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Closing Pandora's Box: Proposing a Statutory Solution to the Supreme Court's Failure to Adequately Protect Property

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I. INTRODUCTION

It is by no means an exaggeration to characterize the Supreme Court's 2005 *Kelo v. City of New London* decision as its most unpopular ruling in more than a century. Justice Scalia, one of four *Kelo* dissenters, went so far as to put *Kelo* in the company of *Dred Scott* and *Roe v. Wade*—decisions he claimed represented the Court's most severe lapses in judgment.[1] In *Kelo*, the Supreme Court upheld a municipal redevelopment plan that resulted in the forced transfer of nine residents' homes to a private development corporation. The Court held that the increased tax revenue and other secondary benefits to the city constituted a "public use" under the Fifth Amendment, justifying the condemnation and forced transfer of the residents' homes.[2] However, it noted that "nothing in our opinion precludes any State from placing further restrictions on its exercise of takings power."[3]

The subsequent response from state legislatures was unprecedented. In direct response to *Kelo*, forty-three states enacted legislation curbing the use of eminent domain for economic redevelopment.[4] On November 8, 2011, Mississippi became the forty-fourth, passing a referendum by an overwhelming seventy-three to twenty-seven percent majority that placed restrictions on the transfer of condemned property to private parties.[5] On the federal level, politicians as ideologically diverse as Rep. Maxine Waters (D-

1. Debra Cassens Weiss, *Scalia Lumps* Kelo *Decision with* Dred Scott *and* Roe v. Wade, ABAJOURNAL.COM (Oct. 19, 2011, 8:05 AM), http://www.abajournal.com/news/article/scalia_ lumps_kelo_decision_with_dred_scott_and_roe_v._wade.

2. Kelo v. City of New London, 545 U.S. 469, 484 (2005); *see infra* Part II.C.

3. *Kelo*, 545 U.S. at 489.

4. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101–02 (2009).

5. Ilya Somin, *Referendum Initiatives Prevent Eminent Domain Abuse*, THE DAILY CALLER (Nov. 11, 2011, 2:43 PM), http://dailycaller.com/2011/11/09/referendum-initiatives-prevent-emine nt-domain-abuse.

CA) on the left and Sen. John Cornyn (R-TX) on the right sponsored bills aimed at enacting similar reforms on a national level.[6]

While property-rights advocates generally find this barrage of legislation encouraging, there is some concern that many states' efforts are merely cosmetic. That is, although the statutes purport to limit the type of taking at issue in *Kelo*, they are riddled with exceptions that eviscerate any substantive protections against forced transfers to private developers. Other scholars argue that many states have gone too far, limiting municipalities' ability to deal with blight and urban sprawl.[7] This Comment surveys enacted state legislation and proposed federal legislation to evaluate the validity of these claims. Ultimately, it finds the vast majority of these efforts wanting and proposes the creation of a federal cause of action modeled loosely on shareholder derivative suits. Unlike proposed federal legislation and many state statutes, this approach avoids burdening federal and local law enforcement, makes economic-development takings infeasible in most instances, and also allows states the flexibility they need to deal with actual blight.

This Comment proceeds as follows. Part II demonstrates the need for a statutory approach to takings reform by showing that *Kelo* was simply a logical extension of the preceding 100 years of Supreme Court precedent. Part III discusses the leading arguments for and against the use of eminent domain for economic development, providing context for Part IV's survey of the many legislative responses to *Kelo*. Part V proposes creating a federal cause of action for property owners involved in improper takings and concludes.

II. WHY A STATUTORY SOLUTION? A BRIEF HISTORY OF THE SUPREME COURT'S TAKINGS JURISPRUDENCE

Despite the unprecedented outrage to *Kelo* among politicians, commentators, and the general public,[8] the majority's reasoning was largely consistent with more than 100 years of the Supreme Court's public-use jurisprudence. This Part traces the genesis of the ultimate result in *Kelo* back to the Court's first public-use holdings in the latter nineteenth century. Broadly, two lines of cases emerged, with

6. *See infra* note 67 and accompanying text.

7. *See infra* Part III.A.

8. *See* Somin, *supra* note 4, at 2108–14 (cataloguing the disapproval displayed by politicians, commentators, and the general public that cut across traditional partisan lines).

some overlap. The first defined public use as "public power"—a seizure of private property constituted a public use so long as it furthered the government's exercise of a constitutional power. The second defined public use as any action that tended to produce a "public benefit" or carried out a "public purpose." Early on, the Court afforded state governments substantial deference in categorizing their legislative goals as "public purposes." In the twentieth century, the Court began to explicitly rely on both definitions, granting state legislatures virtually unlimited condemnation authority while leaving little room for future courts to impose limitations.

A. Public Use Defined by the Scope of the Government's Constitutional Powers

For at least the past century, the Court has defined public use by reference to the scope of the government's constitutional authority, giving substantial deference to legislative determinations that a particular action constitutes a public use.[9] In *United States v. Gettysburg Electric Railway Co.*, for example, the Court upheld the federal government's efforts to condemn the Gettysburg battlefield under a statute authorizing the construction of public buildings.[10] The condemnation upset Gettysburg Electric's plans to build a railroad on its own property, and the asserted purpose of the taking was historical preservation, not erecting public facilities.[11] The Court held that any exercise of eminent domain constitutes a public use if the condemnation is "necessary or appropriate" to the exercise of any constitutionally authorized power.[12] Moreover, legislative judgments about what qualifies as a public use under the Constitution are entitled to deference unless their rationale is "palpably without reasonable foundation."[13]

Nine years later, the Court extended the reasoning from *Gettysburg Electric* to takings of a distinctly private character. In

9. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925); Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527, 530–31 (1906); Clark v. Nash, 198 U.S. 361, 368 (1905); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 679 (1896).

10. *Gettysburg Electric*, 160 U.S. at 681–82.

11. *Id.* at 680–81.

12. *Id.* at 679.

13. *Id.* at 680.

Clark v. Nash, the Court upheld a Utah statute that authorized a private party to condemn a portion of his neighbor's land to access irrigation water.[14] Despite the private nature of the taking, the Court deferred to the Utah Legislature's determination that such a use was indeed "public" under the Constitution.[15] Notwithstanding the Court's efforts to limit its holding so as not to "approv[e] of the broad proposition that private property may be taken in all cases where the taking may . . . tend to develop [a state's] natural resources,"[16] just one year later it approved a mining company's efforts to condemn private property for construction of aerial transport-bucket lines.[17] Writing for a unanimous Court, Justice Holmes noted that the mine's efforts to ease delivery of its ore to railways "should not be made impossible by the refusal of a private owner to sell the right to cross his land."[18] The state legislature's determination that such condemnations constituted a public use was enough to satisfy the Constitution's public-use requirement.[19]

The Court reaffirmed the strength of this proposition in *Old Dominion Land Co. v. United States* and in *Berman v. Parker*. In *Old Dominion*, Congress condemned a lessor's land after the owner refused the government's offer to buy the property.[20] The owner challenged the taking, asserting that the government's purpose of preserving structures it had built during its lease was not a public purpose.[21] The Court upheld the condemnation, holding that Congress's declaration that its purpose was indeed a public one created a rebuttable presumption that the taking did not violate the public-use clause.[22] The Court noted that such legislative determinations are entitled to deference unless shown to "involve an impossibility."[23] Similarly, in *Berman v. Parker*, the Court upheld a redevelopment project in Washington, D.C., that resulted in the

14. *Clark*, 198 U.S. at 370.
15. *Id*. at 369–70.
16. *Id*. at 369.
17. Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527, 531–32 (1906).
18. *Id*. at 531.
19. *Id*.
20. Old Dominion Land Co. v. United States, 269 U.S. 55, 63 (1925).
21. *Id*.
22. *Id*. at 66.
23. *Id*.

condemnation of a department store.[24] Even though the redevelopment scheme ultimately transferred the condemned property to another private party for redevelopment, the Court held that the taking was for public use.[25] It reasoned that because Congress had the authority to alleviate blight conditions in the District of Columbia, it also had the authority to employ private owners to carry out its legislatively determined public purpose.[26] The Court stated that "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[27]

B. Public Use Defined as "Public Benefit" or "Public Purpose" Not Ownership or Access

Although state courts have occasionally defined "public use" as requiring some degree of public ownership or access,[28] the Supreme Court has never adopted such an interpretation. Beginning at least as far back as the late nineteenth century, a second line of Supreme Court precedent adopted a broad definition of public use that authorizes any taking that produces a public benefit or achieves a public purpose.[29] In *Fallbrook Irrigation District v. Bradley*, the Court upheld a private taking exercised under a California law that created cooperative-irrigation districts.[30] The law required any member of a district to pay fees that funded the groups' collective efforts to irrigate their land.[31] The District condemned and sold the property of one member who had refused to pay her fee.[32] In upholding the taking and the law that authorized it, the Court noted that "[i]t is not essential that the entire community, or even any

24. Berman v. Parker, 348 U.S. 26, 35–36 (1954).

25. *Id*. at 33–34.

