

Retaking Mecca: Healing Harlem through Restorative Just Compensation

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Neighborhood redevelopment often brings about major cultural shifts. The Fifth Amendment's Takings Clause allows for the taking of private property only when it is for public use, and requires just compensation. Courts have expanded the "public use" requirement to allow "urban renewal projects" where the economic development of the area stands as the public purpose. The consequent influx of private developers in the name of economic revitalization has led to the displacement of many communities — particularly those made up of low-income people of color.

This displacement has been extremely visible in Harlem. Harlem was once considered the Mecca of black art and culture, but the last few decades have brought changes that may cost it this title. Rampant land condemnations and redevelopment efforts incited a noticeable socioeconomic shift in the historic neighborhood. Residents and small business owners pushed against these eminent domain actions, but to no avail — Harlem's gentrification continued. Rising rents and institutional barriers compelled the slow exodus of longtime African American residents and business owners unable to afford the increasing costs.

This Note explores the expansion of "public use" after Kelo v. City of New London, noting how it encouraged gentrification, particularly in Harlem. It argues that the current compensation scheme does not meet the constitutional standard of being "just" because it does not account for the loss of the community as a unit, or the dignitary harm suffered due to forcible displacement in the name of "revitalization." Finally, it proposes Community Benefits Agreements as the vehicles through which gentrifying communities can receive restorative compensation, offering recommendations for creating a CBA that could begin to heal Harlem.

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I. INTRODUCTION

Despite its humble presentation as the shortest section at the very end of the Fifth Amendment, the Takings Clause has remained a source of heated debate and litigation for decades.¹ The Takings Clause states: “[N]or shall private property be taken for public use without just compensation.”² Most states include similar or identical language in their state constitutions.³ The Supreme Court has decided over 50 takings cases since the development of modern eminent domain jurisprudence.⁴ The topic becomes only more complex with the addition of land use controls, new meanings of “public use,” and challenges against the adequacy of “just compensation.”

In *Kelo v. City of New London*, the Supreme Court permitted the use of eminent domain to seize property and sell it to private developers.⁵ In the name of “economic revitalization,” cities exercise their eminent domain authority on a large scale in hopes of ushering in a new community with more spending power, often displacing a more vulnerable community in the process.⁶ This process — known as gentrification — is currently occurring in Harlem, where frequent land condemnations are claiming the homes of many residents.⁷ In spite of the constitutional requirement, the dispossession leaves many of Harlem’s residents inadequately compensated. This Note argues that the current compensation scheme falls short of being “just” for Harlem’s displaced residents because it fails to compensate many of the affected community members and the community as a unit, and it ignores the dignitary harm inflicted on individuals forced out of their communities in the name of “revitalization.”

This Note proceeds in six parts. Part II discusses the controversial “public purpose” expansion of the Takings Clause doctrine presented in *Kelo* and the racialized history of urban renewal programs. Part III defines gentrification and reviews several

1. ROBERT MELTZ, CONG. RESEARCH SERV., RL97122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1 (2015) [hereinafter CHRONOLOGY OF TAKINGS DECISIONS].

2. U.S. CONST. amend. V.

3. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 310, 311 (2007).

4. CHRONOLOGY OF TAKINGS DECISIONS, *supra* note 1, at 1.

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

6. *See infra* Part III.C.

7. *See infra* Part IV.

causal factors. Part IV documents eminent domain use in Harlem. Part V argues that Harlem's current compensation scheme fails because it does not consider the cultural and community ties lost in the process of displacement, or the dignity lost in being forced out of one's home or community in the name of "revitalization." Part VI proposes the use of Community Benefits Agreements to redress these harms, particularly for underserved communities. Using the West Harlem CBA negotiations as a foundation, it offers recommendations for executing a CBA that could begin to compensate Harlem for these losses. Finally, Part VII reviews some of the critiques of CBAs and difficulties that may arise during their execution.

II. PUBLIC USE, PUBLIC ABUSE: EXAMINING "PUBLIC PURPOSE" IN THE *KELO* CONTEXT

Balancing individual property rights with government necessity has been at the center of the eminent domain deliberation, but the debate has taken a new direction in recent years. Originally, the "public use" requirement of the Takings Clause essentially prohibited use of eminent domain to benefit a private party, but modern jurisprudence has left the question up for debate.⁸ This Part first reviews the Supreme Court case *Berman v. Parker*, which designated urban renewal as a valid "public purpose." It then covers the seminal case *Kelo v. City of New London* and its notable expansion of the "public use" requirement. It goes on to discuss the dissenting opinions in *Kelo*, which warned of the consequences of the expansion on low-income minority communities. Finally, it addresses the racialized nature of urban renewal programs before *Kelo* and recounts the strong public response to the controversial decision.

Berman v. Parker was one of *Kelo*'s most prominent predecessors due to the Court's broad construction of "public use."⁹ The

8. Gerard J. Mangone, *Private Property Rights: The Development of Takings in the United States*, 17 INT'L J. MARINE & COASTAL L. 195, 206–209 (2002) (discussing the development of public use jurisprudence).

9. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . ."). Another noteworthy predecessor is *Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). In *Midkiff*, the Hawaii state legislature sought to reduce the social and economic tensions resulting from the rule of an early Hawaiian land oligopoly by creating a scheme in which the state would condemn and

case, decided in 1954, involved the condemnation of a parcel of land as part of a redevelopment plan designed to eliminate blight in Washington, D.C. The condemnation at issue was part of the District of Columbia Redevelopment Act of 1945, which gave the city virtually unbridled authority to condemn any land as part of the effort to remedy the “injurious” social condition of the nation’s capital.¹⁰ The landowners’ arguments that their individual properties were not blighted and thus unjustly condemned failed. In the majority opinion, Justice William Douglas stated that “community redevelopment programs need not, by the force of the Constitution, be on a piecemeal basis.”¹¹ This language, echoed in *Kelo*, launched the judicial practice of granting wide latitude for measures implemented as part of “revitalization” efforts.¹² As part of the expansion, the Court also validated eminent domain proceedings for the purpose of aesthetic improvements, asserting that a community “should be beautiful as well as healthy.”¹³ Heeding the legislature’s discretion, the Court allowed legislative directive and not the courts to control the breadth of “public

take real property leased to individual homeowners and convey it to another private owner to reduce the concentration of land ownership. *Id.* at 229. Landowners challenged the Act as unconstitutional, denouncing the condemnation process as a taking without the requisite public use requirement. Citing *Berman*, the Court repeated that the courts should play only a narrow role in evaluating a legislature’s judgment of what constitutes a valid “public use.” *Id.* at 239. The Court also held that “deference to the legislature’s ‘public use’ determination is required” unless the articulated purpose is shown to “involve an impossibility.” *Id.* at 240 (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

10. The Act created the District of Columbia Redevelopment Land Agency, which had the authority to “acquire and assemble real property by purchase, exchange, gift, dedication, or eminent domain.” District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790 (1946). The purpose of the Act read: “It is hereby declared to be a matter of legislative determination that owing to technological and sociological changes . . . conditions existing in the District of Columbia . . . are injurious to the public health . . . [T]o these ends . . . the acquisition and the assembly of real property and the leasing or sale thereof for the redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.” *Id.* § 2.

11. *Berman*, 348 U.S. at 35.

12. “Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.” *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

13. In the opinion, Justice Douglas famously states, “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.” *Berman*, 348 U.S. at 33 (citation omitted).

use.”¹⁴ Notably, the *Berman* Court repeatedly employed the phrase “public purpose,” rather than public use. The language choice reflected the gradual enlargement of both the legislature’s role and the scope of the requirement, an expansion that would culminate in *Kelo*.¹⁵

In *Kelo v. City of New London*, the Supreme Court ruled that a city could take private property and redistribute it to private developers without violating the public use requirement of the Fifth Amendment.¹⁶ In its 5–4 decision, the Court expanded the concept of “public use” to include “public purpose”; however, the Court did not present clear guidelines for the change, which created immense controversy.¹⁷ The Court explained that “promoting economic development is a traditional and long-accepted function of government” and that economic revitalization was sufficient to satisfy the criteria for “public use.”¹⁸ The Court reasoned that economic development would create jobs, generate tax revenue, build momentum for the revitalization of the downtown area, and make the city “more attractive.”¹⁹ Wary of stepping onto legislative grounds, the Court reiterated its commitment to the “longstanding policy of deference” to the state’s authority and judgment in making determinations of what constitutes a public use.²⁰ The Court’s broad construction of what constitutes a valid public use would have profound and perilous repercussions in the years to come.²¹

14. *Id.* at 35.

15. DAVID L. CALLIES, PUBLIC USE AND PUBLIC PURPOSE AFTER KELO V. CITY OF NEW LONDON 4 (2008).

16. In *Kelo*, a homeowner in New London, Connecticut, sued the city after its approval of a development project that would involve seizing private property to sell to private developers through eminent domain. *Kelo* and nine other homeowners in the city’s development area challenged the project as a violation of the “public use” requirement. None of the petitioners’ homes were alleged to be blighted or in an otherwise undesirable state. *Kelo*, 545 U.S. at 469.

17. Richard Epstein, *Kelo v. City of New London Ten Years Later*, NAT’L REV. (June 23, 2015), <http://www.nationalreview.com/article/420144/kelo-v-city-new-london-ten-years-later-richard-epstein> [<https://perma.cc/N57Q-NBPR>].

18. *Kelo*, 545 U.S. at 484. Justice Stevens, delivering the opinion of the Court, stated, “it would be incongruous to hold that the City’s interest in the economic benefits to be derived from the development . . . has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.” *Id.* at 485.

19. *Id.* at 474.

20. *Id.* at 480.

21. Despite the widespread impact of this case, the Pfizer facility at issue in *Kelo* was never built in New London. See Daniel M. Lehmann, *N.J. Court Rejects ‘Manifest Abuse of the Eminent Domain Power’*, N.Y.L.J. (Dec. 28, 2016), <http://www.newyorklawjournal.com/>

The *Kelo* decision foreshadowed the consequences of the continued expansion. Although the Court's deference to legislative judgments promoted legislative sovereignty, the decision left much of the nation's politically feeble populations vulnerable to takings. In their dissents in the *Kelo* opinion, Justices Sandra Day O'Connor and Clarence Thomas predicted the injurious effects the decision would have on low-income and minority communities. Justice O'Connor warned that the decision gave license for the government to "transfer property from those with fewer resources to those with more," and that the Founders "cannot have intended this perverse result."²² The consequences, Justice Thomas cautioned, were "not difficult to predict" and "promise[d] to be harmful."²³ Upholding economic redevelopment as a valid form of "public use" fortified the growing trend of "urban renewal programs" with the vague promises of economic and social revitalization. Although the language describing the purpose of the urban renewal programs was unspecific, these programs often targeted discrete populations.²⁴ Justice Thomas asserted that expanding the "public use" requirement "guarantee[d] that these losses [would] fall disproportionately on poor communities."²⁵ These communities' relative economic disadvantages would prevent them from being able to use their land in the most economically and socially efficient ways, making their neighborhoods the perfect candidates for condemnation in the name of economic development.

Justice Thomas insisted that the increased vulnerability of the targeted populations warranted "intrusive judicial review," rather than blind deference to the articulated purposes of the legislature.²⁶ Echoing Justice O'Connor's rhetoric, Justice Thomas argued that "the deferential standard this Court has adopted for the Public Use Clause is . . . deeply perverse."²⁷ Justices Thomas and O'Connor's dissents provided the framework for arguments

id=1202775639918/NJ-Court-Rejects-Manifest-Abuse-of-the-Eminent-Domain-Power?mcode=1202617655491&curindex=70&curpage=2&slreturn=20170111012026 [https://perma.cc/43D4-LBHL].

22. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice O'Connor also stated that "the fallout from the decision [would] not be random," and the beneficiaries would likely be "those citizens with disproportionate influence and power in the political process." *Id.*

23. *Id.* at 521 (Thomas, J., dissenting).

24. *See infra* Part II.A.

25. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

26. *Id.*

27. *Id.* at 522.

against “urban renewal” programs, particularly from members of the condemned communities.²⁸ Reaffirming *Berman*’s legacy, *Kelo* further enabled the displacement of low-income communities of color in the name of “urban renewal.”

A. A PERVERSE RESULT: COMMUNITIES DISPLACED BY A “PUBLIC PURPOSE”

The decision in *Kelo* was the denouement to an age-old story. Urban renewal programs were in place even before *Berman*, and Justice Thomas rehashed the harsh and disparate effects of these broad redevelopment projects in his dissent in *Kelo*.²⁹ Although unaddressed in the case, the incentive behind the urban renewal program in *Berman* and the rampant redevelopment projects was obvious: to “reshape the racial and economic geography of cities.”³⁰ The redevelopment areas deemed “blighted”³¹ were consistently inner-city communities with predominantly minority populations.³² The 1950s and 1960s brought periods of forced migration in cities like Baltimore and St. Paul — cities with substantial populations of people of color.³³ In his essay, Professor Wendell Pritchett notes the irony that the Court was deciding *Berman* at the same time as *Brown v. Board of Education*: the redistribution of populations resulting from the “renewal” program approved by the *Berman* Court actually increased residential segregation by removing black and minority communities,

28. One study observed that, “for urban affairs scholars, the assertions of Justices O’Connor and Thomas represent a familiar refrain. For years, researchers have noted the trend in urban redevelopment strategies to attract wealthier middle classes back to the inner city, resulting in the replacement or succession of one population with another.” Dick M. Carpenter & John K. Ross, *Testing O’Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2449 (2009).

