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Note

Blight and Its Discontents: Awarding Attorney's Fees to Property Owners in Redevelopment Actions

*Noreen E. Johnson**

In June 2007, National City, California renewed a designation declaring two-thirds of the city blighted.¹ The city council's decision to renew this comprehensive designation came as a blow to Carlos Barragan and his son, Carlos Jr., who had spent over fifteen years building a strong after-school program for at-risk youth in their community² and finally moved the program to a newly renovated gym in 2002.³ With this declaration of blight, the Barragans faced the imminent threat that their newly renovated gym would be replaced by upscale condominiums.⁴ Despite numerous requests to the city to provide their findings of blight under the California Public Records Act,⁵ the city refused to release the results of the 2007 blight study until a few days before the hearing, making any meaningful opposi-

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1. See Inst. for Justice, *Knocking Out Eminent Domain Abuse: Youth Gym Files Suit Against National City, Calif.*, http://www.ij.org/index.php?option=com_content&task=view&id=868 (last visited Nov. 3, 2008).

2. *Id.* For the Community Youth Athletic Center (CYAC) website describing their program and the services they provide, see CYAC Programs and Events, <http://cyacboxing.org/events/> (last visited Nov. 3, 2008).

3. CYAC Boxing Timeline, <http://cyacboxing.org/media/flash/> (follow the "2002" hyperlink) (last visited Nov. 3, 2008).

4. See Inst. for Justice, *supra* note 1.

5. CAL. GOV'T. CODE §§ 6250–6276.48 (West 2008).

tion to the findings nearly impossible.⁶ To make matters worse, after the hearings, the Barragans had only ninety days to file suit before they lost their right to object.⁷

The Barragans were fortunate. A public interest law firm took their case, representing them at the public hearings related to the official determination of blight⁸ and filing a civil suit challenging the city's actions as contrary to state and federal law.⁹ As a result of their legal representation and the media backlash that came from increased public awareness,¹⁰ the developers indicated that they may be willing to build around the gym.¹¹ More importantly, the Barragans have a chance to voice their objections to the blight designation in court.¹²

Many property owners and business owners, however, are not so lucky. Given the cost and expense of mounting a legal challenge to a redevelopment project or condemnation action, it is very difficult for the average American to even consider challenging a redevelopment agency's decision.¹³ The procedures in National City and other cities across the United States make the process for opposing them so complicated and onerous that it is almost impossible for ordinary citizens to respond and object to these designations. The difficulties property owners face apply with equal force to condemnation actions, in which the property owner is made an involuntary defendant and is unlikely to capably navigate the difficult legal and factual issues

6. See Inst. for Justice, *supra* note 1.

7. CAL. HEALTH & SAFETY CODE § 33501 (Supp. 2008) (effective Jan. 1, 2007).

8. See Inst. for Justice, *supra* note 1.

9. For the official complaint filed on September 25, 2007, with the California Superior Court, see Complaint, Com. Youth Athletic Ctr v. Nat'l City, No. GIS 37-2007-00076404-CU-EI-SC (Cal. Super. Ct. filed Sept. 25, 2007), available at http://www.ij.org/images/pdf_folder/private_property/national-city/NationalCityComplaint.pdf.

10. For an example of the media backlash against National City's actions, see Rick Reilly, *An Unfair Fight*, SPORTS ILLUSTRATED, Aug. 13, 2007, at 88.

11. Tanya Sierra, *Developer Won't Oust Popular Gym; He'll Build Project Around It*, SIGNONSANDIEGO.COM, Aug. 30, 2007, http://www.signonsandiego.com/uniontrib/20070830/news_1m30ncgym.html.

12. The case is currently on appeal after being dismissed by the district judge on a technicality in February 2008. See Inst. for Justice, *Eminent Domain Case Dismissed on Technicality, Gym Will Appeal* (Feb. 15, 2008), http://www.ij.org/index.php?option=com_content&task=view&id=869&Itemid=165.

13. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887–90 (2007) (suggesting that many individuals, particularly owners of low-value lots, lack the resources to mount a viable challenge to a redevelopment project).

of “public use”¹⁴ and “just compensation”¹⁵ without hiring a lawyer.

Part I of this Note reviews the development of the public-use doctrine of eminent domain, including its crystallization in the Supreme Court’s 2005 decision in *Kelo v. City of New London*.¹⁶ It explores the development of the justifications for urban renewal from the elimination of blight to pure economic development, and it discusses the states’ backlash against *Kelo* which has resulted in a plethora of new laws and additional substantive and procedural protections for property owners. Finally, this Part discusses the difficulties that a property owner may face in challenging a finding of public use or a condemnation award.

Part II suggests that, while state reform efforts have provided significant additional protections to property owners, they are frequently poorly implemented, thus undermining the efforts of the state legislatures. It analyzes several proposals that have been made to improve implementation of these laws and argues that a simple fee-shifting statute, providing that litigation expenses be paid by the condemning authority in certain cases, would be the most efficient means for states to reinforce these reforms. While some states have utilized fee shifting in eminent domain proceedings since the 1970s,¹⁷ very few scholars have examined the intersections of these two bodies of law, despite the increased attention to eminent domain reform in the wake of *Kelo*. This is an important gap in the scholarly literature because fee shifting represents a practical and effective solution to some of the problems posed by redevelopment and could be easily employed alongside other eminent domain reforms. This Note concludes with a useful model state statute, which would allow property owners to claim their rights under state law by improving their access to legal representation.

This issue of eminent domain reform was never more relevant than it is today. Over the three years since *Kelo*, almost every state has either reformed or considered reforming its eminent domain code¹⁸ and state courts have begun to scrutin-

14. See U.S. CONST. amend. V.

15. See *id.*

16. 545 U.S. 469 (2005).

17. See, e.g., OKLA. STAT. tit. 27, § 11 (2001) (enacted 1971).

18. See CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 1–4 (2007) (providing a comprehensive fifty-state survey of changes to state eminent domain laws since *Kelo*).

ize these cases more carefully than in years past.¹⁹ The increased attention state legislatures and courts are paying to this issue is likely due to the fact that people across a broad spectrum of political values and beliefs are concerned about the inappropriate use of eminent domain.²⁰ Surveys suggest that eighty-one percent of the American population opposes the *Kelo* decision,²¹ and the overwhelming opposition to the decision crosses both race and political party lines.²² Thus, state legislatures are now actively considering ways to reform their eminent domain code to protect the rights of property owners, both substantively and procedurally. Yet despite the increased attention to the issue of eminent domain, only a small group of states have enacted or amended fee-shifting statutes as part of their reform efforts.²³ Thus, while a substantial minority of states have fee-shifting statutes on the books,²⁴ many of these statutes have not been updated since *Kelo*.²⁵ A careful look at these statutes, both recent and older, suggests that a number of them could be significantly improved to better address the concerns raised by *Kelo*.²⁶ Moreover, over half of states do not provide for fee shifting in the eminent domain context at all.²⁷

19. See, e.g., Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 673 (2008) (“The public, legislative, and judicial reaction to *Kelo* was significant and swift. Throughout the country, the public, state legislatures, and state courts were quick to take up Justice Stevens’ invitation to narrow what constitutes a public use as a matter of state law.”).

20. A brief survey of the amicus briefs submitted in support of Suzette Kelo reveals the wide appeal of this issue. See, e.g., Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108); Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108); Brief for the National Ass’n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108).

21. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. (forthcoming June 2009).

22. See *id.*

23. See, e.g., COLO. REV. STAT. § 38-1-122 (2007); IOWA CODE § 6B.33 (2007); MICH. COMP. LAWS SERV. § 213.66 (LexisNexis Supp. 2008); MINN. STAT. § 117.031 (2006).

24. See Bell & Parchomovsky, *supra* note 13, at 890 (estimating that twenty states have provisions that provide for fee shifting in some cases in the eminent domain context).

25. See, e.g., FLA. STAT. § 73.092 (2005) (last amended 1999); N.Y. EM. DOM. PROC. LAW §§ 701–702 (McKinney 2003); OKLA. STAT. tit. 27, § 11 (2001); S.C. CODE ANN. § 28-2-510 (2007); WIS. STAT. § 32.28 (2005–06).

26. For example, the Pennsylvania statute provides for fee shifting only up to \$4,000. 26 PA. CONS. STAT. ANN. § 710 (West Supp. 2008).

27. See Bell & Parchomovsky, *supra* note 13, at 890.

Thus, the time has never been riper to consider additional protections for property owners that would add significant teeth to preexisting and pending eminent domain reforms.

I. BLIGHT, PUBLIC USE, AND THE CHANGING FACE OF REDEVELOPMENT LAW

The Fifth Amendment of the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.”²⁸ This small clause of the Constitution caused a firestorm of controversy ever since the Supreme Court handed down its now notorious decision in *Kelo v. City of New London*.²⁹ In *Kelo*, a group of homeowners brought suit against the city of New London, Connecticut to oppose the city’s decision to initiate condemnation proceedings to transfer their homes to Pfizer Corporation as part of a redevelopment plan for the renewal of the city center.³⁰ The petitioners, none of whose properties was found blighted or in poor condition,³¹ argued that the taking of their properties violated the public use limitation implicit in the Fifth Amendment and asked for injunctive relief.³² The *Kelo* Court rejected the petitioners’ claims and held that the Public Use Clause permitted local governments to transfer property from one private party to another for the public purpose of economic development.³³ *Kelo* did not revolutionize redevelopment law, but rather affirmed a long line of precedent applying a deferential standard of review to economic development projects.³⁴ However, it disappointed some scholars who had hoped that the Supreme Court would limit the almost limitless scope of some of its earlier decisions.³⁵ Before *Kelo*, a minority of scholars maintained that public use meant “public right of access.”³⁶ However, the Supreme Court in *Kelo* read public use as “public purpose,” al-

28. U.S. CONST. amend. V.

29. 545 U.S. 469 (2005).

30. *Id.* at 473–77.

31. *Id.* at 475.

32. *Id.* at 474–77.

33. *Id.* at 483–86.

34. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

35. See, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 243–44 (2007) (criticizing the majority’s decision and reasoning in *Kelo*).

36. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161–69 (1985).

lowing any private-to-private transfers of property using eminent domain for economic-development purposes.³⁷

This ruling was immediately attacked by public figures on both the left³⁸ and right³⁹ and has become a political flashpoint in the last two years. Although few scholars of property law were surprised by the *Kelo* decision,⁴⁰ ordinary Americans responded viscerally to the potentially broad sweep of the decision.⁴¹ Justice O'Connor captured the fears of many in her dissent: "The 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."⁴² Trying to limit some of the potential implications of the decision, forty-two states reformed their eminent domain laws by 2007, many to create narrower public use interpretations.⁴³ However, despite these stricter provisions, many statutes contain significant loopholes that weaken the efficacy of the reform efforts.⁴⁴

A. FROM THE CHICAGO SCHOOL OF SOCIOLOGY TO *KELO*: FROM BLIGHT TO ECONOMIC DEVELOPMENT

The theory of modern urban redevelopment grew out of the Chicago school of sociology during the 1920s and 1930s.⁴⁵ Soci-

37. *Kelo*, 545 U.S. at 484.

38. For Ralph Nader's reaction to *Kelo*, see Ralph Nader, Statement, June 23, 2005, <http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html> ("The U.S. Supreme Court's decision in *Kelo v. City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.").

39. For Rush Limbaugh's reaction to *Kelo*, see Rush Limbaugh, *Rush Limbaugh: Liberals Like Stephen Breyer Have Bastardized the Constitution* (Radio Transcript Oct. 12, 2005), <http://www.freerepublic.com/focus/f-news/1501453/posts> ("*Kelo* was decided in favor of the big guy, and *Kelo* was decided, by the way, in a way that the Constitution doesn't say.>").

40. See *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2005) [hereinafter *Hearing*] (statement of Thomas Merrill, Professor, Columbia Law School) (discussing his own lack of surprise at the *Kelo* decision).

41. See Somin, *supra* note 21, at 5-7.

42. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

43. See CASTLE COALITION, *supra* note 18, at 1 (providing a comprehensive fifty-state survey of changes to state eminent domain laws since *Kelo*).

44. See Timothy Sandefur, *The "Backlash" so Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 727; Somin, *supra* note 21, at 11.

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

ologists, such as Ernest Burgess and Roderick D. McKenzie, studied the lives of the poor in urban centers and developed an “ecological approach” to the development of cities.⁴⁶ Following this approach, urban planners and real estate developers worked together to reconstruct American cities by advocating for greater urban planning and the elimination of slums and blight.⁴⁷ Slums were generally understood to be dangers to public health and safety, while blighted areas were in the process of evolving into slums.⁴⁸ Blight was a word that originally referred to plant disease but was incorporated into the rhetoric of urban planners to suggest the organic nature of city development and decline.⁴⁹ The only way to prevent this steady decline was centralized city planning.⁵⁰

From the beginning, the theory was plagued by the problem of creating a precise definition of blight.⁵¹ For example, the Committee of Blighted Areas and Slums, a creation of Herbert Hoover’s tenure as Secretary of Commerce, stated that “a blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped.”⁵² Since this theory was based on terms that were never well-defined, its effects were difficult to contain and it could be used as a justification for projects tainted by other motivations.⁵³ For instance, from the beginning the federal urban-renewal program had racial overtones⁵⁴ and often had the effect of forcing new immigrants and minorities out of their neighborhoods.⁵⁵

46. *Id.* For an example of this “organic” approach to urban sociology, see R. D. McKenzie, *The Ecological Approach to the Study of the Human Community*, in *THE CITY* 63 (1925).

47. Pritchett, *supra* note 45, at 15–16.

48. *Id.* at 18. This distinction between “slum” and “blight” is rarely observed in the literature surrounding urban planning today.

49. *Id.* at 16.

50. *Id.* at 17.

51. The problem of defining “blight” precisely continues today. See Somin, *supra* note 35, at 265–68.

52. Pritchett, *supra* note 45, at 15–18.

53. For a classic critique of the federal urban renewal movement, see MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949–1962*, at 219–23 (1964).

54. For example, Homer Hoyt argued that “certain racial and national groups . . . cause a greater physical deterioration of property than groups higher in the social and economic scale.” Pritchett, *supra* note 45, at 17; see also ANDERSON, *supra* note 53, at 7–8.

55. Pritchett, *supra* note 45, at 17–20. For example, blight laws frequently targeted those who owned small apartment buildings or tenements. The own-

This new program of urban redevelopment was not without its critics and many argued that forced redevelopment was unconstitutional.⁵⁶ However, with the change in Supreme Court jurisprudence during the New Deal, the federal courts became more deferential to state and agency judgments in economic matters and were increasingly willing to acquiesce to whatever projects the state agencies deemed necessary.⁵⁷

This approach to urban planning was crystallized in the Supreme Court's 1954 decision, *Berman v. Parker*.⁵⁸ In *Berman*, the Supreme Court upheld the District of Columbia Redevelopment Land Agency's ambitious redevelopment project for Southwest D.C. on the grounds that the use of eminent domain to remove blight was a public use within the context of the Fifth Amendment.⁵⁹ In this case, the challenger owned a department store in a poor African American neighborhood in Washington, D.C.⁶⁰ At the district court level, the court upheld the constitutionality of the Redevelopment Act but interpreted it narrowly, finding that it applied only to slum clearance and

ers of these buildings were frequently immigrant Jews and Italians who had very little money or education and were unwilling to sell their only properties for the prices developers were offering. *Id.* at 20. For a fascinating visual depiction of the Chicago sociologists' view of urban areas, see Ernest W. Burgess, *The Growth of the City: An Introduction to a Research Project*, in *THE CITY* 55 (1925).

56. For example, the Sixth Circuit declared it unconstitutional for the Public Works Administration to condemn land for a housing program. *United States v. Certain Lands in City of Louisville*, 78 F.2d 684, 687-88 (6th Cir. 1935) ("The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government."). Although this decision deals with the limits on federal projects rather than state projects, it still illustrates the skepticism with which some courts viewed the federal government's redevelopment projects during the early New Deal era.

57. Pritchett, *supra* note 45, at 40-41.

58. 348 U.S. 26 (1954).

59. *Id.* at 30, 33-34.

60. A survey of the area showed that "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory . . ." *Id.* at 30. It also showed that 97.5% were inhabited by African Americans. *Id.* In a pointed critique of the racial implications of this redevelopment plan, Professor Wendell Pritchett pointed out that

Berman was argued just four months after the Supreme Court's monumental declaration on American race relations in *Brown v. Board of Education* But the two cases were intimately related. The urban renewal program that the Court approved allowed cities to redistribute their populations, increasing residential segregation and thereby making the integration of schools far more difficult.

Pritchett, *supra* note 45, at 44.

could not be used to clear blighted or deteriorating properties, as the Government argued.⁶¹ The Supreme Court affirmed the district court's finding of constitutionality but on much broader grounds. Justice Douglas wrote:

The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. 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.⁶²

Although it was clear that there were genuine slums in the area set for redevelopment,⁶³ by showing so much deference to the agency's decisions and embracing so broad a definition of the statute,⁶⁴ the Supreme Court set the stage for more expansive uses of blight in the future. In addition, by adopting such a deferential standard of review, the Court left few judicial protections in place for homeowners and business owners to challenge overbroad blight designations.⁶⁵

The Supreme Court's 2005 decision in *Kelo* was in many ways a natural outgrowth of the urban-renewal movement of the 1920s and 1930s and of the decision in *Berman*. Yet, while

61. *Schneider v. District of Columbia*, 117 F. Supp. 705, 724–25 (D.D.C. 1953) (“We hold that Congress did not in the Redevelopment Act confer power to seize property beyond the reasonable necessities of slum clearance and prevention, the word ‘slum’ meaning conditions injurious to the public health, safety, morals and welfare.”).

62. *Berman*, 348 U.S. at 33 (internal citation omitted). The district court took quite a different approach. *Cf. Schneider*, 117 F. Supp. at 719 (“The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.”).

63. For instance, the neighborhood had more than twice the average number of deaths from tuberculosis in the District and more than four times the average number of deaths from syphilis. *Schneider*, 117 F. Supp. at 709.

64. The statute itself was hardly a model of clarity. There was no definition of “slums” or “blighted areas.” *Berman*, 348 U.S. at 28 n.*. The closest the Act came to defining these terms was in Section 3(r), which states:

“Substandard housing conditions” means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.

Id.

65. While *Berman* did not explicitly set forth a particular standard of review, the Court in *Hawaii Housing Authority v. Midkiff* interpreted the decision as simply requiring judicial deference to state legislatures' determinations when reviewing redevelopment projects. 467 U.S. 229, 244 (1984).

Berman dealt with an impoverished neighborhood that had been designated blighted by a legislative determination,⁶⁶ *Kelo* dealt with properties that even the redevelopers did not argue were blighted.⁶⁷ By holding that the Public Use Clause permits the transfer of property from one private party to another for the purpose of economic development alone,⁶⁸ the Court embraced the broad dicta of Justice Douglas's opinion in *Berman*. Furthermore, the Court clearly removed a finding of blight as a precondition to the use of eminent domain in economic redevelopment.⁶⁹

B. THE STATE REACTION TO *KELO*: BACK TO BLIGHT

In the wake of *Kelo*, many commentators despaired that economic development was so broad a justification for redevelopment that there could be no meaningful judicial review of condemnation actions on the grounds of public use.⁷⁰ With the public use effectively read out of the Constitution, citizens had no means to challenge takings of their property except to demand just compensation.⁷¹ However, while much of the broad language in *Kelo* suggests such an outcome, this result was checked by unprecedented grounds, well in opposition that led forty-two states to pass stricter laws, limiting the use of eminent domain in at least some circumstances.⁷²

In many ways, Justice Stevens' majority opinion in *Kelo* actually set the groundwork for this wave of state responses to the ruling. Stevens stressed the possibility of stricter state standards for redevelopment. He explained that "nothing in [the] opinion precludes any State from placing further restric-

66. *Berman*, 348 U.S. at 28.

67. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) ("Those who govern the City were not confronted with the need to remove blight . . .").

68. *Id.* at 483–84.

69. Justice O'Connor's dissent distinguishes *Berman* from *Kelo* by emphasizing the blight and poverty afflicting the neighborhood in *Berman*. *See id.* at 498 (O'Connor, J., dissenting).

70. *Id.* at 503–04 (raising slippery slope arguments against an expansive definition of public use).

71. Even before *Kelo*, many scholars of American property law had suggested that the Public Use Clause had been all but read out of the Constitution. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) ("[T]he modern understanding of 'public use' holds that any state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking . . ."). Viewed this way, *Kelo* is merely the crystallization of a much longer line of cases.