26. *Id*.

27. *Id*. at 33.

28. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 507–08 (2006).

29. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Rindge Co. v. Los Angeles, 262 U.S. 700 (1923); Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

30. *Fallbrook*, 164 U.S. at 119–22, 160–61.

31. *Id*. at 116 n.1.

32. *Id*. at 122.

considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use."[33] The "public purpose" of facilitating the cultivation of millions of acres of arid property constituted a public use that satisfied the Constitution.[34] In *Clark v. Nash*, the Court employed a similar definition of public use, upholding a Utah statute that allowed a property owner to condemn his neighbor's land to access irrigation water.[35] In defining public use, the Court noted that the "results upon the growth and prosperity of the state . . . have a material bearing upon the question whether the individual use proposed might in fact be a public one."[36]

The "public benefits" and "public purposes" that justify a taking do not necessarily have to be economic in nature, nor must they be generally available for public enjoyment.[37] In *Rindge Co. v. Los Angeles*, the Court upheld the condemnation of land traversing a private ranch for the construction of two highways, both of which would dead-end within the ranch property without connecting to any other road.[38] The Court held that the taking was for public use even though the road merely provided a scenic coastal view before terminating inside the county line.[39] It noted that "[p]ublic uses are not limited . . . to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."[40]

Similarly, in *Ruckelshaus v. Monsanto Co.*, the Court upheld a taking for which the direct benefits would accrue almost exclusively to a private party.[41] At issue was a federal regulation that authorized the EPA to use data submitted by pesticide-registration applicants when evaluating other applicants[42] and also disclose some data publicly to simplify the application process.[43] Monsanto challenged

33. *Id.* at 161–62.

34. *Id.* at 161.

35. Clark v. Nash, 198 U.S. 361, 369 (1905).

36. *Id.* at 398.

37. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).

38. *Rindge*, 262 U.S. at 703, 710.

39. *Id.* at 707–08.

40. *Id.* at 707.

41. *Ruckelshaus*, 467 U.S. at 1014.

42. *Id.* at 990.

43. *Id.*

the public disclosure of data it believed to be intellectual property, alleging that the disclosure in effect "took" its private property to benefit other private competitors.[44] Despite the Court's recognition that "the most direct beneficiaries of EPA actions . . .will be later applicants who will support their applications by citation to data submitted by Monsanto," it held that the taking was for public use.[45] It noted that the taking need only have a "conceivable public character,"[46] and that fostering competition in the pesticide market by removing barriers to entry was "well within the police power of Congress."[47]

C. Midkiff *and* Kelo*: The Public-Purpose and Public-Power Doctrines Merge*

By themselves, neither of the public-use definitions discussed above provides strong limitations on the government's eminent-domain powers. Taken together, the government's condemnation authority would be virtually limitless, and after the Court's rulings in *Midkiff* and *Kelo*, that is more or less the case. Today, a "public use" under the Fifth Amendment is defined by the scope of a sovereign's constitutional power,[48] and legislatures receive substantial deference in determining what public needs justify the use of eminent domain.[49] Stated differently, a legislature can use eminent domain to pursue any public purpose within the scope of its authority, and it enjoys wide latitude from the court to determine the public purposes it constitutionally may pursue—a classic case of trusting the fox to guard the henhouse.

While the Court had articulated the public-purpose and public-power definitions of public use in prior cases, the Court did not explicitly rely on both of them in a single case until the middle of the twentieth century.[50] Two of the Court's most recent takings

44. *Id*. at 998–99.

45. *Id*. at 1014–15.

46. *Id*. at 1014.

47. *Id*. at 1015.

48. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984).

49. Kelo v. City of New London, 545 U.S. 469, 483 (2005).

50. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33–36 (1954) (holding that Congress could condemn non-blighted property as part of a plan to redevelop a blighted area because it had the constitutional authority to eliminate blight, and its legislative determination that the non-blighted condemnation was necessary to exercise its power in such a manner was entitled

decisions illustrate how difficult it is to place any principled limits on the power of eminent domain in light of these two definitions.

In *Midkiff*, the Court upheld a Hawaiian land redistribution statute that allowed the state to condemn private property and immediately sell the land to the previous owner's lessees.[51] The act's goal was to ameliorate what the legislature determined to be an inequitable distribution of land; seventy-two private landowners owned fee title to forty-seven percent of the land in Hawaii, while the government owned forty-nine percent.[52] Even though the act essentially resulted in the transfer of property from one private party to another, the Court held that the redistribution efforts of the Hawaii legislature constituted a public use.[53] Citing *Berman*, it noted that the "'public use' requirement is thus coterminous with the scope of a sovereign's police power[]."[54] Because a state's police power encompasses the authority to regulate oligopolies, and the legislature believed the land-reform act would remove artificial distortions in its real-estate market that were injurious to the public, the act posed no constitutional difficulties.[55]

Notice that in the absence of either the public-power or public-purpose definition of public use, the Court would have had room to invalidate the statute. If public use were only defined in reference to Hawaii's police power, the Court could have held that Hawaii indeed had the authority to regulate oligopolies through use of eminent domain, but determined that the scheme was ultimately a taking for "private use" because the statute simply transferred property from one private party to another. The Court would not have had to defer to the Hawaii legislature's determination that the coerced transfers legitimately served a public purpose. Similarly, if public use was simply defined by the legislature's conception of a public purpose, the Court could have deferred to the legislature's determination that correcting real-estate market inequities is a public purpose, but invalidated the statute because the Constitution prohibits states from using their regulatory powers to transfer

to deference).

51. *Midkiff*, 467 U.S. at 233–34, 241–42.

52. *Id*. at 232.

53. *Id*. at 241–42.

54. *Id*. at 240.

55. *Id*. at 242.

property from one private party to another. However, if courts must defer to legislative judgments to determine what constitutes a legitimate public purpose, and at the same time recognize eminent domain as a power instrumental to the government's exercise of any other constitutional power, there is no principled way to limit condemnation authority.

