

# Desperate Cities: Eminent Domain and Economic Development in a Post-*Kelo* World

## Abstract

*Kelo v. City of New London* unleashed an unprecedented legislative response when the Court upheld the use of eminent domain for private economic development as consistent with the Takings Clause of the Fifth Amendment. By exhibiting an extreme deference to the legislative branch and failing to consider the current model of economic development, in which “desperate” cities have seen their economic bases contract and have embarked on fervent urban revitalization campaigns as a result, the *Kelo* Court failed to take into account the immense influence that large corporate interests wield in the legislature. This influence is generally exercised to the detriment of the interests of the average citizen whose home or small business is at risk of being seized on behalf of powerful private interests and in the name of economic development. Unwittingly, *Kelo* has opened the doors for abuse of these average citizens.

*Kelo* saw its precursor in the infamous 1981 *Poletown* decision by the Michigan Supreme Court. *Poletown*’s lessons and the Michigan Supreme Court’s subsequent reversal of it are instructive in a post-*Kelo* world. While balancing the interests of cities and states desperate to revitalize their tax bases and those of the average citizen who are given very little recourse in *Kelo* and in many legislatures, this paper advocates a new framework under which economic development takings may be analyzed.

This framework comprehends a process, mandated by either the courts or by the legislature in enabling legislation, in which Social Capital Impact Assessments (SCIA) would be used to correct the imbalance of power between large corporate interests and government, on the one hand, and the average citizen, on the other. Successfully implemented under the National Environmental Policy Act (NEPA), Environmental Impact Statements and Assessments, that mandate the study of federal agencies’ actions and their impact on the environment, have revolutionized the influence of previously excluded environmental groups on environmental policy by using the courts as a mechanism for enforcement. By implementing a process by which governments must respond to questions relating to the social impact of proposals that contemplate economic development takings and by providing opportunities for public comments, as in NEPA, the legislative balance-of-power implications post-*Kelo* may be corrected.

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# Desperate Cities: Eminent Domain and Economic Development in a Post-*Kelo* World

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## I. Introduction

The U.S. Supreme Court's decision in *Kelo v. City of New London*<sup>2</sup> (hereinafter *Kelo*), upholding a Connecticut statute<sup>3</sup> and permitting the use of eminent domain for private economic development as consistent with the Takings Clause of the Fifth Amendment to the Constitution,<sup>4</sup> spurred a level of public outrage unseen in modern times to prior rulings of the Court.<sup>5</sup> As a result of this outrage, a flurry of proposed state<sup>6</sup> and federal<sup>7</sup> legislation ensued in an effort to counteract the effects of the Court's decision in *Kelo*.

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<sup>2</sup> *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. Justice O'Connor authored a dissenting opinion in which Justices Rehnquist, Scalia, and Thomas joined. Justice Kennedy wrote a separate concurring opinion, and Justice Thomas filed a separate dissenting opinion.

<sup>3</sup> The relevant Connecticut statute includes a "determination of policy" stating that the acquisition of land by eminent domain for "the continued growth of business and industry," or economic development, in Connecticut is a "public use" in the "public interest." *CONN. GEN. STAT.* § 8-186 et seq. (2006).

<sup>4</sup> The Takings Clause of the Fifth Amendment states that "Nor shall private property be taken for public use, without just compensation." U.S. CONST. art. 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; *see also* *Fallbrook Irrigation Distr. v. Bradley*, 164 U.S. 112, 158-64 (1896). 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. *Kelo*, 125 S. Ct. at 2633.

<sup>5</sup> *See* Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2; *see also* Timothy Egan, *Rulings Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A12.

<sup>6</sup> 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. 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. *See id.*; *see also* Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, Feb. 20, 2006, at 1A (noting the one-year moratorium in Ohio); *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).

<sup>7</sup> 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 Stat. 2396, 2494-2495 (2005). Furthermore, the U.S. House of Representatives recently passed H.R. 4128, a bill that

Economic development in the context of eminent domain generally refers to the government's taking property and its transferring title to a private party with the understanding that development of the property will yield public benefits, such as increased tax revenue or additional employment opportunities.<sup>8</sup> In upholding the use of eminent domain for economic development, the Court also reasoned that economic development satisfied the Fifth Amendment's "public purpose" test, so long as the development is part of an "integrated"<sup>9</sup> or "comprehensive redevelopment"<sup>10</sup> plan that will yield increased benefits to the community in the form of increased property tax, sales tax revenue, and more employment opportunities.<sup>11</sup>

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

This reality was dramatically reflected in the *Kelo* case itself, as the city of New London was generally thought of as an "economically distressed" city.<sup>14</sup> City leaders in New London were desperate to raise additional revenues, as the Federal Government had closed the doors of the Naval Undersea Warfare Center in 1996, resulting in a loss of over 1,500 jobs.<sup>15</sup> In addition, New London's unemployment rate was almost twice that of Connecticut's in 1998, prompting concern from civic and state leaders and spurring the plan for the development of the Fort Trumbull area at issue in *Kelo*.<sup>16</sup>

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.<sup>17</sup> It is estimated that the development and construction of

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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) (2005). The same legislation also 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).

