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KELO SIX YEARS LATER: STATE RESPONSES, RAMIFICATIONS, AND SOLUTIONS FOR THE FUTURE

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Abstract: In 2005, the U.S. Supreme Court upheld the constitutionality of eminent domain takings that benefit private developers in *Kelo v. City of New London*. The case led to public outcry on both the right and the left and the revision of many state eminent domain laws to curtail such takings. However, most of the new laws have been ineffective. In many states, the burden of the takings falls largely onto poor, minority communities while, in others, revitalization projects by private developers are prohibited entirely. This Note examines the negative implications of current approaches to takings on inner-city, minority communities and concludes that states should adopt an approach that allows revitalization of blighted areas by private developers but also provides effective limits such as a narrow definition of blight, enhanced compensation for the displaced, and procedural provisions such as Community Benefits Agreements.

INTRODUCTION

The story of Susette Kelo's fight to prevent the City of New London, the State of Connecticut, and the pharmaceutical giant Pfizer from taking her home struck a nerve throughout America.¹ Kelo's home was not in a slum and there was no declaration that her house was in disrepair.² Instead, her property faced condemnation to allow Pfizer and New London to accomplish an ambitious economic revitalization plan that would include a new research and development facility for Pfizer at its center and would provide the city with a waterfront shopping area, conference hotel, condominium units, parks, and ma-

* Note Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

¹ See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109 (2009); Will Lovell, Note, *The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609, 610 (2007); Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20.

² See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

rinas.³ Although groups across the political spectrum were rooting for Kelo's "David" to win a victory for private property owners, the Supreme Court came out in favor of "Goliath."⁴ In its now-infamous opinion, *Kelo v. City of New London*, the Supreme Court announced that economic revitalization projects by private developers are constitutional "public uses" that justify the use of eminent domain.⁵

Five years after the decision, not only did Pfizer walk away from its ambitious project, but public fear and anger over the implications of the decision have also led to more restrictive legislation in several states and multiple referenda on private eminent domain takings.⁶ In the aftermath of *Kelo*, forty-three states amended their eminent domain laws and seven states changed their constitutions to limit "economic development" projects like the one at issue in *Kelo*.⁷ Despite the public backlash, the majority of state eminent domain laws do little to limit takings for "economic revitalization" projects by private developers.⁸ Instead, most states satisfied the public outcry against *Kelo* by limiting eminent domain for private developers to situations of "blight" which, broadly defined, covers most properties in poor areas or with an economic or physical defect.⁹ For instance, Illinois exempts condemnations for blight from its ban on economic development takings and broadly defines blight as an area where buildings or improvements are detrimental to the public safety, health, or welfare because of a combination of five or more factors.¹⁰ The factors listed include dilapidation, deterioration, excessive vacancies, deleterious land-use layout, overcrowding of structures and community facilities, and lack of community planning.¹¹ Such broad exceptions would allow private "economic redevelopment" takings to take place in many areas, but it is particularly poor, inner-city communi-

³ See *id.* at 474.

⁴ See Anastasia C. Scheffler-Wood, Comment, *Where Do We Go From Here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMP. L. REV. 617, 638 (2006); Terry Pristin, *Connecticut Homeowners Say Eminent Domain Isn't a Revenue Raising Device*, N.Y. TIMES, Sept. 8, 2004, at C8 (noting that the *Kelo* fight led to strange alliances between disparate groups including the conservative Institute for Justice, the ACLU, and Ralph Nader).

⁵ See *Kelo*, 545 U.S. at 488–89.

⁶ See Somin, *supra* note 1, at 2101–02 (describing the massive backlash from across the political spectrum that spurred the development of new state legislation on eminent domain); Lovell, *supra* note 1, at 610.

⁷ See Somin, *supra* note 1, at 2101–02.

⁸ See *id.* at 2105, 2114 (noting that twenty-two of the thirty-four new state laws are "largely symbolic in nature, providing little or no protection for property owners").

⁹ See *id.* at 2114.

¹⁰ 65 ILL. COMP. STAT. 5/11-74.4-3(a)(1) (2006); Somin, *supra* note 1, at 2125.

¹¹ See Somin, *supra* note 1, at 2125–26.

ties that are characterized by such attributes.¹² Because such communities are predominantly composed of minorities, are the least politically connected, and have the lowest property values, they face an additional risk of displacement for tax-boosting corporate projects like the one pursued by Pfizer.¹³ Eminent domain takings like these signal a return to the racially disproportionate “urban renewal” programs that occurred between 1949 and 1976, when states and cities used federal funds and “blight” condemnations to clear out poor, minority neighborhoods, expand downtown areas, and prevent the exodus of affluent residents and businesses to the suburbs.¹⁴ Thus, instead of solving the perceived injustice of the *Kelo* decision, state laws restricting private economic revitalization projects to “blighted areas” will largely shift the burden of these takings to poor and minority citizens.¹⁵

A minority of states, recognizing the problems with allowing private development trends to continue under the pretext of blight, ban such projects without exception.¹⁶ Florida, for example, not only bans all economic revitalization takings regardless of blight or a developer’s comprehensive development plan, but also bans all blight condemnations in general.¹⁷ While such bans certainly remove the dangers of parochial favoritism towards corporate interests over local communities and insulate poor communities from takeover, they also come with a cost.¹⁸ Such bans hinder or prevent a state or municipality’s attempt to

¹² See George Lefcoe, *Redevelopment Takings After Kelo: What’s Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 828–29 (2008); Amanda W. Goodin, Note, *Rejecting the Return to Blight and Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 199–02 (2007).

¹³ See Goodin, *supra* note 12, at 199–02, 205.

¹⁴ See Lefcoe, *supra* note 12, at 828–29 (describing the regressivity of the blight standard); Goodin, *supra* note 12, at 200–02.

¹⁵ See Goodin, *supra* note 12, at 199–02.

¹⁶ See Somin, *supra* note 1, at 2138–39.

¹⁷ See Lefcoe, *supra* note 12, at 833–35; Somin, *supra* note 1, at 2138–39. Florida’s strong condemnation of all economic development takings arose from an eminent domain battle over Riviera Beach, a predominantly black community on the ocean. See Lefcoe, *supra* note 12, at 833–35. Although it was in a prime location for beachside resorts, Riviera Beach was largely impoverished. See *id.* When the city attempted to use eminent domain to pursue a private developer’s economic redevelopment plan, a few residents challenged the taking, despite wide support of the plan by most of the affected residents and extremely high offers of compensation for displaced residents. See *id.* In the aftermath of this battle, Florida voters enacted a constitutional amendment requiring a three-fifths vote of both houses of the legislature to sanction a taking that transferred property from one private person to another. See *id.*

¹⁸ See J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL’Y 131, 153–55 (2005); Lefcoe, *supra* note 12, at 831.

pursue desperately needed revitalization projects in poor areas.¹⁹ Although the potential displacement of low-income, minority communities through private, corporate expansion is a real danger, it is equally dangerous to allow low-income neighborhoods to stagnate and devolve into slums because of a lack of economic opportunity.²⁰ Private development plays a critical role in uplifting depressed communities by providing direct public benefits including new jobs and affordable housing for residents, increased tax dollars for the municipality, increased property values, and improved facilities and public areas for the community.²¹ Furthermore, because local governments and states often do not have the funds to accomplish ambitious revitalization projects, allowing private developers to assist in redevelopment projects can prevent blighted areas from regressing into slums.²²

For instance, the urban revitalization plan that led to the creation of the Inner Harbor in Baltimore stemmed from a public-private partnership with both direct purchases and eminent domain actions used to obtain waterfront land.²³ To reverse the decline of property values and the flight of businesses from Baltimore, the city government and the business community in Baltimore worked together to revitalize Baltimore's harbor into a thriving retail and entertainment district.²⁴ The Inner Harbor development rejuvenated Baltimore and became a main tourist attraction, providing jobs for city dwellers and millions of dollars in tax revenue for the city.²⁵

¹⁹ See Byrne, *supra* note 18, at 153–55; Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 321, 330–31 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁰ See Dowling, *supra* note 19, at 330–31.

²¹ See GEORGE E. PETERSON & DANA R. SUNDBLAD, THE CONFERENCE BD., CORPORATIONS AS PARTNERS IN STRENGTHENING URBAN COMMUNITIES 12 (1994); Byrne, *supra* note 18, at 155–56; Dowling, *supra* note 19, at 330–31. Peterson & Sundblad give many examples of successful corporate-community partnerships that yielded tangible benefits to both the corporation and the urban community. See PETERSON & SUNDBLAD, *supra*, at 15–43. There are a wide variety of ways that corporations can invest in the economic improvement of poor communities and also earn a profit. See *id.* at 26 (describing Ben & Jerry's unique approach to community development in which it franchises Ben & Jerry's ice-cream shops to non-profits such as the Street Youth Center in San Francisco for free to use as job-training facilities for people with few marketable skills).

²² See Byrne, *supra* note 18, at 155–56; Dowling, *supra* note 19, at 330–31.

²³ See Byrne, *supra* note 18, at 155; Phillip A. Hummel, Student Article, *East Side Story: The Redevelopment of East Baltimore*, 15 U. BALT. J. ENVTL. L. 97, 99 (2008).

²⁴ See Martin L. Millsbaugh, *The Inner Harbor Story*, URBAN LAND, April 2003, at 36, 36–37; Robert Sharoff, *Redevelopment Enriching Baltimore's Inner Harbor*, N.Y. TIMES, Aug. 3, 1997, § 9, at 5.

²⁵ See Byrne, *supra* note 18, at 155; Millsbaugh, *supra* note 24, at 36.

