Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment

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This Article analyzes the Supreme Court's most recent foray into redevelopment—the controversial case of Kelo v. City of New London. *Over vehement dissents by the Court's conservatives, an unenthusiastic Justice Stevens validated New London's condemnation of single-family homes for a mixed-use commercial development. The case ignited a firestorm of opposition. Property rights advocates, moving beyond the dissenters' arguments, introduced legislation in most states and in Congress which would terminate the use of condemnation to assist economic redevelopment for any purpose. This Article critiques both the majority opinion and dissents in light of the modern practice of public-private economic redevelopment. It argues that the majority opinion fails to elucidate the economic and social activity involved, and that the facts in* Kelo *are unrepresentative of modern redevelopment—a productive and necessary cure for land use market failure in center cities. This public-private collaboration catalyzes the revitalization of downtowns, facilitates infill development, and produces much of the nation's affordable housing. Where such redevelopment requires the use of eminent domain, its exercise is essential against economically motivated owners who refuse to participate in the redevelopment and hold out for untenable prices. The exercise of eminent domain rarely involves*

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condemnation of residential uses, and when so directed, now requires relocation and produces compensation that usually exceeds fair market value. This Article proposes that modern public-private economic redevelopment commingles public and private uses, public and private ownership, and public and private gain in ways that renders inapposite and un-administrable both the majority's view of land use and the dissenters' proposed litmus tests for acceptable use of eminent domain. Finally, this Article contends that Justice O'Connor's dissent clashes inexplicably with principles of deference she herself articulated in the Court's last pronouncement on redevelopment, that the dissenters' policy complaints are decades out-of-date, and that the landscape of uses and municipal financing the Justices would reinstate lies in the irretrievable past.

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INTRODUCTION

Kelo v. City of New London[1] has engendered a breadth and intensity of public reaction unique among the Supreme Court's land use decisions. Justice Stevens, writing for a five-member majority, held valid the condemnation of a group of single-family homes to carry out a redevelopment plan for the deteriorated waterfront of New London, Connecticut.[2] Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas, filed a passionate dissent.[3]

As expected, property rights groups and Libertarian organizations excoriated the majority opinion and celebrated the dissents. More interesting is the reaction of the rest of the population. Americans of most political persuasions, and education and income levels found the outcome counterintuitive at best, or more often, simply repulsive. Federal and state legislators took note of the universality of this response. Members of Congress, state legislators, and city councilpersons have introduced measures containing palliatives or correctives to the perceived abuse.[4]

What accounts for the breadth and the depth of the popular response? No doubt much is a reaction to the specter presented by the facts of the case as set forth in the various *Kelo* opinions—the condemnation of a group of well-kept single-family homes in a small, functioning residential community to facilitate the creation of a corporate industrial and office campus. The breadth of response also owes much to the success of those, including some amici for the *Kelo* plaintiffs, who have labored to enhance the status of private property and reduce the role of government in American society. They have altered the terms and

1. 545 U.S. 469 (2005).

2. *Id.* at 490. Justices Kennedy, Souter, Ginsberg and Breyer joined the opinion of the Court. Justice Kennedy filed a concurring opinion. *Id.* at 490 (Kennedy, J., concurring).

3. *Id.* at 494 (O'Connor, J., dissenting). Justice Thomas also filed a separate dissent, *id.* at 505 (Thomas, J., dissenting).

4. *See, e.g.*, Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. § 2(a)–(b) (2005) (causing a state or local government to stop receiving federal funding if it uses its power of eminent domain for economic development purposes); *id.* § 7(a)(4). For an updated summary of the response by states to the *Kelo* decision, see Castle Coalition, Institute for Justice, State Legislative Actions, http://www.castlecoalition.org/legislation.html (last visited Jan. 7, 2007), and National Conference of State Legislatures, State Legislative Response to Kelo, Annual Meeting 2006, http://www.ncsl.org/programs/natres/annualmtgupdate06.htm (last visited Jan. 15, 2007).

language of political discourse in ways that render it difficult to make the case for affirmative government efforts in the social arena. It is not surprising then that the potential abuse of redevelopment, one of the most powerful roles assigned to government, makes an easy target, while the virtues of redevelopment remain obscure.

However, without diminishing the success of various policy advocates in framing the debate, more is required to explain both the *Kelo* decision and the popular response. Simple ignorance of the transformed and transforming nature of city-center land use development lies at the heart of the pervasive popular reaction to the *Kelo* decision. Americans enjoy the fruits of economic redevelopment. They live, shop and recreate in revitalized urban cores, they rent or own housing for all income levels created by these efforts, and they enjoy stadiums and arenas that stand where dilapidated warehouses and parking lots once lay vacant. They do not, however, understand how the transformation occurred.

The public also remains unaware of the results of a contentious, but successful movement to reform redevelopment in ways that address the abuses of the mid-twentieth century cited in the *Kelo* dissents. In recent decades, agencies have increasingly avoided the use of condemnation, especially in the single-family residential context. Reforms in federal and state law ensure that condemnees receive payment well in excess of fair market value, and the majority of condemnees upgrade their housing as a result.[5] Few know that in many states, economic redevelopment requires that housing lost to demolition be replaced at a greater than one-to-one ratio.[6]

Educated Americans who otherwise generally understand zoning and development remain unaware of a quiet revolution in city-center redevelopment. Modern forms of urban land use erase traditional boundaries between public use and private use. New forms of contractual relationships between governmental entities and the private sector break apart the hoary "bundle of sticks," and redistribute the attributes of title in ways that supplant traditional real property concepts of public versus private ownership. This sea change arises in the context of an endeavor to remake government, to bring to the public sector qualities found in the private sector, and to infuse in government land use planning an understanding of economics and the operation of markets.[7]

5. *See generally infra* Sections I.A–B.

6. *See infra* note 32 and accompanying text; *see also infra* note 131 (describing new affordable housing units resulting from redevelopment in San Francisco).

7. *See generally* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992); AL GORE, NATIONAL PERFORMANCE REVIEW, BENCHMARKING STUDY REPORT, SERVING THE AMERICAN PUBLIC: BEST PRACTICES IN PERFORMANCE MEASUREMENT 1 (1997). The

This Article examines the *Kelo* opinions in light of the realities of modern public-private redevelopment, and concludes that neither the majority nor the dissents comprehend their subject. Justice O'Connor's dissent invokes concepts, categories, and rules rendered inapposite and un-administrable by the practice of modern public-private development partnerships. Her and Justice Thomas' dissents reflect unexamined personal and political biases that are generally forty years out of date. The America they would reinstate lies in the irretrievable past. Whether these dissenting Justices and those who joined them lack the comprehension to counter visceral reactions to the facts of the case, or whether a property rights orthodoxy drives their reasoning, their dissents in *Kelo* repeat a pattern present in other land use opinions by conservative Justices that misconstrue or omit an examination of the policy foundations, nature, methods, and pragmatic record of the governmental program at stake in the case. The *Kelo* dissenting opinions join an unfortunate line of Supreme Court land use cases whose reasoning reflects the passions or prejudices of the authors more than the realities upon which they rule.

The majority opinion in *Kelo* fails to elucidate the defects of the dissents. Beyond a dry and incomplete summary of the official findings in the case, the opinion penned by Justice Stevens says nothing about the underlying issues of urban decay or the contribution of public-private economic redevelopment to modern American cities. The majority's primary analytic reliance on judicial precedent and judicial deference invites the popular reaction that in fact occurred. This Article contends that these defects in Justice Stevens' opinion arise from the same lack of comprehension afflicting the dissents and the general public, compounded by an unexamined personal position on the role of the free market in city-center land use.

Perhaps in response to the unusual breadth of public antipathy to the decision, Justice Stevens spoke out after the decision, indicating he disagreed with the condemnation as a matter of policy, but felt compelled by precedent to reach the conclusion he did. He stated that "the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[8] Supreme Court Justices breathe the same air we all do, so it is inevitable that ideology should influence the judicial process to some extent. Here, however, the personal ideological position goes to the very heart of the redevelopment effort upon which the Justice rules. Public-private economic

National Performance Review aimed to make government more efficient by uniting the public and private sectors. *Id.*

8. Linda Greenhouse, *Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. Interestingly, Stevens' speech was before a bar association.

redevelopment evolved precisely because decades of experience grappling with issues of urban decay led to a consensus among economists, attorneys, planners, and developers that the unassisted operation of the free market would *not* reverse stubborn economic decline in certain defined situations and geographic areas. As a fair reading of the facts would show, the "free play of market forces" had long failed the New London neighborhood in question in *Kelo*.

This misunderstanding of market forces and market failure comprises one facet of an overall misunderstanding of modern redevelopment. The Justices in the *Kelo* majority do not understand the redevelopment process or the realities underlying the New London redevelopment at issue in the case. An opinion validating New London's actions should have articulated how the regime advocated by the dissents would do violence to the planning and contractual process that has recreated the modern American center city—a new land use regime that is the product of hard-won sophistication among city officials, regulators, and public and private redevelopment advocates.

I. BAD FACTS MAKE BAD LAW: *KELO* IS NOT MODERN PUBLIC-PRIVATE REDEVELOPMENT

The surface of the New London story as presented in the opinions presents a situation so intrinsically compelling that the case against redevelopment appears made without the legal analysis that followed. The city of New London brought the public planning, funding, and eminent domain powers of redevelopment power to bear in order to facilitate Pfizer's plans to locate a corporate campus along a river in town. The city also sought associated uses such as a river-walk, a park, and some related commercial and residential use. Plaintiffs' homes stood in the way. The city condemned their well-kept single-family residences, not for a park, a street, or other public facility, but pursuant to a plan that called for retail uses and parking on the specific site of their homes. Plaintiffs thus lost their houses, their roots and their community for no other reason than "economic development," which presumably means Pfizer's benefit and increased tax base for the city.[9]

The offensive elements of this story are apparent: the use of government power to take private, single-family homes in a functioning neighborhood; the apparent injustice of condemnation in the face of important intangible values for which no fair market formula could compensate; and the appearance of collusion between powerful private interests and government to advance private, rather than public good.

However, this portrayal suffers from the simple omission of key elements of the New London situation that shed a different light on the

9. Kelo v. City of New London, 545 U.S. 469, 475-77 (2005).

condemnation.[10] The subject area had an astounding vacancy rate and suffered tenacious economic decline and blight by any definition. The redevelopment plan was a well-developed approach to economic revival in the face of decades of decline, and the use of a corporate pioneer such as Pfizer is an essential and typical element of the strategy to bring a moribund area back to life. The new project actually contained more housing than it condemned. Without the exercise of eminent domain, the plaintiffs would have frustrated a program of economic revitalization that benefited the New London community.

Both the majority and the dissents visualize the very concept of public-private economic redevelopment through the lens of this incomplete rendition of the *Kelo* facts. This Part contends that these facts convey an unrepresentative picture of modern American public-private economic redevelopment. Condemnation, infrequent in the modern context, is rarely directed against residential uses and is even more rarely against functional single-family homes. Recent scholarship shows that condemnees receive payment in excess of market value in large part because of relocation payments made to ensure they acquire subsequent housing of comparable size, value and location.[11] Many states require a lengthy planning process and public participation prior to the condemnation of the sort employed by New London.

The *Kelo* facts, especially as portrayed by the dissents, represent redevelopment's past more than its present. In the last four decades, complex political and social forces, some created by the reaction to past abuses of the power of eminent domain, have successfully altered the face of redevelopment[12] through changes in federal and state redevelopment laws.[13] Redevelopment is now a primary device for the economic redevelopment of our center cities and produces much of the new housing in center cities, especially low-income housing.[14]

The *Kelo* opinions omit these realities and focus on the alleged abuses in the case. While appellate courts must focus on the facts in front of them, they also must struggle to put "bad facts" into context and employ reasoning that avoids extending the plaintiff's situation in ways that would do violence to the underlying tools developed by civil society. This the *Kelo* Court fails to do. Instead, the Justices ignore key facts that would justify the condemnation, and imply (in the majority opinion) or state outright (in the dissents) that the *Kelo* facts as portrayed *are* redevelopment. Even the majority's use of the term "economic development" implies a process operating simply to create new forms of

10. *See infra* Part IV.B.
11. *See infra* Part I.A–B.
12. *See infra* Part I.D.
13. *See infra* notes 40–46, 86–88 and accompanying text.
14. *See infra* notes 86–88 and accompanying text.

private economic wealth, a conclusion the dissents openly voice.[15] By contrast, the term "*re*development" reflects the intent of modern government to correct the failure of the market alone to bring an area back to life after a substantial period of economic decline.[16] This Article develops a more representative picture of modern redevelopment, and in so doing employs the more accurate terms "economic redevelopment," "public-private redevelopment," or "public-private economic redevelopment," phrases which reflect the new kinds of partnerships between government and the private sector.

An effort to contrast the *Kelo* facts with the representative realities of modern redevelopment must begin with the disclaimer that it is difficult to know what constitutes "representative" reality in the land development endeavor. Land development engages multiple actors at the most local level, creating projects so different from one another as to defy comparison, and presenting financial and political project histories difficult for non-actors to comprehend or analyze comparatively. In this context-dominated environment, developers and communities frequently must "reinvent the wheel" for their own projects, and little comparative scholarship exists. Educational associations such as the Urban Land Institute (ULI) and professional organizations such as the American Planning Association have made heroic efforts to organize, categorize and disseminate experience in the development field.[17] Nonetheless, conferences focusing on development and redevelopment rarely discuss the announced topic per se; instead, they usually consist of a series of individual project presentations loosely grouped around the subject, with the comparative conclusions treated briefly if at all. Most public-private redevelopment participants base their work on local experience, without significant benefit from scholarly literature.

15. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 502 (O'Connor, J., dissenting) ("How much the government does or does not desire to benefit a favored private party has no bearing on whether an *economic development* taking will or will not generate secondary benefit for the public.") (emphasis added). Similarly, Justice Stevens' majority opinion alludes to "economic development" with respect to private party financial gain. *Id.* at 484 (majority opinion) ("Promoting *economic development* is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.") (emphasis added).

16. *See, e.g.*, MIKE E. MILES, GAYLE BERENS & MARC A. WEISS, URBAN LAND INST., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 38, 153–56 (3d ed. 2000) (describing the purposes of urban redevelopment, and distinguishing the public redevelopment intention of the modern public sector from private sector efforts). California law broadly defines redevelopment as predicated upon protecting the interests of the "general welfare." CAL. HEALTH & SAFETY CODE § 33020 (West 2006). Other states define redevelopment as "urban renewal." *See, e.g.*, ARK. CODE ANN. § 14-169-705(b)(2)(A)(i) (West 2006); ALASKA STAT. § 18.55.700(b)(1) (2006).

17. *See* Urban Land Institute, http://www.uli.org (last visited Jan. 15, 2007), and American Planning Association, http://www.planning.org (last visited Jan. 15, 2007).

The variety and situational nature of land use development frustrate the courts as well, resulting in the inability to form generally applicable rules.[18] Judicial deference,[19] as well as judicial references to the American federalist experiment featuring the states as "laboratories,"[20] may implicitly recognize this varied and intensely local nature of land use.

The same impediments affect analyses of redevelopment, particularly regarding the use of eminent domain for redevelopment. Conferees and scholars would like to form conclusions about public-private redevelopment, and cities would like to find answers from sister governments, but the barriers to generation of like-like comparisons frustrate their efforts. In fact, the task is doubly difficult since the nature of the redevelopment and its use of eminent domain varies not only by city, but also over time. Fifty years of experience in fifty states generates grist for any argument without demonstrating obvious patterns or general solutions, and in this polarized environment, every position purports citation to experience.[21]

18. Shunning any "set formula," the Supreme Court's 1978 landmark decision in *Penn Central Transportation Company v. New York City* proffered a regulatory takings test heavily predicated upon the "particular circumstances" of each case. 438 U.S. 104, 123–24 (1978) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) and citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1964)) (quotations omitted). In the realm of noncategorical takings jurisprudence, the Court has consistently reaffirmed *Penn Central's* ad hoc, balancing approach. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (citing positively *Penn Central's* fact-dependent, balancing standard); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (affirming that the *Penn Central* test was still controlling); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (distinguishing *Penn Central's* "case-specific inquiry" requirement from both physical invasion challenges and situations involving the categorical denial of "all economically beneficial or productive use of land").

19. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 *passim* (1984) (majority opinion by Justice O'Connor).

20. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

21. Much scholarly literature debates the appropriateness of eminent domain for redevelopment. In some cases, authors have characterized individual projects. *See, e.g.*, ROBERT DREHER & JOHN D. ECHEVERRIA, GEO. ENVTL. L. & POL'Y INST., KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR REDEVELOPMENT 2–3, 22–26, 42–43 (2006) (arguing that public-private redevelopment is a viable tool for improving communities and calling for thoughtful reforms that will carefully ensure that government can continue using eminent domain as a tool for urban revitalization); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (arguing that because eminent domain is more expensive than acquiring property in the market, it is self-regulating); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 365–66 (2006) (arguing that local government has taken "public use" to the extreme and is misusing its eminent domain power to the demise of poor and minority communities); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 496–98 (2006) (arguing that the Court decided *Kelo* correctly as a matter of law but that

Nonetheless, it is possible and important to extract from this welter of redevelopment experience some generalizations as to its present nature. As discussed in the following four sections, the *Kelo* facts, especially as portrayed in the *Kelo* opinions, lie far from the center of the experience of redevelopment and its use of eminent domain in recent years and in most locales. The Justices, especially the dissenters, have locked themselves in an uncritical embrace of a generally dated, one-sided view of the complex redevelopment reality.

