

# NOTES

## REJECTING THE RETURN TO BLIGHT IN POST-KELO STATE LEGISLATION

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*This Note examines state legislative responses to Kelo v. City of New London, the recent U.S. Supreme Court case that held that the exercise of eminent domain for private development does not violate the public use requirement of the Takings Clause. In response to Kelo, many states are legislatively prohibiting the use of eminent domain for development generally, but continuing to allow its use for development in blighted areas. This Note discusses the problems with such legislation and concludes that states should avoid crafting rules that allow the use of eminent domain for development solely in blighted areas. Such rules would improperly burden poor and minority communities and imbalance the political process by which rules on eminent domain for development are established.*

INTRODUCTION .....	178	R
I. GOVERNMENT TAKINGS: EMINENT DOMAIN		
DOCTRINE .....	179	R
A. <i>Public Use</i> .....	180	R
B. <i>Just Compensation</i> .....	183	R
II. EMINENT DOMAIN FOR DEVELOPMENT AND THE		
PROBLEM OF LAND ASSEMBLY .....	184	R
A. <i>Holdouts and Holdins</i> .....	186	R
B. <i>Restricting the Use of Eminent Domain for</i>		
<i>Development</i> .....	189	R
III. PROBLEMS WITH A BLIGHT RESTRICTION .....	192	R
A. <i>State Legislative Responses to Kelo</i> .....	193	R
1. <i>Legislation that Prohibits the Use of Eminent</i>		
<i>Domain for Development</i> .....	195	R
2. <i>Legislation that Does Not Meaningfully Limit</i>		
<i>the Use of Eminent Domain for Development—</i>		
<i>Broad Definitions of Blight</i> .....	196	R
3. <i>Legislation that Effectively Restricts the Use of</i>		
<i>Eminent Domain for Development—Narrow</i>		
<i>Definitions of Blight</i> .....	198	R

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B. <i>Distorting the Political Process</i> .....	199	R
1. <i>Disproportionate Takings</i> .....	199	R
2. <i>Political Process Problems</i> .....	202	R
IV. REJECTING BLIGHT .....	206	R
CONCLUSION .....	208	R

INTRODUCTION

The U.S. Supreme Court’s decision in *Kelo v. City of New London*<sup>1</sup> focused national attention on the use of eminent domain for urban development projects. In a highly controversial opinion,<sup>2</sup> the Court held that the “public use” limitation in the Takings Clause of the Fifth Amendment<sup>3</sup> is not violated when land is taken from one private owner and given to another as part of an economic development plan.<sup>4</sup> The opinion was widely unpopular—much of the public seems to have taken to heart Justice O’Connor’s ominous dissent, which warned that “[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>5</sup> Public disapproval of *Kelo* has provoked a wave of state statutory reform proposals.<sup>6</sup> Some of this proposed state legislation prohibits the use of eminent domain for economic development but continues to allow the use of eminent domain to redevelop “blighted” areas,<sup>7</sup> effectively overriding *Kelo* but leaving the Court’s earlier holding in *Berman v. Parker*<sup>8</sup> intact.

The attention *Kelo* has generated offers an excellent opportunity for states to reconsider whether and how they wish to restrict the use of eminent domain for urban development projects.<sup>9</sup> States may structure their rules on eminent domain for development in a variety of ways, and these options will be highly dependent on the preferences and circumstances of each individual state. Legislation that

<sup>1</sup> 545 U.S. 469 (2005).

<sup>2</sup> See *infra* note 81 (discussing opposition to and support for *Kelo*).

<sup>3</sup> U.S. CONST. amend. V. See *infra* Part I (discussing takings doctrine).

<sup>4</sup> *Kelo*, 545 U.S. at 489–90.

<sup>5</sup> *Id.* at 503 (O’Connor, J., dissenting).

<sup>6</sup> See *infra* Part III.A (discussing state legislative reactions to *Kelo*).

<sup>7</sup> See *id.*

<sup>8</sup> 348 U.S. 26 (1954). In *Berman*, the Supreme Court held that the use of eminent domain to redevelop a “blighted” area as part of an urban renewal project was a constitutionally legitimate public purpose under the Takings Clause. *Id.* at 35. *Kelo* allows the use of eminent domain for any economically profitable redevelopment project. 545 U.S. at 484–85. See Part I, *infra*, for a more detailed discussion of *Kelo* and *Berman*.

<sup>9</sup> Similarly, Congress could choose to limit the takings power of the federal government through federal legislation. This Note, however, is concerned only with takings at the state level.

April 2007]

REJECTING BLIGHT

179

allows the use of eminent domain for development only in blighted areas, however, is invariably a poor choice. Rather than rushing to override *Kelo*, states need to carefully consider whether and how eminent domain should be available for development projects and should adopt eminent domain rules that apply evenhandedly to all property owners.

This Note argues that restricting eminent domain to blighted areas is unwise for several reasons. First, it is likely to result in takings from solely low-income areas. This result poses fundamental fairness and environmental justice concerns if the use of eminent domain for development imposes net costs on property owners in low-income areas, while society as a whole enjoys the benefits. Second, the political process by which these eminent domain laws—including laws establishing levels of compensation—are established will be imbalanced, since only a discrete group of property owners will have a personal incentive to see that these laws are generous to the individual property owner.

Part I of this Note provides an overview of eminent domain doctrine, including the *Kelo* and *Berman* decisions. Part II discusses the use of eminent domain for development. Part III explains why legislation that only allows eminent domain for development in blighted areas is unwise. Part IV discusses possible ways to address the problems posed by this legislation and concludes that states should not return to the concept of blight in eminent domain law.

## I

### GOVERNMENT TAKINGS: EMINENT DOMAIN DOCTRINE

The Takings Clause of the Fifth Amendment provides: “nor shall private property be taken for public use, without just compensation.”<sup>10</sup> Courts read the Takings Clause as confirming the government’s power to take private property<sup>11</sup> and imposing two important limitations on this power: Property may only be taken for a “public use,” and the private owner must receive “just compensation.”<sup>12</sup> The extent of these two limitations, as well as what government actions

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<sup>10</sup> U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment applies to takings by the federal government and has been incorporated against the states under the Due Process Clause of the Fourteenth Amendment. *See* *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (holding that Takings Clause is incorporated under Fourteenth Amendment); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987) (same).

<sup>11</sup> *See, e.g.*, *United States v. Carmack*, 329 U.S. 230, 241–42 (1946) (describing Takings Clause as “tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power”).

<sup>12</sup> *E.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005); *Carmack*, 329 U.S. at 242.

constitute a taking of property,<sup>13</sup> are the subject of much litigation and commentary.<sup>14</sup>

### A. Public Use

*Kelo* and *Berman* both address the question of what constitutes a “public use” of property such that the government may take it without the owner’s consent. The public use requirement is satisfied when the taken property is intended for future use by the public—for example, when land is condemned for a railroad with common-carrier duties.<sup>15</sup> Courts have also held that the public use requirement is satisfied where the taken property is transferred to another private party, so long as the taking serves a “public purpose.”<sup>16</sup> So what constitutes a public purpose? The Court has repeatedly made clear that this is a question for the legislature rather than the courts, a deferential approach embraced by the *Kelo* Court.<sup>17</sup> In both *Berman*, decided in 1954, half a century before *Kelo*, and in *Hawaii Housing Authority v. Midkiff*,<sup>18</sup> decided in 1984, the Court made clear that it would rarely

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<sup>13</sup> When the government takes title to a piece of real property through the exercise of eminent domain, it is clear that a taking has occurred. Sometimes, however, a regulation that “goes too far” may also be considered a taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The question of when a regulation amounts to a taking is not at issue in this Note.

<sup>14</sup> The takings literature is vast; a few notable works are RICHARD A. EPSTEIN, *TAKINGS* (1985) (arguing that takings doctrine shows tension between private and public law and conflict between original constitutional design and expansion of state power); WILLIAM A. FISCHER, *REGULATORY TAKINGS* (1995) (discussing appropriate role of reviewing courts in regulatory takings); and Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *HARV. L. REV.* 1165 (1967) (discussing fairness of “just compensation” and arguing that legislatures and administrative agencies have important role in compensation process).

<sup>15</sup> *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

<sup>16</sup> *See id.* at 479 (“[T]his ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” (quoting *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984))). Reading “public use” as encompassing a “public purpose” has been long accepted in takings doctrine. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014–15 (1984) (equating “public use” with “public character” and looking to legislative history for evidence of public purpose); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (finding creation of private power company to be clear public purpose).

<sup>17</sup> *Kelo*, 545 U.S. at 480, 482–83 (noting historical deference to state legislatures and courts in determining local public needs); *see also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 *OR. L. REV.* 203, 204–25 (1978) (chronicling evolution of state and federal courts’ interpretations of Public Use Clause, including long-standing deferential approach to legislature).

<sup>18</sup> 467 U.S. 229 (1984).

April 2007]

REJECTING BLIGHT

181

overturn the legislature's determination of what constitutes a public purpose.<sup>19</sup>

In *Berman*, the owner of a department store in the District of Columbia challenged a statute allowing the District of Columbia Redevelopment Land Agency to condemn "blighted" areas for redevelopment.<sup>20</sup> The store owner argued that taking private property "merely to develop a better balanced, more attractive community" did not fall within the scope of the Public Use Clause.<sup>21</sup> The Court disagreed:

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>22</sup>

The store owner also challenged the redevelopment statute as applied to him, arguing that even if the Agency could condemn blighted land, his store was not blighted and so could not be "swept into" the Agency's broad redevelopment plan.<sup>23</sup> Again, the Court disagreed, finding that it was within the power of the legislature to authorize redevelopment on an area-wide, rather than a building-by-building, basis.<sup>24</sup>

The Court reiterated this deferential approach several decades later in *Midkiff*,<sup>25</sup> stating that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."<sup>26</sup>

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<sup>19</sup> See *id.* at 244 (holding that courts "must defer" to legislature's determination that "taking will serve a public use"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.").