The Court's ruling in *Kelo v. City of New London* supports this proposition. In *Kelo*, the Court sustained a municipal redevelopment project that condemned non-blighted residential property to make way for commercial retail space and new housing developments.[56] The city's plans came on the heels of an announcement from a large pharmaceutical company that planned to build a research facility in the area. The city hoped the resulting economic activity would end years of population decline and high unemployment.[57] Despite the fact that the condemned properties would be leased to private parties for redevelopment, the Court held that the condemnations were for public use.[58] It noted that "for more than a century, our public-use jurisprudence has . . . afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power,"[59] and deferred to New London's determination that the condemned properties were "sufficiently distressed to justify a program of economic rejuvenation."[60] The substantial deference afforded legislatures was underscored by the Court's explicit rejection of any requirement that the public benefits of such a project be reasonably certain to accrue.[61] Finally, the Court pointed out that New London had authority to use eminent domain to promote economic development by virtue of a Connecticut statute that authorized municipalities to take such action.[62]

Just as the holding in *Midkiff* relied on the public-power and public- purpose definitions of public use to uphold Hawaii's land-reform act, the *Kelo* majority's rationale necessarily relied on both principles to uphold New London's economic-development plan. If the Court did not view eminent domain as a mere tool at the

56. Kelo v. City of New London, 545 U.S. 469, 475, 484 (2005).
57. *Id*. at 473–75.
58. *Id*. at 483.
59. *Id*.
60. *Id*.
61. *Id*. at 487–88.
62. *Id*. at 483–84.

government's disposal in its exercise of any other constitutional power, the *Kelo* Court could have deferred to New London's definition of economic rejuvenation as a public purpose, but then ultimately concluded that no constitutional power permits the use of eminent domain to reach such an end. Likewise, without deferring to New London's definition of public purpose, the Court could have conceded that states and municipalities have the constitutional power to promote economic development generally, but invalidated the plan because, in this instance, New London was employing its condemnation authority for a distinctly private purpose.

For these very reasons, the *Kelo* dissenters struggled to identify any principle in the Court's jurisprudence that compelled a different result. Justice O'Connor, who ironically authored the Court's unanimous opinion in *Midkiff*, argued that economic-development takings were only permissible to alleviate affirmative harm to society that emanates from a property's pre-condemnation use.[63] In *Berman*, however, the Court allowed the condemnation of a department store near a blighted area that, by the Court's own admission, was not itself blighted.[64] Moreover, Justice O'Connor's public-harm test ignores states' historical police power to abate nuisances without paying property owners a cent of compensation.[65] Justice Thomas's dissent is perhaps most telling. After surveying the Court's takings jurisprudence from *Fallbrook* to *Midkiff*, he concluded that the Court should "revisit [its] Public Use Clause cases and consider returning to the original meaning of the Public Use Clause."[66] In essence, Justice Thomas saw no way around the majority holding aside from overturning one hundred years of the Court's takings jurisprudence.

III. PRIVATE–PUBLIC PARTNERSHIPS, OR CRONY CAPITALISM? ARGUMENTS FOR AND AGAINST ECONOMIC-DEVELOPMENT TAKINGS

Defending the ultimate result in *Kelo* is a lonely endeavor. From Richard Epstein and Sen. John Cornyn (R-TX) on the right, to the

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

64. Berman v. Parker, 348 U.S. 26, 34–36 (1954).

65. Richard A. Epstein, *Public Use in a Post-*Kelo *World*, 17 SUP. CT. ECON. REV. 151, 168 (2009).

66. *Kelo*, 545 U.S. at 514–21 (Thomas, J., dissenting).

NAACP and Rep. Maxine Waters (D-CA) on the left, pundits and politicians across the political spectrum have attacked *Kelo*'s reasoning and attempted to legislate away its effects.[67] However, critics eager to eliminate economic-development takings altogether should take care to consider the consequences of such a measure before proceeding haphazardly. To that end, this Part briefly surveys the theoretical and practical considerations that justify the use of eminent domain for economic development. It also discusses the leading arguments for limiting the government's condemnation authority in this arena. This discussion is not intended to be exhaustive, but it provides context for the policy critiques and proposals that follow in Parts IV and V.

A. Rationale Supporting Economic-Development Takings

For a variety of reasons, economists and jurists have long supported the use of eminent domain for urban renewal and economic development. Economists typically focus on the difficulty of assembling contiguous property for large-scale development projects. Because one stubborn property owner can scuttle a socially valuable investment, they argue, the visible hand of government is necessary to correct the market's failure in such instances. Other scholars point out the significant costs associated with urban sprawl, contending that eminent domain is one of the few viable solutions available to urban planners. Finally, recent scholarship suggests that trimming the government's eminent-domain authority may paradoxically provide less protection for private-property owners.

1. The holdout problem: Eminent domain corrects market inefficiencies

The "holdout problem" is perhaps the principal justification for allowing municipalities to exercise their condemnation authority for redevelopment projects. Highways, railroads, shopping centers, and

67. Richard Epstein and the NAACP both submitted amicus briefs supporting the *Kelo* petitioners. Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (2005) (No. 04-108) (Epstein wrote the brief for the Cato Institute); Brief of Amici Curiae NAACP et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (2005) (No. 04-108). Rep. Waters (D-CA) and Sen. Cornyn (R-TX) both introduced bills to limit states' use of eminent domain for economic development. H.R. 3315, 109th Cong. (2005) (Rep. Waters's bill); S. 1313, 109th Cong. (2005) (Sen. Cornyn's bill). For a discussion of the broad opposition to *Kelo* on both the right and the left, see Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1418 (2006).

other large-scale projects require developers to assemble contiguous parcels of land. In some instances, one property owner's refusal to sell can lead to delays, increased costs, or the potential failure of a project.[68] The holdout problem arises when owners in such a position demand a price much higher than the amount that would persuade them to sell their property under ordinary circumstances. If owners' demands raise the costs of the project prohibitively, the developer may pull the plug, and society forgoes a transaction that could have left everyone involved better off. A brief numerical example demonstrates the nature of the problem and why eminent domain represents an economically efficient[69] solution.

Suppose a developer needs one hundred parcels for a project with a net present value of $700,000. That figure includes expected future revenue and expenses, including the expected cost of land purchases. The planned development will add several hundred jobs to the local economy and increase the surrounding property values. The developer purchases the first fifty parcels near their $10,000 market value without much difficulty. However, as other owners learn of the developer's plans, the developer notices it must offer higher prices to convince each additional buyer to sell. Instead of $10,000, the developer pays $20,000 for the next twenty-five properties, $250,000 more than it anticipated. The next fifteen properties cost $25,000, an additional $225,000 in unexpected costs. The last ten property owners demand $35,000, bringing the total unexpected cost of the project to $725,000, and rendering what was once a profitable endeavor a net loss. Accordingly, the developer declines to purchase the final ten properties and scraps its plans for the immediate future.

Many of the owners in the example may have demanded prices above market value because the higher price reflected a subjective premium—reasons that the owner had not already sold for market

68. *See* Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 160 (2007).

69. The two most common formal definitions of efficiency are Pareto efficiency and Kaldor-Hicks efficiency. A transaction is Pareto efficient if the welfare of some improves without the welfare of anyone else declining. Kaldor-Hicks efficiency is less exacting—if a transaction produces a welfare surplus to some of sufficient magnitude to exceed the losses suffered by others, the test is satisfied, and the transaction is "efficient." *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 42, 51–52 (Geoffrey R. Stone et al. eds., 1992).

value, like sentimental attachment, relocation costs, or the land's unique suitability to her needs.[70] However, it is also quite possible that a substantial portion of the last fifty sellers were willing to move at $10,000 or $12,000, but they demanded higher prices because they knew the developer could not proceed without each parcel in the neighborhood; they were "holding out" for the developer's highest offer. The result is that ten property owners prevent a Pareto-efficient[71] transaction—property owners would have received a payment high enough to make them better off after selling their properties, and the surrounding community would have enjoyed higher property values and increased employment. To correct this market inefficiency, many economists argue that state and municipal governments should step in and wield their condemnation authority to force the holdouts to move.[72]

2. Eminent domain is the only viable solution to urban sprawl

In addition to correcting market inefficiencies, those who support broad use of eminent domain point out the practical difficulties of urban planning, particularly the problem of avoiding urban sprawl and its associated costs.[73] Urban sprawl results as people migrate to lower-density housing further away from the city's core. Traffic congestion, increased infrastructure costs, and pollution soon follow.[74] One scholar notes that the average daily commute in Atlanta is 36.5 miles, and Washington, D.C. residents waste seventy-six hours per year sitting in traffic at a cost of $1260 per person.[75] Nationwide, one researcher estimated that lost time and fuel resulting from urban sprawl costs $72 billion per year.[76]

In order to avoid urban sprawl, city planners argue that they need the ability to revitalize stagnant urban areas through eminent

70. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 538 (2006).