<sup>8</sup> 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).

<sup>9</sup> *Kelo*, 125 S. Ct. at 2666-67.

<sup>10</sup> *Id.* at 2668.

<sup>11</sup> *Id.* at 2665.

<sup>12</sup> MAUREEN KENNEDY & PAUL LEONARD, THE BROOKINGS INST., DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (2001), <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf>.

<sup>13</sup> *Id.*

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

<sup>15</sup> *Kelo*, 125 S. Ct. at 2658.

<sup>16</sup> *Id.* at 2658-59.

<sup>17</sup> *Id.*

the Pfizer facility has resulted in 2,000 additional and largely high-paying jobs to the area.<sup>18</sup>

The other guidepost in the contemporary context in which *Kelo* should be examined is the current phenomenon, dating from the 1990's, of the revitalization of many of the United States's previously forgotten and decrepit inner cities and downtown areas.<sup>19</sup> "Urban revitalization," also known as "urban redevelopment" and "gentrification" is "the process of neighborhood change that results in the replacement of lower income residents with higher income ones."<sup>20</sup> 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, in an attempt to rejuvenate tax revenues and neighborhoods, and ultimately to bring renewed life back to their downtowns areas,<sup>21</sup> precisely for the reasons stated by the city of New London in *Kelo*. 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, as in the Fort Trumbull area in *Kelo*, thriving cultural and arts scenes, easy access to health care, universities, colleges, and jobs.<sup>22</sup>

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.<sup>23</sup> Urban redevelopment efforts diminished in the 1970's 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 for economic development, it is imperative that a new analytical framework be used to examine takings for economic development. The framework posed by the Supreme Court in *Kelo* fails to take into account the current wave of urban development and the effects that this phenomenon is having on ordinary citizens<sup>24</sup> 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 belies the notion that powerful private

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<sup>18</sup> *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.

<sup>19</sup> 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 12, at 1; see also EUGENIE L. BIRCH, THE BROOKINGS INST., WHO LIVES DOWNTOWN 1 (2005), [http://www.brookings.edu/metro/pubs/20051115\\_Birch.pdf](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.").

<sup>20</sup> See KENNEDY & LEONARD, *supra* note 12, at 1.

<sup>21</sup> *Id.*

<sup>22</sup> See BIRCH, *supra* note 19, at 1.

<sup>23</sup> At its inception, urban renewal was heavily pursued by mayors of cities who wished to compete with the suburbs and to revitalize the inner cities. In order to achieve this goal, mayors sought funding for their initiatives from the federal government. Business coalitions took a 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 (1990).

<sup>24</sup> For purposes of this article, reference to the "average citizen," "average resident," or "average American" is not exclusive of persons in the United States having United States citizenship or permanent residency in the United States, but 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.

interests often dictate the terms of economic development and, ultimately, the use of eminent domain for revitalization projects.

Accordingly, this paper will advocate for a new framework that empowers the average homeowner or small business owner who may face 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 of this article will examine the *Kelo* opinion. Part III will explore the inequities in power between large primarily 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 average home and small business owner, using *Poletown Neighborhood Council v. City of Detroit*<sup>25</sup> as a backdrop to this study. Part IV of this article will investigate reasons for a new analytical framework using contemporary and past examples of economic development takings, introduce this new schema, and propose additional solutions that may benefit the average citizen landowner, large private interests, and government. Part V will conclude this paper.

## II. A Critical Look at the Main Tenets of Kelo

*Kelo* has radically changed the landscape of eminent domain law, by upholding general economic development as a “public use” under the Fifth Amendment, though that development may benefit private parties directly, notwithstanding public benefits of increased tax revenues and more jobs. In *Kelo*, the Supreme Court majority relied heavily on *Hawaii Housing Authority v. Midkiff*<sup>26</sup> and *Berman v. Parker*.<sup>27</sup> 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 approved a law as constitutional under the “public use” provision of the Fifth Amendment that authorized Congress to use eminent domain and give land to private developers because of a “balanced, integrated [redevelopment] plan”<sup>28</sup> 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”<sup>29</sup> of the residents as a result of the substandard housing and lack of adequate sanitation facilities, such as running water and indoor toilets.

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 requirement of an “integrated,”<sup>30</sup> “comprehensive,”<sup>31</sup> or “carefully

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<sup>25</sup> 304 N.W.2d 455 (Mich. 1981).

<sup>26</sup> 467 U.S. 229 (1984).

<sup>27</sup> 348 U.S. 26 (1954).

<sup>28</sup> *Id.* at 34.

