KELO’S UNANSWERED QUESTIONS

The Policy Debate Over the Use of Eminent Domain for Economic Development

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INTRODUCTION AND SUMMARY

The United States Supreme Court’s June 2005 decision in *Kelo v. City of New London* sparked a heated public debate over the use and potential abuse of the eminent domain power. In that case, which focused on a major redevelopment project in an economically beleaguered New England port city, the Court ruled that the city’s “taking” of residential and investment properties, accompanied by payment of “just compensation,” was consistent with the Takings Clause of the Fifth Amendment. The decision attracted a great deal of media attention and strong, generally unfavorable public reactions. 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.

The central issue in this debate has been whether the government should be allowed to use eminent domain to transfer land from one private party to another in order to promote some public economic development objective. While condemnation is seldom without controversy, the use of eminent domain to facilitate construction of public facilities like roads, post offices and military bases is widely recognized and generally accepted. While such uses of eminent domain can result in the displacement of private property owners, and can therefore generate significant opposition and controversy, the use of eminent domain for economic development raises the additional concern that government power may be being used to benefit powerful special interests that will end up owning property in the redevelopment area.

*Kelo* may have resolved the legal issue of whether the use of eminent domain for economic development purposes is consistent with the federal constitution, but the propriety of such use of the government’s eminent domain power as a policy matter is, as the Supreme Court acknowledged, a matter for legislators to determine. The use of eminent domain for economic development purposes in fact raises many questions for policymakers to consider. Is eminent domain necessary to accomplish large scale urban renewal projects? Are people whose property is taken for such projects given fair compensation? Is eminent domain sometimes or often invoked for the primary benefit of private interests, without real public benefit? Do government authorities target vulnerable populations and properties, such as churches? Unfortunately, we do not know enough about the use and impact of eminent domain to permit clear, definitive answers to many of these questions. But these issues are nonetheless profoundly important to the ongoing debate over the proper use of eminent domain, and should be considered in assessing proposals to reform this important governmental power.

The Georgetown Environmental Law & Policy Institute at Georgetown University Law Center has prepared this report to assist the public and policy makers in understanding the issues raised by the use of eminent domain to promote economic development, to frame public concerns about the use of this governmental authority in an objective discussion, and to help evaluate potential policy responses to address such concerns.

The first section of the report provides an overview of the legal principles governing the eminent domain power, particularly the “public use” requirement. The second section describes the *Kelo* decision and how it fits into the Supreme Court’s body of precedent on this subject, and summarizes the public and legislative reaction to that decision. The third section addresses the policy issues raised by the use of eminent domain for economic development, and attempts to provide a balanced appraisal of the widely differing perspectives on these issues. Finally, the report describes and critically evaluates reform ideas that various policy makers and scholars have advanced in the wake of *Kelo*.
Brief case studies of particular projects involving the use of eminent domain for economic development are included throughout the report to provide concrete examples of the use — and abuse — of the eminent domain power.

Our primary conclusions are:

- **Need for research.** Not enough is known about the use of eminent domain for economic development to fully evaluate its benefits and impacts, or to assess the potential consequences of eliminating or restricting eminent domain for communities’ ability to pursue successful economic development. More empirical research is badly needed to assist policymakers in evaluating potential reform measures. Pending the acquisition of more and better information, policy makers should be cautious about embracing reform proposals that may have unintended adverse effects for the economic health of our communities.

- **Eminent domain and public-private partnerships appear to be valuable tools for achieving urban redevelopment goals.** Eminent domain appears to be an important tool for many cities seeking to assemble inner-city sites for economic development projects, allowing them to overcome holdouts and other obstacles to efficient land-use reconfiguration. City governments already have strong incentives to use condemnation only where necessary, and have limited ability to overcome such obstacles through other means. In addition, cities receive significant benefits from being able to draw upon private developers’ skills and access to capital in pursuing modern mixed-use redevelopment projects.

- **Property owners whose property is condemned often receive generous compensation.** Fair market compensation awarded by the courts does not fully compensate some property owners for the costs imposed by relocation or for subjective values that are not transferable. Nonetheless, evidence suggests that property owners are frequently given compensation well above market value, and often receive substantial relocation assistance under federal or state law.

- **There is little evidence that eminent domain authority is often abused to serve purely private interests, although “one-to-one” transfers outside the context of comprehensive planning pose risks.** Redevelopment projects often rely upon public-private partnerships that provide private developers economic benefits while seeking to achieve larger public goals of economic enhancement. There is little reliable evidence, however, that governments engage in such projects for the primary purpose of favoring private interests. At the same time, there are troubling cases suggesting occasional abuse, particularly in “one-to-one” transfers from one owner to another.

- **Legal and cultural changes make it less likely that eminent domain will be used to target sensitive populations or religious properties.** The widespread use of eminent domain in the 1950s and 1960s to clear slums and to build freeways had disproportionate impacts on minorities and poor inner-city neighborhoods. However, changes in cultural values and legal rules, as well as gains in political power by minorities, offer greater protection to urban communities, many of whose residents are the primary beneficiaries of economic redevelopment efforts. Religious property may be attractive to urban planners as potential sites for redevelopment because it does not provide tax revenue, but churches enjoy substantial legal and political protections against condemnation.

- **Pursue Procedural Reforms.** Particularly in view of our uncertainty about the potential consequences of radical surgery to local governments’ traditional eminent domain powers, reform efforts should focus on
establishing procedural mechanisms that will assist government and the public in making more discriminate use of the eminent domain power. Given the widely varying practices and traditions across the states, Congress should be wary of proposals to impose sweeping, one-size-fits all solutions in this area.

THE LEGAL FRAMEWORK GOVERNING THE EXERCISE OF EMINENT DOMAIN

Eminent domain is the power of government to take private property for public use by condemnation. Considered an inherent power of the sovereign, this legal authority predates the founding of the United States. The Takings Clause in the Fifth Amendment to the U.S. Constitution recognizes the existence of the eminent domain power, but establishes limits on its exercise: “[N]or shall private property be taken for public use, without just compensation.” Thus, the government can “take” private property, but only if it is for a “public use,” and only upon payment of “just compensation.” Many state constitutions include their own limitations on the taking of private property; these state provisions can be, and sometimes have been, interpreted by the state courts to provide greater protection for property owners in the eminent domain context than the U.S. Constitution. The exercise of eminent domain is further limited by federal and state statutes imposing substantive and procedural limits on the use of this power.

“Public Use”
The central issue in the legal debate over the use of eminent domain for economic development purposes has been the proper interpretation of the phrase “public use.” The Supreme Court has long interpreted the phrase as barring government from taking an owner’s property for the sole purpose of benefiting another private party. On the other hand, the Court has also held that use of the condemnation power to achieve any of a variety of broadly-defined public purposes can constitute a public use. The specific question raised by the recent case of Kelo v. City of New London was whether the government may use eminent domain to promote urban redevelopment, unquestionably a public purpose, but where a new private owner, rather than the government itself, will end up owning and managing all or part of the redevelopment site.

This dispute turns in part on the meaning of the constitutional text. Under one view, the term “public use” should be read to require actual “use by the public,” meaning that the government has to own and utilize the property, or provide for general public access to and use of the property. The other view is that public use is a synonym for “public purpose,” making it irrelevant whether the government itself, or some private party, ends up owning the property. The common remark that “it is no use” to attempt some objective demonstrates that equating “public use” with “public purpose” represents a plausible reading of the text.

In addition, modern and historical legal precedents generally support the broader reading of “public use.” Starting in the 19th century, state legislatures enacted laws authorizing the use of eminent domain to transfer land to private owners for the construction of mills, ferries, railroads, mines, and manufacturing facilities, and the state courts generally sustained such actions. Today, the clear majority of state courts follow the broader reading of public use, while a handful of courts adopt a narrower view.

The U.S. Supreme Court has long embraced the broader understanding of the eminent domain power. As early as 1837, the Court recognized that eminent domain could properly be used to promote “the public interest and convenience.” When the Court began to apply the Fifth Amendment to the states at the close of the 19th century, it interpreted “public use” broadly as meaning “public purpose,” and rejected the notion that actual use by the public was required. The Court gave
An aging shopping mall has become an unlikely symbol of the frustrations and hopes of a predominantly African-American neighborhood in the southeastern quadrant of the District of Columbia. Developed in the 1940s, the Skyland Shopping Center at Alabama Avenue and Good Hope Road once was well maintained, and provided retail services to surrounding middle-class and working-class families. Now it has deteriorated into a hodgepodge of disconnected, run-down storefronts and parking lots, featuring a fast-food restaurant, a liquor store, an automotive parts store and a music store that mainly sells adult entertainment. The mall’s “No Loitering” signs, potholed asphalt, and trash contrast sharply with the attractive, well-kept residential neighborhoods nearby.

Residents in the area, frustrated that there are no sit-down restaurants, movie theaters, or large retail stores in the entire area of the District east of the Anacostia, have tried for more than 15 years to change the character of the run-down strip mall, without success. “Why is it so hard to get a decent little shopping mall?” wonders Kathy Chamberlain, a local resident and officer in the Hillcrest Community Civic Association. Local residents are forced to travel to Maryland or Virginia for shopping or entertainment; the District of Columbia government estimates that more than two-thirds of their retail spending, amounting to more than $400 million annually, takes place outside D.C. City officials and neighborhood residents see the lack of retail shopping in southeast D.C. as emblematic of the historic prejudices that have discouraged major retailers from investing in the District, and particularly in its historically-neglected neighborhoods east of the river. “Across the river, we have just been forgotten,” one resident laments. “We deserve better,” says Barbara Savage, an advisory neighborhood commissioner.

The District of Columbia government, led by Mayor Anthony Williams, responded to these community concerns by proposing a major redevelopment of the Skyland Shopping Center, replacing the existing collection of stores and parking lots with an attractive, contiguous street-front mall featuring restaurants and shops, anchored by a major big-box store like Target. With 250,000 square feet of retail space, the $125 million project would be the largest shopping development east of the Anacostia River; it is projected to generate $3.3 million annually for the District in sales and property taxes and create more than 200 permanent jobs. The project would be built through a public-private partnership between the National Capital Revitalization Corporation and a local developer, the Rappaport Companies. The project received immediate and strong community support, winning endorsements from local neighborhood advisory commissions, civic associations, and residents.

The NCRC budgeted $35 million for acquisition and cleanup of the more than 40 properties at the 18.5 acre site of the existing Skyland Shopping Center. In February 2005 the NCRC made purchase offers to the 16 owners of those properties. More than half agreed to sell, but six property owners, controlling the land at the center of the proposed new mall, refused. Embracing Mayor Williams’ position that Skyland “is an area where eminent domain could be used for the good of the entire community,” in April 2005, the D.C. City Council enacted legislation authorizing the NCRC to use eminent domain to acquire...
the remaining properties. NCRC has now obtained title to all of the properties, although court battles over the amount of just compensation owed to property owners continue. In June 2006 the NCRC secured $150 million in financing from Wall Street investment bank Morgan Stanley to support various redevelopment projects, including the Skyland project. NCRC plans to begin construction by 2007, and to finally fulfill the long-frustrated dreams of residents of eastern D.C. to shop and dine within their own community by 2008.

The use of eminent domain was necessary in the case of the Skyland project because market forces had failed to provide the sort of shopping and dining experiences that the neighborhood sought. “We tried to get [store owners] to upgrade the area and they were flat not interested,” says Vincent Spaulding, the chair of a local task force on the shopping center. “They’d been given chance after chance to do something about it,” Kathy Chamberlain says. “I think it’s now the city’s responsibility to do something.”

Moreover, to assemble the site so that it could be attractive to private developers, the city has had to provide millions in gap financing and funds for acquisition and cleanup. In an attempt to stave off condemnation, one property owner finally proclaimed a willingness to lead a private renovation of the Skyland mall, but was unable to demonstrate how it could finance such a project. Nor could the city have left the holdout property owners in place; they controlled the center of the site, precluding any sort of coherent design for a new mall. Without eminent domain, the modern, urban retail center the city and neighborhood residents seek in eastern D.C. would appear to have been impossible.

a Doug Campbell, *The Economics of Eminent Domain*, REGION FOCUS, Fall 2005, at 25.

d Fernandez & Harris, supra.
e Wilgoren, supra.
f Campbell, supra, at 26; Wilgoren, supra.
k Campbell, supra, at 29.
great deference to the states’ determinations, based on local conditions, of what constitutes a public use,\textsuperscript{11} upholding the use of eminent domain, for example, to promote economic development by mill owners,\textsuperscript{12} mining companies,\textsuperscript{13} and farmers.\textsuperscript{14}

**Two Major 20th Century Precedents: Berman and Midkiff**

In two major 20th century decisions, *Berman v. Parker*\textsuperscript{15} and *Hawaii Housing Authority v. Midkiff*,\textsuperscript{16} the modern Court defined public use broadly and adopted a highly deferential approach to the review of political judgments regarding whether condemnation would serve an appropriate public purpose.

In 1954, in *Berman v. Parker*, the Court upheld an urban renewal plan that employed eminent domain to promote redevelopment of an economically-depressed and deteriorated area of Washington, D.C. Writing for a unanimous Court, Justice William Douglas stated that eminent domain could be employed to serve any valid governmental purpose.\textsuperscript{17} The Court rejected the argument that participation by private developers in the subsequent redevelopment of the area made the project “a taking from one businessman for the benefit of another businessman,” observing: “The public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”\textsuperscript{18}

In *Hawaii Housing Authority v. Midkiff*, decided thirty years after *Berman*, the Supreme Court upheld a Hawaii statute that sought to reduce the concentration of land ownership in that state among a few owners, a residue of the state’s feudal past, by taking fee title from lessors, with compensation, and transferring it to lessees. Writing for the Court, Justice O’Connor reaffirmed *Berman*’s deferential approach to the review of political judgments concerning public use, declaring that “[t]he ‘public use’ requirement is ... coterminous with the scope of a sovereign’s police powers.”\textsuperscript{19} The Court unanimously concluded that the State’s purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use.\textsuperscript{20} The Court rejected the contention that the statute’s transfer of title to private beneficiaries, without an intervening period of public ownership, made the taking improper, noting that the Court “long ago rejected any literal requirement that condemned property be put into use for the general public.”\textsuperscript{21}

Other recent Supreme Court decisions affirmed the use of eminent domain to transfer property to private parties in order to promote economic and social policy objectives in other contexts, such as pesticide regulation\textsuperscript{22} and transportation.\textsuperscript{23} Taken together, the Court’s decisions prior to *Kelo* provided strong, authoritative legal support for the use of eminent domain for economic development purposes.

