

CORRECTING FOR *KELO*: SOCIAL CAPITAL
IMPACT ASSESSMENTS AND THE
RE-BALANCING OF POWER BETWEEN
“DESPERATE” CITIES, CORPORATE INTERESTS,
AND THE AVERAGE JOE

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INTRODUCTION

The U.S. Supreme Court's decision in *Kelo v. City of New London*¹ (hereinafter *Kelo*), upholding a Connecticut statute² and permitting the use of eminent domain for private economic development as consistent with the Takings Clause of the Fifth Amendment to the Constitution,³ spurred a level of public outrage unlike any seen in modern times to prior rulings of the Court.⁴ As a result, a flurry of proposed state⁵ and federal⁶ legislation ensued in an effort to counteract the effects of *Kelo*.

¹ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). Justice Stevens wrote the majority opinion in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. *Id.* at 2658. Justice O'Connor authored a dissenting opinion in which Justices Rehnquist, Scalia, and Thomas joined. *Id.* Justice Kennedy wrote a separate concurring opinion, and Justice Thomas filed a separate dissenting opinion. *Id.*

² The relevant Connecticut statute includes a "declaration of policy" stating that the acquisition of land by eminent domain for "the continued growth of industry and business," or economic development, in Connecticut is a "public use" in the "public interest." CONN. GEN. STAT. § 8-186 et seq. (2006).

³ The Takings Clause of the Fifth Amendment states that "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The current test for whether the exercise of eminent domain satisfies the "public use" portion of the Fifth Amendment is whether or not the exercise has a "public purpose." See *Kelo*, 125 S. Ct. at 2662-63. The Supreme Court has explicitly rejected a strict interpretation of "public use," or a definition that comprehends the exercise of eminent domain only if the real property seized will be used by the public. *Id.*

⁴ See Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2; see also Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A12.

⁵ At last count, approximately 39 states had introduced legislation to limit the use of eminent domain for private economic development in response to *Kelo*. See John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1; see generally Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (discussing different measures that states have taken in response to *Kelo* and noting the opposition to the legislative groundswell from developers, some lawmakers, and the real estate community). For instance, in California alone, five constitutional amendments and six proposed pieces of legislation have been put before the California Legislature to counter the Court's decision in *Kelo*. *Id.* In Texas, the legislature acted swiftly and banned the use of eminent domain on behalf of a private party, except for certain uses. *Id.* Among these exceptions is the taking of land for a new stadium for the Dallas Cowboys football team. *Id.* In addition, in Ohio, the legislature placed a one-year moratorium on all takings soon after the *Kelo* ruling. Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, Feb. 20, 2006, at 1A.

⁶ As of November 30, 2005, legislation was passed by Congress and signed into law by the President that makes appropriations for certain government agencies and provides that no funds shall be used for federal, state, or local projects that seek to use the power of eminent domain for economic development that would primarily benefit private parties. See Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 726, 119

Economic development in the context of eminent domain refers to the government's taking of property from one party and transferring title to another private party with the understanding that development of the property will yield public benefits, such as increased tax revenue or additional employment opportunities.⁷ The *Kelo* Court reasoned that economic development satisfied the Fifth Amendment's "public purpose" test, so long as the development is part of an "integrated"⁸ or "comprehensive redevelopment"⁹ plan that will yield increased benefits to the community in the form of increased property tax, sales tax revenue, and more employment opportunities.¹⁰

Kelo should be evaluated in light of two contemporary guideposts. The first guidepost is the abiding economic reality of many "desperate" cities and states.¹¹ Over the past two decades, many cities have seen their economic bases contract, resulting from a loss of higher-income taxpayers and an increase in the number of lower-income residents who have a higher demand for city services.¹² Indeed, cities run on the "lifeblood" of property and sales tax revenues.¹³

This reality was dramatically reflected in the *Kelo* case itself, as the city of New London was thought of as an "economically distressed" city.¹⁴ City leaders in New London were desperate to raise additional revenues after the federal government closed the doors of the Naval Undersea Warfare Center in 1996, resulting in a loss of over 1500 jobs.¹⁵ In

Stat. 2396, 2494-95 (2005). Furthermore, the U.S. House of Representatives recently passed H.R. 4128, a bill that proposes to prevent states and their political subdivisions from receiving federal economic development funds for two years if a court of competent jurisdiction rules that eminent domain has been used for economic development. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. § 2(b) (as passed by House, Nov. 4, 2005). The same legislation allows not only for individuals to sue local or federal government to enforce any provision of the proposed law, but also for the awarding of attorney's fees should a plaintiff prevail. *Id.* § 4(a), (c). It also prevents the federal government from using eminent domain for economic development. *Id.* § 3. The proposed law broadly defines economic development as "taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." *Id.* § 8(1).

⁷ Rachel A. Lewis, Note, *Strike That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341, 342-43 (2005).

⁸ *Kelo v. City of New London*, 125 S. Ct. 2655, 2666-67 (2005).

⁹ *Id.* at 2668.

¹⁰ *See id.* at 2665.

¹¹ MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST., DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 19 (2001), available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf>.

¹² *Id.* at 17.

¹³ *Id.*

¹⁴ *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004).

¹⁵ *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005).

1998, New London's unemployment rate was almost twice that of Connecticut's, prompting concern from civic and state leaders and spurring the plan for the development of the Fort Trumbull area at issue in *Kelo*.¹⁶

However, Fort Trumbull is an area located on the waterfront of New London, a feature of its location that had attracted Pfizer Inc. to build a \$300 million research facility on land adjacent to the neighborhood.¹⁷ It is estimated that the development and construction of the Pfizer facility has resulted in 2000 additional, mostly high-paying, jobs to the area.¹⁸

The other guidepost in the contemporary context in which *Kelo* should be examined is the phenomenon, dating from the 1990's, of the revitalization of many previously forgotten and decrepit inner city and downtown areas.¹⁹ "Urban revitalization," also known as "urban redevelopment" or "gentrification," is "the process of neighborhood change that results in the replacement of lower income residents with higher income ones."²⁰ In an attempt to rejuvenate tax revenues and neighborhoods and ultimately to bring life back to their downtown areas, the reasons stated by the city of New London in *Kelo*, a new cadre of mayors and other city leaders have placed attracting higher-income residents to the inner cities and downtowns at the top of their municipal agendas.²¹ Municipal leaders' efforts have been aided by the fact that many downtowns have a large number of attractive features to future residents, including unique architecture, the availability of land parcels along waterfronts, cultural and arts scenes, easy access to health care, universities, colleges, and jobs.²²

This contemporary model of urban redevelopment is in direct contrast to the model of the 1940's, 1950's, and 1960's, when urban redevelopment was initiated and pursued almost exclusively by the government.²³ Urban redevelopment efforts diminished in the 1970's

¹⁶ *Id.* at 2658-59.

¹⁷ *Id.*

¹⁸ *Id.*; see also Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, at A1. The benefit to attracting high-paying jobs is the prospect of additional sales and income tax revenue to the city and state governments.

¹⁹ Cities in which urban redevelopment is taking place at an accelerated rate include San Francisco, Boston, Seattle, Chicago, Portland, Atlanta, Washington, D.C., Denver, Cleveland, and Detroit. See KENNEDY & LEONARD, *supra* note 11, at 1-2; see also EUGENIE L. BIRCH, THE BROOKINGS INST., WHO LIVES DOWNTOWN 1 (2005), available at http://www.brookings.edu/metro/pubs/20051115_Birch.pdf (stating that "during the 1990s, downtown population grew by 10 percent, a marked resurgence following 20 years of overall decline.").

²⁰ See KENNEDY & LEONARD, *supra* note 11, at 1.

²¹ *Id.*

²² See BIRCH, *supra* note 19, at 1.

²³ At its inception, urban renewal was heavily pursued by mayors of cities who wished to compete with the suburbs and revitalize the inner cities. In order to achieve this goal, mayors sought funding for their initiatives from the federal government. Business coalitions took a

and 1980's, only to be resurrected in the 1990's through a new model that involved public and private partnerships, with heavy emphasis on the private.

In the context of this contemporary model of eminent domain, it is imperative that a new analytical framework be used to examine takings for economic development. The framework of *Kelo* fails to take into account the current wave of urban development and the effects that this phenomenon is having on ordinary citizens²⁴ who live in areas targeted for urban redevelopment, but who lack the requisite political connections to prevent their home or small business from being seized. History underscores the notion that powerful private interests often dictate the terms of economic development and, ultimately, the use of eminent domain for revitalization projects.

Accordingly, this Article advocates a new framework that empowers the average homeowner or small business owner who faces eminent domain as part of an economic development project, but who lacks the political power to influence or to halt such an undertaking. Part II examines the *Kelo* opinion. Part III examines the historical inequities in power between large corporate interests and average citizens in economic development takings and the attendant economic and political subsidies in favor of large corporate interests at the expense of the home and small business owner, using *Poletown Neighborhood Council v. City of Detroit*²⁵ as a backdrop. Part IV explores reasons for a new analytical framework using contemporary and past examples of economic development takings, introduces a new framework, and proposes additional solutions that may benefit all parties to a taking. Part V concludes in favor of applying to the eminent domain area a process similar to that adopted in the National Environmental Policy Act (NEPA), with an emphasis on Social Capital Impact Assessments (SCIAs).

By asking a series of questions regarding the effect of an economic development taking on a community, SCIAs mandate that government meaningfully address a community's concerns about the proposed taking. Similar to judicial review under NEPA, judicial review of SCIAs would ensure a process rather than a particular outcome. As with NEPA,

direct hand in helping mayors push legislation through Congress, each time requiring more and more federal funds. Over time the funding for renewal projects came not from federal funds, but from private interests as these interests realized the potential for profit of their investments. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 22-33 (1989).

²⁴ For purposes of this article, reference to the "average citizen," "average resident," or "average American" is not exclusive to persons in the United States having citizenship or permanent residency, but instead these references are inclusive of landowners living and owning real property in the United States, whether for their home, business, or investment purposes, regardless of their citizenship or residency status.

²⁵ 304 N.W.2d 455 (Mich. 1981).

the hope would be that a more transparent process would provide additional opportunities for community members to influence the decision-making outcomes for proposed economic development takings.

I. A CRITICAL LOOK AT THE MAIN TENETS OF *KELO*

Kelo radically changed the landscape of eminent domain law by upholding general economic development as a “public use” under the Fifth Amendment, although this development may benefit private parties directly, notwithstanding the public benefits of increased tax revenues and more jobs. In *Kelo*, the Supreme Court majority relied heavily on *Hawaii Housing Authority v. Midkiff*²⁶ and *Berman v. Parker*.²⁷ In *Midkiff*, the Supreme Court upheld as consistent with the Public Use Clause a state statute authorizing eminent domain for the transfer of title to real property from owners to renters as a way to break up the oligarchic concentration of land ownership in Hawaii and to infuse normal market conditions in the real estate market in Hawaii. In *Berman*, the Court similarly upheld the constitutionality of a law that authorized Congress to use eminent domain and to transfer land to private developers because of a “balanced, integrated [redevelopment] plan”²⁸ that existed to clear the targeted area of slums and blight. In Congress’ estimation, there was a threat to the “public health, safety, and morals”²⁹ of the residents as a result of the substandard housing and lack of adequate sanitation facilities.

In the majority opinion of *Kelo*, Justice Stevens noted that there is a single overarching requirement for an economic development taking to pass muster under the Fifth Amendment: the provision of an “integrated,”³⁰ “comprehensive,”³¹ or “carefully considered”³² economic development plan. The Court first made several references to this “balanced, integrated plan”³³ requirement in *Berman*. It appears that the *Kelo* Court has now firmly established this requirement, by consistently mentioning this type of plan throughout the opinion as the primary requisite for an economic development taking to be constitutional.³⁴ Moreover, although in *Berman* the Court attempted to outline the contours of a “balanced, integrated plan” by noting that it would have to include “new

²⁶ 467 U.S. 229 (1984).

²⁷ 348 U.S. 26 (1954).

²⁸ 467 U.S. at 34.

²⁹ 348 U.S. at 28.

³⁰ *Kelo v. City of New London*, 125 S. Ct. 2655, 2667 (2005).

³¹ *Id.* at 2668.

³² *Id.* at 2661.

³³ *Berman*, 348 U.S. at 34–35; see also *Kelo*, 125 S. Ct. at 2666 n.13 (referencing the “balanced, and integrated” plan in *Berman*).

³⁴ See *Kelo*, 125 S. Ct. at 2559, 2665–68.

homes, schools, churches, parks, streets, and shopping centers,” in the hope that the plan would halt the “cycle of decay” of slum-ridden neighborhoods, the *Kelo* Court failed to allude to or to require such specific qualifications.³⁵ Indeed, without defining any terms, the most specific delineation of an integrated or comprehensive development plan that *Kelo* gives is one that will “provide appreciable benefits to the community,” such as additional jobs and tax revenue, as well as the hope that a city’s plan will “coordinate a variety of commercial, residential, and recreational uses of land,”³⁶ such that the plan “will form a whole greater than the sum of its parts.”³⁷ In addition, the Court specifically declined to review the effectiveness of the economic development plan put forward by the city of New London.³⁸

Outside of suggesting an almost exact replica of the economic plan for the Fort Trumbull neighborhood, *Kelo* provides little guidance as to how a constitutional economic development plan would amount to an unconstitutional taking. Not only does this lack of clarity provide little comfort to ordinary citizens whose property may be subject to takings, however amorphous or ineffective the plan may be, but the opaqueness of *Kelo*, with respect to constitutional criteria for an economic development plan, also opens the door wide to potential abuse of citizens by powerful institutional forces.