A. Modern Redevelopment Rarely Includes Condemnation of Residential Uses

Much of the popular reaction to *Kelo* rests on the specter of Susette Kelo being forced out of her home, a fact pattern recited in both the majority and dissenting opinions. The majority told us that petitioner Wilhelmina Dery lived in her home all of her life, and that Susette Kelo made extensive improvements to her house and prizes its water view.[22] Justice O'Connor added that Dery's home has been in her family for over one hundred years, and that Dery's son lives next door in a house bestowed upon him as a wedding gift.[23]

In most American cities this condemnation scenario would occur rarely, if ever. In recent decades condemnation of any use has become infrequent.[24] Many factors contribute to a disinclination to use the power

economic development takings should be banned because they are inefficient and unjust); Nancy Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3 (2003) (arguing for a less deferential standard of review in eminent domain cases); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence* 4–5 (ExpressO Preprint Series, Paper No. 1106, 2006), *available at* http://law.bepress.com/expresso/eps/1106 (arguing that eminent domain is unnecessary because government can acquire the land through the market and that it is socially undesirable because land owners are not compensated for the full value of their loss); Lee Anne Fennell, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock*: Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958, 962 (2004) (arguing that "just compensation" does not compensate land owners completely because it does not account for subjective value); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 488 (1976) (concluding, based on a study from 1962–1970, that high-value properties receive more than fair market value while lower valued properties receive less); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 101, 142–43 (2006) (arguing that land owners often receive more than fair market value because government only uses eminent domain when it has to, usually settling with landowners at above-market rates, and because government pays for relocation costs). *See* Timothy J. Dowling, *How to Think About* Kelo *After the Shouting Stops*, 38 URB. LAW. 191 (2006); Gideon Kanner, Kelo v. New London: *Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006).

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

23. *Id.* at 494 (O'Connor, J., dissenting).

24. *See* J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POL'Y DEBATE 1, 16–17 (2001) (revealing a survey which indicated

of eminent domain. Redevelopment and economic development agencies are reluctant to use condemnation because the total costs of acquisition, including legal fees, runs higher than fair market value, generally by about a third.[25] The possibility that a condemnation could result in the property owner bringing a lawsuit encourages the government to settle before trial at above-market prices.[26] Reductions in federal funding for redevelopment since the 1980s, including a reduction in funding for eminent domain, further discourage the use of condemnation.[27]

Acquisition of land in current residential use is even more infrequent. Modern economic redevelopment tends to focus on converting depressed industrial or commercial areas to mixed-used facilities. Eminent domain thus acquires undeveloped land, land in "holding uses," such as underutilized parking lots and dilapidated, often-empty warehouses, or land held for industrial use that no longer conforms to the current zoning. Agencies avoid acquisition of occupied residential land, whether by negotiation or condemnation, because of the expense of relocation, and, in many situations, because of the risk of political controversy.[28] For example, while redevelopment played a major role in San Francisco land use and development since the inception of the concept, the city's Redevelopment Agency infrequently condemns property, and more than three decades have passed since the last residential condemnation in the city.[29]

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that only four out of thirty-six cities would be willing to relocate at least fifty households and thirty businesses in a blighted area for a large-scale redevelopment project).

25. *See* Merrill, *supra* note 21, at 80–81 (explaining that market exchange due to the additional "due process" costs, such as filing a judicial complaint, serving process, appraising the property, and allowing the property owner a hearing, makes eminent domain more expensive). One commentator challenges the current weight of scholarship that asserts that condemnees do not receive fair market value for their property, finding that condemnees often actually receive greater than fair market value. Garnett, *supra* note 21, at 101. She finds three reasons for this: (1) government avoids taking high-subjective-value properties that are often associated with costly and politically damaging battles in the courts and public opinion; (2) in addition to fair market value, the federal Uniform Relocation Assistance Act usually requires the condemnor to pay relocation assistance costs; and (3) government is incentivized to acquire most property pre-condemnation through settlement at above fair market value prices to avoid the political upheaval that can result from initiating condemnation proceedings. *See id.* at 118, 121, 142–43.

26. *See* Merrill, *supra* note 21, at 77 n.65 (citing Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 436–40 (1967)) (noting that about 85 percent of condemnations settle before trial).

27. C. THEODORE KOEBEL, CTR. FOR HOUS. RES., VA. POLYTECHNIC INST. & STATE UNIV., URBAN REDEVELOPMENT, DISPLACEMENT AND THE FUTURE OF THE AMERICAN CITY 21–22 (1996) (concluding that when the federal government has funded projects, it has moved away from redeveloping residential areas to redeveloping commercial areas because of the high political and social costs of residential displacement).

28. Farris, *supra* note 24, at 10 (observing that city officials and developers avoid land-assembly problems by looking for large, underdeveloped sites such as abandoned lots, dump sites, and parking lots).

29. Telephone Interview with David Madway, former Chief Counsel, S.F. Redevelopment Agency (Aug. 9, 2005).

When residential condemnation does occur, it most commonly involves a different situation than the one represented by the acquisition of the single-family dwellings of the *Kelo* plaintiffs. Residential condemnation usually seeks to acquire and demolish residential tenements, typically multi-unit structures, often owned by absentee landlords who have declined to maintain the structures.[30] This represents a major issue especially in older cities, where inner-city housing is at risk of deterioration to the point of abandonment and total loss. Typical remedies such as building code enforcement are cumbersome, and the resulting fines neither substitute for, nor stimulate the affirmative investment necessary to repair the building. Creative city administrations have used redevelopment instead of, or in addition to, code enforcement. They acquire the subject land and buildings through condemnation, relocate the tenants, and replace the dilapidated structure with new affordable housing on the site.[31] Many states or cities have legislated that the replacement projects in such situations provide more new low-income units than those demolished, resulting in a net gain of affordable housing units in the area.[32]

To say that residential condemnation is rare is not to say it does not occur. Occasionally a high-profile redevelopment effort does require the destruction of single-family homes and negotiation for acquisition fails. Such projects tend to become focus of controversy and litigation, which renders them more visible than their frequency or size might merit. In the small coastal community of Long Branch, New Jersey, for example, redevelopment of a downtown and waterfront that has been economically depressed for decades will involve in the demolition of single-family residences. This redevelopment, however, will create far more housing of the same tenure and type that is destroyed, as is frequently the case with such plans.[33]

In sum, *Kelo* is an outlier because condemnation was employed at all, and even more so because New London directed eminent domain against a viable single-family use.

30. Farris, *supra* note 24, at 10 (noting that the underdeveloped sites used most often for redevelopment are usually surrounded by blight or environmental hazards).

31. *E.g.*, Jerry E. Abramson, A COMPREHENSIVE HOUSING STRATEGY FOR LOUISVILLE METRO 17 (2006).

32. *See infra* note 131 and accompanying text.

33. The current Phase II of the Long Branch, New Jersey effort requires the demolition of thirty-six single-family residences, of which twenty-four are now subject to condemnation. The redevelopment effort has to date involved the rehabilitation and sale of approximately 400 units to low-income purchasers. Telephone Interview by Jonothan Cohen with Howard Woolley, Town of Long Branch Bus. Adm'r, in Town of Long Branch, N.J. (Dec. 1, 2006) (Mr. Cohen is a student of the author and a paper describing the interview is on file with the author).

B. Most Condemnees Receive Compensation Sufficient to Cover Intangible Values

The dissents represent that the *Kelo* plaintiffs do not want money; they want their homes and community. These assertions present us with a vivid representation of what a considerable literature calls uncompensated "subjective loss" or "intangible values."[34] Critics list among the drawbacks of condemnation its failure to compensate for a host of losses other than "fair market value."[35] In the literal sense, the critics are correct; most state condemnation statutes and uniform appraiser instructions give a condemnee what she would obtain from a third party in an arms-length commercial transaction.[36] Courts have consistently required that compensation must equal, but cannot exceed fair market value, even if government should want to provide more.[37]

The missing intangible values examined in the scholarship include added value to the condemnee due to sentimental attachment to the property that cannot be valued using the traditional fair market value calculation of what a willing buyer would pay a willing seller in a market transaction.[38] Intangible values also include the inconvenience of moving, special needs of the owner not recognized in the market, attorneys' fees for fighting the condemnation, relocation costs, and for a commercial enterprise, lost goodwill and strategic losses associated with the relocation of a business.[39] Critics have considered these as defects of the system of eminent domain. They assert that Susette Kelo typifies the reality that fair market value fails to compensate adequately those displaced by condemnation.

34. Merrill, *supra* note 21, at 83. It also includes relocation costs and the value of any special modifications the owner may have added to the property that is of unique value to that property owner but that do not increase the property's value. *Id.*

35. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (6th ed. 2003) (noting with approval that "just compensation is not full compensation in the economic sense" because it does not include subjective values); Fennell, *supra* note 21, at 962–67 (arguing that fair market value does not include the value of the owner's subjective value of her property, lost opportunity to reap a surplus from the sale of her property in the market, and autonomy to decide whether to sell); David L. Callies & Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, *in* EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 137, 154 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (concluding that the fair market value standard is inadequate when government takes for redevelopment purposes because it does not allow the condemnee to recover a premium for the economic benefit or detriment of the redevelopment, nor does it include social value, relocation, attorneys' fees, and replacement value).

36. *See* 4 NICHOLS ON EMINENT DOMAIN § 12.02 (3d ed. 2006) (declaring it "well settled" that when land is taken through eminent domain, the measure of compensation is fair market value).

37. *See id.* § 12.02 n.1 (setting forth federal and state court decisions).

38. *Id.*

39. *See* sources cited *supra* note 35. Most scholars concede the difficulty of creating or administering a system to value sentimental attachment and special needs.

The *Kelo* majority opinion lends tacit support to this view. Justice Stevens never mentions the federal and state legislation that has addressed many of the concerns about compensation, directly with respect to intangible costs, and indirectly for sentimental attachment. Congress first acted to safeguard the rights of condemnees in 1971 with the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs.[40] The Uniform Act responded to the public outcry after the government used eminent domain in the 1940s to 1960s to remove urban blight. Congress intended to ensure that all persons displaced by government renewal programs be treated fairly and equally and to minimize the hardship of displacement.[41] The Uniform Act requires the government to pay for actual moving expenses and up to $22,500 (in addition to the acquisition cost) to help the displaced homeowner secure comparable replacement housing.[42] The Uniform Act covers all redevelopment projects undertaken with federal funds.[43] Condemnation compensation now includes attorneys' fees[44] and lost goodwill for businesses.[45] Severance damages can address many business and commercial strategic losses.[46] Furthermore, if the city receives federal assistance for redevelopment in the form of Community Development Block Grants, it must comply with federal requirements for replacement housing.[47]

State relocation assistance law usually covers projects not subject to the Uniform Act.[48] Many states and cities go beyond the federal baseline requirements.[49] Today, most cities prevent the removal of housing units unless the inhabitants can be relocated into units of similar quality and

40. 42 U.S.C. §§ 4601–4655 (2006) [hereinafter Uniform Act]; *id.* §§ 4622–4623.

41. *See id.* § 4621(b) (congressional policy section).

42. *Id.* §§ 4622–4623(a)(1).

43. *Id.* § 4630.

44. *Id.* § 4654(a) (entitling owners to attorneys' fees, as well as appraisal and engineering fees, if they prevail in a condemnation suit); *id.* § 4623(a)(1)(C) (requiring, as part of the owner's recovery of replacement housing costs, the condemning authority to pay the owner's reasonable expenses incurred for a title search, recording fees, and other closing costs due to the purchase of a new dwelling). Most states allow condemnees to recover attorneys' fees if they prevail in a condemnation suit. *See* 8A NICHOLS ON EMINENT DOMAIN, *supra* note 36, § 15.02 (compiling state-by-state summaries on whether attorneys' fees are recoverable).

45. 8A NICHOLS ON EMINENT DOMAIN, *supra* note 36, § 29.01[1] (noting the "trend" among states to award compensation for loss of goodwill and other business damages); *see also id.* § 29.01[2][a] (explaining that a few jurisdictions have adopted Uniform Eminent Domain Code § 1016, which allows a business to recover goodwill if the owner can prove that the loss was caused by the taking and that the loss "cannot reasonably be prevented by a relocation of the business" or by taking other measures to preserve the goodwill).

46. *See generally id.* § G16.02 (outlining the approach of various states on the payment of severance damages).

47. 24 C.F.R. § 570.606 (2006).

48. Garnett, *supra* note 21, at 123.

49. *Id.* at 121.

job accessibility.[50] Most significantly, many states use excess relocation costs indirectly to compensate for other intangible costs and sentimental attachment. Recent studies have concluded that relocation compensation is higher than actual relocation cost,[51] and that in many cases governments utilize the relocation assistance as a *de facto* surrogate for addressing intangible costs. Condemnees often upgrade their housing as a result of the redevelopment effort, frequently within the same area.[52]

Finally, it should be noted that where the occupants of residential structures subject to eminent domain are tenants (and as discussed above,[53] this is usually the case), the relocation requirement provides a benefit not generally available to tenants facing the operation of the unassisted market.[54] In private sales and eminent domain condemnations, the fair market value flows to the owner, not the tenant. But eminent domain condemnations do provide tenants with relocation assistance, whereas private sales do not. Poor tenants may be on month-to-month leases and evicted on thirty days notice.[55] Regardless of the term of their lease, in many states sale of the residential building terminates the leases of all the renters, in contrast to negotiated commercial leases, which are usually protected in the event of a sale.[56] Thus, where a private developer negotiates a sale with the owner of a multi-family residential building, the residents lose their housing without recourse or relocation rights. Those same residents fare much better if the building is condemned by a

50. *See* Uniform Relocation Assistance Act, 42 U.S.C. § 4630 (2006) (requiring "comparable replacement dwellings"); *id.* § 4601(10) (defining "comparable replacement dwelling" as a dwelling that is "decent, safe, and sanitary," adequate in size, affordable, functionally equivalent, and in a location with reasonable environmental conditions that is "not less desirable" than the displaced person's prior dwelling with respect to various factors).

51. *See* Garnett, *supra* note 21, at 124–25 (citing a 1995 U.S. Department of Transportation study and concluding that because residential condemnees receive a generous amount of relocation assistance, they get the replacement value for their property rather than just the fair market value).

52. *Id.* at 122–23 (explaining that because the Uniform Relocation Assistance Act requires that the replacement dwelling be "decent, safe, and, sanitary" and of adequate size, displaced residents who previously lived in conditions that failed to meet the housing code may receive a larger home than they previously had).

53. *See supra* text accompanying note 30.

54. J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 UCLA J. ENVTL. L. & POL'Y 131, 164 (2005) ("[M]ost poor people will not own a fee but have, at best, a leasehold. The government pays the value of the fee interests that it takes, and the parties divide the compensation according to their shares or lease provisions. But the amount realized by a low income residential tenant will be low in any event, and likely will be zero.") (footnotes omitted).

55. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 540 (1982); *see also* Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 811–12 (1994).

56. *See* KOEBEL, *supra* note 27, at 13 ("[T]enants are often displaced when properties are upgraded or converted to other uses.").

redevelopment agency providing relocation assistance and equal or improved affordable replacement housing.[57]

Thus, had events in New London proceeded without the subject litigation, Ms. Kelo, Mrs. Dery, and the other plaintiffs would likely have received compensation in excess of the fair market value of their homes. Such payments would have permitted them to "upgrade." A number of the *Kelo* plaintiffs owned residences in the neighborhood other than the ones they inhabited, and presumably those houses were rented to others.[58] In that case, their tenants would certainly have benefited from relocation assistance unavailable had these owners just sold the units to new owner-occupants. It is also quite possible that these plaintiffs could have relocated in some of the eighty units of replacement housing in the New London redevelopment effort.[59] Such a move might have served as a poor substitute for the loss of an existing community, or it might have constituted an improvement. The majority opinion does not tell us anything about those newly developed housing opportunities, nor does it address federal or state law on relocation, or the use of relocation funds to compensate owners for sentimental attachment.

C. Affected Residents and Businesses Participate in Modern Redevelopment

The *Kelo* dissents portray the plaintiffs as victims of redevelopment, not active participants. This image of uninvolved and surprised homeowners inaccurately represents the general experience of modern redevelopment. The same reforms that have opened city governments to the public have also made redevelopment a more participatory process at the state level. In most states, redevelopment begins with the iteration of a redevelopment plan.[60] The plan evolves in public, often through volunteer committees and planning workshops that draft modifications and alternatives. State open meeting laws usually make these processes

57. *See* MILES ET AL., *supra* note 16, at 155; *see also* KOEBEL, *supra* note 27, at 13 (explaining that because residential tenants are highly mobile, they are relatively unaffected by displacement other than that they must change the timing of their move); Garnett, *supra* note 21, at 125 (finding that residential tenants benefit the most from relocation assistance, as the majority of tenants "significantly upgrade" their housing because of the assistance).