<sup>29</sup> *Id.* at 28.

<sup>30</sup> *Kelo*, 125 S. Ct. at 2667.

<sup>31</sup> *Id.* at 2668.

considered”<sup>32</sup> economic development plan. Although the Court first made several references to this “balanced, integrated plan”<sup>33</sup> requirement in *Berman*, it appears, however, that the *Kelo* Court has established this factor as the premier requisite for an economic development taking to be constitutional by its consistent mention of this type of plan throughout the opinion.<sup>34</sup> 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 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.<sup>35</sup> 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,”<sup>36</sup> such that the plan “will form a whole greater than the sum of its parts.”<sup>37</sup> In addition, the Court specifically declined to review the effectiveness of the economic development plan put forward by the city of New London.<sup>38</sup>

Outside of an almost exact replica of the economic plan for the Fort Trumbull neighborhood in *Kelo*, little guidance and detail are provided to municipal and state leaders and legal departments of these institutions, developers, real estate professionals, and large private interests, regarding what would constitute a constitutional economic development plan that includes takings. Furthermore, this lack of clarity not only provides little comfort to ordinary citizens whose property may be subject to takings, however amorphous or ineffective the plan may be, but also the opaqueness of *Kelo* opinion, with respect to constitutional criteria for an economic development plan, opens up the door wide to abuse of citizens.

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.<sup>39</sup> The rational basis test involves the courts’ examining whether the State is using a rational means to achieve a legitimate purpose.<sup>40</sup> Indeed, Justice Kennedy noted in his concurrence to *Kelo* that reviewing these cases on a case-by-case basis, rational review 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 favor a particular private party, with only incidental or pretextual public benefits.”<sup>41</sup>

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<sup>32</sup> *Id.* at 2661.

<sup>33</sup> *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*).

<sup>34</sup> *See infra* notes 35-36; *see also generally Kelo*, 125 S. Ct. at 2665-68.

<sup>35</sup> *Kelo*, 125 S. Ct. at 2665-68.

<sup>36</sup> 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 riverwalk, residences, office space, support facilities for the nearby state park, the marina, and shopping, respectively. *Kelo*, 125 S. Ct. at 2559.

<sup>37</sup> *Kelo*, 125 S. Ct. at 2665.

<sup>38</sup> *Id.* at 2668.

<sup>39</sup> *See id.* at 2667.

<sup>40</sup> *Id.* (citing *Midkiff*, 467 U.S. at 242).

<sup>41</sup> *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

By far however, the most important element of *Kelo* 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 by *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.<sup>42</sup> The Court seemingly empathized with those experiencing the "hardship"<sup>43</sup> of eminent domain by counseling them to avail themselves of the legislative process. Practically however, 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.<sup>44</sup>

#### A. A Line in the Sand - What the Kelo Majority Opinion 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."<sup>45</sup> The Court specifically declined to declare such a rule, noting that it would artificially restrict what governments can and cannot do under the Public Use Clause.<sup>46</sup>

Secondly, the Court refused to evaluate the economic development plan under which eminent domain was exercised by the city of New London, both for its proposed effectiveness in securing the public benefits of higher tax revenue, increased jobs, and for New London's determinations regarding the lands needed for the plan.<sup>47</sup> In connection with this argument, the Court, as a third matter, explicitly rejected the Petitioners' request to review Connecticut's judgment of the need for a plan of economic revitalization to

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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. notes 66-80.

<sup>42</sup> *See Kelo*, 125 S. Ct. at 2668 (citing *Berman*, 348 U.S. at 35-36 "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.").

<sup>43</sup> *Kelo*, 125 S. Ct. at 2668.

<sup>44</sup> *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) (discussing that "[w]hen 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.").

<sup>45</sup> *Kelo*, 125 S. Ct. at 2666-67.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 2668.



satisfy certain public needs for the city of New London.<sup>48</sup> The Court reasoned that precedent, dating from *Berman*, bound it to respect the decisions of the legislative branch of Connecticut.<sup>49</sup>

### B. The *Kelo* Dissent

Although the majority relied on *Midkiff* and *Berman* as the underpinnings of the its decision, Justice O'Connor's dissent distinguished these cases by noting that the land taken in them, albeit transferred to private hands, was mitigated by the takings' directly resulting in a benefit to the public.<sup>50</sup> 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. Similarly, in *Berman*, the takings directly benefited the public by clearing an area of slums in Washington, D.C. that in its entirety was a menace to public health and safety. In contrast, in *Kelo*, there was no equivalent "social harm."<sup>51</sup>

In contrast, Justice Stevens' majority opinion countered that precedent did not mandate that the taking result in a *direct* benefit to the public, but that there be *some* benefit to the public, even if the land acquired by a taking may be transferred to private hands. The majority opinion essentially upheld a more attenuated, if not ethereal or 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. Instead the plan itself, once developed, was pregnant with the hope that increased revenues, jobs, and momentum for the city of New London would result in an indirect public benefit. The majority, thus, upheld the *hope* of indirect public benefits.