<sup>20</sup> 348 U.S. at 28–31.

<sup>21</sup> *Id.* at 31.

<sup>22</sup> *Id.* at 32–33.

<sup>23</sup> *Id.* at 34.

<sup>24</sup> *Id.* at 35.

<sup>25</sup> At issue in *Midkiff* was a Hawaii statute that allowed the Hawaii Housing Authority to condemn portions of large landowners' estates in order to sell the lots to existing lessees; the Court held that Hawaii's plan to redistribute land ownership in order to break up the existing land oligopoly did not violate the public use requirement. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 231–34 (1984).

<sup>26</sup> *Id.* at 241.

*Kelo* follows this pattern of deference to legislative determinations of public purpose. In *Kelo*, the City of New London approved a major development project in the hopes of revitalizing the city and reversing “[d]ecades of economic decline.”<sup>27</sup> The planned development included a waterfront hotel, an urban village and commercial area, a museum, and a substantial research and office facility for Pfizer Inc., a pharmaceutical company, that city planners hoped would create jobs and business.<sup>28</sup> While the city was able to acquire most of the property it needed for the project on the private market, several homeowners refused to sell.<sup>29</sup> When the city agency initiated condemnation proceedings, the homeowners brought suit, claiming that the development project was not a valid public purpose and thus violated the Fifth Amendment.<sup>30</sup>

The Court upheld the legislature’s determination that the taking served a valid public purpose, in keeping with its long line of “public use jurisprudence [that] has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>31</sup> The Court found that “[p]romoting economic development is a traditional and long accepted function of government,” and that “[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized.”<sup>32</sup> The Court rejected the private homeowners’ further contention that the New London redevelopment project served a purely private purpose because much of the taken property would be transferred to a private development corporation that stood to benefit from the project.<sup>33</sup> The Court reasoned that “the government’s pursuit of a public purpose will often benefit individual private parties”<sup>34</sup>—that is, the city’s goal of economic development was no less legitimate simply because a private party also stood to gain from the redevelopment project. After *Kelo*, it seems that the Public Use Clause imposes few limits on the use of eminent domain so long as the legislature deems that a given use serves a public purpose.<sup>35</sup>

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<sup>27</sup> *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

<sup>28</sup> *Id.* at 474.

<sup>29</sup> *Id.* at 475.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 483.

<sup>32</sup> *Id.* at 484.

<sup>33</sup> *Id.* at 485–86.

<sup>34</sup> *Id.*

<sup>35</sup> Justice Stevens, writing for the majority in *Kelo*, emphasized the “comprehensive character of the [city’s economic development] plan [and] the thorough deliberation that

April 2007]

REJECTING BLIGHT

183

### B. Just Compensation

The second limitation imposed by the Takings Clause is that private property owners must receive “just compensation” when their property is taken. Courts have generally described the compensation requirement as driven by fairness: The compensation requirement is meant to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>36</sup> Many commentators, on the other hand, have framed the compensation requirement in efficiency terms: By forcing the government to pay for the property it takes, the government will internalize the cost and will only take when the benefits outweigh the costs.<sup>37</sup>

The Takings Clause clearly requires compensation for takings but leaves unanswered the question of what amount of compensation is required. Courts have generally found that the fair market value of the taken property is the appropriate measure of compensation.<sup>38</sup> Both courts and commentators have frequently noted that fair market value is often incomplete compensation because it leaves some costs to be borne by the property owner, such as consequential damages and the additional subjective value the owner may attach to her property.<sup>39</sup> The Court has characterized the costs imposed by incomplete

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preceded its adoption . . .” *Id.* at 484. It is possible that some comprehensive redevelopment plan is a prerequisite to constitutional condemnations for economic development.

<sup>36</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>37</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (6th ed. 2003) (explaining how compensation requirement affects government incentives to take property); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 349 (2000) (describing efficiency rationale for Takings Clause).

<sup>38</sup> *E.g.*, *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (awarding fair market value of condemned property even though payment fell substantially below replacement value); *United States v. Miller*, 317 U.S. 369, 374 (1943) (describing fair market value as “what a willing buyer would pay in cash to a willing seller”). Other measures may be appropriate, however, if market value is too difficult to ascertain or would result in “manifest injustice” to the owner or the public. *564.54 Acres of Land*, 441 U.S. at 512 (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

<sup>39</sup> See *564.54 Acres of Land*, 441 U.S. at 511 (“Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property.”); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (“Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property.”); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) (describing constitutionally required compensation as incomplete).

compensation as “part of the burden of common citizenship”<sup>40</sup>—complete compensation is not required because all property owners bear the risk of having these costs imposed on them.<sup>41</sup>

In sum, the public use limitation does not significantly restrict the purposes for which government may take private property, and the compensation requirement is satisfied even if some residual costs are borne by the property owner. These constitutional requirements, however, are a floor, not a ceiling; states may further restrict the purposes for which property may be taken and/or require greater compensation for takings.<sup>42</sup>

## II

### EMINENT DOMAIN FOR DEVELOPMENT AND THE PROBLEM OF LAND ASSEMBLY

States have broad latitude within the constitutional requirements discussed above to fashion rules on eminent domain for development.<sup>43</sup> The main ways that a state could restrict the use of eminent domain for development are to narrow the definition of public use,

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<sup>40</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>41</sup> *See id.* (residual costs imposed by incomplete compensation are acceptable “[i]n view . . . of the liability of all property to condemnation for the common good”). Some commentators have also suggested that incomplete compensation is itself desirable for various reasons. *See, e.g.,* Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 32–33 (2003) (discussing how incomplete compensation mitigates moral hazard problem—i.e., full compensation creates socially undesirable incentives for owners to over-invest in developing their property); Merrill, *supra* note 39, at 131–33 (describing private incentive problems created by full compensation for regulatory takings); *infra* note 69 and accompanying text (discussing reasons why incomplete compensation could be desirable).

<sup>42</sup> *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

<sup>43</sup> The constitutional requirements discussed in Part I, *supra*, apply to all takings. The development projects at issue in this Note are just one of many types of projects for which governments may choose to exercise their eminent domain power. As already discussed, governments may condemn property so long as it is intended for “public use.” *See supra* Part I.A. This includes property that will literally be used and owned by the public—for example, condemnations to accommodate expansions to a publicly-owned commuter rail system. There are also many other instances in which governments will condemn land on behalf of private parties, claiming that the project furthers a public purpose. For example, governments can condemn land on behalf of a private telecommunications company so that it may install a receiver and transmitter station. *Williams v. Hyrum Gibbons & Sons Co.*, 602 P.2d 684, 687 (Utah 1979) (finding that services provided by privately-owned receiver and transmitter station constitute “public use” and allowing exercise of eminent domain to facilitate station’s construction).

While the arguments for and against the use of eminent domain may vary depending on the type of project, there is often a great deal of overlap. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (suggesting theory of eminent domain in which merits of takings are judged not by type of project involved but, instead, by evaluating whether eminent domain is most efficient means for furthering project). This Note focuses only on arguments relevant to the use of eminent domain for development projects.

increase the measure of compensation, or provide more extensive procedures.<sup>44</sup> Deciding whether these restrictions on eminent domain are desirable, however, is a complicated question. There are good reasons for states to restrict their eminent domain power, as many of them are now doing. There are also good reasons to use eminent domain for development projects.

At bottom, deciding when to allow governments to exercise the power of eminent domain for development, and how much to compensate when they do, involves balancing the interests of the community against the interests of the individual. Development projects may offer a number of important benefits to the community.<sup>45</sup> If the use of eminent domain makes these projects more feasible,<sup>46</sup> then it is in the interests of the community to allow its use for development.

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<sup>44</sup> Restricting the definition of “public use” so that development projects are not included clearly disallows the use of eminent domain for such purposes. By requiring the government to pay more for the property it takes, increasing compensation directly raises the (financial) cost of eminent domain and may therefore limit its use. Enhancing procedural requirements may also increase the cost of eminent domain by requiring additional investment of time and administrative resources. These and other restrictions on the use of eminent domain for development are discussed in greater detail in Part II.B, *infra*.

<sup>45</sup> Benefits of development projects include job creation and economic growth—reasons offered by supporters of the development project at issue in *Kelo*. 545 U.S. at 472–74. For a city with high unemployment and a dwindling population, the prospect of new jobs and economic growth may be quite compelling. *See id.* (“[New London’s] unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.”). These economic benefits can cause the land abutting the assembly project to appreciate in value. *See* Michael A. Heller & Roderick M. Hills, Jr., LADs and the Art of Land Assembly 11 (Oct. 2005) (unpublished manuscript, on file with New York University Law Review) (describing apparent injustice when owners of land abutting project see their land values increase, while condemnees do not share in such gains). In addition to economic growth, development projects may benefit the community by making the city more attractive and by creating recreation and leisure opportunities. *Kelo*, 545 U.S. at 474–75.

Finally, promoting these development projects in already-populated urban areas, rather than distant undeveloped suburbs, may benefit the community by preventing many of the problems associated with suburban sprawl. These problems include increased traffic and decreased availability in agricultural land, ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 28–29 (1999); increases in the per-capita cost of roads, public facilities, and services, *id.* at 24–27; and other environmental harms such as the destruction of wildlife habitat, wetlands, and other environmentally sensitive areas, *id.* at 28–29. For a further discussion of these and other problems with sprawl, see generally FREILICH, *supra*, at 21–29, and Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies are Losing*, 34 CONN. L. REV. 539, 563–75 (2002). For a discussion of the tools used to control sprawl and their economic and legal implications, see generally Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

<sup>46</sup> Eminent domain may make development projects more feasible because it allows the government to bypass the bargaining problems that may arise in attempts to assemble land for development projects. This problem of “holdouts” is discussed in notes 49–58, *infra*, and accompanying text.