58. *See* Kelo v. City of New London, 545 U.S. 469, 475 (2005) ("In all, the nine petitioners own 15 properties in Fort Trumbull . . . .").

59. In the Long Branch, New Jersey redevelopment project discussed *supra* note 33, for example, residents of single-family units which were to be replaced were offered thirty to forty percent premiums over fair market value, discounted prices on units in the redeveloped area, and $5,000 per year to cover property taxes and maintenance fees for ten years. Interview with Howard Woolley, *supra* note 33.

60. *See, e.g.*, ALA. CODE § 24-2-4 (2006); ALASKA STAT. § 18.55.530 (2006); CAL. HEALTH & SAFETY CODE § 33131 (West 2006); DEL. CODE ANN. tit. 31, § 4520 (2006); IND. CODE ANN. § 36-7-14-15 (West 2007); MASS. GEN. LAWS ANN. ch. 121B, § 18 (West 2006).

accessible and transparent to the public.[61] Many states formalize this process through the requirement that agencies appoint or cause the election of formal area committees representing residential and commercial renters or owners of the affected area. Councils adopt these plans in open, noticed hearings. This public participation is usually real, not token; the public process often takes years and alters fundamentally the shape of ultimate product.[62] Some state statutes limit residential condemnation unless adopted redevelopment plans expressly authorize its use. In California, for example, no residential condemnation may proceed unless the applicable redevelopment plan so specifies. Unless an elected project area committee of local residents and businesses approves the plan containing the express residential condemnation power, the local government must muster a two-thirds vote of its governing body to adopt the plan.[63]

Justice Stevens' *Kelo* opinion says nothing of this, leaving the reader with an impression of the plaintiffs as casualties, rather than members of a body politic with participatory rights. The majority does not tell us that Ms. Kelo could have participated in forming and adopting the redevelopment plan, or even whether she did.[64] In fact, the City of New London held extensive public hearings, at which some of the *Kelo* plaintiffs participated.[65] The opinion does not tell us that in many states the condemnation could not have proceeded without the likely consent of a committee representing Ms. Kelo and her neighbors.[66] For the dissents, the omission of this information is consistent with overriding concern for the property owners' rights; as discussed below,[67] the dissenters' formulation of individual rights proceeds without the reference to the intention or nature of the subject governmental program, so a right to

61. *See, e.g.*, ALASKA STAT. § 18.55.530(h) (requiring a public hearing prior to a government body adopting a redevelopment plan); CAL. HEALTH & SAFETY CODE § 33333.2 (requiring a public hearing if a redevelopment plan is amended); Del. Code Ann. tit. 31, § 4524 ; Ind. Code Ann. § 36-7-14-17.5(a) ; MASS. GEN. LAWS ANN. ch. 121B, § 48.

62. These observations are based on the author's practice in the field and conversations over time with other practitioners. For similar conclusions, see Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 223–25 (1999) (discussing historical animosity toward including public participation in redevelopment projects for fear of delay and possible developer abandonment; however, modern approaches consider such participation invaluable for successful implementation of a brownfield project).

63. CAL. CIV. PROC. CODE §§ 1245.235, 1245.240 (West 2005); *see also* DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

64. The relevant statute governing citizen participation in the *Kelo* case provides for standard due process protections. *See* CONN. GEN. STAT. § 8-127 (2006). The statute does not expressly require landowner participation in redevelopment, as the redevelopment statutes of other states do. *See, e.g.*, *supra* text accompanying note 63 (outlining California's framework).

65. E-mail from Tom Londregan, Dir. of Law, City of New London, to Mark Beaudoin (July 26, 2006, 11:44 EST) (on file with the author).

66. *E.g.*, CA. CIV. PROC. CODE §§ 1245.235, 1245.240.

67. *See infra* Part IV.C.

participate in the program's formulation is of no value. For the majority the omission of information about public participation, however, is difficult to fathom.

D. The Characterization of Redevelopment in the Kelo Dissents Reflects the History of Redevelopment, Not Its Present

How is this portrait of modern economic redevelopment, with its largely infrequent, nuanced, and well-compensated use of eminent domain, consistent with the dark picture of redevelopment painted by the dissents[68] and their amici?[69] The answer lies in the evolution of redevelopment during the last half of the twentieth century. Critics, including the *Kelo* dissenters, confuse redevelopment's past with its present.

Redevelopment's past presents us with a contradictory and complex record. Perhaps nothing better embodies the dialectic of modern social experience than the last century and a half of the deliberate, idea-driven and government-directed remake of cities, a history marked by the simultaneity of good and evil, of civic accomplishment and social destruction, and by the combination of great ambition and great corruption.[70]

This endeavor commenced well before the twentieth century, and has produced much of what we love in cities—their great boulevards, parks and public spaces, monuments, museums, stadiums, and arenas. In this regard, the city of Paris, France is iconic. In the nineteenth century, George Eugene Haussmann, the prefect of the Paris region, transformed the city from a medieval agglomeration of tiny sub-communities into modern Paris with its celebrated boulevards and public spaces.[71] American planners and landscape architects arrayed streets and parks in patterns that imitated this style throughout the United States, most

68. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) (stating that all private property is now vulnerable to government takings and citing several cases where local government has taken property for economic development); *id.* at 522 (Thomas, J., dissenting) (suggesting that the racial discrimination that occurred during the urban renewal period of the 1950s and 1960s will happen again because of the Court's decision).

69. *See, e.g.*, Brief of Better Government Ass'n et al. as Amici Curiae Supporting Petitioners at 4, *Kelo*, 545 U.S. 469 (No. 04-108) (calling the use of eminent domain for economic development "widespread" and "abus[ive]"); Brief of Jane Jacobs as Amici Curiae in Support of Petitioners at 2, 19–20, *Kelo*, 545 U.S. 469 (No. 04-108) (arguing that eminent domain for economic development benefits politically connected private interests to the demise of less powerful groups such as minorities and the poor).

70. For an excellent introduction to the modern experience of intentional city-making in light of the dialectic of modern experience, see MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR 150–51, 164–71, 290–312 (1982).

71. *Id.* at 150–52. *See generally* A.E.J. MORRIS, HISTORY OF URBAN FORM 144, 158 (2d ed. 1979) (providing an in-depth history of the restructuring of Paris).

notably in Washington, D.C.[72] In this country during the last century, city builders such as Robert Moses and other Haussman disciples undertook heroic infrastructure projects[73] and massive neighborhood redevelopment to clear slums, remove urban features they believed constituted blight, and create the city that they, urban planners, real estate visionaries, and housing reformers, hoped would eliminate urban poverty and transform urban life. These efforts provided millions of new housing opportunities for the poor and middle classes, and produced the transportation infrastructure that allows metropolitan areas to exist as economic and cultural unities.[74]

Yet, and it is a giant "yet," this remaking of cities destroyed as it created. To remake Paris, Haussmann displaced tens of thousands of people and destroyed entire neighborhoods. In this country, Moses and other redevelopers displaced hundreds of thousands of urban residents and thousands of local businesses. They divided communities with new highways and other infrastructure. Many damaged fundamentally the cities they wished to conceive.[75] Adding to the critique of redevelopment, graft and manipulation by economic elites permeated the effort. Redevelopment became a tool that isolated the poor as often as it meliorated their condition.[76] It also had a racial dimension: politicians used urban redevelopment and the associated tool of condemnation as a

72. *See, e.g.*, *id.* at 279 (describing, in part, Parisian urban design influence over Washington, D.C., planner Major Pierre Charles L'Enfant (1754–1825)).

73. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974) (detailing the political as well as personal life of Robert Moses). It should be noted, especially in light of the *Kelo* dissenters' acceptance of condemnation for public uses such as roads, that many of the largest displacements and many of the racially motivated condemnation efforts supported highway building projects, certainly a form of economic redevelopment, but not the Court's vision of economic development.

74. *See id.*; John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive,* 68 ALB. L. REV. 865, 882 n.98 (2005) ("[Robert Moses] subsequently became the key figure in the rebuilding of New York City and its suburbs through the creation of a modern highway and bridge system."); *Paul Goldberger,* Emminent Dominion: Rethinking the Legacy of Robert Moses, THE NEW YORKER (February 5, 2007); Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 126 (1997) (discussing Moses' construction of roadways connecting various parts of metropolitan New York City, including relatively easy access to local recreational designations, like Long Island's beaches); *see also* G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios*, 8 ALB. L. ENVTL. OUTLOOK 37, 46–47 (2002).

75. *See, e.g.*, BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICAN REBUILDS CITIES 29 (1997) (stating that urban renewal displaced in excess of 400,000 families and 39,000 businesses).

76. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) (asserting that renewal programs were controlled by elite groups of real estate interests and politicians who aimed to change the urban landscape through eminent domain).

device to move entire African-American communities to more isolated areas or settle property disputes adversely to African-American owners.[77]

In San Francisco, for example, the Yerba Buena neighborhood, two blocks south of the central business district, provided housing and community to transient workers, racial minorities and recent immigrants. For its residents, Yerba Buena possessed the same sort of history, context, and meaning that all communities provide their inhabitants.[78] City government, assisted by, or as some argued, on behalf of local real estate developers, extended the downtown and displaced over 4,000 residential units, and in the process destroyed the community. These scenarios were repeated in Boston, New York, Chicago and most other major American cities.[79]

Some of these projects created monuments to civic greed and corruption, while others created positive features out of abusive policies. The unassisted market would probably have replaced the Yerba Buena community with downtown office uses. Tenement owners would have sold to the highest bidder leaving residents to relocate on their own. Instead, redevelopment created, in the midst of what is now downtown, a full-block central park surrounded by a mix of hotel, office, and retail-entertainment facilities, a children's museum and playground, a modern art museum, and 2,500 housing units with more than 1,400 dedicated to low- or moderate-income residents.[80] Alone, the unassisted market would not have produced these beneficial community uses nor provided partial relocation assistance.

While these social contradictions will continue to some extent to plague city reconstruction, redevelopment has evolved: twenty-first-century redevelopment differs fundamentally from that of 1960. The abuses of redevelopment and extensive use of condemnation[81] produced a

77. *See* FRIEDEN & SAGALYN, *supra* note 75, at 28 (stating that 63 percent of the families displaced by urban renewal from 1949 to 1963 whose race was known were nonwhite); 12 THOMPSON ON REAL PROPERTY § 98.02(e) (Thomas ed. 2004) (noting that urban renewal had been called "negro removal"). For an early, critical analysis of urban renewal, see MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964).

78. CHESTER HARTMAN, YERBA BUENA: LAND GRAB AND COMMUNITY RESISTANCE IN SAN FRANCISCO 93–98, *passim* (1974).

79. See id., passim; HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS *passim* (1st ed. 1962); HERBERT J. GANS, THE URBAN VILLAGERS *passim* (updated and expanded ed. 1982).

80. S.F. Redevelopment Agency, Yerba Buena Center, http://www.sfgov.org/site/sfra_page.asp?id=5610 (last visited Jan. 27, 2007).

81. *See* Robert Moses, *What Happened to Haussmann*, ARCHITECTURAL FORUM, July 1942, at 57–66 (writing critically of the displacement and destruction of communities caused by George Eugene Haussmann's nineteenth-century transformation of Paris); *see also* BERMAN, *supra* note 70, at 150–51 ("The new construction wrecked hundreds of buildings, displaced uncounted thousands of people, destroyed whole neighborhoods that had lived for centuries."); CARO, *supra* note 73, at 764 (discussing Moses' increasing titles and power in mid-twentieth-century New York).

countermovement of equal scope and complexity. As is the case with both public and private social efforts in a democracy, the endeavor became more pragmatic as stakeholders organized and developed sophisticated responses. In San Francisco, for example, the Yerba Buena experience produced two decades of reaction, resulting in reform of the redevelopment agency and the redevelopment process, and reformulation of the underlying project.[82] This is typical—redevelopment has changed fundamentally in the last half century, something neither the dissenting *Kelo* Justices nor their supporting amici recognize.

Residents and small-business owners displaced by condemnation initiated a reform movement that grew to include academics, organizers, and attorneys in the New Left who documented the socioeconomic and racial impacts of redevelopment and used litigation as a tool for land use advocacy.[83] Concepts of city evolved as well, as intellectuals in the planning community advocated for preservation or imitation of many of the physical characteristics that redevelopment as practiced at the time tried to replace. Jane Jacobs, perhaps the most eloquent and certainly the most influential of these writers, began the process with her excoriation of the City Beautiful and Modernist movements that had inspired both private sector developers as well as Moses and other practitioners of redevelopment at the time. In her prescient 1961 classic, *The Death and Life of Great American Cities*, she detailed the social, economic, and aesthetic virtues of the traditional dense urban fabric and street grid, and attacked "slum clearance" redevelopment.[84] In the ensuing three decades, a complex relationship between neighborhood preservationists and the environmental movement brought many large urban redevelopment and infrastructure projects to a standstill. Projects stalled during protracted litigation. City councils and redevelopment boards faced new community coalitions, sometimes changed position, and sometimes changed composition.[85]

Commencing in the late 1960s, and gathering strength in the 1970s, these efforts altered the face of redevelopment. Neighborhood-based

82. *See* HARTMAN, *supra* note 79, *passim* (telling the story of the reformulation of the Yerba Buena Center project).

83. *See, e.g.*, *id.*; JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965).

84. JACOBS, GREAT AMERICAN CITIES, *supra* note 83. Ironically, she seems entrained in the very redevelopment she attacked, unable to appreciate the reform that she herself helped initiate, and shortly before her death authorized the filing of an amicus brief in her name on behalf of the *Kelo* plaintiffs. *See* Brief of Jane Jacobs, *supra* note 69.

85. Hartman, *supra* note 78, *passim*; Greer, *supra* note 83. *See generally* RUTHERFORD H. PLATT, *Land Use and Society: Geography, Law, and Public Policy* 177–206 (rev. ed. 2004) (discussing how post–World War II critics of urban sprawl, fragmenting inner cities, along with the civil and environmental rights movements, began changing how communities approached redevelopment and infrastructure projects).

community development groups, which emerged in the 1960s, shifted the focus of urban renewal from blight elimination to improving education, health, and employment and creating housing.[86] State legislatures amended redevelopment and economic development statutes to institutionalize representation of local businesses and residents in the formation of redevelopment plans. For example, in 1975 Texas amended its 1957 Urban Renewal Law to focus on improving the living and economic conditions of low-income residents through community development plans.[87] Community group members gained memberships on redevelopment agency commissions.[88] Politics and negotiation replaced condemnation as the preferred implementation device.

Sensitized by this altered political and intellectual landscape, cities became reluctant to undertake large efforts dependant on the exercise of eminent domain to relocate a significant population. Projects became smaller and more carefully crafted to accommodate diverse community interests.[89] Public agencies limited condemnation to selective use against unanticipated holdouts. Some states passed statutes to make residential condemnation difficult without the consent of the affected community. Many city councils took condemnation *de facto* off the table.[90]

It is important to understand that these trends, while predominant, are far from uniform. The trend toward more consensually developed projects does not eliminate the potential for abuse. Recent political trends and tax limitations may have weakened the independence of local government at the same time as the power and sophistication of urban economic elites elevated their capacity to bend government to their interests.[91] Race continues to play a role in targeted redevelopment.

In selected locations economic redevelopment projects still involve substantial condemnation of functioning residential areas. Some contend that recent projects proposed in New York City represent a Robert Moses revival. They argue that the Manhattan West Side, Bronx Terminal Market, and Brooklyn sports facility redevelopment projects

86. *See* KOEBEL, *supra* note 27, at 19–20.

87. *See* Texas Community Development Act of 1975, 1975 TEX. GEN. LAWS 2058 (codified as amended TEX. LOC. GOV'T CODE ANN. §§ 373.004, 373.006 (Vernon 2005)).

88. See *supra* text accompanying note 63 for a description of California's scheme.

89. *See* KOEBEL, *supra* note 27, at 21 (emphasizing that the political and social costs of urban renewal discouraged government from undertaking large-scale redevelopment efforts of residential areas but that smaller, locally initiated projects continued).

90. *See generally* STEVEN J. EAGLE, REGULATORY TAKINGS § 13-9(b) (2d ed. 2001) (discussing state legislative acts from the late 1990s promulgated to protect private property interests); *see also* National Conference of State Legislatures, Eminent Domain, http://www.ncsl.org/programs/ natres/emindomain.htm (last visited Jan. 27, 2007).

91. *See, e.g.*, Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. MICH. ST. U.-DETROIT C. L. 901, 905 (2001) (disapproving of takings for economic development because of the increased ability of corporations to influence local government).

reflect early days of urban renewal because of the prominent use of eminent domain, significant displacement of residents and business, and limited citizen participation.[92] However, just as many observers contend citizen participation has been effective.[93] Recent pleas from Manhattan community groups for the city to intervene in the sale of much of Stuyvesant Town and Peter Cooper Village, two lower-middle-class working communities, by one private owner to another, demonstrate the complexity of the picture. Community groups argued that since eminent domain originally created the community, the city should reassert its role as economic redeveloper to insure that the community remains affordable.[94]

Finally, some have lamented the resulting contraction of redevelopment ambition, contending that a lack of investment in large infrastructure projects that inevitably involve condemnation will make cities unlivable. Some observers of city economic development characterize this transformation as the end of the era of major public "megaprojects."[95] Others welcome these trends as a sign of respect for neighborhood life and the environment. Nonetheless, redevelopment has in general become less ambitious, more consensual, and much less likely to employ condemnation.[96] Overall, redevelopment continues at a smaller scale, and condemnation remains a valuable, if somewhat rarely utilized, tool.