**Public Controversy Over the Use of Eminent Domain for Economic Development**

Despite the overwhelmingly strong support for the constitutionality of eminent domain for economic development, the use of eminent domain for this purpose has been a matter of continuing public debate. Perhaps most famously, the decision by the City of Detroit in the late 1970s to condemn an entire neighborhood known as Poletown for redevelopment as a General Motors factory triggered intense controversy.\textsuperscript{24} The large-scale urban renewal projects of the 1950s and 1960s, of the kind reviewed in the *Berman* case, have often been criticized as largely-failed efforts at social engineering that destroyed the social fabric of many communities. More recently, the use of eminent domain by various municipalities to assemble sites for large businesses, such as Wal-Mart and Costco, has generated serious controversy.

In the last decade, property rights advocates, led by the Institute for Justice, began to challenge municipal takings of private property for economic development, arguing that the asserted community economic benefits
in the form of higher employment, taxes, and increased economic vitality cannot justify the resulting affront to private property rights. Opponents of the use of eminent domain for economic development purposes achieved several highly visible court victories, persuading the Supreme Courts of Illinois and Michigan, among others, to reject attempted condemnations for economic development under state constitutional provisions. Property rights advocates also lobbied state legislatures, with some success, to restrict the power of eminent domain under state law.

THE KELO CASE

Notwithstanding these advocacy efforts, most legal observers were surprised when the U.S. Supreme Court granted certiorari in *Kelo* to review a decision by the Connecticut Supreme Court upholding the use of eminent domain by the City of New London for an urban redevelopment project. The Connecticut decision was clearly in line with Supreme Court precedent, and no member of the Supreme Court had signaled any particular interest in revisiting *Berman* or *Midkiff*, both of which had been decided unanimously. In the end, the Court’s decision in *Kelo*, upholding the city’s exercise of eminent domain, did not change the law. However, the dissenting opinions in *Kelo*, particularly that of Justice Sandra Day O’Connor, gave strong voice to the policy arguments being made by the Institute for Justice and other groups, helping spur a virtual revolution in the policy debate over eminent domain.

**Factual Background**

*Kelo* involved an integrated development plan designed by the City of New London to revitalize its ailing economy. Over decades of economic decline, the city had suffered the loss of major businesses and employers, including a major naval facility, and had been designated a “distressed municipality” by the state. To recharge New London’s economy, state and local officials developed a plan to redevelop a waterfront area in the city, the Fort Trumbull area, which contained a state park, business properties (many of which were vacant) and some residential housing. Capitalizing on the decision by a major corporation, Pfizer Inc., to build a $300 million research center adjacent to Fort Trumbull, city planners developed a comprehensive plan, following intensive reviews by the city council and state agencies and significant public input, to create a 90-acre complex including a waterfront conference hotel, marina, public river walk, museum, residential housing, and research and development office space. The plan was projected to create more than 1,000 jobs, increase tax and other revenues, and spark additional economic development in the city. At the end of the planning process, the city selected a developer to carry out the redevelopment project in exchange for payment of one dollar.

The city council approved the plan in 2000 and authorized a city-created development corporation to purchase property or to acquire property by exercising eminent domain in the city’s name. The development corporation succeeded in negotiating the purchase of most of the real estate in the 90-acre area, but initiated condemnation proceedings for a small number of properties, including several residential investment properties and a few owner-occupied homes, when negotiations failed. The property owners challenged the condemnations in state court, but the city’s actions were ultimately upheld by a divided Connecticut Supreme Court.

**The Supreme Court’s Decision**

On June 23, 2005, the U.S. Supreme Court affirmed the Connecticut Supreme Court’s decision by a 5-4 vote. The Court, in an opinion penned by Justice John Paul Stevens, emphasized that it had long rejected the argument that the Takings Clause imposes a literal requirement that condemned property be utilized by the general public, and instead had embraced the “broader and more
Norwood, Ohio, a city of 24,000 residents surrounded by the City of Cincinnati, faced hard times when its manufacturing industries died out in the 1970s and 1980s. The 1987 closure of a General Motors plant resulted in the loss of 35% of the city’s tax base and of more than 4,000 jobs, prompting the *Los Angeles Times* to run an article entitled, “Norwood, Ohio Girds For A Grim Life Without GM.” While Norwood has had some success in attracting new office and commercial development, the city continues to face a difficult economic future. The city government confronts a $3.6 million deficit; city services have been curtailed, its parks programs cut, and its bus system has been shut down.

Norwood’s most recent plan to rebuild its economy has made it a focal point of controversy over the use of eminent domain. In 2002, the city began working with a private developer on plans for a $125 million mixed-use project, the Rookwood Exchange, including retail stores, office space, residences and a hotel. The project is expected to generate $300,000 per year for Norwood’s schools and $1.8 million a year in tax revenue for the city, representing 15% of Norwood’s tax base. The 10-acre project site was a gradually-deteriorating middle-class neighborhood that had been cut off from the rest of the city by construction of a section of the interstate highway system in the 1970s. The highway construction dead-ended many streets in the neighborhood, eliminated some houses and took the front yards of others, and placed busy exit and entrance ramps in the neighborhood. Some residents were concerned that the area was no longer a viable single-family neighborhood, and feared that they would not be able to sell their houses if they decided to move.

The redevelopment agreement with the city instructed the developer to attempt to acquire the land needed for Rookwood Exchange through voluntary purchase, and directed the developer to offer homeowners at least 125% of fair market value. By September 2003 the developer had contracts to purchase all but six of the 73 properties in the area. However, the owners of six properties — a couple who owned a home in the neighborhood, an owner of rental property, and four commercial businesses — refused to sell, stalling the project and putting the purchase of the other families’ homes in limbo. Bitter feelings between the holdouts, represented by the Institute for Justice, and the other homeowners were displayed in yard signs declaring “Held Hostage by the Institute for Justice.” In 2003, the city determined that the area was blighted under state and local law, and authorized the use of eminent domain to acquire the last properties. In a ruling issued on July 26, 2006, the Ohio Supreme Court held that the city’s use of eminent domain violated the Ohio Constitution.

In April 2006, *The Cincinnati Enquirer* published an exhaustive investigative story on the use of eminent domain in connection with the Norwood project. The newspaper’s primary conclusion, based on parcel-by-parcel analysis of the land acquisition, was that the property owners had been “handsomely compensated.” On average, the *Enquirer* found, sellers were paid twice the
fair market value of their properties, as estimated by the county auditor in 2002, the latest year for which figures were available.\(^a\)

The *Enquirer* also concluded that the great majority of the owners believed that selling their property for the Norwood project had actually improved their lives. The paper observed that “many used profits from their sales to buy bigger, nicer houses and to upgrade their lifestyles.”\(^b\) Of 26 former owners who responded to the newspaper’s survey, 16 said they are “much happier” than before they moved; nineteen said they received a “very fair” price. Only one called the price unfair.\(^c\) For most homeowners, the paper noted, the case was acrimonious not because of the possible use of eminent domain, but because “unwilling neighbors caused lucrative sales to stall.”\(^d\) “The Rookwood development was the best thing that has ever happened to me,” one homeowner told the paper. “It is very sad that a few people were unable to see a good thing and almost ruined it for the majority who did see it.”\(^e\) At the same time, a few former residents, including those who continued to contest the use of eminent domain in court, see things differently, regretting the loss of their old neighborhood and objecting in principle to the forced sale of their homes and businesses.\(^f\)

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\(^b\) Merits Brief of City of Norwood at 14, *City of Norwood v. Horney*, Nos. 05-1210, 1211 (Ohio 2006).


\(^d\) See www.sconet.state.oh.us.

\(^e\) Korte & Kemme, *supra*, at A1, E1, E4-E5.

\(^f\) *Id.* at E1.

\(^g\) *Id.* at E1, E5.

\(^h\) *Id.* at E1.

\(^i\) *Id.* at E4.

\(^j\) *Id.* at E1.

\(^k\) *Id.*

\(^l\) *Id.* at E4.
The natural interpretation of public use as ‘public purpose.’” The Court also observed that the needs of society have varied in different parts of the nation and have evolved over time, and accordingly the Court’s public use jurisprudence “has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”

Justice Stevens noted that “[p]romoting economic development is a traditional and long accepted function of government.”

Turning to the particulars of the New London project, the Court said that the city had “carefully formulated an economic development plan that it believes will provide appreciable benefits to the community.” The Court concluded: “Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”

The Court rejected the plaintiffs’ argument that using eminent domain for economic development “impermissibly blurs the boundary between public and private takings.” “Quite simply,” it said, “the government’s pursuit of a public purpose will often benefit individual private parties.” Quoting the Court’s decision half a century before in Berman, the Court observed that “[t]he public end may be as well or better served through an agency of private enterprise than through a department of government.”

The Court recognized, however, that some transfers of property through the use of eminent domain may be problematic, and expressly indicated that it was not necessarily sanctioning “one-to-one transfer[s] of property, executed outside the confines of an integrated development plan.” The Court also “emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power,” and commented that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”

In a separate concurring opinion, Justice Anthony Kennedy emphasized that “transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.” He concluded, however, that New London’s publicly-developed plan did not present any reason to suspect impermissible favoritism to private parties.

**Dissenting Justices’ Views**

Former Justice Sandra Day O’Connor filed a strongly-worded dissent, in which former Chief Justice William Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas joined. Justice O’Connor contended that the majority’s holding abandoned the “long-held, basic limitation on government power” — that the sovereign cannot take property from one citizen to give to another for private benefit — embodied in the Public Use Clause.

She recognized that “public ownership” and “use-by-the-public” are “too constricting and impractical” as definitions of the term “public use,” and that the Court’s prior decisions, including her own opinion for the Court in Midkiff, had sustained the use of eminent domain where property was transferred to other private parties. She contended, however, that condemnation should be limited to circumstances where government seeks to redress “an affirmative harm” to society, such as blighted conditions.

In a colorful passage that was quoted in many news stories, she added: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

Justice Thomas filed a separate dissent, arguing that the Court had erred in its earlier decisions defining “public use” as “public purpose” and in granting deference to legislative determinations of public use. He contended that, as a matter of original understanding of the constitutional text, public use should be limited to public ownership or direct use by the public. Thus, he frankly called upon the Court to repudiate over a century of precedent interpreting the Takings Clause. He also asserted that use of eminent domain for economic development would inevitably harm minorities disproportionately.
The Significance of *Kelo*

Notwithstanding Justice O’Connor’s and Justice Thomas’s strongly-worded dissents, the Court’s decision in *Kelo* can fairly be characterized as an unremarkable application of prior precedent, as many scholars and advocates have acknowledged. The surprising aspect of the case was not the outcome but how badly divided the Court was over an issue that appeared to have been settled long ago. Professor Thomas Merrill has accurately characterized the decision as reflecting admirable judicial restraint, in the sense that the Court applied an entirely plausible interpretation of the constitutional text, ruled in accord with longstanding Court precedent, and left the ultimate questions about whether and how to deploy the eminent domain power to elected officials.

Moreover, if anything, the *Kelo* decision, rather than expanding the eminent domain power, actually may have imposed new limitations on the use of this authority in the economic development context. The Court used the word “plan” or “planning” over 40 times in its opinion, emphasizing that a decisive factor in favor of the city was that it exercised the eminent domain power to carry out a carefully considered, comprehensive community plan. Thus, the Court suggested that more *ad hoc* exercises of eminent domain might not receive the same deference and might not be upheld in the future. The Court also emphasized the fact that the developer chosen to conduct the project was bound by contract to carry out the city’s carefully developed redevelopment program.

The plaintiffs in *Kelo* were depicted as strongly sympathetic, ordinary middle-class Americans who wanted to continue to live in their homes. So far as many media accounts revealed, these families were being ripped from their homes simply to advance more powerful private interests. Fanned by the dire warnings in Justice O’Connor’s dissent and by inflammatory press releases from the Institute for Justice, editorial writers expressed outrage at the notion that a person’s property could be condemned and given to another private party for economic development. Public opinion polls showed strong popular opposition to the Supreme Court’s decision, or at least the popular caricature of the decision. One Congressman denounced *Kelo* as the “Dred Scott decision of the 21st century.” New London city officials were targets of death threats, and libertarians proposed condemning the home of Supreme Court Justice David Souter, who had joined in the majority opinion, to create a “Lost Liberty Hotel.”

A variety of government officials, land use planners, and some developers spoke up in defense of the use of eminent domain for economic development, arguing that this tool advances vital urban revitalization goals and that affected property owners are generally treated fairly. Mayor Michael Bloomberg of New York City, which has long used eminent domain to revitalize and redesign America’s largest city, emerged as the single most prominent and vocal defender of the eminent domain power.

The strong public reaction to the *Kelo* decision generated immediate responses from legislators, both in Congress and in state legislatures. By a vote of 365 to 33, the U.S. House of Representatives passed a resolution expressing its “grave disapproval” of the majority’s opinion. Congress adopted a “rider” to an appropriations bill barring the use of federal funds to support federal, state, or local projects involving use of eminent domain for “economic development that primarily benefits private parties.” Members of Congress from both parties...
Boston’s Dudley Street Neighborhood Initiative (DSNI) demonstrates that eminent domain can be a critical tool for a purely community-based renewal effort. One of the most successful community development projects in the nation, and promoted as a national model in its field, the grass-roots Initiative has used eminent domain strategically to gain control over a “critical mass” of its formerly-decaying neighborhood, allowing it to create a vibrant urban village with well-maintained, affordable housing for community residents.

