement warning against the use of reverse eminent domain); Leopold, *supra* note

effect on credit extension and housing market investment, which could have a significant negative impact on consumers and their ability to obtain credit.⁴¹ Another concern is the risk of loss to Fannie Mae and Freddie Mac and the resulting costs imposed on U.S. taxpayers.⁴² Lawsuits filed by banks opposing this approach have been pending in several communities across the country.⁴³ The primary argument made by the coalition against the use of reverse eminent domain is that it is an impermissible taking because the transfer of loans would likely fail to satisfy the public use requirement.⁴⁴

This article considers yet another kind of reverse eminent domain that, although having a different focus, is not without controversy. Disputes between public entities over the power of eminent domain arise on a regular basis due to the number of these entities, their scope of activities, and the vast jurisdictions involved.⁴⁵ When a public entity seeks to take property owned by another public entity, the usual analysis of eminent domain doctrine and its principles must be viewed through a different lens. Takings involving property already in public use shift assumptions regarding the concept of public purpose, the balance of power between condemnor and condemnee, and the notion of reciprocity of advantage.

The following analysis will examine the law involving takings of public property by public entities.⁴⁶ Specifically, it considers whether the state of Wisconsin has the authority and requisite public purpose to acquire vacant MPS facilities through eminent domain for the use of independent education providers.⁴⁷

39 (describing the backlash by banks against reverse eminent domain).

41. Letter from Am. Bankers Ass'n, et al., to Alfred Pollard, Gen. Counsel, Fed. Hous. Fin. Agency (Sept. 7, 2012), <http://www.aba.com/Advocacy/LetterstoCongress/Documents/Mortgage-ED-JointLetter-090712.pdf>.

42. *Id.* at 4.

43. Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), <https://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html>.

44. *Id.*

45. See generally Joris Naiman, *Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 893, 894 (1990) (providing an overview of various public entity disputes regarding eminent domain).

46. See *infra* Part III.

47. See *infra* Part III.

III. ANALYSIS

A. *Comparison: Wisconsin and Minnesota*

According to Wisconsin's eminent domain statute, government entities may "acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to acquire and hold or transfer to the state, for the purposes specified, in case such property cannot be acquired by gift or purchase at an agreed price."⁴⁸ If the state is acquiring the property, the determination of the necessity of exercising the power of eminent domain is determined by the state itself, as the condemning authority.⁴⁹ The state's invocation of eminent domain is itself a conclusion that the taking is necessary.

Arguably, the most significant case regarding eminent domain in Wisconsin decided prior to *Kelo* is *Grunwald v. City of West Allis*.⁵⁰ In *Grunwald*, the plaintiff brought an action against the city to challenge the condemnation of his property as part of a redevelopment project, arguing that the city failed to establish that the area met the definition of a "blighted area."⁵¹ The Court of Appeals of Wisconsin ruled that Wisconsin's eminent domain statutes pertaining to blighted property should be "liberally construed to remove blight and prevent its reoccurrence" and that the trial court's finding that the redevelopment area was a blighted area was "not clearly erroneous."⁵²

The *Grunwald* court also stated that judicial review of the power to exercise eminent domain is limited to determining whether decisions on blighted areas were based on "fraud, bad faith, or gross abuse of discretion."⁵³ In other words, if the condemnor has reasonable grounds for its decision, the decision will be upheld.

Wisconsin was among the states to respond quickly to *Kelo*. Under legislation passed in 2005, eminent domain cannot be used to acquire unblighted property under any circumstances if it is to be later sold to a private entity.⁵⁴ Specifically, section 32.03(6)(b) states,

48. WIS. STAT. ANN. § 32.02 (West, Westlaw through 2017 Act 6).

49. *Id.* § 32.07.

50. 551 N.W.2d 36 (Wis. 1996).

51. *Id.* at 38.

52. *Id.* at 42.

53. *Id.* at 40.

54. Hugh Braun, *Wisconsin's Response to Condemnation for Economic Development*, WIS. LAW., Sept. 2007, <http://www.wisbar.org/NewsPublications/WisconsinLawyer>

“Property that is not blighted property may not be acquired by condemnation by an entity authorized to condemn property . . . if the condemnor intends to convey or lease the acquired property to a private entity.”⁵⁵

Wisconsin’s statute is more restrictive than many states’, but it exempts condemnation of “blighted” property, which it defines broadly as

any property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is detrimental to the public health, safety, or welfare.⁵⁶

This expansive definition provides governmental entities in Wisconsin great flexibility in declaring blight.

To gain perspective on how much flexibility Wisconsin has in its eminent domain statute, a comparison to its neighbor, the Gopher State, is revealing. In Minnesota, which was also among the states that were swift in responding to *Kelo*, a large part of the motivation to change eminent domain laws was a controversial private development project.⁵⁷

In 2000, city officials in the Minneapolis suburb of Richfield began a project to assist electronics retailer Best Buy in building a \$160 million, 1.6 million-square-foot corporate headquarters.⁵⁸ City officials claimed the project would be a much-needed boost to a community that had been losing population and economic prospects since the 1970s.⁵⁹ By 2003, the project was completed,

/Pages/Article.aspx?Volume =80&Issue=9&ArticleID=1417.

55. WIS. STAT. ANN. § 32.03(6) (b) (West, Westlaw through 2017 Act 6).

56. *Id.* § 32.03(6)(a).

57. See Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N.Y. TIMES (Oct. 5, 2005), http://www.nytimes.com/2005/10/05/realestate/eminant-domain-revisited-a-minnesota-case.html?_r=0 (“In response to cases like this one, the Institute for Justice will support bills in the coming session ‘to prohibit the taking of property for so-called economic development,’ said Lee McGrath, the executive director of the Minneapolis office.”).