Much of the recent round of redevelopment critique stems from failure to acknowledge this history. Most of the critical literature cited by property rights advocates dates from the early history of redevelopment, and modern critics cite sources from the same period and omit discussion of the reforms.[97] The *Kelo* opinions suffer from the same defect. It does

92. *See* Susan Fainstein, *The Return of Urban Renewal: Dan Doctoroff's Grand Plans for New York City*, 22 HARV. DESIGN MAG. 1 *passim* (2005).

93. *See, e.g.*, Robert D. Yaro, *Plans for Manhattan's Far West Side*, 22 HARV. DESIGN MAG. 15, 15–17 (2005) (finding the Far West Side plans have been subjected to much debate, though two of the major proposals in the plans have largely evaded local legislative review).

94. *See* Charles V. Bagli, *$5.4 Billion Bid Wins Complexes in New York Deal*, N.Y. TIMES, Oct. 18, 2006, at A1.

95. For an introduction to megaprojects and their performance record, see BENT FLYVBJERG ET AL., MEGAPROJECTS AND RISK: AN ANATOMY OF AMBITION 1–7 (2003).

96. Surveys to the contrary are unreliable because of the researcher's bias. All large projects involve controversy; surveys undertaken for partisan purposes amass alleged trends by taking one consistent view of each project. One such survey is cited uncritically by Justice O'Connor in her *Kelo* dissent. Kelo v. City of New London, 545 U.S. 469, 503 (O'Connor, J., dissenting) (citing DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003)). For a critical analysis of this report, see ROBERT DREHER & JOHN D. ECHEVERRIA, *supra* note 21, at 38.

97. *See, e.g.*, HARTMAN, *supra* note 78; GANS, THE URBAN VILLAGERS (1st ed.), *supra* note 79, at 281–335; GANS, THE URBAN VILLAGERS (updated and expanded ed.), *supra* note 79, at 323–46 (discussing the redevelopment of Boston's inner city neighborhood, the West End);

not appear that the Justices know much about this history. The difference among them lies in their reaction to this lack of knowledge. The majority refuses to take sides, seeking refuge in precedent.[98] As discussed above, omission of historical context is unfortunate because public opinion required more than a tepid defense of redevelopment to justify the Court's decision. The majority opinion could have traced the history and evolution of redevelopment, but it did not. Nothing in the opinion alerts the reader to the decline in condemnation, nor to all the ways in which condemnation of the Kelo and Dery houses is an anomaly in this country. Appellate opinions, especially in controversial Supreme Court cases, should consist of more than legal holding and decision; they must give context, breadth and depth to their reasoning. To the extent that the text of any Supreme Court decision matters, such a full explanation could have meliorated the popular and political reaction to the case.

The dissents reflect a more anachronistic tendency, voicing complaints based on redevelopment's past without acknowledging its present. Justice Thomas, for example, refers to redevelopment as "negro removal,"[99] without no mention that the phrase became prevalent in a period of reaction to redevelopment as practiced in the 1960s when condemnation displaced African-American neighborhoods without corresponding relocation or housing benefits. He thus fails to confront the reforms of the last forty-five years. He does not discuss the federal and state legislation requiring relocation to housing of similar quality and size. He makes no mention of the studies that show that condemnees often upgrade their housing. Of special importance, Justice Thomas fails to note that today, redevelopment is responsible for the production of a significant portion of all the low- and very low-income housing in our cities.[100] Neither of the dissents explains that federal rules require one-for-one replacement of units when a redevelopment project removes a

Kanner, *supra* note 21, at 365–75, nn.166, 169 & 173 (suggesting that the Court's decision in *Kelo* will result in widespread abuse of the eminent domain power and basing this conclusion on the historical misuse of condemnation during 1950s and 1960s). Kanner provides little current data suggesting that local government is misusing condemnation for redevelopment to the detriment of any disadvantaged group. Much like the Justices in *Kelo*, Kanner does not recognize that the use of eminent domain as a tool for redevelopment has changed significantly since the 1950s. *See id.* at 374 n.189.

98. *See Kelo*, 545 U.S. at 490 (noting the important and legitimate public debate on the issue, but claiming that "[b]ecause over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek."); *see also* Greenhouse, *supra* note 8 (quoting Justice Stevens' speech on *Kelo*).

99. *Kelo*, 545 U.S. 469 at 522. (Thomas, J., dissenting).

100. This observation is based on the author's three decades of experience in the field. *See also, e.g.*, DEBORAH L. MYERSON, URBAN LAND INSTITUTE, 3 ULI COMMUNITY CATALYST REPORT, BEST PRACTICES IN THE PRODUCTION OF AFFORDABLE HOUSING 7–8 (2005) (providing examples of mixed-income housing projects in Baltimore and Pittsburgh provided by redevelopment).

federally assisted housing unit, unless there is already a sufficient supply of affordable housing in the area.[101]

Justice O'Connor implies that the plaintiffs were victims of corporate power, but does not tell us that in the last four decades the states have enacted reform legislation to provide safeguards that enhance the predictability and fairness of governmental behavior during redevelopment and to provide for citizen participation. Some examples of these state reforms illuminate their breadth. California's process has already been documented, but most other states have safeguards to protect an affected landowner's rights if her property is acquired through eminent domain for redevelopment.[102] In Texas, a municipality can prepare a redevelopment plan only if it makes a finding of blight, designates an area as appropriate for urban renewal because redevelopment is necessary to further some public purpose, and a majority of voters approve the plan.[103] Moreover, if land is taken through eminent domain, the original owner has first priority to repurchase property in the redevelopment area.[104] Michigan also requires citizen involvement. Redevelopment plans must include a provision on creating and involving a community advisory group composed of representative residents of the redevelopment area who will be "consulted throughout all stages of the planning of the redevelopment so that the desires of residents shall be incorporated into the plans for the area to the extent feasible."[105] Michigan requires that before land can be acquired for redevelopment, a master plan must be adopted designating an area as blighted; and the city must designate district areas for which citizens' district councils of between twelve and twenty-five residents of the affected community will be formed and consulted by the local legislative body.[106]

It might be contended that these omissions of contextual information merely reflect a tendency by Justice O'Connor and her fellow dissenters to limit their discussion to the perceived abuses of eminent domain facing them in the case. Much of the law concerning the early amendments to the Constitution naturally addresses abuses that may be the exception, not the rule. But most of the enunciated doctrines stop the abuse without destroying the underlying social endeavor. The warnings the Court required in *Miranda v. Arizona*[107] may complicate law enforcement. Yet no one would suggest that *Miranda* outlaws law enforcement.

101. 24 C.F.R. §§ 42.301, 42.375 (2006).
102. *See supra* text accompanying note 63; *see also* BEATTY ET AL., *supra* note 63, at 89, 136.
103. TEX. LOC. GOV'T CODE § 374.011(a) (Vernon 2006).
104. *Id.* § 374.017(b)–(c).
105. MICH. COMP. LAWS § 125.904(1)(f) (2006); *see also id.* § 125.74(1), (3)(a), (4)–(6), (9)
106. *Id.* § 125.74(1), (3)(a), (4)–(6), (9).
107. 384 U.S. 436 (1966).

The *Kelo* dissenters however, would, outlaw the strategic use of condemnation for economic redevelopment in all cases, not just in those situations where abuse might be present. As discussed in the next section, the threat or the exercise of eminent domain is essential to economic redevelopment. If the dissenters prevailed, much of the economic redevelopment in the country, with its benefits to center cities and the poor, would cease. The dissents have taken an extreme position in the long, complex debate among thousands of actors, over the fate of American cities, a role their factual, contextual, and historical omissions demonstrate they are not equipped to undertake.

II. THE IMPORTANCE OF EMINENT DOMAIN DESPITE ITS RARE USE: THE HOLDOUT

In a statement made largely for rhetorical effect, Justice O'Connor says, "[p]etitioners are not holdouts; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle."[108] This facile remark glosses over much of the essence of redevelopment.

The authors of modern, government-assisted economic redevelopment sought a specific solution to land use market failure. A century of trial-and-error approaches to the stubborn persistence of economic decline and social impoverishment in large areas in central cities has led both the public and private sectors to conclude that a major obstacle to economic revitalization of urban cores is "over-subdivision," where old land use patterns leave an artifact of multiple small lots under different ownerships. The unassisted market, even over time, cannot assemble these lots into shape and size that would accommodate contemporary land uses.[109] If the private sector attempted to redevelop such a fragmented array of lots, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price. Given the tight margins of development projects, such a "holdout" would often render the redevelopment financially infeasible,[110] and the effort would collapse. Thus the holdout presented a major obstacle to private city-center revitalization.

Redevelopment, as conceived in the 1940s and 1950s, was an attempt to solve the land-assembly problem. The earliest legislative proposals for

108. Kelo v. City of New London, 545 U.S. 469, 495-96 (2005) (O'Connor, J., dissenting).

109. *See* Farris, *supra* note 24, at 13 (emphasizing that a major obstacle to infill development is assembling property because of the great number of transactions necessary for one large lot and the likelihood of holdouts).

110. *See* Merrill, *supra* note 21, at 74–75. Merrill explains,

> Without an exercise of eminent domain, . . . [e]ach owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.

federal urban renewal aimed to help local governments revitalize their communities by creating redevelopment agencies with the power to acquire land (through eminent domain and outright purchase), and assemble acquired holdings into economically functional parcels for redevelopment consistent with the applicable redevelopment plan.[111]

The power of eminent domain prevents holdouts from derailing valuable revitalization efforts. Although condemnation is rare and expensive, the latent authority to condemn encourages the transactions necessary to effectuate the plan for redevelopment. Without condemnation, a single holdout knows it can frustrate an entire project. The expense of condemnation gives some bargaining power to the holdout,[112] but the legal availability of condemnation ensures that the sale will occur at something approaching market value. If the exercise of eminent domain appears coercive, it is because it *is* coercive, and that is the heart of the concept.

Some observers and *Kelo* amici contend that options other than eminent domain can address the holdout problem. For example, the private sector uses secret buying agents to acquire substandard parcels for assembly into larger holdings for development. These sorts of activities are, however, inimical to government, and if employed in the public context, would reactivate the appearance, if not the substance, of the corruption and collusion that contaminated redevelopment's past.[113] Also, many of these private techniques work more effectively in the suburban context of homogenous development than in the complex urban context where multiple ownerships of small lots creates the need for redevelopment.

Two recent examples, more representative of redevelopment today, illustrate exercises of eminent domain that prevented holdouts from thwarting important redevelopment efforts. These present a very different picture than the facts presented by any of the *Kelo* opinions, but they are representative of city-center public-private redevelopment. These two public-private collaborations involved a mix of public and private uses, each pivotal to revitalization of the city's moribund and deteriorated downtown waterfront. In the end, each would have failed without the exercise or the threat of exercise of eminent domain.

111. Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation*, *in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 72–79 (James Q. Wilson ed., 1966).

112. *See* Merrill, *supra* note 21, at 80 (noting that because of the high transaction costs of condemnation, government prefers, and usually succeeds in, assembling land through negotiations in the market).

113. *But see* Kelly, *supra* note 21, at 3 (citing STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124–25 (2004) (arguing that the traditional justification for eminent domain—the holdout—is a fiction)). Kelly asserts that takings for the benefit of private parties are unnecessary because private parties can work through secret buying agents to hide their deep pockets and avoid the holdout problem. *Id.*

A. The Ferry Building

The Ferry Building in San Francisco sits at the intersection of Market Street, the city's major arterial, and the Embarcadero, a boulevard running along San Francisco Bay.[114] The Ferry Building's imposing Beaux Arts structure with a colonnade, two-story internal gallery, roof supported by iron buttresses, and topped by a landmark clock tower, served for nearly a century as the hub of the city's passenger ferry service.[115] Commuters landed on its edge, purchased tickets, and shopped.[116] Maritime-related offices occupied much of the building.[117] By the 1990s the building was in disrepair, a condition repeated on pier after pier along the waterfront as transportation and shipping needs changed.[118] Divided from the immediately adjacent downtown office-core by an elevated freeway, the waterfront languished for more than two decades,[119] presenting a classic case of real estate free market failure. Despite the ideal waterfront views and excellent transportation facilities, piers lay vacant or underused, offered for lease at lower and lower prices.[120]

In the 1990s, the city of San Francisco, through its Port Authority and Redevelopment Agency, embarked on an ambitious redevelopment plan to revitalize this waterfront.[121] The city invested federal, state, and city funds to rebuild the dilapidated waterfront Embarcadero roadway, creating a palm tree-lined pedestrian, rail, bus, and automobile multi-modal boulevard.[122] The city built parks and negotiated for a new cruise terminal. A new baseball park, privately financed and built but supported by city tax-increment financing, anchored the redevelopment at the

114. S.F. BAY CONSERVATION & DEV. COMM'N, SAN FRANCISCO WATERFRONT: SPECIAL AREA PLAN 17 (2000) [hereinafter SPECIAL AREA PLAN].

115. John King, *Project Diary: Surviving Controversy, SMWM's Quiet Mix of Old and New Has Returned San Francisco's Ferry Building to the Center of Urban Life*, ARCHITECTURAL RECORD, Nov. 2004, at 1; *see* PORT OF SAN FRANCISCO, SAN FRANCISCO FERRY BUILDING, REQUEST FOR DEVELOPER QUALIFICATIONS AND PROPOSALS 5, 7 (1998) [hereinafter RFP].

116. King, *supra* note 115, at 1 (noting that there were about 100 million passengers per year using the terminal in the early 1900s).

117. *Id.*; Telephone Interview with Diane Oshima, Asst. Deputy Dir. of Planning & Dev. for the Port of San Francisco (Feb. 14, 2007).

118. *See* King, *supra* note 115 (explaining that by the 1940s, ferry service was almost completely replaced by the Bay and Golden Gate Bridges).

119. *Id.* at 2.

120. *See id.* (describing the waterfront as "derelict").

121. *Id.*; interview with Diane Oshima, *supra* note 117.

122. Interview with Diane Oshima, *supra* note 117; RFP, *supra* note 115, at 6, 9. For a look at the design goals for each area of the project, including the Ferry Building itself, Rincon Park, and the piers, see S.F. PORT COMM'N, THE PORT OF SAN FRANCISCO, WATERFRONT DESIGN & ACCESS: AN ELEMENT OF THE WATERFRONT LAND USE PLAN 14–17 (1997, republished June 2004) [hereinafter WATERFRONT DESIGN & ACCESS PLAN].

southern end.[123] At the geographic and design center of this effort lay restoration plans for the historic Ferry Building itself.[124]

This public effort comprises what the *Kelo* Court calls "economic development." Years of committee work and public hearings produced a design:[125] the renovated Ferry Building would house ferry passenger facilities and an urban marketplace occupied by small Bay Area food businesses and restaurants.[126] The remodeled space on the upper floors would provide office or other commercial space[127] with unobstructed waterfront views, a high-end product the city hoped would rent at a sufficient premium to cover the cost of the historic renovation, the public spaces, and make up potential deficits from the small-scale, locally based retail operation.[128]

The city and its port carried out the proposed redevelopment. Today, the renovated San Francisco waterfront is one of the most heavily used public spaces in the Bay Area. Market-rate and low-income housing is under construction.[129] Tens of thousands of workers and tourists walk or ride transit along the Embarcadero to ball games on summer days and evenings.[130] The Redevelopment Agency has constructed new market-rate and low-income housing, and restaurants occupy space in the renovated Port space. Private development followed the public-private redevelopment; private developers have built thousands of new residential apartments and condominiums along the Embarcadero and near the ball park.[131] The Ferry Building itself, restored and rebuilt, has

123. WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 97 (laying out the design criteria for the Rincon Park and promenade); RFP, *supra* note 115, at 6 (noting that the ground lease for the new ballpark was "negotiated and executed" with the Port). See *infra* text accompanying note 245 for a brief description of tax-increment financing.

124. WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 95 (naming the Ferry Building as part of the National Registry of Historic Places).

125. *See* RFP, *supra* note 115, at 3–4 (explaining the measures taken by the Port Authority prior to seeking a developer for the project, including predevelopment and feasibility analyses, environmental and historic approvals, and extensive work with the public which led to their approval of the project in a ballot proposition).

126. King, *supra* note 115, at 2–3; WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 82–83.

127. *See* RFP, *supra* note 115, at 10; Interview with Diane Oshima, *supra* note 117.

128. *See* King, *supra* note 115, at 3 (noting that all of the office and retail space is fully leased).

129. S.F. REDEVELOPMENT AGENCY, MAJOR PROJECT SUMMARY 10, *available at* http://sfgov.org/site/uploadedfiles/sfra/Projects/MajorProjectSummary.pdf (last visited Jan. 15, 2007) [hereinafter MAJOR PROJECT SUMMARY] (explaining that in the Rincon Point area, located just south of the Ferry Building, 2,576 residential units are being built with 24 percent of those building being set aside for very low-, low-, and moderate-income units).

130. *See* King, *supra* note 115, at 3 (stating that locals and tourists are drawn to the area because of the Ferry Building's "new shine").