More recently, a public-private partnership between the City of Baltimore, the State of Maryland, and Johns Hopkins University has led to a proposed biotech center in the crime-ridden and economically depressed “Middle East” neighborhood that surrounds Johns Hopkins University’s Medical School in East Baltimore.²⁶ The proposed project will create two million square feet of biotech research facilities, 1,200 units of mixed-income housing, retail space and public parks, and up to 8,000 new jobs.²⁷ Although this plan is not without opposition, the home replacement program and mixed-income housing project will allow many of the low-income residents to remain in their communities and will ensure fair accommodations and compensation for those who are displaced.²⁸ Besides benefitting the city as a whole, the project will provide better transportation, public facilities, tax revenues, and job opportunities for the residents of the community and a resolution to the longstanding tension between the community and the University.²⁹ Maryland’s eminent domain laws, while relatively weak in protecting property owners against abusive private takings, still allow much needed revitalization projects like the East Baltimore biotech project.³⁰ In states that completely ban takings for such projects, a few holdouts could easily derail development plans.³¹ Thus, overly restrictive eminent domain laws can do more harm than good by curtailing beneficial projects like the one in Baltimore.³²

²⁶ See Hummel, *supra* note 23, at 97–99; Eugene L. Meyer, *Building a Technology Park in Baltimore by Rehabilitating a Neighborhood*, N.Y. TIMES, Aug. 6, 2008, at C7; see also discussion *infra* Part III.

²⁷ See Hummel, *supra* note 23, at 112.

²⁸ See *id.* at 120–22.

²⁹ See *id.* at 124–27; Meyer, *supra* note 26.

³⁰ See Hummel, *supra* note 23, at 108–12.

³¹ See Byrne, *supra* note 18, at 155.

³² See *id.*; Dowling, *supra* note 19, at 330–31; Hummel, *supra* note 23, at 120–22. Dowling discusses various transformative economic revitalization projects in poor, distressed communities that came to fruition through private development and eminent domain authority. See Dowling, *supra* note 19, at 330–31. These include the corporate-driven Kansas Speedway revitalization project in Kansas City and the Nissan Motor Company manufacturing plant in Madison County, Mississippi, both of which provided tangible public benefits, including thousands of new jobs. See *id.* In addition to corporate-driven economic development, eminent domain power is crucial to grassroots, non-profit redevelopment as well. See *id.* For instance, the Dudley Street Neighborhood Initiative in Boston used eminent domain to provide affordable housing and revitalize decaying areas just a few blocks away from downtown Boston. See *id.* This initiative did not involve a corporate interest or private developer but instead was built from the ground up through neighborhood- and faith-based organizations including La Alianza Hispana, Casa Esperanza, and St. Patrick’s Church. See *id.* The “only feasible way to acquire land and promote neighborhood control of the project” was to use

This Note argues that the best way to protect individuals from overly broad private takings while still allowing states and local governments to pursue legitimate revitalization projects is to define blight narrowly, to provide procedural hurdles for takings in private economic revitalization projects, and to provide enhanced compensation for displaced residents (including renters).³³ Additionally, including incentives for community support for projects such as Community Benefits Agreements will benefit local communities by giving community groups a say in the final development agreements.³⁴ Overall, such limitations will discourage abuses in which blight is used as a pretext, encourage serious planning by private developers, and provide just compensation for displaced communities.³⁵ Part I gives a constitutional background of the public use doctrine and the implications of the *Kelo* opinion for minority communities. Part II focuses on the legislative response to *Kelo* and the problems with both the blight exception to private economic revitalization plans and the complete bans on such plans. Part III provides case examples of beneficial public-private development projects in depressed areas that provide tangible benefits for the city while also accounting for the needs of the poor living in those areas. Finally, Part IV proposes a few reforms that states should consider adopting in their eminent domain laws that would protect affected communities and prevent abuse while also encouraging much-needed economic development.

eminent domain, and it is crucial to recognize that beneficial initiatives like this would be curtailed by strict bans on eminent domain for private development. *See id.*

³³ *See* Byrne, *supra* note 18, at 157–61, 162–63.

³⁴ *See* Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2016 (2007); Jacqueline Leavitt, *Linking Housing to Community Economic Development with Community Benefits Agreements: The Case of the Figueroa Corridor Coalition for Economic Justice*, in JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES 257, 265, 271 (Paul Ong & Anastasia Loukaitou-Sideris eds., 2006); Greg LeRoy, *Community Benefit Agreements: A Strategy for Renewing Our Cities (Los Angeles, California)*, in BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS 205, 208–09 (M. Paloma Pavel ed., 2009). Leavitt defines Community Benefits Agreements as “legally enforceable contracts that result from a negotiation process whereby a developer will provide certain benefits in return for a community group’s promise to support the project.” *See* Leavitt, *supra*, at 265.

³⁵ *See* Byrne, *supra* note 18, at 169.

I. PRIVATE DEVELOPMENT TAKINGS, URBAN RENEWAL, AND THE *KELO* DECISION

The Fifth Amendment's Takings Clause provides: "nor shall private property be taken for public use, without just compensation."³⁶ The Takings Clause applies to states through the Fourteenth Amendment, leaving states free to exercise eminent domain powers up to the constitutional limit.³⁷ The extent of this limit has generated much controversy over the years.³⁸ While takings to build roads, bridges, or railroads for actual "public use" are widely accepted, the question of whether a taking is for public use if it simply serves a "public purpose" has been more controversial.³⁹ "Public purpose" takings could include transfer of private property from one citizen to another who will use the land more efficiently and thereby benefit more people.⁴⁰

Despite the controversy surrounding "public purpose" takings, the Supreme Court's line of precedent on the issue consistently demonstrates that "public purpose" takings are constitutional.⁴¹ In *Berman v. Parker*, the Court unanimously approved the District of Columbia Redevelopment Act of 1945, which gave a redevelopment agency the authority use eminent domain to take private property to redevelop blighted slums.⁴² After a property owner, whose department store was not blighted but was within the condemned redevelopment area, challenged the taking, the Court upheld the taking as constitutional.⁴³ Reasoning that such takings met the "public purpose" requirement, the Court found that the takings were within the bounds of the Fifth Amendment.⁴⁴ The Court extended this reasoning in *Hawaii Housing Authority v. Midkiff*, in which it found that a Hawaii state law that transferred private property from certain landowners to others was a constitutional "public use."⁴⁵ Because only twenty-two landowners controlled more than seventy-two percent of the fee simple titles in Hawaii, the law allowed for wider public ownership of the land and therefore was con-

³⁶ U.S. CONST. amend. V.

³⁷ See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

³⁸ See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 232, 244 n. 7 (1984); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 226 (1897).

³⁹ See *Berman v. Parker*, 348 U.S. 26, 26 (1954).

⁴⁰ See *id.*

⁴¹ See *Kelo*, 545 U.S. at 489.

⁴² See *Berman*, 348 U.S. at 26.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *Midkiff*, 467 U.S. at 232.

stitutional even though the government itself never “used” the land.⁴⁶ The *Kelo* decision reinforced the constitutionality of “public purpose” takings.⁴⁷ The opinion, while very much in line with *Berman* and *Midkiff*, was very deferential to state “economic revitalization” plans and provided a strong base of authority for eminent domain takings.⁴⁸

The *Kelo* case arose out of a development plan for economically depressed New London, Connecticut.⁴⁹ New London hoped to partner with Pfizer to change its economic outlook through a comprehensive revitalization project.⁵⁰ Pfizer and the state contributed much-needed funds for the project and the city’s development board created plans for a state park around Fort Trumbull, two marinas, a museum, a hotel and office building, eighty new condo units, and improved infrastructure and roads.⁵¹ Although the redevelopment area was not blighted, the city hoped to provide a much-needed infusion of jobs into New London as well as an increase in tax revenue.⁵² Susette Kelo, a long-time resident of New London whose home was inside the city’s redevelopment planning area, refused to sell her home to the city’s Development Committee.⁵³ When the city condemned the properties to prevent homeowners from blocking the plan, Kelo and the others challenged the taking as unconstitutional.⁵⁴

In a five-to-four decision, the Supreme Court found that New London’s economic revitalization project constituted a “public use” in accordance with the Fifth and Fourteenth Amendments.⁵⁵ Noting that the word “use” in the takings provision of the Fifth Amendment was meant to be interpreted broadly to mean public “purpose,” the Court found that if the local government could show a rational basis for concluding that its development plan served a “public purpose,” the taking would be constitutional.⁵⁶ In reaching its decision, the Court stressed the comprehensiveness of the plan that New London had adopted for the redevelopment project as evidence that the taking was not primarily

⁴⁶ See *id.*

⁴⁷ See *Kelo*, 545 U.S. at 489.

⁴⁸ See *id.* at 488–89.

⁴⁹ See *id.* at 473–75.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *Kelo*, 545 U.S. at 474–75.

⁵³ See *id.* at 475–76.

⁵⁴ See *id.*

⁵⁵ See *id.* at 489.

⁵⁶ See *id.* at 488–90.

perpetrated for Pfizer's benefit.⁵⁷ The Court also found that because economic development is well within the police power of the states and that the increase in property values, tax revenue, and jobs would serve the public interest, the project was a "public use."⁵⁸ Despite the absence of a finding that the condemned properties were blighted or a specific description of the role that Susette Kelo's house would play in the redevelopment plan, the Court deferred to the determination of the city and found it to be within the bounds of the constitution.⁵⁹

Justice Kennedy, in his concurring opinion, advocated for a limit on the Court's deference towards private "redevelopment" projects which merely favor corporate interests without providing any meaningful public benefit.⁶⁰ Noting the potential abuses of "economic revitalization" projects under the Court's hands-off approach, Kennedy argued that when faced with a "plausible accusation of impermissible favoritism to private parties," courts should scrutinize the project to see whether the transaction primarily benefits the developer with only "incidental benefit to the city."⁶¹ While this limitation could theoretically stop egregious takings intended to favor some private interest, a state or locality will very often be able to find a generalized "public purpose" behind a taking in practice.⁶²

In a spirited dissent, Justice Thomas argued that the result of this opinion would disproportionately fall on poor, minority communities.⁶³ Harkening back to the "urban renewal" projects of the past, which some described as "negro removal" due to their effects on poor, pri-

⁵⁷ See *Kelo*, 545 U.S. at 489; Lefcoe, *supra* note 12, at 812.