72. *See* CASTLE COALITION, *supra* note 18, at 1.

tions on its exercise of the takings power” and emphasized that “many States already impose ‘public use’ requirements that are stricter than the federal baseline,” either through the requirements of their state constitutions or their more restrictive eminent domain statutes.⁷³ Thus, even as Justice Stevens’ opinion reaffirmed the *Berman* view of public use and urban renewal as a matter of constitutional law, it also highlighted the possibility of change on the state level.

1. The *Kelo* Backlash in the State Legislatures

The response of state legislatures to Justice Stevens’ suggestion has been overwhelming, yet varied from state to state. For example, South Dakota passed legislation in 2006 to prohibit all private-to-private transfers of private property, regardless of blight;⁷⁴ that same year, Minnesota tightened the definition of blight⁷⁵ and largely limited private redevelopment to those properties deemed actually blighted.⁷⁶ Other states, such as Mississippi and Massachusetts, have not passed any redevelopment reforms at all.⁷⁷

While many states made meaningful and important reforms in the area of eminent domain law, there remain many significant loopholes that limit the efficacy of such laws.⁷⁸ One of the most substantial is the states’ treatment of blight.⁷⁹ Although a few states banned all takings for purely economic development,⁸⁰ many left their blight laws unchanged and continued to allow economic development takings in cases of

73. *Kelo*, 545 U.S. at 489 (majority opinion).

74. S.D. CODIFIED LAWS § 11-7-22.1 (Supp. 2008).

75. MINN. STAT. § 117.025 (2006) (defining a “blighted area” as an area in “urban use . . . where more than fifty percent of the buildings are structurally substandard”).

76. *Id.* § 117.027.

77. See CASTLE COALITION, *supra* note 18, at 25, 28.

78. See Somin, *supra* note 35, at 261.

79. See *id.* at 266 (“In the years since those early cases, many states have expanded the concept of blight to encompass almost any area where economic development could potentially be increased.”); Will Lovell, Note, *The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609, 611–12 (2007) (discussing loopholes with regards to blight designations in the wake of state legislative reform).

80. See, e.g., N.H. CONST. pt. I, art. 12-a; ALA. CODE § 11-80-1 (Supp. 2007); VA. CODE ANN. § 1-219.1 (2008); WYO. STAT. ANN. § 1-26-801 (2007).

blight.⁸¹ This failure to define blight precisely means that these laws are frequently so broad and vague that definitions may be applied to middle class neighborhoods as well as true slums.⁸² In states that eliminated economic development as a public use while retaining broad eminent domain powers for blight removal, this may undermine the reforms that state legislatures passed by allowing redevelopment that serves ends more akin to economic development than slum removal.⁸³ Furthermore, municipal governments tend to prefer middle-class communities over impoverished areas as locations for redevelopment projects since it is easier to attract businesses to build there.⁸⁴ Thus, the effect of an overbroad definition of blight is that these statutes may be manipulated to redevelop middle-class neighborhoods rather than urban slums.⁸⁵ Some states identified this problem and passed more precise blight laws,⁸⁶ but many still have definitions that are notably vague.⁸⁷

81. CASTLE COALITION, *supra* note 18, at 6, 17, 21, 23, 30, 46, 47, 49.

82. For example, in *West 41st Street Realty LLC v. New York State Urban Development Corp.*, a New York appellate court found the Times Square area of downtown Manhattan was blighted and upheld an urban redevelopment project to provide the New York Times with a new headquarters. 744 N.Y.S.2d 121, 123–26 (N.Y. App. Div. 2002); *see also* Somin, *supra* note 35, at 264–71 (providing a good background discussion of the problems with overbroad blight designations).

83. *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 307 (2004) (“Clearly ‘blight’ has lost any substantive meaning as either a description of urban conditions or a target for public policy. . . . Redevelopment policies originally intended to address unsafe or insufficient urban housing are now more routinely employed to subsidize the building of suburban shopping malls.”).

84. *See* George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 *HASTINGS L.J.* 991, 994 (2001).

85. *Cf. id.* (“City renewal directors quickly learned there was no realistic chance that private builders could be drawn to developing commercial projects in hopelessly blighted areas.”).

86. *See, e.g.*, GA. CODE ANN. § 22-1-1 (Supp. 2008); MINN. STAT. § 117.025 (2006); 26 PA. CONS. STAT. ANN. § 205 (West Supp. 2008).

87. For instance, Colorado defines “blighted area” as follows:

“Blighted area” means an area that, in its present condition and use and, by reason of the presence of at least four of the following factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare.

COLO. REV. STAT. § 31-25-103(2) (2007). Texas defines “blighted area” in a similar manner:

“Blighted area” means an area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements;

2. The *Kelo* Backlash in the State Courts

Not only have forty-two state legislatures passed laws restricting the use of eminent domain for economic development purposes, but state courts have also responded by interpreting pre-existing constitutional and statutory provisions so as to restrict overbroad blight designations on the state level.⁸⁸ The proliferation of successful challenges to blight designations and condemnations indicates two things. First, it suggests that even in the wake of substantial statutory reform, a significant amount of eminent domain abuse continues. Second, it suggests that courts, when confronted with eminent domain actions that directly contravene state laws, are willing to intervene to strike the actions down.

A brief look at some recent state supreme court decisions affirms this trend.⁸⁹ In 2006, the Ohio Supreme Court in *City of Norwood v. Horney* reversed a lower court decision and held that the city's redevelopment scheme violated both the state and federal constitutions.⁹⁰ The court held that economic devel-

defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.

TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005). *See generally* Somin, *supra* note 21 (describing efforts by states to reform their eminent domain laws after *Kelo*).

88. This response again has its roots in Justice Stevens's *Kelo* opinion. In his footnotes to the section discussing the possibility for narrower treatments of "public use" on the state level, Justice Stevens explicitly cites not only efforts on the part of state legislatures to pass tougher eminent domain laws, but also state court decisions construing preexisting state laws and constitutions more narrowly to prohibit economic development takings. *See Kelo v. City of New London*, 545 U.S. 469, 489 & nn.22–24 (2005). This suggests that Justice Stevens's opinion may rest more upon *stare decisis* and an unwillingness to undermine *Berman* than upon a fundamental belief that courts should afford legislatures absolute deference in urban planning. For example, in footnote 22, Justice Stevens cites *County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004), in which the Supreme Court of Michigan overruled its infamous decision in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981), not on the basis of changed law, but upon a narrower reading of a preexisting constitutional provision. *Kelo*, 545 U.S. at 489 n.22.

89. *See, e.g.*, *Sapero v. Mayor of Baltimore*, 920 A.2d 1061, 1076–79 (Md. 2007); *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142–43 (Ohio 2006).

90. 853 N.E.2d at 1122–24.

opment alone is not a public use⁹¹ under the Ohio Constitution and that the “deteriorating area” standard of the statute was void-for-vagueness under the Due Process Clause of the Fourteenth Amendment.⁹² That same year, the Rhode Island Supreme Court held that, while the owners of a temporary easement were not entitled to notice under the Due Process Clause, the taking should be struck down anyway on the grounds that there was no public use.⁹³ In 2007, the New Jersey Supreme Court struck down the city of Paulsboro’s classification of a property as “in need of redevelopment” by interpreting the “blighted areas” clause⁹⁴ of the New Jersey constitution to narrow the scope of the redevelopment statute.⁹⁵

The federal courts also have begun looking more sympathetically at challenges to redevelopment projects. For example, in 2005, only a few months after the *Kelo* decision, the Second Circuit held that the actions of a condemning agency violated procedural due process when the agency failed to give the property owners a meaningful opportunity to be heard in challenging the purpose of the condemnation.⁹⁶ The court ruled that, by failing to provide the owner notice of the thirty-day period which provided the only window for challenging the finding of public use, the city effectively made it impossible for property owners to realize their rights.⁹⁷ The continued inability of property owners to claim their rights poses a significant problem in the context of urban redevelopment and condemnation proceedings and continues to pose an implementation problem for legislatures and agencies.⁹⁸

91. *Id.* at 1140–41.

92. *Id.* at 1142–46.

93. *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 99, 104 (R.I. 2006).

94. N.J. CONST. art. VII, § 3.

95. *Gallenthin Realty Dev. v. Borough of Paulsboro*, 924 A.2d 447, 460–62 (N.J. 2007).

96. *Brody v. Village of Port Chester*, 434 F.3d 121, 127–32 (2d Cir. 2005).

97. *Id.* at 132 (“Thus, we now hold that ‘reasonable notice’ under these circumstances must include mention of the commencement of the thirty-day challenge period. . . . It is not likely that the average landowner would have appreciated that notice of the Determination and Findings began the exclusive period in which to initiate a challenge to the condemnor’s determination.”).

98. For just one example for how this problem of inadequate procedures and insensitive authorities has ensconced itself in the public imagination, see DOUGLAS ADAMS, *THE HITCHHIKER’S GUIDE TO THE GALAXY* 5–36 (1979). Within the first few pages of the novel, Earth is destroyed to make room for a “hyperspatial express route” with no notice or ceremony to its inhabitants. *Id.* at 35. The Vogons who are taking the planet for their route justify themselves in a classic parody of an unsympathetic planning board’s public statement:

Thus, despite the explosion of interest among state legislatures to reform state eminent domain codes and the increase of state supreme courts striking down illegal redevelopment actions, a lingering problem remains. While the definitions of blight have been tightened and economic development takings have been banned in some cases, these reforms are only meaningful if they are carefully implemented. Thus envisioned, the problem then is one of fostering the proper implementation of protections that are already in place. Given that those who are most likely to be affected by overbroad blight designations are those who will be least prepared to challenge them, it is important to create a system in which claims against redevelopment projects that directly contradict the spirit of the new state laws are incentivized rather than discouraged.

C. THE MECHANICS OF REDEVELOPMENT

To appreciate some of the difficulties in challenging public use and blight, it is helpful to examine the statutory basis for these determinations. Although the exact statutory procedures vary from state to state, an overview of the content of these laws provides the general legal framework for most modern redevelopment projects.

1. Formation of a Redevelopment Area and Implementation of Tax Increment Financing

The process of redevelopment generally begins with the enactment of a tax increment financing (TIF) district and the formation of a redevelopment commission or agency.⁹⁹ This redevelopment commission is responsible for creating a redevelopment district and preparing a detailed redevelopment plan.¹⁰⁰ In this plan, the redevelopment agency makes findings

There's no point acting all surprised about it. All the planning charts and demolition orders have been on display in your local planning department in Alpha Centauri for fifty of your Earth years, so you've had plenty of time to lodge any formal complaint and it's far too late to start making a fuss about it now.