131. For an area-by-area summary of the number of units of affordable housing produced along the Embarcadero because of the San Francisco Redevelopment Agency's efforts, see MAJOR PROJECT SUMMARY, *supra* note 129.

won national planning awards and local acclaim,[132] and is today in heavy use as ferry commuters mingle with downtown residents in the urban market. The project finances appear to work, though, at this time of this writing, they have a smaller margin and less certainty than the city and the project developer would prefer.[133]

Yet the Ferry Building project would never have happened without the power of eminent domain. For many years, an old San Francisco institution, the World Trade Club, shared the dilapidated third floor with the Port staff under a long-term lease from the Port.[134] As the plans for the renovation matured, it became clear that the World Trade Club had to relocate to allow office space to be located in the upper floor. Such premium office space would generate most of the revenue as the hoped-for economic engine of the revitalization project. The Port offered the World Trade Club generous terms and relocation assistance. The Club refused, not for financial reasons, but rather because it simply did not want to move, the same "principle" asserted by Ms. Kelo.[135]

No amount of patient negotiation or relocation efforts would change the stance of the Club's board of directors. And beyond a certain point, financial inducements, even if they had been effective in convincing the Club to move, became too costly for the project's fiscal margin. Finally, the Port moved to condemn the lease.[136] This government action spurred the Club to compromise in a settlement: the Port moved the Club into comparable quarters nearby, and the Ferry Building project moved forward. Site assembly in this situation meant acquisition of the leasehold. None of this would have be possible if the regime advocated by the *Kelo* dissents had prevailed at the time. The site assembly, the historic renovation, and the consolidation of the Embarcadero renovation project would all have failed without the power of eminent domain.

132. Press Release, Port of San Francisco, Port of San Francisco Honored with Prestigious Awards for Public Beautification Projects (Nov. 4, 2003), *available at* http://www.sfgov.org/site/uploadedfiles/port/news_events/press_releases/2003/news110403.pdf (describing the many awards the City of San Francisco has won for its revitalization of the Ferry Building, including the National Trust for Historic Preservation award).

133. Memorandum from Harvey M. Rose, Budget Analyst, Bd. of Supervisors, City & County of San Francisco, to Chris Daly and the Bd. of Supervisors, City & County of San Francisco 5 (Apr. 26, 2004), *available at* http://www.sfgov.org/site/uploadedfiles/budanalyst/Reports/sfport/ExecutiveSummary.pdf.

134. *See* RFP, *supra* note 115, at 12.

135. *See* Kelo v. City of New London, 545 U.S. 469, 496 (2005).

136. See Minutes of the Board of Supervisors, City and County of San Francisco, Nov. 13, 2000, *available at* http://www.ci.sf.ca.us/site/bdsupvrs_page.asp?id=11828 (authorizing, by resolution, the acquisition of the World Trade Club by eminent domain).

B. The Gap Headquarters

Nearby on the same Embarcadero lies another version of economic development, more private, yet just as dependant on the use of eminent domain for redevelopment. The example illustrates how redevelopment enlists both land use planning and strategic economic planning in the revitalization effort. The Gap clothing company, headquartered in San Francisco since the company's inception, found its corporate headquarters physically insufficient and unsuitable for its changing corporate campus needs. A long and fruitless search for a downtown location of sufficient size led the company to determine to leave San Francisco. Faced with the loss of 1,400 jobs downtown, the Redevelopment Agency found a large site for the Gap headquarters on the Embarcadero near the Ferry Building.[137]

The site attracted the Redevelopment Agency because the Gap headquarters would locate more daytime workers within the same waterfront area as the Ferry Building. These workers would populate the planned open spaces during the day, while the new inhabitants of residential buildings in the area would use the parks in the late afternoons and weekends.[138] The Gap workers would also join the area residents in contributing the critical market mass necessary to the success of restaurants and other small retail shops along the waterfront. These retail facilities, rendered economically viable by local clientele, would in turn make the area more attractive to visitors, including tourists arriving on the planned downtown cruise terminal. These are the kind of synergies economic redevelopers think about. The Gap also agreed to help defray some costs of the Embarcadero renovation, and as mitigation for open space impacts, to construct and dedicate to the city one of the park areas on the water's edge as called for in the Port's Waterfront Plan.[139] The Redevelopment Agency successfully negotiated the purchase of most of the land necessary for the project.[140]

Near the conclusion of the land assembly effort, however, the owner of a corner parcel, a strategic 13,600 square feet of the 90,000 square-foot site, suddenly became enamored of his parking lot and refused to accept even a generous above-market price.[141] This was a financial holdout. The project stopped until the Redevelopment Agency condemned the site.[142]

137. CLIFFORD W. GRAVES, S.F. REDEVELOPMENT AGENCY, REQUEST FOR AUTHORIZATION TO ENTER INTO CERTAIN AGREEMENTS WITH THE GAP 1–2 (Jan. 3, 1995).

138. This was an important consideration as unpopulated parks in urban areas often turn into havens for the homeless—discouraging rather than activating neighboring streets.

139. See GRAVES, *supra* note 137, at 2 (listing the exactions, which include the development of Rincon Park).

140. *Id.*

141. *Id.* at 4.

142. *Id.*

The issue here is not public power in the service of a corporate client; no one contends the Gap could not have found headquarters space elsewhere in another jurisdiction. Rather, public benefits accrued via economic revitalization of a depressed area through investments that stitched together infrastructure investments and strategic private and public uses. Absent the power of condemnation, the project, with all its public benefits, would have failed.

These public-private redevelopment examples from San Francisco tell a different story from the facts in *Kelo.* Yet these successful efforts typify modern public-private economic redevelopment. Agencies assemble vacant or underutilized land, sometimes through the use of eminent domain, to create new public facilities, often in tandem with new affordable housing, producing uses and amenities that reinvent the urban downtown. Millions of Americans live, work, and recreate in these areas. It is these projects, efforts such as the Ferry Building and the Gap headquarters, that the legal approach of the *Kelo* dissents would render impossible to carry out. Not difficult—impossible.

III. THE DISSENT'S DISTINCTIONS BETWEEN PUBLIC AND PRIVATE USE CANNOT FUNCTION IN THE MODERN URBAN REDEVELOPMENT CONTEXT

Broad assumptions concerning the nature of real estate development underlie the *Kelo* dissents, some express and some implied. Most are inaccurate. Fortunately the dissents did not prevail. But in light of the tepid majority and changes in the composition of the Court, they could someday prevail. Moreover, the same misconceptions influence the current debates in Congress and the states over the issue. Some states have already enacted limitations on the use of eminent domain for economic development, and in others legislation or ballot measures have been proposed which would enact to one degree or another the dissenters' position.[143] Some state courts have elected to follow the approach of the *Kelo* dissenters in interpreting takings provisions in their state constitutions.[144] Thus, despite the outcome in *Kelo*, it is important to examine the dissenters' assumptions and lay out the corresponding reality.

The legal case turns on the meaning of "public use" for which eminent domain is constitutionally permissible.[145] Justice O'Connor's

143. *See* sources cited *supra* note 4. For a cogent analysis of one such ballot measure, see Cal. Ctr. for Envtl. Law & Policy, Boalt Hall, Univ. of Cal., *Proposition 90: An Analysis* (Oct. 2006).

144. *See, e.g.*, Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 652 (Okla. 2006); City of Norwood v. Horney, 853 N.E.2d 1115, 1140 (Ohio 2006).

145. *See* Kelo v. City of New London, 545 U.S. 469, 472 (2005) ("The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the *Takings Clause of the Fifth Amendment.*") (citing U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation . . . .")).

dissent parses public use to create three categories. Two, she tells us, are "relatively straightforward and uncontroversial."[146]

First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium.[147]

She characterizes these two categories as "public ownership" and "use by the public,"[148] and this Article will as well. According to O'Connor, condemnation for these uses would be acceptable; condemnation for economic redevelopment would not.[149] Although this distinction possesses the benefit of facial clarity, the characterization of public use so oversimplifies reality that the test becomes dysfunctional in many modern land use settings.

A. "Use-by-the-public": The Problematic Distinction between Public and Private Land Use

Justice O'Connor's public use-private use distinction could not function with respect to many urban redevelopment projects that mix public and private uses in the same project or even the same building. Before discussing the problems with her approach, we must clarify what "use-by-the-public"[150] means to the dissent. Justice O'Connor uses it to mean "available for the public's use."[151] Justice Thomas likewise talks of the public's "legal right to use the property."[152] Justice O'Connor's phrase "often common carriers"[153] would seem limiting, as are two of the three examples (the railroad and public utility). Her stadium example, however, appears to confirm that for her the concept means what it usually means in the land use context; it includes both classic public land uses and private uses operated for a profit and open to the subset of the general public willing and able to pay the price of entry.[154] Such uses include theaters, movie houses, shopping centers, smaller stores, restaurants, hotels, and also perhaps spas and resorts open to the public on day-use basis. Each of these uses serves anyone who pays for the use.

146. *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).
147. *Id.* at 498 (citations omitted).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 521 (Thomas, J., dissenting).
153. *Id.* at 498 (O'Connor, J., dissenting).
154. 2A-7 NICHOLS ON EMINENT DOMAIN, *supra* note 36, at § 7.02[2]–[4] (explaining that the definition of "public use" is unsettled, but recognizing criteria for a proper exercise of eminent domain, such as title not being held by a private party for profit unless the public receives some benefit).

While it is unclear whether the dissent fully considered such uses, this Article assumes the dissenters would accept this common planning meaning of the term "use-by-the-public."[155]

Justice O'Connor would characterize as constitutionally acceptable a condemnation undertaken in order to acquire land for "use by the public." If the land were for use other than by the public, the exercise of eminent domain would presumably violate her rule. Thus her test requires that one know at the time of the condemnation the eventual use of the subject land.

Whatever the doctrinal or social defects of her proposed rule, such foreknowledge might be possible in the traditional zoning universe where land uses are clearly separate from one another, where land serves one use at a time, and thus one is likely to know in advance the redeveloped land use that will eventually occupy land to be condemned. Many Americans, including, one suspects, the authors of the *Kelo* dissents, live in such a relatively simple land use world—one created by "Euclidean zoning," a concept named for the 1926 Supreme Court case which upheld the basic zoning power.[156] Euclidean zoning divides land areas into zones, each of which permits a primary use,[157] such as residential, commercial, or light industrial. In Euclidean zones one could presumably know with some degree of certainty the eventual use of land acquired through condemnation because all land in the area is subject to the same use

155. Many post-*Kelo* proposed legislative responses go beyond the dissents and clearly limit public uses to publicly owned uses. For example, California's voter-rejected Proposition 90, which would have required that the subject property be "owned by the government; an agency other than the condemnor could use it for a public public use, or the property could be leased to another entity for a public use." Cal. Att'y Gen., Proposition 90, Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment. § 19(a)(2), *available at* http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf. With such a definition of public use, the problems discussed in this section would not pertain, although, as discussed in Parts III.B and V, conflict over what really constitutes government occupancy would continue.

156. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). This invention could be just as well named for Euclid himself, the Greek mathematician, credited with the invention of geometry. EUCLID, THE THIRTEEN BOOKS OF EUCLID'S ELEMENTS (Sir Thomas L. Heath trans.), *in* 11 ROBERT MAYNARD HUTCHINS, GREAT BOOKS OF THE WESTERN WORLD ix, ix–x (1952) (biographical note).

157. *See* PETER W. SALSICH JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 377 (2d ed. 2003). The zoning concept also served to reinforce and perpetuate this separation of use in a time when new land use forms began to threaten separated uses. Growing industrial uses crowded against residential areas. In growing nineteenth-century cities, elites found it ever more difficult to escape the crowding and pollution associated with the growing metropolis. Zoning presented itself as a way to preserve the status quo, to keep other uses away from single-family neighborhoods, and to separate classes and races. A narrow majority of the *Euclid* Court had prepared to hold that the residential zoning challenged by commercial uses was per se unconstitutional as a taking of private property. As was probably the case in *Kelo*, the author suspects that the personal experiences of the Justices informed their positions, as a dislike of apartments animates the opinion. *See Euclid*, 272 U.S. at 394.

limitations, some permitted as-of-right and the rest listed as uses subject to conditional approval.[158] It is a closed universe.[159]

Euclidean zoning guided the expansion of our cities through much of the twentieth century.[160] While the automobile and cheap gasoline are the technological and economic parents of suburbia, Euclidean zoning is suburbia's legal progenitor. Much early redevelopment followed these Euclidean patterns, separating uses, replacing dense mixed-use development patterns in urban neighborhoods with uses segregated by zone. Where this crisp geographic separation of uses prevails, Justice O'Connor's proposal to allow condemnation for land "use by the public" could conceivably function; we would arguably know at the time of exercise of eminent domain whether the condemnation would provide a permissible use such as a park, a movie theater, or a skating rink.

The unraveling of the dissent's logic begins with the concept of "mixed use." In the late 1960s, architects, urban planners, and developers began to rethink the development patterns[161] created by traditional Euclidean zoning.[162] These practitioners rejected the use-segregated, monolithic developments of the decades before, and hoped to replicate the development patterns of older cities.[163] They focused on the desirability of mixing uses to create social and economic synergies.[164] The reaction evolved slowly, and included the "new town" concept, and by

158. SALSICH & TRYNIECKI, *supra* note 157, at 377. Specifically, the underlying zoning document maps the zone, and, significantly, provides that within the zone, the primary use is "permitted." Permitted uses are allowed anywhere in the zone as-of-right, without discretionary approval by a planning commission or zoning administrator. The permitted use must still comply with applicable building codes. A few other uses may be allowed as "conditional uses," subject to the complete discretion of a commission or zoning officer. Conditional uses are intended to be allowed only in some specific locations, under some conditions, as specified in a zoning ordinance special-use permit section. *Id.* at 225. For example, a single-family dwelling zone (typically "R-1"), *id.* at 159, designates houses as permitted uses, that are permitted as-of-right. Conditional uses, desired perhaps but only in certain locations, could include schools, small neighborhood-serving stores, and perhaps group homes.

159. Of course, even in such a traditional zone, the true fate of land might be subject to some uncertainty, because the land could be rezoned, or the zoning ordinance or redevelopment plans amended between condemnation and development.

160. *See* SALSICH & TRYNIECKI, *supra* note 157, at 177 (explaining that while local governments were dissatisfied with the rigidity of Euclidean zoning in the post–World War II era, they preserved zoning for the most part and added flexibility through regulation).

161. *See* JACOBS, GREAT AMERICAN CITIES, s*upra* note 83 and accompanying text.

162. *See supra* notes 156–160 and accompanying text.

163. *See* Todd W. Bressi, *Planning the American Dream*, *in* PETER KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY xxv, xxv (1994) (calling the New Urbanist movement "a rediscovery of [the] planning and architectural traditions" of early urban development in communities such as Boston's Back Bay and Seattle's Capitol Hill).

164. *Id.* at xxx–xxxv (outlining the design features of a New Urbanist city, such as neighborhoods that accommodate a variety of activities from living to shopping to working).

the 1990s, the "New Urbanist" movement.[165] These advocates for change believed housing types should be intermixed, and housing should be commingled with supportive retail and commercial uses,[166] as well as appropriate types of heavy commercial or light industrial uses, to bring jobs close to housing.[167] This mixed-use framework makes it difficult to apply Justice O'Connor's test because a current parcel will likely be redeveloped in more than one type of use.

New versions of mixed use render the application of Justice O'Connor's approach ever more difficult, if not impossible. Planners and attorneys developed new regulatory approaches to implement these mixed-use concepts. The Planned Unit Development[168] overlay and the Specific Plan[169] supplanted traditional single-use zones, especially in urban centers.[170] These concepts freed private developers to mix uses more intensely than ever and also to invent new land uses that defied the traditional Euclidean categories. Since the early 1990s this trend has accelerated such that most urban center development is mixed-use or new-use.[171] In a quiet land use revolution, many Americans now live, recreate, and work in these new mixed-use or new-use environments. Readers may recognize these examples in their own communities:

- A structure with a public indoor plaza, a food court, and an arcade with shops.
- A single structure that includes a public plaza combined with the lobby to a hotel tower and the lobby of a residential multi-family tower. Restaurants inside the building are open to the public and provide food service to the hotel and take-out service to the

165. KATZ, THE NEW URBANISM, *supra* note 163, at ix (recalling that New Urbanism began in 1991 when mainstream periodicals, such as *The Atlantic*, *Travel & Leisure*, and *People*, began featuring stories on the movement).

166. Bressi, *supra* note 163, at xxx. *See generally* CONGRESS FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM 79–109 (Michael Leccese & Kathleen McCormick eds., 2000) (setting forth the vision of the Congress of New Urbanism for how urban centers and sprawling suburbs should be restored).

167. Bressi, *supra* note 163, at xxxi (illustrating Peter Calthorpe's template for city design, which mixes commercial, office, and residential uses to make jobs, goods, entertainment, and services easily accessible).

168. *See* Salsich & Tryniecki, supra note 157, at 178–79.

169. *See, e.g.,* DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CALIFORNIA LAND USE AND PLANNING LAW 37 (25th ed. 2005) (citing CAL. GOV'T CODE §§ 65450, 65455, 65867.5).