Moreover, Justice O'Connor identified three categories of takings that the Court has stated historically conformed 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."<sup>52</sup> The second category includes the government's transferring 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."<sup>53</sup> The third category that Justice O'Connor outlined includes those instances, existing under "certain circumstances" and meeting "certain exigencies," for which "public ownership" under category one and "use-by-the-public" under category two, are

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<sup>48</sup> *See id.* at 2664.

<sup>49</sup> *See id.* at 2668.

<sup>50</sup> *Kelo*, 125 S. Ct. at 2674.

<sup>51</sup> *Id.* at 2675. 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'Conner, 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.*

<sup>52</sup> *Kelo*, 125 S. Ct. at 2673 (emphasis added); *see also* Lewis, *supra* note 8, at 364-70 (identifying three categories of "public use").

<sup>53</sup> *Id.* (emphasis added).

unworkable under the Public Use Clause.<sup>54</sup> 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 resulted in "affirmative harm on society."<sup>55</sup>

In comparison, Justice Thomas, in his dissent, went several steps further by advocating for a return to a strict interpretation of the Public Use Clause in vogue in some states at the nation's founding. This strict interpretation is one in which the government may take private property only if it will use it, or if the public has a legal right to use the land.<sup>56</sup> Justice Thomas also wrote that the *Kelo* Court has expanded the Public Use Clause to such an extent by sanctioning economic development as a proper public use, that it has effectively eviscerated the Clause.<sup>57</sup>

In analyzing the majority opinion, Justice Thomas reiterated the criticism that the majority has created an illusory test that essentially ignores the motive for the economic development. Reflecting the concerns that the Michigan Supreme Court noted in *County of Wayne v. Hathcock*,<sup>58</sup> in which it clairvoyantly disavowed the reasoning set forth by the majority in *Kelo*, Justice Thomas wrote that, in the sphere of economic development, private and tangential public benefit are fused and "mutually reinforcing."<sup>59</sup> 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.<sup>60</sup>

A second limitation that Justice Thomas found in the majority opinion is that governments' choosing to use eminent domain for economic development will put it in the business of "upgrading" real property. Under *Kelo*, government now has additional incentives to take property on behalf of private owners who intend 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.<sup>61</sup>

Finally, Justice Thomas admonished the majority for failing to intervene judicially in the *Kelo* holding because the decision ultimately rests on the backs of those least able to put their property to those uses that would yield the greatest economic benefits to the government and who are least politically connected.<sup>62</sup> Sadly, America's history illustrates that more often than not when eminent domain has been used to re-develop communities, the "leasts" in society are predominantly lower-income, racial minorities, and the elderly.<sup>63</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2673-74.

<sup>56</sup> *Kelo*, 125 S. Ct. at 2679; *see also id.* at 2681-83.

<sup>57</sup> *Id.* at 2678 (discussing that "[i]f such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution.").

<sup>58</sup> 684 N.W. 2d 765, 787 (Mich. 2004).

<sup>59</sup> *Id.* at 2676.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (noting that "[n]othing 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.").

<sup>62</sup> *Id.* at 2686-87.

<sup>63</sup> *Id.* at 2787; *see also 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); Berliner, *infra* note 127, at 185.

### III. Advantage: Corporations, *Kelo* Analyzed and Applied to Current Economic Development Takings

This paper finds the arguments advanced by the *Kelo* dissent ultimately more convincing, more grounded in reality, and, ultimately, more just. The majority's refusal to hold in favor of the Petitioners, really stand-ins for the average citizen, and instead rely on the effete and unrealistic notion that state legislatures, often composed of representatives elected and supported, in no small part, from donations made by large and powerful corporate interests, reflects a view of American democracy that is woefully out-of-step with current realities of the legislative process in many states.<sup>64</sup> This view is particularly outdated, given the two important guideposts influencing the contemporary urban planning environment:<sup>65</sup> 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 "Downtown, Inc.," or 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 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 largely "unmistakable guiding and sustaining hand, indeed controlling hand"<sup>66</sup> behind the government's use of eminent domain for economic development. There are several reasons for this line of thought.

First, "desperate" cities, those such as New London in *Kelo* that face an economic drain, ironically enough do not have the leverage to negotiate terms of these economic development projects that would preserve long-standing communities or small businesses. Cities' and states' negotiating leverage is diminished markedly in the face of a corporate threat, veiled or unveiled, to locate its 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 which many governments find themselves, combined with the revitalization explosion of many of America's inner cities, puts the advantage decidedly in the court of large corporations or other large private interests.