71. *See supra* note 69.

72. *See, e.g.*, Steven Shavell, *Eminent Domain Versus Government Purchases of Land Given Imperfect Information About Owner's Valuations*, 53 J.L. & ECON. 1, 18 (2010).

73. *See* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000).

74. *Id*. at 875–76.

75. *Id*. at 875.

76. *Id*.

domain—such efforts stimulate employment, educational opportunities, and provide other public services that attract middle-class residents that would have otherwise moved to the suburbs.[77] One prominent example of what urban planners want to avoid through such measures are cities along America's rust belt, like Detroit, Michigan. The Motor City has hemorrhaged residents since the 1950s, falling from a population high of almost 2 million to just 714,000 in 2010.[78] Detroit has 60,000 empty houses that attract crime, and plunging property values depress municipal tax revenue that funds the city's schools.[79] Contrast that description with Pittsburgh, a city that has faced similar economic hardship. In the last decade, it seized 1,000 acres of blighted industrial land, transforming it into thriving commercial space, which resulted in $4.8 billion in economic development.[80] Urban planners point to Pittsburgh as an eminent domain success story—a city that developed a thriving health and technology sector to replace a dying manufacturing industry and thereby avoided the fate of cities like Detroit.[81]

3. Allowing economic-development takings actually protects private property

While most justifications for allowing economic-development takings focus on efficiency and rational organization, other scholars have argued that restricting the scope of condemnation authority would ironically provide fewer protections for property owners.[82] What the government is not allowed to do with eminent domain, it can accomplish through zoning, taxation, or legislation redefining

77. Edward Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1034–35 (2008).

78. *The Parable of Detroit: So Cheap, There's Hope*, ECONOMIST, Oct. 22–28, 2011, at 31.

79. *Id.*

80. *Other Shrinking Cities: Smaller is More Beautiful*, ECONOMIST, Oct. 22–28, 2011, at 32, 34.

81. *Id.* Of course, it is worth noting that Detroit's now infamous use of eminent domain to foster economic development produced fewer jobs than headlines. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981); Cohen, *supra* note 70, at 545 (noting that Detroit's efforts to condemn property for General Motors displaced 4,000 residents, destroyed 1,400 homes, between 140 and 600 businesses, and resulted in creating just 2,500 jobs, nearly 4,000 fewer than promised).

82. *See* Bell & Parchomovsky, *supra* note 67.

property rights, none of which provide compensation to aggrieved property owners.[83] Thus, all else being equal, property owners would prefer suffering deprivation through a taking instead of taxation or burdensome zoning regulations.[84] Property rights advocates should, these scholars argue, push for an expansive reading of public use that encompasses as much government activity as possible, not limits to condemnation authority.

B. The Case Against Economic-Development Takings

For a variety of reasons, scholars from across the ideological spectrum oppose the use of eminent domain for economic development. Some libertarians concede the theoretical justification for such takings, but they argue that practical political realities create perverse incentives that offset any efficiency gains that may result from a taking.[85] Liberals, on the other hand, object to the disproportionate impact economic-development takings have on minorities and the poor.[86]

1. There is no guarantee that economic-development takings actually lead to economically efficient outcomes

As noted above, one of the principal justifications for allowing takings for economic development is to alleviate market inefficiencies produced by the holdout problem.[87] Libertarians point out that

83. *Id*. at 1426–33. It is worth noting that this argument overlooks the potential that abusive regulations of the sort that the authors describe would constitute regulatory takings. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) ("[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land.") (internal citations omitted).

84. Bell & Parchomovsky, supra note 67, at 1426.

85. *See, e.g.*, Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 7–8 (2006); Carrie B. Kerekes, *Government Takings: Determinants of Eminent Domain*, 13 AM. L. & ECON. REV. 201 (2011).

86. *See, e.g.*, Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 495 (1976) (concluding that owners of less valuable properties are systematically undercompensated compared to higher value property owners); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 32–35 (2003) (noting that urban redevelopment projects have historically affected ethnic minorities disproportionately).

87. *See supra* Part III.A.1.

political realities surrounding actual takings produce perverse incentives that lead governments and developers to approve inefficient projects. They also argue that developers have other tools to overcome the holdout problem effectively without resorting to eminent domain.

Neither the developer nor the government has any way of knowing whether a recalcitrant property owner is a holdout or simply unwilling to part with his property at fair market value. If the owner values the property at a price higher than the condemning authority is willing to pay, a forced transfer is inefficient[88] and socially undesirable,[89] but it also produces a windfall for the organization effectuating the taking.[90] Consequently, even in the absence of a holdout problem, developers and municipalities will always prefer forced condemnations to voluntary purchases. Furthermore, there are reasons to believe that under-compensation of the sort described here is the norm, not the exception.[91] To make matters worse, the parties that typically benefit the most from a taking are not required to reimburse the state for the cost of condemnation. In effect, economic-development takings allow developers to acquire land for free, leading them to lobby for more condemnations than the benefit of redevelopment would justify.[92]

88. Notice that such a transfer is not Pareto efficient, and it may not satisfy the Kaldor-Hicks test either. *See supra* note 69 and accompanying text. That is, the government is better off having acquired the property for a development project, but the owner is unambiguously worse off after receiving compensation lower than he valued his property. The transfer will satisfy the Kaldor-Hicks test only if the benefits resulting from the project outweigh the harm to owners resulting from under-compensation.

89. *See* Kelly, *supra* note 85, at 6–7.

90. The windfall is equal to the difference between the price the owner would have demanded absent the taking and the price paid as just compensation.

91. *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is therefore 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. Many owners are 'intramarginal,' meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not 'for sale')."); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 107–08 (2006) (explaining that possession itself naturally increases an owner's valuation of her own property beyond what an outsider would attach to it); Kelly, *supra* note 85, at 6–7 (noting that market value cannot measure an owner's subjective valuation of his property).

92. Kelly, *supra* note 85, at 7–8.

There is some anecdotal evidence to support this proposition. The redevelopment project in *Kelo* has resulted in no actual development on what are now vacant lots previously owned by the petitioners.[93] Additionally, the party that stood to benefit the most from the condemnation, pharmaceutical giant Pfizer, closed its New London research development headquarters in 2009.[94] Detroit's failure to kick-start its local economy through condemning thousands of homes on behalf of General Motors is also well chronicled.[95]

In addition to failing to produce tangible public benefits, some scholars argue that eminent domain is not even necessary to overcome the holdout problem in the first place.[96] From an efficiency standpoint, transfers should only occur if the developer's offer price exceeds the owner's valuation of the property.[97] Recall that "holdouts" are not problematic because they refuse to sell; they are problematic because they refuse to sell even when a developer offers a price higher than the holdouts' valuation of the property.[98] Because the holdout problem arises when owners become aware that their parcels are indispensable to large development projects, developers can effectively eliminate the holdout problem through use of secret land purchasing agents. Existing owners never realize the agents are assembling parcels for a large project, and in many cases, neither do the agents themselves.[99] As a result, no purchaser has an incentive to artificially inflate her price, the developer fully compensates each owner, and the project only goes forward if the expected profits from the investment justify the expense of the project—a Pareto-efficient outcome. If a developer is unable to offer each individual owner a satisfactory price through secret land purchases, that means each refusing landowner's true valuation of her property exceeded the developer's willingness to pay.

93. Epstein, *supra* note 65, at 165–66.

94. Editorial, *Pfizer and Kelo's Ghost Town*, WALL ST. J., Nov. 11, 2009, at A20.

95. *See* Cohen, *supra* note 70, at 545.

96. Kelly, *supra* note 85, at 20–22; Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 S. CT. ECON. REV. 183, 203–10 (2007).