On the other hand, prohibiting the use of eminent domain for development may be in the best interests of the individual property owner whose land is taken. If use of eminent domain is allowed, she is harmed because she is forced to sell her property at a lower price than she would choose: If the owner had been willing to sell her property for the amount of compensation that she would receive through a condemnation proceeding, then presumably the government would have been able to acquire her property through the private market.<sup>47</sup> Additionally, the owner may be harmed because she loses some of her individual autonomy, as she must relinquish her control over whether her property is sold and how it is used.<sup>48</sup>

What is the appropriate balance between the interests of the community in seeing that beneficial projects are realized and the interests of individual landowners in controlling whether and at what price to sell their property? As certain assumptions (for example, that individuals are not behaving strategically, or that the government behaves like a rational economic actor) are relaxed, this balancing becomes very complicated.

In the following two sections, this Note first discusses the reasons why it may or may not be desirable to give governments broad latitude to exercise eminent domain for development projects, then addresses some of the possible reforms to eminent domain law that are shaped by these and other concerns.

#### A. *Holdouts and Holdins*

Eminent domain facilitates development projects by overcoming the bargaining problems that may arise in attempts to assemble land.<sup>49</sup> As a result, it is often employed to acquire multiple, contiguous, privately-owned parcels of land.<sup>50</sup> One reason that eminent domain is so frequently used for these assembly projects—including urban

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<sup>47</sup> This assumes that the individual property owner is not acting strategically and demanding a higher price for her property because she knows that her particular parcel is needed to assemble a tract of land. *See infra* notes 49–58 and accompanying text.

<sup>48</sup> *See infra* note 62 and accompanying text (discussing how property takings affect individual autonomy).

<sup>49</sup> *See POSNER, supra* note 37, at 55 (discussing holdout problem).

<sup>50</sup> According to two studies, in the last half century over sixty percent of eminent domain cases contested in state or federal appellate courts involved the use of eminent domain to assemble large tracts of land from a number of individual landowners. *See Merrill, supra* note 43, at 98 (surveying cases from 1954 through 1985); Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 *REAL PROP. PROB. & TR. J.* 251, 262 (2004) (surveying cases from 1986 through 2003). These studies used a definition of “assembly” that includes urban renewal projects as well as other assembly projects such as public highways or dams. Merrill, *supra* note 43, at 98; Wilk, *supra*, at 262. Thus, the results of these studies cannot be used to accurately deter-

renewal and development projects—is to avoid the possibility of “holdouts,” or strategic behavior on the part of the individual landowner.<sup>51</sup> If a landowner realizes that a buyer must acquire her particular parcel of land to assemble a contiguous tract for a development project, she might strategically refuse to sell in an attempt to extract a higher price from the buyer—in other words, she might hold out. Without the power of eminent domain, the buyer must either accept the landowner’s demands for a higher price or choose not to acquire the property.<sup>52</sup> If the buyer may exercise the power of eminent domain, however, then she may force the transfer of the property at market price.<sup>53</sup> Eminent domain thus allows the government to bypass the holdout problems that may thwart private attempts to assemble land.

The holdout problem is not insurmountable without the use of eminent domain—assembling land on the private market is certainly possible.<sup>54</sup> While assembling land on the private market is possible, however, it can often be very expensive: For example, in one project from the 1970s, assembling one block in Manhattan cost forty million dollars, which, at the time, was the most ever paid for one block in the city.<sup>55</sup> While assembly costs are not invariably astronomical, they may be high enough to prevent some beneficial projects from going forward.<sup>56</sup> If assembling land in already-developed areas is too costly,

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mine what portion of assembly takings are for development projects such as those at issue in *Berman and Kelo*.

<sup>51</sup> See POSNER, *supra* note 37, at 55, 61 (explaining how high transactions costs and bilateral monopolies can cripple negotiations with holdouts); Merrill, *supra* note 43, at 75–76 (same).

<sup>52</sup> Holding out is possible only when the seller is protected by what Guido Calabresi and A. Douglas Melamed define as a “property rule,” where the seller has the right to refuse to sell, because the buyer must have the consent of the seller to acquire the property. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

<sup>53</sup> In these cases, the seller is only protected by what Calabresi and Melamed define as a “liability rule,” where the seller can be forced to transfer the property in exchange for a sum arrived at based on objective criteria. *Id.*; see also *supra* notes 38–41 and accompanying text (noting that measure of compensation for property taken by eminent domain is fair market value).

<sup>54</sup> At least one commentator has argued that there is no evidence to support the contention that employing eminent domain is more efficient than assembling land on the private market. Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 475 (1976).

<sup>55</sup> Peter Hellman, *How They Assembled the Most Expensive Block in New York’s History*, NEW YORK, Feb. 25, 1974, at 30, 37, reprinted in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 846, 853 (3d ed. 2005).

<sup>56</sup> Assuming that governments are rational economic actors, then as the price of a beneficial project increases, it may no longer be worth the cost and will not be undertaken. See Michelman, *supra* note 14, at 1218 (arguing that government will not proceed with

developers may choose to build further outward in the suburbs, contributing to urban sprawl.<sup>57</sup> If these development projects benefit the community<sup>58</sup> and if the use of eminent domain overcomes individual strategic behavior that threatens to thwart them, then the argument for allowing the use of eminent domain for development projects is relatively strong and straightforward.

There are, however, also good reasons to restrict the government's exercise of eminent domain for development. First, a reluctant seller may not be a holdout but rather a "holdin."<sup>59</sup> That is, she may refuse to sell not because she is behaving strategically, but because she subjectively values her property at a higher price than the market value. This gap between the owner's subjective value and the market value may cause a reluctant seller to refuse to sell because the price is too low. If a reluctant seller is a holdin rather than a holdout, then eminent domain may harm her by not compensating her for the full value she places on her property;<sup>60</sup> it may also distort the perceived efficiency of a project because the cost of acquiring a holdin's property through eminent domain reflects only part of the value that the property owner loses when her property is taken.<sup>61</sup>

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projects where costs outweigh benefits). *But see infra* notes 68–70 and accompanying text (arguing that governments do not behave like rational economic actors).

<sup>57</sup> See Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (noting that eminent domain may be "a critical weapon in fighting sprawl"). For a discussion of problems caused by urban sprawl, see *supra* note 45.

<sup>58</sup> See *supra* note 45 (describing benefits of development projects).

<sup>59</sup> See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 83, 128–29 (2004) (distinguishing "holdins" from "holdouts"). The subjective value an owner derives from her property may be highly idiosyncratic, or it may be of a type that governments want to encourage—for example, the subjective value a property owner derives from being part of a community. See *id.* at 142 (differentiating idiosyncratic valuation from value of community and suggesting that government compensate for loss of community in takings cases).

<sup>60</sup> As discussed in notes 38–41, *supra*, and the accompanying text, courts have generally found that the Takings Clause only requires compensation equal to the fair market value of property. In addition to the subjective value that the owner may lose if compensation is limited to market value, she also loses the opportunity to bargain for some of the surplus created by the assembly project—an opportunity she would have on the private market. *Heller & Hills*, *supra* note 45, at 10–11.

<sup>61</sup> See Parchomovsky & Siegelman, *supra* note 59, at 84, 136–37 (noting that government's failure to compensate for subjective value of community may lead to approval of inefficient projects). Requiring the government to compensate for subjective value would solve this problem; however, distinguishing holdouts from holdins is difficult because if the owners will be compensated for their subjective value then they have an incentive to inflate their claimed subjective value. See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1030 (1995) (describing how bargainers have incentive to overstate their private valuations). It may be possible to create incentives for owners to reveal their "true" subjective valuations, for example by requiring that owners self-value their property for purposes of compensation and for purposes of property tax. See *infra* note 75 and accompanying text. However,

April 2007]

REJECTING BLIGHT

189

A second cost of eminent domain is the loss of autonomy individuals may feel due to their lack of control over their property.<sup>62</sup> Normative beliefs may play a role here: Individuals and/or a community may simply feel that the government should not be able to take their property for certain reasons (such as economic development), regardless of whether subjective value is compensated.<sup>63</sup>

In sum, allowing government to exercise its power of eminent domain for development may be desirable for projects that actually benefit the community; without eminent domain, bargaining problems caused by strategic holdouts may prevent the projects from going forward, leaving the community worse off than it would have been had the project been realized. Restricting the government's use of eminent domain, however, may protect both individuals who value their property highly and community values of autonomy and dignity in property ownership. Deciding how much weight to give each of these competing considerations in determining when eminent domain should be used is no easy task, as evidenced by the multitude of solutions proposed by commentators.<sup>64</sup>

### B. *Restricting the Use of Eminent Domain for Development*

As discussed above, there are reasons to give government broad latitude to exercise its eminent domain power for development and reasons to restrict it. If a state decides that some restrictions on the use of eminent domain are desirable, then there are many types of restrictions from which to choose. Some restrictions would limit when or what types of property the government should be allowed to take; others focus on structuring compensation so that the government will take at an efficient level. Each of these proposed restrictions is animated by a different set of concerns, and each strikes a different balance between allowing the use of eminent domain for projects that

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governments and/or communities may not have an equal interest in compensating for all types of subjective value. Perhaps taxpayers should not have to compensate an owner for the large subjective value she places on an old building that has been in the family for years—one that she no longer occupies and is now run down and below code. Simply requiring the government to compensate property owners for the “full” value of their property, then, may not be the best solution.