⁵⁸ See *Kelo*, 545 U.S. at 488–89.

⁵⁹ See *id.*

⁶⁰ See *id.* at 493 (Kennedy, J., concurring).

⁶¹ See *id.*

⁶² See *id.* In one such example, the City of Lancaster, California attempted to use eminent domain to condemn a 99 Cents Only Store to transfer property to the adjacent Costco, which threatened to move out of the area if it could not obtain more mall space. See *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1123 (C.D. Cal. 2001). The court found that this taking did not serve a public purpose because the only reason the city condemned the property was to satisfy the private expansion demands of Costco and because the city's claim that the taking was intended to prevent "future blight" was unsupported by any authority or factual findings. See *id.* at 1129. Although the court in this case did not find public use, this case illustrates how local governments may abuse their eminent domain authority solely to benefit private developers and corporate interests and attempt to justify the taking by pointing to minimal incidental public benefits. See *id.*; David L. Callies, *Phoenix Rising: The Rebirth of Public Use*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT*, *supra* note 19, at 49, 50–59 (describing various abuses of eminent domain authority for the benefit of private developers).

⁶³ See *Kelo*, 545 U.S. at 521–23 (Thomas, J., dissenting).

marily black, communities, Thomas argued that the majority's opinion would lead to similar results.⁶⁴ Because the poor are less able to put their land to its most efficient use and are the least politically powerful, allowing states to transfer the lands and homes of poor citizens to corporate interests for any plausible "revitalization" cause would be devastating to these communities.⁶⁵

II. STATE LEGISLATIVE RESPONSES TO *KELO*

In response to the public outcry against *Kelo*, forty-three states changed their eminent domain laws to limit private development takings, some within weeks of the decision.⁶⁶ While such eminent domain reforms were politically expedient, not many states completely curtailed private development takings like the one at issue in *Kelo*.⁶⁷ For many states, the reform was simply symbolic and created no significant constraint on the ability of governments to pursue eminent domain actions to benefit private parties.⁶⁸ A minority of states did pass meaningful eminent domain reforms that provide effective limits on economic development takings, but did so at the cost of their ability to pursue economic development projects.⁶⁹ The trend in most states, however, was to use blight as the limiting factor in private economic development.⁷⁰

The post-*Kelo* eminent domain limitations on private takings fall into three overall categories: (1) broadly defined "blight" limitations for private, economic development takings, (2) narrowly defined "blight" limitations for private economic development takings, and (3) complete prohibitions on private economic development takings.⁷¹ There are both positive and negative consequences for all three kinds of reform.⁷² States that provide wide latitude for private economic development tak-

⁶⁴ See *id.*; Shelley Cashin, *Race, Class, and Real Estate, in BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS*, *supra* note 34, at 59, 61.

⁶⁵ See *Kelo*, 545 U.S. at 521–23 (Thomas, J., dissenting).

⁶⁶ See Somin, *supra* note 1, at 2101–02; *50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*, CASTLE COALITION, 1 (Dec. 2008), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf [hereinafter *50 State Report Card*].

⁶⁷ See Somin, *supra* note 1, at 2105.

⁶⁸ See *id.* For example, Connecticut's new eminent domain law only prevents the condemnation of property "for the primary purpose of increasing local tax revenue." See *id.* at 2132–33. Because it is likely impossible to prove that a property is being condemned for the "primary purpose of increasing local tax revenue" instead of to promote economic development more generally, the law really has no effect. See *id.*

⁶⁹ See *id.* at 2138–43.

⁷⁰ See Somin, *supra* note 1, at 2138–43; Lovell, *supra* note 1, at 617–18.

⁷¹ See Goodin, *supra* note 12, at 195–99.

⁷² See *id.*

ings can stimulate sagging local economies and prevent areas from degenerating into slums by providing tax breaks and municipal bond funding to private developers.⁷³ Because the private developers also contribute planning and funding for projects, redevelopment can be both efficient and cost-effective for a city.⁷⁴ Nevertheless, such projects inevitably affect low-income, minorities either by displacing them or by pricing them out of the area.⁷⁵ On the other hand, states that completely ban economic redevelopment takings suffer from the opposite problem.⁷⁶ Because private developers cannot exercise eminent domain powers in these states, a few holdouts can derail private development projects completely or can engage in rent-seeking behavior that makes a development project unprofitable.⁷⁷ Disallowing the use of eminent domain for private revitalization projects can deter much needed redevelopment and thus allow an area to degenerate into a slum.⁷⁸ Finally, state laws that provide economic redevelopment takings in narrowly defined “blighted” areas are effective in preventing overly lenient private takings such as *Kelo* but, without further restraints, will also disproportionately affect low-income, minority communities due to the fact that these communities are often characterized by the defining factors of blight.⁷⁹

⁷³ See Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 *FORDHAM URB. L.J.* 657, 681–84 (2007) (describing how local governments have turned to public-private partnerships with private developers to meet cities’ particular needs).

⁷⁴ See *id.* at 687; Dowling, *supra* note 19, at 330–31.

⁷⁵ See Byrne, *supra* note 18, at 153; Dowling, *supra* note 19, at 330–31.

⁷⁶ See Lefcoe, *supra* note 12, at 830–31 (noting that without eminent domain for private economic development actions, development officials are convinced that worthwhile redevelopment projects will fail). Even though approximately eighty percent of state and federal government transactions of private property are voluntary, the threat of eminent domain may be necessary to prevent holdouts from blocking a transaction. See Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 *U. CIN. L. REV.* 663, 716 (2006); Lefcoe, *supra* note 12, at 830–31.

⁷⁷ See Lefcoe, *supra* note 12, at 830–31.

⁷⁸ See Byrne, *supra* note 18, at 153–55 (noting that without eminent domain, urban regeneration projects, such as the Inner Harbor in Baltimore, would be severely weakened); Dowling, *supra* note 19, at 330–31; Terry Pristin, *Developers Can’t Imagine a World Without Eminent Domain*, *N.Y. TIMES*, Jan. 18, 2006, at C5.

⁷⁹ See Goodin, *supra* note 12, at 198, 202. There are problems with using an overly narrow definition of blight or requiring all properties within a given area to be blighted. See *id.* at 198–99. If, for example, revitalization planners choose to pursue projects in depressed areas that contain certain properties that do not meet the statutory definition of blight, they will be forced to pursue the project in an area that meets the definition, even if that area is not well-suited to the project. See *id.* A sensible solution to this type of scenario is to adopt a provision similar to Iowa’s—require a large percentage of properties in a given area to meet a narrow definition of blight and allow all properties within the area that are

A. The Broad “Blight-Limitation” Model

The most common legislative reform in the aftermath of *Kelo* was to tighten the definition of “public use” to exclude development projects aimed at increasing tax revenue.⁸⁰ These reforms largely shifted the burden of private development takings onto poor, minority communities by limiting private development actions to “blighted” areas.⁸¹ Because the concept of “blight” is usually both malleable and broadly defined, this restriction alone provides very little substantive protection against *Kelo*-type takings and can be used to rationalize taking nearly any piece of property as part of an economic revitalization plan.⁸² The California legislature, for instance, enacted a series of five eminent domain reform bills in the aftermath of *Kelo* that used blight as a limiting factor for economic redevelopment takings.⁸³ Four of the five bills created minor procedural hurdles for local governments attempting to condemn property and one of the bills nominally narrowed the definition of “blight” for economic redevelopment purposes.⁸⁴ These reforms are more symbolic than effective and will do little to stop eminent domain takings in California that benefit private developers.⁸⁵ For instance, California only requires that a property have one “physical condition” and one “economic condition” that satisfy the vague qualifying criteria in the statute to be considered blight.⁸⁶ Thus, in California and in many other states, local officials retain wide discretion in their implementation of the eminent domain statute, and can use “blight” as a pretense for nearly any taking.⁸⁷

necessary and incidental to the project to be taken. *See id.* This will give planners flexibility in pursuing beneficial revitalization projects while protecting against corrupt or abusive takings. *See id.*

⁸⁰ *See id.* at 194–95.

⁸¹ *See id.* at 199–202.

⁸² *See Somin, supra* note 1, at 2114; Goodin, *supra* note 12, at 196–97.

⁸³ *See Somin, supra* note 1, at 2131–32.