A second noteworthy element of the *Kelo* decision is that the Court re-affirmed the Court’s precedent, from *Midkiff*, that the standard of review for takings statutes is rational basis.³⁹ Under the rational basis test, courts examine whether the State is using a rational means to achieve a legitimate purpose.⁴⁰ Indeed, Justice Kennedy noted in his concurrence to *Kelo* that the rational basis test is likely the only basis on which the Court should review the majority of takings statutes, outside of an examination by the Court to determine whether a taking is “intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits.”⁴¹

³⁵ See *id.* at 2665-68.

³⁶ *Id.* at 2559. The development plan included seven parcels of land, each of which was to be designated for a conference hotel that was to be located at the center of restaurants and shopping, a recreational and commercial marina, a river walk, residences, office space, support facilities for the nearby state park, the marina, and shopping, respectively. *Id.*

³⁷ *Id.* at 2665.

³⁸ *Id.* at 2668.

³⁹ See *id.* at 2667.

⁴⁰ See *id.* (citing *Midkiff*, 467 U.S. at 242-43).

⁴¹ *Id.* at 2669. Justice Kennedy, however, also noted that there may be some instances in which eminent domain has been used to promote economic development in which a heightened standard of review is warranted, but he declined to specify those instances. *Id.* at 2670. Justice Kennedy’s concurrence only reinforces the problems in the majority opinion, especially with respect to the amount of influence large private interests may have on a particular economic development project. See *infra* Parts III.A-B.

The most important element of *Kelo*, however, is the Court's express and extreme deference to state and federal legislatures on the issue of whether or not eminent domain should be used for purposes of economic development. Indeed, the Court underscored the legislative deference exhibited in *Berman* by leaving to the legislative branch questions of what and how much land should be included in an economic redevelopment plan, including where the boundaries should lie for a project, and whether or not a plan is actually effective in practice.⁴² The Court seemingly empathized with those experiencing the "hardship"⁴³ of eminent domain by counseling them to avail themselves of the legislative process. Practically, though, the Court's advice amounted to suggesting that concerned citizens lobby state legislative representatives for laws that would restrict a state's authorization of eminent domain power for economic development.⁴⁴

A. A LINE IN THE SAND - WHAT THE *KELO* MAJORITY REFUSED TO DO

Justice Stevens' majority opinion in *Kelo* explicitly rejected three arguments advanced by the Petitioners in support of their contention that the Connecticut law at issue in *Kelo* was unconstitutional under the Fifth Amendment.

First, the Petitioners argued for a bright-line rule that would "stop a city from transferring citizen A's property to *citizen B* for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes."⁴⁵ The Court declined to adopt this bright-line rule, noting that it would artificially restrict what governments can and cannot do under the Public Use Clause.⁴⁶

⁴² See *Kelo*, 125 S. Ct. at 2668 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.") (quoting *Berman*, 348 U.S. at 35-36).

⁴³ *Id.*

⁴⁴ See *id.* ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised."); see also Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 *FORDHAM L. REV.* 1837, 1867-70 (2005) ("When landowners are unhappy with the land use decisions being made by the legislature on their behalf, they are free to elect new representatives or to vote with their feet by moving to a new locality with land use laws that they prefer.").

⁴⁵ *Kelo*, 125 S. Ct. at 2666-67 (emphasis added).

⁴⁶ See *id.*

Second, the Court refused to evaluate the economic development plan under which eminent domain was exercised by the city of New London, either for its proposed effectiveness in securing the public benefits of higher tax revenue and increased jobs, or by New London's determinations regarding the lands needed for the plan.⁴⁷

Third, and in connection with the second point, the Court explicitly rejected the Petitioners' request to review the Connecticut legislature's judgment of the need for a plan of economic revitalization to satisfy certain public needs for the city of New London.⁴⁸ The Court reasoned that precedent, dating from *Berman*, bound it to respect the decisions of the legislative branch of Connecticut.⁴⁹

The majority opinion determined that precedent did not mandate that the taking result in a *direct* benefit to the public, but only that there be *some* benefit to the public, even if the land acquired by a taking may be transferred to private hands.⁵⁰ The majority opinion adopted an attenuated, if not theoretical, notion of public benefit. For instance, in *Kelo*, the takings did not result in any direct benefit to the community, as the homes themselves were well maintained and there was no oligarchy of land ownership.⁵¹ Instead, the viability of the plan rested entirely upon the mere hope that increased revenues, jobs, and civic momentum would result and produce indirect public benefit for the city. The majority thus upheld the *hope* of indirect public benefits as sufficient grounds for an economic development taking.

B. THE *KELO* DISSENT

Although the *Kelo* majority relied on *Midkiff* and *Berman* to undergird its decision, Justice O'Connor's dissent distinguished these cases by noting that the takings, though transferred to private hands, were mitigated by the fact that the public in each case was to benefit directly from the use of eminent domain—by alleviating an oppressive condition to the public.⁵² For instance, in *Midkiff*, the direct benefit to the public was the dismantling of an oligarchic system of land ownership that resulted in a skewed real property market in Hawaii.⁵³ Similarly, in *Berman*, the takings directly benefited the public by clearing an area of slums in Wash-

⁴⁷ See *id.* at 2668.

⁴⁸ See *id.* at 2664.

⁴⁹ See *id.* at 2668.

⁵⁰ See *id.* at 2666-68.

⁵¹ *Kelo*, 125 S. Ct. at 2674-75 (O'Connor, J., dissenting) (noting in *Midkiff* the "oligopoly resulting from extreme wealth" and stating that "[h]ere, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm.>").

⁵² 125 S. Ct. at 2674 (O'Connor, J., dissenting).

⁵³ 467 U.S. at 232.

ington, D.C. that was a menace to public health and safety.⁵⁴ In contrast, in *Kelo*, there was no equivalent “social harm” that the taking remedied.⁵⁵

Justice O’Connor subsequently identifies three categories of takings that the Court had historically found to conform to the requirements of the Public Use Clause. The first category is one in which the government may convey private property that it has acquired through eminent domain to “public ownership” for “a road, a hospital, or a military base.”⁵⁶ The second category includes the government’s transferring of private property acquired through a taking to private parties, “often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.”⁵⁷ The third category includes instances, existing under “certain circumstances” and meeting “certain exigencies,” for which “public ownership” under the first category and “use-by-the-public” under the second category, are unworkable under the Public Use Clause.⁵⁸ According to Justice O’Connor, until *Kelo*, only *Berman and Midkiff* had met the requirements of this third category because the pre-condemnation uses of the targeted land in those cases were ones that “inflicted affirmative harm on society.”⁵⁹

Reflecting the concerns that the Michigan Supreme Court noted in *County of Wayne v. Hathcock*,⁶⁰ in which it presciently disavowed the reasoning set forth by the majority in *Kelo*, Justice O’Connor additionally wrote that, in the sphere of economic development, private and tangential public benefit are fused and are “mutually reinforcing.”⁶¹ Regardless of the motive behind an economic development taking, it would be difficult to “disaggregate” Pfizer’s or the developer’s private economic benefit from any promised public benefits of increases in jobs or tax revenues in *Kelo*.⁶²

⁵⁴ 348 U.S. 26, 28.

⁵⁵ 125 S. Ct. at 2675 (O’Connor, J., dissenting). In response, the majority opinion of *Kelo* noted that Justice O’Connor’s dissent confused the “purpose of a taking with its mechanics.” *Id.* at 2666 n.16. The majority opinion observed that Justice O’Connor, in her dissent, failed to follow precedent by interpreting the notion that there had to be a social harm before property could be taken and transferred to a private party. Instead, the majority countered that it is “future use” of a taking that is relevant to the public purpose test, and that just because the mechanics of a situation entail a private party securing title to land, a public purpose may still be achieved, presumably in the form of increased tax revenues and jobs. *See id.*

⁵⁶ 125 S. Ct. at 2673 (O’Connor, J., dissenting) (emphasis added); *see also* Lewis, *supra* note 7, at 364-70 (identifying three categories of “public use”).

⁵⁷ 125 S. Ct. at 2673 (O’Connor, J., dissenting) (emphasis added).

⁵⁸ *Id.* (O’Connor, J., dissenting).

⁵⁹ *Id.* at 2673-74 (O’Connor, J., dissenting).

⁶⁰ 684 N.W. 2d 765, 787 (Mich. 2004).

⁶¹ 125 S. Ct. at 2676 (O’Connor, J., dissenting).

⁶² *Id.*

Another limitation that Justice O'Connor found in the majority opinion is that the government's choice to use eminent domain for economic development put it in the business of "upgrading" real property. For example, under *Kelo*, the government now has additional incentives to take property on behalf of a private owner who intends to put it to more profitable use, not only for the landowner herself, but also for the state. As the landowner's profit increases, this profit may be passed along to the state in the form of higher property, sales, and income tax revenue.⁶³

In analyzing the majority opinion, Justice Thomas reiterated Justice O'Connor's criticism of the majority opinion, noting that the *Kelo* holding in that it has by its decision created an illusory test that essentially ignores the motive for the economic development. Justice Thomas, went several steps further by advocating for a strict interpretation of the Public Use Clause. Under this strict interpretation, the government may take private property only if it will use it, or if the public has a legal right to use the land.⁶⁴ Justice Thomas also wrote that the majority opinion had effectively rendered meaningless the Public Use Clause by sanctioning even economic development as a proper public use.⁶⁵

Finally, Justice Thomas admonished the majority for failing to intervene where the consequences of inaction would ultimately "fall disproportionately on poor communities [that] are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."⁶⁶ Sadly, the history of the United States illustrates that, more often than not, when eminent domain has been used to re-develop communities, the "least" in society are predominantly low-income individuals, racial minorities, and the elderly.⁶⁷

⁶³ *Id.* ("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.")

⁶⁴ 125 S. Ct. at 2679 (Thomas, J., dissenting); *see also id.* at 2681-83.

⁶⁵ *Id.* at 2678 (Thomas, J., dissenting) ("If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution.")

⁶⁶ *Id.* at 2686-87 (Thomas, J., dissenting).

⁶⁷ *Id.* at 2787. *See generally* Wendell H. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1 (2003) (examining the legal history of the urban renewal program and its impact on the Public Use Clause); DANA BERLINER, *THE INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A NEW RESOURCE FOR FIGHTING EMINENT DOMAIN ABUSE* 185 (2003), available at <http://www.castlecoalition.org/publications/report/index.html> (documenting the actual or threatened condemnation of more than 10,000 properties in forty-one states between 1998 and 2002).

II. ADVANTAGING CORPORATIONS: *KELO* ANALYZED AND APPLIED TO CURRENT ECONOMIC DEVELOPMENT TAKINGS

The arguments advanced by the *Kelo* dissent are ultimately more convincing, more grounded in reality, and, ultimately, more just. The majority's refusal to hold in favor of the Petitioners reflects a view of American democracy that is woefully out-of-step with current realities of the legislative process in many states. Modern legislative process includes representatives who are largely elected and supported from donations made by large and powerful corporate interests.⁶⁸ The majority's view of state legislative process is particularly outdated, given the two important guideposts influencing the contemporary urban planning environment:⁶⁹ 1) "desperate" cities that are in dire need, or believe they are in great need, of additional tax revenues that make up the lifeblood of their communities; and 2) the current explosion of what might be termed, "Downtown, Inc.," the strategy of securing additional tax revenues by attracting higher-income individuals to live, work, and play in previously neglected, but culturally and historically rich inner-city cores. The effect of this current environment is to displace lower-income residents who can no longer afford to live in these redeveloped areas.

A. EXTREME INFLUENCE

In the context of this model of urban redevelopment, it is often large corporate interests with powerful political connections that are the "unmistakable guiding and sustaining hand, indeed [the] controlling hand"⁷⁰ behind the government's use of eminent domain for economic development. Several characteristics common among urban centers undergoing redevelopment lead to extensive corporate involvement.

First, economically "desperate" cities, such as New London, face an economic drain and do not have the leverage to negotiate terms of these economic development projects to preserve long-standing communities or small businesses. City and state negotiating leverage is markedly diminished by a corporate threat, veiled or unveiled, to locate development and attendant promises of increased real estate, sales, and income tax revenue and jobs to a more accommodating locale. Second, this "desperate" environment in tandem with the revitalization explosion of many of

⁶⁸ See, e.g., Gallagher, *supra* note 44, at 1867-68 (supporting the notion that the legislature is the primary forum for economic development takings and that should landowners disagree with takings laws "they are free to elect new representatives or to vote with their feet by moving to a new locality with land use laws that they prefer.") (citation omitted).

⁶⁹ See *supra* Part I.

⁷⁰ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468 (1981) (Ryan, J., dissenting).

America's inner cities, presents a strategic advantage decidedly in favor of large corporations or other large private interests.