Once a thriving urban community, the Dudley Street neighborhood, located on 1.5 square miles of land in Boston’s hard-hit Roxbury district, had become a virtual wasteland after the 1950s. One third of the land in the Dudley neighborhood was vacant or abandoned, the area had become a magnet for the dumping of trash, and minority residents and local businesses faced severe constraints, including discriminatory loan policies, in obtaining capital for reinvestment in the area. More than twenty per cent of the neighborhood was burned down by arsonists in the 1960s. The multicultural neighborhood of 24,000 people, including African-Americans, Cape Verdeans, Latinos, and whites, is one of the poorest in Boston; per capita income in the community is less than half that of the City of Boston as a whole, and 32% of its residents are below the poverty line.

In 1984, La Alianza Hispana, a non-profit social service agency located on Dudley Street, began a discussion with a local philanthropic foundation about possibilities for neighborhood improvement. From that initial collaboration, the Dudley Street Neighborhood Initiative, a grass-roots community organization controlled by local residents, was founded. DSNI countered the city’s plans for large-scale redevelopment of the area with its own vision of a vibrant urban community, with a town common, park, retail shops and community center, as well as high quality but affordable housing for local residents.

The concept of “critical mass” was a key element of this vision. To overcome destructive market forces leading to a spiral of deterioration and abandonment, community leaders realized that they needed to consolidate ownership of the extensive tracts of vacant land in the heart of the neighborhood. DSNI focused on the “Triangle,” a 64-acre area at the center of the Dudley Street community almost half of which consisted of scattered empty lots. The City of Boston was willing to donate 15 acres of city-owned land in the area, but its properties were intermingled among private holdings, often tax delinquent and abandoned. Foreclosing on the tax delinquent properties would have been complicated and time consuming, and developing only the scattered parcels of city-owned land would not have accomplished DSNI’s goals of achieving sufficient critical mass to change the economic environment in the community. DSNI persuaded the City of Boston to authorize it to use eminent domain, becoming the first grassroots community organization in the nation to receive the power to take private land. With funding provided by the Ford Foundation, the community group purchased the properties and created a land trust on which it began to build new, affordable homes for neighborhood residents.

DSNI has now built more than 400 single-family homes, refurbished 740 existing
houses, and constructed a new town common, a community center and gym, a childcare center, and a community greenhouse. It has established youth and sports programs, a summer camp, and adult education programs for high school dropouts, and sponsors job fairs and classes for low-income people who want to buy homes. The community has driven drug dealers and illegal dumpers from the area. The group’s efforts have literally transformed the face of the neighborhood. Debra Wilson, who was able to buy her house after taking a community home-buying class, says, “When I first came here it was all overgrown with weeds, old tires, abandoned cars everywhere. I couldn’t imagine this as a neighborhood like it is now. It still surprises me.” Gertrudes Fidalgo, who helped develop the original vision for the community as a youth and returned to Dudley Street after college to work as a community organizer, says, “The only way to make things happen is to dream. Dreams are your best resource.”

Because the land-use problem facing the Dudley Street neighborhood was largely the destructive effect of underutilized and abandoned property in its midst, DSNI focused on acquisition of vacant land, and did not use eminent domain to take occupied properties. Nonetheless, it could not have achieved its vision of a vibrant urban village without the use of eminent domain to assemble a coherent “critical mass” of land for the affordable housing and community buildings the neighborhood so badly needed. As one study of the Initiative concludes, “DSNI could not practicably purchase these lots on the open market.... Eminent domain would be the only way to assure that DSNI obtained the land required to implement its redevelopment plan in a comprehensive fashion.”


b Elise M. Bright, Reviving America’s Forgotten Neighborhoods 77 (2000).

c Gilman, supra, at 791.

d Id.

e Taylor, supra, at 1079-80.

f Id.

g Gilman, supra, at 793.

h Id. at 792-93.


j Id.

k Taylor, supra, at 1082.
filed bills seeking to overturn _Kelo_. The U.S. House of Representatives passed one _Kelo_ reform bill by a wide margin, but the Senate has not yet taken up the issue.52

The reaction to _Kelo_ was also strong at the state level, where _Kelo_ reform bills have been introduced in virtually every state legislature. By June 2006, some twenty-two states had enacted new restrictions on the use of eminent domain, and several other bills were awaiting signature by state governors. These new state laws vary, but many enact substantive prohibitions on the use of eminent domain for “economic development,” or where property will be transferred to another private party.53 The laws typically contain exceptions for condemnation to serve utilities, transportation projects, and sometimes other favored uses. Texas, for example, specifically grandfathered sports venues approved by voters by the end of 2005 to allow Dallas to use eminent domain for the new Dallas Cowboys stadium.54 A few states have granted property owners the right to seek reversion of their property if it is not devoted to a valid public use, or have provided for payment of enhanced compensation for residential property.55

Many of the new eminent domain “reform” laws preserve the government’s authority to condemn property for “blight removal.”56 However, responding to complaints by property rights advocates that retention of authority for urban renewal of deteriorated neighborhoods constitutes an inappropriate “loophole,”57 some statutes establish new, narrower criteria for determining that a property is blighted or even prohibit the use of eminent domain to alleviate blight altogether.58

Most recently, on June 23, 2006, on the one-year anniversary of the _Kelo_ decision, President Bush issued an Executive Order declaring that the policy of the United States is to “protect the rights of Americans to their private property … by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”59 The executive order does not constrain any existing legal authority of any federal agency, and contains numerous specific exclusions allowing the use of eminent domain in transportation, telecommunications, public utilities, prevention of harmful uses of land, and other purposes. The order also does not restrict the use of federal funds for state or local redevelopment projects. Commentators therefore concluded that the order does not appear to affect significantly the activities of any federal agency.60

**POLICY ISSUES RAISED BY THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT**

The use of eminent domain to advance economic development goals raises important policy questions. Is eminent domain in fact an important tool for cities seeking economic revitalization? Are the interests of property owners adequately protected by the constitutional requirement that the government pay “just compensation” when it takes property? What are the effects on residents displaced by eminent domain and are they treated fairly? To what extent has the power of eminent domain in fact been abused to serve private interests, and are there steps that can be taken to protect against such abuse without prohibiting the use of condemnation altogether? Do governments unfairly target minority and poor populations, and vulnerable entities such as churches, in exercising eminent domain?

The highly-emotional debate over eminent domain that followed _Kelo_ has provided little illumination of these questions. Unfortunately, there is little empirical data on the use of eminent domain for economic development and its consequences,41 and there has been little in the way of thoughtful analysis of the pros and cons of eminent domain or how current eminent domain practices might be reformed in a way that preserves the benefits of this
tool while minimizing the potential for abuse. The balance of this report seeks to take a modest step toward filling these gaps.

**IS EMINENT DOMAIN AN IMPORTANT TOOL FOR ACHIEVING URBAN REDEVELOPMENT?**

Whether the use of eminent domain serves important economic development purposes appears to break down into two subsidiary questions. First, is eminent domain necessary, or at least very useful, to promote redevelopment projects? Second, does the success of redevelopment projects depend upon, or at least benefit significantly from, the involvement of private developers as actual owners of the land involved?

If either of these questions could confidently be answered “no,” then restricting cities’ use of eminent domain for economic development would have little adverse impact. In other words, if cities could easily promote redevelopment by relying on market transactions with willing sellers, there would be no need for the use of eminent domain. Similarly, if cities could themselves build, own and operate urban development projects without involving private developers, the use of eminent domain in connection with such projects would presumably satisfy the most restrictive definition of public use. But if cities truly need to use eminent domain to promote redevelopment, and if they also need to rely upon the expertise, capital and entrepreneurial ability of private developers, then prohibiting the use of eminent domain in such circumstances may significantly impede economic development objectives.

**Land Assembly and the Holdout Problem**

The first question principally centers on the challenge of land assembly and the problem of “holdouts.” A basic justification for the eminent domain power is that it allows the government to facilitate the efficient recombination of property ownerships by overcoming the objection of the holdout who refuses to sell or, what may amount to the same thing, refuses to sell at a reasonable price. This rationale is widely accepted, even by property rights advocates, in the case of roads or utility lines, where the refusal of a single owner to sell could make the connection of many properties into a useful linear corridor difficult if not impossible. The same issue can arise, however, when cities attempt to assemble land for urban redevelopment projects. Thus, it is hardly surprising that many of America’s most prominent urban redevelopment projects have involved the use of eminent domain, including New York City’s Lincoln Center and its revitalized Times Square, Baltimore’s Inner Harbor, and the District of Columbia’s planned baseball stadium south of the U.S. Capitol.

The conventional justification for the use of eminent domain in this setting has been that, in older cities and suburbs, the fractionation of land ownerships has made the assembly of land suitable for development virtually impossible without eminent domain. As Professor Marc Mihaly, a lawyer with extensive experience in urban development, has explained:

> [A] major obstacle to economic revitalization of urban cores is “over-subdivision,” where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible.

Economists describe the excessive fractionation of urban property as an example of the “tragedy of the anticommons,” where too many people have the ability to block use of a societally-valuable resource, resulting in its underutilization.
Kansas City, Kansas had seen its share of developers’ pipedreams fall flat, including an Oz theme park, an outdoor music pavilion, and a horserace track. Struggling with a legacy of poverty, crime, and political corruption, and burdened with a stagnant economy that had never recovered from the great flood of 1951, Kansas City, Kansas and surrounding Wyandotte County had faced decades of economic difficulty. Residents were leaving because of a lack of retail services and amenities, and declining tax revenues forced cuts in government services and increases in property tax rates, creating a downward spiral. “We were a dead community,” recalls Don Denney, a spokesperson for the unified city and county government. “We couldn’t get developers to return our phone calls, much less come visit us.”

All that changed in 1997 when a newly-invigorated government for the city and county came up with a daring idea for a sophisticated public-private partnership, relying on its powers of eminent domain, to spark economic development. The city and county government persuaded the International Speedway Corporation to build a new $250 million NASCAR racetrack on sparsely-settled land at the junction of two interstate highways west of Kansas City. The city and county offered ISC $95 million in financing, structured through long-term bonds paid by deferred property taxes so there would be no impact on residential tax rates.

The truly creative aspect of the project, however, was the local government’s recognition that the racetrack alone would not generate the economic revival it sought; instead, it needed to tie the new attraction to new shopping, restaurant and entertainment opportunities so that visitors would stay for days, rather than leave after a race. The city and county thus planned a new mixed-use development, called Village West, on a 400-acre site adjacent to the track. That project would pay its own way in taxes from the beginning, providing revenue for the cash-strapped government as well as badly-needed retail and entertainment services for residents. The city and county’s plan ran counter to conventional wisdom; private developers and consultants had told the government that new retail could not succeed without increased residential population, but the government had the vision to recognize that the speedway would be a magnet that would support retail development and attract new residents.

The city and county government’s plan succeeded brilliantly. As a local business magazine noted in hailing the development as one of the biggest deals in Kansas City’s history, “The impact was both immediate and electric…. Overnight, [Kansas City, Kansas] and western Wyandotte County became one of the hottest growth areas of the region.” After the speedway’s inaugural 2001 season, the Kansas City Sports Commission concluded that the track alone had pumped $89.3 million into the local economy. But the most important economic benefits have come from the Village West development adjacent to the track. Home to an outdoor sporting goods store that has become the number one tourist attraction in the state, an indoor waterpark, the Kansas City T-Bones baseball team, and a host of other entertainment and retail venues, the still-expanding Village West draws 10 million visitors a year, has created 3,000 jobs, and generates $5 million a year in property taxes (up from $15,000 per year before develop-
ment). Kansas City, Kansas is experiencing a housing boom, and the speedway and Village West have spurred hundreds of millions of dollars in new commercial and retail investment in the area. The city and county’s new revenues have permitted the government to lower taxes and to pump funds into revitalizing older areas of the city, and will allow early payback of the 20-year bonds that financed the raceway.

None of this would have been possible without the government’s initiative; the Village West site was “in the middle of a demographically barren nowhere” that attracted no interest from developers. Nor would it have been possible without the use of eminent domain. The 1,000-acre speedway site at the junction of Interstates 70 and 435 contained 146 homes and owner-occupied farms, as well as four businesses. The city and county committed to offer the homeowners 125% of the assessed value of their properties, but was still required to initiate eminent domain to acquire all of the land needed. The city’s mayor found the decision to use eminent domain very difficult, but realized that the government needed land to fulfill its vision for redevelopment of western Wyandotte County. City and county officials later testified before the state legislature that if the use of eminent domain for such economic development projects were prohibited, the Speedway and Village West projects wouldn’t have been possible, and “nothing like it will ever be possible again.”

Some of the former homeowners on the site remain bitter about being forced to sell their properties, but many now support the project and are happy with their new homes elsewhere in the area. One homeowner observed about her new home: “At first I was pretty bitter about having to come out here, we’d lived there so long. But now I love it.” She’s also proud of the progress around the new speedway: “It’s beautiful and ... it just amazes me when you go down there to eat how there are all those places and they’re busy. It’s just a beautiful thing.”

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c Garrison, supra.
d Alm, supra.
e Cathy Swirbul, Tilling the Local Economy, PUBLIC POWER, May-June 2006.
f Mark Weibe, Housing Boom Moves to KCK; Construction Follows Race Track, Retailers, KANSAS CITY STAR, Dec. 22, 2004.
g Lisa Scheller, Where Did They Go?, TONGANOXIE MIRROR, Aug. 4, 2004; Langston, supra.
h Alm, supra.
j Id.
k Testimony of United Government of Wyandotte County/Kansas City Kansas on Senate Bill 547, Senate Judiciary Committee, Kansas Legislature (Mar. 9, 2004).
m Id.
n Id.
The fundamental question, however, is whether the use of eminent domain for land assembly is truly necessary to carry out redevelopment projects. The land assembly challenge and the holdout problem obviously can arise when city planners select a specific area of the city for redevelopment, as in the case of the Fort Trumbull area in the *Kelo* case. Certainly from a planning perspective, the eminent domain power is extremely useful because it allows the public to prescribe specific forms of development in a particular area to generate maximum public benefits. In other cases, the exact location of a redevelopment project within the community may be relatively unimportant, because there may be multiple potential sites for the project, possibly including sites that can be redeveloped without the aid of eminent domain. Some communities may have so few large-scale parcels that it may be impossible, without the eminent domain power, to site major new projects anywhere in the communities. The situation undoubtedly varies from city to city. Unfortunately, we lack the data to definitively answer “how necessary” eminent domain really is in these circumstances; more and better information might help provide clearer answers.