29. In his dissent, Justice Thomas notes that over 97 percent of the residents forcibly displaced by the “slum-clearance” project upheld by the Court in *Berman* were black. 63 percent of families displaced by urban renewals in general were nonwhite; 56 percent of them had incomes low enough to qualify for public housing. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

30. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POLY REV. 1, 46 (2003) [hereinafter Pritchett, *The “Public Menace” of Blight*].

31. The then-ambiguous term “blight” was critical to sustaining redevelopment efforts. The term had no overt implications, but, like all coded language, had underlying prejudicial biases. *Id.* at 6.

32. *Id.* at 47.

33. *Kelo*, 545 U.S. at 522.

complicating the integration of schools in those areas.³⁴ Across the nation, “urban renewal” became known as “Negro removal.”³⁵ Between 1960 and 1970 alone, 20 percent of all black central city residents nationwide were displaced by urban renewal programs — double the percentage of white residents displaced during this time.³⁶ Since the 1990s, public housing demolitions in the name of “urban revitalization” have disproportionately targeted housing projects primarily inhabited by black residents.³⁷ It seemed the prejudicial effects of redevelopment were readily apparent, particularly in the wake of *Brown*. In response to these programs, black residents rallied against the “spatial manipulations that enforced historic patterns of black subordination.”³⁸ Nonetheless, the Court’s decisions to broadly construe “public use” as an umbrella term left many of the nation’s most vulnerable out in the rain.

The Court’s controversial decision in *Kelo* incited a strong public response.³⁹ In the wake of *Kelo*, Congress and nearly every state implemented measures to curb the reach of “public purpose” and reduce the government’s power of eminent domain.⁴⁰ Urban renewal projects plaguing inner cities came under fire from both sides: they angered conservatives, who feared the threat to their ownership interests and were wary of increased interference with the private market, and they faced fierce opposition from liberals,

34. Pritchett, *The “Public Menace” of Blight*, *supra* note 30, at 44. Only 310 of the 5,900 newly constructed housing units developed per *Berman*’s redevelopment plan were affordable to the area’s former residents, driving many out. *Id.* at 46.

35. *Id.* at 47. Novelist James Baldwin also famously stated that the terms had become synonymous. James Baldwin et. al, CONVERSATIONS WITH JAMES BALDWIN 42 (1996).

36. JOHN R. LOGAN & HARVEY LUSKIN MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACES 114 (2007). This figure does not include the displacement that occurred from other market forces (e.g. evictions, commercial development, rent increases). *Id.*

37. Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities*, 48 URB. STUD. J. 1581, 1600 (2011).

38. Eric Avila & Mark H. Rose, *Race, Culture, Politics, and Urban Renewal*, 25 J. URB. HIST. 335, 343 (2009).

39. Much of the public outcry could be attributed to the fact that the defendant was Pfizer, a large corporation and easy villain. Moreover, as Professor Wendell Pritchett notes, “the fact that th[e] homes were well-maintained and owned by white, middle-class residents would certainly increase public sympathy.” Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 908 (2006) [hereinafter Pritchett, *Beyond Kelo*].

40. Forty-seven states introduced, considered, or passed legislation intended to limit the government’s eminent domain authority. Federal legislation included HR 3058, which became law; it specified, “public use shall not be construed to include economic development that primarily benefits private entities.” CALLIES, *supra* note 15, at 11, 19.

who condemned the actions as discriminatory against communities of color.⁴¹ Legal scholars were also heavily involved in the surrounding dialogue, arguing for a stricter application of the Public Use Clause.⁴² The increased attention to the headline-grabbing eminent domain debate coaxed attorneys to represent condemnees fighting for their properties.⁴³ Though there is little empirical research indicating whether eminent domain proceedings have increased nationally since *Kelo*, the decision illuminated the ideological tensions between government deference and a property owner's right to remain.

III. GENTRIFICATION DEFINED

Efforts at urban revitalization can be a driving force behind the gentrification of a city. This primarily occurs in cases where the "renewal" requires or results in the displacement of the original, lower income residents to attract those with more spending power. Though the physical changes accompanying gentrification are often readily apparent, the precise mechanisms catalyzing the process are more obscure. This Part defines gentrification and examines several social and economic factors that can cause the phenomenon, particularly in low-income minority communities.

Sociologist Ruth Glass first coined the phrase "gentrification" in 1964, after observing the trend of middle-class people displacing the working class in London and changing the "whole social character" of the area.⁴⁴ Those in support of gentrification assert that the demographic shifts are beneficial for communities, as

41. Pritchett, *The "Public Menace" of Blight*, *supra* note 30, at 48 ("Liberals argued that it exacerbated racial discrimination, while conservatives stated that it wasted government resources and interfered with the private market.")

42. *Id.* at 2.

43. Notable cases include African-American farmers fighting the condemnation of their land for the development of an automobile plant, and a woman seeking to protect her land from condemnation for a Trump Casino in Atlantic City. Press Release, John Kramer, Inst. for Just., Court Tells Government: Think Twice Before Condemning Property (Jul. 20, 1998), <http://ij.org/press-release/atlantic-city-nj-condemnation-latest-release/> [<https://perma.cc/DT5E-3MWC>]. Such cases are often taken on by the Institute for Justice in Washington, D.C. Pritchett, *Beyond Kelo*, *supra* note 39, at 902. The Institute for Justice is the non-profit law firm that represented the plaintiffs in *Kelo*. *Kelo Eminent Domain*, INST. FOR JUST. (last visited Feb. 16, 2018), <http://ij.org/case/kelo/> [<https://perma.cc/Y94B-SWGN>].

44. J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOWARD L.J. 405, 405 n.1 (2003).

they improve civic society,⁴⁵ create job opportunities, raise property values, and reduce the crime rate.⁴⁶ In a study on residential mobility in gentrifying neighborhoods, Columbia University professor Lance Freeman concluded that displacement during gentrification is “rare,” and that mobility out of gentrifying areas does not drastically differ from those in other neighborhoods.⁴⁷ However, gentrification continues to draw sharp criticism. Opponents denounce the practice as a form of “exclusionary displacement,” with the displaced more likely to be “renters, poorer, and people of color.”⁴⁸ Rachel Godsil, professor at Seton Hall Law School, addressed the “pain of loss of community and the harm of lost autonomy” involved in forced displacement, and drew a distinction between consensual integration and a scenario where “only the affluent (who are often white) have the means to make choices.”⁴⁹ Despite mixed outlooks on its impact and even its meaning, both supporters and opponents generally agree on an explication of gentrification as the process of neighborhood change that results in the replacement of lower income residents with higher income ones.⁵⁰

Redevelopment does not necessarily imply gentrification because the affected communities may not experience displacement as a result of the project;⁵¹ however, cities’ efforts at generating higher revenue in urban areas can involve displacing lower-

45. Timothy Taylor, *Economics of Gentrification*, CONVERSABLE ECONOMIST (Dec. 6, 2016), http://conversableeconomist.blogspot.com/2016/12/economics-of-gentrification_6.html [https://perma.cc/ER86-8MPR].

46. Patrick Gillespie, *How gentrification may benefit the poor*, CNN: MONEY (Nov. 12, 2015), <http://money.cnn.com/2015/11/12/news/economy/gentrification-may-help-poor-people/index.html> [https://perma.cc/N4H7-8UL3].

47. Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 URB. AFF. REV. 463, 487–88 (2005).

48. Karen Chapple, *Income Inequality and Urban Displacement*, 26 NEW LAB. F. 84, 86 (2017).

49. Rachel D. Godsil, *Transforming Gentrification into Integration*, NYU FURMAN CENTER (2014), <http://furmancenter.org/research/iri/essay/transforming-gentrification-into-integration> [https://perma.cc/EW8G-V3Q5].

50. MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INSTITUTION, *DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 1* (2016), <https://www.brookings.edu/wp-content/uploads/2016/06/gentrification.pdf> [https://perma.cc/R76M-9RMC].

51. *Id.* For example, redevelopment may involve changing an industrial area into a mixed residential/commercial area, which does not typically displace many residents. For an instance of “industrial” gentrification, see Mike DeBonis, *McDuffie resolute on helping his ward shed image of a dumping ground*, WASH. POST (Dec. 25, 2012), https://www.washingtonpost.com/local/dc-politics/2012/12/25/927a82d8-4c7b-11e2-a6a6-aabac85e8036_story.html?utm_term=.ae33b947eaea [https://perma.cc/EL87-FQRA].

income residents.⁵² In addition to serving as business centers, cities continue to increase their arts and entertainment presence and activity. Consequently, redevelopment plans usually include measures designed to usher in residents with more spending power, with the aim of creating sustainable economic development.⁵³ Gentrification has occurred in cities across the country for decades, and the precise mechanisms of the process may vary.⁵⁴ The rate of change, the desired outcome, and the condition and response of the affected community all affect the scale and presentation of gentrification.

Additionally, several social and economic factors can provoke the process of displacement. The remainder of this Part describes the factors that cause gentrification, focusing on zoning plans, housing market pressures, and eminent domain. First, state or local governments may implement comprehensive zoning laws that reframe the layout and demographic of specific jurisdictions. Second, housing market fluctuations may result in living expenses becoming unaffordable for low-income residents. Finally, and most pertinently, the city may use eminent domain to condemn areas they argue are “blighted” or in need of “renewal.” It is important to note that these factors are not mutually exclusive — in fact, they often interact with each other (e.g. city planning seeking to remedy unfavorable market trends). Though the mechanisms differ, they are means to the same end — to implement and enhance sustainable economic development.⁵⁵

A. ZONING PLANS

Zoning is a powerful tool used to plan and modify the physical layout of a city. Zoning ordinances classify land according to its use, dividing it into residential, commercial, or industrial zones.⁵⁶

52. See KENNEDY & LEONARD, *supra* note 50, at 2.

53. *Id.* at 1.

54. Gentrification typically occurs in cities with tight markets and in specific neighborhoods. *Id.*

55. The factors listed here are by no means exhaustive. There are many other contributing factors, including rapid job growth, an influx of professionals seeking to avoid long and arduous commutes, and increasing New Urbanist sentiments of accessibility and “walkability.” See KENNEDY & LEONARD, *supra* note 50, at 10–12.

56. Zoning ordinances differ from comprehensive plans. Comprehensive plans set forth the overall guidelines and purposes of development. Ordinances classify property and regulate its use accordingly. For a more detailed explanation, see Will Van Vector,

Zoning is among the most invoked of the government's police powers, which give the government the right to interfere with private activity for the general welfare.⁵⁷ Challenges against the validity of a zoning ordinance usually prompt due process analyses in court; namely, landowners argue that the ordinance is improper or unconstitutional because it has deprived them of their property without due process of law. Understanding urban planning to be an integral and challenging part of city regulation,⁵⁸ courts have historically given local governments considerable deference in dealing with zoning ordinances, so a landowner has to show that the ordinance deprives his or her land of so much of its economic value that it amounts to a physical appropriation of the land.⁵⁹ The government's power of eminent domain and its police power often interact; in fact, takings law has defined the parameters of police power regulation.⁶⁰ Some states encourage inclusionary zoning programs, which require affordable housing in new residential developments, to mitigate displacement.⁶¹ Even so, rezoning plans can facilitate gentrification.

B. MARKET PRESSURE

The condition of (and reactions to) the housing market can also drive gentrification. In many of these neighborhoods, housing prices are high, suitable living options for workers are distant,

Zoning Ordinances and Regulations, LAWYERS.COM (2015), <https://zoning-planning-land-use.lawyers.com/zoning-ordinances-and-regulations.html> [<https://perma.cc/FZ75-FZT3>].

57. APA Board of Directors, APA Policy Guide on Takings, AM. PLANNING ASS'N (Apr. 11, 1995), <https://planning.org/policy/guides/adopted/takings.htm> [<https://perma.cc/NNE2-WAZ5>].

58. "The constantly increasing density of our urban populations . . . make it necessary for the state . . . to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions." *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). In the case, the Supreme Court held that a local zoning ordinance that imposed building restrictions was a valid exercise of the police power.

59. In a recent takings case, Justice Sotomayor's dissent illuminated the heightened standard for proving takings cases: "[G]overnmental action that reduces the value of property or that imposes 'a significant restriction . . . on one means of disposing' of property is not a per se taking; in fact, it may not even be a taking at all." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2438 (2015) (Sotomayor, J., dissenting) (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)).

60. See APA Board of Directors, *supra* note 57.

61. The Department of Housing and Urban Development defines unaffordable housing as rent that exceeds 30 percent of the household income. U.S. DEP'T OF HOUSING AND URB. DEV., Affordable Housing (last visited Jan. 13, 2018), https://www.hud.gov/program_offices/comm_planning/affordablehousing/ [<https://perma.cc/5669-A5V6>].

and the rate of job growth exceeds the housing supply.⁶² Increased housing demand leaves buyers looking for housing elsewhere. In some instances, property owners and investors create large “rent gaps”⁶³ by disinvesting in a neighborhood; once property values drop low enough, they reinvest in the same neighborhood and the influx of capital catalyzes the process of displacement.⁶⁴ Rent hikes⁶⁵ and landlord harassment or indifference may also force tenants into uninhabitable, unaffordable, or unsafe conditions in an effort to drive out old tenants and usher in higher income residents.⁶⁶ In cases where developers and landlords are seeking to profit from a favorable economy, tenants might even face a combination of these challenges.