58. *Id.*

59. *Id.*

displacing over eighty homes and businesses.⁶⁰ Although there was some community support for the project, property rights advocates vowed at the time to support bills that would prohibit “so-called economic development” projects that they believed were improper takings by overreaching municipalities.⁶¹

After *Kelo* in 2005, the Minnesotans for Eminent Domain Reform Coalition was formed to capitalize on the widespread outrage over the decision and push for changes in Minnesota law that would only allow eminent domain for a public use, such as roads, public buildings, and infrastructure.⁶² The coalition was large and ideologically diverse, with members including the Automobile Dealers Association, Farm Bureau, Petroleum Marketers Association, National Federation of Independent Business, Hispanic Chamber of Commerce, NAACP, Urban League, and Teamsters, among others.⁶³ In the end, the coalition was able to get bipartisan legislation introduced and passed in 2006, only three years after the completion of the Best Buy project.⁶⁴

Ostensibly, post-*Kelo* laws in Wisconsin and Minnesota had the same primary objective: to prevent the government from taking property from one private owner and transferring it to another. Wisconsin’s law specifically prohibits condemnation if the condemnor intends to convey the property to a private entity, unless it is blighted.⁶⁵ In Minnesota, eminent domain may only be used for a public use,⁶⁶ and the public benefits of economic development “do not by themselves constitute a public use or public purpose.”⁶⁷

There are significant differences between the laws of the two states, however, and they are found in the definitions of key terms within the statutes. Specifically, in Minnesota, “public use” exclusively refers to

60. *Id.*

61. *Id.*

62. John Vomhof, *Coalition Calls for Eminent Domain Reform*, MINNEAPOLIS/ST. PAUL BUS. J. (Jan. 5, 2006), http://www.bizjournals.com/twincities/stories/2006/01/02/daily30.html?jst=b_ln_hl.

63. *Minnesota Enacts Meaningful Eminent Domain Reform*, CASTLE COALITION (May 19, 2006), <http://castlecoalition.org/2312>.

64. *See* Pristin, *supra* note 57.

65. WIS. STAT. ANN. § 32.03(6)(b) (West, Westlaw through 2017 Act 6).

66. MINN. STAT. § 117.012, subdiv. 2 (2016).

67. *Id.* § 117.025, subdiv. 11(b).

- (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;
- (2) the creation or functioning of a public service corporation; or
- (3) mitigation of a *blighted* area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.⁶⁸

Prior to the *Kelo* decision, Minnesota's statutory definition of a "blighted area" was surprisingly similar to Wisconsin's very broad definition currently in use. In 2005, a "blighted area" under Minnesota statute was

any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.⁶⁹

With the passage of the 2006 legislation, however, Minnesota's definition has narrowed significantly. Now, a "blighted area" is defined as property that is "in urban use" and "where more than 50 percent of the buildings are structurally substandard."⁷⁰ To qualify as "structurally substandard," the property must be a building

- (1) that was inspected by the appropriate local government and cited for one or more enforceable housing, maintenance, or building code violations;
- (2) in which the cited building code violations involve one or more of the following:
 - (i) a roof and roof framing element;
 - (ii) support walls, beams, and headers;
 - (iii) foundation, footings, and subgrade conditions;
 - (iv) light and ventilation;
 - (v) fire protection, including egress;
 - (vi) internal utilities, including electricity, gas, and water;
 - (vii) flooring and flooring elements; or
 - (viii) walls, insulation, and exterior envelope;

68. *Id.* § 117.025, subdiv. 11(a) (emphasis added).

69. *Id.* § 469.002, subdiv. 11 (2005).

70. *Id.* § 117.025, subdiv. 6 (2016).

(3) in which the cited housing, maintenance, or building code violations have not been remedied after two notices to cure the noncompliance; and

(4) has uncured housing, maintenance, and building code violations, satisfaction of which would cost more than 50 percent of the assessor's taxable market value for the building, excluding land value, as determined under section 273.11 for property taxes payable in the year in which the condemnation is commenced.⁷¹

This narrow definition provides strong protections for property owners against eminent domain and limits the strong influence developers typically have in the process of declaring blighted property. As stated by Lee McGrath, executive director of the Minnesota Chapter of the Institute for Justice, “[b]efore the government can call a property ‘blighted,’ it must prove to a court that the property poses an actual and significant threat to health or safety. ‘Blight’ in Minnesota is no longer whatever a developer or bureaucrat wants it to be.”⁷²

Indeed, opponents of the use of eminent domain for economic development purposes often point to private sector developers' prominent role in the process of declaring blighted property.⁷³ Developers typically drive the process by identifying suitable sites, developing plans, and bringing public and private sector partners to the table.⁷⁴ Essentially, municipalities give developers the power of condemnation by allowing them to have a substantial role in the determination of what property is blighted and setting the boundaries for the redevelopment project.⁷⁵

It is important to note that Wisconsin's eminent domain statute is silent on the status of the condemned property at the time of the taking.⁷⁶ Specifically, there is no significance placed upon (1) whether the current property owner is a private or public entity, or (2) whether the property's current use is for a private or public purpose.⁷⁷ Rather, the focus in the statute is on whether the

71. *Id.* § 117.025, subdiv. 7.

72. *Minnesota Enacts Meaningful Eminent Domain Reform*, *supra* note 63.

73. *See, e.g.*, Rebecca Leung, *Eminent Domain: Being Abused?*, CBS NEWS (Sept. 26, 2003), <http://www.cbsnews.com/news/eminent-domain-being-abused/>.