This notion of the powerful "sustaining hand" of large corporate interests at the local or state level is grounded in American political theory.⁷¹ There is an inverse relationship between the size of the unit of the government and the risk of the abuse of power.⁷² As the government unit decreases in jurisdiction, from national to local scope, the risk of abuse of power increases.⁷³ For this reason, several courts and commentators have called for the abolition of the doctrine of separation of powers with respect to land use decisions by municipalities.⁷⁴

B. INCREASED RISK OF ABUSE OF POWER

Several arguments have been advanced in support of the notion that there is an increased risk of abuse of power at the local level.⁷⁵ One contention is that municipal development corporations, such as the New London Development Corporation that was the condemning authority in *Kelo*, lack objectivity because they invest substantial "time, expertise, and money in designing public projects."⁷⁶ There is a vested interest on the part of these economic development corporations for the drawn-up plans to succeed. Furthermore, outside of the judicial system, there is generally no authority that impartially reviews the plans and decisions of municipal development corporations.⁷⁷ A second contention is that at a more basic level, precisely because of the "desperate" situation in which local officials often find their communities, large-scale private interests and their associates, such as large corporations, developers, and real estate interests simply overpower the local officials.⁷⁸

Additionally, at the state levels, cities and the "sustaining hand" of large corporate interests curry political favor with state legislators, often seeking eminent domain statutes that favor the use of economic develop-

⁷¹ See Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 432 (1983).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 433 (citing *Fasano v. Bd. of Comm'rs*, 507 P.2d 23 (Or. 1973)), *overruled* on other grounds, *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980), which overruled a zoning board's decision to approve a developer's plan to rezone an area because "zoning decisions by local governing bodies" are not all "legislative acts to be . . . shielded from less than constitutional scrutiny by the theory of separation of powers," and equating a taking to be "quasi-judicial in nature" that "militates against a presumption of validity when a court hears a constitutional challenge." (citing BERNARD SCHWARTZ, *The Rights of Property*, in 2 A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 241-42 (1965)).

⁷⁵ *Id.* at 433-35.

⁷⁶ *Id.* at 434.

⁷⁷ *Id.* (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §10-8, at 513-14 (1st ed. 1978)).

⁷⁸ See *id.* at 435 (citation omitted).

ment takings to the exclusion and expense of the average citizen and taxpayer. Judge Posner⁷⁹ explains this sort of behavior by arguing that all people “in all of their activities” are “rational maximizers of their satisfactions, including the “legislator deciding whether to vote for or against a bill.”⁸⁰ The public interest may not consistently motivate legislators, but their desire to be elected or re-elected does.⁸¹ Money is often a critical tool for pursuing a campaign to secure the election or re-election of legislators, and is “more likely” to come from “well-organized groups than from unorganized individuals.”⁸²

Judge Posner further elaborates:

The rational individual knows that his contribution is unlikely to make a difference; for this reason and also because voters in most elections are voting for candidates rather than policies, which further weakens the link between casting one’s vote and obtaining one’s preferred policy, the rational individual will have little incentive to invest time and effort in deciding whom to vote for. Only an organized group of individuals (or firms or other organizations—but these are conduits for individuals) will be able to overcome the informational and free-rider problems that plague collective action. But such a group will not organize and act effectively unless its members have much to gain or much to lose from specific policies, as tobacco farmers, for example, have much to gain from federal subsidies from growing tobacco and much to lose from the withdrawal of those subsidies. The basic tactic of an interest group is to trade the votes of its members and its financial support

⁷⁹ Judge Richard A. Posner sits on the U.S. Court of Appeals for the Seventh Circuit, and he has written a number of books and authored countless law review articles. In *Central States, Southeast and Southwest Areas Pension Fund v. Lady Baltimore Foods*, 960 F.2d 1339 (1992), Judge Posner, writing for the majority regarding tax legislation, similarly noted that “[m]uch modern legislation involves targeting government largesse on politically influential groups and the burdens of government on politically impotent ones. Not infrequently the legislation benefits a tiny handful of individuals or firms or even a single firm. . . .”

⁸⁰ RICHARD A. POSNER, *THE PROBLEMS WITH JURISPRUDENCE* 353 (1990) (emphasis omitted).

⁸¹ *Id.* at 354.

⁸² *Id.*; see also Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, MICH. ST. L. REV. 1005, 1016 (2004) (stating that “[l]ittle prevents municipalities and private interests from abusing the system. Both corporate interests and *political leaders* dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation.”) (emphasis added).

to candidates in exchange for an implied promise of favorable legislation.⁸³

Posner's reasoning would clearly lead to the conclusion that most plaintiffs who seek to defeat economic development takings would be individual homeowners. That the nine petitioners in *Kelo* and the members of the Poletown Neighborhood Council in *Poletown Neighborhood Council v. City of Detroit*⁸⁴ were individual homeowners would seem to help confirm Posner's theory of the use of interest group politics to combat the rational apathy of individual voters.

Posner's theory, however, is seemingly contradicted by the overwhelming legislative response to *Kelo*, which has largely been in favor of the average citizen and against large corporate interests and government. For instance, after the *Kelo* decision, while only five states actually enacted legislation that placed restrictions on economic development takings in 2005, almost every state to date is considering proposing this type of legislation.⁸⁵

Of course, no sweeping conclusions should be drawn from this surge of reform proposals, since there is a wide gap between a legislative proposal and the actual promulgation of legislation. Nonetheless, one way to explain this divergence from ordinary legislative practice in favor of corporate interests is that the reaction to the *Kelo* decision was in itself extraordinary. The reaction, likely a result of extremely effective publicity measures taken by the Petitioners in *Kelo* and their counsel, erupted from a nationwide groundswell of public opinion, yielding a tremendous, organized, and concentrated response to the decision. The fact that the U.S. Supreme Court acted on eminent domain for economic development

⁸³ POSNER, *supra* note 80, at 354; *see also* Somin, *supra* note 82, at 1015 (noting that there is an "unjustified faith" in the political process and emphasizing that the process currently justifies less deference by the courts); *see also* Ilya Somin, *Posner's Democratic Pragmatism*, 16 *CRITICAL REV.* 1 (2004) (echoing Posner's arguments regarding how interest groups are able to take advantage of the political process, and arguing for increased judicial review).

⁸⁴ 304 N.W.2d 455 (Mich. 1981) (upholding a Michigan quick-take statute that allowed the city of Detroit to take land in the Poletown neighborhood and to transfer it to General Motors for the construction of a Cadillac auto plant because the public benefits promised by the plant were substantial); *see also infra* Part III.(D).

⁸⁵ The National Conference of State Legislatures has placed this reactionary legislation into the following five categories: (1) categorically limiting takings for "economic development, enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes); (2) defining what constitutes public use; (3) establishing additional criteria for designating blighted areas subject to eminent domain; (4) strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property; and (5) placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature." National Conference of State Legislatures, Eminent Domain, available at <http://www.ncsl.org/programs/natres/EMINDOMAIN.htm>.

purposes, as opposed to a state legislature, municipality, or a state court, also likely attracted an inordinate amount of publicity to eminent domain takings on a macro level.

This situation, combined with the Supreme Court's strong inference in *Kelo* that contentious issues involved in economic development takings were best solved by state legislatures, consequently spurred a strong and extraordinary trickle-down response to the opinion by state legislatures. However, most legislation whether or not it concerns eminent domain in the ordinary course, does not result in the *Kelo*-type federal case. Any media attention garnered relating to typical eminent domain legislation is concentrated at a local level, leaving in place many of the traditional power structures that affect legislation, such as powerful private interests.

Nevertheless, groups that must stand against city and corporate giants are often too small and have too little time to organize effectively before a plan or action is taken to seize their property.⁸⁶ Their resolve to organize might erode as the result of inner turmoil created by some landowners supporting the economic development out of economic self-interest. For instance, the Poletown Neighborhood Council in *Poletown* suffered from this fate; it failed to unite the Polish-American community in Detroit because many residents believed that they would benefit from the new Cadillac plant by having additional job opportunities.⁸⁷ Moreover, the Poletown Neighborhood Council failed to gain the support of Poletown's African-American residents, many of whom pointed out that in previous urban re-development projects, Polish-American residents of other neighborhoods failed to support them and many "knew a good [economic] deal when they saw one."⁸⁸

⁸⁶ *But see* Gallagher, *supra* note 44, at 1868 (refuting the notion that landowners may organize effectively because economic development projects often involve assembling numerous parcels of land in close proximity to one another, owned by different landowners who are bound to be displaced by the project, thus strengthening the bonds that would facilitate landowners' stance as a united group in opposition to the takings).

⁸⁷ *See* BRYAN D. JONES & LYNN W. BACHELOR, *THE SUSTAINING HAND* 155 (1986). *But see* Gallagher, *supra* note 44, at 1868 (discussing how residents in Poletown banded together to form the Poletown Neighborhood Council to contest the takings, and noting that in *Kelo* property owners who opposed the takings organized to file a lawsuit). There were only nine *Kelo* landowners who filed suit, thus minimizing the effect that the group may have had, regardless of how tightly organized it was, given its small numbers. *See Kelo*, 125 S. Ct. at 2660.

⁸⁸ *See* JONES & BACHELOR, *supra* note 87; *see also* *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 471 (1981) (Ryan, J., dissenting) (noting that the community-at-large failed to mobilize behind the Poletown Neighborhood Council because of "[t]he promise of new tax revenues, retention of a mighty GM manufacturing facility in the heart of Detroit, new opportunities for satellite businesses, retention of 6,000 or more jobs, and concomitant reduction of unemployment, all fostered a community-wide chorus of support for the project.").

In addition, the short amount of time that accompanies many economic development takings, like in *Poletown* under Michigan's quick-take statute, dictates that opposition community groups will usually be short-term ventures. By contrast, large private interests know there is some degree of permanence in their endeavors. They, therefore, form politically effective interest groups to influence politicians. Homeowners and small businesspersons faced with economic development takings often see no reason to form a lasting alliance between themselves or others.⁸⁹

The average citizen not only lacks the requisite political power to stop economic development takings legislation at the state level or the actual taking at the municipal level, but also finds little practical recourse in the courts. Most average Americans faced with the prospect of losing their home or small business simply cannot afford to continue litigation until the exhaustion of all appeals, let alone mount a lawsuit contesting the eminent domain taking against well-financed and organized municipal and state legal offices.⁹⁰ As an exception that proves the rule, the homeowners in *Kelo* were able to mount and press their judicial attack to the highest level of the judicial system, but only because they were represented by the Institute for Justice, a non-profit law firm.⁹¹

C. ECONOMIC SUBSIDIES

Perversely, the citizen from whom the government takes a home or small business pays twice in the bargain, a type of "double taxation" for the privilege of having his or her property taken. The first time a landowner is "taxed" is through the seizure of his or her house or livelihood. The second time is through tax dollars that often pay to subsidize the economic development behind which already-wealthy corporate interests are the "sustaining hand." This second level of "taxation" in economic development takings comes in the form of tax dollars spent to purchase the land under eminent domain, bonds, or other debt issued that the local, state and federal levels of government must service to pay for the purchase of the land. An added third level of "taxation" conceivably falls upon the rare landowner willing to pay attorney's fees and court costs to seek recourse in the judicial system.

⁸⁹ Mansnerus, *supra* note 71, at 436.

⁹⁰ See Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, a573 (2002) ("Private landowners are at a disadvantage fighting against cities with vast taxpayer revenues to pay good attorneys and to appeal rulings. If a single private landowner's property is taken, she may not have the money to challenge the city's action in court.").

⁹¹ *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005).

Furthermore, large corporate interests are economically subsidized by avoiding competitive real estate market bidding.⁹² This subsidy, in combination with the first and second levels of taxation on ordinary citizens, results in those with the most resources benefiting economically at the expense of those with the least economic means. The most desperate cities, with the fewest alternative options available, must pay the most in subsidies to attract large corporate interests, and the wealthiest corporations end up receiving the largest concessions.⁹³

D. HISTORY REPEATS ITSELF: *POLETOWN* REDUX

Judge Ryan, one of the dissenting judges in the 1981 Michigan Supreme Court *Poletown* case, sagely predicted, “the reverberating clang of [Poletown’s] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations.”⁹⁴ The *Poletown* clang has now been eclipsed by the sonic boom of the Supreme Court’s decision in *Kelo*, a decision almost twenty-five years later that parallels *Poletown*, but the effects of which will ultimately be more far-reaching and likely longer lasting.

Poletown upheld a Michigan “quick-take” statute that authorized municipalities to use eminent domain for economic development. In practice, this quick-take statute⁹⁵ allowed the city of Detroit to take Poletown, a historic neighborhood composed primarily of 3,438 elderly lower-class Polish- and African-American residents, for General Motors (GM) construction of a new \$500 million dollar Cadillac plant.⁹⁶ The plant was to cost local, state, and federal taxpayers, nearly \$200,000,000 but GM and Detroit promised 6150 auto-manufacturing jobs and \$15 million in property tax revenues.⁹⁷

⁹² Kruckeberg, *supra* note 90, at 579 (2002) (discussing the notion that corporations should be prevented from having to go “outside of the open market.”).

⁹³ John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 70 (1984) (quoting JONES AND BACHELOR, *supra* note 87, at 48) (“ . . . those cities most in need of increased revenues are likely to make the greatest overpayments, and those corporations with the greatest profit margins are likely to receive the largest surpluses from them.”).

⁹⁴ *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 464–65 (1981) (Ryan, J., dissenting).