The mayors of many major cities, such as Anthony Williams of the District of Columbia and Michael Bloomberg of New York City, insist that large-scale redevelopment would be impossible in their communities without eminent domain. The mayors of nineteen U.S. cities, ranging from Miami to San Francisco, signed a resolution making the observation that the problem of land assembly is “one of the biggest obstacles to the revitalization of our metropolitan areas,” and affirming that “eminent domain is ... critically important for municipalities to promote sensible land use, revitalize distressed communities ... and alleviate the problems of unemployment and economic distress by fostering economic development.”*65* The National Conference of Black Mayors has declared that “eminent domain is often a municipality’s only recourse when faced with reclaiming forgotten communities in the face of uncooperative absentee landowners and vice establishments.”*66* While these statements might be dismissed as the defensive posturing of government officials who see their authority under threat, they should give some pause to those who would quickly jettison traditional eminent domain authority without considering the potential unintended consequences.

Critics of eminent domain respond by saying that, while eminent domain may be *useful* in generating desirable development, it is hardly essential. They point to the fact that private firms are responsible for many major development projects, and cite the Michigan Supreme Court’s observation that “the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce,” most apparently developed without the use of eminent domain.*67* This facile argument misses the point that development may be easy and quick on the urban fringe, where large parcels are relatively abundant, but that the situation is dramatically different in urban areas, where land ownership is much more divided. In that setting, although purely private developments sometimes can and do succeed,*68* there may be urgent need on occasion for government intervention to rescue a publicly-supported redevelopment project from the veto power of a holdout.

Critics also argue that cities can use skillful techniques to acquire properties through voluntary purchases, without resorting to condemnation or the threat of condemnation. For example, they suggest that government, borrowing a page from private developers, could assemble property clandestinely by using secret buying agents, option agreements, and “straw transactions.”*69* If private developers are able to negotiate the purchase of sites for shopping centers and office buildings, critics ask, why can’t the government? While there is some force to this point, it arguably makes the mistake of confusing the role of government with that of a private real estate investor. When the government is using public funds to advance some public objective, the public presumably deserves some voice in deciding
whether the funds are being wisely spent for a valuable purpose. It would be difficult, to say the least, to coordinate a secret government land purchase program with a publicly-accountable planning process. Further, government agents spending taxpayer money in secret without public oversight would appear to create serious risks of public corruption.

Critics further argue that the issue largely comes down to a matter of money: if municipal leaders were forced to compete in the “open market” to purchase land, they might have to pay more to assemble properties, but they could still do so. It is certainly logical to suppose that in some circumstances cities could indeed overcome owner reluctance to sell by offering more money. As a practical matter, however, state and local governments already seem to use considerable effort to try to secure needed land through voluntary acquisition, and frequently offer above-market compensation in order to avoid costly, time-consuming and politically-controversial legal proceedings. But in some cases a particular owner may be unwilling to sell at any price, squarely pitting the individual’s claim of unfettered rights in his property against the greater good of the community.

Moreover, the critics’ argument fails to take into account the full dimensions of the holdout problem. A savvy property speculator could threaten to derail a project if he does not receive a significant, and arguably unfair, premium. If public authorities no longer had the option of initiating condemnation proceedings, the public would lose considerable leverage and owners could seek to extract significant windfalls at taxpayer expense. Of course, if a speculator miscalculates and demands more than the project can support, he might, rather than reap a windfall, derail the project, depriving not only himself of a potential profit but the community of a potentially valuable development.

It is also noteworthy that reliance on voluntary acquisitions may not be sufficient to establish clear title given the complex landscape of many inner cities. The assembly of fragmented parcels in an urban center often confronts city officials and developers with the need to resolve uncertainties in legal title caused by absentee and unknown owners whose interests, if still valid, may date from the 19th century. Without eminent domain, which provides a judicial process to resolve such title problems while protecting the due process rights of property owners, many such sites could never be acquired and redeveloped.

Another response of the eminent domain critics to the holdout argument is that cities and developers can simply design around holdouts. For example, the Institute for Justice dismisses the holdout argument in part by asserting that “there is absolutely nothing wrong with piecemeal or infill development.” Urban redevelopment projects can sometimes be accomplished in several alternative site layouts, and it may be possible to redesign them to accommodate unwilling property owners. But, in other cases, holdouts may possess parcels squarely in the middle of the planned redevelopment area, threatening the viability of the entire project. In Kelo, for example, the handful of objecting property owners occupied parcels scattered throughout one section of the proposed development site, blocking planned changes to the street layout and likely preventing meaningful site design. Similarly, holdouts on the site of the District of Columbia’s new baseball stadium were smack in the middle of the planned location of the stadium. Moreover, even if it is physically possible to redesign around a holdout, coherent and graceful design may be lost in the process. The Washington Post recently ran a front-page photograph of an aging townhouse precariously perched in the middle of the excavation for a block-sized office building. Such oddball examples of urban design would presumably become more prevalent if the use of eminent domain for economic development were sharply restricted or eliminated.

**Private Market Failure in Valuing Development Opportunities**

While the need to overcome the holdout problem encountered in the process of land assembly represents
The use of the eminent domain power to address the need of a private automobile speedway in a community in southern Illinois for additional parking space raises troubling questions about the use of eminent domain.

In 1966, the Southwestern Illinois Development Authority (SWIDA) provided financial assistance to Gateway International Motorsports Corp. to support the construction of an automobile racetrack in southern Illinois, across from St. Louis, Missouri. The Gateway International Raceway flourished, and in 1998 the owner increased the track’s seating capacity. It asked SWIDA to use its power of eminent domain to acquire a 148.5-acre parcel of property west of the track owned by National City Environmental (NCE), a metal recycler and car shredder, for expanded parking. Gateway agreed to pay the costs of the acquisition, and to pay SWIDA a fee representing 6-10% of the purchase price.

The St. Clair County board authorized SWIDA’s use of eminent domain for this project on the grounds that expanded parking was necessary to serve dramatic attendance increases expected at the racetrack, and that expansion of the track’s facilities would serve the general welfare by generating substantial tax revenues. SWIDA offered NCE $1 million for its property, which NCE rejected. SWIDA then filed a “quick take” condemnation action in state court. After a hearing at which the Illinois Department of Transportation testified that inadequate parking was causing serious pedestrian and traffic safety problems on racedays, and witnesses for SWIDA, Gateway, and cities in the area testified that expansion of Gateway’s operations would provide significant economic benefits for the area, the circuit court approved the taking.

On appeal, the Illinois Supreme Court ruled that the proposed use of eminent domain did not serve a valid public use. The court held that property taken by eminent domain must be accessible to the public as of right, and concluded that the Gateway racetrack did not qualify since patrons were charged for admission and parking. The court characterized SWIDA’s effort to acquire land for Gateway as serving a “purely private benefit.” The court noted that SWIDA had not conducted a thorough study of the parking situation at Gateway, and that Gateway apparently had other alternatives to meet its parking needs, such as an on-site parking garage. Even more damning, the court observed that SWIDA “advertised that, for a fee, it would condemn land at the request of ‘private developers’ for the ‘private use’ of developers.” The court concluded: “It appears SWIDA’s true intentions were to act as a default broker of land for Gateway’s proposed parking plan.”

A dissenting judge accused the court of overlooking the substantial evidence in the record showing that the county and development authority had acted out of serious traffic safety concerns as well as legitimate interests in promoting the economic health of the region. The dissenting judge also noted that the majority had used a test for public use, requiring access for the public as of right to taken property, that was inconsistent with the U.S. Supreme Court’s holdings on this point.

The SWIDA case presents troubling
issues regarding the influence of a powerful local business over government's exercise of eminent domain. The Illinois Supreme Court apparently perceived the regional development authority as essentially offering to delegate its powers of eminent domain to private parties for a fee, thus allowing private businesses to avoid the costs and risks of the open real estate market.\textsuperscript{a} It was far from clear that the use of eminent domain was even necessary, since it appeared that the racetrack could have built a parking garage on its own land instead. Furthermore, SWIDA had engaged in a very truncated negotiation with NCE, and had done relatively little planning to support its decisions.

On the other hand, as the dissent pointed out, there was in fact strong evidence of traffic safety problems caused by current parking problems at the track, and testimony indicating that a parking garage was economically infeasible.\textsuperscript{b} SWIDA had at least done some study of the economic impact of expanded track operations, and its interest in promoting economic development in the region reflected its statutory mission. A different court, using a less-restrictive test for public use, might have concluded that SWIDA acted properly to serve a larger public purpose, rather than merely to help Gateway achieve its private needs.

\begin{itemize}
\item[a] Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 768 N.E.2d 1, 4 (Ill. 2002).
\item[b] Id.
\item[c] Id. at 5-7.
\item[d] Id. at 8-11.
\item[e] Id. at 9.
\item[f] Id. at 10.
\item[g] Id.
\item[h] Id.
\item[i] Id. at 12 (Freeman, J., dissenting).
\item[j] Id. at 17 (noting that the U.S. Supreme Court had rejected any requirement that property taken by eminent domain be directly used by the public in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 243-44 (1984)).
\item[k] See id. at 10-11.
\item[l] Id. at 25.
\end{itemize}
the primary justification for the use of eminent domain, there is a separate rationale that rests on the notion that certain owners, looking solely to their own private interests, are not likely to recognize and act upon the true economic value of deploying their property to a higher and better use. This rationale appears to underlie the use of eminent domain by Boston’s highly-regarded Dudley Street Neighborhood Initiative (DSNI). Exercising the city’s delegated eminent domain authority, DSNI has acquired vacant properties in the Roxbury section and redeveloped them, primarily for residential use. The primary challenge facing Roxbury was a long-term loss of population and building units, which was gradually undermining the social and economic viability of the community. DSNI used eminent domain to help accomplish its plan to convert Roxbury into an “urban village” for low-income residents.76

At least in theory, the City of Boston could have used other strategies to induce owners of vacant properties in Roxbury to redevelop their properties, including various kinds of public subsidies. Whether such strategies would induce investments by enough owners to overcome the negative effects of vacant and deteriorating properties on the neighborhood, and when such reinvestment might take place, would have been entirely uncertain, offering little assurance to the struggling Dudley Street community. The use of eminent domain, however, permitted the community to proceed with its redevelopment program in a targeted fashion, and arguably avoided granting absentee and otherwise disinterested owners unfair windfalls.

The Value of Public-Private Partnerships to Pursue Economic Redevelopment Goals

Much of the controversy over the use of eminent domain for economic development arises from the fact that many projects involve transfer of title to the condemned property to private developers. The concerns are that government power might be deployed primarily if not exclusively to benefit powerful special interests, or that the public objectives of the project may be subordinated to private goals. This feature of eminent domain in the economic development context distinguishes it from other uses of eminent domain, such as for highway construction, which may be equally disruptive of private property interests, but where some government entity generally ends up holding the property.

One threshold question is whether this entire problem might be avoided if government retained title to redevelopment areas and simply leased different parcels of the area to various developers and other businesses. This type of arrangement might be viewed as preserving a measure of public control, and might alleviate concerns about the use of eminent domain. However, especially if the leases were very long term, the practical differences between actual transfers of title and leasing arrangements might be quite modest. Importantly, the sweeping eminent domain legislation adopted by the U.S. House of Representatives and many of the laws enacted or under consideration in various states treat transfers of title and leases as being indistinguishable. Thus it seems clear that most of the concerns about special interests potentially benefiting from the use of eminent domain for economic development cannot be finessed through leasing arrangements.

The fundamental justification for transferring effective control (whether through sales or leases) to private entities appears to be that government has little experience and questionable competence in operating many of the uses slated for redevelopment areas. Thus, for example, it would be unusual, perhaps even bordering on the bizarre, for the government to take on the role of owning and managing grocery stores, shopping centers, hotels, and myriad other kinds of uses that are typical in redevelopment areas. Of course certain other typical uses in redevelopment areas, such as housing, are commonly provided by government entities. Even in that circumstance, however, there are plausible arguments for enlisting private enterprise to undertake this type of development. In sum, the idea of using eminent domain
for economic redevelopment, while avoiding retransfers to private entities, appears to be in considerable tension with the basic goals of many redevelopment projects.

The problem is underscored by the current popularity of mixed-use developments, in which various public facilities and functions, such as libraries or public open space, are frequently mixed together with private businesses and residences.77 The use of eminent domain for the publicly-owned facilities in such projects will generally be regarded as non-problematic. But the entire development scheme could be derailed if eminent domain were unavailable to support the private aspects of the development. Thus, prohibitions or severe restrictions on the use of eminent domain to assemble properties intended in part for use by private developers could make such mixed-use development far more difficult, if not impossible.

The Opportunity Costs if Redevelopment Were Impeded

The ultimate question, of course, is what would be the opportunity costs, in terms of lost redevelopment opportunities, lost tax revenues, lost employment, and lost hope for urban revitalization, if the eminent domain power were unavailable. Presumably no one would object to abandonment of the eminent domain power if that course imposed no costs on society. But it seems clear that is not the case, though the potential economic and social costs if cities could not use eminent domain to pursue urban redevelopment are certainly difficult to quantify. Even if these costs could be quantified, they are largely incommensurate with the perceived offense to individual liberty and dignity sometimes caused by eminent domain. Thus, the debate over eminent domain presents an exceedingly difficult cost-benefit problem.

Based on common sense, it seems reasonable to suppose that eliminating the power of eminent domain for economic development might well impose serious social and economic costs. Depending on the character of the community and the local real estate market, site assembly for redevelopment would presumably become more time consuming and expensive without the eminent domain power, if it were feasible at all. Thus, eliminating or restricting the eminent domain power could be expected to shift development opportunities from older urban areas with fractionated ownership patterns to outer suburbs and rural areas. Lost development opportunities in urbanized areas would presumably translate into lost tax revenues, increasing the burdens on many communities caught in a negative spiral of heavy public service burdens supported by a shrinking or static tax base. Lost development opportunities would also presumably mean fewer job opportunities, often in those communities that need more employment opportunities the most.