<sup>62</sup> See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 966–67 (“[T]here is arguably a deeper value associated with autonomy that is different in kind [from other uncompensated losses] . . .”).

<sup>63</sup> See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006) (arguing that increased compensation may not make up for “dignitary harms” caused by takings).

<sup>64</sup> See *infra* Part II.B.

benefit the community and restricting it in order to protect individuals.

One way to curtail the government's use of eminent domain is to require increased compensation for takings, on the theory that increasing the price government must pay for land will cause the government to take land less frequently.<sup>65</sup> In particular, states could require increased compensation for particular types of takings that they find objectionable, so as to discourage (without flatly prohibiting) these types of takings. For example, states could require increased compensation for takings related to development projects or for other exercises of eminent domain where the "public purpose" of the taking is deemed to be less worthwhile. This might deter those projects thought to have less beneficial effects.<sup>66</sup> Alternatively, as an attempt to distribute the burden imposed by eminent domain more fairly across neighborhoods, states concerned with distributive justice could require increased compensation for the exercise of eminent domain in low-income areas.<sup>67</sup>

Increased compensation, however, may not serve as a check on eminent domain because governments do not necessarily behave like rational economic actors: While rational economic actors respond to financial incentives, government actors respond primarily to political incentives.<sup>68</sup> Forcing the government to provide compensation for the property it takes, then, does not necessarily force the government to internalize the costs of the project.<sup>69</sup> If governments respond primarily to political incentives rather than financial incentives, then

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<sup>65</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 605 n.386 (2005) (illustrating this point by highlighting that South Carolina government was initially willing to force individual property owner to preserve beachfront property, but was unwilling to preserve property when forced to bear cost itself).

<sup>66</sup> See James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866–68 (suggesting that compensation be varied depending on extent of public benefit).

<sup>67</sup> For an exchange on the topic of progressive compensation, see Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999), proposing a progressive compensation rule; Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157 (2000), responding to Dagan and rejecting Dagan's progressive compensation rule; and Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000), defending his progressive compensation proposal against Lunney's criticisms.

<sup>68</sup> Levinson, *supra* note 37, at 354–57.

<sup>69</sup> One consequence of this disconnect between financial and political costs is that political costs may be minimized by compensating property owners (at the expense of disorganized, diffuse taxpayers) to mitigate the political costs of those development projects that primarily benefit an organized interest group. Therefore, requiring governments to compensate for takings may not create incentives for governments to take only for efficient or beneficial projects; instead, projects that do not actually benefit the community may be implemented at the community's expense. See *id.* at 375–77 (explaining, using interest

April 2007]

REJECTING BLIGHT

191

increased compensation may not actually curtail the use of eminent domain. Increased compensation may also create undesirable incentives for landowners by encouraging them to overinvest in developing their property.<sup>70</sup>

In response to these and other concerns, it has been argued that legislative restrictions should be imposed on the definition of “public use,” limiting the government’s power of eminent domain to certain types of projects.<sup>71</sup> While increasing the amount of compensation arguably deters, but does not prohibit, certain types of takings, a legislative determination that a certain type of project does not serve a public use completely forecloses the use of eminent domain.

Adjusting levels of compensation or restricting what types of projects constitute a public use are not the only tools available to states establishing eminent domain rules: They could develop creative mechanisms for the use of eminent domain generally, or specifically for development projects. For example, instead of restricting the types of *projects* for which eminent domain is available, states could disallow the taking of certain types of *property*—such as property that is particularly important to an individual’s sense of personhood.<sup>72</sup> Or, in situations that pose environmental justice<sup>73</sup> concerns, communities could be given veto power over proposed exercises of eminent domain

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group analysis, why it may be in governments’ political interests to engage in economically inefficient takings even if compensation is paid).

This implies that it may actually be desirable to undercompensate property owners. The property owners whose land will be taken may be the only concentrated group that will have a strong incentive to oppose the project. If the property owners do not wish to sell, they may provide political pressure against the project, pressure that the diffuse and unorganized taxpayers will not. Undercompensating property owners, then, may be an essential part of the political equation: If holdins are fully compensated, they may no longer have as strong an incentive to oppose the project (though they might still object on autonomy grounds), in which case there will be no organized, interested group to balance out the political pressure for the project from the project’s beneficiaries. Opposition from property owners balances the political equation, making it more likely that only projects that actually do benefit a larger portion of the community will go forward. *See id.* (suggesting that undercompensation may deter inefficient taking).

<sup>70</sup> Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 528–31 (1986).

<sup>71</sup> *E.g.*, Garnett, *supra* note 63, at 137, 149 (advocating “substantive restrictions on eminent domain”).

<sup>72</sup> Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1005 (1982).

<sup>73</sup> The environmental justice movement is concerned with the disproportionate environmental burden borne by minority and low-income areas—for example, the disproportionate siting of hazardous waste disposal sites that may cause cancer and other adverse health effects in minority and low-income neighborhoods poses environmental justice concerns. *See generally* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998); Vicki Been, *What’s Fairness Got To*

for development.<sup>74</sup> If states want to compensate for subjective value without giving owners incentives to inflate their valuations, states could let owners self-determine the value of their property for the purposes of compensation in the event of a taking *and* for the purposes of property tax, or could require that the owner be willing to sell to any willing buyer at the price that the owner self-determines.<sup>75</sup> If states want to allow landowners to bargain for some of the increase in property values generated by the assembly project, then states could require that developers bargain with the group of landowners whose property they hope to purchase. This allows various groups of landowners to negotiate with developers for the best possible price for their assembled land and gives a majority of the community the power to sell their assembled land to the developers—exercising the power of eminent domain over reluctant members if necessary.<sup>76</sup>

The above proposals do not exhaust the ways in which states could choose to reform their eminent domain laws. Concluding which restrictions, compensation requirements, or other rules on the use of eminent domain produce the fairest overall scheme or best incentives is well beyond the scope of this Note. It seems clear, however, that there is no single right answer to the question of which rules regarding the use of eminent domain are best. This being the case, it seems particularly appropriate to allow local governments to develop individualized rules concerning the use of eminent domain, reflecting each state's preferences regarding these competing considerations. If particular rules turn out to have unintended consequences, or if public opinion shifts from supporting greater protection for property owners to greater support for development projects, these rules can be changed through state political processes.

### III

#### PROBLEMS WITH A BLIGHT RESTRICTION

The first two Parts of this Note have discussed the constitutional requirements imposed by the Takings Clause<sup>77</sup> and the use of eminent

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*Do With It? Environmental Justice and the Siting Of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

<sup>74</sup> See Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1875–78 (2004) (proposing “Residents’ Choice Rule” to give disadvantaged communities greater control over local land use).

<sup>75</sup> See Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401 (2005) (proposing self-assessed valuation mechanism for regulatory takings).

<sup>76</sup> Heller & Hills, *supra* note 45 (proposing such bargaining system to replace traditional eminent domain where assembly of fragmented land is at issue).

<sup>77</sup> See *supra* Part I.

April 2007]

REJECTING BLIGHT

193

domain for development.<sup>78</sup> This Part criticizes one particular type of state reform to eminent domain law: state laws that restrict the use of eminent domain for development to blighted areas.<sup>79</sup> The first section of this Part discusses the state legislative responses to *Kelo* and categorizes the blight restrictions that states are considering or have passed. The second section argues that these restrictions disadvantage low-income and minority communities by distorting the political process by which rules on eminent domain for development are established.

#### A. State Legislative Responses to *Kelo*

Doctrinally, the Court's decision in *Kelo* was unsurprising;<sup>80</sup> nonetheless, the decision provoked fierce public opposition.<sup>81</sup> It is hard to say exactly why *Kelo* provoked such a strong public reaction where previous takings cases did not;<sup>82</sup> whatever the reasons behind the strong public opposition to *Kelo*, it has served as a catalyst for eminent domain reform at the state level.

After the Supreme Court announced its opinion in *Kelo*, many states raced to reform their eminent domain laws. Texas, Delaware, and Alabama passed reforms within weeks of the *Kelo* opinion, and Ohio immediately declared a moratorium on the use of eminent domain for development until the end of 2006.<sup>83</sup> At one point there were no less than six proposed laws, five constitutional amendments, and several citizen initiatives on eminent domain reform before the California legislature.<sup>84</sup> A year later, the momentum to reform eminent domain continued: Dozens of states have passed reforms to their

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<sup>78</sup> See *supra* Part II.

<sup>79</sup> See, e.g., *infra* note 87; see also *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 646–47 nn.11 & 13 (Okla. 2006) (interpreting Public Use Clause narrowly to prohibit use of eminent domain for economic development except for blighted areas).

<sup>80</sup> See *supra* Part I.A (discussing *Kelo v. City of New London*, 545 U.S. 469 (2005), and precedent).

<sup>81</sup> See, e.g., Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (reporting that *Kelo* provoked “firestorm of public resentment”); *United States: Hands Off Our Homes; Property Rights and Eminent Domain*, THE ECONOMIST, Aug. 20, 2005, at 34 (discussing “fierce backlash” to *Kelo*). While many of the reactions to *Kelo* have been negative, there has been some support for the decision as well. See Diane Cardwell, *Bloomberg Says Power to Seize Private Land is Vital to Cities*, N.Y. TIMES, May 3, 2006, at B1 (describing New York City Mayor Bloomberg's support for eminent domain use for development).