170. *See* SALSICH & TRYNIECKI, *supra* note 157, at 178 (describing Planned Unit Development as "encouraging flexibility" because it allows a developer to mix uses within one small tract and deviate from the density requirements usually imposed under the zoning scheme); CURTIN & TALBERT, *supra* note 169, at 37 (providing that in California, the specific plan is a tool used to implement the general plan for a particular geographic area).

171. Jesse C. Smith, *Vitalizing Urban Property*, URB. LAND, July 2005, at 50, 50 (noting that most city development is mixed use and citing as the newest trends, the union of entertainment and recreation, public transit with housing and retail, and waterfront projects).

residential tower. Gym, massage, and day care are shared by the hotel and residential users, and are open to the public.

- An older, derelict shopping center redeveloped into a mixed-use development (a process called "refill"[172]) that includes public spaces at ground level, on parking podiums, on the mezzanine, and on rooftops, some landscaped. New buildings contain shops, community meeting rooms, a movie theater, and an all-purpose theater available for rent for civic uses, all on ground level. Shops are on the mezzanine, and housing above. All uses share the parking.
- A renovation of an old warehouse into a project with ground-floor restaurants, retail on the first and second levels, low- and very-low-income units on the third floor, and a fourth floor of "loft" live/work residences and penthouse apartments.
- A new shopping center with a central spine, partially indoor and partially outdoor, that is developed as a central park, anchored at one end by a department store and at the other by structure that contains ground floor retail and restaurants, and an entry foyer for a second-floor public library[173] and city hall. Structured parking serves all the uses.
- A structure containing, in one undivided space, a series of small open shops, a restaurant, and a police station.
- A single structure containing offices, shops, and a public school.

Such mixed-use developments are no longer the exception; they are sprouting everywhere—in the center city, suburbia, in "edge cities," in large cities and smaller cities. The public enjoys these models and they consequently become prominent economic success stories.[174] And for that same reason, redevelopment and public-private development aimed at revitalization of distressed areas looks to these models as well.

A perusal of this list both asks and answers the obvious question raised with respect to the distinctions drawn by Justice O'Connor's approach: How, in this new land use world, can one find the bright line dividing the prohibited use of eminent domain exercised for development of private uses from the permitted use of eminent domain for redevelopment of public uses? The answer is that one cannot. This new approach to mixed-use rejects bright-line distinctions between land uses,

172. Refill, also known as infill, aims to redevelop existing buildings and communities rather than build new ones. *See* Robert Puentes, *First Suburbs in the Northeast and Midwest: Assets, Challenges, and Opportunities*, 29 FORDHAM URB. L.J. 1469, 1480–81 (2001–02) (advocating for local government policy that encourages the rehabilitation of communities through refill).

173. Libraries are increasingly combined with private uses. *See, e.g.*, Janny Scott, *Stranger than Fiction? Having People Live on Top of Branch* Libraries, N.Y. TIMES, Nov. 13, 2006, at B1.

174. *See* Smith, *supra* note 171, at 51 (giving San Francisco's Ferry Plaza Farmers Market as an example of a successful public-private redevelopment project).

opting instead for areas simultaneously used for living, working, shopping, and recreating. Mixed uses blur the distinction between public and private use because the very same land can be used for a public arcade, a city hall, and private residences. One cannot say that a given parcel to be condemned is fated for just one use. Justice O'Connor's definition of public use is unworkable in this context.

The problems with Justice O'Connor's test are compounded by the large footprints required by modern public-private redevelopment uses. Eminent domain is a tool for land assembly employed largely because economically viable uses do not fit within antiquated ownership patterns.[175] Agencies acquire on a parcel-by-parcel basis, and then assemble the parcels into larger parcels. Failed negotiation leads to condemnation.[176] The boundaries of the condemned individual parcels are an historical artifact that bears little or no relationship to the "footprints" of the ultimate uses. Redevelopment aims to create a new use pattern that the prior parcelization would not support. Development footprints straddle portions of more than one condemned parcel as properties are agglomerated to facilitate new uses. Even if uses in the ultimate development were separated in the horizontal plane and vertically uniform, one could not necessarily assign one parcel proposed for condemnation to one ultimate land use fate that could be then labeled public or private.

But modern land uses are generally not separated horizontally, nor are they vertically uniform in their use. Public uses are intermingled with private uses in the same development, in the same building, and even the same space within a building.[177] It becomes impossible to characterize a condemnation to acquire the space that includes shops, housing, a library and the city hall, or the space that includes a community theater, a sports club, a hotel and apartments. If one were to take the strictest view of Justice O'Connor's test and simply prohibit condemnation for parcels some portion of which could eventually include the prohibited land use, the test is then too narrow, and would effectively outlaw an entire genre of urban development. At best, the dissents' bright-line definition of public use is no longer a line at all, but a muddle inapplicable to most new, mixed-use urban development situations.

175. John Fee, *Reforming Eminent Domain*, *in* EMINENT DOMAIN USE AND ABUSE, *supra* note 35, at 125, 131 (arguing that eminent domain is sometimes essential to assembling the large parcels of land necessary to accommodate important public projects such as large retail, manufacturing, housing, and universities).

176. *See id.* (identifying the holdout as a main obstacle to land assembly).

177. *See* Bressi, *supra* note 163, at xxx–xxxv (detailing the attributes of New Urbanist mixed-use development).

B. "Public Ownership": The Problematic Distinction between a Government Project and a Private Project

The O'Connor dissent would also allow condemnation in aid of all projects where the private property is transferred to "public ownership." Again, the dissent gives us a short list of examples: "a road, a hospital, or a military base."[178] These are uses the government has traditionally owned. Yet, however much Justice O'Connor would like to insure the separation of public and private ownership, however much she uses such distinctions as the lodestone of her argument, facts on the ground confound the distinction. Modern development mixes government and private ownership in arrangements that defeat any bright-line test. Governments now own land that supports private uses; private parties own land devoted to public use; and governments and private parties share elements of the fee interest in the same land.[179]

The simplest and most common example is the long-term ground lease. Many clearly private uses are built on land owned by the public and leased to the developer and subsequent user.[180] For example, developers build many low-income apartments on land owned entirely by a governmental entity that leases the land to a developer; the developer then leases back the low-income units to a city housing authority. In other situations, a city may enter a long-term ground lease with a private company that contracts to develop an office building on the site. The term of the lease is substantially less than the useful life of the building, which will revert to the city when the ground lease expires. The private company builds the building to city specifications so that at the end of the lease, the city can locate city offices in the building. In each case the use is private (for now), but the government owns the underlying fee interest in the land. There exists no policy or doctrinal basis on which to distinguish, for purposes of the test articulated by the *Kelo* dissents, whether this conglomeration is a "private" use or a "public" use.

The increasing sophistication of the public-private relationship renders the public-private ownership distinction even more uncertain. During the last several decades, those engaged in the design of the institutions and instruments to carry out redevelopment and other public-private development partnerships have given much thought to the respective capabilities of the public and private sectors. The private sector now understands government can bring to a development project

178. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

179. *See* Fee, *supra* note 175, at 131 (noting that private ownership can often provide public services more efficiently than government-owned services).

180. BEATTY ET AL., *supra* note 63, at 153. Ground leases are effective tools in redevelopment because they reduce or eliminate developers' up front land costs and enable redevelopment agencies to maintain control over a project after completion. *Id.*

city-wide and area-wide planning capability (and responsibility), institutional ability to involve the public in a credible planning effort,[181] access to tax-free financing,[182] land assembly capability,[183] the ability to hold land with low or no carrying cost, the ability to reduce regulatory risk through development agreements or other public-private contracts,[184] and certain tort immunities.[185]

Likewise, government has come to appreciate that developers have capabilities that government does not share. These attributes include certain project or building-specific planning expertise, development, construction, leasing and sometimes maintenance expertise;[186] relatively high tolerance for and understanding of market risk and interest rate risk;[187] access to private equity markets and lines of credit;[188] institutional flexibility and responsiveness with respect to contractual relationships with other private entities;[189] and the ability to segregate project funds free from the claim of other public needs.[190]

Public-private negotiations strive to determine the most efficient actors for each development function at each stage in the life of a project. Projects move through concept planning, development planning, zoning, subdivision, engineering, land acquisition, grading and utility installation,

181. *See generally* Nick Beermann, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 SEATTLE U. L. REV. 175, 206–08 (1999) (discussing generally the capacity of public-private partnerships to be legitimated through appropriate safeguards ensuring the public involvement).

182. Theodore C. Taub & Katherine A. Castor, *Public/Private Joint Ventures in Development and Redevelopment*, ALI-ABA Course of Study Materials, Land Use Institute: Planning, Regulations, Litigation, Eminent Domain, and Compensation 1 (Aug. 1999).

183. KOEBEL, *supra* note 27, at 8, 22 (explaining that government can help with land assembly, development subsidies, and regulatory incentives).

184. *Id.* at 8.

185. Redevelopment corporations are often immune from tort liability because they act to carry out governmental functions. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* §§ 47–48 (2006).

186. *See* MARY BETH CORRIGAN ET AL., URB. LAND INST., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC/PRIVATE PARTNERSHIPS 10 (2005) [hereinafter ULI'S TEN PRINCIPLES].

187. *See* MIKE E. MILES ET AL., URBAN LAND INST., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 36 (3d ed. 2000) (identifying private developers as "primary risk bearers," because they put up their own equity and sometimes also guarantee investors or lenders). Because local government is spending public money when it helps fund redevelopment projects, it remains accountable for the success or failure of the project. For this reason, local government has become increasingly focused on the costs and benefits of financing revitalization projects. *See id.* at 282 (delineating costs and financing options public officials typical consider).

188. Taub, *supra* note 181, at 1–2; *see also* MILES ET AL., *supra* note 187, at 71–75 (discussing basic equity and debt markets) and 94–97 (addressing innovative finace options available to private developers such as opportunity funds, REITS, and commercial mortgage-backed securities).

189. *See* ULI'S TEN PRINCIPLES, *supra* note 186, at 7 (identifying, as an important step in the redevelopment process, the developer's research of the resources needed to complete the project, such as assessment of risk, potential deal structures, and potential investors).

190. This is an advantage that the public sector often has difficulty achieving when government funding is low and state or local monies are demanded elsewhere.

construction ("vertical development"), sale and leasing, and maintenance.[191] For each stage for each project, public and private negotiators wrestle with defining the best allocation of the components of responsibility, defining, for each project component and stage, which entity directs it, which pays for it, and which performs it.

The result is embodied in a contractual relationship between the public and private entities, and transcends concepts that could be memorialized in a government plan or zoning ordinance.[192] At that point it is much too simple to talk about "ownership" because the proverbial bundle of sticks associated with land ownership has been deliberately broken apart and replaced with a pattern of contractual responsibilities that allocates to the respective public and private parties the specific elements of assembly, clearance, construction, maintenance, and control they are best equipped to perform for the subject development.

For example, a typical mixed-use development might be planned and conceived by a city, built by a developer, and transferred to a homeowners association which must allow public use pursuant to permit conditions and adopted covenants, conditions, and restrictions. A large redevelopment project might involve city ownership of part of the property and private ownership of the rest. The city might have acquired the land long ago, holding it free of debt with low carrying costs. If so, the city might agree, for valuable consideration reflected elsewhere in the deal, to acquire the private property and hold it until the market is ready to absorb the planned uses.

A second, more complex example presents a situation repeated in various forms in larger public-private urban land use arrangements. After a public selection process, a city enters into a contract with a large developer that will serve as master developer of an area. The city owns the land and creates the master plan and zoning plan. The developer pays for the subdivision planning and engineering. The developer and city jointly hold public forums and jointly staff a public advisory board selected by the city, the expenses of which are paid by the developer as predevelopment cost. The developer advances the funds for and builds the major or "backbone" infrastructure. The city floats bonds and buys the infrastructure from the developer. The city holds the land until ready for sale to the developer. The developer takes and owns the land on which it builds a hospital, a stadium, and a public school. The developer sells the hospital, keeps the stadium, and the school is leased back to the city. The city retains the land under multi-family, mixed-income rental

191. For visuals of the predevelopment and development processes, see two flow charts provided in ULI'S TEN PRINCIPLES, *supra* note 186, at 4 & 5.

192. *See id.* at 4. For more on development agreements and how cities are using them to increase the public's return on their investment in redevelopment, see MILES ET AL., *supra* note 187, at 283 fig.14-6.

housing, which the developer builds and turns over to the city ownership of the low-income units. The developer maintains and manages the housing pursuant to a contract with the housing agency.

These complex relationships are the rule, not the exception. Condemned parcels underlie these projects in random ways, fated for a variety of uses in the final development. Which condemnation is to acquire a project for "public ownership"? The O'Connor opinion complains that the majority approach would "wash out any distinction between private and public use of property."[193] Evolution of the land use model has already erased the distinction.

Finally, the test proposed by the dissents would incentivize evasion through simple manipulation of the nature of the public-private arrangement. Consider the *Kelo* facts. The dissents emphasized that the parcel containing petitioners' homes was designated in the redevelopment plan not for a classic public use such as the park itself, but for "park support"—commercial, parking and retail uses not owned by the government or necessarily open to the public.[194] In the face of the bright-line test as proposed by the dissents, the public entity could readily have placed those parcels inside the park rather than in "park support," leaving it to an implementation phase to sort out what land was actually designated for open space and what for park support. In fact, many urban parks now integrate these support uses into the park itself. The park support uses could be operated under a lease or concession on parkland retained by the city (as happens frequently in the National Park System).[195]

IV. GRAPPLING WITH THE DISSENT'S PROPOSED TEST OF "AFFIRMATIVE HARM ON SOCIETY"

Justice O'Connor then addresses what she calls a third category of condemnation. She begins with a strange admission.

> But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.[196]

193. Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

194. *Id.* at 495.

195. *See, e.g.*, George Cameron Coggins & Robert L. Glicksman, *The National Park System: Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 729 (1997) (discussing the National Park Service's contracting with private concessionaires for "food, lodging, transportation, recreation, and other services" for national park visitors).

196. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

Her reference addresses the Supreme Court's two prior pronouncements on redevelopment, neither of which involved "public ownership" or "use-by-the-public." *Berman v. Parker*[197] upheld the use of eminent domain as part of redevelopment in the District of Columbia, and *Hawaii Housing Authority v. Midkiff*[198] validated the use of condemnation to undo the Hawaiian feudal oligarchy through land redistribution. Justice Douglas' holding and reasoning in *Berman* espoused a positive view of the redevelopment. Infused with the affirmative approach to government dominant in the decades after the New Deal, Justice Douglas supported condemnation of the plaintiff's department store in a blighted area of Washington, D.C., even though the store itself, as is the case with the Kelo and Dery homes, was in good repair and a commercial success. The *Berman* opinion explicitly approves the condemnation of the store for subsequent sale to a private developer. *Midkiff*, written by Justice O'Connor herself, cites *Berman* as its primary authority, restates positively the goals of Hawaii's legislature, and defers to its legislative fact-finding.

This third category to which Justice O'Connor refers in *Kelo*, of course, is economic redevelopment, the concept *Berman* firmly endorsed as a tool to revitalize America's urban landscape. But Justice O'Connor then extracts a rule that limits both *Berman* and her own prior opinion in *Midkiff* to what she now construes as their facts: "In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."[199]

Justice O'Connor would thus limit the use of condemnation in aid of redevelopment to situations where the existing use inflicts an "affirmative harm on society."[200] She fails, however, to articulate a legal basis on which to distinguish *Midkiff* and *Berman*. Further, the situation in New London more than meets her proposed test of "affirmative harm on society."

A. In Kelo*, Justice O'Connor Effectively Overturned Her* Midkiff *Decision*

It is a testimony to the complexities of the human mind that Justice O'Connor should join Justices Rehnquist and Scalia in *Kelo*, and even more strange that she pens the dissent herself. After all, she herself is the

197. 348 U.S. 26, 35–36 (1954).
198. 467 U.S. 229, 245 (1984).
199. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).
200. *Id.*

author of *Midkiff*,[201] and a reading of that case leaves one startled at her dissent in *Kelo*.

Thirty years after *Berman*, Justice O'Connor used the *Berman* reasoning and holding to uphold the Hawaii condemnations at issue in *Midkiff*. Considering *Berman* the authoritative source for the law, she explained then that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers,"[202] In *Kelo*, O'Connor backtracks on her *Midkiff* decision. She avoids overturning her own prior holding by characterizing her former equation of the police power and public use as dicta, calling it "errant language" and "unnecessary for the specific holding."[203] Yet the two decisions directly and irreconcilably oppose each other.