The reality, however, is that no one really knows whether these negative consequences would follow from eliminating or restricting eminent domain, or how serious the impacts might be. A handful of states — South Carolina and Arkansas, for example — have long restricted the use of eminent domain for economic development, suggesting that economic progress is possible even if this power is limited.78 But, significantly, these states are not generally among the most urbanized. Thus, the experience in those states may well not be transferable to other states, such as Missouri or Pennsylvania. Moreover, even among those few states that have traditionally restricted use of eminent domain for economic development, we do not know what economic penalty those states have paid, or may pay in the future, for restricting their redevelopment options. All of these uncertainties appear to argue for a certain measure of restraint in considering proposals to curtail this traditional and widely used municipal power.

From an environmental standpoint, eliminating or restricting the power of eminent domain would tend to undermine efforts to advance “smart growth” policies. The revitalization of urban areas to reduce the centrifugal pressure of outward migration is an important strategy for containing the size of metropolitan areas and for maintaining densities that will support transit-
The failed effort by Lancaster, California to use its eminent domain power to force a discount retailer to vacate the city’s major shopping mall in order to accommodate the expansion plans of Costco is often cited as an especially problematic abuse of the eminent domain power.

The City of Lancaster, a city of 130,000 near Los Angeles, developed the “Power Center,” part of the city’s Valley Central shopping center, in the late 1980s through a major urban renewal effort that relied in part on eminent domain. By the late 1990s the shopping center had become “one of the most prestigious shopping areas in the city,” housing major retailers like Home-Base, Wal-Mart, and Circuit City as well as Costco.

In 1998, 99 Cents Only Stores, a discount variety retailer, leased space in the shopping center. Almost immediately thereafter, Costco informed the shopping center’s owner and the city that it wanted to expand the size of its store, and threatened to relocate to a nearby town unless it was provided with additional space. The mall owner advised the city that “the most efficient use of [Costco’s] property would be an expansion to the south of their existing facility behind the 99¢ Only Store.” Costco, however, demanded the space occupied by 99 Cents Only Stores. Fearing the loss of an “anchor tenant,” the city began negotiations with the mall owner to purchase the 99 Cents Only Stores space; the city did not include 99 Cents Only Stores in these discussions.

When negotiations failed, the city filed condemnation proceedings, proposing to purchase the property on which 99 Cents Only Stores was located for $3.8 million, relocate 99 Cents, and resell the property to Costco for $1.00. The city proposed to pay 99 Cents Only Stores $130,000 for its leasehold interest, with additional unspecified amounts for the costs of relocation and the loss of goodwill. The city’s resolutions authorizing the condemnation did not claim that 99 Cents Only Stores’ space was blighted, or that the shopping center itself was blighted, although a finding of blight is a precondition for the exercise of eminent domain for redevelopment purposes in California. After 99 Cents Only Stores sued, the city rescinded its resolutions, and informed the court that it found alternative space for Costco. It would not stipulate, however, that it would not later seek to condemn 99 Cents Only Stores’ space, and the court refused to dismiss the suit.

On these facts, a federal district court enjoined the taking of 99 Cents Only Stores’ leasehold, finding that “the evidence is clear beyond dispute that Lancaster’s condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another.” Noting that Lancaster had admitted that “the only reason” it had initiated condemnation proceedings “was to satisfy the private expansion demands of Costco,” the court concluded that the city’s conduct “amounts to an unconstitutional taking for purely private purposes.” The court rejected the city’s concerns that the loss of a major business might lead to the reestablishment...
of blight in the area, finding the city’s argument that it had acted to avert “future blight” unsupported by evidence as well as illegitimate under California law. The court also rejected the city’s alternative argument that the blight findings it had relied upon to justify the original assembly and redevelopment of the site for the shopping mall could support the transfer of the leasehold to Costco.

The 99 Cents Only Stores case is troubling because it appears to involve the use of eminent domain solely to accommodate the preferences of a powerful business. Although Lancaster’s concern at the potential loss of a major employer and taxpayer is understandable, the record indicated that Costco’s expansion plans could have been, and apparently ultimately were, satisfied with an alternative site. The city’s desperation to keep Costco is evidenced by its apparent willingness to spend almost $4 million for the property Costco wanted, and to resell it to Costco for a nominal sum. Lancaster’s use of eminent domain to effect this one-to-one transfer certainly did not grow out of the kind of comprehensive planning process that the Supreme Court had pointed to in upholding the use of eminent domain in <i>Kelo</i>.

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b  Id.
c  Id.
d  Id.
e  Id. at 1127.
f  Id.
g  Id. at 1129.
h  Id. at 1129.
i  Id. at 1129-30.
j  Id. at 1130 n.2.
and pedestrian-oriented communities. Thus, to the extent restricting eminent domain would make downtown redevelopment more difficult, it would tend to exacerbate the problem of sprawl and the associated problems of traffic congestion, loss of open space, and high transportation costs.

ARE PROPERTY OWNERS FAIRLY COMPENSATED?

Another key question in the eminent domain debate is the extent to which awards of “just compensation” and other financial payments to property owners solve or at least mitigate the burdens imposed by the exercise of the eminent domain power.

“Just Compensation” and Relocation Assistance Payments

Perhaps the most distinctive feature of eminent domain is that government can exercise this power only if it is willing to pay financial compensation to citizens affected by its exercise. The Takings Clause states that the government can use the taking power only if it pays “just compensation” for the property taken. The Supreme Court has long defined this to mean “fair market value” — “what a willing buyer would pay in cash to a willing seller.” An owner, the Court has declared, “is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.” The Court has also observed that the “transferable value” of a property “has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.”

It can be argued, at least as a first approximation, that payment of just compensation should fully mitigate the effect of a taking of private property. In Lucas v. South Carolina Coastal Council, Justice Antonin Scalia quoted the famous jurist Lord Coke’s statement: “[F]or what is the land but the profits thereof?”

Taking this viewpoint seriously, if rights in property consist of nothing more than their economic value, and the government is willing to pay an owner the market value of the property, what has the owner really lost when property is taken in exchange for just compensation? Consistent with this viewpoint, the Supreme Court has repeatedly emphasized that the Takings Clause “is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.”

Just compensation awards under the Constitution generally do not include payment for consequential damages caused by dislocating a resident or a business, however, such as moving costs, lost good will or lost profits. Losses from relocation can impose significant hardships on small businesses, which may be unable to reopen or may fail in a new location. Residents, particularly tenants, also may face serious hardships in finding comparable housing.

But owners whose property is condemned generally are eligible to receive relocation assistance payments under federal and state laws. The federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, enacted in response to concerns about the impacts of wide-scale displacements caused by highway and other development projects, requires federal agencies and state and local agencies receiving federal funds to provide relocation assistance when they displace residents and small businesses. The act requires payment of residents’ moving expenses, as well as mortgage and closing costs; farms and businesses can also claim up to $10,000 for “reestablishment” expenses.

Perhaps more importantly, the act requires agencies to ensure that residents can obtain “comparable” replacement housing before taking their property, at least ostensibly guaranteeing displaced residents that they can remain in their community at an affordable price. Displaced homeowners can receive payments of
$22,500 or more, on top of the market value of their homes as awarded in the condemnation proceeding, to cover the cost of obtaining “comparable” housing. Tenants are entitled to rental assistance of up to $5,250. Agencies also must offer displaced residents relocation advice to assist them in searching for a new home or business location. Studies by the U.S. Department of Transportation show that nearly 90% of homeowners receiving relocation assistance reported that they were “able to significantly upgrade” their housing.

Many property owners affected by eminent domain are eligible for assistance under the federal act because, apart from federally sponsored projects, many state highway and redevelopment projects are constructed using federal funds. In addition, most states require similar relocation assistance for projects using state funds or, more broadly, for condemnations by any public entity.

Negotiated Payments
In practice, many, perhaps most, payments for the taking of private property occur through negotiated settlements rather than formal judgments in condemnation proceedings. The city or redevelopment agency may seek to negotiate with property owners, and in other cases the developer takes the lead in the negotiations. Because these discussions take place in the shadow of potential legal proceedings, the just compensation standard and rules governing relocation assistance provide important sideboards for the financial terms of any agreement. At the same time, cities are apparently willing to pay a premium in negotiated agreements because they prefer to resolve condemnation disputes amicably, and because a quick resolution can save the city both time and litigation expenses. In addition, federal and state laws governing condemnation proceedings typically require government to bargain in good faith with property owners before resorting to eminent domain, and to support their offers with formal appraisals. Cities also may be required to pay owners’ attorneys’ fees and costs if the final award in a condemnation suit exceeds the amount offered. Municipalities thus have strong incentives to make reasonable, and even generous, offers.

Not surprisingly, therefore, there is significant anecdotal evidence that negotiated payments are sometimes well in excess of the amounts owners could expect in formal condemnation awards. A recent empirical study of land acquisition for a new manufacturing plant in Indiana found that the developer paid homeowners an average of 141% of the appraised value of their homes. Newspaper accounts of land acquisition for the Atlantic Yards project in Brooklyn, New York and for the new baseball stadium in Washington, D.C. provide examples of property owners being offered up to three times the market value of their properties. The assertion is commonly made that informal offers of payment actually represent low-ball offers, and it stands to reason that aggressive government officials or developers will sometimes attempt to acquire property at a low cost, particularly from relatively unsuspecting owners. Whether or not property owners are well compensated in general is difficult to determine. But landowners certainly have considerable leverage in the process, in many cases property owners have fared quite well, and reforms could be adopted to make payments more generous.

Unresolved Subjective Valuation Issues
Despite the availability of “just compensation” and other financial assistance, there remains the concern that financial payments, even if they exceed the legal definition of “just compensation” and satisfy statutory relocation assistance requirements, may not be adequate to truly compensate property owners for their losses. Estimates of fair market value are based on general market conditions, and are unlikely to reflect the actual value that any particular owner places on her property. After all, based on traditional economic thinking, if fair market value were adequate to induce the owner to sell, the owner presumably would have already placed the property on the market at that price.

The adequacy of constitutional and statutory
THE HOLDOUT PROBLEM

“[E]minent domain applies where market exchange, if not impossible to achieve, is nevertheless subject to imperfections.... [C]onsider the most common situation in which we see the exercise of eminent domain: a public or private project requiring the assembly of numerous parcels of land.... Without an exercise of eminent domain, [the developer] must obtain [land] from each of hundreds of contiguous property owners. Each 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.”


Houses of property owners who refused offers for voluntary sale on the site of the Rookwood Exchange Project, Norwood, Ohio.

Developers of a large office building in Washington, D.C. were forced to build around this townhouse/office when its owner demanded up to 75 times its assessed value.
THE HOLDOUT PROBLEM

“[A] major obstacle to economic revitalization of urban cores is ‘over-subdivision,’ where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible.”


Site map of Metrotech project in Brooklyn, N.Y., showing fractionated property lines.

Holdouts controlled the central properties needed for the Skyland Shopping Center in Southeast Washington, D.C.
Site map of New York City’s Times Square redevelopment, showing highly subdivided plots.
Resisting property owners would have made construction of the new baseball stadium in Washington, D.C. impossible.
compensation no doubt varies with the type of property owner. Some commercial businesses, especially if they are not dependent on a customer base in a particular community, may be largely indifferent to condemnations, provided they actually receive full financial indemnification. For example, several of the plaintiffs in *Kelo* were investors in residential properties, and payment of fair market value as well as relocation expenses presumably allowed them to reinvest in comparable, equally-profitable properties elsewhere. On the other hand, homeowners may have highly personal reasons for placing an above-market price on their property, if they are willing to sell at all. A homeowner may, for example, have a strong sentimental attachment to a residence, or enjoy remodeling done to suit her personal needs. Dignitary losses are also arguably inflicted by a government mandate to vacate, especially if the property would be transferred to a wealthier or more powerful individual or firm. Finally, much of the value an individual attaches to a particular home may relate to the social network the individual has built up in the community. Apart from basic social relations, this network can provide such services as child care, home repair, and so on. Such services, often exchanged on a barter basis, may be relatively more important for lower-income families than for higher-income families.

Finally, there remains the larger question whether every property owner has a valid equitable claim to complete and perfect compensation for any losses they may suffer as a result of the exercise of eminent domain. Justice Felix Frankfurter argued that the loss of “nontransferable” personal values when an owner’s property is taken for the public good “is properly treated as part of the burden of common citizenship.” With tax or regulatory programs, citizens are required to bear certain burdens in exchange for the benefits they receive from such programs. Assuming the use of eminent domain truly advances the common welfare (a point that is not beyond dispute in particular cases), the imposition of at least some burdens on property owners can be viewed as socially and morally acceptable.

**Loss of Opportunity to Share in Profit from Site Assembly**

Another aspect of the valuation question is whether property owners subject to condemnation should be entitled to a proportionate share of the run-up in property value attributable to the assembly of a larger, presumably more valuable parcel. The argument proceeds from the premise that if a private developer assembled the property, or if the owners worked in concert to assemble the property themselves, they would reap a share of the assembly premium. If government is supposed to be acting on behalf of the citizenry, then why shouldn’t citizens subjected to eminent domain share in the economic benefits generated when government decides to exercise this power?

As an initial matter, it is not always clear that land assembly generates a significant premium. If government’s primary motivation is to attempt to jump start redevelopment in an economically depressed community, some form of subsidized financing, tax deferrals, public investments in infrastructure, or resale of the assembled site for a nominal price may be necessary, on top of the exercise of eminent domain, to attract economic development that would otherwise locate elsewhere.

However, assuming there is a premium, whether and how to allow affected landowners to share in the premium presents a complex question. Because they are the ones going through the condemnation process, landowners within the redevelopment area obviously have some equitable claim to share in the run-up in value. On the other hand, landowners within a redevelopment area can also be viewed as the serendipitous beneficiaries of the government’s initiative. Thus, it might be questioned whether they should be allowed to reap a potential windfall ultimately financed by other taxpayers. In addition, if the premium payments were
sufficiently large, they might undermine the economic viability of the entire redevelopment project. No doubt, too, calculating an equitable share of the assembly premium would present difficult valuation issues.