⁹⁵ The “quick-take” statute allowed for faster takings, “making the process easier for both the condemning authority and the ultimate owner.” Mansnerus, *supra* note 71, at 435; *see also* Rocco C. Nunzio, Note, *Eminent Domain: Private Corporations and the Public Use Limitation*, 11 U. BALT. L. REV. 310, 319 & n. 89 (1982), and *Poletown*, 304 N.W.2d 455 at 461 (Fitzgerald, J., dissenting).

⁹⁶ Bukowczyk, *supra* note 93, at 61.

⁹⁷ *Id.* at 464 n.15, 467; *see also* JONES & BACHELOR, *supra* note 87, at 138–39; JEANIE WYLIE, *POLETOWN: COMMUNITY BETRAYED* 52 (1989) (noting that the social cost to the *Poletown* takings was the clearance of 1400 homes, 144 businesses, and sixteen churches and that estimates the actual cost to taxpayers was over \$300,000,000); *see also* Somin, *supra* note 83, at 1017 (analyzing the social and economic costs to the taking of the *Poletown* neighbor-

Like the city of New London in *Kelo*, Detroit made the case that it was in dire economic straits. One of the dissenting opinions in *Poletown* noted:

[w]hile unemployment is high throughout the nation; it is of calamitous proportions throughout the state of Michigan, and particularly in the City of Detroit, whose economic lifeblood is the now foundering automobile industry. It is difficult to overstate the magnitude of this crisis. Unemployment in the state of Michigan is 14.2%. In the City of Detroit it is at 18%, and among black citizens it is almost 30%.⁹⁸

In both *Poletown* and *Kelo*, then, unemployment was the bait used to lure judicial approval of economic development takings. Moreover, like New London in *Kelo*, Detroit in *Poletown* justified the use of eminent domain for the construction of a new GM plant by pointing to the city's dismal economic statistics.⁹⁹ Although the kind of economic development pursued in each case differed, with *Kelo* having a large-scale mixed commercial/residential project, and *Poletown* having the GM manufacturing plant, both cases had similar intended benefits to the public: the retention and creation of new jobs, more tax revenue, and spill-off reconstruction into the community. In each instance, however, a small group of average citizen residents who lacked political and economic influence was pitted against the local government and powerful private interests.

hood and arguing that with the closing of small businesses located in Poletown as a result of the takings, Detroit actually suffered a net job loss and that the condemnation of the neighborhood "did the people of Detroit more harm than good"); *see also id.* at 1018 (confirming that \$150 million of taxpayer money expended on the Poletown project came from federal loans and grants and state taxpayer funds were responsible for \$30 million of the budget); *but cf.* Jenny Nolan, *Auto Plant vs. Neighborhood: The Poletown Battle*, DETROIT NEWS, available at <http://info.detnews.com/history/story/index.cfm?id=18&category=business> (referencing a study from University of Michigan that showed that "87% of the former Poletown residents older than 60 and 84 percent of younger former residents were happy in their new homes."). That most residents of Poletown were in time "happy" in their new neighborhoods, however, bears no relevance to the issue of whether or not eminent domain should have been used to construct the GM plant. Also, the psychological effects of forced relocation have been documented, noting that in one community 46% of adult females and 38% of adult males underwent "a fairly severe grief reaction or worse." HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* 379 (The Free Press, 2d ed. 1982); *see also* Bukowczyk, *supra* note 93, at 62.

⁹⁸ *Poletown*, 304 N.W. 2d at 465 (Ryan, J., dissenting).

⁹⁹ *See id.* at 459 ("In this regard the city presented substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project.").

Yet another similarity between *Poletown* and *Kelo* is that the neighborhoods did not suffer from blight, were not slums, and did not pose any other hazard to the community.¹⁰⁰ Both neighborhoods, however, did share one unfortunate trait that made them ripe for economic development taking: they happened to be located in areas that large politically-connected corporations, namely Pfizer and General Motors, wanted for their own ends, regardless of the spill-over benefits to the community. In the case of the Poletown community in Detroit, General Motors exercised inordinate influence over the city's political elite.¹⁰¹ Similarly, after searching for an appropriate site for its headquarters, Pfizer decided on the economically depressed city of New London, Connecticut, ingratiating itself to the local political leadership.¹⁰²

For instance, in his dissent in *Poletown*, Judge Ryan included correspondence from GM to the Mayor of Detroit that detailed the extent to which GM was involved in the destruction of Poletown. According to the correspondence, GM conceived the project, dictated the site where the Cadillac plant was to be built, stated the deadlines by which it was to receive title to all of the land seized in Poletown, directed how costs involved in clearing the site and making improvements to it were to be allocated, and demanded twelve years of property tax abatements.¹⁰³

Pfizer and New London may have absorbed the lessons of *Poletown*, as there was no "smoking gun" correspondence that detailed publicly the extent to which the parties were intertwined in the taking of the petitioners' homes in Fort Trumbull. Nonetheless, it was clear to Justice Thomas that the project, located adjacent to Pfizer's \$300 million newly-built research complex,¹⁰⁴ was "suspiciously agreeable to the Pfizer Corporation."¹⁰⁵ Indeed, in a review of documents dating from 1997 concerning the project, Pfizer, like GM, was involved from the plan's inception, and it detailed a "vision" for the Fort Trumbull area that involved replacing the neighborhood with upscale housing and office space to mesh with the Pfizer campus.¹⁰⁶

An even more startling fact is that several former high-ranking state officials confirmed that Pfizer demanded that Connecticut replace Fort

¹⁰⁰ Mansnerus, *supra* note 71, at 418 (supporting the lack of blight and sub-standard conditions in *Poletown*); *Kelo v. City of New London*, 125 S. Ct. 2655, 2674-75 (2005) (noting that the Petitioners' homes in *Kelo* were "well-maintained" and yielded no kind of social ill).

¹⁰¹ *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 465-69 (1981) (Ryan, J., dissenting).

¹⁰² Barry Yeoman, *Whose House Is It Anyway?*, AARP MAGAZINE ONLINE, (May/June 2005), at http://www.aarpmagazine.org/money/whose_house_is_it_anyway.html.

¹⁰³ *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 466-71 (1981) (Ryan, J., dissenting).

¹⁰⁴ *Kelo*, 125 S. Ct. at 2659.

¹⁰⁵ *Id.* at 2678 (Thomas, J., dissenting).

¹⁰⁶ *See Mann, supra* note 18, at A1.

Trumbull or else it would not build the multi-million dollar Pfizer facility.¹⁰⁷ The reason for this demand was, as one official noted, Pfizer wanted to ensure that the PhD's it attracted to work in its adjacent research complex, who would be making \$150,000 to \$200,000 annually, would feel comfortable in the neighborhood and enjoy a high quality of life.¹⁰⁸ Indeed, the husband of a former president of the New London Development Corporation, who was a Pfizer executive, was quoted in a Connecticut newspaper stating, "Pfizer wants a nice place to operate. We don't want to be surrounded by tenements."¹⁰⁹

The cost to taxpayers for both *Kelo* and *Poletown* has been enormous. In *Poletown*, the price tag to local, state, and federal taxpayers was upwards of \$200,000,000.¹¹⁰ The expense to taxpayers has been similar in *Kelo*, where in addition to the \$118,000,000 in financial incentives that Connecticut and New London offered to Pfizer to build its facility, the state has spent an additional \$73,000,000 from bonds for the redevelopment of Fort Trumbull.¹¹¹

In spite of these massive costs to the taxpayer and the "sustaining hand" of GM and Pfizer, both the *Poletown* and *Kelo* majorities justified the takings of the neighborhoods by pointing to the public benefits to the community that would result from the economic development projects: the GM/Cadillac plant in *Poletown* and the large-scale, mixed-use redevelopment project in *Kelo*.¹¹² In neither case, however, did the courts verify or inquire into whether these speculative public benefits would likely occur. In the case of *Poletown*, the promise made by GM and

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Jane Ellen Dee, *Oh, Claire You're a Scholar and a Visionary . . . If Only You Could Quit Leaving Skin on the Sidewalk*, HARTFORD COURANT, Feb. 25, 2001, at 5; see also Barry Yeoman, *Whose House Is It Anyway?*, AARP MAGAZINE ONLINE, (May/June 2005), at http://www.aarpmagazine.org/money/whose_house_is_it_anyway.html. In addition, the building for the more politically-connected Italian Dramatic Club was spared condemnation. Izaskun E. Larrañeta, *New London, Conn., Development Group Accused of Pushing Too Hard for Pfizer*, THE DAY, Aug. 14, 2001, at B1, available at INFOTRAC, Document No. CJ120922867. Despite these developments, Justice Kennedy wrote in his concurrence to *Kelo* that the trial court had heard testimony from parties involved in the deal, examined correspondence between them, but concluded that Pfizer was not the prime beneficiary of the plan. *Kelo*, 125 S.Ct. at 2669-70. In addition, Justice Kennedy pointed out that even the justices on the Connecticut Supreme Court that dissented had agreed that the plan was not "to serve the interests of Pfizer . . . or any other private party." *Id.*

¹¹⁰ *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, n.15 (1981) (Ryan, J., dissenting).

¹¹¹ Mann, *supra* note 18.

¹¹² *Kelo*, 125, S. Ct. at 2664-65, *Poletown*, 304 N.W.2d at 459.

Detroit was that “at least 6,000 jobs” were to be created by replacing the neighborhood with a Cadillac plant.¹¹³

The hoped-for public benefits of opening the GM plant never came. The GM plant opened late.¹¹⁴ In 1988, seven years after the condemnation of the neighborhood, “no more than 2,500 workers”¹¹⁵ worked there. Even in 1998, at the apex of the economic expansion of the 1990’s, the plant employed only 3,600 workers, a figure equivalent to less than 60% of the 6,150 jobs initially promised.¹¹⁶ In addition, with the closing of small businesses located in Poletown, there is an argument that Detroit actually suffered a *net loss* of jobs and that the condemnation of the neighborhood “did the people of Detroit more harm than good.”¹¹⁷

The current economic health of GM is reason enough to re-examine *Kelo*. The impact of GM on Detroit also illustrates the futility of relying on hope — or the illusory benefits of economic development as a pretext to taking someone’s home or business. For instance, because of GM’s decreased market share, which many attribute to the carmaker’s inability “to make cars that people want to buy,”¹¹⁸ GM announced in November 2005 that it was eliminating 30,000 jobs and fully and partially closing a dozen plants.¹¹⁹ In addition, GM lost \$8.6 billion in 2005, providing a reason for the termination of 30,000 jobs.¹²⁰

GM, however, is not alone in its economic woes in Detroit. All three of Detroit’s Big Three automakers, including Ford and Chrysler, have eradicated or have plans to eradicate 86,000 jobs, or what amounts to one-third of their work force in North America.¹²¹ Moreover, Detroit’s auto industry’s bonds have been “downgraded to junk.”¹²²

The Michigan Supreme Court reversed *Poletown* in *County of Wayne v. Hathcock*,¹²³ only a year before the U.S. Supreme Court in

¹¹³ *Poletown*, 304 N.W.2d at 467–68 (1981) (Ryan, J., dissenting) (citing Mayor Coleman Young’s statement and referencing the correspondence from Thomas A. Murphy, Chairman of the Board of General Motors to Mayor Young (Oct. 8, 1980)).

¹¹⁴ See JONES & BACHELOR, *supra* note 87, at 218.

¹¹⁵ Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City?*, DOLLARS & SENSE, Jul/Aug. 2001, at 25.

¹¹⁶ See *id.*

¹¹⁷ Somin, *supra* note 82, at 1017 (emphasis added).

¹¹⁸ Maryann N. Keller, *Dull at Any Speed*, WASH. POST., June 12, 2005, at B1.

¹¹⁹ Micheline Maynard & Vikas Bajaj, *Ford to Cut Up to 30,000 Jobs and 14 Plants in Next Six Years*, N.Y. TIMES, Jan. 24, 2006, at A1.

¹²⁰ Michael Ellis, *Ex-GM Spokesman Returns*, DETROIT FREE PRESS, Feb. 1, 2006, at 6F.

¹²¹ See Maynard & Bajaj, *supra* note 119, at A1.

¹²² Editorial Desk, *Trying to Find the Road Ahead*, N.Y. TIMES, Jan. 24, 2006, at A20; see also Moody’s *Cuts G.M.’s Credit Rating Again*, N.Y. TIMES, Feb. 23, 2006, at C15 (noting that Moody’s Investors Service reduced the automaker’s debt to B2 from B1, five levels beneath investment grade, making it much more expensive for G.M. to borrow money and to improve its profitability).

¹²³ 684 N.W. 2d 765, 787 (Mich. 2004) (“Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown*. . .”).