The *Midkiff* decision she describes in 2005 is not the same *Midkiff* she wrote in 1984. A reader of her *Kelo* dissent would not recognize the actual text of *Midkiff*. In *Kelo*, her "harm on society" test discussed above includes a requirement that "each taking *directly* achieve[] a public benefit,"[204] a test reinforced by her judicial gloss on the facts which gives virtually no deference to legislative intent. In *Midkiff* she takes the opposite approach:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.[205]

Justice O'Connor states in the very first words of her *Kelo* dissent that the "bedrock" of Fifth Amendment jurisprudence assures that government cannot condemn the property of A to give it to B.[206] She then advocates that the judiciary must adopt a line so bright that it destroys all economic development takings in order to protect against abusive exercise of this power. Yet, on this issue, one cannot distinguish between her opinion in *Midkiff* and the *majority* opinion in *Kelo*. Justice O'Connor states in *Midkiff*:

> To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private

201. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
202. *Id.* at 240.
203. *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting).
204. *Id.* at 500.
205. *Midkiff*, 467 U.S. at 242–43 (citations omitted).
206. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

> person without a justifying public purpose, even though compensation be paid." . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. See Berman v. Parker . . . .
>
> . . . .
>
> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." "[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair."[207]

Thus, despite the Justice O'Connor's effort in *Kelo* to narrow rather than overrule *Midkiff,* she affords irreconcilably different levels of deference to legislative decisions in the two decisions. Her *Kelo* dissent, if adopted, would *sub silencio* amount to a reversal of *Midkiff*.

Justice O'Connor reverses another key element of *Berman* and *Midkiff* that is even more central to the entire redevelopment effort—the approval of area-wide determinations of blight. She takes the position that a finding of blight for an area is not sufficient; the use on each parcel proposed for condemnation must itself inflict an "affirmative harm on society" and its taking must be necessary to remedy the harm.

O'Connor's discussion at first appears to go the other way on this issue. Discussing *Berman*, she states that Mr. Berman's department store was not itself blighted, noting that the court elected not to second-guess the redevelopment agency's decision "to treat the neighborhood as a whole rather than lot-by-lot."[208] She avoids any direct pronouncement on the subject, a fact by itself significant since, in her care not to directly overrule *Berman* and *Midkiff*, she is otherwise careful to delineate the extent to which she takes on these opinions. For example, her dissent specifically addresses language in those cases that asserts the power to take for public use is "coterminous" with the police power, labeling those words as "errant language" and dicta that should be ignored.[209] Yet nowhere does she address with similar directness the area-wide blight determination she admits is directly approved in *Berman.* By negative

207. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241, 243–44 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937), Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923), and Block v. Hirsh, 256 U.S. 135, 155 (1921)) (citations omitted).

208. *Kelo*, 545 U.S. at 499 (O'Connor, J., dissenting).

209. *Id.* at 501.

inference, it might seem that she does not want to limit *Berman* in that respect.

But that is not O'Connor's intent, and it shows from her language. After limiting *Berman* and *Midkiff* to situations involving takings to eliminate affirmative harm to society, she states: "Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."[210] Her italicized "directly" must have some significance. Does it mean to create some general requirement of closeness between action and result, perhaps the application of a new requirement for some nexus between the condemnation and the elimination of harm? Justice O'Connor clarifies her intent in the next sentences.

> New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[211]

But that is exactly what happened in *Berman* and what can happen whenever an agency makes an area-wide finding of economic decline, distress, or blight as a prelude to instituting area planning. It appears that Justice O'Connor would overrule *Berman* and require a parcel-by-parcel determination of "harm" or blight; a result clear from the text, if bizarre in light of the fact that she herself wrote *Midkiff*.

This requirement of individualized blight determination would hinder contemporary redevelopment more than any aspect of the opinion. Many states require a finding of blight prior to establishment of a redevelopment area.[212] None requires that the finding be individualized to each parcel because market failure and economic blight are area concepts. The market does not fail parcel by parcel. A viable use may exist inside of a blighted area, but still present an obstacle to the

210. *Id.* at 500.

211. *Id.* at 500–01.

212. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 33030–33037 (West 2006); CONN. GEN. STAT. §§ 8-125(b), 8-127 (West 2006); Maritime Ventures, LLC v. City of Norwalk, 894 A.2d 946, 959 (Conn. 2006) (outlining Connecticut's redevelopment planning program and noting that it requires a redevelopment agency to make a finding of blight when adopting a redevelopment plan); FLA. STAT. ANN. § 163.355 (West 2006) (requiring, before the exercise of its community redevelopment powers which includes eminent domain, the adoption of a resolution finding that an area is blighted or that there is a shortage of low- or moderate-income housing); Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 731 (Fla. Dist. Ct. App. 2002) (stating that the plaintiffs' rights under the Florida Constitution would be violated if a finding of blight was not made to justify the taking of their land).

parcelization and development necessary to transform an area and insure its successful redevelopment.

B. The Situation in New London Meets the Test of "Affirmative Harm"

Even if O'Connor's "affirmative harm" requirement were valid, the facts in New London would satisfy the test. She sketches out her definition of "affirmative harm on society" in her discussion of *Berman* and *Midkiff*. O'Connor characterizes those opinions as permitting condemnation only to eliminate an "extraordinary" pre-condemnation use—"extraordinary"[213] being something on the order of the horrible slums ("extreme poverty") referenced in *Berman* and the aristocracy referenced in *Midkiff* ("resulting from extreme wealth").[214] After articulating the test, she falls silent on the facts at hand. Given her proposed decision adverse to New London, presumably she believes the situation there would not pass the test of affirmative harm.

But the *Kelo* facts do pass the test, such as it is. The facts in *Kelo* are similar to the facts in *Berman*, and in other severe cases of market failure that have given rise to appropriate uses of eminent domain for redevelopment. It is worth retelling the *Kelo* story, not as it was recited by the Court (either the majority or dissents), but from the perspective of modern redevelopment. The facts in *Kelo* constitute the elements that typically lead to exercise of the redevelopment power in states where a finding of "blight" is required. A potentially attractive waterfront location suffers long-standing stagnation; no market exists for uses in the area, banks will not lend, and developers will not redevelop. The human cost in the area is high: existing businesses have fallen into patterns of substandard performance due to lack of customers and inability to finance purchase of machinery, make building repairs, or undergo improvements. Houses are abandoned and apartment buildings stand half empty.

This is the situation that prevailed in New London. The city did not make a formal determination that Fort Trumbull was blighted because Connecticut's redevelopment law did not require such a finding before an eminent domain condemnation, but the situation more than met the usual blight standard.[215] The record—but not the opinions—states that the New

213. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

214. *Id.*

215. New London exercised its eminent domain powers pursuant to a Connecticut development statute that does not contain a blight standard. *See* Brief of the State of Connecticut as Amicus Curiae in Support of the Respondents at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108) (citing CONN. GEN. STAT. ANN. § 8-186 (West 2002)). However, Connecticut law empowers municipalities to define "blight" pursuant to local ordinance. CONN. GEN. STAT. ANN. § 7-148(7)(xv) (West 2007). Blight "factors" commonly used

London redevelopment area suffered from an astonishing 82 percent vacancy rate for nonresidential structures.[216] Sixty-six percent of these structures were in fair or poor condition.[217] In these types of situations residents are unemployed or must travel long distances outside the area to find work, and the area is not safe. In sum, the unassisted market failed to function in New London.

Redevelopment attacks the problem of economic stagnation by developing an area-wide plan, and then catalyzing revitalization through public improvements that set the scene for pioneering private development. These early public improvement projects ensure strategic investment of scarce public funds. Early infrastructure often focuses on parks and new attractive streets that serve as on-the-ground evidence to lenders and developers of the potential for change in the area.[218] The private investment stategy requires locating a developer sufficiently motivated—often for extrinsic reasons—to risk funds in an area that has not previously supported successful enterprise. The agency often builds upon pioneer project proponents who have already demonstrated an interest in the area or own an interest in projects underway in the area, seeking private development that will provide quality jobs, attract secondary beneficial uses, and promote the renewed visibility of the subject area.[219]

New London followed this typical and rational pattern: it focused first on developing a plan, and then on funding a park as catalytic infrastructure. The city then selected a research facility, Pfizer, already interested in the area as a pioneer private project to provide jobs and visible growth.

The *Kelo* opinions tell a different story, one that underemphasizes the important transitions, nuances, and context of modern redevelopment. The majority opinion limits itself to a recital (characteristically somewhat brief and bland) of the facts leading to

by Connecticut communities include vacancy, threat to public health, fire hazard, criminal or illegal activities, or depreciation of neighborhood property values. Kevin E. McCarthy, Office of Legislative Research, Municipal Blight Ordinances (Oct. 23, 2003), *available at* http://www.cga.ct.gov/2003/olrdata/pd/rpt/2003-R-0771.htm (summarizing blight ordinances for the communities of Farmington, Middletown, and Stamford).

216. Brief of the Respondents at 3, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

217. *Id.*

218. *See* PATRICIA L. KIRK, URB. LAND INST., REBUILDING THE NATION'S URBAN FOUNDATION, Jan./Feb. 2006, *available at* http://www.uli.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=64779 (explaining that because federal funding in redevelopment has dropped significantly, states and local government must ensure that early infrastructure is leveraged to encourage private investment in the area).

219. *See* MILES ET AL., *supra* note 187, at 132 (explaining that beginning around the turn of the twentieth century, local government viewed development as a way to revitalize downtowns).

redevelopment, and describes a city designated by a state agency as "distressed" after decades of economic decline.[220] Justice Stevens neither mentions nor explains the significance of the high vacancy rate. The dissenting Justices fail to acknowledge these conditions at all. The truncated factual recitation in Justice O'Connor's opinion begins with the petitioners and skips directly to the Pfizer development.[221] She does not mention the economic decay, unemployment, or population loss. Her only citation to the underlying purpose of redevelopment is in a brief clause on the mission of the New London Development Corporation.[222] She selects as her only mention of the redevelopment plan a quote that describes the redevelopment as designed to "complement the facility that Pfizer was planning to build,"[223] a statement that probably turns the order of events on its head. Justice Thomas recites a brief and politically charged version. He characterizes the entire New London effort as merely "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."[224]

These omissions and mischaracterizations reveal the panorama of the dissenters' ideological prejudices and misunderstanding of redevelopment. In light of these opinions, it is especially unfortunate that the majority failed to make the case for redevelopment.

C. A Private Rights Orthodoxy Drives the Dissenters' Determined Ignorance of Governmental Purpose

A careful study of the *Kelo* dissents yields no information for the uninformed reader of the goals and processes of redevelopment, the procedural protections developed over the last three decades, or even of the supporting facts in the case. In a world-view fixed on the property rights of individuals, the intention of the regulating government program holds no interest or, for that matter, relevance. The two dissents look at the redevelopment world from the bottom up, from the eyes of the landowner. These Justices believe that their only obligation, as guardians of the constitutional rights of the property owner, is to ask and answer what this all this means for the condemnee. Once a need becomes a "right," such as the dissents' creation of Susette Kelo's right to be free from the exercise of eminent domain in this case, then there is no point to

220. Kelo v. City of New London, 545 U.S. 469, 473 (2005).

221. *Id.* at 495 (O'Connor, J., dissenting).

222. *Id.*

223. *Id.* As discussed *supra* text accompanying note 219, working with a pioneer developer early in project formation is desirable.

224. *Id.* at 506 (Thomas, J., dissenting).

discussing whether her need should be accommodated, and no need to balance her needs against others' needs, individual or collective.

We have seen this approach before from some of these dissenting Justices. An early version emerges in Justice Rehnquist's dissent from the majority opinion in *Penn Central Transportation Co. v. City of New York*.[225] *Penn Central* involved a challenge to the application of New York City's historic preservation law.[226] The majority, in an opinion written by Justice Brennan, upheld the scheme and its application.[227] Brennan commenced with a complete review of historic preservation laws in the fifty states and 500 municipalities. He then described the derivation and details of the New York City legislation, turning to the individual plaintiff's interests much later in the opinion. Finally he evaluated the plaintiff's individual interests against the larger interests of the community as expressed in the legislation and its history.[228]

In contrast to the majority, Justice Rehnquist's *Penn Central* dissent took the bottom-up approach that O'Connor took in *Kelo*. He began his opinion charging that the city had "singled out" the plaintiff's building, creating a substantial cost with "little or no offsetting benefit."[229] He contended that the ordinance unfairly targeted the plaintiff, and he emphasized the plaintiff's application costs.[230] His dissent omits discussion of historic preservation goals or approaches, or the New York City ordinance. This classic bottom-up view of the world reemerged three decades later in the *Kelo* dissents, one of which Justice Rehnquist joined.

This decision to ignore the applicable governmental program is not an artifact of the internal logic of drafting a dissent. Justice Scalia takes the same approach in *Nollan v. California Coastal Commission*[231] where he is joined in the majority by Justices Rehnquist, White, Powell, and O'Connor. This majority upholds a homeowner's challenge to a condition to a permit (an "exaction") for substantial enlargement of his house on the beach. As in Justice Rehnquist's *Penn Central* dissent, the *Nollan* opinion starts with the plaintiff, continues with a recitation of his travails with the Coastal Commission, and then moves directly into its analysis of the legal flaws in the Commission's case. The opinion omits discussion of the pattern of overdevelopment of the California coast or the privatization of the coast that prevents the public from accessing visible beaches. Nor does the opinion discuss the popular concern which led to the passing of the California Coastal Initiative in 1972, or even the

225. 438 U.S. 104 (1978).
226. *Id.* at 108–09.
227. *Id.* at 107, 138.
228. *Id.* at 136–38.
229. *Id.* at 138 (Rehnquist, J., dissenting).
230. *Id.* at 138–39.
231. 483 U.S. 825 (1987).

operative statute, the Coastal Act,[232] passed by the state legislature because of the citizen initiative.

Most significantly, the *Nollan* opinion omits treatment of the nature of public access and the state policies acknowledging the importance of access both *to* the beach ("vertical access") and *along* the beach ("lateral access"). The opinion ignores California's considered and publicly debated public access policy, which culminated in legislation stating that both vertical and lateral access were major goals of the state and conditioning development on implementation of the two types of access.[233]

As is the case with the *Kelo* dissents, the logic of the opinion in *Nollan* rests on an inaccurate construct of the facts. Justice Scalia posits that the purpose of the exaction was simply "psychological" access whereby those driving along the coast could see the ocean, a strange form of *vertical* access.[234] He then contrasts this avowed purpose with the actual exaction of *lateral* access along the Nollan's beachfront, and finds missing the now famous concept of "nexus."[235] Had the Coastal Commission exacted a condition relating to the alleged regulatory goal of this visual *vertical* access, such as a public viewing spot on the Nollan property so people off the beach could look at it, then the exaction would have passed his nexus test. But the exaction of access along the beach had nothing to do with this avowed purpose to view the beach from afar, and thus fails his test.[236]

This approach absurdly fragments the unified concept of "public access." Public access exactions create an opportunity for the public to enjoy the coast. Vertical and lateral access together comprise the *program* of public access. Getting to the beach is of little use if one cannot walk along the beach, and the ability to walk along the beach is of little value if one cannot get to and from it. California coastal law and commentary clarifies that a successful public access program contains both vertical and lateral access in an appropriate configuration.[237] Each

232. For a detailed discussion on the citizen movement, see William J. Duddleson, *How the Citizens of California Secured Their Coastal Management Program*, *in* PROTECTING THE GOLDEN SHORE: LESSONS FROM THE CALIFORNIA COASTAL COMMISSIONS 3, 48 (Robert G. Healy ed. 1978); *see also* California Coastal Act, CAL. PUB. RES. CODE §§ 30000–30900 (West 2006).

233. California Coastal Act, CAL. PUB. RES. CODE § 30001.5(c); *see also* CAL. CONST. art. 10, § 4 (amending state constitution to forbid property owners from preventing public access to the shorelines).

234. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 (1987).

235. *Id.* at 835–37.

236. *Id.* at 836. See Fenster, "Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions." 58 Hastings Law Journal 729 (2007) (containing an excellent analsis of *Nollan and its treatment in practice and by the judiciary.)*

237. *See* CAL. PUB. RES. CODE § 30212(a) (West 2006) (requiring public access from the nearest road to the ocean (vertical access) and along the shoreline (lateral access)).

coastal property owner dedicates the access that makes sense given the property's location. The Nollan's location near two developed access points rendered vertical access unnecessary, but required lateral access.

The benefits of a successful dedication program inure at least as much to the affected property owners as to the general public. Coastal landowners enjoy the beach not just by looking at it or walking the short stretch of their private ownership, then turning around and walking back inside their home; they walk along the beach across the property owned by others and may in fact do a loop, walking along the beach, then via vertical public access to a public road atop a bluff, then down the road, back to the beach, and across more private dedications to their property. This pattern of reciprocal burdens and benefits occurs in every modern subdivision, coastal or not, in the form of sidewalks, made possible by dedication by each parcel owner (or by the precursor owner or developer). The stroll across beachfront dedications constitutes the coastal analogue of the proverbial walk around the block.

For Justice Scalia, however, the beach access program, its history, its implementation, and its procedure must give way before his construct of the rights of the landowner. He eschews recitation of the public's needs and corresponding governmental solutions as logically unnecessary to the opinion. They are also inconvenient to the argument. Successful iteration of Justice Scalia's legal construct requires a gloss on the facts to support the concept, a characterization obtainable only through the omission of a true description of the regulatory or land use environment, and a misstatement of the underlying governmental purpose.

Similarly, in *Kelo*, the dissents had to blind themselves to the economic ills, the reality of the program designed to address the ills, and the safeguards developed to protect landowners in the last four decades.[238] In *Nollan*, this intellectual casuistry garnered a majority. In *Kelo*, it almost succeeded, and the view may yet prevail in state courts or legislation.