Id. at 35–36.

99. See, e.g., MINN. STAT. ANN. §§ 469.174–.175 (West Interim Ann. Serv. June 2008); see also Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919, 926–28 (1999) (explaining the mechanics of a TIF project); Catherine Michel, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 459 (1996) (explaining the structure of TIF and its use in Indiana).

100. See, e.g., MINN. STAT. ANN. § 469.175; see also Goshorn, *supra* note 99, at 926; J. Drew Klacik & Samuel Nunn, *A Primer on Tax Increment Financ-*

showing that the area meets certain criteria.¹⁰¹ Some states require a finding that the private investment would not reasonably be expected to occur without government intervention.¹⁰² Once the commission develops the plan, it must hold a public hearing and provide notice of the hearing, generally by newspaper announcement.¹⁰³ After the hearing, the plan commission and the city council typically vote on whether to approve the project.¹⁰⁴

After a proposal is approved, the commission has substantial authority over the area.¹⁰⁵ While the extent to which eminent domain powers may be used in an approved redevelopment district varies by state, typically, once an area is designated as part of a redevelopment district, any use of eminent domain in the area is considered a valid public use.¹⁰⁶ Furthermore, any objections to the designation not raised at the initial public hearing are considered waived.¹⁰⁷

Once the project is approved, the municipality implements the tax increment financing portion of the statute by issuing bonds to cover the costs of the project.¹⁰⁸ These bonds are paid

ing, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT 15, 17–18 (Craig L. Johnson & Joyce Y. Man eds., 2001).

101. See, e.g., MINN. STAT. ANN. § 469.175.

102. See, e.g., *id.* subdiv. 3(b)(2)(i) (providing that the municipality shall find that “the proposed development or redevelopment would not reasonably be expected to occur solely through private investment within the reasonably foreseeable future”); see also Goshorn, *supra* note 99, at 927.

103. See, e.g., MINN. STAT. ANN. § 469.175; see also Michel, *supra* note 99, at 460.

104. See, e.g., MINN. STAT. ANN. § 469.175 (requiring municipal approval for a plan to proceed); see also Michel, *supra* note 99, at 460.

105. See, e.g., MINN. STAT. ANN. § 469.101 (West 2008) (setting forth the powers of an economic development authority).

106. See, e.g., 735 ILL. COMP. STAT. 30/5-5-5(c) (2006) (“An acquisition of property primarily for the purpose of the elimination of blight is rebuttably presumed to be for a public purpose and primarily for the benefit, use, or enjoyment of the public under this subsection.”); MINN. STAT. ANN. § 469.101 (providing for the creation of a redevelopment district); MINN. STAT. ANN. § 469.174, subdiv. 10 (West Interim Ann. Serv. June 2008) (setting forth the requirements for a redevelopment district); see also Michel, *supra* note 99, at 462–63.

107. See, e.g., 735 ILL. COMP. STAT. 30/5-5-5(c) (“Any challenge to the existence of blighting factors alleged in a complaint to condemn under this subsection shall be raised within 6 months of the filing date of the complaint to condemn, and if not raised within that time the right to challenge the existence of those blighting factors shall be deemed waived.”).

108. See, e.g., MINN. STAT. ANN. §§ 469.1813–.1814 (West 2008); see also Goshorn, *supra* note 99, at 926–27.

off by any incremental growth in property-tax revenues from the redevelopment project area.¹⁰⁹ This is accomplished by freezing the property tax assessments paid into the city treasury during the period of the redevelopment project so that the city continues to receive the same revenue from the property taxes even as the value of the property rises.¹¹⁰ Since the property owners pay taxes on the actual value of the property, any increase in property tax revenue can be used to pay off the debts incurred to finance the redevelopment.¹¹¹ Once the bonds are paid off, the property-tax assessments can be unfrozen and the city receives the full balance of the tax revenues.¹¹² The idea behind TIF is that the redevelopment project will cause a rise in the surrounding property values and that the city will use the additional tax revenue to pay off the bonds that it issued to finance the redevelopment.¹¹³ Some have criticized this theory, suggesting that most increases in property values would have occurred even in the absence of the redevelopment.¹¹⁴

2. Challenging a Redevelopment Plan

In this system, challenges to findings of public use and blight come in two contexts. First, after an administrative declaration of blight but before condemnation of properties, a property owner seeking to challenge the public use of a particular redevelopment project may bring a reverse validation action within a set period of time.¹¹⁵ Otherwise, a challenge may come once a redevelopment agency brings condemnation proceedings against a property owner.¹¹⁶ Typically, in such a condemnation

109. See, e.g., MINN. STAT. ANN. §§ 469.177–178 (West 2008); see also Goshorn, *supra* note 99, at 927–28; Lefcoe, *supra* note 84, at 996–97.

110. See, e.g., MINN. STAT. ANN. § 469.177; see also Goshorn, *supra* note 99, at 927–28; Lefcoe, *supra* note 84, at 996–97.

111. See, e.g., MINN. STAT. ANN. § 469.177; see also Goshorn, *supra* note 99, at 927–28; Lefcoe, *supra* note 84, at 996.

112. See, e.g., MINN. STAT. ANN. § 469.177; see also Goshorn, *supra* note 99, at 928.

113. See Goshorn, *supra* note 99, at 928–29; Lefcoe, *supra* note 84, at 997.

114. See Lefcoe, *supra* note 84, at 997.

115. See, e.g., CAL. HEALTH & SAFETY CODE § 33501 (West 2008) (setting forth a cause of action for a reverse validation action challenging a redevelopment plan and setting a ninety-day window for bringing the challenge); *id.* § 33501.2 (providing that those issues not raised at the administrative level are waived for subsequent judicial proceedings); CAL. CIV. PROC. CODE § 860 (West 2008) (setting forth the procedural basis for challenging such an action).

116. See 6 NICHOLS ON EMINENT DOMAIN § 24.05[1] (3d ed. 2006).

the only way that a property owner may obtain injunctive relief is to show that the condemnation is not a public use within the meaning of the statute.¹¹⁷ In states that limit redevelopment to blighted areas, this showing frequently turns on whether the property is blighted or whether development would not happen but-for the intervention of the agency.¹¹⁸ In addition to or instead of the public use challenge, the owner may also challenge the agency's offer of payment as not the just compensation required by law.¹¹⁹

II. REDEVELOPMENT REFORM AND THE PROBLEM OF IMPLEMENTATION: AWARDING LITIGATION EXPENSES AS A MEANS OF EMPOWERING PROPERTY OWNERS TO CHALLENGE ILLEGAL CONDEMNATIONS

Despite the paradigm shift in the treatment of public use and blight in state legislatures and courts and the increased interest in providing procedural protections for property owners, statutes limiting the power of municipal redevelopment agencies are difficult to apply in practice, leading to persistent under-implementation.¹²⁰ States have considered a variety of means to reinforce procedural and substantive protections, including granting the state attorney general or other public figure the power to review redevelopment plans,¹²¹ entrusting the decision-making power for redevelopment districts to elected city councils rather than unelected redevelopment officers,¹²² or passing fee-shifting statutes to provide property owners full access to the courts.¹²³ Part II of this Note analyzes the issues that states face in implementing additional protections for property owners and suggests that a simple fee-shifting statute

117. See *id.* (noting that the government entity seeking to take the property must first show it has the "right to condemn" the property).

118. See, e.g., MO. REV. STAT. § 99.810 (2000).

119. See 6 NICHOLS ON EMINENT DOMAIN, *supra* note 116.

120. See generally LEGISLATIVE ANALYST'S OFFICE, REDEVELOPMENT AFTER REFORM: A PRELIMINARY LOOK (1994), available at http://www.lao.ca.gov/1994/redevelopment_after_reform.html.

121. See, e.g., UTAH CODE ANN. § 13-43-101 to -206 (Supp. 2008).

122. See Bernard W. Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 178 (2006) ("To promote transparency and political accountability, Congress might require that local officials compile a record and set forth their justifications for concluding that a project will benefit the public as well as a private developer. Perhaps it can also require that the politically-accountable officials make the decision.").

123. See, e.g., MINN. STAT. § 117.031 (2006).

is the most efficient mechanism for improving these statutes. This Part also discusses the theory behind fee-shifting statutes in the eminent domain context and evaluates the strengths and weaknesses of several such statutes already in place.

A. BLIGHT, CONDEMNATION, AND THE PROBLEM OF IMPLEMENTATION

Although states acted to limit the power of cities to engage in redevelopment for economic growth, these reforms are only as effective as the means of implementing them. Take the definition of blight. Notoriously difficult to define, blight provides an easy label to assign to communities that may or may not be in a serious state of disrepair.¹²⁴ A redevelopment agency looking for a successful project may be tempted to include more land in a redevelopment district than is strictly necessary since the agency will generally finance the project with tax revenue derived from the entire redevelopment district.¹²⁵ This is equally true for the determinations of public use and but-for causation that also frequently figure prominently in agency decision-making.¹²⁶ Thus, while there are doubtless many instances of genuine blight and slums for which the use of eminent domain may be appropriate, there are many others in which specious blight designations are used by well-connected developers to obtain bargaining advantages in real estate negotiations.¹²⁷

124. See Gordon, *supra* note 83, at 320–24.

125. See Lefcoe, *supra* note 84, at 1003–04 (“Despite formal legal requirements, there is usually only a weak connection between an area’s TIF potential and its blight. A redevelopment agency with a strong survival instinct needs to produce tax increments starting in the year after the redevelopment boundaries are set. . . . This usually precludes redevelopment of the most crime-ridden and poverty-stricken sites in town because there is simply no alternate market for them.”).