Kelo seemingly “upheld” the decision in *Poletown*. *Hathcock* involved the decision by Wayne County, which includes Detroit, to condemn nineteen parcels of land for the construction of Pinnacle Project, a business and technology park that was anticipated to create 30,000 jobs and yield \$350 million in new tax revenues for the county.¹²⁴ Wayne County argued that Pinnacle Project would create jobs, expand the tax base, stem population loss, decrease disinvestment in the community, and provide fertile ground for additional re-development.¹²⁵ The *Hathcock* court acknowledged that these public benefits were in harmony with the Michigan statute under which eminent domain was exercised by the county,¹²⁶ but ultimately ruled that basing the taking on these public benefits was inconsistent with the Michigan Constitutional requirement that eminent domain be exercised only for a “public use.”¹²⁷ Like Justice Thomas in *Kelo*,¹²⁸ the court further noted that almost every use of real property by a business or “productive unit” benefits the community.¹²⁹ According to the court, to justify the use of eminent domain because a particular profit-seeking private party would put the land to “better use,” in the form of more money to the public and more jobs to the community removes the restrictions imposed on eminent domain by the Michigan Constitution.¹³⁰

Thus far, the economic benefits of the takings promised in *Kelo* have been just as illusory as those promised in *Poletown*. The public outcry against the takings in *Kelo* left investors wary of building on land that had become a symbol of eminent domain abuse and left the petitioners in *Kelo* so confident that they not only stayed in their houses, they even renovated them for an extended time period after the Court rendered its decision.¹³¹ Moreover, “contract disputes and financial uncer-

¹²⁴ *Id.* at 771.

¹²⁵ *Id.* at 775–76.

¹²⁶ *Id.*; see also MICH. COMP. LAWS 213.23 (1998) (stating that “any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public.”).

¹²⁷ MICH. CONST. art. 10, § 2 (1963) (stating that “private property shall not be taken for public use”).

¹²⁸ See *supra* note 65 and accompanying text regarding Justice Thomas’ dissent.

¹²⁹ *Hathcock*, 684 N.W.2d at 786.

¹³⁰ *Id.* at 786–87. The *Hathcock* court also outlined three general categories, tracking the criteria outlined in Justice Ryan’s *Poletown* dissent, that fit within the Michigan Constitution’s “public use” limitation: 1) if there is a public necessity that warrants use of eminent domain, including “instrumentalities of commerce” such as railroads, highways, and canals; 2) if the eventual private owner of the property is subject to public accountability in the property’s use; and 3) if the condemnation itself is a public use, such as when slums or blight is eliminated. See *Hathcock*, 684 N.W.2d at 781–83; see also Lewis, *supra* note 7, at 367–68.

¹³¹ William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21 2005, at A1. In June 2006, however, New London voted, in opposition to the stance taken by Connecticut’s governor to evict the remaining hold-outs in Fort Trum-

tainty” marred plans to construct in previously cleared areas of Fort Trumbull.¹³² Indeed, after the decision, the Mayor of New London publicly questioned the viability of the re-development of Fort Trumbull for at least the next two years.¹³³ As a result, under *Kelo*, even in times of economic uncertainty, the average Joe is unable to stand on *terra firma*.

III. A NEW FRAMEWORK

A. CORPORATE INFLUENCE

The Supreme Court’s failure to clearly define what sort of “comprehensive, integrated, or balanced” economic development plan would be constitutional under the Fifth Amendment, combined with its position of extreme deference to state legislatures, leaves the floodgates wide open for abuse by large private interests that exert great influence on these same state legislatures. These private interests are often the “sustaining hand” behind many economic development takings. Furthermore, the Court’s refusal to require evidence from the government that the promised theoretical public benefits of takings in the form of increased jobs and tax revenues will yield actual equivalent benefits to the community further perpetuates the ability of corporate entities to enjoy the advantages of their cozy relationships with legislators and municipal leaders to the detriment of ordinary citizens.

Particular abuses of this kind can be seen in *Poletown* and in *Kelo*,¹³⁴ but the litany of abuses runs long.¹³⁵ For instance, in 2001, a federal district court in California granted plaintiff 99 Cents’ motion for summary judgment¹³⁶ after the city of Lancaster, California, had initiated

bull. See Avi Salzman, *Connecticut City Takes First Step to Evict Eminent Domain Case*, N.Y. TIMES, June 6, 2006, at B2. Furthermore, in July 2006, the city’s Planning and Zoning Commission granted building permits for the economic development project to begin. See Elaine Stoll, *Commission Approves Hotel Suite Plan For Fort Trumbull*, THE DAY, July 22, 2006, at 2B.

¹³² Yardley, *supra* note 131, at A1.

¹³³ *Id.* at B7 (“Winning took so long that the plan may not be as viable in 2005 or 2006 or 2007.”).

¹³⁴ See *supra* Part III.(D).

¹³⁵ See generally Dana Berliner, *supra* note 67 (compiling records of condemnations or threats of condemnations of more than 10,000 properties in forty-one states from 1998 to 2002). In his concurring opinion in *Kelo*, Justice Kennedy wrote that allegations of “impermissible favoritism to private parties” should be treated seriously by the courts, but that in many cases, including *Kelo*, the record indicated no such preferences. 125 S. Ct. at 2669-70. On the other hand, Justice Kennedy acknowledged that a stricter test might be warranted for instances where “the risk of undetected impermissible favoritism of private parties” is so “acute” that a taking would be invalid under the Public Use Clause. *Id.* at 2670. However, Justice Kennedy declined to hypothesize what sort of instances may warrant this stricter scrutiny. *Id.*

¹³⁶ 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp.2d 1123 (C.D. Cal. June 26, 2001), *aff’d*, 60 Fed. Appx. 123 (9th Cir. 2003).

condemnation proceedings on property in which a 99 Cents Only store had a leasehold interest.¹³⁷ Costco Wholesale Corporation (Costco) had previously demanded that it be allowed to expand its store on the space occupied by 99 Cents.¹³⁸ Viewing Costco as an “anchor tenant” and fearful of Costco’s relocation to another city, Lancaster put forth a proposal to expend \$3.8 million of taxpayer money to purchase the leased property from the owner, relocate 99 Cents at taxpayer expense, and sell the property to Costco for \$1.00, though there was no evidence that the 99 Cents store was blighted.¹³⁹ To the court’s credit, it halted this economic development project that appeared to be tainted by Costco’s corporate influence.

Another contemporary example of the inordinate corporate influence on takings is exemplified in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*¹⁴⁰ In this case, an Illinois court struck down a development authority’s (SWIDA) exercise of eminent domain on behalf of a private racetrack operator that needed more parking.¹⁴¹ Conveniently, the racetrack found it cheaper to petition the government to take an adjacent landowner’s property for ground parking, instead of building a parking garage on its own property.¹⁴² As a result of the development authority’s action, the racetrack’s revenues were expected to increase to up to \$14 million.¹⁴³ The court also noted that SWIDA, as an agent of the government, advertised that, for a fee, it would condemn land “at the request of ‘private developers’ for the ‘private use’ of developers.”¹⁴⁴

Yet another case in which a court has acted to counteract the expansive influence of large corporate interests in economic development takings involved the condemnation of two small businesses and an elderly woman’s home by the New Jersey Casino Redevelopment Authority.¹⁴⁵ Trump Plaza Associates, owned by Donald Trump, had successfully petitioned the Redevelopment Authority to condemn the landowners’ properties in order to make way for casino expansion, including surface parking

¹³⁷ *Id.* at 1126.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1126–27.

¹⁴⁰ 768 N.E.2d 1 (Ill. 2002) [hereinafter *SWIDA*].

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 10. Previously, the racetrack operator benefited from the issuance of \$21.5 million in revenue bonds by SWIDA that had been lent to the operator to finance the construction and development of the racetrack. *Id.* at 3.

¹⁴³ *Id.* at 10.

¹⁴⁴ *Id.* at 10, 12. The fee included a \$2,500 application fee and a \$10,000 down payment to be applied to SWIDA’s fee for taking the property. Other parts of the deal were the racetrack’s agreement to pay for the price of the land and all other expenses that SWIDA incurred in the acquisition.

¹⁴⁵ *See* Casino Redevelopment Auth. v. Banin, 727 A.2d 102, 110 (N.J. Super. 1998).

and open green space.¹⁴⁶ The New Jersey court held that the limousine parking was a public use, but that the taking was simply a pretext for giving Trump a “blank check”, including the addition of more casino space, without oversight by the government.¹⁴⁷ Here again, it was the judicial branch that stepped in to check the imbalance of power in the legislative and executive branches.

A recent case that has been placed on a fast-track post-*Kelo* and that is attracting significant media attention is also illustrative of the vast power that large corporate interests can have on municipalities and states.¹⁴⁸ The city of Oakland has evicted two small businesses, Revelli Tire and Autohouse, from land that the businesses owned, as part of a redevelopment of the city.¹⁴⁹ This development is expected to cost \$61 million to taxpayers¹⁵⁰, and will consist in part of a Sears store with an attached tire store.¹⁵¹ This instance is one of many in which the threat of eminent domain over small businesses has attracted media attention.¹⁵²

¹⁴⁶ *Id.* at 107.

¹⁴⁷ *Id.* at 111.

¹⁴⁸ See, e.g., FOXNews.com, Oakland Seizes Land, Swaps Retailer, at <http://www.foxnews.com/story/0,2933,174519,00.html> (Nov. 4, 2005) (presenting primarily the viewpoint of one of the businesses affected by the eminent domain situation in Oakland); see also Jim Herron Zamora, *City Forces Out Two Downtown Businesses Action Follows High Court Ruling on Eminent Domain*, SAN FRANCISCO CHRONICLE, July 2, 2005, at B3 (describing the Oakland redevelopment plans from multiple perspectives).

¹⁴⁹ See FOXNews.com, *supra* note 148; see also Zamora, *supra* note 148.

¹⁵⁰ Zamora, *supra* note 148.

¹⁵¹ See FOXNews.com, *supra* note 148.

¹⁵² See, e.g., Lynn Arave, *Y'all Come! Ogden Leaders Eager to Get a Wal-Mart*, DESERT MORNING NEWS, Nov. 14, 2004, at B3 (reporting a situation where plans to build a Wal-Mart were thwarted). Another example of undue private influence in economic development takings, akin to *Poletown* and *Kelo*, was found in Mesa, AZ. See *Baily v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); see also Berliner, *supra* note 67, at 16. There an Arizona Appellate court struck down the condemnation of two small businesses as inviolate of the “public use” restriction in the Arizona Constitution. See *Baily v. Myers* at 899; Berliner at 16. Alternatively, in another situation, the New York Court of Appeals affirmed the condemnation of land by the City of Yonkers’ Community Development Agency that initiated proceedings to transfer land to Otis Elevator Company, a leading employer in Yonkers, despite the fact that the City made no more than a “bare pleading” that the area in which the land was located was “substandard.” See *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331-33 (N.Y. 1975). Similarly in Minnesota, the appellate court upheld the condemnation order of an auto dealership for a blighted area because of the closeness of the auto dealerships to residential areas, but the land was then transferred to a Best Buy to build a store. See *Hous. And Redev. Auth. For Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. 2001). In some cases, pressure from the surrounding community forced big businesses to back out despite impending approval of condemnation. See, e.g., Debra West, *Ikea Wants to Move In, but Neighbors Fight Moving Out*, N.Y. TIMES, Feb. 1, 2001, at B1; Winnie Hu, *Ikea Cancels Plans for Store in Westchester*, N.Y. TIMES, Feb. 1, 2001, at B1. Similarly, the City of Pittsburgh, PA, wanted to replace sixty-four downtown buildings that included “restaurants, flower shops and a 144-year-old optometry business,” with a \$500 million retail project that would have yielded \$181,000 more in annual property tax revenues at a cost of \$70 million to taxpayers. See *Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26. The project was halted, however, after Nordstrom, a proposed anchor tenant of the project, chose not to pursue the deal. *Id.* The

B. CREATIVE SOLUTIONS

Despite these instances of abuse of ordinary citizens and the implications of *Kelo*, this Article does not advocate a categorical ban on economic development.¹⁵³ If economic development takings were banned, cities may respond by retaining ownership of seized land, but “contracting it out” via leases to powerful private interests for private development.¹⁵⁴ Such arrangements are already common practices in other contexts, such as when cities or their airport authorities enter into restaurant leases with private parties in airports, or when they enter into contracts for private garbage collection services.¹⁵⁵ Also, there may be legitimate instances in which governments may use eminent domain for the right kind of economic development.

Other scholars have argued that strict scrutiny should be applied to economic development takings as a way to guard against exploitation of the average citizen.¹⁵⁶ For instance, these scholars assert the idea that the taking of a home is more than an ordinary economic right deserving

New York Times has itself been the recipient of eminent domain largesse from the government in the form of the Empire State Development Corporation. See David W. Dunlap, *Blight to Some is Home to Others: Concern over Displacement by a New Times Building*, N.Y. TIMES, Oct. 25, 2001, at D1 (illustrating how the development corporation condemned a city block in Times Square for construction of a new New York Times building, forcing the removal of countless businesses, a dormitory, and hundreds of homes).

¹⁵³ Compare Somin, *supra* note 82, at 1007 (discussing the need for a “categorical ban” on the used of eminent domain for economic development as a way to alleviate the problems posed by *Poletown*). Supreme courts in at least three states have banned economic development takings. See *Wayne County v. Hathcock* (denying proposed condemnations since they did not “advance a ‘public use’”); *Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002) (dismissing the economic development justification because “every lawful business” adds to the economy); *City of Owensboro, Kentucky v. McCormick*, 581 S.W.2d 3, 7 (Ky. 1979) (brushing aside economic development justifications for the use of eminent domain because “[e]very legitimate business, to a greater or lesser extent, indirectly benefits the public by benefiting the people who constitute the state.”); see also Somin *supra* note 82, at 1009-10.