<sup>82</sup> See *Heller & Hills*, *supra* note 45, at 1 (“Rarely do people express outrage when a court says: we respect you and you may as you see fit. Yet this is precisely the political and editorial reaction to [*Kelo*].”).

<sup>83</sup> John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

<sup>84</sup> *Id.*

eminent domain laws, and others are close, with bills awaiting final legislative or gubernatorial approval.<sup>85</sup>

Most states that have proposed or passed legislative reforms have focused primarily on tightening their definition of “public use” to exclude development projects or projects aimed at increasing tax revenue.<sup>86</sup> Much of this legislation, however, explicitly does not apply to

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<sup>85</sup> See Castle Coalition, Legislative Action Since *Kelo*, <http://www.castlecoalition.org/pdf/publications/state-summary-publication.pdf> (last visited Nov. 16, 2006) (summarizing passed and pending state eminent domain legislation); Castle Coalition, State Legislative Actions, <http://www.castlecoalition.org/legislation/index.html> (follow “On Printable List” hyperlink under “Passed Legislation”) (last visited Nov. 16, 2006) (same).

Some of these state reforms seem to be knee-jerk reactions to *Kelo* rather than carefully reasoned decisions about the use of eminent domain. The Rhode Island House and Senate, for example, have both adopted bills urging the United States Congress to amend the U.S. Constitution to prevent *Kelo*-like takings. H. Res. 6636, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); S. Res. 1237, 2005 Gen. Assem., Jan. Sess. (R.I. 2005). While these bills effectively express the Rhode Island legislators’ disapproval of *Kelo*, proposing an amendment to the U.S. Constitution is probably the least feasible path Rhode Island could choose to restrict the use of eminent domain for economic development.

On the other end of the spectrum, Kentucky’s legislation prevents the use of eminent domain for anything except actual, physical use and ownership by the public. Act of Mar. 28, 2006, ch. 73, 2006 Ky. Acts 162, 162 (codified at KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2006)). Kentucky’s law rejects the “public purpose” reading of the Public Use Clause that has been established in Supreme Court jurisprudence for over a century, see *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896) (holding that public use requirement is satisfied if taking serves a public purpose), and radically curtails the state’s power of eminent domain.

A few of the strictest state restrictions on eminent domain already have exceptions carved out of them for specific projects. Texas, for example, has prohibited the use of eminent domain for development projects, except for condemnations needed to build a new stadium for the Dallas Cowboys. See TEX. GOV’T CODE ANN. § 2206.001 (Vernon Supp. 2006) (prohibiting use of eminent domain for economic development but listing exceptions including “a sports and community venue project approved by voters at an election held on or before December 1, 2005”); *Texas Voters Approve Stadium Referendum*, USA TODAY, Nov. 3, 2004, at C1 (noting voter approval of construction of new stadium for Dallas Cowboys). Fully prohibiting the use of eminent domain for redevelopment but carving out one or two specific exceptions is, at best, a short-term solution. If there are currently projects that states feel require the use of eminent domain (even in the face of the intense post-*Kelo* public opposition to its use), there probably will be more in the future; better to sort out now, in general terms, when and how eminent domain may be used, than to only make allowances for projects on the immediate horizon.

<sup>86</sup> See, e.g., Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) (disallowing condemnation for development, except for blighted areas); Act of June 6, 2006, ch. 349, 2006 Colo. Sess. Laws 1749, 1749 (codified as amended at COLO. REV. STAT. § 38-1-101 (2006)) (disallowing condemnation for economic enhancement or increasing tax revenue); Landowner’s Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (disallowing condemnation by transfer to private entity for economic development); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (Supp. 2006)) (disallowing condemnation for economic enhancement or primarily for increasing tax revenue); Act of

April 2007]

REJECTING BLIGHT

195

blighted areas<sup>87</sup>—in other words, eminent domain is only allowed for development in blighted areas.

The state legislation that limits the use of eminent domain for development can be grouped into three categories: (1) legislation that essentially prohibits the use of eminent domain for development; (2) legislation that does not meaningfully limit the use of eminent domain for development; and (3) legislation that effectively limits the use of eminent domain for development to specific areas.

1. *Legislation that Prohibits the Use of Eminent Domain for Development*

Some of the state legislation proposed or passed in the wake of *Kelo* flatly prohibits the use of eminent domain for development, regardless of whether the property is blighted or not. For example, a recent Florida statute enumerates the purposes for which private property may be taken; development is not among them. For good measure, the statute then provides that “taking private property for the purpose of eliminating slum or blight conditions is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public-purpose requirement of [the Florida Constitution].”<sup>88</sup>

Some of the legislation that ostensibly allows the use of eminent domain for the development of blighted areas, however, is so restrictive that it essentially prohibits the use of eminent domain for development in these areas as well. For example, a recent Georgia act defines blight narrowly as property that meets at least two conditions from a list of possibilities and contributes to health or safety problems.<sup>89</sup> The same act also enumerates what uses count as a public

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Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same).

<sup>87</sup> See, e.g., Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) (“[T]he . . . provisions of this subsection [restricting takings] shall not apply to the exercise of the powers of eminent domain . . . based upon a finding of blight in an area . . . .”); Landowner’s Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (prohibiting condemnation for economic development but allowing use of eminent domain in blighted areas); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (West Supp. 2006)) (excepting blighted areas from eminent domain reforms); Act of Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same). *But see* Act of May 11, 2006, ch. 2006-11, sec. 2, § 73.014, 2006 Fla. Laws 1, 4 (prohibiting use of eminent domain to remedy blight) (codified as amended FLA. STAT. § 73.014 (2006)).

<sup>88</sup> FLA. STAT. § 73.014 (2006).

<sup>89</sup> Landowner’s Bill of Rights and Private Property Protection Act, GA. CODE ANN. § 22-1-1 (Supp. 2006) (including following in list of conditions: uninhabitability, inade-

use for which the power of eminent domain may be exercised and disallows the use of eminent domain for any other purpose.<sup>90</sup> Indiana's statute is even more restrictive: A parcel must meet *all* of a long list of blighting factors to be taken for development.<sup>91</sup>

Under these statutes, each parcel must fall within the definition of blight and be individually condemned. Because only distinct, extremely neglected parcels of land may be designated as blighted, such statutes effectively disallow the use of eminent domain to assemble land for development. It seems improbable that a completely uninterrupted stretch of such parcels would exist. Moreover, it is relatively unlikely that eminent domain will be the preferred tool for dealing with individual properties that cause significant negative externalities, since the condemnation process is lengthier and more costly than other ways of dealing with the problem.<sup>92</sup>

## 2. *Legislation that Does Not Meaningfully Limit the Use of Eminent Domain for Development—Broad Definitions of Blight*

In contrast, some of the recently enacted state legislation that ostensibly limits the use of eminent domain for development to blighted areas contains definitions of blight that are broad enough to reach virtually any parcel of property. Under West Virginia's statute, for example, an *area* may be considered blighted if it meets any one of a number of conditions including "improper subdivision or obsolete platting," "faulty lot layout in relation to size, adequacy, accessibility or usefulness," or "deterioration of site improvement" that "substantially impairs or arrests the sound growth of the community." An individual *parcel* may be declared blighted if one of a list of factors is present, including "obsolescence, inadequate provisions for ventilation, light, air or sanitation, high density of population and overcrowding, [or] deterioration of site or other improvements."<sup>93</sup> South Carolina's legislature passed a joint resolution proposing an amendment to the state constitution that defined blight as "lack of ventilation, light, and sanitary facilities, dilapidation, [or] deleterious land use," and explicitly provided that blighted property may be con-

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quate ventilation, imminent harm to life or other property caused by natural disasters, Superfund identification, or sub-code status).

<sup>90</sup> *Id.*

<sup>91</sup> IND. CODE § 32-24-4.5-7 (Supp. 2006).

<sup>92</sup> David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 8-9 (Nw. Law & Econ., Research Paper No. 917891, 2006), available at <http://ssrn.com/abstract=917891>.

<sup>93</sup> W. VA. CODE ANN. § 16-8-3 (LexisNexis 2006).

demned and put to “private use.”<sup>94</sup> Under such an amendment, if a developer is able to negotiate with a number of land owners to purchase their property through the private market, it seems likely that the developer would be able to acquire the parcels of any remaining holdouts under these broad definitions of blight.

State definitions of blight that predate *Kelo* are particularly likely to be so broad as to be essentially meaningless. Every state defines “blight” by statute, requiring a finding of at least one among a list of factors that constitute blight.<sup>95</sup> These older definitions are often veritable laundry lists of factors that collect concepts from different ideas and uses of blight over the course of its early development,<sup>96</sup> the mid-century urban renewal movement,<sup>97</sup> and modern incarnations.<sup>98</sup> Blighting factors include everything from structural deterioration<sup>99</sup> to overcrowding,<sup>100</sup> from inadequate parking<sup>101</sup> to high crime rates;<sup>102</sup> from property tax delinquency<sup>103</sup> to uneconomic use of land.<sup>104</sup> In many states, the presence of a single blighting factor is legally suffi-

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<sup>94</sup> J. Res. 1031, Gen. Assem., 116th Sess. (S.C. 2005).

<sup>95</sup> Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394 (2000).

<sup>96</sup> The concept of “blight” as an urban disease grew out of the early urban planning movement. 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, 7 (2003) (describing fears of slum “contagion”). As the field of urban planning developed and grew, the profession developed a new discourse to describe the inner city conditions they hoped to plan out of existence. “Blight” was a term first used by the Chicago School of Sociology to describe areas that were not yet slums but were destined to decline. See *id.* at 16–17 (discussing origins of “blight” in urban development context). While planners were increasingly successful in developing the concept of blight as a serious urban problem, exactly what conditions constituted blight were never clearly defined. Some early definitions of blight were almost comical in their ambiguity. One Philadelphia planner, for example, helpfully explained that a blighted area “is a district which is not what it should be.” Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 306 (2004).