C. EMINENT DOMAIN

State actors may also undertake eminent domain actions that displace low-income minority communities.⁶⁷ The incentive is typically economic in nature; states will condemn neighborhoods they consider “underperforming” in hopes of welcoming residents and businesses that will maximize tax revenue.⁶⁸ However, the profit-driven motivations cannot be completely severed from the social impact. A 2008 study compiled U.S. census data and a sample of areas using eminent domain for redevelopment projects and found that eminent domain use for private-to-private trans-

62. KENNEDY & LEONARD, *supra* note 50, at 10.

63. Rent gaps are the potential difference in property value before renovation and after renovation. *Id.* at 11.

64. *Id.*

65. A 2014 study by Zillow Real Estate Research found that between 2000 and 2014, the median household income rose about 25 percent while rents more than doubled. Krishna Rao, *The Rent is Too Damn High**, ZILLOW (Apr. 15, 2014), <https://www.zillow.com/research/rent-affordability-2013q4-6681/> [https://perma.cc/9HAP-UV98]. A 2016 study showed that the typical household in New York City spends approximately 65.2 percent of their income on rent — 35 percent above the value the federal government deems unaffordable. Typical NYC Household Spends 2/3 Of Income on Rent: Study, NBC (Apr. 21, 2016), <https://www.nbcnewyork.com/news/local/NYC-New-Yorkers-Spend-Nearly-23-of-Income-on-Rent-in-2016-StreetEasy-376497101.html> [https://perma.cc/J6NS-LQVJ].

66. In New York, Mayor de Blasio created the Tenant Harassment Assistance program to support low-income tenants facing these harms. Forms of landlord harassment may include not offering leases or lease renewals, failure to provide necessary repairs or utilities, or unjustified eviction notices. CITY OF NEW YORK, *Tenant Harassment Assistance* (last visited Jan. 13, 2018), <http://www1.nyc.gov/nyc-resources/service/4860/tenant-harassment-assistance> [https://perma.cc/YL3P-A4KP].

67. Further discussed *infra* Part IV.A.

68. See Carpenter & Ross, *supra* note 28, at 2450–51.

fer of property did, in fact, disproportionately harm poor and minority community members.⁶⁹ Considering discriminatory condemnation selections, gentrification cannot be understood in a purely economic context.

New York eminent domain proceedings demonstrate the multifaceted nature of gentrification. The New York Constitution allows governments to condemn land “for the purpose of redevelopment of economically unproductive, blighted or deteriorated areas.”⁷⁰ In the 1930s, “blight” consisted of a “set of conditions analogized as a disease or cancer.”⁷¹ Today, however, the bar is set much lower — courts continue to define the language from the Constitution expansively, finding “substandard” conditions in cracked sidewalks, graffiti, and “underutilization.”⁷² “Blight” has become somewhat amorphous and coupled with vague descriptors, such as the presence of “physical conditions impeding the development of appropriate uses.”⁷³ The malleability of these phrases affords ample latitude to prove conditions of blight or “substandard” conditions. One scholar notes: “Blacks and Latinos, more often renters than their white counterparts, are less likely to exert any influence on the process [of gentrification].”⁷⁴ Consequently, these “underutilized” sites frequently are home to low-income communities of color. This does not necessarily result from malicious intent, but involves a variety of factors. These partially arbitrary designations of blight and the limited political capital of these communities form the perfect storm for gentrifi-

69. A significant number of these members are racial minorities, of a significantly lower income level, and have low levels of education. *See generally* Carpenter & Ross, *supra* note 28.

70. N.Y. CONST. art. XVI, § 6.

71. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 310 (2003).

72. Nicole Gelinias, *Eminent Domain as Central Planning*, *CITY J.* (2010), <https://www.city-journal.org/html/eminent-domain-central-planning-13253.html> [<https://perma.cc/3NCZ-QNZU>]. “Underutilization” meant that landowners in the site were not generating the benefits that the government sought. *Id.* *See also* Jeffrey Kleegeer, *Blight Makes Right: Utilization as Public Use*, 43 *URB. LAW.* 889, 892 (2011) (“The concept of underdevelopment or underutilization supports a finding of blight when the term is defined broadly. It is a factor for blight determinations in New York.”).

73. The descriptor was language used in dicta in *Cannata v. City of N.Y.*, where the court found that there were conditions that “impair[ed] or arrest[ed] the sound growth of the community . . . an area does not have to be a ‘slum’ to make its redevelopment a public use.” *Cannata v. City of N.Y.*, 182 N.E.2d 395, 397 (1962). The court’s language reveals the standard was becoming broader and more encompassing, as if serving as a predecessor to *Kelo*.

74. Ray Telles, *Forgotten Voices: Gentrification and its Victims*, 3 *SCHOLAR* 115, 140–41 (2000) (quoting RAY SUAREZ, *THE OLD NEIGHBORHOOD* 211 (1999)).

cation to shower these low-income residents of color.⁷⁵ The changes Harlem has experienced in recent years illustrate this process.

IV. GENTRIFIED HARLEM AND THE AMERICAN DREAM DEFERRED

Harlem was dubbed the black Mecca during the rise of the Harlem Renaissance in the 1920s.⁷⁶ A bustling art scene, empowering political rhetoric, and abundant Afro-centric imagery enamored both artists and activists alike.⁷⁷ Harlem was home. It was where residents could be moved by the oratory of Claude McKay by day and croon to the tunes of Billie Holiday by night.⁷⁸ Harlem was where irreverent vagabond Detroit Red evolved into the revolutionary Malcolm X.⁷⁹ It was where West Indian immigrants became prominent political figures,⁸⁰ and amateurs received standing ovations at the Apollo Theater.⁸¹ It was far from Shangri-La — racial tension and population density were just a couple of its social problems — but it was indispensable.⁸² Harlem was more than a neighborhood experiencing a revival; it was the symbol, and the site, of the black “American dream.”⁸³

As is the story with most neighborhoods, the coming decades brought many changes. Lost jobs and increasing poverty rates caused urban decline. Economic development efforts sought to bring and retain professionals and business to revive the area.⁸⁴ Business development and rising housing costs continue to shift

75. For an extended analysis of how gentrification affects communities differentially depending on race, see Elizabeth Kirkland, *What's Race Got to Do With it? Looking for the Racial Dimensions of Gentrification*, 32 WEST. J. BLACK STUD. 18 (2008).

76. DAVID MAURRASSE, LISTENING TO HARLEM: GENTRIFICATION, COMMUNITY, AND BUSINESS 43 (2014) (ebook).

77. *Id.* at 45.

78. See Allen Dunn & George Hutchinson, *The Future of the Harlem Renaissance*, 80 SOUNDINGS: AN INTERDISC. J. 445 (1997). See also GERALD DAVID JAYNES, ENCYCLOPEDIA OF AFR. AM. SOC'Y 52 (2005).

79. See generally MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

80. See MAURRASSE, *supra* note 76, at 44 (discussing Marcus Garvey and his influence during the Harlem Renaissance).

81. See JAYNES, *supra* note 78, at 52.

82. See MAURRASSE, *supra* note 76, at 49–51.

83. *Id.* at 49.

84. *Id.* at 110.

the demographics in the area today.⁸⁵ In fact, since at least 2008, blacks are no longer the majority population in the area.⁸⁶ Changes in land use, ownership, and social pressures continue to drive out original residents.⁸⁷

Recent rezoning efforts illustrate these changes. The 2008 rezoning plan for Harlem's 125th street affected the neighborhood character and affordability in ways that drove out many of the original business owners and residents, who could not keep up with increasing rents.⁸⁸ The plan permitted mixed-use developments and increased density on land that was previously limited to low-density commercial uses, inciting the construction of thousands of residential units in luxury high-rises.⁸⁹ Although the plan stated that 46% of these constructions would be "income-targeted," only 5.18% were affordable to the average Harlem resident.⁹⁰ Residents criticized the plan as having "steamroll[ed] the community,"⁹¹ and many small business owners were evicted by landlords seeking to construct more profitable buildings.⁹²

Affordable housing options in East Harlem are also dwindling. East Harlem is composed primarily of low-income minorities

85. Average prices of residential homes rose from \$190,000 in 1995 to \$391,000 in 1999, to \$412,000 in 2001. *Id.* at 62. As of January 2018, the median sales price for a Harlem home is \$874,500. *Harlem Real Estate Market Overview*, TRULIA (Jan. 13, 2017), https://www.trulia.com/real_estate/Harlem-New_York/5131/ [<https://perma.cc/764Z-22M7>].

86. Sam Roberts, *No Longer Majority Black, Harlem Is in Transition*, N.Y. TIMES (Jan. 5, 2010), <http://www.nytimes.com/2010/01/06/nyregion/06harlem.html> [<https://perma.cc/S6DS-3AJZ>].

87. In response to arguments that mixed-economy neighborhoods actually benefit both the high- and low-income residents, one author points out that these economies do not generally stay mixed for long: "[I]f the low-income people stick around, the more affluent ones want to leave or move the low-income people out. Or, if the low-income people enter a neighborhood, higher income people leave . . . even if a neighborhood has become better-serviced, cleaner, and safer, low-income people, renters in particular, possess fewer choices. They are, in effect, hanging on." MAURRASSE, *supra* note 76 at 114.

88. See Alessandro Busà, *After the 125th Street Rezoning: The Gentrification of Harlem's Main Street in the Bloomberg Years*, 4 URBANITIES 51, 60–61 (2014). The study explores how the 2008 rezoning plan for 125th street facilitated the gentrification of the surrounding area.

89. See DEP'T OF CITY PLANNING, CITY OF N.Y., 125TH STREET 6 (2008), <http://www1.nyc.gov/assets/planning/download/pdf/plans/125th/125th.pdf> [<https://perma.cc/67E5-TU4J>]. See also Busà, *supra* note 88, at 57.

90. Busà, *supra* note 88, at 57.

91. Matthias Bernt, *The 'Double Movements' of Neighbourhood Change: Gentrification and Public Policy in Harlem and Prenzlauer Berg*, 49 URB. STUD. 3045, 3053 (2012).

92. See Busà, *supra* note 88, at 62.

renting their homes.⁹³ Properties in the neighborhood south of 96th Street continue to appreciate, causing rents to skyrocket. As a result, residents are leaving the Upper East Side and seeking larger, cheaper housing options — often leading them to East Harlem.⁹⁴ In response to these market changes, prices in East Harlem have begun to surge.⁹⁵ Landlords drive out low-income tenants so they can raise rents, diminishing affordable housing options for the majority of East Harlemites.⁹⁶ By 2030, East Harlem will likely lose nearly 7,000 rent-stabilized or subsidized units.⁹⁷ Mayor Bill de Blasio sought to curtail the loss of affordable housing options for low-income New Yorkers by implementing the Housing New York plan in 2014; still, East Harlem is in the throes of an affordable housing crisis.⁹⁸

Despite efforts at providing affordable housing options for Harlem's low-income residents — such as inclusionary zoning and rent control — tax benefits and public policy continue to favor homeownership at the expense of low-income renters.⁹⁹ Some observers see redevelopment and its changes as positive and ultimately beneficial.¹⁰⁰ However, reduced sustainable living options prevent lower-income residents from being able to stay, keeping them from enjoying many of those benefits. For many Harlemites, the situation is clear: Harlem is gentrifying, longtime residents are being displaced, and there are limited opportunities to find relief.

A. NEW YORK COURTS UPHOLD EMINENT DOMAIN ACTIONS FUNNELING GENTRIFICATION

Land condemnation remains a significant source of gentrification, and this has proven to be the case in West Harlem. Developers invoke eminent domain, and — encouraged by courts' ten-

93. Maggie Calmes, *Wary of Gentrification, East Harlem Braces for Rapid Change*, *GOHAM GAZETTE* (Apr. 1, 2016), <http://www.gothamgazette.com/city/6253-wary-of-gentrification-east-harlem-braces-for-rapid-change> [<https://perma.cc/2NMM-9N28>].

94. Holly Dutton, *Efforts stepped up to preserve low-rise East Harlem character*, *REAL ESTATE WEEKLY* (Sept. 30, 2015), <http://rew-online.com/2015/09/30/efforts-stepped-up-to-preserve-low-rise-east-harlem-character/> [<https://perma.cc/6C3S-BK79>].

95. *Id.*

96. *See* Calmes, *supra* note 93.

97. *Id.*

98. *Id.*

99. MAURRASSE, *supra* note 76, at 111.

100. *See generally* Freeman, *supra* note 47.

dency towards broad interpretations of “blight” — seize private property condemned under questionable premises for private profit.¹⁰¹ As a result, small business owners or residents are displaced for no real public use — an outcome antithetical to that traditionally envisioned by the Takings Clause. Such was the case in *Kaur v. New York State Urban Development Corporation*.¹⁰² In arguably one of the most controversial public use cases since *Kelo*, the New York Court of Appeals permitted the use of eminent domain by a private developer to take private properties in West Harlem and transfer them to a private institution — Columbia University.¹⁰³ The defendant, New York State Urban Development Corporation, a subdivision of the Empire State Development Corporation (ESDC), sought to use eminent domain to take 17 acres of private property for the expansion of educational and research facilities in West Harlem’s Manhattanville neighborhood.¹⁰⁴ To obtain all of the property within the site,¹⁰⁵ ESDC hired a consultant to conduct a “blight” study so that, upon a finding of blight, Columbia could condemn the remaining land.¹⁰⁶ The consultant found that the area was “blighted,” and the ESDC authorized Columbia to condemn the property for its project.¹⁰⁷

The petitioners, business owners of different establishments located in the project site, sued ESDC on the grounds that the condemnation was not for a “public use,” that ESDC had acted in “bad faith” in its determination of blight, and that the definition of blight applied was void for vagueness.¹⁰⁸ The Court of Appeals reversed the order of the Appellate Division,¹⁰⁹ giving “deference to the findings and determination of the ESDC” that the project

101. Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193, 1195 (2010).