In addition, the notion of a powerful "sustaining hand" of large corporate interests at the local or state level is grounded in American political theory.<sup>67</sup> This theory indicates that there is an inverse relationship between the size of the unit of the

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<sup>64</sup> See, e.g., Gallagher, *supra* note 44, at 1868 (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.").

<sup>65</sup> See Part I., *supra* notes 12-22.

<sup>66</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468 (1981) (Ryan, J., dissenting).

<sup>67</sup> See Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 432 (1983).

government and the risk of the abuse of power.<sup>68</sup> As the government unit decreases in size, the risk of abuse of power increases.<sup>69</sup> 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.<sup>70</sup>

## B. Increased Risk of Abuse of Power

Several arguments have been advanced in support of the idea that there is an increased risk of abuse of power at the local level.<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup> A second contention is that at a more basic level, precisely because of the “desperate” situation in which local officials often find themselves, they are simply more susceptible to large-scale private interests and their associates, such as large corporations, developers, and real estate interests, who overpower local officials.<sup>74</sup>

Additionally, at the state levels, cities and the “sustaining hand” of large corporate interests that curry more political favor with state legislators often seek eminent domain friendly statutes that favor the use of economic development takings to the exclusion of, and at the expense of, the average citizen and taxpayer. An economic view of the law bears out this theory. Judge Posner<sup>75</sup> explains this behavior by noting 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.”<sup>76</sup> The public interest seldom motivates legislators, but their desire to be elected or re-elected does.<sup>77</sup> Money is often

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *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), that overruled a zoning board’s decision to approve a developer’s plan to rezone an area because “zoning decisions by local governing boards” are not “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 judicial challenge.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 434.

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 435.

<sup>75</sup> 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 . . . .”

<sup>76</sup> RICHARD POSNER, *PROBLEMS WITH JURISPRUDENCE* 353 (1990).

<sup>77</sup> *Id.* at 354.

the most necessary tool for pursuing a campaign that will secure the election or re-election of legislators, money that is “more likely” to come from “well-organized groups than from unorganized individuals.”<sup>78</sup>

Judge Posner further elaborates by stating that:

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 to candidates in exchange for an implied promise of favorable legislation.<sup>79</sup>

Posner would reason that most plaintiffs who seek to defeat economic development takings are individual homeowners, such as the nine petitioners in *Kelo* and the members of the Poletown Neighborhood Council in *Poletown Neighborhood Council v. City of Detroit*.<sup>80</sup>

Sadly, these groups that must stand against city and corporate giants are often too small and have too little time before a plan or action is taken to seize their property to organize effectively.<sup>81</sup> Moreover, the impetus to organize is even further destroyed when

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<sup>78</sup> POSNER, *supra* note 76, at 354; *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).

<sup>79</sup> POSNER, *supra* note 76, at 354; *see also* Somin, *supra* note 78, 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).

<sup>80</sup> 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* Part III.D., *infra* notes 89-14.

<sup>81</sup> *But see* Gallagher, *supra* note 44, at 1868 (refuting the notion that landowners may organize effectively because economic development projects often involve the assembling numerous parcels of land, owned by

one considers that some landowners may support the economic development because of the economic gains to themselves individually. For instance, the Poletown Neighborhood Council 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.<sup>82</sup> 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 [on its face] when they saw one."<sup>83</sup>

In addition, the short amount of time that accompanies many economic development takings, such as those in *Poletown* under Michigan's quick-take statute, necessarily dictates that any groups will be largely short-lived. In contrast to large private interests, including corporations, developers, and other real estate interests that know there is some degree of permanence in their ventures and therefore form politically effective interest groups to influence politicians regarding these ventures, homeowners and small businesspersons faced with an economic development taking have no reason to form a lasting alliance between themselves or others.<sup>84</sup>

Not only does the average citizen lack the requisite political power to stop economic development takings legislation at the state level and the requisite political power to stop the actual taking at the municipal level, but also there is little practical recourse to be found in the courts. To mount a lawsuit contesting the eminent domain taking and perhaps to continue litigation until the exhaustion of all appeals against often well-financed and organized municipal and perhaps state legal offices, is an undertaking that most average Americans faced with the prospect of losing their home or small business simply cannot afford.<sup>85</sup> For example, the homeowners in *Kelo* were able to mount and continue their judicial attack to the highest levels of the American judicial system only because they were represented by the Institute of Justice, a non-profit law firm.<sup>86</sup>

### C. Economic Subsidies

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different landowners in close proximity and 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).

<sup>82</sup> See BRYAN D. JONES & LYNN W. BACHELOR, *THE SUSTAINING HAND* 155 (1986). *But see* Gallagher, *supra* note 44, at 1868 (discussing that 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). It should be noted, however, that there were only 10 *Kelo* landowners who filed suit, thus minimizing the effect that the group may have had, given its small numbers, regardless of how tightly organized it was.