74. *See, e.g., id.*

75. *See* Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing upon the Land?*, 74 MO. L. REV. 301, 307–08 (2009).

76. *See* WIS. STAT. ANN. § 32.03 (West, Westlaw through 2017 Act 6).

77. *See id.*

appropriated property is blighted and whether it is conveyed to a private entity.⁷⁸ Therefore, if a property is declared blighted, or if the property is conveyed to a public entity, the statute appears to provide significant latitude to the condemnor.

B. Options for the Wisconsin Legislature

Legislative leaders have various options in their effort to make unused MPS properties available, each with its own unique requirements: (1) pass additional legislation, (2) exercise eminent domain based upon existing Wisconsin law, or (3) exercise eminent domain under the “paramount public use” doctrine.

1. Additional Legislation

Lawmakers could pass additional legislation to make it more difficult for MPS to bypass or delay the sale of its unused buildings. However, MPS and city officials have shown little interest in complying with existing laws.⁷⁹ In a March 2016 Zoning Committee meeting of the Milwaukee Common Council, the city attorney informed the committee that the city could be sued if it failed to sell buildings.⁸⁰ “Let them sue us,” responded one alderman, and the committee held any further action so that it could seek additional legal advice.⁸¹

Cutting state funding for MPS is possible, but it would also require passing additional legislation. State legislators who represent districts in Milwaukee would likely oppose any MPS budget cuts. So, passing another bill would likely take significant time and expend substantial political capital, which may be in short supply due to competing legislative priorities.

78. *Id.*

79. See Annysa Johnson, *Statute Blocks MPS Interest in Empty Buildings, City Attorney Says*, MILWAUKEE J. SENTINEL (Mar. 22, 2016), <http://archive.jsonline.com/news/education/statute-blocks-mps-interest-in-empty-buildings-city-attorney-says-b99692527z1-373126751.html>.

80. *Id.*

81. *Id.*

2. *Eminent Domain Based on Existing Wisconsin Law*

a. *Blighted Property*

Although the language in section 32.03 describing blighted property may appear to focus on property that has been abandoned and left to deteriorate, the text uses general terms that could potentially qualify vacant MPS buildings as blighted property.⁸² Specifically, the statute states that blighted property means “any property that, by reason of . . . *usefulness* . . . is detrimental to the *public health, safety, or welfare*.”⁸³ Therefore, statutory language does exist that could permit the state to use eminent domain to acquire MPS properties.

Because the buildings are intended for educational purposes but remain vacant, the state could argue they meet the definition of blighted property. While the facilities are left idle, they are not being used to educate Milwaukee’s children, and maintenance costs are incurred. The lack of its usefulness for education, combined with MPS’s public education resources that are wasted on maintenance costs, likely demonstrates that public welfare is detrimentally impacted.

Additionally, vacant MPS properties could be considered blighted under another aspect of the statute’s broad definition: detrimental impacts on public safety. Blighted property was discussed in a recent Wisconsin Supreme Court case, *Bank of New York Mellon v. Carson*.⁸⁴ In *Carson*, the court ruled that Wisconsin’s abandoned premises statute⁸⁵ authorized courts to order banks to sell abandoned foreclosures “within a reasonable time” to minimize harm to communities.⁸⁶ Although the case involved abandoned residential property, at least some of the principles the court used to support its position that abandoned properties should be sold in a timely manner can be applied to vacant MPS properties.

Vacant properties, despite being maintained, can be more prone to criminal activities, which impacts public safety.⁸⁷ The court

82. See WIS. STAT. ANN. § 32.03.

83. *Id.* § 32.03(6)(a) (emphasis added).

84. 859 N.W.2d 422 (Wis. 2015).

85. WIS. STAT. ANN. § 846.102.

86. See *Carson*, 859 N.W.2d at 432.

87. See generally Charles C. Branas, David Rubin & Wensheng Guo, *Vacant Properties and Violence in Neighborhoods*, ISRN PUB. HEALTH (Sept. 10, 2012), <https://www.hindawi.com/journals/isrn/2012/246142/> (showing a “significant

in *Carson* observed that the legislature recognized the potential harm that vacant buildings can do to communities by its passage of an abandoned premises statute to deal with the issue, stating, “Because its context and the legislative history of Wis. Stat. § 846.102 clearly indicate that the statute was intended to help municipalities deal with abandoned properties in a timely manner, we decline to interpret it so as to permit properties to languish abandoned.”⁸⁸

MPS could argue that its properties are vacant and not abandoned, as evidenced by the district’s incurred costs to maintain the properties. However, the lack of traffic in and around the facilities, combined with a reduced level of security at the facilities, makes the properties potential magnets for criminal activity and possible public nuisances. Therefore, given the broad definition of blighted property in section 32.03(6)(a) and the legislative intent behind the abandoned premises statute, the state could take MPS buildings under the eminent domain statute.⁸⁹

b. Emergency Condemnation

Within the eminent domain statute is an emergency condemnation provision.⁹⁰ The required elements of emergency condemnation are that (1) there is an urgent need for the property, (2) a contract for the purchase of the property cannot be achieved, (3) there is an approval from the governor, and (4) there is tender of an award of damages to the owner.⁹¹ Once these elements are met, the state may take immediate possession of the property.⁹²

First, to satisfy the urgent need element, the state could point to specific needs at both the state and local levels.⁹³ For example, Milwaukee has the highest concentration of African American students in the state.⁹⁴ National Assessment of Educational Progress

association between vacant properties and the risk of aggravated assault”).

88. *Carson*, 859 N.W.2d at 432.

89. *See* WIS. STAT. ANN. § 32.03(6)(a).