<sup>97</sup> See *infra* notes 119–23 and accompanying text (discussing urban renewal movement’s concept of blight).

<sup>98</sup> As the urban renewal movement came down from its peak, development projects changed but did not disappear; the focus shifted to more isolated projects with specific goals, including economic growth and job creation. Pritchett, *supra* note 96, at 48–49. This, too, was often justified under the rhetoric of blight, and new economic factors such as inefficient use of land and insufficient tax revenues were suddenly also decried as signs of blight. Gordon, *supra* note 96, at 314.

<sup>99</sup> N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 2006).

<sup>100</sup> CAL. HEALTH & SAFETY CODE § 33031(b)(5) (West 2006).

<sup>101</sup> § 33030(c).

<sup>102</sup> § 33031(b)(7).

<sup>103</sup> MD. CODE ANN., art. 41, § 14-805(a)(1)(iv) (LexisNexis 2003).

<sup>104</sup> N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 2006).

cient to support a finding of blight.<sup>105</sup> The determination that land is blighted is generally made by redevelopment agencies,<sup>106</sup> and this determination is given substantial deference by the courts.<sup>107</sup> These definitions are so broad that most if not all of the economic development projects allowed by *Kelo* would already have been permissible based on a finding of blight.

### 3. *Legislation that Effectively Restricts the Use of Eminent Domain for Development—Narrow Definitions of Blight*

Blight has always been, and often still is, a loosely defined concept that is ill-suited to serve as a meaningful check on the government's power of eminent domain. However, this objection is certainly surmountable: States may choose to define blight more precisely by statute, thereby imposing more substantial limits on the government's power of eminent domain. Indeed, some states are doing just that, passing legislation in the wake of *Kelo* that both restricts the use of eminent domain for development to blighted areas and significantly revises their definitions of blight.<sup>108</sup> Unlike some of the broad definitions of blight discussed above, these definitions of blight are narrow enough that only some individual parcels could reasonably be described as blighted. If definitions of blight are narrow enough to reach only some parcels, then it seems relatively unlikely that enough qualifying parcels will exist contiguously for land to be assembled for development.

Some of this legislation, however, specifically allows the taking of unblighted parcels in an area where some portion of the parcels are blighted, which makes land assembly possible. Pennsylvania's recent statute, for example, requires a single parcel to meet at least one of a number of conditions (e.g., a public nuisance, a fire hazard, neglect and unimprovement) to be declared blighted.<sup>109</sup> However, if a majority of parcels in a given area are blighted under the statute, then the entire area may be declared blighted and taken.<sup>110</sup> Iowa requires that

<sup>105</sup> Luce, *supra* note 95, at 403–04. Courts and agencies, however, will usually list as many blighting factors as are applicable, even though only one would be sufficient. *Id.*

<sup>106</sup> Luce, *supra* note 95, at 407.

<sup>107</sup> See Luce, *supra* note 95, at 409 (stating that most common standards of review for finding of blight are “arbitrary and capricious” and “bad faith”).

<sup>108</sup> E.g., Act of July 14, 2006, H.F. 2351, sec. 2, § 6A.21–.22, 2006 Iowa Acts 1031, 1031–32 (codified at IOWA CODE § 6A.21–.22 (2007)); Act of May 19, 2006, ch. 214, sec. 2, § 117.025, 2006 Minn. Laws 195, 195–96 (codified at Minn. Stat. § 117.025 (2006)); Property Rights Protection Act, No. 2006-35, sec. 1, § 205, 2006 Pa. Laws 148, 151–53 (to be codified at 26 PA. CONS. STAT. § 205).

<sup>109</sup> § 205(b), 2006 Pa. Laws at 151–53.

<sup>110</sup> § 205(c), 2006 Pa. Laws at 153.

April 2007]

REJECTING BLIGHT

199

seventy-five percent of the parcels in an area be blighted to take the entire area,<sup>111</sup> and Minnesota requires that at least fifty percent of the buildings in the area be “structurally substandard” to declare the area blighted.<sup>112</sup> Unlike the statutes discussed above that essentially prohibit the use of eminent domain for development,<sup>113</sup> these bills, by permitting an area to be taken if *some*, rather than *all*, of the parcels fall under a narrow definition of blight, allow for the use of eminent domain for land assembly and development.

### B. *Distorting the Political Process*

As discussed above, laws restricting the use of eminent domain to blighted areas fall into three categories: (1) legislation that essentially prohibits the use of eminent domain for development; (2) legislation that does not meaningfully limit the use of eminent domain for development; and (3) legislation that effectively limits the use of eminent domain for development to specific areas.<sup>114</sup>

The first of these categories—laws that effectively prohibit the use of eminent domain for development—does not pose many of the problems that the latter two present. There are good reasons to disallow the use of eminent domain for development, and a state could easily conclude that individual property rights should take priority over the community’s interest in development.<sup>115</sup>

The remaining two categories of rules restricting the use of eminent domain for development to blighted areas, however, do raise serious problems because they will disadvantage low-income and minority neighborhoods. Both may result in the disproportionate taking of land from low-income and minority neighborhoods, and may distort the political process by which these eminent domain laws will be changed.

#### 1. *Disproportionate Takings*

Some commentators have argued that “[j]ustifying eminent domain on a finding of blight invariably targets low-income communi-

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<sup>111</sup> IOWA CODE § 6A.22 (2007).

<sup>112</sup> MINN. STAT. § 117.025 (2006).

<sup>113</sup> See *supra* Part III.A.1.

<sup>114</sup> See *supra* Part III.A.

<sup>115</sup> See *supra* Part II.A (discussing arguments for and against use of eminent domain for development). It arguably might be simpler to explicitly disallow the use of eminent domain for development instead of restricting its use to the point that it is effectively disallowed, but this marginal additional simplicity does not confer substantial benefits.

ties . . . .”<sup>116</sup> This seems to be a particularly accurate prediction regarding restrictive definitions of blight, because the factors that constitute blight are more likely to be found in low-income areas—for example, the less-valuable buildings in low-income neighborhoods are far more likely to be “dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by statute or an applicable municipal code”<sup>117</sup> than buildings in upper- and middle-income neighborhoods.

The history of blight condemnations during the urban renewal movement confirms that the poor will be displaced under a blight rule. Blight developed as a loose concept early in the twentieth century;<sup>118</sup> it became the animating concept behind, and the legal justification for, the nationwide urban renewal movement in the ensuing decades.<sup>119</sup> In the 1950s and 1960s, cities across the country engaged in massive urban renewal projects that relied heavily on the use of eminent domain.<sup>120</sup> Major sections of many cities were demolished and rebuilt.<sup>121</sup> Throughout its course and across the country, the urban renewal movement resulted in the displacement of “177,000 families and another 66,000 single individuals, most of them poor and most of

<sup>116</sup> Pristin, *supra* note 57 (internal quotations omitted) (quoting John D. Echeverria, Executive Dir., Georgetown Env'tl. Law and Policy Inst.); *see also* Dana, *supra* note 92, at 9 (making similar argument).

<sup>117</sup> Property Rights Protection Act, No. 2006-35, sec. 1, § 205(b)(3), 2006 Pa. Laws 148, 152 (to be codified at 26 PA. CONS. STAT. § 205(b)(3)).

<sup>118</sup> *See* Pritchett, *supra* note 96, at 16 n.59 (citing earliest references of use of term “blight”).

<sup>119</sup> The use of eminent domain for these expansive urban renewal projects was challenged in many state courts as not serving a constitutionally legitimate public purpose, and was almost invariably upheld. *See, e.g.*, State v. Land Clearance for Redev. Auth., 270 S.W.2d 44, 52 (Mo. 1954) (en banc) (holding that redevelopment project constitutes valid public purpose); Kaskel v. Impellitteri, 115 N.E.2d 659, 662 (N.Y. 1953) (upholding condemnation for redevelopment of blighted area); Schenck v. City of Pittsburgh, 70 A.2d 612, 615–16 (Pa. 1950) (upholding condemnation for redevelopment of commercial area to ease traffic congestion and reduce density of buildings). The issue of whether urban renewal projects served a public purpose under the Takings Clause made its way to the Supreme Court in 1954 in *Berman*, by which point the urban renewal movement was in full swing nationwide. The Supreme Court, using the language of blight developed by the urban renewal movement in the preceding decades, declined to use the Public Use Clause to constrain the national movement. *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

<sup>120</sup> The urban renewal movement began in 1949 with the passage of new federal legislation that made substantial federal funding available for large-scale urban renewal projects, Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1441–60 (2000)), and formally ended in 1974. Gordon, *supra* note 96, at 313. For more on the urban renewal movement, *see generally* MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (1967).

<sup>121</sup> New York provides one of the most dramatic examples of the reshaping of a city through urban renewal projects: Robert Moses's aggressive development agenda reshaped much of New York City as we know it today, leveling many neighborhoods in the process. *See generally* ROBERT A. CARO, *THE POWER BROKER* (1975).

April 2007]

## REJECTING BLIGHT

201

them black.”<sup>122</sup> Urban renewal projects did not just temporarily displace low-income residents: Some projects had the effect of forcing low-income residents out of the city entirely if substitute low-rent housing could not be found.<sup>123</sup>

Just because blight designations may have discriminated against or disparately impacted low-income and/or minority neighborhoods in the past does not necessarily mean that they will have the same impact under post-*Kelo* legislation. However, the tarnished history of redevelopment to cure blight should give policymakers pause when electing to limit the use of eminent domain for development to blighted areas.