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.* A high profile case in Lakewood, Ohio demonstrates the ease with which “blight” can be used to justify nearly any type of private redevelopment taking. *See* Rebecca Leung, *Eminent Domain: Being Abused?*, CBS News (July 4, 2004), <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml>. Under Ohio law, a municipality that qualifies as an “impacted city” is allowed to use eminent domain to pursue economic development benefitting private parties. *See* Christopher S. Brown, Comment, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 210 (2004). Additionally, Ohio provides a broad definition of blight for purposes of redevelopment projects by “impacted cities” and municipalities are given wide latitude in determining what constitutes blight. *See id.* at 210–11. Using its wide latitude in defining blight,

Although blight definitions like California's make limitations on economic redevelopment condemnations essentially meaningless, in practice these blight condemnations overwhelmingly affect urban minority communities.⁸⁸ It is not hard to understand why.⁸⁹ Not only are low-income communities likely to meet any definition of "blight," but there also are much stronger incentives for local governments and private developers to condemn and redevelop in low-income areas than in higher income areas.⁹⁰ The first major incentive is the low monetary cost of taking properties in depressed, urban communities compared to takings in more affluent areas.⁹¹ Because municipal governments are often low on funds and private developers want to maximize profits, obtaining property for redevelopment at a low cost is an ideal scenario.⁹² Second, the political cost of condemning and redeveloping property in poor, minority communities is small compared to redevelopment projects in more affluent, white neighborhoods.⁹³ Low-income minorities are often cut off from the political process and lack the political capital to influence elections.⁹⁴ Given their overall marginalization, these communities can lack the ability to deter municipal governments and private developers from targeting their neighborhoods for condemnation.⁹⁵

The history of the controversial urban renewal projects of the mid-twentieth century confirms that low-income, urban minorities (particularly African Americans) faced disproportionate displacement in blight condemnations.⁹⁶ With the passage of the Housing Acts of 1949 and 1954, urban renewal programs symbolized "progress" for American cities and became the primary means for municipal governments to combat the dispersal of middle and upper class families and businesses

the City of Lakewood sought to condemn many single-family properties in the quiet and scenic town to transfer to developers, who intended to build expensive condominiums in their place. See Leung, *supra*. What the city considered blight for condemnation purposes was almost comical—a home could be considered blighted if it didn't have three bedrooms, two baths, a two-car garage, and central air. See *id.* Although the proposed development project eventually failed due to widespread public outcry, broad "blight" definitions like Ohio's potentially allow takings like this to occur. See *id.*

⁸⁸ See Goodin, *supra* note 12, at 200–02.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Goodin, *supra* note 12, at 202–04.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 16 (2003).

from the cities into outlying suburbs.⁹⁷ The new jobs and new technologies that resulted from urban renewal projects meant more revenue for city governments and downtown businesses—but standing in the way were the poor, urban communities that kept the city “blighted.”⁹⁸ The rhetorical use of the term “blight” to refer to inner-city slums deliberately evokes the image of a disease that should be isolated and eradicated.⁹⁹ The goal of saving America’s downtowns from the “diseased neighborhoods” came at the overwhelming expense of the poor, most of whom were African American.¹⁰⁰ The upheaval and displacement of black neighborhoods due to urban renewal programs not only uprooted people from their homes and communities but also devastated their sense of belonging in the nation.¹⁰¹ Many of the same problems are inherent in broad, blight-centered eminent domain authority for economic revitalization projects that lack further protections for poor communities against pre-textual takings.¹⁰²

⁹⁷ See ROBERT M. FOGELSON, *DOWNTOWN: ITS RISE AND FALL, 1880–1950*, at 318 (2001); MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 57–59, 74–75 (2005). Fullilove describes four decades of upheaval after urban renewal in what was once a vibrant and thriving black community in beautiful Roanoke, Virginia. See FULLILOVE, *supra*, at 57–59, 74–75. The renewal effort was based on a declaration of “blight” that was pre-textual, exaggerated, and racist—the white power structure championed the destruction of the community in favor of “better uses” for the land. See *id.*

⁹⁸ See FOGELSON, *supra* note 97, at 318–19, 349; FULLILOVE, *supra* note 97, at 57. To be sure, many city neighborhoods were legitimately dangerous and were both unsanitary and unfit for human habitation. See FOGELSON, *supra* note 97, at 318–19. For instance, the filthy, crowded, and dilapidated tenement houses on the Lower East Side of New York, which housed poor immigrants, would meet any definition of blight. See *id.* The problem with the concept of blight, however, was that proponents of urban renewal did not restrict themselves to redeveloping slum areas that posed a danger to the health and safety of their residents. See *id.* Instead, downtown business interests and their allies were able to pressure local officials to declare neighborhoods surrounding central business districts as “blighted” even if they were not slums. See *id.* at 365.

⁹⁹ See FOGELSON, *supra* note 97, at 349.

¹⁰⁰ See DAVID FLEMING, *CITY OF RHETORIC: REVITALIZING THE PUBLIC SPHERE IN METROPOLITAN AMERICA* 77–79 (2008); FULLILOVE, *supra* note 97, at 57–59, 166–67.

¹⁰¹ See FULLILOVE, *supra* note 97, at 166–67.

¹⁰² See Byrne, *supra* note 18, at 152–53. Byrne notes, however, that there are protections in place today, such as the Fair Housing Act and informed consent provisions in some states that allow low-income residents of cities to fight against racist or pre-textual takings. See *id.* at 152–55.

B. *Narrow Definition of Blight Model*

A few states such as Iowa and Indiana also use blight as the limitation for private economic development takings.¹⁰³ Unlike the majority of state reforms, however, these states provide a much narrower definition of blight.¹⁰⁴ The benefit of limiting economic development takings to narrowly defined “blighted” properties is that it protects against private-benefit economic development takings like the one at issue in *Kelo*.¹⁰⁵ Under this type of system, states and municipalities can no longer rely on a vague “public use” justification for taking private property or use a conveniently broad definition of “blight” as a pretext for such a taking.¹⁰⁶ Instead, the parcel to be taken (or the majority of properties within the taking area) must actually satisfy the specific criteria in the statute in order for private property to be taken for a redevelopment project.¹⁰⁷ For instance, Indiana only finds blight if the area is “a public nuisance, is unfit for habitation, does not meet the building code, is a fire hazard, or is otherwise dangerous.”¹⁰⁸ Thus, using a narrow definition of blight puts a meaningful check on a government’s power of eminent domain while also allowing flexibility for needed redevelopment projects.¹⁰⁹

The downside of the narrow definition of blight is that without further statutory protections, it strengthens the already disproportionate targeting of low-income communities for private redevelopment.¹¹⁰ Just like the urban renewal programs of the past that used “blight” as an excuse to raze minority communities, today’s “economic revitalization” projects can be similarly destructive, even with a narrow definition of blight.¹¹¹ Thus, more provisions are needed to ensure that communities targeted for revitalization receive fair treatment, have a voice in the planning efforts, receive just compensation, and receive adequate and affordable housing in the aftermath of the project.¹¹²

¹⁰³ See Goodin, *supra* note 12, at 198–99; *50 State Report Card*, *supra* note 66, at 18–19.

¹⁰⁴ See Goodin, *supra* note 12, at 198–99.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See, e.g., IND. CODE ANN. § 32-24-4.5-7 (LexisNexis 2002 & Supp. 2010) (forbidding most private-to-private condemnations and restricting the definition of blight); IOWA CODE § 6A.22 (2008); *supra* note 79.

¹⁰⁸ See § 32-24-4.5-7.

¹⁰⁹ See Goodin, *supra* note 12, at 198–99.

¹¹⁰ See *id.* at 202.

¹¹¹ See *id.*

¹¹² See *id.*

C. Complete Ban

Finally, a minority of states completely restricted private development takings for the benefit of private parties.¹¹³ Florida, for instance, bans all eminent domain actions to relieve blight and requires municipalities to wait ten years before transferring taken private property to another private owner or developer.¹¹⁴ Florida is now considered the model for effective eminent domain reform because it neutralizes any threat of abusive or pre-textual takings.¹¹⁵ Similarly, Georgia countered the *Kelo* decision by explicitly stating that economic development is not a valid public use that justifies an eminent domain action.¹¹⁶

Although such bans effectively prevent the exploitation and displacement of low-income minority communities inherent in private economic redevelopment takings, they also come with a major cost—they give local governments no flexibility in pursuing projects that could boost not only the city as a whole, but also the affected neighborhoods.¹¹⁷ The specter of abusive takings is certainly real and local governments often do not act in the best interests of the communities.¹¹⁸ Nevertheless, completely banning private economic redevelopment is a harmful overreaction to the problem because corporations and businesses are very important players in the health of a city and the neighborhood where they are located.¹¹⁹ Local governments, in order

¹¹³ See Somin, *supra* note 1, at 2138–42.

¹¹⁴ See Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. 237, 241 (2009).

¹¹⁵ See *id.*

¹¹⁶ See 50 State Report Card, *supra* note 66, at 14.

¹¹⁷ See Dowling, *supra* note 19, at 330–31; Lefcoe, *supra* note 12, at 830–31; LeRoy, *supra* note 34, at 208.

¹¹⁸ See Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 178–80 (2009) (noting that allowing unlimited private involvement in the eminent domain process raises a number of concerns including corruption, inordinate influence, and conflicts with the public interest). Kelly also notes that there is a definite possibility in private economic development takings that “private parties threaten to relocate unless the local government condemns on their behalf.” See *id.*

¹¹⁹ See PETERSON & SUNDBLAD, *supra* note 21, at 12–14; Lefcoe, *supra* note 12, at 830–31. While there are risks involved for corporations that choose to get involved in reinvestment projects, corporate involvement in the health of adjacent communities can in fact benefit both parties by decreasing crime, increasing property values, promoting an educated population, and improving physical conditions. See PETERSON & SUNDBLAD, *supra* note 21, at 12–14. Corporations can choose different strategies and levels of involvement in community development, including direct involvement, community partnership around a business core, or reaching communities through intermediary institutions. See *id.* Regardless of the level of involvement, however, profit maximization and community-building

to improve the economic health of their communities, often rely upon private developers for much-needed funding and planning for major urban revitalization projects.¹²⁰ Despite the fear of corporate favoritism or slum clearance, private and corporate redevelopment can play an important role in turning distressed communities into healthy neighborhoods.¹²¹ Because a local government's most fundamental role is to protect the health, safety, and welfare of its citizens, revitalizing dilapidated, run-down, economically depressed areas is thus part of a local government's basic duties.¹²² If a private developer collaborates with a local community to provide an efficient, well-planned, and socially just economic redevelopment project for a depressed area, then the entire city can reap the benefits.¹²³

Eminent domain plays a very important role in beneficial redevelopment projects.¹²⁴ Many public-private development projects are large in scale and require a lot of land to be implemented effectively.¹²⁵ Because a single property owner can derail even small-scale development projects, eminent domain takings become crucial for the success of large projects.¹²⁶ Not only would a property owner's veto over a development project lead to inefficient results, but it could also hinder a local government's efforts to renew and rebuild economically depressed

are completely compatible if a corporation acts in a way that the community supports. *See id.*

¹²⁰ *See* SEAN ZIELENBACH, *THE ART OF REVITALIZATION: IMPROVING CONDITIONS IN DISTRESSED INNER-CITY NEIGHBORHOODS* 249 (2000); Blais, *supra* note 73, at 681–83. Zielenbach notes the importance of a variety of actors in the successful revitalization of a depressed neighborhood, particularly community organizations, local governments, local businesses, and churches. *See* ZIELENBACH, *supra*, at 223. He also notes that while corporate-driven, “trickle-down” economic growth may revitalize a downtown, it has not proved to be a panacea for the lowest-income residents. *See id.* at 226. Nevertheless, bottom-up community development can be very effective in revitalizing an area, particularly when community organizations collaborate with large institutions and corporations in the revitalization planning. *See* ALEXANDER VON HOFFMAN, *HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS* 158 (2003).