90. *Id.* § 32.21.

91. *Id.*

92. *Id.*

93. *See id.* (allowing for condemnation “[w]henver any lands or interest therein are urgently needed by any state board, or commission, or other agency of the state”).

94. *QuickFacts: Milwaukee City, Wisconsin*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/5553000,00> (last visited Apr. 21, 2017).

tests show a significant achievement gap between African American and white students in Wisconsin.⁹⁵ Average scores for African American students are some of the lowest scores in the nation.⁹⁶ Moreover, according to the U.S. Department of Education, Wisconsin has the largest disparity in graduation rates between African American and white students.⁹⁷ Therefore, given the state's obligation to provide essential public education, utilizing MPS buildings to partner with private voucher and charter schools to help close the achievement gap could be viewed as an urgent need.

Second, there needs to be a determination as to whether a contract to purchase the property can be made.⁹⁸ Despite the legislature passing laws requiring MPS buildings to be sold,⁹⁹ the district refuses to comply.¹⁰⁰ MPS and the City of Milwaukee have passed "policies that explicitly prohibit[] private schools in the choice program from purchasing the buildings," thereby frustrating the legislative intent of the law.¹⁰¹ Because MPS and the City have placed deed restrictions on these properties preventing "competing use," purchase contracts are nearly impossible to obtain.¹⁰²

Third, the governor's approval is required to take possession of a property.¹⁰³ Governor Scott Walker signed legislation impacting MPS vacant buildings and has been supportive of efforts to better utilize the buildings.¹⁰⁴ Whether he will be supportive enough to give his approval and place himself in the middle of a controversial eminent domain issue is another question. If emergency condemnation is necessary to take the property, the governor's approval will likely depend on the political environment and circumstances at the time.

95. Beck, *supra* note 14.

96. *Id.*

97. Johnson & Crowe, *supra* note 13.

98. WIS. STAT. ANN. § 32.21 (West, Westlaw through 2017 Act 6).

99. 2011 Wis. Act 17, sec. 4 (codified at WIS. STAT. § 119.60 (2m)(a)(1) (2015)).

100. See, e.g., WIS. INST. FOR LAW & LIBERTY, INC., *supra* note 1, at 3–5 (discussing the attempts charter and private schools have made to purchase unused schools); Paul Brennan, *Milwaukee Makes It Hard to Buy Its Many Empty School Buildings*, WIS. WATCHDOG (Jan. 26, 2015), <http://watchdog.org/195123/milwaukee-empty-schools/> (discussing an attempt to buy MPS property that was turned down).

101. WIS. INST. FOR LAW & LIBERTY, INC., *supra* note 1, at 6.

102. *Id.*

103. WIS. STAT. ANN. § 32.21.

104. Marley & Johnson, *supra* note 19.

Finally, an award of damages must be tendered to the City of Milwaukee in exchange for the taking of property held by MPS.¹⁰⁵ The payment amount may be determined by previous offers made by other educational institutions for the properties¹⁰⁶ and fair market value of the properties.¹⁰⁷

Therefore, with the governor's approval, the state likely has the option of emergency condemnation, as all of the required elements appear to be met. After meeting these requirements, the state would be free to take immediate possession of vacant MPS buildings and sell them to private, high-performing education providers in Milwaukee.

3. *Eminent Domain Based on Utilizing the "Paramount Public Use" Doctrine*

The "paramount public use" doctrine addresses takings between two public entities that both hold powers of eminent domain.¹⁰⁸ The paramount public use doctrine requires a court to balance the needs of two general condemnors for specific property and to determine which use would produce the greater public benefit.¹⁰⁹ Depending on the jurisdiction employing the doctrine, superiority of use can be determined by the character of the condemnor or the actual use of the property.¹¹⁰

a. Superior Use: Character of Condemnor

Although they have their own governing bodies, Wisconsin cities are still subject to the authority of the Wisconsin Constitution.¹¹¹ The Wisconsin Constitution states,

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall

105. WIS. STAT. ANN. § 32.21.

106. ESENBERG ET AL., *supra* note 3, at 4–8.

107. *See, e.g., id.* at 9 (providing an example of an attempt to purchase an institution for its appraised value).

108. Naiman, *supra* note 45, at 893.

109. *Id.* at 898.

110. A. S. Klein, Annotation, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves*, 35 A.L.R. 3d 1293, § 2(a) (1971).

111. WIS. CONST. art. XI, § 3.

affect every city or every village. The method of such determination shall be prescribed by the legislature.¹¹²

The state's sovereignty also includes authority over the property of its municipalities.¹¹³ Even in the absence of a statute expressly authorizing the state to appropriate public property, state authority over the property of its municipalities is significant. Concerning "property within its own borders [and] not held by the [f]ederal [g]overnment, a state has broad power of eminent domain, and its right to take the property of one of its subdivisions is rarely questioned."¹¹⁴

States are generally regarded as possessing broad powers over cities within their boundaries. For example, in *City of Trenton v. New Jersey*,¹¹⁵ the Supreme Court declared that a city is a "political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted [sic] to it."¹¹⁶ The Court further stated that "[t]he power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned."¹¹⁷

State legislatures have significant authority over property within a state, and their eminent domain power is restricted only by constitutional limitations.¹¹⁸ Also, legislatures generally have the authority to grant eminent domain power to lesser entities, such as state agencies, counties, and municipalities.¹¹⁹

Based on the state's broad power over its municipalities, the Wisconsin State Legislature can likely use eminent domain to acquire vacant MPS buildings even without express statutory authority.

b. Superior Use: Purpose

If a superior use of the property is required, the state is likely able to demonstrate that its proposed use is paramount to MPS's use in the foreseeable future. Courts in Illinois, New Jersey, and Texas

112. *Id.*

113. *See id.* § 2.