97. Kelly, *supra* note 85, at 19.

98. *See supra* notes 66–71 and accompanying text.

99. Kelly, *supra* note 85, at 21 n.110 (explaining Disney's double-blind purchasing agent system, where neither the property owners nor the purchasing agents were aware that properties were being assembled for a larger project).

Consequently, forcing them to move at any price would not be a Pareto-efficient outcome. Of course, depending on the value of the project, such an outcome may not satisfy the Kaldor-Hicks test.

2. The disparate impact of economic-development takings on minorities and the poor

Not only is there evidence that economic-development takings produce rather-than-correct market inefficiencies, but many commentators also point out that such takings disproportionately target poor minority communities.[100] For instance, one of the country's first large urban redevelopment projects in New York City uprooted 11,000 working-class families, replacing them with 8756 middle-class families.[101] Several years later, ten of the eleven neighborhoods singled out by Los Angeles for condemnation and redevelopment had majority Hispanic or black populations.[102] Similarly, Chicago's efforts to redevelop its south side almost completely overlaid the area's predominantly black neighborhoods.[103]

To make matters worse, the populations most likely to be subject to development condemnations are also those most likely to lack the resources necessary to launch legal challenges to protect their rights.[104] An owner who wants to keep her property might seek an injunction to prevent the taking, but even a successful action would not generate money damages to attract attorneys to take the case on a contingent-fee basis.[105]

IV. INADEQUACY OF PREVIOUSLY PROPOSED SOLUTIONS

Proposals to curb the use of eminent domain in the wake of *Kelo* are too voluminous to treat exhaustively. However, the most practically relevant proposals are recently enacted state legislation,

100. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 55–56 (1993); Imperatore, *supra* note 77, at 1033–34;Munch, *supra* note 86, at 495 (finding that owners of less valuable properties are systematically undercompensated); Pritchett, *supra* note 86, at 32–35.

101. Pritchett, *supra* note 86, at 33.

102. *Id*. at 33–34.

103. *Id*. at 34–35.

104. Imperatore, *supra* note 77, at 1034.

105. *Id*.

which purport to limit condemnation authority for economic development, and H.R. 1433, which is now in its third iteration and currently stalled in the House of Representatives.[106] This Part first presents the results of an exhaustive survey of all fifty states' eminent-domain regimes. It then examines the weaknesses in federal-reform efforts. Despite the flood of post-*Kelo* reforms from state legislatures across the country, more than two-thirds of the resulting legislation is largely cosmetic. Additionally, despite bipartisan support for eminent-domain reform on the federal level, Congress has been unable to pass H.R. 1433 in its last three sessions, and the bill's substantive protections are fairly modest.

A. State Constitutional Amendments and Statutory Bans: Too Far or Not Far Enough?

State reform efforts have generally targeted three types of eminent domain abuse: (1) expansive public-use definitions that include enhanced tax revenue or employment opportunities to the general public, which allows condemned property to be transferred to private developers; (2) vague definitions of blight that enable municipalities to condemn virtually any type of property and convey it to private developers; and (3) urban redevelopment statutes that allow municipalities to condemn entire neighborhoods in which a sufficient proportion of parcels meet the state's blight definition. Without substantive protection in each of these categories, reforms in the other two are largely ineffectual. For instance, many states prohibit any condemnation that results in a transfer from one private entity to another, yet provide an exception for takings that eliminate blight.[107] If a vague blight definition covers most residential property,[108] any protection against condemnations for private development is largely hollow. Similarly, even a narrow blight definition coupled with a ban on economic-development takings fails to protect all property owners if a municipality can condemn non-

106. *See infra* note 131.

107. *See, e.g.*, MO. REV. STAT. §§ 523.271, 523.274, 99.805 (2012).

108. Many states' blight definitions are so vague that most property satisfies their criteria. Courts have concluded that Times Square and downtown Las Vegas were 'blighted," justifying condemnations to make way for the New York Times's new headquarters in Manhattan and several new casinos on the strip. City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12–15 (Nev. 2003); W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 125–26 (N.Y. App. Div. 2002), *cited in* Somin, *supra* note 4, at 2121.

blighted property located in an area predominated by blighted conditions.[109]

Unfortunately, few state reform packages provide comprehensive protection. Table 1 summarizes the results of an exhaustive survey of eminent domain reform efforts across the country. Of the forty-four states that have passed eminent domain reform in response to *Kelo*, only thirteen provide substantive protection against each of the potential abuses mentioned above;[110] nineteen states do not provide meaningful limits on economic-development takings, thirty-six states have blight exceptions with vague definitions of blight, and thirty-one allow non-blighted property to be condemned and conveyed to a private developer if it is located in a blighted area.[111]

Table 1—Summary of post-*Kelo* eminent-domain legislation

Number of states that have passed reform	44
Number of states that do not meaningfully limit economic-development takings	19
Number of states with a blight exception and vague blight definitions	36
Number of states that allow non-blighted property to be taken in a blighted area	23
Number of states with substantive provisions in each category	13

1. States that failed to meaningfully limit economic-development takings

Many states have passed measures that purport to limit authority to condemn private property for economic development, but the statutory language employed provides condemning authorities with plenty of wiggle room to seize property and convey it to private developers. In Wisconsin and Oregon, property cannot be

109. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 34–36 (1954) (holding that a non-blighted department store could be condemned as part of a city's plan to redevelop a blighted neighborhood).

110. See Appendix A for a summary of reform efforts in all fifty states.

111. *Id.*

condemned if the government "intends" to convey or lease the property to a private entity at the time of the condemnation.[112] Despite the ostensible protections against private-to-private takings the language provides, it is not difficult to imagine problematic scenarios. A municipality may seize land for a public project but later find that it does not have adequate funding. A subsequent conveyance to a private entity for development would be exactly the type of taking at issue in *Kelo*, but the problematic "intent" language would not prohibit it. Similarly, statutes in Missouri, Nebraska, and Ohio only prohibit takings that are "primarily" or "solely" for the purpose of economic development.[113] Creative city councils could easily skirt these statutory protections by asserting that a private-to-private taking enhances public health, safety, or any other purpose related to a traditional state-police power. Finally, Indiana, Kansas, and Louisiana enacted statutes that ban takings whose primary purpose is to enhance tax revenue or employment, but they provide exceptions for "certified technology parks," legislative authorizations, and "industrial plant sites," respectively.[114]

2. States that employ over- or under-inclusive definitions of blight

While a substantial number of states have managed to pass legislation that meaningfully limits economic-development takings, many of them provide exceptions for blight removal, and many of them define blight in a way that could apply to almost any property within its borders. For example, North Carolina bans the use of eminent domain against parcels that are not blighted,[115] but it defines blight as the presence of any one of several vague factors such as "dilapidation," "age," or "obsolescence" that "impairs the sound growth of the community, is conducive to ill health " or "is detrimental to the public health, safety, morals, or welfare . . . ."[116] New Hampshire's blight definition is probably worse, including such factors as "dilapidation, obsolescence, overcrowding, faulty

112. *See* OR. REV. STAT. § 35.015 (2010); WIS. STAT. § 32.03 (2011).

113. *See* MO. REV. STAT. §§ 523.271, 523.274, 99.805 (2012); NEB. REV. STAT. §§ 76-710.04, 18-2103(11) (2010); OHIO REV. CODE ANN. §§ 163.01, 1.08 (West 2007).

114. IND. CODE §§ 32-24-4.5-1, 32-24-4.5-7 (2006); KAN. STAT. ANN. §§ 26-501a, 26-501b (2006); LA. CONST. art. I, § 4, art. VI, § 21.