¹⁵⁴ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 552 (2000) (stating that “[i]n the last half century, the private nonprofit sector has become the primary mechanism for delivering government-financed human services, such as health care.”).

¹⁵⁵ Outside of health care, local governments have also contracted out their waste management and highway construction services. *Id.*

¹⁵⁶ Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 311-14 (2000); see also Kruckeberg, *supra* note 90, at 570-73 (comparing the deprivation of one’s property to the loss of life or liberty, thereby meriting strict scrutiny); see also Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL.L.REV. 207, 224 (2004) (discussing the need for application of strict scrutiny in cases involving eminent domain when land is transferred by the state to a private party, the landowner’s interest in the land is “particularly strong” because, for example, on it is his or her home, and money could not “significantly compensate” the owner for the loss, and the landowner is “relatively powerless politically.”); see also Jonathan N. Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV., 542 (1988); see also Mansnerus, *supra* note 71, at 444 (arguing that “the exercise of eminent domain for third-party use

of only rational basis scrutiny, but instead is a fundamental right because of the personal element in a home.¹⁵⁷ They argue that an individual's interest in his or her home is akin to the rights of life or liberty under the Due Process Clause.¹⁵⁸

Although cognizant of other proposals designed to address the power inequities in economic development takings between average citizens and large corporate interests, this Article advocates a different framework. Not only may there be legitimate situations in which eminent domain should be used for economic development, but also the Supreme Court has explicitly affirmed the use of the rational basis test to scrutinize economic development takings. The Court, therefore, has implicitly rejected a strict scrutiny test.

It appears that, regardless of the theoretical answers proposed to address the imbalance of power in economic development takings, there are a number of both practical and creative solutions to which the parties involved, all landowners and large corporate interests, might privately agree. For instance, one obvious resolution would be to establish a premium price, above fair market value, for takings of homes.¹⁵⁹ This premium would take into account the sentimental or personal value of a home, including the neighborhood and community,¹⁶⁰ a value that is often more than the market would assign and that is placed on the property where the landowner is not a willing seller.¹⁶¹ The premium would also include reasonable costs of relocation or reasonable attorney's fees should a legal challenge be mounted against a taking, and the cost of a similar home in a similarly situated neighborhood or area.¹⁶² For instance, the New York and Indiana Legislatures to date are deliberating legislation that would assess this premium at 25% and 50% above market value, respectively, for economic development takings.¹⁶³ In addition,

requires at a minimum full review for rationality" and the review should entail the application of an objective, over a good-faith test, that would likely require "a full factual hearing.").

¹⁵⁷ Jones, *supra* note 156, at 309.

¹⁵⁸ *Id.*

¹⁵⁹ D. Benjamin Barros, *Home as a Legal Concept*, 46 Santa Clara L. Rev. 255, 298–300; Bukowczyk, *supra* note 93, at 72 (It is also important to note that the residents in *Poletown* received much less than they believed their homes were worth in the judicial settlement, and they did not receive payment for the cost of replacing their homes).

¹⁶⁰ Bukowczyk, *supra* note 93, at 73.

¹⁶¹ *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988); see also JACK L. KNETSCH, *PROPERTY RIGHTS AND COMPENSATION: COMPULSORY ACQUISITION AND OTHER LOSSES* 36, 39–40 (1983) (underscoring the notion that many landowners place a higher value, than that of the market, on their homes because of emotional attachments to them and to their neighborhoods).

¹⁶² Barros, *supra* note 159, at 299–300; accord Gallagher, *supra* note 94, at 1869–70, and Bukowczyk, *supra* note 93, at 73 (noting that the premium should include an amount related to the cost of construction of a "new building of the same size and style as the structure being condemned, possibly less a depreciation factor.").

¹⁶³ Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, Feb. 20, 2006, at 1A.

some scholars have proposed that the premium be tied, on a sliding scale, to the length of residence in a home.¹⁶⁴ Small-business owners would be similarly compensated for loss in fair market value of their land, for the value of the good will of the business correlated with the number of years the business had occupied the land, and the costs of relocation and construction of a similar building in a comparable area.¹⁶⁵

Another creative, albeit expensive and likely impractical, solution would be to require the state and large corporate interests to meet the price named by the displaced landowners.¹⁶⁶

Without resorting to takings, another promising solution to accumulate land for an economic development project would be to have landowners whose properties are slated for the development, to share in the profits that the development would generate.¹⁶⁷ There is precedent for this proposed solution in Atlanta, where thirty-nine African-American families were able to receive shares in the commercial development project that replaced their neighborhood.¹⁶⁸

It should be remembered that countless successful economic development projects, such as Disney World,¹⁶⁹ have been built without resort to eminent domain, though it is often cited as a necessary tool for redevelopment against individuals who attempt to “hold out” for the maximum price for their land. When it comes to holdouts, however, Euclid, Ohio, tried an unusual but fresh approach. When a developer that wanted to build a marina and a luxury high-rise development on Lake Erie urged the city to use eminent domain on remaining holdout landowners, the city was well aware of the possibility of a public outcry from residents. Thereafter, the Mayor and a City Council member wrote a polite letter to remaining landowners requesting their cooperation and offering their willingness to meet with landowners in reaching a “satisfactory resolution.”¹⁷⁰ The developer was able to secure almost all of the land that it needed. Moreover, in exchange for one landowner selling an adjacent rental house and a vacant lot to the developer, he remained in his house while the development was built around him.¹⁷¹

¹⁶⁴ Barros, *supra* note 159, at 33.

¹⁶⁵ Bukowczyk, *supra* note 93, at 72-73.

¹⁶⁶ *Id.* at 73.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing Roger Witherspoon, *Profits Out of Thin Air in Johnstown*, BLACK ENTERPRISE 65-68 (Dec. 1982)).

¹⁶⁹ Roger Pilon, *Kelo v. City of New London and U.S. Supreme Court Decision and Strengthening the Ownership of Private Property Act of 2005*, Testimony before the US House Committee on Agriculture, Sept. 7, 2005; see also Somin, *supra* note 82, at 1026.

¹⁷⁰ Thomas Ott, *Euclid Tried Polite Approach in Property Dispute*, THE PLAIN DEALER, Aug. 26, 2002, at B3.

¹⁷¹ Thomas Ott, *Developers Offer to Let Holdout Keep House*, THE PLAIN DEALER, Sept. 20, 2002, at B3.

In Pittsburgh, instead of resorting to eminent domain on a holdout 48-year-old pizzeria for the planned redevelopment of an old Sears store into a Home Depot, Home Depot agreed to house the pizzeria in its parking lot.¹⁷² Furthermore, in a similar move in Huntington Beach, California, after the city voted against using eminent domain to condemn a mall in favor of private developers, but awarded the project to developers who included discount retailers, most of whom opposed the initial project, in the new 2.8 million-square-foot outdoor retail and entertainment complex.¹⁷³

C. AN ALTERNATIVE FRAMEWORK FOR ANALYZING THE EFFECT OF ECONOMIC DEVELOPMENT TAKINGS ON THE AVERAGE CITIZEN: SOCIAL CAPITAL IMPACT ASSESSMENTS

Despite the array of creative solutions that can be used to restore the balance of power in proposed eminent domain takings, the need exists for a novel framework that courts may use to examine post-*Kelo* economic development takings.¹⁷⁴ It is likely that the floodgates of eminent domain abuse may open wide post-*Kelo* as a result of the combination of the following several factors: 1) the current fervor by many “desperate” cities for urban revitalization; 2) the high degree of deference expressly accorded the legislature by the Supreme Court regarding economic development takings, even though it is the well-financed political insiders being served by the legislature and not the interests of ordinary citizens; 3) the Supreme Court’s failure in *Kelo* to define the largely opaque requirement of an “integrated, balanced, or comprehensive” economic development plan; and 4) the *Kelo* Court’s refusal to hold municipalities and states accountable even when faced with striking evidence that the public benefits promised are often never realized.

Many economic development takings involve takings of land owned by generally small groups of average citizens who are individual home-

¹⁷² See Tom Barnes, *Home Depot to Oust Smaller Businesses*, PITTSBURGH POST-GAZETTE, Mar. 9, 1998, at A11; see Lawrence Walsh, *This Store’s Opening is Simply Grand*, PITTSBURGH POST-GAZETTE, Feb. 11, 2000, at B1.

¹⁷³ *Property Rights Victories*, ORANGE COUNTY REGISTER, Nov. 26, 2000, at 2; Jim Hinch, *Mall Project Seen as a Winner; Development Huntington Hopes to Reverse a History of Plans Falling Through*, ORANGE COUNTY REGISTER, Mar. 8, 2002, at 4. Other creative tools that government can use to encourage economic development, in lieu of eminent domain, include cutting red tape for building permits and property owners who wish to relocate, reducing fees for development application, and building around holdouts. See Jordan R. Rose, *Eminent Domain Abuse in Arizona: The Growing Threat to Private Property*, ARIZONA ISSUE ANALYSIS 174, Aug. 16, 2002, at 8, available at <http://www.goldwaterinstitute.org/article.php/134.html>.

¹⁷⁴ See *supra* Part I. and notes 11-23 and accompanying text (noting that the current judicial framework does not take into account contemporary realities of economic development).

owners or small business owners. Examples of these takings abound and include the petitioners in *Kelo*, *99 Cents*,¹⁷⁵ *SWIDA*,¹⁷⁶ *Casino Redevelopment Authority*,¹⁷⁷ *Bailey v. Myers*,¹⁷⁸ and *Richfield*.¹⁷⁹ Other examples include the owner of the Rivelli Tire Store that the city of Oakland wanted to replace with a Sears,¹⁸⁰ the New Rochelle, New York, homeowners who resisted the taking of their land for an IKEA,¹⁸¹ the Ogden, Utah, residents who opposed the development of a Wal-Mart on their land,¹⁸² and the small business owners and residents displaced by the construction of a new *New York Times* building in Manhattan.¹⁸³

It is logical that these economic development takings would occur where the cost of land in many of these areas, often due to previous neglect by city leaders. Moreover, in the midst of the popular wave of urban revitalization, land has been identified as valuable because it is waterfront property, as was the case in *Kelo*,¹⁸⁴ or because large corporate interests have identified the property as desirable, as evidenced in *Poletown*, *Kelo*, *Casino Redevelopment Authority*, *Bailey*, and *Richfield*. Typically an undue share of the costs of these takings are borne by ordinary residents, those who lack significant political influence with municipal leaders that approve many urban revitalization projects or with state legislators that promulgate enabling statutes for eminent domain.

Given the current legal and political environment in the wake of *Kelo*, this Article proposes that courts establish common law, or state or federal enact enabling legislation, that would require a social impact study of the social effects of economic development takings on average citizens, whose interests are currently devalued by the economic devel-

¹⁷⁵ See *supra* notes 136-139 and accompanying text.

¹⁷⁶ See *supra* notes 140-144 and accompanying text.

¹⁷⁷ 727 A.2d 102, 106, 110 (N.J. Super. 1998).

¹⁷⁸ 76 P.3d 898, 899 (Ariz. Ct. App. 2003).

¹⁷⁹ 630 N.W.2d 662, 665 (Minn. App. 2001).

¹⁸⁰ See *supra* note 149 and accompanying text.

¹⁸¹ See *supra* notes 150-51 and accompanying text.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Plans are in the works to use eminent domain to seize waterfront property in Riviera Beach, Florida, a predominantly African-American town and neighborhood. See generally Dennis Cauchon, *Pushing the Limits of 'Public Use'*, USA TODAY, Apr. 1, 2004, at A03; Pat Beall, *Riviera Beach Eminent Domain Case Draws National Spotlight*, PALMBEACHPOST, Dec. 11, 2005, at 1A; John-Thor Dahlburg, *An Eminent High Tide*, LA TIMES, Nov. 29, 2005 at A12. Similar plans are intended for the Cramer Hill section of Camden, New Jersey, a predominantly minority neighborhood located on the Delaware River across from Philadelphia. See generally *Cramer Hill Association Looks Out for Residents*, COURIER-POST ONLINE, Feb. 1, 2006, available at www.courierpostonline.com/apps/pbcs.dll/article?AID=/200602; New Jersey FIT: Future In Transportation, available at <http://www.state.nj.us/transportation/works/njfit/case/route30.shtm> (describing the Cramer Hill Redevelopment Project); Dwight Ott, *Camden Wants Judge to Revisit Cramer Hill Ruling*, PHILADELPHIA INQUIRER, Feb. 3, 2006, at B03.

opment takings process. Similar environmental studies, termed Environmental Impact Studies (EIS) and Environmental Impact Assessments (EIA), are already prescribed in the National Environmental Policy Act of 1969.¹⁸⁵

1. NEPA-EISs

Some view NEPA as an “environmental constitution”¹⁸⁶ because it was promulgated to ensure environmental harmony, and to avert damage to the environment,¹⁸⁷ by making information available to the public in an effort to compel federal “agencies to incorporate environmental values into their thinking.”¹⁸⁸ The Act requires that all agencies of the federal government prepare an EIS on all “Federal actions [a project, regulation, policy, or permit issuance] significantly affecting the quality” of the environment.¹⁸⁹ The EIS is meant to be an “action-forcing mechanism.”¹⁹⁰ It is a detailed statement that addresses:

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁹¹

In addition, the Council on Environmental Quality (CEQ) has established regulations that implement NEPA.¹⁹² The regulations mandate that the lead agency preparing the draft EIS make it available to the public and other agencies early enough in the decision-making process for

¹⁸⁵ 42 U.S.C. § 4321-4375 (2006) [hereinafter NEPA].