114. Klein, *supra* note 110.

115. 262 U.S. 182 (1923).

116. *Id.* at 185–86.

117. *Id.* at 188.

118. *See* 26 AM. JUR. 2D *Eminent Domain* § 6 (2016).

119. *See id.* § 23.

have used some version of the paramount public use doctrine, thus they provide valuable insight into its use.¹²⁰

In *State v. Montgomery County*,¹²¹ the state of Texas sought to prevent Montgomery County from exercising eminent domain.¹²² As part of the condemnation process, the county was required to obtain title to a strip of land to be used for a highway project and transfer it to the state.¹²³ The court stated that the exercise of eminent domain authority between units of government is governed by the doctrine of paramount importance, and the focus of this doctrine is on whether “the necessity be so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way.”¹²⁴

Unlike Texas courts, courts in Illinois have focused less on necessity and more on the *reasonableness* of the taking. In *City of East Peoria v. Group Five Development Co.*,¹²⁵ the City of East Peoria wanted to construct a highway, which partially extended over the property of a community college district.¹²⁶ The court ruled that when a public entity seeks to take property already devoted to a public use, “courts are empowered to consider the reasonableness of the taking, and to correct any clear abuses of authority.”¹²⁷

A New Jersey case, *Township of Weehawken, v. Erie Railroad Co.*,¹²⁸ demonstrates yet another version of judicial balancing in a comparison of public uses. The township sought to condemn land owned by a railroad to construct recreational facilities and related parking structures.¹²⁹ In its denial of the township’s condemnation of the railroad’s property, the court’s reasoning focused on the “reasonable necessity and comparative value of the conflicting interests.”¹³⁰ The court hesitated to offer a general rule for

120. See *City of E. Peoria v. Grp. Five Dev. Co.*, 429 N.E.2d 492 (Ill. 1981); *Twp. of Weehawken v. Erie R.R. Co.*, 120 A.2d 593 (N.J. 1956); *State v. Montgomery Cty.*, 262 S.W.3d 439 (Tex. App. 2008).

121. 262 S.W.3d 439.

122. *Id.* at 441–42.

123. *Id.* at 442.

124. *Id.* at 444–45 (quoting *Sabine & E.T. Ry. Co. v. Gulf & I. Ry. Co.*, 46 S.W. 784 (Tex. 1898)).

125. 429 N.E.2d 492.

126. *Id.* at 492.

127. *Id.* at 494 (citation omitted).

128. 120 A.2d 593 (N.J. 1956).

129. *Id.* at 595.

130. *Id.* at 597.

reasonable necessity but observed that the reasonable necessity for the taking should be determined by assessing whether “the advantages to the condemnor will largely exceed the disadvantages to the condemnee.”¹³¹

Finally, Joris Naiman proposed a paramount public use doctrine to resolve conflict between two public entities that focuses on an analysis of the broad public necessity of each party’s use:

A court applying the paramount public use doctrine should weigh each party’s need for the contested property, as well as the public necessity for each use. A court should avoid undue deference to either party’s claim of need, and should take a broad view of public necessity. The analysis of need should consider each party’s alternatives to using the contested property, and any equitable factors supporting each party’s use. *A court’s analysis of public necessity should encompass long-term public welfare and noneconomic factors implicated by each party’s use.*¹³²

c. Comparison of Uses

Whether using a standard based on necessity, reasonableness, or broad public impact, a comparison of the proposed uses of the buildings by MPS and the state is required. In a basic sense, the general use of the MPS buildings would not change regardless of which entity owned them after the exercise of eminent domain. Whether owned by MPS, the state, or a private school, the buildings would likely be used to educate children in the City of Milwaukee. In order to determine the superior use, a deeper analysis of the competing uses is necessary.

MPS is responsible for educating over 76,000 students in the City of Milwaukee, from kindergarten through high school.¹³³ Students of color represent 88% of its enrollment, and 80% of its students are economically disadvantaged.¹³⁴ The district receives almost 60% of its revenues from the State of Wisconsin, with the balance coming from federal and local sources.¹³⁵

131. *Id.* (quoting 2 LEWIS, EMINENT DOMAIN § 440 (3d ed. 1909)).

132. Naiman, *supra* note 45, at 915–16 (emphasis added).

133. *At a Glance 2016–17*, MILWAUKEE PUB. SCHS. (Nov. 2016), <http://mps.milwaukee.k12.wi.us/MPS-Shared/Documents/MPS-District-Fact-Sheet.pdf>.

134. *Id.*

135. *See* CORNMAN, *supra* note 17, at 8.

Obviously, there is no current use of the property while it sits vacant. MPS has floated ideas in the past about potential projects or initiatives to utilize specific facilities that are currently idle.¹³⁶ However, these projects and initiatives may not come to fruition. Also, these potential projects will activate only a handful of the seventeen facilities that are currently underutilized,¹³⁷ which is not a sufficient reason to resist the sale of all the vacant facilities, as MPS has done up to this point.