115. N.C. GEN. STAT. §§ 160A-515, -512(6) (2012).

116. *Id.* § 160A-503(2).

arrangement or design," "excessive land coverage," "deleterious land use or obsolete layout," or any other factors that are "detrimental to the safety, health, morals, or welfare of the community."[117] Such an expansive blight definition eviscerates otherwise strong state constitutional protections that prohibit takings that transfer property directly or indirectly to an entity for private development or private use.[118]

Other states have either established narrow statutory definitions of blight or prohibit the use of condemnation authority for blight removal altogether. Arizona requires that any blighted condition constitute "a direct threat to public health or safety," while Georgia requires the presence of at least two of six factors, the majority of which involve affirmative harm to the public.[119] Florida and New Mexico are two of four states that do not allow municipalities to eliminate blight through eminent domain.[120] New Mexico provides municipalities with "all the powers, other than the power of eminent domain, necessary or convenient" to carry out redevelopment projects,[121] and Florida does not allow condemning property for the purpose of eliminating blight.[122] While property rights activists have lauded efforts in both states as a model for the rest of the country,[123] these measures will diminish municipalities' ability to deal with actual blight and urban sprawl,[124] or may paradoxically prompt city councils to adopt vague nuisance ordinances to deal with problems they

117. N.H. REV. STAT. ANN. §§ 205:2, 205:3–a (2012).

118. N.H. CONST. pt. I, art. 12-a.

119. ARIZ. REV. STAT. ANN. § 12-1136(5)(iii) (2006); GA. CODE ANN. § 22-1-1 (2006) (defining blight as the presence of any two of the following conditions: (i) uninhabitable, unsafe, or abandoned structures; (ii) inadequate provisions for ventilation, light, air, or sanitation; (iii) an imminent harm to life or other property caused by a natural disaster; (iv) a site identified by the Environmental Protection Agency as a Superfund site; (v) repeated illegal activity on the individual property of which the owner knew or should have known; or (vi) maintenance of property violates municipal building codes for at least one year after notice of the violation).

120. The other two are North Dakota and South Dakota. *See* N.D. CONST. art. I, sec. 16; N.D. CENT. CODE § 32–15–01 (2007); S.D. CODIFIED LAWS §§ 11–7–22.1, 11–7–22.2 (2006).

121. N.M. STAT. ANN. § 3-60A-10 (2007).

122. FLA. STAT. §§ 73.013 to .014 (2006).

123. *See Legislative Center*, CASTLE COALITION, www.castlecoalition.org/legislativecenter (grading both states' reform efforts as some of the most effective in the country) (last visited Jan. 2, 2012).

124. *See supra* Part III.A.2.

previously remedied with compensated takings.[125] Utah's state legislature may have experienced such problems first hand, as it reversed a prohibition on blight condemnations just two years after its initial enactment.[126]

3. States that allow blight takings of non-blighted property

Several states that provide otherwise exemplary protections against private-to-private takings in addition to narrow blight exceptions also allow municipalities to take non-blighted property located in blighted areas. Nevada's state constitution prohibits the direct or indirect transfer of any interest in property taken in an eminent domain proceeding to another private party, and its blight definition requires an immediate threat to public safety.[127] However, the state allows condemning authorities to acquire non-blighted properties through eminent domain if the property is located in an area in which at least two-thirds of the surrounding parcels are blighted.[128] Similarly, West Virginia, whose blight definition is somewhat less inclusive than Nevada's, allows the government to take non-blighted property if it can show that there are no available alternative sites in the blighted area and it has taken every reasonable effort to avoid resorting to eminent domain.[129] Even Utah, which has a fairly narrow public-use definition, allows private owner-occupied homes to be condemned if eighty percent of the property owners in the area voice their approval.[130] Thus, even in states that appear to provide some of the strongest private property protections in the country, a model property owner could still face condemnation if enough of her neighbors allow their property to deteriorate, or, at least in Utah, prefer she move elsewhere.

125. *See supra* Part III.A.3.

126. *See* UTAH CODE ANN. §§ 78B-6-501, 17C-2-601 (LexisNexis 2012); *Legislative Center: Utah*, CASTLE COALITION, www.castlecoalition.org/about/1373 (last visited Jan. 2, 2012).

127. NEV. CONST. art. I, § 22; NEV. REV. STAT. § 37.010 (2011).

128. NEV. REV. STAT. § 279.471 (2011).

129. W. VA. CODE §16-18-6a (2008); W. VA. CODE §§ 54-1-2, 16-18-3 (2006).

130. UTAH CODE ANN. §§ 17C-2-601, 78B-6-501 (LexisNexis 2012).

B. The Feds Fall Short: The Private Property Rights Protection Act (H.R. 1433)

At least with respect to potential impact and precise statutory drafting, federal efforts to eliminate economic-development takings show more promise than the state legislation described above; that is, if Congress ever decides to pass them. Despite bipartisan support from co-sponsors as ideologically diverse as Rep. Maxine Waters (D-CA) on the left and Rep. Lamar Smith (R-TX) on the right, H.R. 1433, Congress's latest effort at eminent domain reform, has stalled in the House Judiciary Committee.[131] Previous efforts as early as 2005 have met similar fates.[132]

Setting politics aside, H.R. 1433 largely avoids many of the pitfalls that plague state legislation. The bill prohibits federal and state authorities from using eminent domain authority for economic development and authorizes property owners to file suit against state agencies in the event of such a taking.[133] Its definition of economic-development takings avoids the problematic 'intent' and 'purpose' language that plagues some state statutes, focusing instead on takings that result in the conveyance or lease of property from "one private person or entity to another . . . for commercial enterprise . . . or to increase tax revenue, tax base, employment, or general economic health."[134] The bill includes exceptions for traditional public works projects[135] and blight, but H.R. 1433's blight exception requires "harmful uses of land [that] . . . constitute an immediate threat to public health and safety."[136] Thus, the bill provides meaningful limits on economic-development takings, has a narrow definition of blight, and does not allow the taking of non-blighted properties near blighted areas—so far so good.

Unfortunately, H.R. 1433 does not have any real teeth, and its enforcement mechanisms are probably inadequate. States that violate

131. *Bill Summary and Status, H.R. 1433, 112th Cong. (2011)*, THOMAS.LOC.GOV, thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01433:@@@X (last visited Jan. 2, 2012).

132. *See supra* note 67.

133. Private Property Rights Protection Act of 2012, H.R. 1433, 112th Cong. §§ 2–4 (2012), *available at* http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1433:.

134. *Id.* § 9(1).

135. *Id.* § 9(1)(A) (allowing exceptions for public ownership, hospitals, roads, airports, common carriers, flood control, abandoned property, and other non-private uses).

136. *Id.* § 9(1)(B).

its provisions lose "federal economic-development funds" for up to two years.[137] While it is not clear which federal grants would be included in that definition, one scholar has estimated that the total amount of money at stake nation-wide is just $7.4 billion, or 1.8% of all federal grants to states and municipalities in 2005.[138] Additionally, because the bill allows states to restore their funding by returning "all real property[,] the taking of which was found by a court of competent jurisdiction to have constituted a violation" of H.R. 1433,[139] states can easily avoid sanctions for any takings for which the owner did not file suit under federal law, and the bill's enforcement provisions certainly do not encourage lawsuits. That is, although H.R. 1433 purports to create a private cause of action, its language seems to authorize injunctive relief, not money damages.[140] Consequently, because the victims of eminent domain abuse typically cannot afford to hire an attorney,[141] many potential plaintiffs are unlikely to obtain counsel that would otherwise be available for a contingent fee.

Perhaps not wholly unaware of these problems, H.R. 1433's drafters included provisions that allow the attorney general to receive reports from aggrieved property owners and file lawsuits against state agencies on their behalf.[142] While certainly an improvement, federal law enforcement agencies are already overburdened, especially considering rising threats posed by international terrorism and cyber-crime.[143] If large-scale financial fraud is currently at the bottom of federal investigative priorities lists,[144] it is not hard to predict where a $200,000 residential property taking would end up.