102. *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (2010).

103. *Id.*

104. *Id.* The ESDC is a state authority which authorized the condemnation of the land. Somin, *supra* note 101, at 1197.

105. Columbia began purchasing some of the land around 2003. By that year, it owned 51 percent of the land in the project site. *Kaur*, 933 N.E.2d at 726.

106. *Id.*

107. “This study concluded that the Project site was ‘substantially unsafe, unsanitary, substandard, and deteriorated’ or, in short, blighted.” *Kaur*, 933 N.E.2d at 726.

108. The petitioners also argued that there were no findings of blight prior to Columbia’s purchase of property there. *Id.* at 730, 732–33.

109. The Appellate Division found that the plan’s true purpose was to benefit a “private elite educational institution” and that ESDC’s finding of blight was “mere sophistry” made in bad faith. Jeffrey D. Friedlander, *Defending Eminent Domain During Economic Development*, N.Y.L.J. (Dec. 23, 2010), <http://www.nyc.gov/html/law/downloads/pdf/Friedlander%20Jeff%20Newspaper%20Article%2012-23-10.pdf> [<https://perma.cc/EY4H-PSNR>].

qualified as a civic project “serving a public purpose.”¹¹⁰ Applying the standard set in *Matter of Goldstein v. New York State Urban Development Corporation*,¹¹¹ another controversial case, the *Kaur* court stated in dicta that “blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition.”¹¹² The decision generated considerable public ire. Attorneys denounced judicial review of eminent domain in New York as “fundamentally broken”;¹¹³ other states refused to accede to the “manifest abuse of the eminent domain power.”¹¹⁴ Some scholars noted that the decision reiterated “very substantial deference to government determinations.”¹¹⁵ Property owners in Harlem witnessed their constitutional protections diminish.

The case was another milestone for developers seeking to gentrify Harlem. Of all the states, New York has one of the highest rates of eminent domain actions in the nation.¹¹⁶ Courts continue to interpret the language from the state Constitution broadly, deferring to developers’ determinations of blight. It is clear that the process is in need of repair: courts must narrow their interpretations of blight to protect against pretextual findings, and should abandon “judicial blindness” and engage in a more critical review of these determinations.¹¹⁷ There is, however, a more ob-

110. *Kaur*, 933 N.E.2d at 737.

111. *Matter of Goldstein v. New York State Urban Dev. Corp.*, 921 N.E.2d 164, (2009). In the case, property owners challenged the ESDC’s condemnation of their land for the development of a sports arena as a violation of the public use clause. The Court upheld the condemnation, applying a deferential standard in the ESDC’s finding of blight.

112. *Kaur*, 933 N.E.2d at 732.

113. Press Release, John Kramer, Inst. for Just., New York’s High Court Slams Door On Property Owners in the Empire State (June 24, 2010), <http://ij.org/press-release/new-yorks-high-court-slams-door-on-property-owners-in-the-empire-state/> [https://perma.cc/BT8V-PVKZ].

114. See Lehmann, *supra* note 21.

115. Steven J. Eagle, *Regulatory Takings*, ch. 1, § 1-11 (5th ed. 2017).

116. INST. FOR JUST., *BUILDING EMPIRES, DESTROYING HOMES: EMINENT DOMAIN ABUSE IN NEW YORK* (2009), <http://ij.org/wp-content/uploads/2015/03/buildingempires.pdf> [https://perma.cc/CT6K-2QRM]. New York was one of only seven states that did not pass reforms to curb eminent domain abuse in the wake of *Kelo*. Dick Carpenter & John K. Ross, *Robin Hood in Reverse*, CITY JOURNAL (Jan. 15, 2010), <https://www.city-journal.org/html/robin-hood-reverse-10676.html> [https://perma.cc/CA9X-APX4]. One observer notes that no property owner has been able to succeed in an eminent domain case against the state since the passing of the New York Urban Development Corporation Act of 1968. *Fighting University Gentrification: the Eminent Domain Angle and Columbia*, DAILY KOS: TOTE (May 17, 2010), <http://www.dailykos.com/story/2010/5/17/867110/> [https://perma.cc/J5D3-ZBHB].

117. See Kramer, *supra* note 113.

scure component to these eminent domain proceedings that must be reexamined and reshaped: the myth of just compensation.

V. NO COMPENSATION POSSIBLE: EVALUATING JUST COMPENSATION IN THE DISPLACEMENT OF LOW-INCOME COMMUNITIES OF COLOR

In his dissent in *Kelo*, Justice Thomas articulated that “no compensation is possible for . . . the indignity inflicted by uprooting [displaced individuals] from their homes.”¹¹⁸ This is especially true with regard to gentrification, in which eminent domain seizures disproportionately target low-income minority communities with low levels of education and communities comprising renters living at or below the federal poverty line.¹¹⁹ This Note argues that, in the displacement of vulnerable communities, monetary damages equivalent to the property’s market value is insufficient. This form of compensation tends to overlook renters, as compared to real property owners; street vendors, as compared to “brick-and-mortar” commercial establishments; and communities, as compared to individuals. Additionally, it fails to account for the dignitary harm imposed by being forced out in the name of “revitalization.”

This Part describes the current compensation structure, arguing that the Constitution calls for more than fair market reimbursement. It goes on to demonstrate that the current compensation scheme fails to reach many of Harlem’s most vulnerable, or redress the loss of the community as a unit. Finally, it addresses the dignitary harms inflicted by the displacement of Harlem’s residents.

A. COMPENSATION THEN AND NOW

Although they typically defer to the legislature or developers on determinations of public use and blight, courts decide questions of compensation.¹²⁰ Currently, takings compensation aims to “make the victim of the interference whole by returning her to

118. *Kelo*, 545 U.S. at 521.

119. *Id.*

120. James J. Kelly, ‘We Shall Not Be Moved’: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST. JOHN’S L. REV. 923, 938 (2006).

the pre-interference baseline.”¹²¹ The Supreme Court has said that “just compensation” equates to full monetary compensation of the value of the property,¹²² and that fair market value will make the property owner whole.¹²³ The conflation of being made “whole” and fair market value was not a judicial misstep, but a “compromise” between the value of the home to the property owner and the value to potential buyers.¹²⁴

Although the established standard for compensation is the fair market value, there are other considerations that suggest this standard is insufficient. First, the inadequacy of the current compensation scheme may be evident in the language of the clause itself. Compensation is a remedy intended to make the injured person “whole.”¹²⁵ Considering this definition, it can be inferred that compensation is meant to do more than provide monetary indemnity for financial losses; it should also redress other forms of harm.¹²⁶ Though the Supreme Court has maintained fair market value as the applicable standard, in *United States v. Fuller*, Justice Rehnquist stated in dicta that the fair market value “is ‘not an absolute standard nor an exclusive method of valuation,’” and that just compensation “derives as much content from basic equitable principles of fairness, as it does from technical concepts of property law.”¹²⁷ Additionally, the Framers described the remedy as “just compensation” rather than simply “compensation.”¹²⁸ Under the principle that “it cannot be presumed that any clause in the Constitution is intended to be without effect,”¹²⁹ there is a suggestion that the Framers proposed that restitution must do more than financially compensate; it must also be just. A legal dictionary from 1856, several decades after the ratification of the Fifth Amendment, defined “just” as something that agreed with the principles of “right and

121. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 249 (2007). See also *Olson v. United States*, 292 U.S. 246, 255 (1934) ([The property owner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.).

122. Kelly, *supra* note 120, at 938.

123. Wyman, *supra* note 121, at 252.

124. *Id.* at 253.

125. *Compensation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

126. See generally W. Harold Bigham, *Fair Market Value, Just Compensation and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 92 (1970).

127. *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citing *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961)).

128. U.S. CONST. amend. V.

129. *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

wrong,” invoking questions of morality.¹³⁰ Justness, an infinitely nuanced concept, should not be reduced to a question of a specific dollar amount; doing so would render null the purpose and function of the judicial branch of government. Justness requires equity; it requires fairness.¹³¹ As applied to Harlemites displaced by gentrification, the current compensation model is inconsistent with those principles.

The preference for valuations based on fair market value is certainly understandable: the metric is straightforward and easier to assess than possible subjective values or nuanced notions of justice.¹³² The implication here is not that there must be subjective valuations of the properties of each person displaced by eminent domain. Rather, in the displacement of a historically subjugated community for private economic gain, there must be some form of restitution which recognizes and reinforces that community's dignity. Admittedly, such a formulation will by necessity be more complex than fair market value. However, arguments of “ease” must not be allowed to supersede constitutional rights; the Constitution was not created for convenience, but to “establish Justice.”¹³³ In displacing black residents from Harlem and denying them their due compensation, the standard form of compensation undercuts all of those values.

There are arguments that takers attempt to minimize undercompensation by paying over fair market value to cover relocation costs and other losses. However, overcompensation merely recognizes without remedying the harm of forced displacement because the application is still too narrow to sufficiently compensate vulnerable communities. This is the case primarily for two reasons: (i) the awards would only be accessible to property owners already entitled to compensation, which, in places like Harlem, excludes a significant amount of the community; and (ii) the awards would not adequately remedy non-monetary losses, such as the communal network of support and exchange. One scholar

130. *Bouvier's Law Dictionary*, CONSTITUTION.ORG, http://www.constitution.org/bouv/bouvier_j.htm [<https://perma.cc/HA37-RJSQ>].

131. *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950) (“The word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity.’”).

132. J. Peter Byrne, *Condemnation of Low Income Residential Communities under the Takings Clause*, 23 *UCLA J. ENVTL. L. & POL'Y* 131, 165 (2005) (“The market value of a house is relatively straightforward, but determining the value of lost emotional attachments is inherently unreliable and costly to investigate.”).

133. U.S. CONST. pmbl.

discusses this overcompensation theory and its shortcomings in addressing dignitary harms, arguing, “to the extent that the losses associated with private takings are noninstrumental and ‘dignitary,’ resulting from the nature of the government’s action rather than the owner’s subjective attachment to her property, even accurate valuation methods may fail to make owners whole.”¹³⁴ Though overcompensation may assuage the harms to some individual property owners, the rest of the community would still be left without restitution.

B. AN UNCOMPENSATED COMMUNITY

The current compensation scheme is inadequate to redress the harms of gentrification because it fails to reach the community as a whole. By definition, more than a few cases of displacement must occur to be considered gentrification; it is not specific homes but entire neighborhoods that are gentrified.¹³⁵ An entire neighborhood may be effectively taken, but the entire neighborhood is not compensated. This Section discusses two ways that Harlem is uncompensated. First, certain populations in the community, primarily renters and street vendors, are collectively excluded from receiving compensation. Second, compensation fails to consider the loss of the community as a unit. Though the Section focuses on Harlem, communities with a similar demographic makeup (e.g. predominantly low income, renters) can experience these same losses.

1. *Renters and Vendors*

Many Harlemites suffering the loss of their homes and community are ineligible for compensation because they do not own the property they inhabit. This is primarily the case with renters. In East Harlem, for example, a majority of the residents are not owners; 92 percent of the residents rent their homes.¹³⁶

134. Nicole S. Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006).

135. KENNEDY & LEONARD, *supra* note 50, at 1.

136. N.Y.C. DEP’T OF HOUS. PRES. & DEV., EAST HARLEM: NEIGHBORHOOD SNAPSHOT - MN CD11 9 (Aug. 24, 2015), <http://www.cvhaction.org/sites/default/files/East%20Harlem%20-%20HPD%20Housing%20Snapshot.pdf> [https://perma.cc/5RNT-3GP4]. Over half of these renters are either rent-burdened or severely rent-burdened. See Calmes, *supra* note 93.

This implies that 92 percent of the community may lose their homes without receiving any compensation in the case of a taking. Condemnation clauses in leases dictate what happens in the event that the land is condemned, stating who collects the award and under what standard.¹³⁷ In New York, however, most leases have a condemnation clause prohibiting tenants from making a leasehold claim, leaving them unable to receive compensation.¹³⁸ With few leases allotting leasehold claims to renters, and the majority of East Harlem being renters, it follows that condemnations leave the overwhelming majority of tenants without compensation. Gentrification denotes the displacement of an entire community, and if mainly renters comprise the community, then the entire community is affected while left constitutionally unprotected. Ninety-two percent of East Harlem may not be losing their property, but they are losing their homes.

There is a possible argument that renters whose rental agreements contain a condemnation clause should not receive compensation because they do not have a leasehold claim, and as such, are not entitled to compensation. Though it has its merits, this reasoning could produce prejudicial consequences in gentrifying neighborhoods. Primarily, it would leave hundreds of residents dispossessed without remedy in a renter-heavy neighborhood like Harlem. Additionally, many Harlem families have resided in the neighborhood for decades and are deeply rooted in the community, with as much of a vested interest in their home as another resident with a leasehold claim.¹³⁹ Severing these roots, forcibly displacing the residents, and offering no indemnification or means for relocation is injurious to the ousted residents.

Many of Harlem's entrepreneurs are also left uncompensated. Street vendors are a staple of Harlem and contribute to the cultural vibrancy of the neighborhood.¹⁴⁰ Concentrated along 125th Street, vendors sell literature, art, natural body care products and various fashions which "reflect the culture of Harlem and the African diaspora" to eager patrons from across the nation.¹⁴¹ Dif-

137. Saul Fenchel, *The Condemnation Clause of the Lease*, N.Y. EMINENT DOMAIN & CONDEMNATION (May 19, 2010), <http://newyorkeminentdomain.com/site/publications/34-the-condemnation-clause-of-the-lease> [https://perma.cc/4SA9-9YGV].