Even under definitions of blight that are so broad that they could be applied to practically any property,<sup>124</sup> there are reasons to believe that property will still be taken disproportionately from low-income communities for development projects. Several incentives are aligned to induce the government to develop in low-income areas. The cost of each location is one factor that would cause a developer to prefer one location over another. Whether “costs” are counted as financial or political (or both), redeveloping low-income areas will be less costly. If governments respond to financial costs in deciding what property to take,<sup>125</sup> then they will likely take from low-income areas because the land is likely to be less expensive. If governments respond to political

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<sup>122</sup> BERNARD J. FRIEDEN & MARSHALL KAPLAN, *THE POLITICS OF NEGLECT* 24 (1975). Only 20,000 new units of low-rent housing were built during this period. *Id.*

<sup>123</sup> The blighted area that was condemned and redeveloped in *Berman*, for example, contained only 310 units of housing after redevelopment that were as affordable as the 5900 units that had been condemned. Pritchett, *supra* note 96, at 46–47; *see supra* note 122 and accompanying text (noting that there were only 20,000 new units of low-rent housing for more than 177,000 displaced).

The potential for redevelopment in blighted areas to displace some residents remains: In most states, a redevelopment project that involves the condemnation of blighted land generally does not involve an obligation on the developer’s part to redevelop the blighted area for similar uses. So, for example, if low-income housing is condemned, states usually do not require that more low-income housing be built as part of the redevelopment project. *But see* IOWA CODE § 403.22 (2002) (disallowing tax revenue division unless low and moderate income family housing is built in areas designated as “economic development” areas). In the absence of a same-use redevelopment requirement, or, perhaps, an affirmative obligation to provide some amount of low-income housing, a city’s expansive use of eminent domain to eradicate blight might function a lot like exclusionary zoning—zoning schemes that price low-income residents out of entire areas by zoning all lots for housing beyond their price range. *See* S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 724 (N.J. 1975) (establishing “fair share” requirement to combat practice of exclusionary zoning in New Jersey); S. Burlington County NAACP v. Twp. of Mt. Laurel, 456 A.2d 390, 460, 464 (N.J. 1983) (affirming “fair share” requirement).

<sup>124</sup> *See supra* Part III.A.2 (discussing broad definitions of blight).

<sup>125</sup> *See supra* notes 65–67 and accompanying text (noting that under standard economic account of Takings Clause, government responds to financial costs).

costs in deciding what property to take,<sup>126</sup> then they will likely take from low-income areas as well because low-income areas are less likely to be politically powerful.<sup>127</sup>

Although the political and financial incentives that lead to the disproportionate taking of property from low-income and minority neighborhoods will be present even if a state's eminent domain laws do not restrict the use of eminent domain for development in any way, statutorily restricting the use of eminent domain for development to blighted areas, particularly under narrower definitions of blight, may make it even more likely that land will be taken from low-income neighborhoods. To that extent this state legislation is unwise because it exacerbates a preexisting problem.

## 2. Political Process Problems

Restricting the use of eminent domain for development to blighted areas also distorts the political process by which these rules are established. As discussed above, the use of eminent domain for development involves balancing the interests of the community

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<sup>126</sup> See *supra* notes 68–69 and accompanying text (summarizing argument that governments respond to political costs).

<sup>127</sup> Low-income neighborhoods are likely to be less politically powerful because they are significantly less likely to vote. See ACORN, DEMOS & PROJECT VOTE, A PROMISE UNFULFILLED 3 (2005) (finding that eighty-five percent of citizens in households with incomes of \$75,000 or more are registered to vote, but only fifty-nine percent are registered in households with incomes less than \$15,000); MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES, INCOME AND RACIAL DISPARITIES IN THE UNDERCOUNT IN THE 2000 PRESIDENTIAL ELECTION 9 (2001), available at <http://oversight.house.gov/Documents/20040629065057-51969.pdf> (finding that poor and minority voters were more than three times as likely to have their ballots discarded as compared to wealthy voters' ballots). Low-income neighborhoods are also far less likely to make substantial campaign contributions, which may limit their political influence. See Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 70–71 (1991) (discussing barriers that poor and minority communities face in mobilizing against local toxic threats); National Voting Rights Institute, About Us: "Wealth Primary," <http://www.nvri.org/about/wealth.shtml> (last visited Jan. 31, 2007) (noting that less than one percent of population provides over eighty percent of all money in federal elections; eighty-one percent of major congressional campaign contributors have annual incomes of \$100,000 or more). But see Stephen Ansolabehere et al., *Are Campaign Contributions Investment in the Political Marketplace or Individual Consumption? Or "Why Is There So Little Money in Politics?,"* (MIT Sloan, Working Paper No. 4272-02, 2002), available at [http://web.mit.edu/jdefig/www/papers/invest\\_or\\_consumpt.pdf](http://web.mit.edu/jdefig/www/papers/invest_or_consumpt.pdf) (arguing that campaign contributions are not "policy-buying," but instead are form of consumption and participation). Some commentators, however, have argued that some communities may actually have a disproportionately large amount of political influence. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–26 (1985) (arguing that "discreteness and insularity" can increase groups' bargaining power by fomenting group solidarity, providing social sanctions, and lowering organizational costs).

against the interests of the individual.<sup>128</sup> If blight is understood to allow the use of eminent domain only in low-income areas, then only a discrete group of low-income property owners have a personal interest in ensuring that new rules for the use and compensation of eminent domain are more generous to the individual property owner. If, on the other hand, eminent domain rules are understood to allow for development in any area, then all property owners will *believe* that compensation and condemnation procedure rules will affect them too. This creates a much larger constituency with an interest in making those rules generous to the individual, even if in practice most projects will still take land in low-income areas.

The previous section argued that the use of eminent domain for development may result in the disproportionate taking of land from low-income communities. Whether or not this imposes a burden on these communities depends on whether the use of eminent domain disadvantages the individual whose property is taken. It could be that eminent domain actually grants windfalls to property owners because compensation is generous in practice,<sup>129</sup> in which case taking land disproportionately from low-income or minority neighborhoods might be less troubling (at least from an environmental justice perspective).<sup>130</sup> If, however, the use of eminent domain for development results in undercompensation or imposes other disadvantages on the property owner whose land is taken,<sup>131</sup> then we should be concerned with the unfairness of imposing these costs primarily on low-income and minority neighborhoods.

Local governments have a great deal of flexibility to fashion rules regulating their use of eminent domain within the minimum requirements of the Constitution.<sup>132</sup> If these rules primarily affect low-income and minority neighborhoods, then they may be more disadvantageous to the individual whose property is taken than a rule

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<sup>128</sup> See *supra* Part II.

<sup>129</sup> It is not necessarily the case that a property owner whose land is taken through eminent domain is left worse off; there are reports in American history of savvy entrepreneurs who would buy up land knowing that it would be condemned by the government, and would reap a handsome profit from the compensation for the taking. Christopher Serkin, *Big Differences for Small Governments*, 81 N.Y.U. L. REV. 1624, 1640 n.61 (2006); see Garnett, *supra* note 63, at 101–05 (arguing that academics overstate undercompensation problem by focusing on constitutional minimums, rather than actual compensation practices).

<sup>130</sup> The environmental justice movement is generally concerned with the disparate burdens that low-income or minority communities bear, not the benefits they receive. See *supra* note 73 (defining environmental justice).

<sup>131</sup> See *supra* notes 59–63 and accompanying text (discussing harms eminent domain may impose on individual property owners).

<sup>132</sup> See *supra* Part I.A.

that affects all property. This is true for several reasons. First, if a given eminent domain rule applies only to a minority of property owners (regardless of whether that minority is low-income residents or some other group), the rule may disadvantage the minority to the benefit of the majority.<sup>133</sup> This may be of particular concern at the local level.<sup>134</sup> If blight rules single out low-income residents, then majoritarian politics might adopt compensation and procedural rules for the use of eminent domain for development that disadvantage the minority of individuals to whom they apply.<sup>135</sup>

Second, this majoritarianism problem may be exacerbated if low-income or minority residents are less able to secure gains through the political process because of bias or discrimination.<sup>136</sup> While it is unlikely that bias and discrimination against low-income or minority neighborhoods will infect every land use rule-making process, commentators have found that biases infect at least some.<sup>137</sup> In addition to problems of bias or discrimination, low-income communities might be unable to protect themselves from unfair eminent domain rules through the political process because they have limited time and

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<sup>133</sup> See William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1582–83 (1988) (discussing problem of majoritarianism in takings in context of owners of developed and undeveloped land).

<sup>134</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 867 (1995) (“[E]mpirical studies indicate that local government decisionmaking is characterized by majoritarian politics.”). See generally WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001) (attributing local governments’ majoritarianism to their responsiveness to homeowners).

<sup>135</sup> While public choice scholars might argue that we should expect discrete minorities to be effective at opposing legislation that disadvantages them, there are several reasons why that dynamic does not work here. First, discrete minorities are disproportionately politically powerful only if the majority is relatively disinterested and unorganized. With all of the attention and opposition that *Kelo* has generated, *see supra* notes 81–86 and accompanying text, the majority is anything but disinterested regarding eminent domain reform. Second, the source of a discrete group’s power is their superior bargaining position. However, low-income neighborhoods are less likely to be politically powerful and, therefore, would be more likely to have that advantage neutralized, *see supra* note 127.

<sup>136</sup> Some commentators have argued that the Takings Clause should protect against just this type of discrimination. See Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 125, 137 (1992) (“[T]he takings clause can be defended as a barrier against a serious form of discrimination [i.e., lack of compensation] against politically disfavored groups.”); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 310–11 (1990) (arguing that takings law does and should protect minorities that are particularly vulnerable in political process).