126. See Gordon, *supra* note 83, at 323–25.

127. See, e.g., R.I. Dev. Corp. v. Parking Co., 892 A.2d 87, 106 (R.I. 2006) (“It is apparent to us that changes . . . that RIAC could not achieve at the bargaining table were obtained in Superior Court through an exercise of the state’s eminent domain authority.”); Lefcoe, *supra* note 84, at 994–95 (“As city renewal directors came to accept the fact that private developers had no capacity to re-build in the worst parts of cities, they searched for ‘the blight that’s right’—places just bad enough to clear but good enough to attract developers. When program administrators couldn’t legitimately find blight in areas with good prospects for redevelopment, they fabricated it.”); Somin, *supra* note 35, at 264–71 (detailing a number of particularly troubling instances in which a blight rationale was used for redeveloping areas that would not meet any layperson’s definition of blight); Andrew Jacobs, *Judge Stops Newark Redevelopment Project*, N.Y. TIMES, July 20, 2007, at B3 (describing a case in which the “close links” between the city administration and the developers raised serious

Furthermore, the procedural protections of due process are of little benefit to property owners unless they are enforced rigorously and uniformly.¹²⁸

The recent proliferation of state supreme court decisions striking down redevelopment plans as illegal, often under newly reformed state laws, suggests that courts are willing to enforce stricter statutes.¹²⁹ However, the large number of recent decisions also suggests that redevelopment agencies frequently do not police themselves with the rigor necessary to maintain the balance between redevelopment interests and property interests that many state legislatures intended. For example, California limits the use of eminent domain to blighted areas, and California courts are frequently willing to interpret these statutes strictly against the redevelopment agencies.¹³⁰ However, even after a significant redevelopment reform effort in the 1990s, the California Legislative Analyst's Office reported that there was "no evidence that redevelopment project areas" were "smaller in size or more focused on eliminating urban blight than project areas adopted in earlier years."¹³¹ It went on to suggest that, because of the "decentralized and weak" oversight system, the legislature could have "no assurance that communities will follow its intent regarding the [Community Redevelopment Law]—or that questionable redevelopment activities will be reviewed and challenged."¹³² Thus, even states engaged in a serious overhaul of their redevelopment statutes may have trouble changing the long-standing practices of redevelopment agencies and translating legislative reform into concrete protections and safeguards for property owners.

Given the cost of challenging a redevelopment agency's decision to designate a particular property as blighted, it is likely that many valid challenges are never brought.¹³³ This is partic-

questions about the misuse of redevelopment statutes).

128. See, e.g., *Brody v. Village of Port Chester*, 434 F.3d 121, 129–32 (2d Cir. 2005) (emphasizing the importance of notice in the eminent domain context).

129. See, e.g., *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142–43 (Ohio 2006); *R.I. Dev. Corp.*, 892 A.2d at 106.

130. *Lefcoe*, *supra* note 84, at 991. For a decision in which a California court struck down redevelopment proposals as not complying with state blight laws, see *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265 (Cal. Ct. App. 2000).

131. LEGISLATIVE ANALYST'S OFFICE, *supra* note 120.

132. *Id.*

133. See *Hearing*, *supra* note 40, at 26 (statement of Sen. Jeff Sessions)

ularly true in residential neighborhoods where the costs of bringing a suit may surpass the value of the homes themselves.¹³⁴ Given that substantial research indicates that those property owners who are affected by blight designations and eminent domain tend to have less education and less wealth than the average American, this problem is particularly acute.¹³⁵ This makes it difficult for large portions of the population to obtain any legal remedy, thus undermining the efforts of state legislatures and courts to redress these important problems.¹³⁶

This problem is particularly pronounced for those property owners who want injunctive relief (i.e. no redevelopment) rather than additional compensation.¹³⁷ Since many eminent domain attorneys work on a contingency fee basis, property owners who want to keep their property rather than negotiate for a better offer may have additional difficulties finding an attorney to represent them.¹³⁸ Although there are some public interest firms that do work in this area and some attorneys who are willing to volunteer their services *pro bono*, the demand for this type of work substantially outstrips the supply.¹³⁹

B. IMPROVING IMPLEMENTATION: POTENTIAL SOLUTIONS

The problems that property owners face in opposing redevelopment projects have not gone unnoticed and several potentially useful solutions have been proposed. For example, some

(“Having represented property owners in condemnation lawsuits, I would say it is very difficult and expensive for the property owner . . . to defend the taking. . . . [T]o do a long-term, in-the-trenches battle with the city to contest the taking may cost \$50,000 or \$100,000 right out of their pocket, and most people don’t have it.”).

134. *See id.*

135. *See* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28–29 (1989) (discussing the disproportionate impact the urban renewal projects of the mid-twentieth century had on poor minority communities).

136. *See* Bell & Parchomovsky, *supra* note 13, at 888–89 (discussing the increased likelihood that owners of low-value homes will be undercompensated because of their inability to afford adequate legal counsel).

137. *See Hearing, supra* note 40, at 21 (statement of Thomas W. Merrill, Professor, Columbia University School of Law).

138. *Id.* (“It is very important for the Congress to understand the way in which most property owners are able to obtain a lawyer in an eminent domain case. They hire someone on a contingent fee arrangement, and so it is critical for people to get legal representation that there be some money on the table out of which the contingency fee lawyer can be compensated.”).

139. *See id.* at 21–22.

suggest that state legislatures should give the state attorneys general the responsibility to review redevelopment plans and act as a check on overzealous redevelopment agencies.¹⁴⁰ Utah implemented a version of this solution, creating the Office of the Property Rights Ombudsman in 1997.¹⁴¹ The purpose of this office is to aid in mediation of land disputes and to determine the fairness of redevelopment agencies' actions.¹⁴² This solution has proven effective in reducing the amount of litigation over property rights disputes in Utah by applying the principles of alternative dispute resolution to the eminent domain context.¹⁴³ The agency also helps property owners opposing a redevelopment action by providing them with additional information for free and a neutral arbitrator to serve as a check on agency overreaching.¹⁴⁴ Ombudsman statutes certainly alleviate some of the problems associated with overreaching redevelopment agencies, and states looking to give additional protections to property owners should consider them.¹⁴⁵ However, although they create an additional forum for resolving issues, they are not sufficient alone to ensure fair representation for the property owner and do little to enable the property owner to obtain independent legal counsel.¹⁴⁶ Furthermore, although having a neutral arbitrator might resolve some disputes, it also creates a bureaucracy that may not be responsive to the unique needs of individual property owners.

140. See LEGISLATIVE ANALYST'S OFFICE, *supra* note 120 ("Specifically, we recommend that the Legislature pass legislation requiring local governments to submit all proposed redevelopment plans, pass-through agreements, and five-year implementation plans to the state for a finding of consistency with the [Community Redevelopment Law]. . . . [W]e recommend that this responsibility be assigned to the state Attorney General.")

141. See UTAH CODE ANN. §§ 13-43-101 to -206 (Supp. 2008). It is worth noting, however, that the ombudsman in Utah is independent from the attorney general and is separately funded. See CRAIG M. CALL, HOW UTAH RESOLVES EMINENT DOMAIN DISPUTES 2 (2007), http://www.propertyrights.utah.gov/booklet_how-ut-resolves-emdom-disputes.pdf.

142. See Office of the Property Rights Ombudsman, Home Page, <http://propertyrights.utah.gov/> (last visited Nov. 3, 2008) (describing the nature of the ombudsman office).

143. See CALL, *supra* note 141, at 2.

144. *Id.* at 2, 6.

145. For a useful discussion of some of the advantages of ombudsman statutes, see Hannah Jacobs, *Searching for Balance in the Aftermath of 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1560-62 (2007).

146. See CALL, *supra* note 141, at 6 ("The process is not meant to suggest that property owners must avoid lawyers. The OPRO allows full participation by counsel for either party.")

Another possible approach would require that those who make the final decisions on redevelopment projects be elected representatives rather than unelected redevelopment officials.¹⁴⁷ While this solution would increase political accountability, its effectiveness would necessarily be somewhat limited.¹⁴⁸ While elected officials who abused their authority could be voted out of office after the fact, this would not get someone's home or business back if it had already been taken.¹⁴⁹ Furthermore, this would not necessarily create sufficient disincentives for officials in cases in which only a small number of property owners were affected, since they would be unlikely to have enough political clout to force anyone out of office.¹⁵⁰

Although both the aforementioned proposals have some merit, the most attractive approach to improving implementation of eminent domain statutes is a fee-shifting statute, which would allow property owners to obtain attorney's fees and other litigation expenses in cases in which the homeowner is the prevailing party. Over the last forty years, both state and federal governments have used fee-shifting statutes in many different contexts to enable private individuals to bring certain types of lawsuits that serve some larger public goal.¹⁵¹ This type of statute has already been enacted in a number of states in the emi-

147. See Bell, *supra* note 122, at 178.

148. See, e.g., Somin, *supra* note 35, at 201–03 (discussing challenges associated with relying on the political system to correct for these problems).

149. For an example of this type of situation, see Wameng Moua, *New Eminent Domain Reform Brings Joy to Local Businessman, but Doesn't Get His Land Back*, HMONG TODAY, May 26, 2006, at 1, available at <http://www.hmongtoday.com/displaynews.asp?ID=2254>.

150. Justice Thomas addressed this issue in his dissenting opinion in *Kelo v. City of New London*, writing that

these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities” surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.

545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting) (internal citations omitted).

151. See Michael Wieteki, Comment, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney's Fees into the Minnesota Environmental Rights Act*, 14 MO. ENVTL. L. & POLY REV. 147, 164–80 (2006) (discussing the use of fee-shifting to incentivize private actions enforcing environmental regulations); see generally Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 220–26 (1994) (discussing awards of attorneys' fees under federal law).

ment domain context,¹⁵² and expanding this approach to other states would be both simple and effective. For states concerned about the balance of power between state agencies and individuals in condemnation actions, a fee-shifting statute would help to even the odds by allowing private individuals to pursue meritorious legal claims against redevelopment agencies aided by counsel. The remainder of this Note analyzes the advantages and disadvantages of this approach at length, with a focus on states in which fee shifting has been utilized. It concludes by synthesizing the best elements of a few different statutes to provide a potential model statute that optimizes the various relevant considerations and could be enacted by state legislatures concerned with this issue.

C. THE THEORY BEHIND FEE SHIFTING IN THE EMINENT DOMAIN CONTEXT

Under the American Rule, parties to litigation generally pay their own fees although state and federal legislatures have carved out numerous exceptions to this general policy.¹⁵³ While a number of states have crafted exceptions to the American Rule in the eminent domain context,¹⁵⁴ there is little scholarly discourse as to the theoretical justifications for such a move. Thus, before examining the current legal landscape in this area, it is worthwhile to examine why an application of fee-shifting principles might be uniquely appropriate in the eminent domain context.