138. Michael Rikon, *Eminent Domain: State of New York*, SECTION OF LITIG. AM. BAR ASS'N (2007), at 14, <http://pstrust.org/docs/NEWYORK.pdf> [https://perma.cc/9SRH-69MZ].

139. MAURRASSE, *supra* note 76, at 61.

140. *Id.* at 184.

141. *Id.* at 198.

difficulties faced by property-owning business owners in Harlem only multiply for these street vendors, who do not have a legal claim to the land on which they make their living. Efforts to “clean up” the area and purportedly enhance aesthetic appeal result in the displacement of these independent entrepreneurs.¹⁴² Harassment by law enforcement, shifting neighborhood demographics and forced relocation obstruct sales and profit, forcing vendors out or into areas without enough foot traffic to remain for long.¹⁴³ Harlem residents recognize the void left as street vendors and small establishments continue to disappear, commenting that “those little things that really made the community unique and distinctive — we’re starting to lose those, and I don’t know how we hold on to that.”¹⁴⁴ Street vendors are an arguably essential part of Harlem’s heart lost with gentrification.¹⁴⁵ Like renters, these community members are subjected to the worst of the loss of their community, but fall out of the reach of compensation.

2. *The Community as a Unit*

In addition to not reaching major populations, the current compensation scheme fails to recognize the loss of the community as a unit. It would be imprecise to describe Harlem solely as a “neighborhood,” for it has remained an iconic historical and cultural center for black Americans for at least a century.¹⁴⁶ Harlem is lauded as having played a unique role in “forging an identity and a degree of pride for people of African descent.”¹⁴⁷ David Maurrasse recounts that while “walking the streets of Harlem, one can feel . . . the African American, African, and Caribbean

142. Jeff Mays, *Harlem Vendors on 125th Street Cleared in Sweep Ahead of Obama Visit*, DNA INFO (Jan. 18, 2012), <https://www.dnainfo.com/new-york/20120118/harlem/harlem-vendors-on-125th-street-cleared-sweep-ahead-of-obama-visit> [https://perma.cc/SV5X-42JY].

143. Street vendors on 125th Street were moved to 116th Street to eliminate competition for the influx of commercial establishments. MARRAUSSE, *supra* note 76, at 184–85. See also Tressie Smiley, *Street vendor says tickets from NYPD are unfair; ‘I was treated better when I sold drugs’*, DAILY NEWS (Feb. 16, 2012), <http://www.nydailynews.com/opinion/treated-better-sold-drugs-article-1.1023223> [https://perma.cc/6US5-DULY].

144. MARRAUSSE, *supra* note 76, at 199.

145. One resident said, “the feeling of knitting together, or a closeness, can get lost when you have big enterprises . . . It loses some of its flavor, its customs, and its color.” *Id.*

146. See *supra* Part IV.

147. MARRAUSSE, *supra* note 76, at 197.

cultures that made the neighborhood so unique.”¹⁴⁸ The neighborhood is far more than a collection of homes and businesses; it is a cultural and historical unit to which the residents have a strong attachment. In a study on the psychological effects of displacement on one community in Boston, research showed that “the destruction of spatial identity — which represents the emotional connection with the home and community — and social relationships were the primary causes of the grief felt by the relocated individuals,” and that the residents’ reactions “ha[d] been compared to the sadness and mourning experienced with the death of a person.”¹⁴⁹ Standard compensation neglects these harms associated with the loss of the community. As one commentator points out, “a physical house can be replaced, but the sense of belonging and camaraderie that comes with living in a particular community often cannot be replicated.”¹⁵⁰

In addition to a sense of belonging, communities provide a network of support and communal advancement. For example, in a study on the effect of gentrification on Chicago’s community fabric, one scholar comments: “Fixed in place like no other group, lower-income racial minorities are uniquely affected by changes in places of residence. Displacement can seriously disrupt or destroy their systems of support, exchange and reciprocity or social fabrics.”¹⁵¹ Although present in many communities, these informal networks are less of a necessity to affluent residents, who typically are more capable of “institutional resistance” against unwanted change.¹⁵² For low-income minority communities, however, these networks can be critical to their sustainability by presenting opportunities, providing affordable goods and services, and serving as a platform for civic engagement.¹⁵³ As the author puts it, these community ties “can be the difference between helplessness and hope.”¹⁵⁴

148. *Id.* at 197.

149. Jeffrey T. Powell, *The Psychological Cost of Eminent Domain Takings and Just Compensation*, 30 L. & PSYCHOL. REV. 215, 222 (2006).

150. Shai Stern, *Just Remedies*, 68 RUTGERS U. L. REV. 719, 746 (2016).

151. John Betancur, *Gentrification and Community Fabric in Chicago*, 48 URB. STUD. 383, 385 (2010).

152. *Id.*

153. *Id.*

154. *Id.* As a potent illustration of his argument, the author cites another study on social fabrics in minority communities in Chicago: “Examining a 1996 heat wave in Chicago that selectively killed hundreds of isolated elderly, Klinenberg (2002) showed how local ecologies made the difference between death and life for poor and vulnerable residents of

There is a growing body of literature recognizing communities as distinct cultural entities deserving political agency. One scholar, in recognizing the need for neighborhoods to have more bargaining power in the face of rampant land condemnation, proposed a system in which property owners can assemble into districts with voting power on whether to maintain or to sell their assembled parcel of land.¹⁵⁵ Another scholar suggested incorporation as a way for predominantly minority communities to achieve economic equality and sovereignty.¹⁵⁶ Although these proposals offer mechanisms to achieve more equitable development, they address a different issue than that in this Note. Namely, they seek to protect communities *from* undesired development, while this Note offers suggestions for protecting communities *undergoing* development. Redevelopment can bring beneficial changes to vulnerable communities when undertaken fairly; accordingly, this Note offers measures which allow the community to share in those benefits, rather than be excluded. The current system of fair market value compensation overlooks Harlem's value as an iconic historical and cultural unit, and the losses incurred by its dissolution.¹⁵⁷

C. DIGNITARY HARMS

Just compensation, in its current form, fails to account for the dignitary harm inflicted by forcibly displacing and thereby marginalizing historically dispossessed communities. The taking of private property imposes more than a physical loss, particularly in the context of gentrification. To eject one community with the purpose of welcoming a perceivably more favorable socioeconomic class of residents constitutes the taking of not only original residents' property and community, but also their dignity. This Sec-

low-income neighbourhoods and how social fabrics rescued them in a Latino area when the City failed to help." *Id.*

155. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008).

156. See Ankur J. Goel et al., *Black Neighborhoods becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 418 (1988).

157. In *Listening to Harlem*, Murrasse states, "the preservation of Harlem's culture is . . . an essential element in understanding the significance of where the neighborhood is today, and in which direction it may be headed. Approaching the business side without adequately addressing the cultural aspect creates tension and resentment." MARRASSE, *supra* note 76, at 197.

tion first recounts literature describing the nature of dignitary harms imposed by property takings. It then describes how takings for the purpose of gentrification engender dignitary harms against low-income communities of color in several ways. First, assessing compensation strictly by fair market value ignores the history of exclusion of these communities. Second, these mass expulsions diminish the personhood of these already marginalized people. The separation of communities based on socioeconomic status — and thus, intrinsically, race — generates feelings of inferiority for the residents being expelled. For these reasons, compensation is incapable of being “just” until it is reformulated to account for the damage to the dignity of these communities.

Several scholars have commented on the dignitary harms resulting from eminent domain seizures. Professor Bernadette Atuahene describes a dignity taking as an act that occurs when “a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization.”¹⁵⁸ The notion that the taking of property can inflict dignitary harms rests on the premise that the ability to hold and protect property bestows dignity. This dignity is maintained in part through the ability to make autonomous decisions regarding one’s own property. Professor Lee Anne Fennel argues that — during eminent domain seizures for private parties — the autonomy to decide whether and when to sell is “confiscated without compensation”¹⁵⁹ and that “money is not an acceptable currency for delivering justice,”¹⁶⁰ particularly when there are questions of whether the tak-

158. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796, 817 (2016). Originally, Professor Atuahene defined a dignity taking as when “a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation and without a legitimate public purpose,” but later revised this definition. Bernadette Atuahene, *We Want What’s Ours: Learning from South Africa’s Land Restitution Program* 21 (2016). The revision reflected a shift in focus from the states’ mental processes to the effects on the owners and occupiers, regardless of intent. This revision supports the assertion that prejudicial intent is not always necessary for a practice to have prejudicial effect. Whether developers knowingly and intentionally subjugate low-income residents of color through gentrification need not be proven to necessitate compensation reform due to these effects.

159. Lee Anne Fennel, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 966 (2004).

160. *Id.* at 961.

ing is truly for public benefit.¹⁶¹ These dignitary harms, then, result from the nature of the government's action, rather than the property owner's subjective losses.¹⁶² Similarly, Professor Nicole Garnett notes that compulsory takings deprive owners of their "most essential right" to exclude others, and that eminent domain "eviscerates the physical autonomy guaranteed by the boundaries of private property."¹⁶³ Additionally, as Professor Garnett points out, property owners who bear the onus of these projects may be unable to take part in the benefits used to justify the redevelopment project, particularly if they have been displaced as a result.¹⁶⁴ These harms can leave owners feeling "vulnerable" and "unsettled,"¹⁶⁵ and the effect is only multiplied when the displaced community has a history of disenfranchisement.

The history of black subjugation must be considered for compensation to begin to approach sufficiency. The issue is particularly relevant for Harlem, which was predominantly black until at least the early 2000s.¹⁶⁶ Certainly, forced displacement can cause multifold injuries to any affected residents, regardless of race or economic status. However, the practice becomes a unique beast when it mirrors malicious policies of the past. The practice of targeting historically marginalized communities for land condemnation evokes the history of racially discriminatory policies in the United States, and risks becoming an iteration of those policies. Even absent an explicit showing of discriminatory intent, systematically condemning communities of color echoes the historical misperception that these communities have lesser value. Therefore, though any owner may bear losses, the damages are deepened when the practice resembles — or even is a remnant of — policies intended to subordinate a community based on their race.

Developers and their supporters assert that demographic shifts occur due to natural processes primarily related to efficiency and wealth, not race.¹⁶⁷ However, in the words of Michael

161. *Id.* at 992.

162. *See* Garnett, *supra* note 134, at 109.

163. *Id.*

164. *Id.* at 110.

165. *Id.* at 109.

166. *See* Roberts, *supra* note 86.

167. Kay Hymowitz, Opinion, *The mistaken racial theory of gentrification*, L.A. TIMES (Nov. 13, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-1115-hymowitz-gentrification-20151115-story.html> [<https://perma.cc/A2Q3-HXL4>].

Henry Adams, that is but “a distinction without a difference,” as blacks still occupy the “lower ranks of America’s wealth tables.”¹⁶⁸ Bifurcating race and wealth as it relates to gentrification attempts to separate interconnected factors, particularly in light of disproportionate condemnation selections and the history of discrimination against black citizens.¹⁶⁹ Studies have repeatedly shown that race plays a significant factor in property valuations. For example, a 2001 study by the Brookings Institution demonstrated that, “equalizing for income, black homeowners received 18 percent less value for their homes than white homeowners.”¹⁷⁰ Another scholar observes, “put simply, the market penalizes integration: The higher the percentage of blacks in the neighborhood, the less the home is worth, even when researchers control for age, social class, household structure, and geography.”¹⁷¹ These differential valuations stem from the history of black Americans being treated as second-class citizens. Gentrification relies on and perpetuates this history by using those prejudicial valuations as a rationale for condemning black communities.¹⁷² Accordingly, the history of exclusion of black Americans is an extremely salient factor in evaluating the degree and nature of the harms of displacement, and in assessing what would be equitable compensation.

In addition to gentrification’s historical associations, the practice itself sends a malicious message. Evinced in the successful

168. Michael Henry Adams, Opinion, *The End of Black Harlem*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html> [<https://perma.cc/FR2G-PW7S>].

169. See *supra* Parts II.A and III.C.

170. DAVID RUSK, BROOKINGS INSTITUTION, THE “SEGREGATION TAX”: THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS 1 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/rusk.pdf> [<https://perma.cc/C7UC-EE6V>].

171. Dorothy Brown, Opinion, *How Home Ownership Keeps Blacks Poorer Than Whites*, FORBES (Dec. 10, 2012), <https://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/#67d5ca514cce> [<https://perma.cc/CQN9-RXKF>].