<sup>137</sup> See Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997) (discussing results of study finding that some locally undesirable land uses were disproportionately sited in Hispanic neighborhoods but were not disproportionately sited in poor or African American neighborhoods).

April 2007]

REJECTING BLIGHT

205

money, lack of access to technical expertise,<sup>138</sup> and a relative lack of political influence.<sup>139</sup>

To the extent that the rules surrounding the use of eminent domain are likely to be unfair in the first instance because of these political process problems, these rules are also less likely to be changed through the political process for the same reasons. This sets blight rules apart from other state responses to *Kelo*: Other responses can be changed through the political process should they prove to be inadequate in practice.

These political process problems exist to the extent that state laws that limit the use of eminent domain for development to blighted areas are perceived to apply only to low-income areas. In the case of statutes that define blight narrowly, this perception is likely accurate.<sup>140</sup> In the case of statutes that define blight broadly, this perception is inaccurate; yet, it is still frequently held.<sup>141</sup> If this is the case, then statutes that define blight broadly pose the same political process problems as statutes that define blight narrowly.<sup>142</sup>

A rule of compensation that leaves substantial costs to be borne by the property owner is not necessarily undesirable;<sup>143</sup> it is, however, troubling if such a rule applies only to a discrete group of property

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<sup>138</sup> See Austin & Schill, *supra* note 127, at 71 (describing these problems as obstacles to mobilization against toxic threats).

<sup>139</sup> See *supra* note 127 and accompanying text (discussing reasons why low-income neighborhoods may have less political power).

<sup>140</sup> See *supra* Part III.A.3.

<sup>141</sup> While *Kelo* barely, if at all, changed the rule on when the exercise of eminent domain is permissible, it nonetheless sparked strong public opposition. The most plausible explanation for this opposition is that statutes that limited the use of eminent domain to blighted areas, broadly defined, were inaccurately perceived as legally limiting the use of eminent domain more than they actually did.

<sup>142</sup> Statutes that define blight broadly also offer an additional political process distortion. If the purpose of post-*Kelo* state legislation is the legal restriction of allowable uses of eminent domain, then legislation that limits the use of eminent domain for development to blighted areas fails on its own terms when blight is broadly defined. Such legislation is largely symbolic: It reflects a legislative desire to restrict the use of eminent domain for development, but provides no standards that are restrictive in practice. On its face, however, this legislation is perceived to restrict the use of eminent domain for development, and so this empty legislation may take the heat off of state legislators to enact reforms that are actually meaningful in practice. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 223 (1990) (discussing problems created by overbroad or meaningless legislation that gives legislators political benefit of having acted while avoiding actual difficult choices).

<sup>143</sup> See *supra* note 69 (noting that undercompensation might appropriately generate opposition from property owners against projects in order to counterbalance pressure from interest groups in support of project).

owners.<sup>144</sup> Rules that limit the use of eminent domain for development to blighted areas leave minority groups, and no one else, with a personal interest in ensuring that new rules for the use and compensation of eminent domain are generous to individual property owners.<sup>145</sup> In contrast, rules that apply evenhandedly to all property owners will lead to a more balanced political debate on the competing interests of the community and the individual that are at stake in decisions on the use of eminent domain for development.<sup>146</sup>

#### IV REJECTING BLIGHT

What should be done about this state legislation? Legal challenges promise little success. State legislation that allows the use of eminent domain for development only in blighted areas is constitutional.<sup>147</sup> Two commentators have argued that courts should strictly

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<sup>144</sup> Cf. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003) (arguing that antidiscrimination principle is basis for right of just compensation and that Takings Clause is best understood as comparative right).

<sup>145</sup> It is not necessarily the case that compensation and procedural rules on the use of eminent domain for development will be developed separately; they may simply be the same as the rules for the use of eminent domain generally. Since the use of eminent domain generally (as opposed to its use specifically for development, which is the topic of this Note) is not restricted to blighted areas, see Merrill, *supra* note 43, at 97–101 (surveying eminent domain cases contested in state and federal appellate courts and finding that eminent domain has been employed for multiple purposes), the general applicability of these rules may protect against the problems discussed in this section to some degree.

<sup>146</sup> See *supra* Part II (describing competing interests of community and individual in use of eminent domain for development).

<sup>147</sup> See *supra* Part I.A. While the concerns with these blight rules map some of the concerns in *Carolene Products* footnote four, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938), it does not fit into that framework under current case law: The poor are not a protected group, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973), and while race is a suspect classification, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), the fact that a given rule disparately impacts a racial minority does not, alone, pose a constitutional problem, *Washington v. Davis*, 426 U.S. 229, 242 (1976). Even though these blight rules are constitutional under the Court's current jurisprudence, they should give us pause because they pose familiar and troubling concerns about the limitations of the political process. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (proposing "political process" theory of government action whereby actions by majority against minority should receive careful judicial scrutiny).

review the use of eminent domain in scenarios such as these,<sup>148</sup> but such strict scrutiny is unlikely under current case law.<sup>149</sup>

One possible solution would be for citizen groups to carefully monitor how this state legislation plays out in practice and to draw as much attention as possible to future inequities, should they develop. A well-founded environmental justice claim, announced loudly and often, could generate the political capital necessary to prevent the imposition of disparate burdens on disadvantaged groups.<sup>150</sup> Another possibility is for community activists to work towards a more forward-looking land use planning model of environmental justice, one that works to build strong communities rather than reacting to inequities once they occur.<sup>151</sup> For example, protective zoning laws that prevent the intrusion of incompatible land uses<sup>152</sup> would eliminate one “blighting” factor.<sup>153</sup>

In the end, however, the best solution is for states to avoid using “blight” entirely as they reform their eminent domain laws. Other options abound,<sup>154</sup> and blight poses problems no matter how it is defined.<sup>155</sup> Even if redeveloping blighted areas were an effective way

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<sup>148</sup> Ralph Nader and Alan Hirsch argue for strict scrutiny:

[C]ourts should subject eminent domain takings to strict scrutiny where three conditions are present: 1) the land is transferred to another private party rather than held by the public; 2) the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and 3) the party whose land is taken is relatively powerless politically.

Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 224 (2004).

<sup>149</sup> See *supra* Part I.A (describing judicial deference to legislative determinations of public purpose in takings doctrine).

<sup>150</sup> This tactic has sometimes been successful in opposing the siting of locally undesirable land uses in poor or minority neighborhoods. For example, strong and well-publicized community opposition to the siting of Shintech’s polyvinyl chloride plant in Convent, Louisiana—a town populated by low-income minority residents, in an area already exposed to significant pollutants—was sufficient to force the company to abandon its attempt to locate the plant in Convent. For a good discussion of the Shintech siting story, see Gemma Aymonne Heddle, *Sociopolitical Challenges to the Siting of Facilities with Perceived Environmental Risks* 28–44 (June 2003) (unpublished M.S. thesis, Massachusetts Institute of Technology), available at [http://lfee.mit.edu/metadot/index.pl?id=2675&isa=Item&field\\_name=item\\_attachment\\_file&op=download\\_file](http://lfee.mit.edu/metadot/index.pl?id=2675&isa=Item&field_name=item_attachment_file&op=download_file).

<sup>151</sup> Arnold, *supra* note 73 (arguing that environmental justice advocates should move from reactive strategies to proactive planning and participation).

<sup>152</sup> Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993) (arguing for protective zoning rights for low-income and minority neighborhoods).

<sup>153</sup> See Luce, *supra* note 95, at 435 (noting that incompatible land use (e.g., mixed industrial and residential) is statutory blighting factor in some states).

<sup>154</sup> See *supra* Part II.B (describing wide variety of possible modifications to rules on eminent domain for development).

<sup>155</sup> See *supra* Part III (discussing problems with blight legislation).

to improve inner-city slum conditions,<sup>156</sup> the chance that these neighborhoods will simply be leveled rather than bettered,<sup>157</sup> combined with the political process shortcomings,<sup>158</sup> leads to the conclusion that, on balance, rules limiting the use of eminent domain for development to blighted areas are best avoided.

#### CONCLUSION

This Note has argued that state legislation limiting government's eminent domain power for development to blighted areas is troubling for several reasons. First, state laws limiting the use of eminent domain for development to blighted areas may not restrict the government's eminent domain power at all, since many blight definitions are expansive. Limiting the government's eminent domain power is not necessarily desirable, but imposing a limit that in practice is no limit at all is a cumbersome and disingenuous way of giving governments broad authorization to exercise their eminent domain power.

Second, state laws that do meaningfully restrict the government's power of eminent domain for development projects by restricting its use to blighted areas *and* redefining blight to reach fewer properties may be even more troubling. Such rules may restrict the use of eminent domain for development to a discrete and relatively noninfluential group of property owners and result in rules that are less generous to the individual than they would be were they applicable to all property owners. Not only might the rules surrounding the use of eminent domain be less generous when they are first developed, they also may be less likely to be changed through the political process.

*Kelo* has prompted many states to experiment with their eminent domain laws, and in many ways this experimentation is a good thing. Hopefully, over time, states will arrive at rules that are well-tailored to their local preferences and circumstances. Returning to the stretched and troubled rhetoric of blight, however, is one choice that states should avoid.

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<sup>156</sup> The history of the urban renewal movement should indicate that this is a dubious proposition. *See supra* notes 118–23 and accompanying text (discussing history of urban renewal movement).

<sup>157</sup> *See supra* notes 122–23 and accompanying text (noting that urban renewal resulted in displacement of many residents without construction of equivalent amounts of low-income housing).

<sup>158</sup> *See supra* Part III.B.2 (discussing political process problems with blight rules).