V. CONCLUSION: PROPOSING A PRACTICAL, POLITICALLY VIABLE NATIONAL SOLUTION

This Comment has pointed out a number of issues that need to be addressed in any effective eminent domain reform effort. First, a

137. *Id.* §§ 2(b), 9(2).

138. Somin, *supra* note 4, at 2150–51.

139. H.R. 1433 § 2(c).

140. *Id.* § 4(a).

141. *See supra* Part III.B.2.

142. H.R. 1433 § 5.

143. U.S. DEP'T OF JUSTICE, FOLLOW-UP AUDIT OF FBI PERSONNEL RESOURCE MANAGEMENT AND CASEWORK 8–14, 17–21 (April 2010).

144. *Id.* at 8, 28–29.

century of Supreme Court public-use jurisprudence has clearly established an expansive reading of the Fifth Amendment, making the prospect of substantive change through the courts dubious at best;[145] legislative efforts are thus the preferred course. Second, under most state eminent domain regimes, private developers have no skin in the game; they acquire costless land through condemnation, leading them to lobby for excessive takings.[146] Third, there are compelling reasons why an absolute ban on takings for economic development, including blight removal, would be misguided.[147] Fourth, piecemeal reform efforts at the state level have led to comprehensive protections in just thirteen states, no protection in six states, and overprotection in four states,[148] making federal legislation the most promising avenue for effective reform. Fifth, optimal eminent domain reform probably includes a ban on economic-development takings, a narrowly defined blight exception, and protections that prohibit non-blighted properties near blighted areas from being condemned. Sixth, federal legislation must impose meaningful penalties for violations and provide money damages to promote adequate enforcement. Finally, and perhaps most importantly, any proposed legislation must generate enough bipartisan support to actually become law. This Part puts forward a tentative proposal that addresses each of these issues, modeled loosely on shareholder derivative suits.

Generally, shareholder derivative suits allow a company shareholder to sue an executive on behalf of the corporation. In most cases, the plaintiff does not receive any damages, which are instead remitted to the company. Before the suit can go forward, the shareholder must ask the company to take action; if it refuses, the litigant can proceed with her suit.[149] Several aspects of this framework, coupled with an effective definition of blight and public

145. *See supra* Part II. It is also worth noting that the Court has applied rational-basis review to economic legislation for almost a century, *see* Nebbia v. New York, 291 U.S. 502 (1934), and economic-development takings naturally fall in that category. Persuading even the Court's most conservative members to overturn such an entrenched fixture of constitutional law is unlikely.

146. *See supra* Part III.B.1.

147. *See supra* Part III.A.

148. *See supra* Part IV.A.

149. *See generally* DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS LAW AND PRACTICE (2011).

use, provide a useful starting point for a practical, politically viable solution to the economic takings problem that addresses each of the issues identified above.

To begin with, takings that result in the transfer of property from one private entity to another should be prohibited. To that end, the statute's public-use definition should largely conform to H.R. 1433's language outlining permissible takings.[150] The statute should also include a narrowly defined blight exception, allowing condemned property to be transferred to private developers only if the parcel's current use constitutes an immediate threat to public health and safety. Condemnation of non-blighted property should be prohibited, and no public entity should be allowed to condemn non-blighted property because of its proximity to blighted parcels.

Additionally, the statute should require developers and municipalities in every condemnation proceeding to file a pre-condemnation report in the state's real property recording system that details the purpose of the taking, the expected qualitative benefits, and the estimated monetary value of redevelopment. The private developer would be required to pledge collateral to cover at least half the monetary value stated in the pre-condemnation report. Any person listed in the recording system as an owner of a fee simple estate or other interest in the condemnation area would have a private cause of action if the taking was either not for public use as provided in the statute, or the benefits of the development failed to accrue within a reasonable time after the condemnation. A successful litigant would be entitled to her pro rata share[151] of the monetary value stated in the pre-condemnation report, and each owner of an interest in the condemned area would automatically receive her own pro rata share of the funds upon the conclusion of a successful lawsuit regardless of whether the owner was party to the suit. Courts would be free to impose punitive damages on parties that

150. Private Property Rights Protection Act of 2012, H.R. 1433, 112th Cong. § 9(1)(A) (2012), *available at* http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1433: (allowing takings for public ownership, availability to the general public, public transportation, public infrastructure, incidental private use in a publicly owned building, acquiring abandoned property, public utilities, and clearing defective titles).

151. To calculate each owner's pro rata share, the value of each parcel in the condemned area would be added up, and the value of each owner's interest would be divided by the total value, yielding a percentage of the total value. For instance, if an owner's condemned property was worth $100,000 in a condemned area with a total value of $1,000,000, she would be entitled to ten percent of the monetary value listed in the pre-condemnation report.

intentionally understate the benefits of a redevelopment project in the pre-condemnation report. Procedurally, an aggrieved property owner would first be required to approach the condemning authority, state the basis of her claim, and request that the public and private entity involved in the condemnation pay each owner his or her pro rata share. If the condemning authority and the developer refuse, a suit can commence. Plaintiffs' attorneys would collect a contingent fee based on the total recovery, not their client's pro rata share.

These provisions are important for several reasons. First, private developers are forced to internalize the cost of condemnations when making investment decisions, without letting state agencies off the hook. Second, condemning authorities no longer have an incentive to overstate the public benefits associated with a redevelopment project; these authorities will be liable for at least fifty cents of every dollar they overstate, and understating benefits risks the imposition of punitive damages. Third, providing money damages, automatic remittance of pro rata shares to property owners not party to the lawsuit, and attorney fees proportional to the entire award provides incentives for vigorous enforcement without burdening federal or state law enforcement agencies, and takes into account the relative poverty of those most often affected by condemnations. Fourth, the enforcement mechanism and monetary damages provisions force municipalities to carefully screen redevelopment proposals, approving only those they feel are both certain to produce their predicted benefits and strictly conform to statutory definitions of public use.

Most importantly, these provisions provide something legislators from both political parties could sell to their constituents. Liberals can claim victory for protecting minorities and the poor from crony capitalism, as well as forcing corporations to pay their fair share. Conservatives can trumpet comprehensive private property protections that forever prohibit the type of takings at issue in *Kelo*, *Midkiff*, and *Berman*. Additionally, liberals would certainly feel pressure from trial lawyer associations to approve a potential boon to the profession.

In today's hyper-partisan political environment, it is rare for liberal and conservative lawmakers to share such broad agreement on much of anything, let alone on a politicized issue like eminent domain reform. It would be a shame for legislators from both sides of the aisle to miss a historic opportunity to provide meaningful and

equal Fifth Amendment protections for property owners across the country. The Supreme Court's early takings jurisprudence unwittingly opened a veritable Pandora's box of bad policy for which a judicial remedy has proven elusive. Property rights advocates can only hope Congress finally finds the lid.

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State	Relevant statutes and Constitutional provisions	Meaningful limits on economic-development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
Alabama	ALA. CONST. art. I, § 23; ALA. CODE §§ 18-1B-2, 24-2-2, -6, 24-3-2 (2012).	Yes	Yes	Yes
Alaska	ALASKA STAT. §§ 09.55.240(d), 29.35.030 (2011); 18.55.540(a), .950(2), (14), (15) (2010).	No Prohibition is only for takings whose "purpose" is transferring title for private development.	No Blight definition includes inadequate street layout, faulty lot layout, and obsolete platting.	No
Arizona	ARIZ. REV. STAT. ANN. §§ 12-1132 (2006); 12-1136(5) (West Supp. 2011).	Yes	Yes	Yes
Arkansas	ARK. CODE ANN. § 18-15-301(a) (2003).	No Currently, property can be condemned for "wharves, levees, parks, squares, market places, or other lawful purposes."	No	No