172. Another type of discrimination is the more recent prejudicial practice of redlining, which occurs when low-income minority communities are systematically denied credit and thus do not have the capital necessary for homeownership and business success. Robert Mark Silverman, *Redlining in a Majority Black City?: Mortgage Lending and the Racial Composition of Detroit Neighborhoods*, 29 WEST. J. BLACK STUD. 531, 531 (2005). The Fair Housing Act outlawed the practice in 1968, but it persists in several different forms. For example, a large bank in Wisconsin recently settled a case brought by HUD for discriminating against black and Hispanic borrowers. Emily Badger, *Redlining: Still a thing*, WASH. POST: WONKBLOG (May 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/05/28/evidence-that-banks-still-deny-black-borrowers-just-as-they-did-50-years-ago/?utm_term=.a467dd53727d [<https://perma.cc/RCV5-MK9R>].

arguments for school desegregation in *Brown v. Board of Education*, separating people based on their race generates feelings of inferiority for one of those groups.¹⁷³ In gentrification, this group is the population being evicted — often communities of color. Although these communities are not subject to displacement as pervasively as blacks were under segregation, there are analogous repercussions when race seems to be the only common and distinguishing factor in a disproportionate amount of eminent domain selections.¹⁷⁴ Regardless of intent, the practice of uprooting and expelling the majority of Harlem’s original community to make room for an influx of predominantly white residents denotes an inferior value of the original black residents. Moreover, the fact that public services noticeably improve only upon the influx of white residents reinforces the message that the black residents matter less.¹⁷⁵ In *Property and Personhood*, Margaret Jane Radin argues that, to retain their personhood, an individual must retain control over certain external resources in the form of property rights.¹⁷⁶ Seizing the homes and the communities of these marginalized people, then, takes not only their land and the life that they know — it diminishes their ability to function as people. Compensation based on market value turns a blind eye to the history of deprivation and forced migration of these individuals, and the uncompensable loss of their personhood.

173. 347 U.S. 483, 494 (1954) (“To separate [the black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

174. Nicole Garnett has also noted that owners may be aggrieved by the government’s implication that their use of property is “less than socially optimal,” and would be put to a more desirable use by another private owner. Garnett, *supra* note 134, at 110.

175. Though some gentrification supporters argue that these developments benefit the community as a whole, they often prove to be “out of reach to all but the well-educated newcomers.” Benjamin Grant, *Flag Wars: What is Gentrification?*, PBS (June 17, 2003), <http://www.pbs.org/pov/flagwars/what-is-gentrification/> [<https://perma.cc/X2GZ-3AR5>]. See also Adams, *supra* note 168 (“It was painful to realize how even a kid could see in every new building, every historic renovation, every boutique clothing shop — indeed in every tree and every flower in every park improvement — not a life-enhancing benefit, but a harbinger of his own displacement.”).

176. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

VI. USING COMMUNITY BENEFITS AGREEMENTS TO COMPENSATE HISTORICALLY DISADVANTAGED COMMUNITIES

Gentrification imposes unique harms that go unaddressed in the current compensation scheme. In addition to those injuries, communities are typically given little decision-making power during redevelopment.¹⁷⁷ A more democratic compensation process, created by and for the community, would be a step towards restoring the dignity of historically disadvantaged communities affected by gentrification. Recently, cities across the nation have executed Community Benefits Agreements (CBAs) to integrate communities into the redevelopment process.¹⁷⁸ CBAs are agreements executed between community groups and developers to ensure that redevelopment projects benefit the affected community.¹⁷⁹ If drafted effectively, CBAs can be the vehicle through which Harlem residents can receive meaningful compensation. Through an inclusive negotiation process and benefits which address specific community needs, CBAs can rectify the neglected harms of gentrification by providing compensation which real, equitable and restorative — compensation which is just.

This Part opens with a brief overview of CBAs. It then illustrates generally how CBAs provide a restorative form of compensation to dispossessed communities by providing specialized and enforceable benefits. Finally, it applies the argument to Harlem, using the framework of West Harlem's CBA negotiations to offer recommendations for forming a CBA that could begin to heal the community.

A. OVERVIEW OF COMMUNITY BENEFITS AGREEMENTS

A community benefits agreement (CBA) is a legally enforceable contract between developers and community coalitions comprising a range of community benefits to be produced by a development project.¹⁸⁰ CBAs allow community members to shape redevelopment projects affecting their lives by bargaining for bene-

177. William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiations Processes*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7, 8 (2007).

178. *Id.*

179. *Id.*

180. Leland T. Saito, *How Low-Income Residents Can Benefit from Urban Development: The LA Live Community Benefits Agreement*, 11 CITY & COMMUNITY 129, 130 (2012).

fits that meet the community's specific needs.¹⁸¹ To that end, CBAs often include affordable housing mandates, local job-related benefits and requirements, and environmental improvements.¹⁸² Although the exact terms of the Agreement depend on the particular circumstances of the community and the project,¹⁸³ CBAs typically concern a single development project.¹⁸⁴ Developers and community coalitions negotiate the terms of the Agreement, securing critical benefits for the community in exchange for the coalition's support of the project.¹⁸⁵ The coalitions consist of diverse interest groups such as labor unions, faith congregations, community organizing groups and local residents;¹⁸⁶ the more inclusive and representative the coalitions are, the greater the chance that the developers will agree to negotiate.¹⁸⁷

Community Benefits Agreements are a relatively recent development in urban land use law. The first major CBA was negotiated in 2001 between a community coalition and a developer seeking to establish a large sports and entertainment district in downtown Los Angeles.¹⁸⁸ Since then, community groups across the nation have begun CBA negotiations with developers.¹⁸⁹ The

181. Nathan Markey, *Atlantic Yards Community Benefit Agreement: A Case Study of Organizing Community Support for Development*, 27 PACE ENVTL. L. REV. 377, 378 (2009).

182. JOHN AHERN ET AL., TASK FORCE ON PUB. BENEFIT AGREEMENTS, RECOMMENDATIONS OF THE TASK FORCE ON PUBLIC BENEFIT AGREEMENTS 18 (Sept. 29, 2010), <http://www.goodjobsny.org/sites/default/files/docs/task-force-report-final.pdf> [<https://perma.cc/F2QA-P5KQ>].

183. N.Y.C. BAR, THE ROLE OF COMMUNITY BENEFIT AGREEMENTS IN NEW YORK CITY'S LAND USE PROCESS 2 (Mar. 8, 2010), <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf> [<https://perma.cc/F2QA-P5KQ>].

184. *Id.* See also Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 39 (2007) (arguing for a stricter construction of the term to only those agreements concerning a single project).

185. Markey, *supra* note 181, at 378. In some cases, negotiations may include the city government either in addition to or instead of the community coalition. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities*, 37 CARDOZO L. REV. 1773, 1780 (2016). Typically, in New York City, CBAs do not directly involve government agencies or elected officials. N.Y.C. BAR, *supra* note 183, at 6.

186. See De Barbieri, *supra* note 185, at 1785.

187. See Gross, *supra* note 184, at 38.

188. Saito, *supra* note 180, at 131. Some of the promises that the developers made to the community coalition were that they would commit \$1 million to the community's park and recreation needs; implement a "first source" hiring program, giving preference to low-income and displaced community members affected by the development; and construct 100 to 160 affordable housing units. N.Y.C. BAR, *supra* note 183, at 4.

189. Coalitions in Atlanta, Denver, Chicago, Milwaukee, Miami, New Orleans, New Haven, Seattle, and Washington D.C. have initiated the CBA negotiation process. N.Y.C. BAR, *supra* note 183, at 5-6.

first CBA in New York City was achieved in 2005, during a large mixed-use development project in Brooklyn called “Atlantic Yards.”¹⁹⁰ Following the Atlantic Yards project, CBAs have been executed in connection with major development projects in New York City, including the development of Yankee Stadium in the Bronx, the Mets stadium development in Queens, and Columbia University’s expansion into West Harlem.¹⁹¹ Although the use of CBAs has not escaped controversy,¹⁹² they have been celebrated as one of the few opportunities for underserved communities to influence development projects affecting their communities and their lives.¹⁹³ As one scholar notes, the community benefits movement has led to “significant improvements in the job quality, housing affordability, and environmental effects of hundreds of development projects.”¹⁹⁴

CBA can be advantageous to developers as well. First, they can lower transaction costs for developers by resolving disputes outside of court, prior to approval. Proceeding with a development project without the community’s input may lead to costly and time-consuming court processes by residents and business owners opposing the development.¹⁹⁵ Settling these disagreements pre-litigation reduces the chance that the development will be challenged in court. Similarly, the support of the community increases the chances that the city will approve of the project.¹⁹⁶ Community opposition has the potential to influence whether regulatory bodies approve of the project, and in some cases, whether government agencies will provide funding.¹⁹⁷ CBAs,

190. AHERN ET AL., *supra* note 182, at 18.

191. N.Y.C. BAR, *supra* note 183, at 13–16.

192. Amanda Fung, *Controversial benefit-agreement report aired*, CRAINS N.Y. BUS. (Sept. 29, 2010), http://www.crainsnewyork.com/article/20100929/REAL_ESTATE/100929807/controversial-benefit-agreement-report-aired [<https://perma.cc/92L9-H4T9>]. For a further discussion of criticisms of CBAs, see *infra* Part VII.

193. See Madeline Janis, *Community Benefits: New Movement for Equitable Urban Development*, 15 RACE, POVERTY & ENV. 73, 73 (2008) (“These substantial gains for low- and moderate- income households are not the result of a newfound corporate conscience but a product of the growing community benefits movement. . . . [The movement] is rapidly becoming an important force in addressing the needs of the marginalized and the underrepresented.”).

194. *Id.* at 74.

195. See De Barbieri, *supra* note 185, at 1813.

196. N.Y.C. BAR, *supra* note 183, at 35.

197. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 7 (2010).

therefore, can be a cost-effective measure, saving both time and money during the approval and building processes.

B. CBAS CAN PROVIDE RESTORATIVE COMPENSATION TO DISPOSSESSED COMMUNITIES

CBAs can remedy many of gentrification's unique harms by including a wider array of benefits, decided by and disseminated to the affected community. Through this process, CBAs provide restorative compensation, defined here as compensation that redresses the communal and dignitary harms suffered by displaced communities. Specifically, CBAs allow for restorative compensation through three key attributes: varied and customized terms; specified beneficiaries; and enforceable promises.

1. *Flexibility of Terms Allows for Compensation That Redresses the Specific Harms of Gentrification*

As discussed, the current compensation scheme fails to consider the dignitary harm inflicted by forced displacement, the value of the community as a whole, or vulnerable residents left uncompensated.¹⁹⁸ Remedies, then, must recognize and respond to these specific injuries to adequately compensate the community. CBAs contain benefits addressing a range of community interests.¹⁹⁹ In fact, some scholars have suggested that such an agreement must be multi-issue and broad-based to be considered a CBA.²⁰⁰ Proposed by community members, these benefits are tailored to respond to the specific needs of the community. For example, when the city of Los Angeles released plans to expand Los Angeles International Airport in 2002, a coalition of residents from the surrounding communities demanded that the schools and homes in the affected area be soundproofed, and that residents be trained for aviation and airport-related jobs.²⁰¹

For projects affecting low-income communities of color, benefits such as affordable housing units, relocation assistance, local

198. See *supra* Parts V.B–C.

199. See N.Y.C. BAR, *supra* note 183, at 2.

200. See Gross, *supra* note 184, at 40 (“To be termed a CBA, an agreement should address a range of issues of concern to the community. . . . [S]ingle-issue commitments . . . share little in common politically or practically with multi-issue, broad-based CBAs.”).

201. Murtaza H. Baxamusa, *Empowering Communities through Deliberation: The Model of Community Benefits Agreements*, 27 J. PLANNING EDU. RES. 261, 265 (2008).

hiring and job training programs are forms of restitution that would begin to reinstate the personhood of displaced community members. Similarly, maintaining art and cultural centers and retaining minority-owned local businesses would be measures to acknowledge and protect the integrity of the community as a unit. The availability of varied forms of remedy which respond to the particular needs of the community encourages equitable development and allows the residents to receive meaningful compensation.

2. CBAs Concentrate Benefits Where They Are Needed

The “back to the city” movement of the last two decades has brought an influx of middle-and upper-income groups into metropolitan areas.²⁰² To attract and retain these groups, cities work with developers to construct large entertainment arenas, retail supercenters and luxury residential units.²⁰³ These developments are not always accessible or affordable to the existing, lower-income community — and in some cases, can lead to their displacement.²⁰⁴ Traditional zoning policies, such as inclusionary zoning, help mitigate this risk by requiring developers to build affordable housing units or contribute to an affordable housing fund.²⁰⁵ However, there is no guarantee that these policies will benefit the affected communities; the “affordable” housing may not actually be affordable to residents in the affected area,²⁰⁶ and the funding could go to building housing elsewhere in the city.²⁰⁷ CBAs, however, formulate benefits specifically intended for the

202. See Janis, *supra* note 193, at 73.

203. *Id.*

204. *Id.*

205. *Inclusionary Zoning and Mixed-Income Communities*, OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEPT OF HOUSING AND URB. DEV. (2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> [<https://perma.cc/NG4B-GH2U>].

206. Currently, affordability is calculated by the area median income (AMI) of the city. *What Is Affordable Housing?*, N.Y.C. HOUSING PRESERVATION & DEV., <http://www1.nyc.gov/site/hpd/renters/what-is-affordable-housing.page> [<https://perma.cc/WEZ5-XGGZ>]. This skews the calculations so that neighborhoods like Harlem, which has a significantly lower median income than the city as a whole, find even the purportedly “affordable” housing options to be infeasible. See *Providing Affordable Housing and Cultural Assets in Harlem*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_inpractice_060115.html [<https://perma.cc/CWG5-4NAH>]. (“Although this trend has affected neighborhoods throughout the city, residents of Harlem are particularly susceptible to price increases because median household incomes in Harlem are significantly lower than in the rest of Manhattan.”).