¹⁸⁶ Jeannette MacMillan, Book Note, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks* (Department of Transportation v. Public Citizen), 32 *ECOLOGICAL L.Q.* 491, 494 (2005).

¹⁸⁷ See *id.* at 494-95.

¹⁸⁸ JAMES P. LESTER, *ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE* 245 (1995).

¹⁸⁹ National Environmental Policy Act, 42 U.S.C. § 4332(c) (2006). Some agency actions, however, may categorically require an EIS. See *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002).

¹⁹⁰ MacMillan, *supra* note 186, at 495.

¹⁹¹ National Environmental Policy Act, 42 U.S.C. § 4332(c).

¹⁹² Council on Environmental Quality, “Guidance Regarding NEPA Regulations”, 48 Fed. Reg. 34,263 (July 28, 1983), available at: <http://www.nepa.gov/nepa/regs/1983/1983guid.htm>.

comments to meaningfully affect the agency's decision,¹⁹³ to which the lead agency must subsequently respond in the final EIS.¹⁹⁴ Because of the detail required, EISs can be costly, ranging from "hundreds of thousands of dollars to several million dollars."¹⁹⁵ EISs generally take one to two years, if not longer, to complete.¹⁹⁶

Furthermore, the first step in the NEPA inquiry is an Environmental Assessment (EA) in which the agency will determine if its action will significantly impact the environment, thus triggering the need for an EIS.¹⁹⁷ The public and other agencies are invited to comment on the EA.¹⁹⁸ In contrast to EISs, EAs are usually about twelve pages long, do not include discussion of alternatives to a project, and incorporate scant analysis of environmental impact.¹⁹⁹ If the agency determines that there is no significant impact after performing the EA, then it prepares a Finding of No Significant Impact (FONSI).²⁰⁰

a) Judicial Review

NEPA provides no provisions for judicial review. It has instead been construed to incorporate the Administrative Procedure Act (APA), with review of matters arising under NEPA using the APA's "arbitrary and capricious" standard of review.²⁰¹ In certain cases, the standard of review falls under a "rule of reason." An agency may decide (1) not to prepare an initial EIS,²⁰² (2) to perform an EIS, but one that certain interest groups deem inadequate under NEPA,²⁰³ (3) not to compile a supple-

¹⁹³ 40 C.F.R. § 1501.7 (2006) (requiring that once an agency decides that it will undertake an EIS and before it publishes a draft EIS, it must publish a Notice of Intent that provides public participation in determining the "scope" of the EIS and significant issues related to it), and 40 C.F.R. § 1503.1 (inviting comments by the public and other agencies).

¹⁹⁴ 40 C.F.R. § 1503.4 (requiring that the lead agency respond to the public's comments); see also Brian Cole, et. al., *Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 J. HEALTH POL. POL'Y & L. 1153, 1162 (2004).

¹⁹⁵ Cole, *supra* note 194, at 1163-64.

¹⁹⁶ *Id.* at 1163.

¹⁹⁷ 40 C.F.R. § 1501.4 (2006).

¹⁹⁸ *Id.*

¹⁹⁹ Cole, *supra* note 194, at 1164.

²⁰⁰ Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1067.

²⁰¹ MacMillan, *supra* note 186, at 497.

²⁰² See, e.g., Greenpeace Action v. Franklin, 14 F.3d 1324, 1330-32 (9th Cir. 1992) (upholding the "arbitrary and capricious" standard when assessing the need for an initial EIS and ensuring that the agency has taken a "hard look" at the environmental consequences of its action in a case involving an agency's decision to raise fishing levels of pollock without considering its effect on the population of the Steller sea lion in an EIS); Audobon Soc'y of Cent. Arkansas v. Dailey, 977 F.2d 428, 436 (8th Cir. 1992) (holding that the Army Corps. of Engineers was required to undertake an EIS regarding its grant of a permit to build a bridge).

²⁰³ This standard of review is the "rule of reason." See, e.g., Robertson v. Methow Valley, 490 U.S. 332, 358-59 (1989) (stating that "[i]t was surely not unreasonable for the Forest Service" to include a more developed mitigation plan of environmental effects in its EIS);

mental EIS,²⁰⁴ or (4) to perform an EA, but one that is similarly regarded by interested parties as insufficient under NEPA.²⁰⁵

In general, however, “NEPA forces a process but not an outcome.”²⁰⁶ The process should be “fully informed and well-considered,”²⁰⁷ but ultimately courts are not able to make decisions on the substantive actions that may be taken, whether or not they would agree with the agency.²⁰⁸

b) Assessment of NEPA

The EIS process in NEPA has been roundly criticized for being too burdensome, costly, and time-consuming.²⁰⁹ Other criticism has centered around NEPA’s heavy emphasis on process, to the detriment of substance.²¹⁰ One scholar has noted that “[t]o this day, the Supreme Court has never decided in favor of a NEPA-plaintiff.”²¹¹ While lower courts have some history of rulings favorable to NEPA plaintiffs, courts are nonetheless constrained by the focus on process.²¹²

However, Lynton Caldwell, the “intellectual father of EIS” and a public administration professor,²¹³ notes that although “NEPA has not come near to realizing its full potential,” its success in influencing decision-making regarding environmental policy should not be underestimated.²¹⁴ Due to NEPA, federal projects have been reconsidered, redesigned, or even withdrawn if the environmental consequences are too severe.²¹⁵ For instance, projects that would have impacted old-growth

Kern, 284 F.3d at 1071 (citing *Oregon Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (stating that “[i]n reviewing the adequacy of an EIS, we employ a ‘rule of reason to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of probable environmental consequences’” that ensures that the agency took a “hard look” at the consequences)).

²⁰⁴ This standard of review, like that which governs an initial EIS, is the “arbitrary and capricious” standard. *See, e.g.*, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374-75 (1989) (noting that NEPA requires that agencies take a similar “hard look” at environmental consequences and that the Court will review this “hard look” under the “arbitrary and capricious” standard).

²⁰⁵ For instance, the Ninth Circuit has stated that the “rule of reason” governs this decision of an agency under NEPA. *See Kern*, 284 F.3d at 1070 (stating that “[a]n agency’s threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness.”).

²⁰⁶ Cole, *supra* note 194, at 1170-71.

²⁰⁷ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

²⁰⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

²⁰⁹ MacMillan, *supra* note 186, at 521; *see also* Cole, *supra* note 194, at 1169.

²¹⁰ Cole, *supra* note 194, at 1170.

²¹¹ Macmillan, *supra* note 186, at 523.

²¹² *Id.*

²¹³ *Id.* at 517.

²¹⁴ Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205, 207 (1998).

²¹⁵ *Id.* at 207.

forests or the northern spotted owl have been halted as a result of the EIS process.²¹⁶

In addition, the public comment and information required in NEPA has given structure to public debate concerning projects of environmental import that otherwise would not have occurred without free disclosure.²¹⁷ Indeed, this scrutiny has empowered environmental and community groups to participate in the decision-making process, a process from which they were previously excluded.²¹⁸ Moreover, because of the public disclosure mandated in NEPA, decision-makers in federal agencies have been prodded to make more “responsible” and “better informed” decisions from the outset.²¹⁹ Finally, NEPA has fostered more inter-agency cooperation on plans, and has provided more information to other potential decision-makers, such as legislators.²²⁰ Therefore, there is an argument that the procedural, if not costly at times, tendencies of NEPA are far outweighed by the Act’s benefits, namely the empowerment of previously excluded environmental and community groups.

2. *Social Capital Impact Assessments*

Thomas Sander²²¹ has identified several socioeconomic factors within a project that may have significant environmental consequences and thus trigger an EIS that may be used to form a Social Capital Impact Statement (SCIS).²²² This paper, however, proposes that many of

²¹⁶ See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (D. Wash. 1988) (halting attempts to log the habitat of the northern spotted owl after it was declared a threatened species by the Fish & Wildlife Service); see also Thomas Sander, *Environmental Impact Statements and Their Lessons for Social Capital Analysis*, available at <http://www.ksg.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf> at 2 (last visited on Dec. 15, 2005) (citing Mark Bonnet & Mark Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, *ECOLOGY* L.Q. 105-71 (1991)).

²¹⁷ MacMillan, *supra* note 186, at 529; see also Caldwell, *supra* note 214, at 207.

²¹⁸ Cole, *supra* note 194, at 1168-69 (“ . . . NEPA has created an opportunity for public review and feedback on projects where previously there was little if any such opportunity.”). See also Caldwell, *supra* note 214, at 207 (“To the extent that the NEPA Process informs decisionmaking, the Act must generally be accounted a success. It has caused reconsideration, redesign, and even withdrawal of federal projects that previously would have gone forward without effective challenge. It has forced the public disclosure of plans and proposals which previously would have been shielded from public scrutiny.”).

²¹⁹ Cole, *supra* note 194, at 1169.

²²⁰ Caldwell, *supra* note 214, at 207; see also MacMillan, *supra* note 186, at 519-20.

²²¹ Thomas Sander is EXECUTIVE DIRECTOR OF THE SAGUARO SEMINAR: CIVIC ENGAGEMENT IN AMERICA, a program of the John F. Kennedy School of Government at Harvard University.

²²² Thomas Sander, *Environmental Impact Statements and Their Lessons for Social Capital Analysis*, available at <http://www.ksg.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf>, at 3 (last visited on Dec. 15, 2005). These socioeconomic factors are “1) Will the action affect neighborhood character and cohesion?, 2) Will the action cause displacement and relocation of homes, families, and businesses?, 3) For airport and highway projects, will surface-traffic disruption affect access to community facilities, recreation areas, and places of residence and

Sander's factors, as well as others identified below, could similarly be required in three possible ways with respect to economic development takings in a Social Capital Impact Assessment (SCIA). First, courts, likely the Supreme Court, could mandate that SCIA be performed and examined, in conjunction with an economic development plan, to ensure that the necessary consequences and alternatives are considered before embarking upon a potentially disastrous project. Second, states could require as part of their enabling legislation for economic development takings, that SCIA be executed at an early enough time in a development proposal's history to allow for meaningful public comment on a project. The timing seems perfect for states' to pay their considerations of this proposal, given the legislative reaction of thirty-nine states to *Kelo* on the issue of takings for economic development.²²³ Third, SCIA could be placed into not only all future federal legislation contemplating restrictions on economic development takings,²²⁴ but also into federal enabling legislation for these types of takings that are applicable to Washington, D.C., that was at issue in *Berman*.²²⁵

a) Components of SCIA

SCIA for economic development takings should likely include, at a minimum, a response to the following questions, which largely track the concerns outlined in Part III of this article, with studies or data to support the answers:

1. How will the taking or development project disrupt existing land uses?
2. How will the taking or development affect neighborhood integrity?
3. Will the taking or revitalization project displace and relocate homes, families, and businesses?
4. What opposition, if any, exists to the taking or project?
5. If neighborhood integrity is to be affected or the taking or revitalization project is to displace homes, families, and businesses, how can these effects be mitigated?

business?, 4) Will the action affect the quality of life of the residents of the area?, 5) Will the action increase traffic flow and congestion? and 6) Will the action divide or disrupt existing land uses?" *Id.* Indeed, Sander infers that had a SCIS been incorporated into the EIS for *Poletown*, it might have proved helpful to the residents there. *Id.* at 4.

²²³ See Broder, *supra* note 5.

²²⁴ See *supra* note 6.

²²⁵ 348 U.S. 26, 28 (1954).

6. If displacement and relocation identified in Question Three occur, how many homes, families, and businesses will be relocated?
7. If displacement and relocation occur, what opportunities be made available for displaced residents to occupy space in the new development as a home or as a small business?²²⁶
8. If there is no plan to have displaced residents occupy space in the new development as a home or as a small business, what proposals do the relevant government entities have to relocate residents or small business owners to an equivalent site?
9. What is the economic impact of the displacement of these homes, families, and businesses on the city and state's purse, in the form of lost real property and sales taxes, jobs generated by small businesses that may be displaced, and revenues generated by these businesses?
10. What is the ethnic and racial breakdown of the families who may be displaced?
11. What is the promised economic impact of the takings, in terms of employment opportunities and tax revenue gained?
12. Is the promised economic impact referred to in Question Eleven realistic and practical, in light of other potentially uncontrollable factors, such as the availability of financing for the project, key tenants and institutions that may occupy the project, or the economic health of these key tenants?
13. What ties, if any, do the private entities that stand to gain from the economic development project have with any state or local governments exercising eminent domain or promulgating legislation in support of its exercise?
14. What alternatives exist to placing the economic development project in the proposed site?

²²⁶ Housing provisions in the new development plan for some of the displaced residents in *Berman* were specifically noted by the Court in that case. *Berman*, 348 U.S. at 30-31. At least one-third of the new residential units were to be "low-rent housing with a maximum rental of \$17 per room per month." *Id.*

b) The SCIA Process

Just as with EISs in NEPA, SCIAAs would incorporate both pre-draft and draft versions, to which the public and other decision-makers could respond.²²⁷ They would also include final versions in which the entity seeking to use an economic development taking would respond to public comments.²²⁸ In addition, provisions for supplemental SCIAAs should be included, in case the initial assessment is inadequate. Moreover, because of the heightened sensitivities that may result when economic development takings are proposed, public hearings and public comments should be incorporated at each stage of the process to allow for meaningful public input. A reasonable page limit and plain English requirement should be placed on the SCIA to ensure that the general public can readily understand the document.