¹²¹ *See* Anastasia Loukaitou-Sideris & Paul Ong, *Lessons for Community Economic Development*, in *JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES*, *supra* note 34, at 295, 298.

¹²² *See* Pritchett, *supra* note 96, at 45–46.

¹²³ *See* VON HOFFMAN, *supra* note 120, at 158 (noting the importance of large institutions and local governments in successful community redevelopment programs).

¹²⁴ *See* Dowling, *supra* note 19, at 330–31.

¹²⁵ *See* Blais, *supra* note 73, at 681–83; Dowling, *supra* note 19, at 330–31.

¹²⁶ *See* Blais, *supra* note 73, at 683–84. Without the ability to use eminent domain, a single holdout can veto the entire project or coerce the developer to pay much more than necessary to acquire the land. *See id.*

areas.¹²⁷ Indeed, for some cities, “spot revitalization,” in which a city or developer strategically buys and rehabilitates or develops property surrounding a blighted area with the hope of catalyzing reinvestment in the area, is not an effective solution.¹²⁸ Thus, a state is severely limiting a local or municipal government’s ability to revitalize blighted areas by banning private economic revitalization projects.¹²⁹

III. ECONOMIC REVITALIZATION AND EMINENT DOMAIN: CASE STUDIES

Because eminent domain plays such an important role in urban planning and redevelopment, states should calibrate their laws to allow for private takings that are part of a comprehensive, community-supported redevelopment plan in depressed areas.¹³⁰ At the same time, these laws must also prevent the transfer of private property simply in services of an economically “better use.”¹³¹ In order to fully appreciate

¹²⁷ See Lefcoe, *supra* note 12, at 830–31.

¹²⁸ See Hummel, *supra* note 23, at 115–16 (describing the failure of Baltimore and Johns Hopkins to revitalize the Middle East neighborhood through spot revitalization).

¹²⁹ See Dowling, *supra* note 19, at 330–31; Lefcoe, *supra* note 12, at 830–31. Newark, New Jersey provides an example of how states and cities can use economic revitalization projects to rejuvenate their poorest and most depressed cities. See Rafael Zabala, *Enterprise Renaissance Revitalizes Newark, N.J.*, 10 F. FOR APPLIED RES. & PUB. POL’Y 112, 115 (1995). In 1983, New Jersey passed the Urban Enterprise Zone Act, which authorized tax incentives for businesses to move back into cities and facilitated targeted investment in poor areas. See *id.* at 112–13. Newark chose the Newark Economic Development Corporation (NEDC) to manage its “enterprise zone” and revitalize the city. See *id.* Through cooperation with corporations as well as with the city, the state, and community organizations, the NEDC was able to generate more than \$5 billion in economic development activities and helped secure local benefits, including a number of programs to benefit local businesses, provide employment training for residents, and rebuild existing houses and commercial structures. See *id.* The enterprise zone program also gave city residents the opportunity to purchase taxable goods from businesses at a fifty percent discount, with the rest of the sales tax proceeds going to economic development and public improvement programs in the city, including an around-the-clock police unit. See *id.* at 114. New Jersey’s Urban Enterprise Zone program and the work of the NEDC proved to be a huge success in Newark, not only by bringing in companies and building up commercial corridors, but also by creating thousands of permanent jobs for residents along with thousands of refurbished affordable housing units. See *id.* at 115. For a city that during the 1980s had an unemployment rate that was twice the national average, an average per capita income that was half the nation’s average, and a soaring foreclosure and vacancy rate, the redevelopment program was a veritable urban renaissance. See *id.*

¹³⁰ See Dowling, *supra* note 19, at 330–31.

¹³¹ See *id.* Finding this balance is not easy; therefore takings for economic revitalization projects require strict limitations and procedures. See *id.* As noted by Justice O’Connor in her dissent in *Kelo*, nearly any redevelopment project can claim to be for a “public use” because it may have some secondary benefits to the public such as increased tax revenue, more jobs, and maybe even aesthetic pleasure. See *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O’Connor, J., dissenting). For instance, the planners and officials in New

the correct balance needed in eminent domain laws, it is important to see how private redevelopment can be used to uplift rather than destroy poor communities.¹³² The following case examples demonstrate that corporate interests can align with community interests in urban revitalization projects and provide tangible benefits for neighborhoods and entire cities.¹³³

A. *The East Baltimore Development Project—Using Economic Redevelopment and Eminent Domain to Transform a Neighborhood*

With Johns Hopkins buying up everything north of Monument Street and tearing the shit down, I think we all see the writing on the wall in East Baltimore.

—Proposition Joe¹³⁴

London truly felt that Pfizer's proposed research facility and development plan would revitalize the city's crumbling infrastructure and sagging economy and therefore benefit the city as a whole. See Editorial, *A Turning Point for Eminent Domain?*, N.Y. TIMES (Nov. 19, 2009, 6:36 PM), <http://roomfordebate.blogs.nytimes.com/2009/11/12/a-turning-point-for-eminent-domain>. Unfortunately, they were wrong and homes and families were displaced for nothing. See Patrick McGeehan, *Pfizer and 1,400 Jobs to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1. States should set meaningful limits on taking authority for private development projects to prevent situations such as this, in which private property and especially poor communities are sacrificed with no other justification except vague promises of a greater good. See *infra* Part IV.

¹³² See Dowling, *supra* note 19, at 301.

¹³³ See PETERSON & SUNDBLAD, *supra* note 21, at 12–14; Thomas D. Boston, *The Role of the Black-Owned Businesses in Black Community Development*, in JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES, *supra* note 34, at 161, 168–71. The recent history of urban revitalization in Oakland, California demonstrates how economic revitalization projects can integrate local community members in the planning. See Alex Salazar, *Designing a Socially Just Downtown*, NAT'L HOUSING INST. (2006), <http://www.nhi.org/online/issues/145/designingdowntown.html>. In 2003, Oakland mayor Jerry Brown attempted to reverse the city's downward spiral into "slumification" through an ambitious economic revitalization project in Oakland's "Westside," including its downtown area. See *id.* Unfortunately, the plan centered on the development of high-priced condominium units and, while it would be successful in gentrifying parts of the city, it would disproportionately displace many low-income residents. See *id.* To prevent this scenario, local housing rights activists and members of the affected communities were able to convince the private developer of the financial viability of building mixed-income housing on less desirable parcels within the development area by pressuring the city to provide a tax credit to the developer for these buildings. See *id.* The end result of the grassroots housing advocacy by members of the community was the inclusion of affordable, mixed-income housing as part of the redevelopment area. See *id.* This project's success highlights the importance of community involvement in any economic revitalization project. See *id.*

¹³⁴ See *The Wire: More With Less* (HBO television broadcast Jan. 6, 2008). Proposition Joe, a fictional East Baltimore drug kingpin in the critically acclaimed HBO series *The Wire*, discussed "the writing on the wall in East Baltimore" at a co-operative meeting of drug

Eminent domain takings used to promote economic development are a critical tool of state and local governments and sometimes the only effective means to revitalize a depressed, crime-ridden area.¹³⁵ The ambitious East Baltimore Development Initiative (EBDI) biotech project, spearheaded by the City of Baltimore and Johns Hopkins University, demonstrates both the desperate need for some economic revitalization projects and how they can be used to breathe new life into a poor and hopeless neighborhood.¹³⁶

Johns Hopkins University, one of the premier research and medical institutions in the nation, is only blocks away from a collection of the most desperately poor and violent neighborhoods in Baltimore, ironically known as the “Middle East.”¹³⁷ Long-standing tension has existed between the university and the residents of the Middle East neighborhoods, both because of Hopkins’ expansions into Middle East territory and because of crimes committed against Johns Hopkins’ students and faculty by Middle East residents.¹³⁸ The University, the City of Baltimore, and even the federal government made various attempts to revitalize the Middle East neighborhood through rebuilding individual buildings and blocks with the hope that the rebuilding process would attract new investment and uplift the neighborhood.¹³⁹ For instance, in 1994, the Department of Housing and Urban Development (HUD) designated the Middle East neighborhoods as an “empowerment zone”

dealers. *See id.* In response to his lamentation over lost drug territory, another drug dealer replied: “Yeah, they movin’ the hood out.” *See id.* This fictional scene encapsulates the actual tension between Johns Hopkins University and the surrounding East Baltimore neighborhoods, which are notorious for a violent drug trade. *See* Hummel, *supra* note 23, at 97; Stephen Kiehl, *Seeds of Renewal in Oliver*, BALT. SUN, May 7, 2008, at B1. Given the history between the neighborhood and the university and the many failed attempts at “spot revitalization,” the university and the city decided to pursue a much more ambitious approach to redevelopment—the East Baltimore Development Initiative (EBDI), centered around the biotech industry. *See* Hummel, *supra* note 23, at 117.

¹³⁵ *See* Dowling, *supra* note 19, at 330–31. One amicus brief in *Kelo* noted that “by creating job opportunities for local residents, such [economic revitalization] projects attack what may well be the single greatest contributor to urban misery.” *See* Brief Amici Curiae of Brooklyn United for Innovative Local Dev., et al. in Support of Respondents at 11, *Kelo*, 545 U.S. 469 (No. 04-108).