1. Comparison of Fee-Shifting in Eminent Domain and the Citizen Suit in Environmental Law

There is a long tradition of “citizen suits” in the Anglo-American tradition, whereby an individual citizen brings suit to enforce a larger government regulatory scheme and to ad-

152. See, e.g., COLO. REV. STAT. § 38-1-122 (2007); FLA. STAT. § 73.092 (2005); IOWA CODE § 6B.33 (2007); MICH. COMP. LAWS SERV. § 213.66 (Lexis-Nexis Supp. 2008); MINN. STAT. § 117.031 (2006); N.Y. EM. DOM. PROC. LAW §§ 701–702 (McKinney 2003); OKLA. STAT. tit. 27, § 11 (2001); S.C. CODE ANN. § 28-2-510 (2007); WIS. STAT. § 32.28 (2005–06).

153. See Sisk, *supra* note 151, at 223; see generally John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1634–35 (1993) (discussing the policies underlying the American rule).

154. See, e.g., COLO. REV. STAT. § 38-1-122; FLA. STAT. § 73.092; IOWA CODE § 6B.33; MICH. COMP. LAWS SERV. § 213.66; MINN. STAT. § 117.031; N.Y. EM. DOM. PROC. LAW §§ 701–702; OKLA. STAT. tit. 27, § 11; S.C. CODE ANN. § 28-2-510; WIS. STAT. § 32.28.

vance some public good.¹⁵⁵ The idea of delegating at least some of the responsibility for enforcing regulatory schemes has been adopted by many in the environmental movement who argue that government agencies have been captured by lobbyists and special interests and have therefore failed in their administrative duties.¹⁵⁶ Here, fee shifting is seen as but one way of many of enabling concerned citizens and attorneys to bring suits to enforce legislative regulatory schemes that are being persistently under enforced.¹⁵⁷

While statutes providing for fee shifting in the eminent domain context bear some resemblance to statutes dealing with citizen suits, they arise in a qualitatively different context. Most importantly, since property owners are typically the defendants in eminent domain proceedings, there is no need for the private attorney general rationale. Those challenging findings of blight or public use are not citizens concerned about a larger social or environmental problem, but are made involuntary parties in the redevelopment process. Even in cases where the property owners are plaintiffs, they are still typically on the defensive as their properties have usually been declared blighted and are under threat of condemnation.¹⁵⁸ Thus, even when a property owner sues to challenge a finding of blight, his motivation for the suit is typically to raise the issue within the short statute of limitations after an administrative finding of blight so as to preserve the right to challenge the issue of public use later on rather than simply to act as a check on agency overreaching.¹⁵⁹ Thus, while the regulatory-enhancement rationale of the citizen suit remains, it is coupled in the eminent domain action with very serious considerations of equity.

155. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 835 (1985).

156. See *id.* at 837–38.

157. See *id.* at 835 (listing various devices, such as punitive damages, implied rights of action, and attorney's fees provisions).

158. See, e.g., CAL. HEALTH & SAFETY CODE § 33501(a) (West 1999) (allowing property owners to challenge the validity of redevelopment plans); CAL. CIV. PROC. CODE §§ 860, 863 (West 2007).

159. See, e.g., CAL. HEALTH & SAFETY CODE §§ 33501, 33501.2 (West Supp. 2008) (providing a ninety-day window for challenging "the designation of the survey area" after which such objections shall be waived).

2. Fee-Shifting Statutes and the Spirit of the Constitutional Mandate Requiring Just Compensation for Property Owners

The Fifth Amendment of the U.S. Constitution provides that “[N]or shall private property be taken for public use, without just compensation.”¹⁶⁰ Typically, just compensation is understood to be fair market value.¹⁶¹ However, in situations in which the redevelopment agency’s initial offer is substantially below market value or in which the taking of the property does not comply with state law, a property owner who wishes to oppose the action has little choice but to hire a lawyer and incur significant additional expenses.¹⁶² Thus, even if the property owner receives the fair market value for the property or obtains injunctive relief, he will not be made whole because he will still have to personally bear the costs of litigation.¹⁶³ Furthermore, there is a significant possibility that the prohibitive costs of litigation may make a condemnee forgo an otherwise meritorious claim and accept less than fair market value.¹⁶⁴

This is not to suggest that the Fifth Amendment of the Constitution mandates that attorney’s fees be paid by the government for parties opposing eminent domain actions,¹⁶⁵ but it does support an argument that fee-shifting provisions flow from the spirit of the Fifth Amendment.¹⁶⁶ The idea of fee shifting in

160. U.S. CONST. amend. V.

161. For a discussion of some of the limitations of such a “market value” calculation, see EPSTEIN, *supra* note 36, at 182–83 (“Yet market price still contains a systematic bias that underestimates the use value, which is typically in excess of its exchange value.”).

162. N.Y. STATE LAW REVISION COMM’N, 1987 RECOMMENDATIONS OF THE LAW REVISION COMMISSION, *reprinted in* N.Y. EM. DOM. PROC. LAW § 701 (Consol. 2008).

163. *Id.*

164. *Id.*

165. For the United States Supreme Court’s treatment of this argument, see *Dohany v. Rogers*, 281 U.S. 362, 368 (1930) (holding that attorney’s fees are not part of the “just compensation” guaranteed by the Fifth Amendment). For a more recent Ninth Circuit decision following this opinion, see *United States v. 4.18 Acres of Land*, 542 F.2d 786, 788 (1976).

166. An interesting turn-of-the-century case does suggest that litigation expenses be included in a computation of “just compensation”:

The Constitution requires that private property shall not be taken for public purposes except upon the payment of “just compensation”; and a man who is forced into court, where he owes no obligation to the party moving against him, cannot be said to have received “just compensation” for his property if he is put to an expense appreciably important to establish the value of his property.

In re Water Supply in N.Y., 109 N.Y.S. 652, 654 (N.Y. App. Div. 1908), *aff’d*, 85 N.E. 1117 (N.Y. 1908).

condemnation actions has a long-standing pedigree and found some champions as early as the nineteenth century.¹⁶⁷ While fee shifting in eminent domain actions may not be required by the Constitution, there is certain equity in treating the property owners' lawyers as a cost of redevelopment, similar to the way in which the redevelopment agency's lawyers are treated.¹⁶⁸ The New York Law Revision Commission adopted this logic in its 1987 proposals for reform.¹⁶⁹ In its proposals, the Commission recommended that the New York legislature adopt a statute that would allow judges to award costs and litigation expenses to property owners opposing condemnation actions in some circumstances.¹⁷⁰ The New York legislature implemented these recommendations that same year to loosen some of the restrictions on attorneys'-fees awards.¹⁷¹ Since then, this legislation has enabled judges to award attorney's fees to property owners for meritorious claims in numerous instances, providing meaningful benefits to New York property owners facing the threat of condemnation.¹⁷²

167. One court wrote that

[a] person or corporation whose property is sought to be taken under condemnation proceedings is entitled to be heard at every step in the process, and in justice should be compensated, not only for the land or property taken, but should be indemnified against all costs and expenses reasonably incurred either in resisting the appropriation or in the proceedings for ascertaining the compensation to be made.

City of Brooklyn v. Long Island Water-Supply Co., 42 N.E. 413, 413 (N.Y. 1895).

168. See Bell & Parchomovsky, *supra* note 13, at 888–90 (discussing fee shifting as one attempt by state legislatures to even the balance of power between property owners and the government).

169. N.Y. STATE LAW REVISION COMM'N, *supra* note 162.

170. *Id.*

171. See N.Y. EM. DOM. PROC. LAW § 701 (McKinney 2003) (as amended in 1987).

172. See, e.g., Gelsomino v. City of New Rochelle, 809 N.Y.S.2d 122, 124 (N.Y. App. Div. 2006) (finding that the trial court appropriately awarded the property owners attorneys' fees where the condemnor's original offer was \$310,000 and the court awarded \$420,000); *In re Williamsburgh II Urban Renewal Area*, 616 N.Y.S.2d 785, 786 (N.Y. App. Div. 1994) (affirming the decision of the lower court to award attorney's fees when the claimant was awarded \$152,000 rather than the \$52,000 offered by the condemnor); *Malin v. State*, 584 N.Y.S.2d 596, 597 (N.Y. App. Div. 1992) (finding that the claimant was entitled to attorney's fees after the trial court found her property was worth \$475,000 rather than the \$265,400 that she was initially offered by the State).

3. Using Fee-Shifting Statutes to Incentivize Meritorious Causes of Action and to Deter Agency Abuse

One of the most common criticisms of fee-shifting provisions, particularly one-way fee-shifting provisions, is that they incentivize frivolous litigation.¹⁷³ Although this is certainly a very reasonable concern in general, it is of much less concern in the eminent domain context because the parties challenging a determination of blight or public use are involuntary participants in many senses. They do not seek out the litigation, but merely are resisting municipal actions that threaten to take away their property.

Furthermore, state legislatures may largely eliminate the danger of incentivizing frivolous lawsuits by conditioning the recovery of litigation expenses and other costs on prevailing in the lawsuit.¹⁷⁴ Lawyers representing parties who could not otherwise pay would carefully weigh the merits of the lawsuit and the likelihood of success before taking the case.¹⁷⁵ Furthermore, the rules of civil procedure are designed to penalize lawyers and litigants who bring frivolous lawsuits, providing a further disincentive to engage in this practice.¹⁷⁶ Thus, while property owners might occasionally raise frivolous claims regarding just compensation or public use, it is unlikely that the fee-shifting statute would be responsible for encouraging such claims.¹⁷⁷

Along with enabling property owners to bring meritorious claims, these statutes serve the secondary function of deterring redevelopment agencies from taking actions of questionable legality.¹⁷⁸ The knowledge that well-represented property owners would almost certainly challenge such actions in court would likely make agencies more cautious about declaring large sections of a city blighted and more willing to make comprehensive

173. *But see* Boyer & Meidinger, *supra* 155, at 934 (noting that fee-shifting statutes in the environmental context do not seem to have incentivized frivolous law suits).

174. *Cf.* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 742-44 (1993) (discussing the issues that can go into defining a "prevailing party").

175. *See* Boyer & Meidinger, *supra* note 155, at 934 (stating that fee shifting in the environmental context has not seemed to produce frivolous lawsuits).

176. *See, e.g.*, FED. R. CIV. P. 11 (authorizing sanctions in response to frivolous suits brought in federal court).

177. *See* Boyer & Meidinger, *supra* note 155, at 934.