**DOES THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT IMPROPERLY PROMOTE PRIVATE INTERESTS?**

A further concern with the use of the eminent domain power for economic development is the recurring suspicion that development projects are designed to generate profits for a specific developer as much if not more than to generate benefits for the public. This concern was highlighted in the powerful dissents of Justice O’Connor and Justice Thomas in *Kelo*, who focused on the potential capture of democratic institutions of government by politically-advantaged special interests promoting the use of eminent domain for their own ends.

These concerns have been reinforced by examples of perceived abuses at the behest of powerful corporations. Detroit’s condemnation of the Poletown neighborhood to dissuade General Motors from building a new assembly plant elsewhere is the most controversial exercise of eminent domain in the nation’s recent history. Anecdotes relating to the use of eminent domain by municipalities to accommodate potential large employers, such as Costco and Wal-Mart, have received considerable media attention and have stirred public antagonism. Critics of the *Kelo* decision claim that New London’s Fort Trumbull project largely served the interests of the Pfizer corporation, which was building a new pharmaceutical research plant on an adjacent site and would benefit from redevelopment of the surrounding area.

In the broadest sense, concerns about the use of government authority to advantage private interests can extend to the full range of government activities. The U.S. government no doubt enriches private interests when it enters into military procurement contracts, or when it leases oil and gas and other natural resources on public lands to private parties. While such arrangements are hardly free from controversy, they are generally viewed as necessary and appropriate so that the public can take advantage of private firms’ entrepreneurial skills, access to capital, and special expertise. For the reasons discussed above, assuming that redevelopment of older urban and suburban communities represents a valuable public goal, there are sound reasons for enlisting private firms to help achieve this goal. Public-private partnerships have been particularly valuable in urban redevelopment projects, enabling cities to draw the public back to their downtowns with vibrant mixes of public and private space. Such projects always offer benefits, sometimes quite substantial, to the private businesses involved. Indeed, it would be impossible for government to enlist the participation of private firms without offering opportunities for profit. But the theory and hope is that private firms, in the course of doing well, can also be directed to do good for the community as a whole.

The critical issues are defining the right balance between private gain and public benefit and determining how to control the risk that eminent domain may be used primarily to benefit private parties without delivering significant public benefits. The U.S. Supreme Court has made clear that government may not take private property for the sole purpose of conferring a benefit on a particular private party, and the use of eminent domain for this purpose is obviously indefensible as a matter of public policy. Beyond this type of extreme case, the challenge is to figure out where to draw the line between cases where the balance swings too far in the private direction and cases that promise significant, tangible public benefits. The available data do not support any clear conclusion about what proportion of projects fall into one category or another, and in any event abuse or success is very much in the eye of the beholder. Public authorities can and do defend virtually every economic development project as serving the
How Often are Homes Taken for Economic Development Projects?

Given the high value Americans place on homeownership and neighborhoods, one important question in the eminent domain debate is how frequently private homes are being taken, and neighborhoods displaced, for economic development projects.

There certainly have been some dramatic instances in the past of condemnations of residential areas for economic development, including the condemnations of Detroit's Poletown neighborhood in 1981 and Boston's West End in the late 1950s. More common, apparently, especially today, are cases such as New London's Fort Trumbull project and the proposed site for the new baseball stadium in Washington, D.C., where the area is not primarily devoted to residential purposes, but nonetheless owner-occupied homes are affected.

The use of eminent domain in connection with construction of the interstate highway system, urban renewal projects, and other public works in the 1950s and 1960s displaced enormous numbers of residents. One study observes, “The Interstate Highway Program subjected cities — particularly older, high-density cities — to major surgery, on a scale without precedent in American history.” In the decade between 1956 and 1967, urban renewal projects displaced 400,000 families and 39,000 businesses; highway construction is believed to have displaced another 330,000 families. Public works undertaken by leaders such as New York City's Robert Moses led to the uprooting of entire neighborhoods. Few cities are undertaking redevelopment projects on this scale today, and it seems clear that public leaders have now become at least somewhat more sympathetic to the social costs of widespread displacement through eminent domain. Thus, there may actually be less reason for concern about potential “eminent domain abuse” than 50 years ago. The current controversy over eminent domain may partly reflect the lingering questions and resentments over the extensive use of eminent domain in the 1950s and 1960s.

There is reason to believe that today redevelopers tend to avoid the taking of residential properties. Homeowner groups have emerged as a vocal and powerful political force. Also, some state redevelopment laws now include high procedural hurdles to the use of eminent domain without the support of the affected community. Professor Marc Mihaly has contended that cities rarely take occupied homes for economic development projects; the great majority of condemnation actions, he says, “are aimed at undeveloped land, land in ‘holding uses,' such as underutilized parking lots and warehouses, or other commercial uses.” He observes that the
City of San Francisco, which has used its redevelopment authority extensively, has not condemned a residence in more than three decades.\(^9\)

The question of how many residences (homeowners and tenants) are being affected by current eminent domain practices, and whether whole neighborhoods are still being displaced against their will, unquestionably deserves greater empirical study and analysis.

\(^a\) Alan Altshuler & David Luberoff, Mega-Projects: The Changing Politics of Urban Public Investment 83 (2003); see also id. at 88 (noting that the annual rate of displacement for federally-aided highway projects ranged from 64,000 people per year in 1968-69 to 13,300 in 1975-76).


\(^d\) Altshuler & Luberoff, supra, at 21-44.


\(^f\) Id.

\(^g\) Id.
interests of their community by providing jobs, tax revenues, and other economic benefits. On the other hand, according to the Institute for Justice, for example, every use of eminent domain in which property is transferred to private parties, including cases in which private firms appear to have been harnessed to obtain quite considerable public benefits, represents an abuse.

The Kelo case illustrates the differing perspectives on the use of eminent domain for economic development. The Institute for Justice has prominently cited New London’s Fort Trumbull project as an abuse of eminent domain. Yet the record in Kelo shows that the developer of the New London site was not involved in planning the project, and indeed was not even selected until the planning process was completed. Although the project would undoubtedly benefit Pfizer, and there is some evidence that Pfizer actively encouraged it, the project also offered an economic boost for the entire city, promising more than 1,000 jobs and increased tax and other revenues as well as enhanced recreational amenities on the city’s waterfront. The trial court specifically concluded that benefiting Pfizer was not “the primary motivation or effect of this development plan.” Despite the public outcry it prompted, it is far from clear that the Fort Trumbull redevelopment represents an example of eminent domain abuse.

One possible avenue for reform is to attempt to divorce, to the extent possible, the public planning process from the private process of implementing the plan, as occurred in Kelo. On the other hand, some contend that it is actually counter-productive to insulate the developer from the planning process, because the public may gain a great deal from the developer’s expertise during the planning process. As with so many other aspects of the eminent domain issue, there are apparently no easy answers.

Ultimately, the question comes down to whether the potential for private abuse is so great that the use of eminent domain for economic development should be outlawed, or whether instead steps can be taken to minimize potential abuses while preserving the potential benefits of this tool for promoting economic development. While reasonable minds can and obviously do differ, the prudent view favors, at least as an initial step, attempting to better police eminent domain rather than jettisoning it altogether.

**DOES EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT PURPOSES TARGET VULNERABLE POPULATIONS OR PROPERTIES?**

A final major concern is that the eminent domain power may be used to target vulnerable communities, including the poor and minority groups, and vulnerable types of property, such as churches. First, it has been charged that eminent domain has been used with racist intent and effect, to impose redevelopment projects on minority groups and as a tool to remove minorities from the community. In fact, historical evidence supports the conclusion that urban renewal programs and highway construction in the 1950s were sometimes specifically directed at African-American neighborhoods. Between 1949 and 1963, sixty-three percent of all families displaced by urban renewal were non-white. More broadly, critics claim that eminent domain has been targeted at lower-income communities. Again, there is substantial evidence to support this contention. For a variety of reasons, some relatively benign and some less so, it is reasonable to expect this type of targeting to occur. Lower-income communities tend to have lower property values, making land acquisition relatively inexpensive, and therefore making these areas economically attractive sites for redevelopment projects. In addition, residents of lower-income communities are likely to have relatively less political power than other citizens, making it less likely that they can mount effective political resistance to officials’ decisions to exercise eminent
domain.\textsuperscript{109} In many states, moreover, targeting of lower-income communities is effectively built into state law by requirements that eminent domain for economic development be limited to so-called “blighted” areas.

Finally, critics have often contended that government officials tend to target property belonging to churches and other non-profits.\textsuperscript{110} The theory is that these properties generate little in the way of property tax revenues, and therefore are attractive targets for redevelopment activities that would bring in new, for-profit, tax-paying businesses.

These charges have considerable force and are supported, at least to some degree, by actual experience in various communities across the country. But most examples of the use of eminent domain for overtly racist purposes appear to be in the relatively distant past. Modern social norms more strongly discourage and stigmatize such practices than was the case in the past.\textsuperscript{111} Minority groups have gained significant political power in many urban centers over the last several decades. In addition, current private and public legal remedies against racial discrimination discourage repetitions of these shameful episodes today.\textsuperscript{112} Nonetheless, in view of the history of the use of eminent domain, it is hardly surprising that some members of minority groups, such as the leadership of the National Association for the Advancement of Colored People, have voiced considerable concern about the use of eminent domain for economic development purposes.

The apparent targeting of lower-income communities presents a somewhat more complicated issue. On the one hand, it is obviously a matter of concern if lower-income people are disproportionately displaced by eminent domain. On the other hand, focusing redevelopment in lower-income communities may make sense because it is precisely these communities that are most in need of economic revitalization. Some advocates of inner-city economic development point out that many of the primary beneficiaries of economic development projects — those that will receive jobs and benefit from increased tax revenues to support services such as public health care, education, and affordable housing — are themselves residents of these communities.\textsuperscript{113} As the trial court in \textit{Kelo} noted, the advocates of the Fort Trumbull redevelopment, no less than the individual property owners who fought to retain their property, “have a dream”: for “jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city that can be realized.”\textsuperscript{114}

One critical issue in determining how redevelopment affects lower-income populations is whether residents will have effective assurances of being able to live in the redevelopment area at an affordable price. Many mixed-use economic development projects include affordable housing components, and may significantly expand the availability of low-cost housing for residents in the community. The Atlantic Yards project in Brooklyn, New York, for example, is planned for lands that are currently largely vacant and industrial; the 160 units of existing housing on the site will be replaced by 4,000 units of housing, half of which will be rented at below-market rates and one-fifth of which will be set aside for low-income individuals — with space guaranteed for all displaced residents and preferences for neighborhood residents.\textsuperscript{115} Other projects, however, may lack housing components or, as in Norwood, Ohio, focus on construction of relatively upscale condominiums.

Reliance on determinations of “blight” conditions as a precondition for the exercise of eminent domain for economic development is problematic from a variety of perspectives. The blight requirement apparently is intended to focus redevelopment projects on areas most in need of redevelopment, and may help police potential abuse of eminent domain by limiting the availability of this power. But the term blight has proven notoriously difficult to define, making it a poor guideline for determining when eminent domain can and cannot be used. In addition, blight removal is completely backward looking; it focuses on the conditions that would be
The Institute for Justice’s Misleading Reports on Eminent Domain

The Institute for Justice (IJ) has published two reports that purport to document the extent of local government “abuse” of the eminent domain power. In *Public Power, Private Gain,* published in 2003, IJ claimed to have identified 10,282 instances in 41 states over a five-year period where condemnation was used or threatened to transfer private property to another private party. In a more recent follow up report, *Opening the Floodgates,* IJ alleged that local governments, spurred by the Supreme Court’s ratification of the use of eminent domain in *Kelo,* have “threatened eminent domain or condemned at least 5,783 homes, businesses, churches, and other properties.” These data have been frequently cited in media reports, and invoked by advocates of sweeping eminent domain legislation.

For a variety of reasons, IJ’s numbers do not appear to provide a reliable basis for reasoned policy making. IJ characterizes every use of eminent domain in which property may subsequently be transferred to a private party as an “abuse;” it does not attempt to examine the circumstances of such takings to see, for example, if government authorities acted from an improper purpose to benefit private parties. Even apart from that broad definition of “abuse,” IJ’s data are flawed.

- In the absence of any comprehensive data base on the use of eminent domain, IJ has relied largely on newspaper reports, mostly unverified, of the use or threatened use of eminent domain. As IJ emphasizes, examples of the use of eminent domain not picked up by the media are not included in the data, suggesting that they might underestimate the true extent of the use of eminent domain for economic development.
- On the other hand, IJ counted as a “threat” of eminent domain every media report suggesting that local governments might be considering urban redevelopment, even where they were merely conducting studies of economic conditions in their cities. Thus, of the 5,783 cases cited in the 2006 report, 5,420 (over 90%) involved reports of everything from studies of economic and social conditions that might support “blight” findings to official public statements that eminent domain might be used and legislative votes to make offers for the voluntary purchase of properties. Even when condemnation proceedings were filed, the data do not reveal how many such proceedings resulted in actual condemnations, were resolved through settlement, abandoned by the government, or rejected by the courts.
- In addition, IJ listed each parcel of property affected or threatened by eminent domain as a separate case. Thus, IJ counted single redevelopment projects as representing dozens or even hundreds of instances of potential eminent domain “abuse.” Under IJ’s approach, just three projects in Maryland generated 127 filed condemnations and 1,110 threats of condemnation. IJ’s widely-cited 2003 estimate of over 10,000 instances of the
use of eminent domain actually involved only 222 projects.

- Despite the fact that IJ has taken the position that some uses of eminent domain are legitimate, IJ has not attempted to separate out these cases. Thus, IJ has not attempted to identify those uses of eminent domain supported by blight findings, despite saying that elimination of blight can sometimes support the use of eminent domain. IJ also included at least one use of eminent domain for a classic public use: the South Carolina section of the 2003 report, for example, cites the proposed use of eminent domain for an expansion at the Greenville-Spartanburg International Airport.

- Finally, IJ’s suggestion in its 2006 report that local governments are rushing to file condemnations after Kelo is belied by IJ’s own data. According to IJ’s report, the level of condemnation filings in the past year is about one-half the level of preceding years, and many recent condemnation filings implement redevelopment projects planned and approved years before Kelo.