¹³⁶ *See* Hummel, *supra* note 23, at 117; Stephen Kiehl, *Life Science Cornerstone Opens in East Baltimore*, BALT. SUN, Apr. 11, 2008, at B1.

¹³⁷ *See* Hummel, *supra* note 23, at 97.

¹³⁸ *See id.* Residents who lived near the Hopkins complex referred to it as “the compound” and its leaders as “vampires” because of Hopkins’ spread across the neighborhood. *See id.* The leaders of Hopkins equally distrusted the residents of the neighborhood, particularly after a Hopkins medical student was raped and a medical school professor was attacked in her own office. *See id.*

¹³⁹ *See id.* at 97, 114–15.

and allocated \$250 million to “catalyze reinvestment in these decaying neighborhoods.”¹⁴⁰ The Historic East Baltimore Community Action Coalition (HEBCAC) was tasked with the responsibility of coordinating and implementing the rehabilitation program in East Baltimore and chose to implement its agenda by strategically rehabilitating blighted houses in the neighborhood.¹⁴¹ These new homes were then sold to residents of the neighborhood in exchange for the residents’ deteriorating homes.¹⁴² Despite their efforts, however, HEBCAC’s revitalization project did not produce the results it intended.¹⁴³ Despite the project’s spiraling costs and increasing debt, the number of vacant properties in the area doubled by the year 2000.¹⁴⁴

Instead of accepting the status quo and leaving the neighborhood to sink deeper into violence and disrepair, however, Johns Hopkins and the City of Baltimore developed a much more ambitious plan to change the nature and health of the Middle East neighborhoods.¹⁴⁵ The plan centered on the Life Sciences industry, given Johns Hopkins’ status as one of the premier medical research institutions in the nation; the eighty-eight acre, ten- to fifteen-year development would result in two million square feet of biotech research space, up to 100,000 square feet of retail and commercial space, up to 8,000 new jobs, and more than 2,000 units of new and rehabilitated mixed income housing.¹⁴⁶ The plan also included new parks, playgrounds, and gardens, a brand new public

¹⁴⁰ See *id.* at 115. As of 2004, the crime rate in East Baltimore was double that of the rest of the city, which at the time had one of the highest crime rates in the nation. See E. Baltimore Dev. Inc., *The East Baltimore Revitalization Initiative*, ANNIE E. CASEY FOUND. (Sept. 2007), http://www.aecf.org/MajorInitiatives/CivicSites/~media/PDFFiles/East_Balti_Summary.pdf. More than one-third of families in East Baltimore had incomes below the poverty level and the median household income was half that of the rest of the city’s. See *id.* Forty-one percent of Middle East residents were not even in the labor force, with another fourteen percent unemployed. See *id.* The staggering crime and poverty of East Baltimore was a major impetus behind the EBDI project. See *id.*

¹⁴¹ See Hummel, *supra* note 23, at 115–16.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 117; *About*, E. BALT. DEV. INC., <http://www.ebdi.org/about> (last visited May 8, 2011). Instead of a scattered-site, individual neighborhood approach, the EBDI plan would focus first on rebuilding a core area and then on the peripheral areas. See Hummel, *supra* note 23, at 117. The development plan covers eighty-eight acres and will cost approximately \$1.8 billion, making it one of the largest revitalization plans in Baltimore history. See *id.*

¹⁴⁶ See Kiehl, *supra* note 136; Meyer, *supra* note 26. The first phase of the project, which began in 2006, covers 31 acres, includes 5 life science buildings, 3 parking garages, 900 units of housing, 40,000 square feet of retail space, and several new parks. See Rona Marech, *Biotech Park to Get Under Way; Developers Break Ground Today on \$120 Million East Baltimore Life Science Center*, BALT. SUN, Apr. 17, 2006, at 1B.

school for East Baltimore children from kindergarten to the eighth grade, and an infusion of new retail businesses ranging from retail stores to dry cleaners to coffee shops.¹⁴⁷ Johns Hopkins University, the City of Baltimore, the State of Maryland, the Federal Government, and a number of private financial partners, foundations, community groups, and non-profits formed a public-private partnership to develop and implement this plan.¹⁴⁸ This partnership led to the creation of the East Baltimore Development Initiative (EBDI), a non-profit organization tasked with overseeing the entire ten- to fifteen-year project.¹⁴⁹ In the words of the former mayor of Baltimore, the EBDI project would be a chance to “rebuild a neighborhood from the ground up.”¹⁵⁰

What has kept this project from resembling the “urban renewal” projects of the past is community collaboration and accommodation—EBDI both listened to and integrated community concerns in its development process and has “tak[en] pains to accommodate the people who were there before all the building began.”¹⁵¹ Middle East neighborhood groups including the Oliver Community Association and the Collington Square Neighborhood Association partnered with the development initiative and community representatives have seats on EBDI’s board of directors, thereby guaranteeing the neighborhood a voice in the planning.¹⁵² To allay fears of abusive displacement, for instance, EBDI has offered progressive relocation assistance that allows residents of East Baltimore who are displaced in the redevelopment project to improve their social and economic situations and secure the ability to be included in the revitalized community.¹⁵³ This relocation assistance for displaced residents provides different types of aid throughout the project and includes monetary compensation for the fair market value of the property, replacement housing payments for property owners, up to three and one-half years rent for displaced ten-

¹⁴⁷ See *2005–2006 Annual Report: A New Model for Urban Revitalization*, E. BALT. DEV. INC., 4 [hereinafter *EBDI 2005–2006 Annual Report*], <http://www.ebdi.org/uploads/pdfs/20067AnnualReport.pdf>; *East Baltimore Community School*, E. BALT. DEV. INC., http://www.ebdi.org/our_school (last visited May 8, 2011).

¹⁴⁸ See Hummel, *supra* note 23, at 98.

¹⁴⁹ See *id.* at 112.

¹⁵⁰ See *id.* at 114.

¹⁵¹ See Kiehl, *supra* note 136.

¹⁵² See *EBDI 2005–2006 Annual Report*, *supra* note 147, at 11, 16.

¹⁵³ See Hummel, *supra* note 23, at 117–18. EBDI and its partners also created a new type of relocation strategy in which families affected by eminent domain takings are given first priority to move into newly created housing units in the revitalized neighborhood. See *EBDI 2005–2006 Annual Report*, *supra* note 147, at 4.

ants, legal and social support services, and moving expenses.¹⁵⁴ Additional funds contributed by Johns Hopkins and the Casey Foundation provide supplemental benefits for displaced residents that include continued social service support after the moving process is complete, eighteen additional months of rental assistance, and augment federal assistance for homeowners by up to \$70,000.¹⁵⁵ The program has already had an impact—as of 2007, 396 households were relocated with the right to return to the neighborhood in brand new housing units.¹⁵⁶ Additionally, thirty-nine of the fifty-six new senior apartments and twenty-four of the forty-two new workforce apartments were claimed by East Baltimore residents.¹⁵⁷

Furthermore, EBDI required a set amount of on-site jobs to be filled by East Baltimore residents, thereby ensuring that the neighborhood will directly benefit from the influx of companies and retailers.¹⁵⁸ EBDI's development project is still ongoing but residents and local firms have already benefitted from the development.¹⁵⁹ For instance, more than thirty-five percent of all project contracts were awarded to women, minorities, and local firms and local residents were connected to more than fifty-five percent of the on-site jobs.¹⁶⁰ Though the project is far from being completed, a number of blocks in the neighborhood have already undergone transformation and better housing and new job opportunities have moved in.¹⁶¹ Overall, most residents of the redeveloped East Baltimore neighborhoods have welcomed the positive changes stemming from the project including the improved safety, increased job opportunities and training, new and improved housing, and progressive relocation assistance.¹⁶² While it is still too early to determine how residents will be fully integrated into the "economic engine" of the com-

¹⁵⁴ See Hummel, *supra* note 23, at 117–19.

¹⁵⁵ See *id.* at 118–19. On average, homeowners impacted by the EBDI project receive \$150,000 in benefits and renters receive close to \$40,000. See *id.*

¹⁵⁶ See *EBDI 2005–2006 Annual Report*, *supra* note 147, at 4.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Kiehl, *supra* note 134. In May 2008, the first 5 of 122 new or rehabilitated homes were built in the Oliver neighborhood, just north of Johns Hopkins and the new East Side biopark. See *id.* The project is certainly not without its controversy and, despite its large relocation benefits, some in the neighborhood have complained that EBDI has not provided housing for neighborhood property owners quickly enough. See Kiehl, *supra* note 136. Despite the slow process, however, EBDI has made progress towards its promise to provide new housing for property owners and even former critics have been pleased with the progress in the development and relocation plan. See *id.* at 3B.

¹⁶² See Kiehl, *supra* note 134.

pleted biopark project, overall, the redevelopment effort has given significant hope to a once desperately poor and violent neighborhood.¹⁶³

B. *Community Benefits Agreements in Los Angeles—Ending the Enmity Between Business and Community*

If they don't comply with even one portion of the agreement then the whole thing is void.

—Victor Narro¹⁶⁴

Not only are private economic redevelopment plans often the most effective way of revitalizing a depressed neighborhood, but community partnerships made with private developers are also the most cost-effective way for a city or municipality to fund projects that otherwise would not happen and that directly benefit local communities.¹⁶⁵ Aid to local governments has been one of the largest victims of state budget cuts in recent years and the federal government has cut its funding to cities as well.¹⁶⁶ For this reason, cities and local governments often depend heavily on corporations and private developers as the source of funding for much-needed economic development projects.¹⁶⁷ While tight budgets and local economic stagnation have often influenced local and city officials into favoring corporate interests at the expense of affected communities, this does not have to be the case.¹⁶⁸ In fact, through procurement and development rules, cities can use corporate-sponsored projects not only to promote smart growth, curb sprawl, and promote economic development, but also to provide tangible benefits to local communities.¹⁶⁹ The greatest tool that local and city governments can use to accomplish these goals, and that communities can use to get a voice in redevelopment projects, are community

¹⁶³ See Kiehl, *supra* note 136.