V. THE PROBLEMATIC DISTINCTION BETWEEN PUBLIC AND PRIVATE GAIN

The *Kelo* Court's misperceptions of the nature of modern redevelopment goes beyond the dissents' confusion over use, ownership, and blight. The majority opinion, the concurrence, and the dissents share

238. This determination to ignore underlying social policy is in stark contrast to Justice O'Connor's approach in *Midkiff*. The structure of *Midkiff* resembles Brennan's majority opinion in *Penn Central*, more than the typical landowner rights opinion such as Justice Rehnquist's dissent in *Penn Central* and Justice Scalia's opinion in *Nollan*, discussed above. Though a bit less intense than Brennan's opinion, *Midkiff* begins with a three-page recitation of the entrenched nature of the Hawaiian oligarchy, and the determined evolution of the land redistribution scheme the Hawaiian public sector developed to address the issue. Only then does she turn to the plaintiffs and *Berman*. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232–34 (1984).

an outdated, nostalgic perception of the financial relationship between the public and private sector in public-private redevelopment.

Each opinion articulates the view that government does not possess the legal authority to acquire property from one citizen merely to transfer it to another.[239] This reflects a fear that government will act as an agent of private rather than public power. The majority admits that use of eminent domain to transfer property from one citizen to another for the sole reason that the second "will put the property to a more productive use and thus pay more taxes" would "raise a suspicion that a private purpose was afoot."[240] Justice Kennedy's concurrence considers the possibility of city council "capture" by private parties.[241]

The dissents focus almost entirely on the possibility of takings for impermissible private purposes, and put a political gloss on their discussions. Justice O'Connor explains that the majority rule will benefit "citizens with disproportionate influence and power in the political process, including large corporations and development firms."[242] Justice Thomas quotes Justice O'Connor's language with approval and adds race as an issue: "Urban renewal projects have long been associated with the displacement of blacks . . . ."[243]

The frailties of American politics that animate these concerns have not changed, and probably never will; corruption has not ceased, racial prejudice remains a central factor, and in many cities economic elites dominate politics. Rather, the *Kelo* Justices fail to grasp that the structure of public-private economic redevelopment renders almost quaint the very concept of distinct, clearly separable "public" gain and "private" gain. It is worth examining the outlines of this relationship between a public entity and a potential developer.

The *Kelo* dissents imply that redevelopment applies governmental power to subsidize public budgets and enrich private parties.[244] Most large redevelopment projects, however, pose significant fiscal challenges for both the public and private entities involved. Redevelopment proposes to revitalize a depressed area by creating jobs and new infrastructure to serve the public; the effort involves the major development risk that the costly changes will not provide anticipated revenue necessary to support the public expenditures involved. Replacement of antiquated

239. *See* Kelo v. City of New London, 545 U.S. 469, 472-90 (2005); *id.* at 490–93 (Kennedy, J., concurring) (explaining that there may be cases where the transfers are "suspicious" and will require courts to apply a demanding level of scrutiny to determine if the transfer is for "an impermissible private purpose"); *id.* at 493 (O'Connor, J., dissenting).

240. *Id.* at 487 (majority opinion).

241. *See id.* at 491 (Kennedy, J., concurring).

242. *Id.* at 505 (O'Connor, J., dissenting).

243. *Id.* at 522 (Thomas, J., dissenting).

244. *E.g.*, *id.* at 503 (O'Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

infrastructure, often high demolition costs, and a strong community desire for a healthy public benefit package overwhelm likely revenues from possible market uses.

Cities and their agencies (referred together here as "city" or "cities") struggle with how to bridge the gap between available local funding and the cost of desired uses. Successful projects usually leverage federal contributions for regional or other major infrastructure, a variety of grants, and creative public financing. Tax-increment financing, for example, provides a common bootstrapping device. Cities issue bonds early in a project's life on the basis of pledge of the anticipated "increment" between current property tax revenues (often negligible in distressed areas) and the increased tax revenues generated when new uses hopefully increase the value of the land and improvements.[245] Even after the application of these techniques, the projects often face funding shortfalls.[246]

The *Kelo* Justices reason that the interests of government and the private sector must remain separate to prevent abuse.[247] Cities recognize, however, that while they can facilitate or oversee much of the redevelopment, they are not equipped to take on many aspects of the effort. Cities can provide a conduit for grants and issue public debt, and they can hold land for long periods without actual cash outlays for the debt service that developers would incur. However, public development goals such as low-income housing, public infrastructure or neighborhood revitalization need early injections of capital. Cities typically lack access to capital early in the project, cannot front high "predevelopment" expenses (that is the costs of planners, economists, engineers, and attorneys necessary to work through the details of the project proposal). Cities cannot accept development and market risk, and they are ill-suited to perform the vertical development of uses on the site.

Given these incapacities and the reciprocal advantages of a relationship with a private developer, the city may advertise for a "master developer." The master developer will initially assist the city with planning, perform due diligence reviews concerning site issues such as contamination, and assist in estimating the cost of old infrastructure demolition and new project-related infrastructure and improvements.[248] Eventually, the master developer will also find and manage relationships with developers of sub-areas within the project, and potentially with

245. DAVID PAUL ROSEN, PUBLIC CAPITAL 49 (1988).

246. *See* Farris, *supra* note 24, at 22.

247. Kelo v. City of New London, 545 U.S. 469, 478 n.6 (2005).

248. For an example of the requirements a redevelopment authority includes in a request for proposal, see RFP, *supra* note 115, at 11–12.

builders.[249] The city's advertisement typically asks for experience and financial capability.[250]

Most developer-selection processes reveal that, while the resulting relationship is important to both parties, it is not collusive. Public advisory committees often advise the city council on the selection process and the selection itself. Competing development teams make presentations to the council in open session. On the basis of these, the council selects one developer with whom to negotiate the documents that would guide a permanent relationship.[251] This exclusive negotiation period may be short or last several years, depending on the size of the project. The negotiators ordinarily meet in private and make interim reports to council in executive (closed) session.

These relationships force developers to take risks that bring immediate financial benefits to the city and its citizens. During the exclusive negotiation period, the developer usually fronts all of its predevelopment costs and may advance all or a portion of the city's as well.[252] For a large project area, these costs run into the millions of dollars. This is high-risk money for the developer because the city, while obligated to negotiate for the full period in good faith, has no obligation to consummate the relationship;[253] if the negotiations fail, the developer has lost the fruit of its work. If the city and developer teams reach agreement on key issues, the relationship matures to a set of contractual documents that the council then considers in open session. If, after public hearing and testimony, the council approves the contracts, the obligations mature and the project commences.[254]

In *Kelo*, Justice Thomas characterizes the city-developer relationship as simply "suspiciously agreeable."[255] Yet, in almost any significant redevelopment effort the negotiation of these contractual documents involves contentious issues and tests the patience of all concerned. These negotiations produce a relationship sufficiently complex to defy summary presentation. Each negotiation evolves in distinct ways, but large project efforts contain similar elements. The parties first attempt to reach a mutual understanding of the project economics.[256] They often field

249. *See, e.g.*, *id.* at 17.

250. *See, e.g.*, *id.* at 16.

251. *Id.* at 16–17.

252. *See id.* at 15 (making the developer responsible for all predevelopment costs).

253. *See id.* at 11 (allowing the Port Commission to reject a project if the economic and social benefits of a project are outweighed by its disadvantages up until a master lease is approved).

254. *See id.* (requiring approval by the Port Commission and the city's Board of Supervisors).

255. Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).

256. ULI'S TEN PRINCIPLES, *supra* note 186, at 4, 7 (naming "[e]stablish[ing] [f]easibility" as one of the first steps to a redevelopment effort).

independent teams to develop engineering estimates of project costs such as infrastructure and to perform market studies to determine the likely revenues from the sale of land, and sale or rental of buildings. This effort, when reasonably complete, allows the construction of a hopefully mutually-agreed upon economic model of the development, a spreadsheet commonly called a "pro forma."[257]

As they build the pro forma, the city and the developer negotiate a reasonable rate of profit for the developer based on the returns typically realized in the development world for projects with similar risk profiles. That profit is usually measured as the present value of the net cash flow from the development, or the developer's internal rate of return (IRR).[258] The parties argue about the level of each sort of risk—regulatory risk (which the city asserts it will mitigate through the contract under negotiation), construction risk (the risk of cost overruns which can be quite high), market risk (the risk that the rental and sales markets will change), and interest rate risk (the risk that interest rates will change).

These discussions produce an allocation of risk simply ignored in the *Kelo* opinions. The city may, for example, decide to take some of the regulatory risk by agreeing to pay back some predevelopment funds advanced by the developer for city costs if the project approvals are not forthcoming. The city may agree to appropriate ways to take some portion of the market risk by assembling the property and holding it at no cost to the developer until the market has reached sufficient maturity. As an additional way to assume some of the market risk, the city may agree to issue tax-increment financing as soon as the bond market permits, and repay the developer some or all of the predevelopment costs.

Contrary to the fears of the *Kelo* Justices, these typical city efforts are not gifts of public funds to the developer. Some smaller cities lack expertise and may suffer financially in negotiations that are inadequately staffed, but if the city is minimally competent, it calculates and then "monetizes" the value of these concessions in the form of other benefits to the public. The city typically requires that the developer assume specific financial risks to insure that the project moves forward and to incentivize the developer to keep its money in the project. The city might, for example, require that the developer take the land for the backbone infrastructure early, engineer and build it according to a schedule in order to "prime the pump" with the construction of desired public parks, boulevards, recreational spaces or other public facilities regardless of whether the market is present for development at that time. Similarly, the

257. MILES ET AL., *supra* note 187, at 554 (Appendix D) (defining pro forma as "[a] financial statement that projects gross income, operating expenses, and net operating income for a future period based on a set of specific assumptions").

258. *Id.* at page 88–89; GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 677–81 (5th ed. 2005) (explaining and contrasting net present value with internal rate of return).

contract might require the developer to develop these public facilities at its own cost, and dedicate them to the city.[259] These negotiations often produce a profit-sharing arrangement.[260] In many situations the developer has a right to the excess project revenues over project costs up to a certain return on its investment, and after that, the parties divide profits according to an agreed-upon formula.

The draft contract allocates financial and performance rights and obligations. The relationship that emerges from these arduous negotiations resembles a complex partnership. For example, the city might contribute tax-increment financing, tax relief, substantial in-kind predevelopment costs, and the land either for free or at below market value ("written down"). The developer might make a large initial cash infusion prior to the sale of bonds for most of the predevelopment costs, contribute the remaining cash required after public financing for most of the predevelopment, demolition, and construction of the infrastructure and improvements. The developer takes the market risk, and must manage the sale or lease of the revenue-producing elements.

How do the fears of the *Kelo* Justices compare with these realities? The majority, without explaining the factual underlay discussed above, simply quotes *Berman* for the proposition that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."[261] In the majority opinion, the form or mechanism for economic redevelopment is not the issue; rather, abuse is a factual matter for a reviewing court, which determines the question of adequate public purpose by examining the record directly, and with deference.

Justice Kennedy puts a bit more meat in his analysis of judicial review, and in some cases, his approach to searching out instances of actual abuse corresponds well with the reality of public-private development. He would, for example, look to the existence of a comprehensive redevelopment plan and evidence that the economic benefits of the project are real as evidence that a redevelopment scheme serves public rather than private purposes.[262] Some of Kennedy's criteria work less well. He fixes on the timing of identification of the private beneficiaries. He assumes that if the decision makers are "blind" as to the identity of the ultimate developer at the time of condemnation, the

259. *See supra* note 137 and accompanying text (explaining that the Gap was required to dedicate a park in order to lease the land for its new headquarters in San Francisco).

260. For a real-life example of typical financing terms, see MILES ET AL., *supra* note 187, at 283 fig. 14-6.

261. Kelo v. City of New London, 545 U.S. 469, 486 (2005) (quoting Berman v. Parker, 348 U.S. 26, 34 (1954)).

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

underlying motive is more likely to serve public needs rather than private power.[263]

However, it may be of financial and strategic advantage to the public to have a master developer involved in the economic and physical planning of the site well before site acquisition is complete. The same could be true for early knowledge of the ultimate commercial users of the site. While it is true that at the time of condemnation sometimes the ultimate purchasers or lessees of land uses on the site may be unknown, they often are known, and if so, it is for good reason. As a pro forma is developed for the site, it may become apparent, for example, that the project would fail because too many expenses occur too early and the revenue comes too late in the period of project development. A project can sink under the weight of early costs such as developer-contributed predevelopment funds that compound at a high rate of interest reflecting the high risk at that point in the project. One solution is an early revenue generator such as a successful large-scale retail project or a pre-leased corporate headquarters. In that event, very early in the project, even during the exclusive negotiation period before a contractual relationship is cemented, the putative master developer, or the master developer and the city together, may work to identify such a potential owner who can generate revenue early in the development.

A fear that government will become an instrument of private power and condemn in the pursuit of increased tax revenues permeates the dissents' opinions.[264] The true picture is more complex; as to tax-driven motivation, public entities rarely make money on these projects. They must devote all the increased tax revenues from the project to tax-increment financing to move the pro forma onto positive ground. As to abuse of condemnation for private gain, the process is in fact susceptible to corruption, a concern, however, that arises not so much from this public-private partnership as it does from the intrinsic role financial support of political candidates plays in the current electoral process. All governmental decisions run the risks of contamination by interested parties. Public-private partnerships clearly pose new and special challenges because they involve such intricate interdependencies. However, note the safeguards: public selection determines the developers, public contracts memorialize the relationships, and cities generally provide periodic public reports on the financial and other aspects of redevelopment projects.

These partnerships do undermine the concepts underlying the idea that government must never condemn the land of A to give it to B. This is no longer a regulatory world in which government exercises a reactive,

263. *See id.*

264. *Id.* at 501–04 (O'Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

police-power role and the developer plays the protagonist. City redevelopment instead inhabits a contractual world, where agreements break apart traditional roles and rearrange their elements with much refinement to reflect the needs and attributes of each party. The government typically is the project protagonist, affirmatively pushing the redevelopment to achieve public benefits. This public-benefit package often achieves major public goals such as the production of low-income housing, creation of new jobs for a low-income community, construction of new parks and recreational facilities, and needed infrastructure. The developer is more of an agent of the public, performing specified tasks for a return that allows it to function and attract the necessary private capital to make the project succeed. In some cases, a contract formalizes this agency relationship such that the developer simply performs its obligations for a negotiated fee.

Whatever the form, public gain and private gain intertwine. The solutions to abuse should not outlaw the public-private relationship so fruitful to public goals, but rather focus on an open process, involvement of the subject community in decisions concerning the use of eminent domain, and clear-minded judicial review.

CONCLUSION

The Courts that produced *Berman* and *Midkiff* would have strongly supported the legislative decisions of the New London Development Corporation. O'Connor herself wrote in *Midkiff* that "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[265]

How then does one explain the change in the Court, the tepid majority, and the change in Justice O'Connor? The explanation lies in the unfortunate mix of ignorance and belief. Justice Stevens finds refuge in precedence, but cannot articulate a defense of essential elements of economic redevelopment because he does not understand them. His personal ideology probably leaves him uncomfortable with the redevelopment's longstanding and successful core concept of public intervention to cure land use market failure.

Justice O'Connor could, with no special land use expertise, grasp the unusual concentration of power in *Midkiff.* The feudal remnant that owned so much of Hawaii's land represented a concept hostile to both capitalism and individual liberty. It is easy for an American conservative, even a property rights advocate, to find in her ideological orthodoxy a

265. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

home for Hawaii's effort to extirpate the oligarchy so the modern land use market could function.

Public-private economic redevelopment is not similarly accessible. The Court lives in the past when the public and private roles were crisply separate, where government built roads and parks with general-fund money derived from property taxes, and the private market built the houses, factories and shops. The national and international movement towards new forms of business that partner with the state for mutual gain finds no place in the Justices' understanding of land use and eminent domain. The majority does not comprehend the new concepts and the dissents are utterly uncomfortable with the heart of the public-private relationship.

It is impossible to know the extent to which the defects in the majority and dissenting opinions contributed to the public reaction to the decision. In any case, the *Kelo* decision precipitated a sudden swell of antipathy for economic redevelopment. Since the decision, a majority of states have either considered or adopted measures limiting the use of condemnation in this context.[266] What does the future of public-private redevelopment look like after *Kelo?* Hopefully the body politic will recover perspective on this issue, and consider further reforms that retain this valuable tool. The beneficiaries of redevelopment—the poor, minorities, and other urban constituencies, including some developers, are slowly organizing after an early silence during the initial storm of reaction.[267] Perhaps in the end, this crisis will force public-private redevelopment to make its case to legislatures and the general public, bringing understanding of its benefits to a wider circle than before, and finally putting to rest the shadow of its checkered past.

266. *See* Castle Coalition, *supra* note 4, and Nat'l Conf. of State Legislatures, *supra* note 4.

267. *See, e.g.*, U.S. Conference of Mayors, Resolution, *Eminent Domain*, adopted Jan. 26, 2006; DREHER & ECHEVERRIA, *supra* note 21, at 1.

> Critics of the *Kelo* decision from across the political spectrum have called upon Congress and/or state legislatures to establish new limits on the government's authority to take private property for economic development purposes. In response, many local officials, urban planners, and some downtown developers have spoken out in defense of the use of eminent domain in the context of urban redevelopment projects.

Id.