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a DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003).
b DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-Kelo WORLD (June 2006).
c PUBLIC POWER, PRIVATE GAIN 2; OPENING THE FLOODGATES 6.
d PUBLIC POWER, PRIVATE GAIN 2, 8 (noting that study included “redevelopment plans” as “threatened” condemnations); OPENING THE FLOODGATES 6 (noting that study includes reports of cities conducting blight studies or plans).
e OPENING THE FLOODGATES 2-3, 6.
f PUBLIC POWER, PRIVATE GAIN 2, 8.
g PUBLIC POWER, PRIVATE GAIN 92.
i PUBLIC POWER, PRIVATE GAIN 188.
j OPENING THE FLOODGATES at 2-3 (354 condemnation actions filed or authorized for “private use” in past year, compared with 3,722 filed in five years).
k See, e.g., id. at 23-24 (listing the District of Columbia’s acquisition of land for redevelopment of Skyland Shopping Center; project had been in planning since 2002, and eminent domain was authorized by the D.C. City Council in 2004).
eliminated by eminent domain, but ignores the benefits redevelopment might produce in the redevelopment area itself and for the community as a whole. Finally, as discussed, reliance on blight designations seems to suggest that the burdens of economic redevelopment should be reserved for lower-income communities. As New York Assemblyman Richard Brodsky asked rhetorically at a legislative hearing in 2005, “Why should Park Avenue be excluded?”

The taking of church property is an especially charged issue worthy of more careful analysis. Scattered anecdotal evidence reveals that some church properties have been taken through eminent domain. However, it is difficult to determine whether church properties have been specifically targeted because of their non-profit status, or whether church properties are being condemned more frequently than other types of properties. In apparently the only comprehensive empirical exploration of the issue, Professor Nicole Garnett concluded that officials in the City of Chicago systematically avoided condemning church properties, deliberately altering the routes of proposed freeways to bypass churches and avoid antagonizing churchgoers. Moreover, the taking of religious property may trigger heightened scrutiny under the First Amendment.

In addition, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) may provide another potential protection for church properties. RLUIPA requires strict scrutiny of land use regulations that burden religious exercise. Some courts have held that the Act’s protection does not extend to municipal decisions to exercise eminent domain. But in Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, a federal court invoked RLUIPA (as well as the First Amendment) to enjoin a city from taking land from a church for development of a “big box” discount retail center. The church intended to use the land, which was undeveloped, for a new church facility to accommodate its growing membership, but the city withheld building permits for the church and then decided to condemn the property to further longstanding plans for commercial development of the area. The federal district court held that the city’s plans were likely to violate the RLUIPA, observing that “[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion.” The court concluded that the city’s interests in generating revenue and eliminating blight were not sufficiently compelling to justify the burden that the exercise of eminent domain would impose on religious exercise, and that the city had ignored less restrictive means to achieve its ends.

POTENTIAL PATHWAYS FOR REFORM

Given the sincere public concerns about the use and potential abuse of the eminent domain power for economic development, it is reasonable for policy makers to consider potential reforms. As discussed, a number of states have already adopted reform legislation and many other states, as well as Congress, are still considering the issue.

General Considerations

Several overarching principles should govern sensible reform efforts in this area. First, while most of the post-*Kelo* controversy has focused on the use of eminent domain for urban redevelopment projects, this appears to represent a too narrow approach to the question of eminent domain reform. In many parts of the country, particularly in the western U.S., the primary controversies associated with eminent domain arise from the use of eminent domain by utilities to establish new electric transmission lines, by mining companies to access mineral deposits, and by companies seeking to develop oil and gas resources. Ironically in view of the current controversy over the use of eminent domain, the 108th Congress passed comprehensive energy legislation that actually expanded the ability of electric utilities to use eminent domain.
to site transmission lines.124 While critics of eminent
domain for economic redevelopment often attempt to
place utilities' use of eminent domain in a separate
category, in truth the use of eminent domain in this
context raises many of the same concerns as the use
of eminent domain for urban redevelopment. It would
be unfair, and irrational as a matter of policy, to
sharply restrict cities' use of eminent domain for
economic development without considering possible
reforms in the use of eminent domain by utilities and
natural resource industries.

A related observation is that different regions of
the country utilize eminent domain in very different
contexts for very different purposes. In Connecticut, for
example, the City of New London invoked the eminent
domain power as part of an effort to revitalize this aging
port city. In Wyoming, by contrast, eminent domain is
apparently primarily used to support oil and gas develop-
ment. The Governor of Wyoming has staunchly
defended this use of eminent domain as critical to
Wyoming's economy, all the while harshly criticizing
the use of eminent domain for a New London-type
redevelopment project, of which there are presumably
relatively few in Wyoming.125 The point is that any sen-
sible approach to eminent domain reform must recog-
nize the wide diversity of uses of the eminent domain
power in different states. The different legislative
approaches in the states to the eminent domain issue
naturally and quite properly reflect this diversity.

The third and final general observation is that
Congress in particular should consider treading lightly
in the field of eminent domain. As discussed, the states
differ enormously in how and for what purposes they
use the eminent domain power; thus, Congress runs a
serious risk in attempting to craft national legislation of
restricting particular uses of the eminent domain power
that are well established and regarded as entirely appro-
priate in certain states, if not in others. Even focusing
exclusively on the use of eminent domain for economic
redevelopment, states differ greatly in their geographi-
cal conditions, degree of urbanization, and land use pat-
terns. As a result, different states have developed very
different attitudes and traditions about the appropriate
use of eminent domain for economic development
purposes. At least in the absence of some compelling
justification, any step Congress takes to improve the
fairness and transparency of the eminent domain
process should respect and allow for these traditional
differences among the states. What works for South
Dakota may not work for New York; and what works
for Idaho may not work for California.

Prohibitory Approach

One popular approach to reform already adopted in
some states involves prohibiting various specific uses
of eminent domain or, what amounts to the same thing,
prescribing the allowed uses of eminent domain. This
approach seeks to draw clear lines establishing when
eminent domain can and cannot be used. The difficulty
with this approach is that it turns out to be very diffi-
cult to make reasonable generalizations about when the
use of eminent domain is appropriate. Apparently
because professional sports teams tend to be popular,
some enacted and pending legislation provides wide
latitude for the use of eminent domain to develop
sports stadiums. But, as a matter of principle, it is diffi-
cult to understand how one can distinguish between
stadiums and other privately-owned public entertain-
ment venues, such as movie theaters and theme parks.
Moreover, it is hard to see why sporting arenas, which
are accessible only by admission-paying customers, are
considered more “public” than shopping centers, which
may in a sense serve a lesser civic function, but at least
are accessible to all without charge.

The prohibitory strategy raises a number of other
serious problems. First, it strikes at the heart of efforts
to rely on public-private partnerships to promote
mixed-use development; bills adopting this approach
typically prohibit the use of eminent domain for certain
types of uses included in mixed-use developments,
jeopardizing the entire mixed-use approach to development. In addition, this approach only helps property owners threatened with redevelopment that includes proscribed uses; owners affected by other government-sponsored development activities, such as highways, utility lines or, depending on the legislation, sports stadiums, or whose property has been designated as “blighted,” receive no protection whatsoever. Finally, Professor Thomas Merrill has observed that property owners will have difficulty obtaining legal representation to protect their rights under such prohibitory approaches, since the relief they will be seeking is an injunction preventing the taking of their property rather than enhanced compensation which could attract lawyers to serve on a contingent-fee basis.\textsuperscript{126}

Recently-enacted state laws have taken a variety of somewhat contradictory approaches to the use of eminent domain for “blight” removal. Some measures preserve a blight exception. This approach raises the basic concerns about blight designations discussed above, that is, that the term will be hard to apply in a predictable fashion, that it is fundamentally backward looking in its orientation, and that it tends to focus redevelopment projects exclusively in lower-income communities. On the other hand, some recent laws deal with these objections to the blight concept, as well more general concerns about the use of eminent domain for economic development, by sharply restricting or virtually eliminating blight designation as a basis for the use of eminent domain. Completely eliminating the ability of cities to use eminent domain for redevelopment efforts aimed at alleviating the worst conditions of poverty and decay in their communities would likely cripple hopes of urban revival in many cities.

Another possible approach that has some support would be to prohibit the taking of owner-occupied homes for redevelopment. This idea would directly respond to the strong public concerns about the use of eminent domain to displace private homeowners. But a categorical bar on taking owner-occupied property could create serious holdout problems for otherwise worthy urban redevelopment projects. Most cities apparently try to avoid the taking of residential property. Nonetheless, redevelopment projects sometimes require acquisition of some residential properties, even when the projects mostly involve vacant land or commercial uses. In addition, a homeowner exception, unless carefully crafted, could create a perverse incentive for investors to set up homes in potential redevelopment areas to acquire strategic leverage and to seek windfall buyouts.

**Procedural Reforms**

Various types of procedural reforms could ensure greater political accountability, encourage more careful consideration of the social costs and benefits of proposed condemnations, and afford greater fairness for property owners. These measures may not prevent abuses of the eminent domain power as effectively as the prohibitory approach, but they may go a long way in that direction while preserving the opportunity for communities to reap significant economic development benefits. Particularly given the limited information we currently have about the real world effects of eminent domain, and our inability to predict accurately the consequences of eliminating or sharply restricting this authority, a cautious approach has much to commend it, at least as a first step. Potential procedural reforms could include:

- Requiring that the exercise of eminent domain be explicitly and specifically approved by locally-elected officials in the affected municipality. In some jurisdictions, the eminent domain power is delegated to bureaucratic officials and relatively invisible commissions. Increasing the political visibility of decisions to use the eminent domain power can be expected to help weed out abusive uses of eminent domain.

- Requiring that the exercise of the eminent domain power advance general, publicly-adopted planning goals
for the area established in an integrated development plan. The majority and concurring opinions in *Kelo* placed considerable weight on the careful planning and public involvement that underlay the City of New London’s redevelopment project. Unfortunately, not all jurisdictions impose comparable requirements for planning and public involvement prior to the initiation of condemnation proceedings.

- Requiring preparation of some sort of formal community and homeowner impact analysis prior to the exercise of eminent domain, including a discussion of why condemnation is necessary, what benefits it will achieve, what alternatives to condemnation were considered, and the expected impacts on homeowners and other property owners. Again, additional public visibility and transparency should help identify ill-advised eminent domain proposals.

- Divorcing the developer from the planning process, by requiring that localities conduct planning first, and then subsequently solicit bids in an open competition from developers interested in carrying out the redevelopment. This step should help insulate the public planning process from special interest influence, although it may also prevent municipalities from gaining the benefit of private developers’ insight at the outset of planning for a project.

- Requiring condemnors to guarantee residents of the area (homeowners and renters) an opportunity to return to live in the redeveloped area at an affordable price. As discussed, these types of guarantees are sometimes made, but they could be required more generally.

**Compensation Reforms**

Various adjustments in the amount of compensation paid to property owners could increase the fairness of eminent domain and deter its overuse. Increasing compensation above market levels could overcome some property owners’ sense of unfairness from being coerced to sell their property, and would provide some redress for the loss of the subjective value that some homeowners place on their residences. Increasing compensation would also increase the cost of using eminent domain, indirectly discouraging its use and encouraging exploration of alternatives. Possible compensation reforms include:

- Payment of a premium when occupied homes, businesses or farms are taken. Some recently-enacted state laws provide for payment of 125%–150% of fair market value when a person’s primary residence is taken. In a variation of this approach that more sensitively reflects the reliance interests of long-time homeowners and minimizes speculation, Professor Thomas Merrill has suggested compensating homeowners with an additional 1% above fair market value for each year they have resided in their home.

- Payment of relocation costs to homeowners, business owners, and apartment tenants to compensate those displaced by eminent domain for the real costs they face. (As discussed, federal, state and local laws already require payment of relocation expenses in many, but not all, cases.)

**CONCLUSION**

Unfortunately, some reforms developed in response to *Kelo* would make it difficult for communities to engage in public-private partnerships to achieve important urban development goals. More thoughtful reforms could help ensure that condemnation is used more judiciously to achieve valuable planning objectives while providing fair compensation to property owners who suffer uncompensated losses. Adopting the procedural reform route, however, will pose a constant challenge to the democratic process to control potential abuses of the eminent domain power on a case by case basis.
The English crown and colonial governments took private property, sometimes even without compensation, for public facilities such as roads and forts, and also to promote economic development. Colonial lawmakers sometimes enacted statutes compelling development of land for agriculture and mining, and transferred underutilized land to owners who would use it more productively. See John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252, 1265, 1282-83 (1996).


See, e.g., Board of County Comm'rs of Muskogee County v. Lowery, __ P.3d __, 2006 WL 1233934 (Okla. May 9, 2006) (Oklahoma constitution places additional restrictions on taking of private property).

See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”); Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (setting aside as a violation of due process an order of a Nebraska agency requiring a railroad to allow farmers to build a grain elevator on the grounds of a railroad station).


See Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 Hastings L.J. 1245, 1298 (2002) (“[T]akings of land by private parties for the building of mills or ferries were thought to be every bit as legitimate a use of the eminent domain power as takings to build forts or post offices.”). Some state courts adopted a narrower view, interpreting state constitutional provisions as limiting eminent domain to circumstances where the property to be taken would actually be used by the public itself, by a common carrier serving the public, such as a railroad, or by other businesses that were closely regulated by the government to protect the public interest. See, e.g., Ryerson v. Brown, 35 Mich. 333, 338-39 (1877) (holding it “essential” to the constitutionality of a Mill Act “that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations”). But most such courts later abandoned this restrictive interpretation. See Philip Nichols, Jr., The Meaning of Public Use in the Law of Eminent Domain, 20 B.U. L. Rev. 615, 619-24 (1940) (tracing evolution in state court decisions on public use).

See Muskogee County v. Lowery, supra, at __ n.20 (citing cases from Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine interpreting “public use” narrowly under state constitutions).

Charles River Bridge v. Warren Bridge, 36 U.S. 420, 542 (1837) (noting that state legislators had taken and extinguished a ferry franchise through eminent domain because “the public interest and convenience would be better promoted by a bridge in the same place”).


See, e.g., Rindge Co. v. Los Angeles County, 262 U.S. 700, 705-06 (1923) (noting that the determination of what constitutes a public use “is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State.”).