¹⁶⁴ See Leavitt, *supra* note 34, at 265. Victor Narro was a lawyer representing the Coalition of Humane Immigrant Rights and was part of the Figueroa Corridor Coalition for Economic Justice in Los Angeles. See *id.* The FCCEJ's negotiations to protect residents affected by the Staples Center project resulted in a binding agreement between the developer, the city, and the FCCEJ, with which the developer would have to comply in order to implement its project. See *id.*

¹⁶⁵ See LeRoy, *supra* note 34, at 208.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See Callies, *supra* note 62, at 56 (describing the lengths to which the City of Akron, Ohio went to please the Ganley Toyota-Mercedes Benz car dealership, including condemning neighborhood properties to transfer to Ganley); LeRoy, *supra* note 34, at 208.

¹⁶⁹ See Leavitt, *supra* note 34, at 258; LeRoy, *supra* note 34, at 207.

benefits agreements (CBAs), which are “legally enforceable contracts that result from a negotiation process whereby a developer will provide certain benefits in return for a community group’s promise to support the project.”¹⁷⁰ Across the nation, grassroots “Davids” are able to use CBAs in order to negotiate with developer “Goliaths” and gain tangible community benefits including the creation of living-wage jobs, affordable housing, and local hiring requirements.¹⁷¹

In Los Angeles, community groups and neighborhood organizations used CBAs to secure community needs during the expansion of both the downtown Staples Center and the Los Angeles airport.¹⁷² The history of community organization and negotiation in the Staples Center project in particular demonstrates how CBAs can be used to prevent abusive displacement by private developers in economic revitalization projects.¹⁷³ The Figueroa Corridor in Los Angeles covers a forty-block area between the University of Southern California and the Staples Center, with Martin Luther King, Jr. Boulevard to the south, Eighth Street to the north, Western Avenue to the west, and Alameda Street to the east.¹⁷⁴ Figueroa Street is a major corridor in Los Angeles, but also includes older residential neighborhoods and one of the poorest areas in the city known as Skid Row.¹⁷⁵ Anschutz Entertainment Group, the developer and owner of the Staples Center, sought to expand into the surrounding Figueroa community to make way for a sports and entertainment district.¹⁷⁶ The plan was to build two hotels and several condominiums, along with 1.1 million gross square feet for retail, entertainment, office, and residential uses.¹⁷⁷ Unfortunately, the sports and entertainment district would also displace many in the community and drive out local businesses.¹⁷⁸ Even worse for those in the community, the Staples Center development and its resulting gentrification would cause

¹⁷⁰ See Leavitt, *supra* note 34, at 258.

¹⁷¹ See *id.* at 257–58.

¹⁷² See *id.*; LeRoy, *supra* note 34, at 200.

¹⁷³ See Leavitt, *supra* note 34, at 262; LeRoy, *supra* note 34, at 200.

¹⁷⁴ See Leavitt, *supra* note 34, at 262.

¹⁷⁵ See *id.*; Steve Lopez, *Now Comes the Heavy Lifting*, L.A. TIMES, Oct. 23, 2005, at B1. Skid Row contains one of the largest populations of homeless people in the United States, with thousands of people living in informal structures such as camping tents, sleeping bags, and cardboard boxes on the street. See Solomon Moore, *Some Respite, if Little Cheer, for Skid Row Homeless*, N.Y. TIMES, Oct. 31, 2007, at A14. Drug infestation, crippling poverty, and rampant violence make Skid Row one of the worst living environments in the nation. See Lopez, *supra*.

¹⁷⁶ See Leavitt, *supra* note 34, at 263.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

housing prices to skyrocket.¹⁷⁹ Local landlords would cash in on the dramatic rise in housing prices by threatening evictions in order to raise prices or by converting single-room occupancies in nearby Skid Row to upscale housing.¹⁸⁰

The residents of the Figueroa Corridor community felt very uneasy about the upcoming development, fearing mass evictions, price increases, and job losses.¹⁸¹ Fortunately for the community, its residents were well-organized and its community groups had won victories for low-income members in the past.¹⁸² To face this latest challenge, the Figueroa Corridor Coalition for Economic Justice (FCCEJ) worked with other groups, including the Los Angeles Alliance for a New Economy and Strategic Action for a Just Economy, to develop a consolidated strategy to ensure that community voices were heard and needs were met.¹⁸³ As a result, the FCCEJ was able to enter into formal negotiations with both the developer and the city.¹⁸⁴ Through strong negotiations resulting in a legally binding CBA, the FCCEJ secured a number of direct benefits for the community from the private developer, which were integrated into and buttressed by the city's own agreement with the developer.¹⁸⁵ The provisions of the agreement include local hiring requirements, living wage and unionized job benchmarks, minimum requirements for affordable housing for low-income individuals, provisions for developer-funded parks and recreation facilities for the community, environmental planning agreements, and preferential parking for local residents.¹⁸⁶

Thus, CBAs have brought about a "fundamental change" in the dynamics of development by giving residents a voice in shaping the future of their communities.¹⁸⁷ Through the use of CBAs, neighborhood

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See Leavitt, *supra* note 34, at 263.

¹⁸² See *id.*

¹⁸³ See *id.* The FCCEJ is the umbrella group for local unions, religious groups, community-based and city-wide organizations, environmentalists, students, health groups, block groups, and worker centers. See *id.* The developer was wary of the negative publicity that would result from a prolonged struggle with the community, particularly given the unrest among the local residents and their clashes with police during the Democratic National Convention at the Staples Center. See *id.* at 264.

¹⁸⁴ See *id.* at 264, 268.

¹⁸⁵ See *id.* at 268.

¹⁸⁶ See Leavitt, *supra* note 34, at 268.

¹⁸⁷ See Danny Feingold, *LAX Rising (Los Angeles, California)*, in BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS, *supra* note 34, at 199, 200–01; Leavitt, *supra* note 34, at 265, 271–72; LeRoy, *supra* note 34, at 208–09.

stakeholders are able to sit directly across the table from developers and ensure that their needs are addressed and integrated into development plans.¹⁸⁸ Furthermore, CBAs are also beneficial for cities because they provide a way to fund otherwise unaffordable projects and services while also ensuring that the projects directly serve their constituents' needs.¹⁸⁹ While a CBA is only one tool to use in private economic revitalization projects, CBAs can be a very potent way to link community needs to private economic development.¹⁹⁰

IV. FINDING THE MIDDLE GROUND IN EMINENT DOMAIN REFORM

Eminent domain allows state and local governments to correct market failure and promote the welfare of citizens, but it can also lead to corruption and land grabbing.¹⁹¹ Private redevelopment projects, although ostensibly done in the name of "economic revitalization" with real public benefits, are often little more than patronage to big box retailers or major corporations.¹⁹² Thus, without strong and substantive limits on eminent domain, city and local governments easily capitulate to private demands without regard to the communities they are affecting.¹⁹³ For this reason, state eminent domain laws must walk a fine line between being too beholden to private interests and being too strict and narrow, thereby curtailing private redevelopment plans that would

¹⁸⁸ See LeRoy, *supra* note 34, at 208–09.

¹⁸⁹ See *id.*

¹⁹⁰ See Leavitt, *supra* note 34, at 259, 265.

¹⁹¹ See Dowling, *supra* note 19, at 330–32. It is certainly true that state and local governments have abused eminent domain, primarily to the detriment of poor and minority communities. See FULLILOVE, *supra* note 97, at 223–25; Callies, *supra* note 62, at 50–51; Lefcoe, *supra* note 12, at 846–47. Yet these communities are also those who have the most to gain from a comprehensive and community-oriented redevelopment plan that integrates local needs with corporate funding and planning. See Dowling, *supra* note 19, at 330–32; LeRoy *supra* note 34, at 208. With such a partnership, both sides gain. See LeRoy, *supra* note 34, at 208. While corporations and private developers cannot replace government or community organizations as either funders or policy designers in revitalization projects, they offer focused energy and a goal-oriented mindset that community organizations and local governments often lack. See *id.* In fact, corporate-community partnerships in low-income neighborhoods can be beneficial for all parties involved: community organizations can pave the way for local acceptance of the partnering business so that the business can profit in a new market, and the business can offer products and jobs that the neighborhood would otherwise lack. See PETERSON & SUNDBLAD, *supra* note 21, at 12.

¹⁹² See PETERSON & SUNDBLAD, *supra* note 21, at 12.

¹⁹³ See John Fee, *Reforming Eminent Domain*, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT, *supra* note 19, at 125, 130–31; Lefcoe, *supra* note 12, at 846–47.

stimulate economically depressed communities.¹⁹⁴ While there is certainly no uniform solution to eminent domain reform and economic revitalization projects in general, there are a number of steps state legislatures can take to ensure that private economic revitalization takings are both fair and provide direct public benefits.¹⁹⁵

First, states should require a finding that a property satisfies strictly defined criteria before it can be condemned and before any development plan can begin.¹⁹⁶ Such a limitation would prevent states from flippantly condemning private property to satisfy a business or corporate developer and then justifying the condemnation post hoc through a broadly conceived notion of blight.¹⁹⁷ The primary argument against using blight as a limit on condemnations is that it shifts the burden of eminent domain takings to poor communities that already are disproportionately affected by these takings.¹⁹⁸ Completely banning blight or economic redevelopment condemnations, however, prevents states and local governments from fulfilling their most fundamental duty—protecting and preserving the health, safety, and welfare of citizens.¹⁹⁹

How to define blight is a thorny issue that has confounded legislatures and city planners for decades.²⁰⁰ While it is overly simplistic to expect to have a simple definition that encapsulates the complex and fluid state of neighborhoods, states can set meaningful limits on the definition of blight to prevent it from being completely open-ended.²⁰¹ Factors often included in statutory definitions of blight such as “age,” “inadequate planning,” “incompatible land use,” and “dilapidated buildings” are overly vague and are not necessarily indicative of the true nature of a given neighborhood.²⁰² Factors that should be included in a definition of blight are those which demonstrate that a property poses a danger to the health, safety, and welfare of the community.²⁰³ Good examples of

¹⁹⁴ See Dowling, *supra* note 19, at 330–31; Fee, *supra* note 193, at 130–31 (noting that narrowing the definition of public use would potentially deter many beneficial projects).