207. See Saito, *supra* note 180, at 131.

local community. Rather than being excluded by the development projects, CBAs allow for the fruits of the city's evolution to be enjoyed by the population that is already there. As one scholar noted, "CBAs give a role in the process to community residents, and help ensure that the people who remained loyal to the cities during the darkest years share in the benefits as urban areas are rediscovered."²⁰⁸

Additionally, to the extent that these neighborhoods are the site of publicly-funded programs to develop affordable housing, there already exists a commitment to supporting these communities. In Harlem, for example, there have been efforts to counteract widespread rent increases with the construction of affordable housing units.²⁰⁹ CBAs maintain this commitment by allowing these same populations to also benefit from development projects. These Agreements allow local harms to be remedied by local goods, instating a sense of fairness in the compensation process.

3. *CBAs Empower the Community Through Enforceable Promises and an Inclusive Process*

CBAs restore the autonomy of affected communities by providing them with a legal mechanism to ensure that they receive actual compensation. Enforceability is a key (and necessary) attribute for effective CBAs.²¹⁰ Through enforceability, the community is able to hold developers accountable for their promises rather than remain vulnerable to many possible detrimental effects of the development. CBAs give communities the authority to shape the development project and the ability to compel specific performance if the promises are not upheld.²¹¹ This authority mitigates the power imbalance between developers and communities surrounding development decisions.²¹² The shift in power dynamics and the legal right to receive benefits, especially for

208. JULIAN GROSS ET AL., GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE, (2002), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-gross.pdf> [perma.cc/M92L-4NYB].

209. *City Officials Join Radson Development and Partners to Celebrate Completion of Construction of 54-units of Affordable Housing in the Central Harlem Neighborhood of Manhattan*, N.Y.C. HOUSING DEV. CORP. (July 31, 2017), http://www.nychdc.com/pr_07-31-2017 [https://perma.cc/4QY3-ADCQ].

210. See De Barbieri, *supra* note 185, at 1788.

211. *Id.* at 1808 n.210.

212. Gross, *supra* note 184, at 52.

those not entitled to any under the current compensation scheme, allay the structural inequity present in development projects.

In addition to offering enforceable benefits, CBAs are also empowering because of their inclusive nature. In the field of community psychology, empowerment is described as being “about self-determination and democratic participation of individuals in the life of their community.”²¹³ Through participation in democratic deliberations, the process of inclusion reinforces the agency of the residents. Behavioral science studies have shown that even when the outcome of decisions are unfavorable, individuals tend to react positively to the decision if they felt that it was procedurally fair — that is, that they were included in the decision-making process.²¹⁴ Similarly, exclusion from a process creates feelings that the outcome was unreasonable or that people were not treated fairly, and people so excluded are more likely to oppose the decision.²¹⁵ Extending this principle to the forced expropriation of communities, Professor Bernadette Atuahene conducted a study on the communication process in South Africa’s land restitution program, which sought to provide equitable restitution to those dispossessed by racially discriminatory practices during the apartheid state.²¹⁶ Professor Atuahene found that it was not only inclusion, but also sustained conversation that was key in making respondents feel that the restitution process was fair.²¹⁷ Therefore, inclusivity and a sufficient oversight and feedback system can instill a sense of justice in the process of compensation. Admittedly, CBAs cannot resolve all issues stemming from gentrification and displacement, and their relative newness raises questions about how these agreements would fare in court. Nonetheless, Community Benefits Agreements compensate the community in ways that monetary valuations alone cannot.

213. Baxamusa, *supra* note 201, at 262.

214. Joel Brockner & Batia M. Wisenfeld, *An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures*, 120 PSYCHOL. BULL. 189 (1996).

215. Markey, *supra* note 181, at 379.

216. Restitution of Land Rights Act 22 of 1994 (S. Afr.). *See also* S. AFR. CONST., 1996, § 25(7) (“[A] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.”).

217. Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 L. SOC. INQUIRY 902, 934 (2014).

C. BRINGING IT ALL HOME: CREATING AN EFFECTIVE CBA IN HARLEM

Columbia University announced its plans to expand into West Harlem in 2003,²¹⁸ hoping to construct a series of buildings dedicated to the arts, science, and business.²¹⁹ Amid growing opposition from the community,²²⁰ the University negotiated what was described as a “CBA” with community representatives and city officials.²²¹ Though the West Harlem CBA laid the groundwork for an Agreement that could alleviate the harms of gentrification, it was not without its flaws: unenforceability, insufficient community involvement and vague terms were among the Agreement’s most prominent shortcomings. By including a sufficiently democratic process and comprehensive and enforceable terms, the Community Benefits Agreement can be the vehicle through which Harlem can receive compensation which is truly just. This Section will open with a brief review of the West Harlem CBA. It will then offer several revisions for drafting a CBA that would more adequately serve the community.

Once Columbia won the right to seize private properties for expansion,²²² the West Harlem Local Development Corporation (WHLDC) was established in 2006 to negotiate a CBA with the University.²²³ Following several years of negotiations, the CBA was signed by the president of the WHLDC and University President Lee Bollinger in May of 2009.²²⁴ The Agreement stated that its goal was to provide the local community with benefits relating to housing, employment and economic development, education, arts and culture, and community facilities, among other areas.²²⁵

218. See Charles V. Bagli, *Columbia, in a Growth Spurt, Is Buying a Swath of Harlem*, N.Y. TIMES (July 30, 2003), <http://www.nytimes.com/2003/07/30/nyregion/columbia-in-a-growth-spurt-is-buying-a-swath-of-harlem.html> [https://perma.cc/4VWU-KGRG].

219. See Charles V. Bagli, *Court Upholds Columbia’s Campus Expansion Plan*, N.Y. TIMES (June 24, 2010), <http://www.nytimes.com/2010/06/25/nyregion/25columbia.html> [https://perma.cc/ND2G-ZAF3].

220. *Id.*

221. N.Y.C. BAR, *supra* note 183, at 19–21.

222. See *supra* Part IV.A.

223. N.Y.C. BAR, *supra* note 183, at 19.

224. Aaron Fisher et. al, *Ties That Bind: Checking on the Manhattanville Community Benefits Agreement, six years later*, COLUMBIA SPECTATOR (Mar. 25, 2015), <http://features.columbiaspectator.com/eye/2015/03/25/ties-that-bind/> [https://perma.cc/7F44-QAJ5].

225. COLUMBIA UNIV. OFFICE OF GOV’T AND CMTY. AFFAIRS, WEST HARLEM COMMUNITY BENEFITS AGREEMENT 12 (May 18, 2009), <https://gca.columbia.edu/sites/>

Columbia aimed to provide \$76 million towards a Benefits Fund, \$20 million for an Affordable Housing Fund, and \$20 million in access to Columbia University facilities.²²⁶ The Benefits Fund would go toward improvements to two public housing projects,²²⁷ traffic-related improvements,²²⁸ art and cultural programs,²²⁹ and a resource center for the community.²³⁰ The Affordable Housing Fund was to go towards the development and preservation of affordable housing.²³¹ Additionally, the Agreement stipulated that Columbia aimed to hire 40 % minority-, women-, and/or locally-owned construction companies.²³² A recent assessment of how the West Harlem CBA is faring cites both support and criticism of the implementation of the CBA from local residents and business owners, with most waiting to see whether Columbia will continue to honor its commitments.²³³

1. *Enforceable Benefits*

The West Harlem CBA was a respectable effort at integrating the community into the development process, but both the process and the Agreement were flawed. Most significantly, the terms provided limited enforceability options. The agreement which Columbia signed prior to the project's City Council approval in 2007 was actually a memorandum of understanding (MOU),²³⁴ which typically are not intended to be binding.²³⁵ The actual CBA was signed two years later, just before the project

default/files/2016-11/CBAAgreement.pdf [https://perma.cc/VGT8-FU5K] [hereinafter WEST HARLEM CBA].

226. *Id.* at 8.

227. *Id.* at 17.

228. *Id.* at 35.

229. *Id.* at 36.

230. *Id.* at 18. The Benefits Fund would be held by a mutually agreed upon "Fiscal Sponsor," with community requests for expenditures to be reviewed by the WHLDC at least once a year. *Id.* at 9.

231. *Id.* at 16.

232. *Id.* at 18.

233. Fisher et. al, *supra* note 224 (For example, one resident reported that Columbia had been "very, very good" at hiring minority and female construction workers, while a local nonprofit commented on being unable to sustain grants from the Benefits Fund).

234. Daniel Amzallag, *Community Benefits Specifics Remain Up in the Air*, COLUMBIA SPECTATOR (Jan. 22, 2008), <http://spc.columbiaspectator.com/2008/01/22/community-benefits-specifics-remain-air> [https://perma.cc/82EP-CUG4].

235. "A letter of intent is not meant to be binding. . . ." LETTER OF INTENT, Black's Law Dictionary (10th ed. 2014). An MOU is synonymous with a letter of intent. *Id.*

was approved by the State Public Authorities Control Board.²³⁶ Although this CBA was binding, the enforceable terms were limited to three provisions: the obligation to make payments to the Benefits Fund,²³⁷ the obligation to make payments for the establishment of a neighborhood public school,²³⁸ and the obligation to provide access to in-kind benefits.²³⁹ Only the payments to the Benefits Fund and the establishment of the public school were enforceable in court; disputes over the in-kind benefits were to be resolved by a “Dispute Resolution Team” composed of members of the university and the WHLDC.²⁴⁰ Though these terms may be reasonable, it diminishes the community’s ability to enforce promises regarding the maintenance of affordable housing, employment opportunities, or the preservation of cultural spaces. Ostensibly, the Benefits Fund could be used for these causes; however, since the CBA states that the specific enumerated uses for the Benefits Fund are non-binding,²⁴¹ there is no guarantee that those needs will be met. This guaranty is an integral part of an effective CBA. Additionally, some of the terms in the Agreement are enforceable solely by state and/or local governmental officials, further reducing the opportunity for community members to find relief.²⁴²

To remedy this, all of the key terms should be enforceable by members of the community coalition. The mechanisms through which this can occur, including who may have standing to enforce the promises, is further discussed in the next Part.²⁴³ Though it is ultimately up to the community to designate which terms are most pressing, terms that should be mandatory in Harlem are the construction and maintenance of affordable housing, detailed anti-displacement measures, hiring local minority workers and retaining at least a portion of those who are already present, and

236. Keith H. Hirokawa & Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist?: A Case Study in Progress on Columbia University*, 37 *FORDHAM URB. L.J.* 637, 683 (2010).

237. WEST HARLEM CBA, *supra* note 225, at 42.

238. *Id.* at 43.

239. *Id.* at 42–43.

240. *Id.*

241. *Id.* at 13. The provision provided an exception for programs and capital improvements for the two public housing complexes.

242. *Id.* at 12–13 (“[A]ll Community Benefits included in this CBA that are provided for in the Governing Documents shall be . . . enforceable solely by State and/or local governmental authorities in accordance with their terms.”).

243. *See infra* Part VII.A.

preserving art and cultural spaces. Making those terms enforceable would ensure that critical benefits are actually provided where they are needed.

2. *Community-Led Negotiations*

Further, the WHLDC may not have had adequate community representation due to the involvement of elected officials. Although the local community board had not intended the WHLDC to include elected officials when they authorized its formation, several elected officials or their representatives joined the board.²⁴⁴ Community members argued that they had been “shut out” of negotiations once the officials joined the board,²⁴⁵ and several board members resigned due to concerns about the WHLDC’s “alleged disconnectedness with the community and lack of transparency.”²⁴⁶ In fact, West Harlem’s Community Board, CB9, did not support the final CBA and voted unanimously that its members on the WHLDC reject it.²⁴⁷ One scholar notes that the structure of the WHLDC may have also further excluded community representatives.²⁴⁸ The WHLDC was formed as a nonprofit entity, which in New York is controlled by its board of directors;²⁴⁹ since nine of those seats were reserved for elected officials,²⁵⁰

244. See Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING 113, 124 (2008) [hereinafter “Salkin & Lavine, *Negotiating for Social Justice*”]. Originally, the WHLDC comprised representatives of a range of community organizations, local businesses, public housing organizations, and faith communities. See Erin Durkin, *Community-Benefits Agreement Talks on Horizon*, COLUMBIA SPECTATOR (Mar. 27, 2013), <http://columbiaspectator.com/2006/06/20/community-benefits-agreement-talks-horizon/> [https://perma.cc/J2L2-J3WK].

245. See Maggie Astor & Betsy Morais, *Community Board 9 opposes Columbia’s community benefits agreement*, COLUMBIA SPECTATOR (May 4, 2009), <http://spc.columbiaspectator.com/2009/05/04/community-board-9-opposes-columbias-community-benefits-agreement> [https://perma.cc/C8C8-S8WN].

246. Gross, *supra* note 184, at 43. After the resignation of these members, seven out of the fifteen remaining board members were elected officials, which critics argued was not enough to adequately represent community interests. See Maggie Astor, *Where Have All the Benefits Gone?*, COLUMBIA SPECTATOR (Feb. 17, 2011), <http://spc.columbiaspectator.com/eye/2011/02/17/where-have-all-benefits-gone> [https://perma.cc/V38P-XASQ] (“[A] common allegation has been a lack of transparency throughout the process.”).