Strickley v. Highland Boy Gold Mining Co., supra (upholding the use of eminent domain to allow mining companies to construct aerial bucket lines over others’ land).

Fallbrook Irr. Dist., supra; Clark v. Nash, 198 U.S. 361 (1905) (upholding the use of eminent domain to empower farmers to construct irrigation ditches over others’ land).


17. 348 U.S. at 33 (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent
domain is clear. For the power of eminent domain is merely the means to the end.”).

18. Id. at 33-34.
19. 467 U.S. at 240.
20. Id. at 241-42.
21. Id. at 244.

licenses for pesticides to rely upon proprietary data submitted by prior applicants served a valid public use by enhancing competition
in the pesticide market, notwithstanding that the “most direct beneficiaries” of these provisions were the subsequent private
applicants).

Amtrak’s rail service” served by taking rail track from one private company and transferring it to another private company).

24. Detroit’s action was sustained by the Michigan Supreme Court in a sharply-divided opinion. Poletown Neighborhood
N.W.2d 765 (2004).

25. Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 199 Ill.2d 225, 768 N.E.2d 1 (2002);
County of Wayne v. Hathcock, supra.

28. Id. at 2662.
29. Id. at 2664.
30. Id. at 2665.
31. Id.
32. Id.
33. Id. at 2666.

34. Id.
35. Id. (quoting Berman, 348 U.S. at 33-34).
36. Id. at 2667.
37. Id. at 2668.
38. Id. at 2669 (Kennedy, J., concurring).
39. Id. at 2671 (O’Connor, J., dissenting).
40. Id.
41. Id. at 2676.
42. Id. at 2677-87 (Thomas, J., dissenting).


44. Thomas W. Merrill, Six Myths About Kelo, PROBATE & PROPERTY (Jan./Feb. 2006), at 19-23.

45. See, e.g., statement of Dana Berliner, staff attorney with the Institute for Justice, available at http://www.ij.org/private_property/Connecticut/6_23_05pr.html (“It’s a dark day for American homeowners. While most constitutional decisions affect a small
number of people, this decision undermines the rights of every American, except the most politically connected. Every home, small business, or church would produce more taxes as a shopping center or office building. And according to the Court, that’s a good enough reason for eminent domain.”).


49 Souter W on’t Get a Taste of His Own Medicine, ASSOCIATED PRESS, Mar. 3, 2006 (reporting that New Hampshire voters had rejected initiative by California property rights advocate to seize Justice Souter’s home).


52 H.R. 4128, “The Private Property Rights Protection Act of 2005” (prohibiting the use of eminent domain for economic development by the federal government and denying federal economic development funds to states and local governments that use eminent domain for economic development).

53 See, e.g., H.B. 4048 (W. Va. 2006) (prohibiting condemnation where primary purpose of taking is economic development that will result in transfer to a private party).

54 S.B. 7 (Tex.) (enacted Sept. 1, 2005).

55 See, e.g., H.B. 1313 (Ga. 2006) (establishing right of reverter if property not devoted to public use within 5 years); H.B. 1010 (Ind. 2006) (requiring payment of 125% of fair market value for agricultural land and 150% of fair market value for owner-occupied residential property, plus relocation costs).

56 See, e.g., S.B. 68A (Ala. 2005) (provisions prohibiting taking property for economic development or transfer to private persons “shall not apply to the use of eminent domain … based upon a finding of blight in the area”).


58 See, e.g., H.B. 1567 (Fla. 2006) (prohibiting transfer of private property acquired through eminent domain to private parties, with certain exceptions; also prohibiting use of eminent domain to eliminate blight conditions, with exception where necessary to remove a threat to public health or safety); H.R. 1313 (Ga. 2006) (establishing narrow, property-by-property criteria for determining blight).


60 Bush Limits Eminent Domain Seizures, THE WASHINGTON POST, June 24, 2006, at A5 (quoting Doug Kendall, executive director of Community Rights Counsel, as saying: “This order appears to apply to a null, or virtually null set of government actions. I’m not aware of any federal government agency that takes property for economic development.”).

61 Professor Vicki L. Been of New York University School of Law notes that there is much scholars do not know about the use of eminent domain and the potential impact of “reform” legislation limiting local government’s eminent domain powers. Vicki Been, The Empirical Challenges of Kelo (statement to the American Association of Law Schools Property and Local Governments Section, Jan. 11, 2006) (on file with GELPI). A special task force of the New York State Bar Association comprised of scholars and practitioners with experience in the use of eminent domain issued a report in March 2006, urging the state legislature to conduct empirical research to answer a long list of questions concerning the use of eminent domain, including how often eminent
domain is invoked and for what purposes; how often it leads to loss of a home or business; how often it is used for economic
development and how successful are the projects on which it is employed; whether the use of eminent domain is increasing, and if
so, why; how often public-private partnerships are used to effectuate eminent domain for redevelopment projects; what efforts are
made by governments and developers to negotiate settlements with property owners; what compensation is being paid to owners,
and how such compensation relates to market value, costs such as relocation costs, and subjective values; and how many instances
of “abuse” of eminent domain exist (and how should “abuse” be defined). NEW YORK STATE BAR ASSOCIATION, REPORT OF SPECIAL
TASK FORCE ON EMINENT DOMAIN 35-37 (March 2006).

62 See Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 74-77 (1986) (discussing the ability
of holdouts to extract a monopoly price or block development altogether).

63 Marc B. Mihaly, Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London, in
Vermont Law School’s Land Use Institute & Vermont Journal of Environmental Law, THE SUPREME COURT AND Takings: Four

64 See, e.g., James J. Kelly, Jr., “We Shall Not Be Moved”: Urban Communities, Eminent Domain and the Socioeconomics of

65 Michael R. Bloomberg et al., Resolution on Eminent Domain (December 22, 2005) (signed by Mayors of New York City,
San Francisco, Sacramento, Boston, Denver, San Jose, Salt Lake City, Carmel, San Leandro, Chicago, Dearborn, Philadelphia,
Miami, Oklahoma City, Kansas City, Baltimore, Charleston, Providence, and Bridgeport).


67 See, e.g., Brief of the Cato Institute as Amicus Curiae in support of Petitioners, filed in Kelo, at 22 (quoting County of
Petitioners, filed in Kelo, at 13 (same).

68 See, e.g., Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners, filed in
Kelo, at 5-7 (describing successful private developments in Providence, R.I. and West Palm Beach, Fl.).


70 See Merrill, The Economics of Public Use, supra, at 81-82 (noting the possibility that buying agents might tip off potential
sellers of an impending city project, or offer exorbitant amounts for properties in return for kickbacks).

71 See, e.g., CASTLE COALITION, INSTITUTE FOR JUSTICE, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE (June 2006)
(asserting that “treating homeowners with respect and offering them the right price is enough to purchase their property”).

72 See, e.g., Merrill, The Economics of Public Use, supra, at 77-78 (noting the “due process” costs of eminent domain, and
concluding that the higher cost of condemnation procedures inherently limits cities’ use of eminent domain); Garnett, The
Neglected Political Economy of Eminent Domain, supra, at 34 (noting that potential liability for attorney’s fees and costs at trial
gives government an incentive to offer higher-than-market values for property; and concluding from empirical study that property
owners in one project received an average of 141% of the appraised value of their property); Gregory Korte & Steve Kemme,
Remaking Cities: At What Price, CINCINNATI ENQUIRER, April 30, 2006, at A1, E1, E4-5 (reporting that owners in Norwood, Ohio
whose homes were acquired for an urban redevelopment project typically were offered more than double the market value of their
http://www.fhwa.dot.gov/realestate/cndmst.htm (study of condemnation negotiations in five states finding that 80% of highway
rights-of-way were acquired without initiation of eminent domain proceedings; a majority of cases where condemnation was
actually filed settled before trial).

73 The Washington Post, for example, reported recently that a private developer was unable to purchase a townhouse on the
site of a proposed major development project in downtown Washington, D.C. The owner of the townhouse, who used it as an
office, was offered $1.5 million for property assessed at $199,000, but demanded up to 10 times that amount, forcing the develop-
er to build around his obsolescent structure. Lyndsey Layton, A Solitary Stand at the Precipice: D.C. Architect Refused to Sell to
CASTLE COALITION, INSTITUTE FOR JUSTICE, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE, supra.

Layton, A Solitary Stand at the Precipice, supra.


See Mihaly, supra, at 50.

See Karesh v. City of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1975) (use of eminent domain to acquire land for parking garage as part of a mixed-use development did not serve a valid public use under South Carolina constitution because the public would not have access as of right to all of the privately-operated garage); City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967) ( takings for “industrial development” do not satisfy public use requirement under state constitution).

See, e.g., Tony Proscio, Smart Communities: Curbing Sprawl at its Core, Local Initiatives Support Corp. (2002); Funders’ Network for Smart Growth and Livable Communities & Local Initiatives Support Corp., Community Development and Smart Growth: Stopping Sprawl at its Source.

See, e.g., Abraham Bell & Gideon Parchomovsky, The Uselessness of Public Use, U. Penn. Inst. for Law & Econ. Research Paper No. 06-11 (2006), available at http://ssrn.com/abstract=903805 (arguing that “eminent domain is the government power least pernicious to property owners as it is the only one that guarantees them compensation”).


Id. at 373.

Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).


Id. at 1017 (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)).


Id. at 33 (noting that typical residents displaced by urban renewal paid 20% more rent after being relocated).

42 U.S.C. § 4621 et seq.

42 U.S.C. § 4626(b).

42 U.S.C. §§ 4623, 4624.


U.S. DEP’T OF TRANSP., RELocation Retrospective Study (1996), appendix.


The federal Uniform Relocation Assistance and Real Property Acquisition Act requires federal and state agencies using federal funds to make every reasonable effort to acquire property through negotiation, and requires purchase offers to be at least as high as the final appraisal for the property. 42 U.S.C. § 4651. Most state eminent domain statutes also require good faith negotiation, based on one or more appraisals, prior to initiating condemnation proceedings. See 1 NICHOLS ON EMINENT DOMAIN § 1A-02[3], 6 NICHOLS § 24.11[3][A], 7 NICHOLS § 6.02[6] (Julius L. Sackman, ed., Matthew Bender 3d ed. 2005).

Garnett, supra, at 34.

Garnett, supra, at 36.


Kimball Laundry Co., 338 U.S. at 5.
See, e.g., Mihaly, supra, at 58; J. Terrence Farris, The Barriers to Using Urban Infill Development to Achieve Smart Growth, 12 HOUSING POLICY DEBATE, FANNIE MAE FOUNDATION (2001), at 9 (noting that developers typically pay from $0.25 to $4.00 per square foot for open land in suburban residential sites, while assembly in the built-up urban environment might cost around $15 per square foot, and observing: “A $5.7 million land writedown to attract a private development costing roughly $9 million is not abnormal and represents the nation’s urban renewal experience.”).

See, e.g., Dean Starkman, Big-Box Stores Benefit from Use of Eminent Domain, CHI. TRIB., Dec. 19, 2004).

Kelo, 125 S.Ct. at 2661.


125 S.Ct. at 2670 (Kennedy, J., concurring).

One study concludes that exclusion of the developer from the public planning process for urban renewal projects and the use of arms-length bidding processes to avoid potential favoritism “was generally considered responsible in later years for the vast number of failed urban renewal projects.” The renewal agencies that were the most successful “all seem to have worked closely with developers in selecting sites as well as developing plans for them.” ALTSHULER & LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 31 & n. 58 (2003).


See, e.g., 12 THOMPSON ON REAL PROPERTY 194, § 98.02(e) (quoting James Baldwin) (“The displacement of African-Americans and urban renewal were so intertwined that urban renewal was often referred to as ‘Negro removal.’”); 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) (“Blight was a facially neutral term infused with racial and ethnic prejudice…. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.”); Kevin Douglas Kuswa, Suburbification, Segregation, and the Consolidation of the Highway Machine, 3 J. L. SOC’Y 31, 53 (2002) (describing how “a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations”); Garnett, supra, at 23-24 (describing instances of apparent racism in urban highway construction).

FRIEDEN & SAGALYN, supra, at 28.

See, e.g., Garnett, supra, at 24-25.

See, e.g., Brief of Amicus Curiae The Beckett Fund for Religious Liberty, supra (collecting cases and media accounts of condemnation of church properties).

See, e.g., ALTSHULER & LUBEROFF, MEGA-PROJECTS, supra, at 2, 21-44 (describing profound social change following the 1950s and 1960s era of urban renewal and freeway construction, including the empowerment of inner-city residents and groups to constrain development threatening disruption of their communities, and noting modern consensus that economic development efforts should proceed only if they have minimal negative impacts, or their impacts are fully mitigated); Mihaly, supra, at 57 (observing that many states and cities now require replacement of housing in redevelopment projects, that redevelopment agencies and city governments are more responsive to local communities, and that redevelopment is now responsible for a large percentage of all low-income housing produced).

In addition, modern environmental and planning requirements, such as the requirement for environmental impact analysis under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and state and local counterparts to that law, and legal protections for historic properties under the National Historic Preservation Act, 16 U.S.C. § 470 et seq., and other laws, have fostered more careful consideration of the impacts of development.

See, e.g., Brief Amici Curiae of Brooklyn United for Innovative Local Development (BUILD), et al., filed in Kelo v. City of New London; TIMOTHY J. BARTIK, WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? (1991) (concluding that metropolitan economic growth benefits African-Americans, the less educated and younger workers the most, thus reducing income inequality).
115 Brief *Amici Curiae* of BUILD, *supra*, at 18.
117 Garnett, *supra*.
122 Id. at 1226.
123 Id. at 1226, 1228.
126 Thomas W. Merrill, Testimony at public hearing on eminent domain, New York Senate (Oct. 19, 2005).
127 See H.B. 1010 (Ind. 2006) (requiring payment of 125% of fair market value for agricultural land and 150% for owner-occupied residential property); S.J.R. E (Mich. 2005) (proposed state constitutional amendment requiring payment of 125% of fair market value for an owner’s principal residence).
128 Thomas W. Merrill, Testimony at public hearing on eminent domain, New York Senate (Oct. 19, 2005).
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