Although the state does not directly educate Milwaukee's public school children, public education is a fundamental responsibility of the state, and so, under this mandate, the state is responsible for its children's education.¹³⁸ Additionally, as MPS's primary funder, the state has a responsibility to its taxpayers to ensure its resources are spent effectively. MPS has the largest achievement gap between African American and white students in the country, as well as the biggest disparity in graduation rates among the two groups.¹³⁹ Facilities built to educate Milwaukee's children sitting vacant and requiring millions of dollars in maintenance costs is not an effective use of state resources.¹⁴⁰

Even in a broader sense, the failure of MPS—whether fault can be placed solely on the district or not—causes increased costs to state taxpayers.¹⁴¹ MPS's low graduation rate is particularly troubling. Multiple studies have shown that high school dropouts are more likely to utilize public money for health care and welfare, more likely to be involved in the criminal justice system, and far less likely to contribute to the state's tax revenues through sustained employment.¹⁴²

136. See Johnson, *supra* note 79.

137. See Brennan, *supra* note 100 (discussing how some of the seventeen facilities appear to be unutilized).

138. WIS. STAT. ANN. § 118.01(1) (West, Westlaw through 2017 Act 6).

139. Johnson & Crowe, *supra* note 13.

140. James Wigderson, *Report Says Milwaukee Defying State Law Regarding Vacant School Buildings*, WIS. WATCHDOG (Mar. 14, 2017), <http://watchdog.org/290919/report-says-milwaukee-defying-state-law-regarding-vacant-school-buildings> ("These empty [public school] buildings over the course of the last decade have cost Milwaukee taxpayers well over \$10.2 million.").

141. See *supra* Part I.

142. See D'ANDREA, *supra* note 16; see also Matthew Lynch, *Cause and Effect: The High Cost of High School Dropouts*, HUFFINGTON POST (Jan. 30, 2015), http://www.huffingtonpost.com/matthew-lynch-edd/cause-and-effect-the-high_b_6245304.html.

Using Naiman's broad public necessity approach, the state's proposed use of the properties will likely be deemed more valuable than MPS's proposed use. The state's use has a broader impact, from improving education for Milwaukee's children to ensuring more effective utilization of Wisconsin taxpayer resources. From a long-term public welfare perspective, MPS's proposed use—leaving the buildings vacant indefinitely—is not compelling.

IV. PUBLIC POLICY CONSIDERATIONS

The use of eminent domain inevitably raises several public policy concerns. The following analysis considers whether the same arguments against takings involving private property should apply to those involving public property.

A. *Overstated Objectives and Uncertain Outcomes*

One argument against eminent domain is the difficulty in predicting the outcome of a particular project and whether it will have positive results. This concern is particularly applicable to takings for economic development purposes. The results of the redevelopment projects in *Kelo*¹⁴³ and *Poletown Neighborhood Council v. City of Detroit*¹⁴⁴ provide valuable insight.¹⁴⁵

A November 2009 article in the *San Francisco Chronicle* described how the City of New London's project in *Kelo* fell far below expectations:

The well-laid plans of redevelopers, however, did not pan out. The land where Susette Kelo's little pink house once stood remains undeveloped. The proposed hotel-retail-condo "urban village" has not been built. And earlier this month, Pfizer Inc. announced that it is closing the \$350 million research center in New London that was the anchor for the New London redevelopment plan, and will be relocating some 1,500 jobs.¹⁴⁶

In *Poletown*, a neighborhood association and several individual residents sued to block the acquisition of a large tract of land for the

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

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

145. *See id.*

146. *After the Homes Are Gone*, S.F. CHRON. (Nov. 28, 2009, 4:00 AM), <http://www.sfgate.com/opinion/editorials/article/After-the-homes-are-gone-3209347.php>.

construction of a General Motors (GM) plant.¹⁴⁷ The Michigan Supreme Court held that the project, while incidentally benefitting a private interest, fell within the meaning of “public purpose” as defined in the relevant statute.¹⁴⁸

Despite the projections of GM and city officials that indicated the project would create 6150 jobs, the Poletown project did not meet expectations.¹⁴⁹ Only a few years after displacing 4000 residents, hundreds of businesses, and destroying 1400 homes, the plant only employed approximately 2500 people.¹⁵⁰

Although examples of successful economic development projects and other eminent domain takings for public purposes exist, these well-known cases demonstrate that it is difficult to determine outcomes when projects are conceived.

The use of eminent domain to acquire public property, however, may not involve the same level of risk if the project fails to meet expectations. Because the government is taking property already devoted to public use, there is no threat to individual property rights. Unlike the projects in *Kelo* and *Poletown*, takings of public property do not typically involve displacement of residents and private businesses.

Still, MPS might argue that the expectation that the use of the facilities by another educational institution will produce superior results is unfounded, citing the mixed results in assessments of private and charter school performance over the last several years. Even though the schools that have attempted to purchase the vacant buildings have had success in educating their current students, their past performance is not a guarantee of future success. Moreover, education needs throughout the district are continually reassessed, and buildings that are currently vacant might be required for new projects to meet the needs of MPS students.

Similar arguments were made in 2008 in Minnesota, when the Minneapolis School District considered selling three vacant district buildings to high-performing charter schools.¹⁵¹ Some district

147. *Poletown Neighborhood Council*, 304 N.W.2d at 457.

148. *Id.* at 459.

149. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J.L. & LIBERTY 949, 952 (2005).

150. Ilya Somin, *Robin Hood in Reverse: The Case Against Economic Development Takings*, CATO INST. POL'Y ANALYSIS, Feb. 22, 2005, at 1, 2, <https://object.cato.org/pubs/pas/pa535.pdf>.