<sup>83</sup> *Id.*; *see also Poletown*, 304 N.W.2d at 471 (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.").

<sup>84</sup> Mansnerus, *supra* note 67, at 436.

<sup>85</sup> 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, 573 (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.").

<sup>86</sup> *Kelo*, 125 S. Ct. at 2658.

Ironically, the average citizen, including those whose homes and small businesses are taken, ends up paying twice, a sort of double taxation, for the privilege. The first time he or she “pays” is through the seizure of his or her house and 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 often comes in the form of tax dollars spent to purchase the land under eminent domain, bonds or other debt issued that all levels of government, including local, state, and federal, must service to pay for the purchase of the land, or certain promises made by the government as part of the economic development deal. A third level of “taxation” may occur should a rare landowner expend resources in attorney’s fees and court costs to seek recourse in the judicial system.

Furthermore, large corporate interests are economically subsidized by not having to bid on the private, competitive real estate market for the land that is taken and paying market prices for its acquisition.<sup>87</sup> This subsidy, in combination with ones associated with the second level of taxation above, result in those with the most resources benefiting economically at the expense of those with the least economic means.

Paradoxically, it is also the more desperate cities that end up paying the most in subsidies to attract large corporate interests, and the wealthiest corporations that end up receiving the largest concessions.<sup>88</sup> Like a child, therefore, who runs to his parent to protect him from a fight with a bully, large corporate interests run to the government to shield them from the economic pain of the open market.

#### D. History Repeats Itself: *Poletown*, the *Kelo* of Its Day

Judge Ryan, one of the dissenting judges in *Poletown*, wrote tellingly in his 1981 dissenting opinion that “the reverberating clang of its [Poletown’s] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations.”<sup>89</sup> The *Poletown* clang has now been replaced by the sonic boom of the Supreme Court’s decision in *Kelo*, a decision that parallels *Poletown* almost 25 years later, but whose effects will ultimately be more far-reaching and likely longer lasting.

In 1981, the Michigan Supreme Court upheld in *Poletown*, a Michigan “quick-take” statute that authorized municipalities to use eminent domain for economic development. In practice, this quick-take statute<sup>90</sup> allowed the city of Detroit to take Poletown, a historic neighborhood composed primarily of 3,438 lower-class elderly

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<sup>87</sup> Kruckeberg, *supra* note 85, at 579 (2002) (discussing the notion that corporations should be prevented from having to go “outside of the open market.”).

<sup>88</sup> 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 Bachelor, *supra* note 82 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.”).

<sup>89</sup> *Poletown*, 304 N.W.2d at 464-65 (Ryan, J., dissenting).

<sup>90</sup> The “quick-take” statute allowed for faster takings, “making the process easier for both the condemning authority and the ultimate owner.” Mansnerus, *supra* note 67, 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).

residents of Polish descent and African-Americans for the construction of a new \$500 million dollar Cadillac plant<sup>91</sup> by General Motors (GM). The plant was to cost nearly \$200,000,000 to local, state, and federal taxpayers, and GM and Detroit promised 6150 auto-manufacturing jobs and \$15 million in property tax revenues.<sup>92</sup>

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%.<sup>93</sup>

Therefore, unemployment is often the bait to lure judicial approval in economic development takings.

Moreover, like New London in *Kelo*, Detroit in *Poletown* justified the use of eminent domain for the construction of a new General Motors Cadillac plant by pointing to its dismal economic statistics.<sup>94</sup> 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 of or 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, were pitted against City Hall and the large powerful interests standing with them.

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<sup>91</sup> Bukowczyk, *supra* note 88, at 61.

<sup>92</sup> *Id.* at 464 n.15, 467; *see also* JONES AND BACHELOR, *supra* note 82, at 138-39, and JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 52 (1989) (noting that the social cost to the *Poletown* takings was the clearance of 1,400 homes, 144 businesses, and 16 churches and that estimates the actual cost to taxpayers was over \$300,000,000); *see also* Somin, *supra* note 78, at 1017 (analyzing the social and economic costs to the taking of the *Poletown* neighborhood 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* Somin, *supra* note 78, 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, <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 (2d ed. The Free Press 1982); *see also* Bukowczyk, *supra* note 88, at 62.

<sup>93</sup> *Poletown*, 304 N.W. 2d at 465 (Ryan, J., dissenting).

<sup>94</sup> *See id.* at 459 (“In this regard the city presented substantial evidence of the severe economic conditions facing the residents of the city and the state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide . . .”).



Yet another similarity that *Poletown* has with *Kelo* is that the neighborhood did not suffer from blight, was not a slum, nor did it pose any other hazard to the community.<sup>95</sup> Both neighborhoods, however, did suffer from one commonality--they happened to be located in areas that large politically-connected corporations, namely Pfizer Corp. and General Motors, respectively, wanted for their own ends, regardless of the spill-over benefits to the community.