178. *See* Sisk, *supra* note 151, at 220.

findings of fact available to the public prior to the condemnation to insulate the taking from challenge.

These statutes, where enacted, have had a real impact of significantly improving property owners' access to attorneys. For example, in Florida, one of the states that has enacted the toughest fee-shifting laws,¹⁷⁹ a group of law firms are devoted to providing representation to property owners in eminent domain actions without charging them fees.¹⁸⁰ Even in those states with less strict fee-shifting provisions, there are a significant number of law firms that advertise the accessibility of their services to all property owners.¹⁸¹

4. Enhancing Principles of Federalism While Promoting a Client-Centered Approach

In addition to enabling property owners to bring meritorious claims while deterring abuse of municipal authority, fee-shifting statutes operate well within the context of federalism.¹⁸² These statutes, passed by state legislatures, enhance the substantive procedural protections that the state already has in place. This approach has the advantage of squarely addressing the federalism concerns raised by the National League of Cities in their amicus brief supporting the city in *Kelo*.¹⁸³ In

179. See FLA. STAT. § 73.092 (2005).

180. See, e.g., Fixel, Maguire & Willis, Responsibility for Fees, <http://www.fla-eminentdomain.com/fees.htm> (last visited Nov. 3, 2008); Florida Property Rights Law Firm, P.A., <http://www.florida-eminent-domain.com/> (last visited Nov. 3, 2008); The Law Firm of Savlov and Anderson, P.A., Economics of Eminent Domain, <http://www.flaeminentdomain.com/practiceareas/economics-of-eminent-domain.asp> (last visited Nov. 3, 2008).

181. See, e.g., Archer & Greiner, P.C., Condemnation and Eminent Domain Law, <http://www.archerlaw.com/> (follow "Practices" hyperlink; then "Litigation Services"; then "Condemnation and Eminent Domain Law") (last visited Nov. 3, 2008) (New Jersey firm offering eminent-domain services on a contingency basis and advertising recovery of attorney's fees); Niebler & Roth, LLP, Condemnation/Eminent Domain Law, <http://www.nieblerroth.com/practiceareas/eminent-domain-law.asp> (last visited Nov. 3, 2008) (Wisconsin firm offering eminent-domain services and advertising fact that Wisconsin law allows recovery of attorney's fees).

182. Cf. *Hearing, supra* note 40, at 16 (statement of Thomas W. Merrill, Professor, Columbia University School of Law) (expressing a preference for allowing states to determine their own level of substantive protections rather than setting a uniform national standard); Klass, *supra* note 19, at 690–94 (discussing the advantages of reform on the state level in the context of eminent domain).

183. See Brief for the National League of Cities et al. as Amici Curiae Supporting Respondents at 12–16, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166931.

their brief, they argue that eminent domain is essentially a local concern, and the needs and preferences of the communities of Utah may be quite distinct from those of the communities of Connecticut.¹⁸⁴ By passing fee-shifting statutes that require the redevelopment agencies to pay the property owner's attorney's fees, state legislatures will have the opportunity to reinforce existing procedures and protections.¹⁸⁵ Thus, this type of statute naturally reinforces the principle of federalism by allowing states to set and reinforce differing levels of protection.

While promoting a local approach to the problem of eminent domain reform, fee-shifting statutes also shift more power to the individual whose property is in danger of being taken, allowing him, with the advice of his lawyer, to determine the best course to pursue.¹⁸⁶ For some property owners, this may be additional compensation and relocation expenses; for others, it may be injunctive relief.¹⁸⁷ By giving the property owner the tools he needs to negotiate with the redevelopment agency on an even ground, the statutes serve to empower individuals in what otherwise might be perceived as a very disempowering situation.¹⁸⁸

D. DIFFERENT APPROACHES TO STATUTES AWARDING LITIGATION EXPENSES

The majority of states do not provide for attorney's fees for property owners challenging public use or blight designations in condemnation actions, but a substantial minority of states¹⁸⁹

184. *Id.* at 12–13.

185. *See id.* at 13 (highlighting the right of states to set higher levels of protections than the federal baseline).

186. This is true both for pre condemnation negotiations as well as for actual court proceedings. *See generally* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 126 (2006) ("Most academic discussions of the undercompensation problem overlook another important fact: the compensation that a property owner receives almost always results from a bargain between the owner and a Taker, rather than a judicial determination of the property's fair market value.").

187. *Cf.* Bell & Parchomovsky, *supra* note 13, at 890 (discussing fee-shifting statutes as one way state legislatures have tried to restore the balance between the property owners and the government).

188. For a vivid example of the significant difference having an attorney can make to negotiations over "just compensation," see Gaylord Merlin Ludovici Diaz & Bain, *Notable Cases*, http://www.gaylordmerlin.com/notable_cases.php (last visited Nov. 3, 2008) (highlighting differences between initial offers for property and the final price reached with the aid of representation).

189. *See* Bell & Parchomovsky, *supra* note 13, at 890 (citing Garnett, *supra* note 186, at 129 & n.175) (estimating that twenty states have provisions that

have laws that do just this.¹⁹⁰ A careful survey of the landscape of current fee-shifting statutes is useful, both for understanding the diversity of approaches within this area of law and for understanding the shortcomings and strengths of these approaches.

There are four main categories of statutes that shift some or all of the property owner's litigation expenses in the eminent domain context: unconditional fee shifting, conditional fee shifting, limited reimbursements, and judicial discretion.¹⁹¹ Unconditional fee shifting likely allows fee shifting in favor of property owners regardless of the outcome of litigation,¹⁹² while conditional fee shifting generally conditions the property owner's award of litigation expenses on being a prevailing party to the litigation.¹⁹³ Limited-reimbursement statutes allow for awards of litigation expenses up to a certain dollar amount,¹⁹⁴ and judicial discretion statutes generally leave the decision of whether or not to award attorney's fees to the trial judge's discretion in each particular case.¹⁹⁵ It is helpful to examine an example of each type in turn to understand the types of protections available.

1. Unconditional Fee Shifting

Florida has some of the strongest protections for property owners in the country,¹⁹⁶ and Florida law provides that attorney's fees are recoverable unconditionally.¹⁹⁷ In determining awards of litigation expenses in Florida, courts look both to Florida statutes and to the Florida Constitution's guarantee of "full compensation,"¹⁹⁸ which together have generally been in-

provide for fee shifting in some cases in the eminent domain context).

190. See, e.g., COLO. REV. STAT. § 38-1-122 (2007); FLA. STAT. § 73.092 (2005); IOWA CODE § 6B.33 (2007); MICH. COMP. LAWS SERV. § 213.66 (Lexis-Nexis Supp. 2008); MINN. STAT. § 117.031 (2006); N.Y. EM. DOM. PROC. LAW §§ 701-02 (McKinney 2003); OKLA. STAT. tit. 27, § 11 (2001); S.C. CODE ANN. § 28-2-510 (2007); WIS. STAT. § 32.28 (2005-06).

191. See N.Y. STATE LAW REVISION COMM'N, *supra* note 162, pt. IV.

192. See, e.g., FLA. STAT. § 73.092.

193. See, e.g., MINN. STAT. § 117.031 (authorizing award of attorney's fees when the difference between the amount offered and the amount awarded exceeds twenty percent or when the court determines that the taking is not for public use).

194. See, e.g., 26 PA. CONS. STAT. ANN. § 710 (West Supp. 2008).

195. See, e.g., N.Y. EM. DOM. PROC. LAW § 701.

196. See CASTLE COALITION, *supra* note 18, at 13.

197. See FLA. CONST. art. X, § 6; FLA. STAT. §§ 73.091-131.

198. See FLA. CONST. art. X, § 6; FLA. STAT. §§ 73.091-131.

terpreted to include attorney's fees.¹⁹⁹ One Florida court described the purpose of this law as "to permit the owner to contest the value placed on his property by the condemning authority and at the same time come out whole."²⁰⁰ This idea is even more clearly set forth in *City of Miami Beach v. Liflans Corp.*,²⁰¹ in which the court required the condemner pay the property owner's attorney's fees despite the fact that a jury awarded no compensation.²⁰² The idea is premised on the concept that when a property owner's home or business is condemned, he becomes an involuntary participant in litigation and should have the right to have his attorney's fees paid, even if his claim fails.²⁰³

This line of reasoning is compelling, particularly when the property owner is an involuntary defendant and chooses to challenge a very close legal issue.²⁰⁴ However, the statute may be too broad in some circumstances, particularly if the property owner's claim is frivolous and is dismissed without awarding additional compensation or any other form of relief.²⁰⁵ Furthermore, the statute does not apply to property owners who are bringing suit themselves to challenge an overbroad blight designation or but-for agency determinations, both fixtures of the modern redevelopment landscape.²⁰⁶ A simpler statute that

199. See *Ga. S. & Fla. R.R. Co. v. Duval Connecting R.R. Co.*, 187 So. 2d 405, 406 (Fla. Dist. Ct. App. 1966) ("Thus it is seen that the public policy of this state as evidenced by the cited constitutional and statutory provisions has been to secure to a landowner full compensation—not full compensation less the expenses of his lawyer.").

200. *Hodges v. Div. of Admin.*, 323 So. 2d 275, 277 (Fla. Dist. Ct. App. 1975), *superseded by statute*, 1987 Fla. Laws ch. 87-148, § 2, *as recognized in Dep't of Transp. v. Jack's Quick Cash, Inc.*, 748 So. 2d 1049, 1053 (Fla. Dist. Ct. App. 1999).

201. 259 So. 2d 515 (Fla. Dist. Ct. App. 1972).

202. *Id.* at 516.

203. The Florida Supreme Court put the point as follows:

Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received "just compensation" for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value.

Dade County v. Brigham, 47 So. 2d 602, 604-05 (Fla. 1950).

204. See *Hodges*, 323 So. 2d at 277 (finding that an award of attorney's fees was appropriate when the issue challenged was close, even though the property owner ultimately lost).

205. For a version of this critique, see N.Y. STATE LAW REVISION COMM'N, *supra* note 162, pts. IV, V.

206. See *Dep't of Env'tl. Prot. v. Gibbins*, 696 So. 2d 888, 890 (Fla. Dist. Ct.

combines the conditional-fee-shifting model for successful suits and the judicial discretion model in limited cases may better achieve the right balance along with fairly predictable results.