¹⁹⁵ See Dowling, *supra* note 19, at 330–31; Fee, *supra* note 193, at 130–31.

¹⁹⁶ See Goodin, *supra* note 12, at 198–99.

¹⁹⁷ See *id.*

¹⁹⁸ See Blais, *supra* note 73, at 674.

¹⁹⁹ See Dowling, *supra* note 19, at 330.

²⁰⁰ See FOGELSON, *supra* note 97, at 360–61; Goodin, *supra* note 12, at 199–202.

²⁰¹ See Dowling, *supra* note 19, at 333; Goodin, *supra* note 12, at 198–99.

²⁰² See Brown, *supra* note 87, at 225–26.

²⁰³ See *id.* at 231–32. These may include: structural unsoundness, prolonged vacancies, unsafe or unsanitary conditions, conditions that endanger life or property by fire, and environmental contamination. See *id.* States should avoid requiring every parcel in a given redevelopment area to be “blighted” however, since redevelopment projects are often large in scale and need to use eminent domain in order to acquire a large number of properties in a

narrow “blight” definitions include statutes like those in Iowa and Indiana, which limit abusive takings while still allowing eminent domain to be used in depressed areas that need redevelopment.²⁰⁴ Overall, by codifying a narrow definition of blight for purposes of eminent domain, city planners and private developers will be restrained from using eminent domain abusively but economic revitalization projects will occur in areas that are in desperate need.²⁰⁵

Second, procedural requirements should be built into eminent domain laws to ensure that before economic revitalization takings occur, residents are not only able to receive fair compensation for the loss of their housing, but also are able to play a role in the development plan for their communities.²⁰⁶ One aspect of the *Kelo* opinion that states could codify into their eminent domain laws is to require a comprehensive redevelopment plan with strict requirements that must be met before any taking is approved.²⁰⁷ To ensure the redevelopment plan is necessary and benefits the community, states could codify a judicial review provision whereby governments are precluded from condemning any private property to transfer to another private party unless there is a showing: (1) that the project has “substantial and direct public uses and benefits,” (2) that acquiring the property was “necessary to accomplish the comprehensive redevelopment plan,” and (3) that displaced parties are included or have an opportunity to be included in the project.²⁰⁸ Before any condemnation, states should also require that the redevelopment planning processes be open to public input, with public hearings and state-funded technical assistance to facilitate participation.²⁰⁹ Any significant changes to the project or underlying justification by the developer should be subject to judicial review.²¹⁰ Such requirements would prevent pre-textual, abusive takings and would allow for greater community participation in economic redevelopment plans.²¹¹

given area. See Dowling, *supra* note 19, at 330; Goodin, *supra* note 12, at 198–99. A sensible, middle-ground approach is to require a minimum threshold of “blighted” properties in a given development area before a taking can occur and to require every other property in the redevelopment area to be “reasonably necessary” for the overall project. See Goodin, *supra* note 12, at 198–99.

²⁰⁴ See Goodin, *supra* note 12, at 198–99.

²⁰⁵ See Dowling, *supra* note 19, at 332–33.

²⁰⁶ See *id.*

²⁰⁷ See *Kelo v. City of New London*, 545 U.S. 469, 484–85 (2005); Dowling, *supra* note 19, at 332–33.

²⁰⁸ See Hummel, *supra* note 23, at 110–11.

²⁰⁹ See Dowling, *supra* note 19, at 330–32.

²¹⁰ See *id.*

²¹¹ See *id.* at 330–34.

Third, states should provide displaced residents with enhanced compensation, above fair market value.²¹² Because the fair market value of housing in distressed areas is quite low, setting the compensation figure at a premium will provide some restitution of the non-economic value of the property to displaced residents.²¹³ This premium could be calculated based on the value of the land's highest and best use or by the value of the property to the receiving entity, thereby giving the resident some of the increased value of the property that will result from the economic revitalization project.²¹⁴ Increased relocation benefits could also be a part of a state's just compensation laws.²¹⁵ When the federal government exercises its power of eminent domain, displaced residents and businesses receive compensation in the form of moving expenses, dislocation allowances, and other incidental expenses.²¹⁶ Such federal benefits do not apply to state, local, or private redevelopment projects, and therefore do not protect all those who may be displaced by a taking.²¹⁷ States could compensate such individuals by enacting additional compensation provisions like Maryland's, which would cover displaced residents' moving expenses and provide them allowances to rent, lease, or purchase comparable housing.²¹⁸ Additionally, to preserve communities and limit displacement, local governments should be encouraged to offer condemnees an opportunity to acquire new homes or housing units in the revitalized area so that they can retain their ties to the neighborhood.²¹⁹

Finally, state legislatures should include provisions in their laws that provide incentives for local governments and developers to integrate community planning and local benefits into their redevelopment strategies.²²⁰ These provisions could include tax incentives for busi-

²¹² See David L. Callies & Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT*, *supra* note 19, at 137, 148–49.

²¹³ See *id.* at 151–53. The *Kelo* Court stressed that states are allowed to place further restrictions on the exercise of eminent domain power; thus it is well within a state's authority to require additional factors to be included in a just compensation calculation, as well as to grant a premium to residents for takings that are part of economic revitalization projects. See *id.* at 150.

²¹⁴ See *id.* at 153.

²¹⁵ See *id.* at 152.

²¹⁶ See 42 U.S.C. § 4622 (2006).

²¹⁷ See Callies & Saxer, *supra* note 212, at 152.

²¹⁸ See MD. CODE ANN., REAL PROP. § 12-202 (LexisNexis 2010); Hummel, *supra* note 23, at 108–10.

²¹⁹ See Dowling, *supra* note 19, at 333.

²²⁰ See Zabala, *supra* note 129, at 112–13.

nesses to hire local residents within a redevelopment area or tax credits for investors to invest in small businesses within the area.²²¹

For any renewal effort to be successful, there must be strong community leadership, organization, and support from within the neighborhood dedicated to the neighborhood's revitalization.²²² Thus, the needs, concerns, and strategies of community groups, religious organizations, tenant organizations, and non-profits in a neighborhood should be integral to any redevelopment plan and developers should be encouraged to collaborate and strategize with community leaders in drafting and implementing their projects.²²³ The best time to ensure that developers include community concerns in development plans is at the beginning, when a private developer is seeking zoning changes, easements, infrastructure assistance, or even government funding.²²⁴ In return for this assistance, the city government can require the developer to include community groups at the planning table and make commitments to provide local benefits such as jobs and training.²²⁵ In this way, the developer, the city, and the neighborhood all benefit and progress can be made in neighborhoods which may otherwise degenerate into slums.²²⁶

²²¹ See *id.*; Kyle R. Williams, Note, *State Tax Credits for Private Start-Up Capital: Arching Toward Urban "Entrepreneurial Redevelopment,"* 6 WASH. U. J.L. & POL'Y 299, 301, 304 (2001). New Jersey's "Enterprise Zone Act," for instance, provided significant tax incentives for businesses to relocate in depressed areas, hire low-income residents, and improve real estate within the enterprise zone. See Zabala, *supra* note 129, at 113–14. This strategy was successful in Newark and improved the quality of life of many of its residents. See *id.* Additionally, states should consider authorizing local governments to use development agreements—private contracts between a city and a developer in which a developer agrees to provide benefits for the public in exchange for zoning protection. See Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights,* 28 B.C. ENVTL. AFF. L. REV. 719, 720 (2001). While CBAs alone may suffer from enforcement problems such as problems with standing, cities and towns can bypass some of these problems by integrating a CBA into a larger development agreement that the city can enforce. See Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations,* 26 UCLA J. ENVTL. L. & POL'Y 291, 295 (2008).

²²² See VON HOFFMAN, *supra* note 120, at 252.

²²³ See *id.*; LeRoy *supra* note 34, at 208.

²²⁴ See Mary Nelson & Steven McCollough, *Community Activism for Creative Rebuilding of Neighborhoods (Chicago, Illinois),* in BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS, *supra* note 34, at 157, 165.

²²⁵ See *id.*

²²⁶ See *id.*

CONCLUSION

Overall, the reaction to the *Kelo* opinion has led to some positive changes in state eminent domain laws, but for the most part has not substantially curbed abusive takings. Some states allow economic revitalization takings for any property that meets a broad definition of blight, simply shifting the burden of takings onto poor communities. Without further protections for affected communities or substantive limitations on private redevelopment takings, this eminent domain “reform” almost exactly mirrors the urban renewal programs of the past. Other states reacted to *Kelo* by banning private economic redevelopment takings completely, effectively curbing state and local governments from pursuing private development projects to turn around depressed communities.

With effective limitations and procedures, private development can be an important aspect of revitalizing entire neighborhoods and cities. Eminent domain is a crucial tool for governments to have available to pursue revitalization projects due to the potentially catastrophic effect of “holdouts.” Thus, states should not completely ban the use of eminent domain in private redevelopment. Instead, substantive limits should be placed on private redevelopment takings. These limits should include a prerequisite finding of narrowly defined “blight” for purposes of “economic redevelopment” takings, procedural requirements before any taking occurs, enhanced compensation for displaced residents, and incentives for developers to integrate community concerns into redevelopment projects.