For instance, in *Poletown*, Judge Ryan included in his dissenting opinion correspondence from GM to Mayor Young of the city of Detroit that detailed the extent to which General Motors's hand 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 and 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 12 years of property tax abatements.<sup>96</sup>

More than 20 years later, it appeared that Pfizer and New London had absorbed the lessons of *Poletown*, as there was no "smoking gun" correspondence that detailed 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,<sup>97</sup> was "suspiciously agreeable to the Pfizer Corporation."<sup>98</sup> 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.<sup>99</sup>

More startlingly, is that several former high-ranking state officials confirmed that Pfizer demanded that Connecticut replace Fort Trumbull or else it would not build the multi-million dollar Pfizer facility.<sup>100</sup> The reason for this demand was that, as one official noted, Pfizer wanted to ensure that the PhD's that it wanted to attract to work in its adjacent research complex and who would be making \$150,000 to \$200,000 annually, felt comfortable in the neighborhood and enjoyed a high quality of life.<sup>101</sup> The husband of a former president of the New London Development Corporation, who was a Pfizer executive, was notably quoted in a Connecticut newspaper as saying that, "Pfizer wants a nice place to operate. We don't want to be surrounded by tenements."<sup>102</sup>

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<sup>95</sup> Mansnerus, *supra* note 67, at 418 (supporting the lack of blight and sub-standard conditions in *Poletown*); see also *Kelo*, 125 S. Ct. at 2674-75 (noting that the Petitioners' homes in *Kelo* were "well-maintained" and yielded no kind of social ill).

<sup>96</sup> *Poletown*, 304 N.W.2d at 466-71 (Ryan, J., dissenting).

<sup>97</sup> *Kelo*, 125 S. Ct. at 2659.

<sup>98</sup> *Id.* at 2678 (Thomas, J., dissenting).

<sup>99</sup> Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, at A1.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 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, Nov. 3, 2005, [http://www.aarpmagazine.org/money/whose\\_house\\_is\\_it\\_anyway.html](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. 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 letters, e-mails, and other correspondence between them, but concluded that Pfizer was not the prime beneficiary of the plan. *Kelo*, 125

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.<sup>103</sup> The expense to taxpayers has been similar in *Kelo*, where in addition to the \$118 million in financial incentives that Connecticut and New London offered to Pfizer to build its facility, the state has spent an additional \$73 million from bonds for the redevelopment of Fort Trumbull.<sup>104</sup>

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 and supplant the neighborhoods, the GM/Cadillac plant in the former and the large-scale, mixed-use redevelopment project in the latter. In neither case, however, did the courts verify or inquire into whether these benefits would likely take place. In both cases, the public benefits were speculative. Indeed, in the case of *Poletown*, the promise made by GM and Detroit was that “at least 6,000 jobs” were to be created by replacing the neighborhood with a Cadillac plant.<sup>105</sup>

Reality, however, proved a different matter. The GM plant ended up opening two years late.<sup>106</sup> In 1988, seven years after the condemnations of the neighborhood, “no more than 2,500 workers”<sup>107</sup> worked there. Moreover, in 1998, at the apex of the economic expansion of the 1990s, only 3,600 workers were employed at the plant, a figure equivalent to less than 60% of the 6,150 jobs initially promised.<sup>108</sup> 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.”<sup>109</sup>

The current economic health of GM is reason enough why *Kelo* should be re-examined, and it illustrates the futility of relying on illusory benefits of using economic development as a pretext to take 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,”<sup>110</sup> GM announced in November 2005 that it was eliminating 30,000 jobs and fully and partially closing a dozen plants.<sup>111</sup> In addition, GM lost \$8.6 billion in 2005, providing a reason for the termination of 30,000 people.<sup>112</sup>

GM, however, is not alone in its economic woes. All three of Detroit’s Big Three automakers, including Ford and Chrysler, have eradicated or have plans to eradicate

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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.*

<sup>103</sup> *Poletown*, 304 N.W.2d at 464 n.15.

<sup>104</sup> Mann, *supra* note 99.

<sup>105</sup> *Poletown*, 304 N.W.2d at 467-68 (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)).

<sup>106</sup> JONES AND BACHELOR, *supra* note 82, at 218.

<sup>107</sup> Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City?*, DOLLARS & SENSE, Jul/Aug. 2001, at 25.

<sup>108</sup> *Id.*

<sup>109</sup> Somin, *supra* note 78, at 1017 (emphasis added).

<sup>110</sup> Maryann N. Keller, *Dull at Any Speed*, WASH. POST., June 12, 2005, at B1.

<sup>111</sup> Micheline Maynard and 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.

<sup>112</sup> Michael Ellis, *Ex-GM Spokesman Returns*, DETROIT FREE PRESS, Feb. 1, 2006, at 6F.