151. Tom Weber, *Charter Schools to Buy Three Mpls District Buildings*, MPR NEWS

leaders and members of the community feared that selling to a charter school that subsequently underperformed would only result in students returning to the district in worse shape academically, and the efforts could be a waste of time better spent on planning for an alternative use for the building.¹⁵² Also, many believed the district should keep the building in case enrollment should grow in the future.¹⁵³

In the end, the district decided to make the sale,¹⁵⁴ despite a previous policy banning the sale of any district buildings to charter schools.¹⁵⁵ Although the move was not without critics, the driving factors behind the sale were eliminating debt on the properties and adding cash flow to district operations, and the \$11.3 million received for the three vacant buildings accomplished those objectives.¹⁵⁶ Minneapolis School Board member Pam Costain called the sale “uncharted territory” but supported the partnership because “[w]e desperately need to unload property, which carries debt and is a burden on our district.”¹⁵⁷

Although educational success for the students enrolled in the private or charter schools that take over vacant MPS buildings is not guaranteed, it is difficult to argue that the buildings’ use by high-performing schools will not provide some level of benefit over a building left vacant. Also, according to a 2016 report by the Wisconsin Department of Public Instruction, third- through eighth-grade students in Milwaukee’s charter and private voucher schools outperformed their counterparts in public schools in math and language arts.¹⁵⁸ Because the likely buyers of the buildings will be the highest performing private and charter schools in the city and the MPS use essentially has no current benefit, academic or financial,

(Nov. 18, 2008), http://minnesota.publicradio.org/features/2008/11/18_schools_for_sale/index.shtml?refid=0.

152. *Id.*

153. *Id.*

154. Patrice Relerford, *Minneapolis Gives Final OK to Sell Three Schools*, STAR TRIB. (Nov. 26, 2008, 7:27 PM), <http://www.startribune.com/minneapolis-gives-final-ok-to-sell-three-schools/35146194/?refer=y>.

155. *See* Weber, *supra* note 151.

156. *Id.*

157. *Id.*

158. Annysa Johnson, *Vouchers, Charters Outscore Public Schools in Latest Data*, MILWAUKEE J. SENTINEL (Mar. 16, 2016), <http://archive.jsonline.com/news/education/vouchers-charters-outscore-public-schools-in-latest-data-b99688846z1-372279021.html>.

the project is likely less risky than a typical economic development project.

B. Reciprocity of Advantage

The concept of reciprocity of advantage should be included in any discussion of expected project outcomes in the use of eminent domain. Reciprocity of advantage refers to the possibility that a property owner may receive some reciprocal benefit from the taking of his or her property.¹⁵⁹

In the case of a taking of private property, a property owner would need to enjoy some type of advantage from the broader community to obtain reciprocity of advantage, such as community amenities, better job opportunities, etc.¹⁶⁰ Reciprocity of advantage in a taking of public property, however, is likely easier to obtain, because it simply involves a transition from one public use to another.¹⁶¹ There are no individual property rights to balance against the proposed public use.

The potential taking of MPS buildings would not change the overall purpose of the property, which is education. It would be difficult to demonstrate that MPS receives no reciprocity of advantage with the state's proposed use of the property, because, in a broad sense, it is the same purpose and use MPS has for the property.

C. Coercive Takings

Another argument frequently used against eminent domain is that it involves the coercive acquisition of property from its owner. The involuntary nature of the taking has created concerns that the use of this power will result in oppressive actions by government and those who hold power over government. As explained by Neil

159. Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 492, 540 (2006).

160. See, e.g., *id.* at 545 (discussing how *Kelo* was supposed to bring in over 6000 jobs to benefit that community).

161. See, e.g., *id.* at 544 ("It has frequently been noted that concerns over undercompensation are at their lowest when the proposed public use for the condemned property is 'public' in the broadest sense. This relationship is true because the more that the benefits of a public use inure to the public as a whole, the more likely it is that the condemnee is reaping some reciprocity of advantage from the taking.").

Komesar, this “majoritarian oppression” is “an abuse of the political process by a powerful majority that exerts sufficient control over the government such that it can co-opt the eminent domain power to confiscate the property of a less powerful minority.”¹⁶² Because eminent domain is a very powerful tool used to involuntarily take property from its owner, it is prone to abuse and can be used to oppress those without, or with less, power over government.

However, the risk of abuse in takings of public property due to the coercive nature of eminent domain is mitigated because the balance of power between the condemnor and the condemnee is more equalized.¹⁶³ Although the city is a political subdivision of the state and holds far less power, the susceptibility of the largest city in the state to oppression is significantly less than that of the average individual homeowner positioned against a governmental entity.¹⁶⁴

Still, opponents of a taking of MPS property could argue that the same components of oppression do exist, except they do not involve individual homeowners. They might claim, for example, that it is the white, Republican majority in the state legislature forcing its will on an institution devoted to serving poor African American children in Milwaukee. This majority could be seen as taking resources devoted to the education of African American students and handing them to private entities that already take resources (public funding) that should be going to the city’s public schools.

However, this argument is flawed because African American students are the primary beneficiaries of the reallocation of resources the taking makes possible. In fact, one could argue that the state would be negligent, or even discriminatory, in its overall responsibility for public education if it did not act and attempt to provide a superior use for MPS’s vacant buildings.

162. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958 (citing NEIL KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 60–70 (2001)).

163. Naiman, *supra* note 45, at 894.

164. *Compare* *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O’Connor, J., dissenting) (explaining the disproportionate power and influence between individuals and a governmental entity), *and id.* at 521–22 (Thomas, J., dissenting) (same), *with* Naiman, *supra* note 45, at 894–95 (explaining the balance of power between condemnor and condemnee in public property situations).

D. Local Rule

Related to the notion of coercive takings is the question of whether the state's use of eminent domain over MPS buildings would be an unlawful intervention into a local matter, bypassing duly elected public officials and the will of the people who put them in office. A distinction must be made, however, between what is lawful and what is politically acceptable.