State	Relevant statutes and constitutional provisions	Meaningful limits on economic-development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
California	CAL. CONST. art. I, § 19; CAL. CIV. PROC. CODE § 1240.010 (West 2007).	No Prohibits conveying owner-occupied residents to a private person, but exceptions eviscerate any substantive protections.	No	No
Colorado	COLO. REV. STAT. ANN. §§ 31-25-105.5 (2004); 31-25-103(2)(a)–(k.5) (West Supp. 2011).	Yes	No	No
Connecticut	CONN. GEN. STAT. § 8-127a (2007).	No Purports to limit takings whose primary purpose is increasing tax revenue, but allows condemnation whenever "public benefits . . . outweigh any private benefits"	No	No
Delaware	DEL. CODE ANN. tit. 29, § 9501A; tit. 31, § 4501(3) (2009).	Yes	Yes	Yes
Florida	FLA. CONST. art. I, § 6; FLA. STAT. §§ 73.013 to .014 (2006).	No Three-fifths vote by legislature allows conveyances to private entities.	Yes Eminent domain cannot be used to eliminate blight	Yes
Georgia	GA. CODE. ANN. §§ 8-3-31; 22-1-1(1), (4), (9)(A), -2(a) (2006).	Yes	Yes	Yes

State	Relevant statutes and Constitutional provisions	Meaningful limits on economic development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
Hawaii	No post-*Kelo* reform.	No	No	No
Idaho	IDAHO CONST. art. I, § 14; IDAHO CODE ANN. § 7-701A (2006).	No Strong statutory language, but exceptions in the constitution eviscerate any actual protection.	No Blight definition requires specific showing that property poses actual threat to building occupants, but constitution allows much broader use of condemnation authority.	No
Illinois	735 ILL. COMP. STAT. 30/5-5-5 (2007); 65 ILL. COMP. STAT. 5/11-74.4-3 (2012).	No	No	No
Indiana	IND. CODE §§ 32-24-4.5-1, -7 (2006).	Yes However, there is an exception for "certified technology parks."	Yes	Yes
Iowa	IOWA CODE §§ 6A.21 to .22, .24 (2006).	Yes	No	No Non-blighted properties can be condemned if located in an area in which 75% of the properties are blighted.

State	Relevant statutes and Constitutional provisions	Meaningful limits on economic development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
Kansas	KAN. STAT. ANN. §§ 26-501A to -501B (2007).	No Statute bans economic-development takings, but there is an exception for legislative authorizations.	Yes	Yes
Kentucky	KY. REV. STAT. ANN. §§ 416.675, 99.705, 99.725 (West 2006).	Yes	No	No
Louisiana	LA. CONST. arts. I, § 4; VI, § 21.	No Economic-development takings are banned, but there is an exception for industrial parks.	Yes	Yes While residential properties cannot be condemned for industrial parks, other types of property can.
Maine	ME. REV. STAT. tit. 1, § 816; tit. 30-A, § 5101 (2006).	Yes	No	No
Maryland	MD. CODE ANN., REAL PROPERTY § 12-105 (West 1990).	No Reform puts a 4-year time limit on condemnation authorizations.	No	No
Massachusetts	No post-*Kelo* reform.	No	No	No
Michigan	MICH. CONST. art. X, § 2; MICH. COMP. LAWS § 213.23 (2007).	Yes	Yes	Yes
Minnesota	MINN. STAT. §§ 117.012, .025, .027 (2006).	Yes	No	No
Mississippi	Mississippi Ballot Initiative #31 (2011).	Yes	Yes	Yes

State	Relevant	Meaningful	Narrow	Prohibits

	statutes and Constitutional provisions	limits on economic-development takings	definition of blight or no blight exception at all	taking of non-blighted properties in blighted areas
Missouri	MO. REV. STAT. §§ 523.271, .274, 99.805 (2006).	No Statute prohibits takings "solely for economic development," leaving municipalities some wiggle room.	No	No If 50% or more of the parcels in an area are blighted, the entire area can be condemned.
Montana	MONT. CODE ANN. §§ 70-30-102, 7-15-4206(2) (2009).	Yes	No	No
Nebraska	NEB. REV. STAT. §§ 76-710.04, 18-2103(11) (2010).	No Statute limits takings "primarily for economic development," allowing municipalities leeway to assert other qualifying purposes to justify an otherwise impermissible taking.	No	No
Nevada	NEV. CONST. art. I, § 22; NEV. REV. STAT. §§ 37.010 (2011), 279.388 (2005), 279.471 (2011).	Yes	Yes	No Non-blighted property can be acquired if located in an area in which at least two-thirds of the parcels are blighted.

State	Relevant statutes and Constitutional provisions	Meaningful limits on economic-development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
New Hampshire	N.H. CONST. PT. I, ART. 12-A; N.H. REV. STAT. ANN. §§ 203:3, 205:2, :3-A (2012).	Yes	No	Yes
New Jersey	No post-*Kelo* reform	No	No	No
New Mexico	N.M. STAT. ANN. § 3-60A-10 (2007).	Yes	Yes	Yes
New York	No post-*Kelo* reform	No	No	No
North Carolina	N.C. GEN. STAT. §§ 160A-503(2A), -512(6), -515 (2012).	Yes	No	Yes
North Dakota	N.D. CONST. ART. I, § 16; N.D. CENT. CODE § 32-15-01 (2012).	Yes	Yes	Yes
Ohio	OHIO REV. CODE ANN. §§ 163.01 (LexisNexis 2012).	No Takings are allowed for economic development if the purpose is not "solely" to increase tax revenue.	No	No Whole area can be taken if 70% of the parcels are blighted
Oklahoma	No post-*Kelo* reform	No	No	No
Oregon	OR. REV. STAT. § 35.015 (2010).	No Statute bans takings if the government has "intent" to transfer it to a private party, which may be difficult to prove.	Yes	Yes

State	Relevant statutes and Constitutional provisions	Meaningful limits on economic-development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
Pennsylvania	26 PA. STAT. ANN. §§ 202, 203, 204, 205 (West 2006).	Yes	Yes	Yes
Rhode Island	R.I. GEN. LAWS §§ 42-64.12-6 to -7 (2008).	No	No	No
South Carolina	S.C. CONST. art. I, § 13.	Yes	Yes	Yes
South Dakota	S.D. CODIFIED LAWS §§ 11-7-22.1 to .2 (2006).	Yes	Yes	Yes
Tennessee	TENN. CODE ANN. §§ 29-17-102, 13-20-201 (2006), 13-20-202 (2010), 29-17-1003 (2006).	No Prohibition on private-to-private takings includes an exception for industrial parks.	No	No
Texas	TEX. CONST. art. I, § 17; TEX. GOV'T CODE ANN. § 2206.001 (2011); TEX. LOC. GOV'T CODE ANN. § 374.003 (2011).	Yes	No	Yes
Utah	UTAH CODE ANN. §§ 17C-2-303, -601, 78B-6-501 (2011).	Yes	No	No Neighborhoods can vote to approve a private-to-private transfer.
Vermont	VT. STAT. ANN. tit. 12, § 1040; tit. 24, § 3201(3), (19)(J) (2005).	No Prohibits takings whose "primary purpose" is economic development.	No	No
Virginia	VA. CODE ANN. § 1-219.1 (2012).	Yes	Yes	Yes

State	Relevant statutes and Constitutional provisions	Meaningful limits on economic development takings	Narrow definition of blight or no blight exception at all	Prohibits taking of non-blighted properties in blighted areas
Washington	WASH. REV. CODE §§ 8.08.020, .25.290(2007).	No	No	No
West Virginia	W. VA. CODE §§ 54-1-2, 16-18-3, -6A (2006).	Yes	No	Yes However, government can condemn non-blighted property if it can show that it has taken every reasonable effort to avoid using eminent domain, and there is no alternative site available for purchase.
Wisconsin	WIS. STAT. § 32.03 (2011).	No Prohibition depends on whether the condemning authority "intends" to convey or lease the property to a private entity.	No	Yes, but only for residential properties
Wyoming	WYO. STAT. ANN. §§ 1-26-801, 15-9-133, 15-9-103 (2007).	Yes	No	Yes