Furthermore, the fourteen questions suggested in Part IV.C.2.i. could be further expanded and standards added to ensure a consistent process. These questions are designed to ensure greater transparency and balance of power between the public, private interest, and government that largely acts in favor of corporate interests to the exclusion of the community.

In addition, the expanded opportunity for notice and comment by the public also furthers another goal - by raising the bar for approval of economic development takings, the government is forced to seek consensus among affected and interested parties. This consensus could lead to several favorable outcomes: (1) wholesale elimination of a project that contemplates takings, (2) revision of a project to take into account a community's needs, and (3) when takings are unavoidable, increased economic bargaining power for traditionally less powerful communities faced with the threat of loss of home and business.

Due to the pressing need for this type of information, SCIAAs should be mandated by the courts or by the legislatures for all economic development takings. On the other hand, there is the counterargument that a mandatory process would only be obstructionist. This process would increase bureaucratic red tape, engender resistance, and perhaps waste time and resources for economic development takings that might not have a significant impact.²²⁹ Given the success of EISs and NEPA in empowering previously disaffected communities, increased transparency, resulted in greater participation and influence by average Joe communities, will likely offset these perceived negative attributes of SCIAAs.

²²⁷ 40 C.F.R. § 1503.1 (2006) (inviting public comment).

²²⁸ 40 C.F.R. § 1504.1 (2006) (noting that the lead federal agency proposing the development shall respond to comments made in part by the public in the final EIS).

²²⁹ See Cole, *supra* note 194, at 1176 (supporting the use of Health Impact Assessments as part of EISs or as free-standing documents).

Standards for judicial review would depend on the goals of SCIA's. If the goal is to ensure a process, one that is consistent and standardized throughout a particular state or other jurisdiction, then, as with EISs in NEPA, there are three items that are of utmost importance in procedurally focused SCIA's. First, the public must be able to access information at a reasonably early date concerning an economic development taking. Second, the public must have the ability to respond at an appropriate time, through public hearings and written comments, to contemplated governmental action. Third, as in NEPA's EISs, the government, and any corporate interests proposing an economic development project that involves takings, must meaningfully demonstrate that it has integrated and responded to any concerns by the public in a final version of the SCIA.²³⁰

On the other hand, the goal of SCIA's might be to ensure a particular substantive outcome. The lack of emphasis on substantive outcomes in NEPA has been a long-standing point of contention with critics of the statute. Moreover, given the power that corporate interests may wield over government and, as a consequence, government's largely dismissive approach to affected landowners who do not wield equivalent influence in economic development takings, a substantive focus to SCIA's might, therefore, be urged. With an emphasis solely on process, an SCIA may simply be inadequate as a way to countervail the influence of large corporate interests over desperate cities. The result would be more of the same, landowners of lesser power would still be bereft of house and small business, left with the cold comfort of more documentation that simply explains how they arrived at the same place.

Ultimately, however, this Article advocates a concentration on process with respect to SCIA's for several reasons. First, in reviewing SCIA's under NEPA, courts have been extremely reluctant to assess the substantive outcomes of a particular decision by federal agencies regarding a project that may have deleterious environmental consequences on a community.²³¹ Therefore, judicial precedent that supports a more procedural stance towards EISs, akin to SCIA's, has already been set. Therefore, it is unlikely that courts would take a more substantive approach to SCIA's. Moreover, the Court's decision in *Kelo*, in which it took a "hands-off" approach to substantively assessing the economic development project at issue in New London,²³² also might suggest that the judiciary would be likely unwilling to judge a particular outcome of a SCIA.

²³⁰ See *supra* notes 193–194 and accompanying text.

²³¹ See, e.g., *Greenpeace Action*, 14 F. 3d 1324, 1330–32 (9th Cir. 1992) *supra* note 203 (ruling not on substantive outcomes, but on the need for EISs). See also *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (noting that NEPA is "essentially procedural").

²³² 125 S. Ct. at 2668.

In addition, if courts were to step into the role of ensuring a particular substantive outcome, it is unclear exactly what that outcome should be. From the perspective of an affected landowner or community that believes that they have been negatively impacted by an economic development taking, the belief would be that a court should determine a holding or outcome in their favor. On the other hand, a desperate city and any of its private economic development partners would likely desire a ruling that supports the project, even though it contemplates the use of eminent domain and may indelibly transform a community. Operating under the belief that courts and justice are supposed to be blind and unbiased towards any particular party, it is difficult to reconcile this premise with the notion that the judiciary should be placed in the position of ensuring a particular result. Employing a process-oriented approach to SCIA's by the courts is, therefore, the preferable course.

In light of the undeniable success of NEPA in opening up access, accountability, and information to the public, and thereby fomenting the creation of numerous socially aware environmental groups, benefits should accrue to politically marginalized and less powerful landowners and communities in the eminent domain context. This article suggests that placing more information in the hands of previously excluded communities and therefore encouraging meaningful participation in decisions related to economic development takings, are successes in themselves.

Therefore, if the goal is to ensure a process by which the public, government, and private beneficiaries of economic development takings will be more informed, then the applicable standard of review should be that already used in assessing NEPA cases. For instance, to assess the adequacy of a government's SCIA, the "rule of reason" should be used.²³³ On the other hand, the judicial standard of review for a case in which it is argued that a supplemental SCIA is necessary should invoke an "arbitrary and capricious" standard.²³⁴

c) Assessment of SCIA's

SCIA's will likely require more time, expense, and work for the parties involved, as well as for the courts that are charged with reviewing them. However, given the checkered history of economic development takings and their failure to deliver the public benefits that were promised, the investment in a SCIA may be miniscule compared to the investment of taxpayer dollars that are used to support an unviable project and the unnecessary bad will that is engendered by a lack of meaningful public debate. By virtue of the time, expense, and public disclosure, SCIA's will

²³³ See *supra* notes 201-08 and accompanying text.

²³⁴ See *supra* notes 201-08 and accompanying text.

provide incentives for government and private party decision-makers to consider thoughtfully and carefully the ramifications and consequences of their plans.

In addition, more information will be provided to the public, and average citizens would have more of an opportunity to participate and to influence economic development projects that call for the use of eminent domain. The assessments would likely empower ordinary citizens, as NEPA has similarly empowered environmental groups. Finally, SCIAAs and the public scrutiny to which they will be subject, will likely correct, for the lack of political power and influence that average citizens do not have, especially when measured against that wielded by large corporate interests.

D. STUDIES PERFORMED IN *Kelo*

In *Kelo*, two studies were performed. One study, commissioned by the New London Development Corporation, focused on the pure economic impact of the Fort Trumbull redevelopment project on the city of New London and New London County.²³⁵ The second study²³⁶ was performed pursuant to the Connecticut Environmental Policy Act,²³⁷ and it required an Environmental Impact Evaluation (EIE)²³⁸ or a Finding of

²³⁵ See generally Fred Carstensen et al., *The Economic Impact of the Pfizer and Fort Trumbull Development Projects*, Connecticut Center for Economic Analysis, (2001), available at <http://ccea.uconn.edu/studies/New%20London%20City%20Impact%20Study—Final%20Report.pdf> (last visited on Aug. 24, 2006).

²³⁶ See *Kelo*, 125 S. Ct. at 2659 n.2; see also Brief of the State of Connecticut, Through its Attorney General Richard Blumenthal, as *Amicus Curiae* in Support of the Respondents at 5, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

²³⁷ CONN. GEN. STAT. § 22a-1, et seq. (2006).

²³⁸ According to Connecticut law, EIEs must detail the following: “(1) A description of the proposed action which shall include, but not be limited to, a description of the purpose and need of the proposed action, and, in the case of a proposed facility, a description of the infrastructure needs of such facility, including, but not limited to, parking, water supply, wastewater treatment and the square footage of the facility; (2) the environmental consequences of the proposed action, including cumulative, direct and indirect effects which might result during and subsequent to the proposed action; (3) any adverse environmental effects which cannot be avoided and irreversible and irretrievable commitments of resources should the proposal be implemented; (4) alternatives to the proposed action, including the alternative of not proceeding with the proposed action and, in the case of a proposed facility, a list of all the sites controlled by or reasonably available to the sponsoring agency that would meet the stated purpose of such facility; (5) an evaluation of the proposed action’s consistency and each alternative’s consistency with the state plan of conservation and development, an evaluation of each alternative including, to the extent practicable, whether it avoids, minimizes or mitigates environmental impacts, and, where appropriate, a description of detailed mitigation measures proposed to minimize environmental impacts, including, but not limited to, where appropriate, a site plan; (6) an analysis of the short term and long term economic, social and environmental costs and benefits of the proposed action; (7) the effect of the proposed action on the use and conservation of energy resources; and (8) a description of the effects of the proposed action on sacred sites or archaeological sites of state or national importance. In the case of an action which affects existing housing, the evaluation shall also contain a detailed statement analyzing

No Significant Impact (FONSI) to be performed and approved by the Connecticut Office of Policy Management.²³⁹

Because of the Fort Trumbull project's impact on homes, Connecticut law also required that the EIE in *Kelo* examine the indirect and direct effects on housing, based on race and income levels of the residents in Fort Trumbull, as well as whether the impact on housing was consistent with the state's long-term housing initiative.²⁴⁰ The Connecticut Office of Policy Management concluded that the economic development project did not conflict with the state's housing goals.²⁴¹

Connecticut's inclusion of these social factors in the EIE, such as the project's impact on housing categorized by race and income levels, is to be commended. The inclusion of these social factors responds to Questions Three, Six, and Ten in the alternative framework of SCIA's. However, in comparison to the alternative framework proposed by this Article the Connecticut law does not delve as deeply into the details of economic development projects, such as the influence that a private interest may have on it, any opposition that may be percolating against a project, and whether theoretical public benefits may mesh with what the public will actually receive.²⁴²

CONCLUSION

In today's context, economic development takings must be viewed through the dual prisms of the exploding popularity of urban revitalization and cities' desperate measures to expand their tax and revenue bases. Given these twin guideposts in the economic development environment, the Court's decision in *Kelo* may have created a situation that is ripe for abuse and further advantages those with the most power at the expense of those with the least.

(A) housing consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action by income group as defined in section 8-37aa and by race, and (B) the consistency of the housing consequences with the long-range state housing plan adopted under section 8-37t." CONN. GEN. STAT. §22a-1b(7)(c) (2006).

²³⁹ Richard Blumenthal, Attorney General, Connecticut Attorney General Opinion, 2001 WL 1639012 (Conn. Att'y Gen. Dec. 6, 2001).

²⁴⁰ CONN. GEN. STAT. § 22a-1b(7)(c)(A)-(B) (2006).

²⁴¹ *Kelo*, 125 S. Ct. at 2659 n.2.

²⁴² Similarly, in *Poletown*, an EIS was required because of the federal dollars spent to fund the project. The EIS "examined the economic, social, and physical impacts of the project." JONES & BACHELOR, *supra* note 87, at 86. However, Detroit received a waiver to the requirement that the EIS had to be completed before federal funds were to be released because the city "emphasized the deadlines set by GM." *Id.* at 85. Ultimately, the EIS had little effect, as it just needed to be completed just before construction of the plant and it "had no influence on project planning." *Id.* at 86.

For instance, the Supreme Court in *Kelo* deferred to the judgment of the legislature, refusing to hold cities and large corporate interests accountable for public benefits promised but seldom yielded, and paid tribute to the “sustaining hand” of many large private interests in economic development takings. The lack of safeguards against harmful economic development takings is frightening to the average citizen faced with the threat of his or her home or small business being seized for economic development. In light of these factors, it is important that these takings be examined under an alternative framework that attempts to re-weight the balance of power between “desperate” government, its private backers, and the average Joe.

While there have been several proposals that attempt to re-balance the power structure between these three groups, including the application of a strict scrutiny test to economic development takings and a number of economically creative solutions, this Article proposes a new analytical framework for examining economic development takings. Taking a page from the National Environmental Policy Act (NEPA), this new construct involves the application of a consistent process in which Social Capital Impact Assessments (SCIAs), either mandated by the legislatures in enabling legislation or by the courts, would be the focal point.

The emphasis on process will also mandate that governments meaningfully respond to a number of questions regarding the economic and social impact of a proposed economic development project that involves takings on a community. In addition, this process would require that the public not only have an opportunity to comment at an early stage on any projects, but also that government address these comments in a meaningful way. Furthermore, similar to the review of Environmental Impact Statements in NEPA, judicial review of SCIAs in this new framework will ensure that a certain procedure has been conformed to, rather than ensuring a specific outcome. By providing the public with not only greater access to information at an early stage of an economic development project that contemplates the use of eminent domain, but also greater opportunities to influence it, it is possible that the average citizen will be empowered and the balance of power between him or her, the government, and powerful corporate interests will be altered. Finally, as evidenced by experience with NEPA, the judiciary is vital in ensuring a process and thereby bridging the power gap in economic development takings between the average Joe, “desperate” cities, and powerful private interests.