As discussed in Part III, the state has broad authority over its political subdivisions.¹⁶⁵ The Supreme Court explained, in no uncertain terms, the extent of state control over city powers in *Hunter v. City of Pittsburgh*¹⁶⁶:

The state . . . at its pleasure, may modify or withdraw all [city] powers, may take without compensation [city] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.¹⁶⁷

So, according to the Court, the state legislature controls what, if any, powers a city has, and any actions to modify a city's powers can be done without the consent of its citizens.¹⁶⁸

Still, state actions that impact a city, though lawful, may be deemed abusive, oppressive, or unfair by the city's residents. In those situations, the city's electorate, which is a component of the state's electorate, may have some influence in the state legislature to eliminate, or at least mitigate, the perceived abuse of power. Specifically, MPS, its board of directors, and the Milwaukee Common Council may decide to wage a campaign encouraging city residents to contact their representatives in the state legislature to

165. See *supra* Section III.B.3.a.

166. 207 U.S. 161 (1907).

167. *Id.* at 178–79.

168. *Id.* at 179 (“The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.”).

express their opposition to the state's seizure of MPS's vacant buildings.

Similar protests occurred when dozens of MPS teachers and union supporters rallied outside the Milwaukee County Courthouse to fight the state's plan to create a turnaround district that would assist in improving some of MPS's poorest performing schools.¹⁶⁹ The turnaround district is another major component of the legislation passed to address MPS's vacant buildings and, pursuant to the new law, is the responsibility of the Milwaukee County Executive.¹⁷⁰ The protest and general opposition from MPS led to the resignation of the commissioner selected by the county executive to oversee the turnaround district.¹⁷¹

In the end, however, despite formal protests and the existence of the independent elected bodies of the Milwaukee Common Council and the Milwaukee Board of School Directors, any political pressure MPS and its supporters may place on the legislature is merely influential and not authoritative. As Gerald Frug put it, "[u]nder current law, cities have no 'natural' or 'inherent' power to do anything simply because they decide to do it."¹⁷²

Despite the city's lack of power against the state, the question remains whether it is sound public policy for the state to use eminent domain to take MPS buildings. MPS would undoubtedly argue that the state's use of its authority to usurp the power of Milwaukee's residents to manage property paid for with local tax dollars is an abuse if its power and sets a dangerous precedent. If these takings are allowed, MPS would argue, local governments and their affiliated entities could be subject to endless uncertainty in the management of their local affairs, caused by the whims, politically motivated schemes, or competing priorities of state officials.

The state would argue, however, that the taking is necessary to fulfill its duties on behalf of state taxpayers. Its overall responsibility for public education in the state, and the significant portion of the state budget devoted to Milwaukee's public education system, likely warrants aggressive means of protecting the state's

169. Bill Hurley, *MPS Supporters Rally Against Takeover Plan, in Support of Community Schools*, MTEA (June 21, 2016), <http://mtea.weac.org/2016/06/21/10763/>.

170. See Marley & Johnson, *supra* note 19.

171. *Id.*

172. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980).

interests, particularly in light of resistance from MPS and Milwaukee officials in complying with state law.

V. CONCLUSION

The state has several options to justify use of eminent domain to acquire MPS vacant buildings. The property could qualify as “blighted property” under the broad definition of the term in the state’s eminent domain statutes,¹⁷³ thereby enabling the state to exercise eminent domain with the traditional approach. Contingent on the governor’s approval, the state’s taking of MPS buildings could also potentially qualify under the “emergency condemnation” statute¹⁷⁴ due to the urgent need to educate Milwaukee children. Finally, using Naiman’s broad public necessity approach within the paramount public use doctrine,¹⁷⁵ the broader impact of the state’s proposed use likely justifies the state exercising eminent domain over the MPS buildings.

The public policy considerations in the use of eminent domain for taking public property are different and somewhat less controversial than in taking private property. The potential for abuse is reduced because the relative power of the public entities involved is more balanced. Moreover, the public outcry caused by cases such as *Kelo* and *Poletown* is unlikely to occur, because there are no individual homeowners or businesses displaced.

The political minefields created if the state chooses to pursue eminent domain to acquire MPS’s buildings would likely come from the current state and local politics surrounding education issues. Specifically, any attempt to forcibly take MPS property would be framed by the public versus voucher/charter debate in urban education that has existed since the first voucher program was introduced during the administration of former governor Tommy Thompson in 1989.¹⁷⁶ The debate would also include the usual opponents and stakeholders in urban education issues: Republicans versus Democrats, business groups versus teachers’ unions, etc.

173. See *supra* Section III.B.2.a.

174. See *supra* Section III.B.2.b.

175. See *supra* Section III.B.3.

176. See *A Brief History of Voucher Expansion*, WIS. DEP’T PUB. INSTRUCTION, <https://dpi.wi.gov/sites/default/files/imce/eis/pdf/vhist.pdf> (last visited Apr. 26, 2017).

Currently, MPS appears to be vacillating between viewing the recently passed bills as merely invitations to partner with the state and seeing them as actual laws with which they must comply. MPS has refused to place unused buildings on the market and has rejected a turnaround district plan by submitting its own counter-proposal.¹⁷⁷ Yet, officials state that “MPS has and will continue to meet its obligations under the [new] law.”¹⁷⁸ The political stand-off will continue until the legislature makes its next move.

Wisconsin State Senate Majority Leader Scott Fitzgerald stated that the legislature is prepared to take “even more aggressive moves in dealing with MPS.”¹⁷⁹ Whether those aggressive moves involve cutting state funding for MPS, a lawsuit, or stepping in the controversial waters of eminent domain will be determined by lawmakers’ political will on the issue and support from the governor, as well as other competing legislative priorities.

177. See Marley & Johnson, *supra* note 19.

178. See *id.*

179. *Id.*