2. Conditional Fee Shifting

Under Minnesota law,²⁰⁷ attorney's fees are recoverable conditional on the property owner receiving an award of compensation greater than what the condemning authority offered or upon a court determination that the taking is unlawful.²⁰⁸ The Minnesota law is intriguing because it combines elements of the conditional recovery and the judicial discretion models. A court *must* make an award of litigation expenses to a property owner receiving an award of more than forty percent of the condemner's initial offer or if the taking is proven to be not for public use or illegal.²⁰⁹ On the other hand, the court *may* award litigation expenses to a property owner recovering between twenty and forty percent more than the initial offer.²¹⁰ Other states, including Wisconsin²¹¹ and Oklahoma,²¹² have enacted similar laws.

This is a sophisticated approach and accomplishes several useful objectives. Most importantly, it ensures that property owners will be reimbursed for the worst instances of eminent domain abuse, while avoiding the possibility of over-incentivizing litigation. However, by setting the bar for mandatory recovery at forty percent more than the initial offer,²¹³ the Minnesota statute may discourage attorneys from bringing solid cases that are likely to fall within the discretionary range. Furthermore, the Minnesota statute might be improved by allowing more judicial discretion in awarding fees in determinations of public use in which the claim is a close one but the property owner ultimately loses. Despite these limitations, Minnesota's law remains one of the strongest and provides a

App. 1997) (reversing an award of attorneys' fees because, although there was an administrative proceeding by the Department of Environmental Protection seeking access to the plaintiff's property, there was no actual eminent domain proceeding within the meaning of the statute).

207. MINN. STAT. § 117.031 (2006).

208. *See id.*

209. *Id.*

210. *Id.*

211. WIS. STAT. § 32.28 (2005–06).

212. OKLA. STAT. tit. 27, § 11 (2001).

213. MINN. STAT. § 117.031.

partial framework for the proposed statute in Part III of this Note.

3. Limited Reimbursement

Pennsylvania takes the limited-reimbursement route to awarding attorney's fees for opposing a condemnation action.²¹⁴ Under the Pennsylvania statute, the attorney's-fee award available to a property owner's lawyer is capped at four thousand dollars, with some exceptions.²¹⁵ Although this type of statute provides some compensation to the individual property owner opposing a government action and is relatively simple to administer, the amount of compensation will almost certainly be less than the actual cost in attorney's fees and will under-compensate the property owner.²¹⁶ Thus, while this statute was intended to "materially assist the owner of a property interest,"²¹⁷ the notably low cap on awards renders the statute relatively ineffective in balancing the power between the redevelopment agency and property owner, making it the least satisfactory of the four categories.²¹⁸

4. Judicial Discretion

Under New York law, attorney's fees are recoverable at the discretion of the trial judge.²¹⁹ The statute gives substantial deference to the trial judge, stating that "where an order or award is substantially in excess of the amount of the condemnor's proof" the court "may in its discretion" award the condemnee "an additional amount."²²⁰ While it is true that the trial judge has a unique perspective on the litigation and can make nuanced judgments that legislatures cannot make in advance, by vesting almost unlimited discretion in the trial judge, the statute provides uncertain protections for property owners and invites unequal administration of the law.²²¹ While an ap-

214. 26 PA. CONS. STAT. ANN. § 710 (West Supp. 2008).

215. *Id.* §§ 306(g), 308(d), 709.

216. See N.Y. STATE LAW REVISION COMM'N, *supra* note 162, pt. IV.

217. JOINT STATE GOV'T COMM., COMMENT (1971), reprinted in 26 PA. CONS. STAT. ANN. § 710 (West Supp. 2008).

218. See N.Y. STATE LAW REVISION COMM'N, *supra* note 162, at pt. IV.

219. N.Y. EM. DOM. PROC. LAW § 701 (McKinney 2003).

220. *Id.*

221. A look at some of the appellate decisions in which a state court of appeals had to overturn a trial court's denial of attorney's fees supports this general concern. See, e.g., *County of Oswego v. Maroney*, 588 N.Y.S.2d 478, 478 (N.Y. App. Div. 1992) (finding that the trial court erred in denying attorney's

proach emphasizing judicial discretion is useful in close cases, mandatory awards are more appropriate in cases where the property owner clearly qualifies as a prevailing party because they promote the enforcement of eminent domain statutes by increasing the willingness of attorneys to take on difficult cases.

III. A MODEL STATUTE TO BE ENACTED BY STATE LEGISLATURES

In light of this analysis, the following statute combines the best elements of the existing state statutes by adopting a bright line rule for fee shifting in most situations, including all those involving determinations of just compensation, while allowing for some judicial discretion in proceedings involving close questions of public use. It adopts the general elements of the conditional-fee-shifting statute by providing for mandatory awards in certain circumstances in which the property owner has clearly prevailed. By requiring a property owner to recover at least twenty percent more than the condemnor's initial offer, it avoids encouraging property owners to bring claims that are not worth litigating while still setting the bar low enough not to discourage property owners from bringing legitimate grievances to court.

In addition to enabling property owners to bring meritorious claims for just compensation, this statute allows for full recovery of litigation expenses, including expenses related to administrative proceedings, where property owners can show the condemnation is not for a public use within the meaning of state law. Furthermore, in light of the importance of determinations of public use in the eminent domain statutory scheme in most states, this statute also allows for awards of litigation expenses at a trial judge's discretion in cases of public use. This is not intended to encourage litigation, but to enable property owners to contest close issues of public use by allowing a judge to award litigation expenses if he finds that the claims were substantially justified and that an award of litigation expenses is necessary for just and adequate compensation in that particular case. This decision is left to the discretion of the trial judge

fees when the court's award was more than two-hundred percent of the condemnor's original offer); *Scuderi v. State*, 585 N.Y.S.2d 271, 272 (N.Y. App. Div. 1992) (finding the trial court erred when it determined that a court award 41.4% in excess of the condemnor's initial offer was not "substantially in excess").

because he is in the best position to make the type of nuanced and concrete judgments necessary to a fair determination of this issue.

Model Fee-Shifting Statute

(1) In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any other court.²²² These expenses shall include, but not be limited to, those expenses necessary to prepare for and represent the property owner at the administrative level.

(2) Litigation expenses shall be awarded to the condemnee or challenger if:²²³

(a) the final judgment or award for damages, as determined at any level of the eminent domain process, is more than 20 percent greater than the last written offer of compensation made by the condemning authority;²²⁴

(b) the proceeding is abandoned by the condemnor after the public use determination;²²⁵ or

(c) the court or any other reviewing body determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.²²⁶

(3) Litigation expenses for the determination of public use may be awarded to the condemnee or challenger if the trial judge deems it necessary for just and adequate compensation of the condemnee or challenger.

This statute combines some of the best elements of the fee-shifting statutes. It creates a bright-line standard for when litigation expenses are recoverable in determinations of just compensation and combines both the conditional recovery model and the judicial discretion model with regards to public use determinations, providing for mandatory recovery if the property owner wins the public use issue and providing for recovery at the sole discretion of the judge if the property owner loses a close public use issue.

This statute is not intended to conclusively answer all challenges in implementing substantive and procedural protections for property owners, nor is it intended to develop a revolutionary approach to fee shifting in the eminent domain context. It is largely based on conditional fee-shifting statutes that have

222. *Cf.* WIS. STAT. § 32.28 (2005–06).

223. *Cf. id.*

224. *Cf.* MINN. STAT. § 117.031 (2006).

225. *Cf.* WIS. STAT. § 32.28.

226. *Cf. id.*

been successfully enacted in Minnesota and Wisconsin, but improves on them in several important ways.

First, this statute takes a unique approach to fee shifting in the context of determinations of public use. Under both Minnesota²²⁷ and Wisconsin²²⁸ law, property owners who lose on the issue of public use have no right to litigation expenses. This statute takes a significantly more flexible approach. Like the Minnesota and Wisconsin²²⁹ statutes, it guarantees that litigation expenses will be granted to the property owner who prevails on the issue of public use. However, it also provides that litigation expenses may be granted at the trial judge's discretion in situations where the property owner loses on the issue of public use but the judge determines that the challenge was reasonable and brought in good faith. This modification is made in light of the importance that the American public clearly places on fair determinations of public use in the wake of *Kelo*²³⁰ and on the importance of encouraging people to bring such challenges when there is a significant possibility that the redevelopment agency is abusing its authority and condemning property it has no right to condemn.

Regarding the issue of just compensation, this statute adopts a purely conditional recovery approach, allowing recovery where the court awards more than twenty percent of the condemning authority's last written offer. In so doing, it sets the mandatory bar for recovery lower than Minnesota²³¹ and higher than in Oklahoma.²³² The decision to set the standard at twenty percent is based on an understanding that, while it is important to encourage individuals to challenge low appraisals of their property, a recovery of only ten or fifteen percent more than was originally offered is typically not worth the litigation. Thus, this statute represents a compromise position, setting the bar low enough to enable property owners to demand fair compensation, but high enough to prevent wasteful litigation.

227. MINN. STAT. § 117.031.

228. WIS. STAT. § 32.28.

229. See MINN. STAT. § 117.031; WIS. STAT. § 32.28.

230. It seems safe to say much of the controversy surrounding *Kelo* deals with what does and does not constitute a "public use" within the meaning of the Fifth Amendment. See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) ("The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.").

231. See MINN. STAT. § 117.031.

232. See OKLA. STAT. tit. 27, § 11 (2001).

Simple to enact, this statute could be passed by any state legislature looking to improve implementation of preexisting protections for property owners. While it is primarily intended as a straightforward starting point for state legislatures that are in the process of reforming their eminent domain codes and are concerned about the effective implementation of these new laws, it can also serve as a model for those states looking to optimize these laws in light of the recent developments in eminent domain law.

CONCLUSION

The enactment of fee-shifting statutes will not provide a conclusive answer to the problems of eminent domain abuse. The protections these statutes afford will be only as strong as the substantive protections of the states and the willingness of the courts to enforce these protections. However, fee-shifting provisions provide promising means of creating a mechanism that will both enable property owners to bring meritorious suits they might otherwise not be able to afford and to provide meaningful deterrence to overzealous redevelopment agencies which might otherwise be tempted to overreach their legislative authority by offering less than just compensation or by relying on specious blight designations to promote goals of private economic development. The utility of these statutes is necessarily limited since they can only reinforce pre-existing legal protections. Thus, the enactment of attorney's-fees provisions by state governments should not be seen as the end of the debate, but rather as a useful procedural mechanism to reinforce existing state laws in a changing world.