247. Astor & Morais, *supra* note 245.

248. See Gross, *supra* note 184, at 43.

249. See N.Y. Nonprofit Corp. Law § 701(a) (“[A] corporation shall be managed by its board of directors.”).

250. See Gross, *supra* note 184, at 43. The by-laws have been amended since the publication of Gross’ article. The current by-laws reserve three seats for designees of local officials, and have reduced the maximum number of board members from 28 to 19. See

there may not have been sufficient opportunity for community involvement.²⁵¹ Including the elected officials became “detrimental” due to the increasing criticism that they exerted undue influence on the negotiations, diminishing the opportunity for engagement by neighborhood residents.²⁵²

Harlem should execute a private CBA to increase inclusivity and representation. Private CBAs are solely between the developer and community.²⁵³ Although they may provide authority and experience that can be helpful to community members, government involvement may also serve as a hindrance. First, as signatories, the community representatives can enforce the promises directly rather than having to appeal to some government representative, which could be time-consuming or unsuccessful. Additionally, the absence of government actors allows for the negotiation of a wider array of benefits. According to the Supreme Court, conditions that the government places on development projects must meet specific requirements.²⁵⁴ If the conditions do not meet these standards, they may be considered an unconstitutional exaction.²⁵⁵ Private CBAs are free of these restrictions, allowing for more comprehensive terms, and ultimately stronger protections for the community. It is worth noting that the absence of government actors may reduce the incentive for developers to enter into CBAs in the first place, and this may be the cost of receiving the stronger community protections available in private agreements. However, as discussed above, developers may still choose to enter into private CBAs with the community to earn their support, increasing the chance that their project will be approved and successful.²⁵⁶ A private CBA is thus more likely to better serve Harlem by including benefits tailored to the community’s specific needs.

West Harlem Local Development Corporation Bylaws, “Qualifications and Requirements of Director,” art. III §§ 2, 5.

251. See Gross, *supra* note 184, at 43.

252. Salkin & Lavine, *Negotiating for Social Justice*, *supra* note 244, at 124.

253. See Gross, *supra* note 184, at 46. This is in contrast to public CBAs, which involve governmental entities. *Id.* at 47.

254. The conditions must have an “essential nexus” to a legitimate state interest under *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). They must also be “roughly proportional” to the impact of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

255. See De Barbieri, *supra* note 185, at 1820.

256. See Gross, *supra* note 184, at 46.

3. *Clear and Detailed Terms*

Finally, key terms of the West Harlem CBA lacked sufficient detail. For example, the organizations and programs to receive funding from the Benefits Fund and Affordable Housing Fund were left undetermined.²⁵⁷ The types of access to Columbia facilities — and which facilities would be accessible — were also left without specification.²⁵⁸ In rejecting the Agreement, CB9 members expressed discomfort with the open-ended allocation of funding, which could be spent however the WHLDC saw fit.²⁵⁹ One member felt that framing of the CBA made it a “loose [and] bad agreement,” and essentially a “fight over \$76 million,” suggesting the inclusion of more details regarding how the money should be prioritized and spent.²⁶⁰ Residents criticized the WHLDC for rushing the negotiation process and “punting the specifics of the agreement to a later date.”²⁶¹ The CBA also may have lacked an adequate oversight structure. Although the Agreement charged an “Independent Monitor” with overseeing and reporting on Columbia’s commitments, there remained criticisms that Columbia was not upholding key promises.²⁶² For example, despite the commitment to hiring minority workers, an organization of black architects in Harlem claimed that the University had excluded them from major projects.²⁶³ A more detailed enforcement structure would be more effective at ensuring that promises are upheld.

Harlem should ensure that the CBA is precise and well-written for it to be effective and upheld in court. Specifying which programs and initiatives will receive funding — while leav-

257. Aside from some passing references to permissible projects, the exact programs or causes to be sponsored by the Benefits Fund were unspecified. See WEST HARLEM CBA, *supra* note 225, at 8–9. Similarly, the Affordable Housing Fund did not clarify which organizations or programs would receive funding to encourage the creation and preservation of affordable housing. *Id.* at 9–10 (“CU shall work with the appropriate government agencies and not-for-profit entities, as well as tenants, to provide for the lawful relocation of Residential Tenants to equal or better apartment units . . .”).

258. *Id.* at 11–12.

259. Astor & Morais, *supra* note 247.

260. *Id.*

261. Salkin & Lavine, *Negotiating for Social Justice*, *supra* note 244, at 124.

262. WEST HARLEM CBA, *supra* note 225, at 43.

263. Jeff Mays, *Black Architects Say Columbia Shut Them Out of \$6.3 Billion Harlem Campus*, DNA INFO (Dec. 18, 2012), <https://www.dnainfo.com/new-york/2012/12/18/west-harlem/black-architects-say-columbia-shut-them-out-of-63-billion-harlem-campus> [<https://perma.cc/TW63-U2NL>].

ing flexibility for other requests — would have strengthened the CBA and better represented their interests. Provisions delineating an oversight and enforcement structure and permitting courts to award specific performance in the event of a breach would also protect against unheeded commitments. The assistance of legal counsel may be necessary in drafting such clear and precise terms, particularly if the coalition members are inexperienced. Negotiating explicit and comprehensive terms would boost the efficacy of the CBA.

Despite its shortcomings, the West Harlem CBA was a major step towards protecting the interests of a community affected by redevelopment. An enforceable and comprehensive CBA, negotiated by the community, can be an effective means of providing necessary compensation to displaced and affected Harlemites.

VII. CHALLENGES AND CRITICISMS OF CBAS

Though supporters have lauded CBAs as a major step towards balancing the scales of power in redevelopment projects, some critics have expressed concerns about their use. This Part reviews several arguments highlighting the drawbacks of CBAs.

A. QUESTIONS OF ENFORCEABILITY

Critics have questioned the legal enforceability of CBAs, particularly since courts have not yet evaluated their validity as private contracts.²⁶⁴ First, scholars have explored whether CBAs implicate the exactions jurisprudence of *Nollan* and *Dolan*.²⁶⁵ This may occur if the promises in the CBA are considered exactions — conditions which a municipality places upon development approval.²⁶⁶ Under *Nollan* and *Dolan*, if the promises constitute government-imposed exactions, they must meet certain requirements: the conditions must have a nexus to a legitimate state interest, and be roughly proportional to the project's impacts.²⁶⁷ If the conditions do not meet these standards, they may consti-

264. See Alejandro E. Camacho, *Community Benefit Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 372 (2013).

265. See generally Michael L. Nadler, *The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem*, 43 URB. LAWYER 587 (2011).

266. See Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1563–1564 (2006).

267. See *supra* note 254 and accompanying text.

tute an uncompensated taking and be unconstitutional. However, these limitations only apply when the negotiations can be “fairly attributed” to the state and the government was found to have been substantially involved in the negotiations. If the Agreement is negotiated between a developer and a private entity, *Nollan* and *Dolan* do not apply.²⁶⁸ Therefore, to avoid triggering limitations under *Nollan* and *Dolan*, communities can execute private CBAs without involvement from the government.

Critics also argue that CBAs lack the consideration necessary to be an enforceable contract.²⁶⁹ Though community coalitions typically exchange their support for development in exchange for promised benefits, some have questioned whether this is sufficient when compared to the benefits that the developers provide.²⁷⁰ However, courts generally do not question the adequacy of consideration in examining an agreement’s validity.²⁷¹ Further, parties “need not be equally bound, or bound to the same extent” for consideration to be sufficient.²⁷² Additionally, when communities agree in the CBA to forbear from pursuing legal claims to block developments, there is a strong chance that the forbearance will constitute sufficient consideration.²⁷³

Some have also questioned who would have standing to enforce a CBA’s provisions. Contract law generally permits only signatories to enforce the terms of the contract, which can become complicated when the coalition disbands, or community members not in the coalition seek to enforce the terms.²⁷⁴ To increase the prospects of enforceability, CBA supporters recommend that each community organization sign the CBA so they can each enforce the provisions.²⁷⁵ It is unclear whether community members would be considered third-party beneficiaries who can also en-

268. Nadler, *supra* note 265, at 605.

269. Patricia Salkin, *Community Benefits Agreements: Opportunities and Traps for Developers, Municipalities, and Community Organizations*, 59 *PLANNING & ENV. L.* 3, 7 (2007).

270. *Id.*

271. See Stephanie M. Gurgol, *Won't You Be My Neighbor? Ensuring Productive Land Use through Enforceable Community Benefits Agreements*, 46 *U. TOL. L. REV.* 473, 493 (2015).

272. 17A *Am. Jur.* 2d *Contracts* § 124.

273. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 *UCLA J. ENVTL. L. & POL'Y* 291, 325 (2008).

274. *Id.*

275. *Id.*

force the provisions, but relevant case law in New York suggests that they may not be.²⁷⁶ Until the issue is examined by a court, community members should maintain communication with coalition members and keep them informed of the developer's commitments, so that they may pursue legal action if necessary.

B. QUESTIONS OF EFFICIENCY AND FAIRNESS

Critics also question whether CBA negotiations are fair to community members, and in some cases, developers. Michael Bloomberg, the former mayor of New York, described CBAs as “a small group of people . . . extort[ing] money from the developer.”²⁷⁷ Some also raise concerns about potential government pressure on developers to enter into CBAs.²⁷⁸ However, these arguments that CBAs are unfair to developers often minimize the immense value of the development. Assembling several parcels of land into a single parcel significantly increases the total value of the property; in other words, the value of an aggregate parcel of land is greater than the sum of its parts.²⁷⁹ Since property owners eligible for compensation only receive the fair market value of their single parcel of land, developers often receive a windfall of profits compared to the property owners forced to give up their homes.²⁸⁰ Accordingly, providing mechanisms through which the community can share in these benefits should be considered equity, rather than extortion. Another scholar has argued that the structures of CBAs are inefficient and increase the cost of public goods.²⁸¹ Similarly, observers state that the process of forming a representative community organization can be costly and time consuming.²⁸² However, as discussed above, negotiating

276. AHERN ET AL., *supra* note 182, at 22.

277. Mike McLaughlin, *Bloomy still wants Gehry — plus other tidbits from the mayor in our endorsement sit-down*, BROOKLYN NEWS (Aug. 25, 2009), https://www.brooklynpaper.com/stories/32/34/32_34_mm_bloomberg_in_our_office.html [<https://perma.cc/3SRF-LK9Z>].

278. Camacho, *supra* note 264, at 369.

279. See John T. Goodwin, Note, *Justice and the just Compensation Clause: A New Approach to Economic Development Takings*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 219, 231–233 (2011).

280. *Id.* at 233.

281. See generally Steven M. Seigel, *Community Benefits Agreements in a Union City: How the Structure of CBAs May Result in Inefficient, Unfair Land Use Decisions*, 46 URB. LAW. 419 (2014).

282. AHERN ET AL., *supra* note 182, at 21.

a CBA may still be preferable because they avoid costs and delays from litigation by resolving these disputes in advance.²⁸³

Critics have also inquired whether CBAs are equitable to communities. Some worry that the increased use of CBA negotiations will result in opaque decision-making processes inaccessible to much of the public.²⁸⁴ Others have pointed out that negotiations may not be fair when the community coalitions, with no assistance from experts, are “not well matched” with large development teams, which can include lawyers and consultants with greater expertise.²⁸⁵ Critics have also questioned whether community coalitions are adequately representative of the stakeholder interests and the community as a whole.²⁸⁶ Achieving adequate sophistication and representativeness may be challenging, particularly given the novelty of CBAs. However, since the current government approval processes “neglect large swaths of stakeholders,” CBAs remain the preferable option because they allow for a level of civic engagement not possible under the current land use approval process.²⁸⁷ Additionally, transparent and well-publicized negotiations will attract a diverse set of community members before the formation of the coalition, increasing the representativeness and sophistication of the coalition.²⁸⁸

C. QUESTIONS OF UTILITY

A number of scholars have argued that coalition members lack the resources necessary to incorporate community interests and to monitor and ensure developer performance.²⁸⁹ Without a system for monitoring performance and incorporating community input, the CBAs may not guarantee that the community receives benefits, eliminating their utility. Such a system could be written into the Agreement in a way that encourages accountability and efficacy. Another scholar suggested that CBAs may be a neighborhood solution to a citywide problem, arguing that a jurisdiction-wide approach would be more effective at channeling

283. See De Barbieri, *supra* note 185, at 1813.

284. Camacho, *supra* note 264, at 369.

285. AHERN ET AL., *supra* note 182, at 21.

286. Camacho, *supra* note 264, at 370.

287. See De Barbieri, *supra* note 185, at 1815.

288. *Id.* at 1816.

289. *Id.* at 371–72.

resources to the neighborhoods that need them the most.²⁹⁰ If CBAs appear to divert benefits from other vulnerable communities, city officials may need to consider reallocating public funds or implementing other mitigating measures.

VIII. CONCLUSION

Neighborhoods shift and change. A single city can experience several different demographic and economic uses in a matter of decades. Neighborhoods should not be frozen or prohibited from experiencing these natural changes — they are essential to the evolution of a city. It becomes, however, a separate issue when the city drives these changes by intentionally displacing vulnerable communities. Courts' overbroad applications of "public use" has fueled gentrification in communities like Harlem, which has lost many of its residents and much of its character to luxury residences, commercial establishments, and profit-seeking private actors. This Note argues that gentrification and displacement impose unique harms in historically disenfranchised communities because they risk reiterating discriminatory policies of the past, and that compensation must begin to address these harms in order to be considered "just." Community Benefits Agreements can begin to rectify these harms by allowing community members to negotiate benefits that respond to the community's specific needs.

There currently exists no right to housing in the U.S., but since *Brown*, the nation has recognized the right against forced feelings of inferiority fostered by separation based on race and perceived diminished worth. Natural, inalienable rights are referred to as such because they are considered intrinsically tied to our existence as people; to be born — to exist — bestows these rights and warrants their fierce protection. Although there may exist no right to housing, there is a fundamental right to retain one's personhood. Restorative just compensation would be a step toward healing a community hurt by history, reinstating the dignity of that community, and accordingly, the dignity of the nation as whole.

290. See Been, *supra* note 197, at 25–26.