86,000 jobs, or one-third of their work force in North America.<sup>113</sup> Moreover, Detroit's auto industry's bonds have been "downgraded to junk."<sup>114</sup>

Perhaps cognizant of the inherent vagaries of the marketplace and the resultant instability on which economic development takings rest, the Michigan Supreme Court, therefore, reversed *Poletown* in *County of Wayne v. Hathcock*,<sup>115</sup> only a year before the U.S. Supreme Court seemingly "upheld" the decision in *Poletown*, almost 25 years later. *Hathcock* involved Wayne County's decision, a county that includes Detroit, to condemn 19 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.<sup>116</sup> Wayne County argued that Pinnacle Project would create jobs, grow the tax base, stem population loss and disinvestment in the community, and provide fertile ground for additional re-development.<sup>117</sup> The *Hathcock* court acknowledged that these four public benefits were in harmony with the Michigan statute under which eminent domain was exercised by the County,<sup>118</sup> but ultimately they were inconsistent with the Michigan Constitutional requirement that eminent domain be exercised only for a "public use."<sup>119</sup> Like Justice Thomas in *Kelo*,<sup>120</sup> the court further noted that almost every use of real property by a business or "productive unit" benefits the community.<sup>121</sup> According to the court, to justify the use of economic domain because a particular profit-seeking private party would put the land to "better use," in the form of more money to the public purse and more jobs to the community, eviscerates the restrictions imposed on eminent domain by the Michigan Constitution.<sup>122</sup>

Thus far, the economic benefits promised as a result of the condemnations in *Kelo* have been just as illusory as those promised in *Poletown*. The public outcry against the takings in *Kelo* has left investors wary of building on land that has become a potent symbol of eminent domain abuse and left the petitioners in *Kelo* confident enough to stay in their houses and even to renovate them.<sup>123</sup> Moreover, "contract disputes and financial uncertainty" have marred plans to construct in previously cleared areas of Fort

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<sup>113</sup> See Maynard and Bajaj, *supra* note 111, at A1.

<sup>114</sup> 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).

<sup>115</sup> 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* . . .").

<sup>116</sup> *Id.* at 770.

<sup>117</sup> *Id.* at 775-76.

<sup>118</sup> *Id.* at 770; 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.").

<sup>119</sup> MICH. CONST. art. 10, § 2 (1963) (stating that "private property shall not be taken for public use").

<sup>120</sup> See *supra* notes 56-63 in Part II.B. regarding Justice Thomas' dissent.

<sup>121</sup> *Hathcock*, 684 N.W.2d at 787.

<sup>122</sup> *Id.* 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 8, at 367-68.

<sup>123</sup> William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21 2005, at A1.

Trumbull.<sup>124</sup> Indeed, the Mayor of New London has publicly questioned the viability of the re-development of Fort Trumbull for at least the next two years.<sup>125</sup> Therefore, in such times of economic flux, declines in market share, and investor pull-outs and hesitation, terra firma was one of the last things upon which homeowners and small business owners could plant their feet, but under *Kelo*, however, even the ground is not so firm.

#### IV. A New Framework

##### A. Corporate Influence

The Supreme Court's failure to provide courts with a clear definition of 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 legislatures that over which large corporate interests often exert great influence, leaves the floodgates wide open for abuse by large private interests that 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 the taking, whether 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.

Abuses of this sort were seen in *Poletown* and in *Kelo*,<sup>126</sup> but the list, however, runs long.<sup>127</sup> For instance, in 2001, a federal district court in California granted plaintiff 99 Cents' motion for summary judgment<sup>128</sup> after the city of Lancaster, California, had initiated condemnation proceedings on property in which a 99 Cents Only store had a leasehold interest.<sup>129</sup> Costco Wholesale Corporation (Costco) had previously demanded that it be allowed to expand its store on the space occupied by 99 Cents.<sup>130</sup> 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

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ("Winning took so long that the plan may not be as viable in 2005 or 2006 or 2007.")

<sup>126</sup> See *supra* Part III.D., notes 95-102.

<sup>127</sup> See generally Dana Berliner, *Public Power, Private Gain: A New Resource for Fighting Eminent Domain Abuse* (Apr. 2003), [www.castlecoalition.org/report](http://www.castlecoalition.org/report). This comprehensive report compiles the condemnation or threat of condemnation of more than 10,000 properties in 41 states from 1998 to 2002. In addition, 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. *Kelo*, 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.*

<sup>128</sup> *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp.2d 1123 (C.D. Cal. June 26, 2001) (aff'd by 60 Fed. Appx. 123 (9th Cir. 2003)).

<sup>129</sup> *Id.* at 1126.

<sup>130</sup> *Id.*

blighted.<sup>131</sup> To the court's credit, it placed the brakes on this economic development project, tainted as it were by 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.*<sup>132</sup> in which 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.<sup>133</sup> 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.<sup>134</sup> As a result of the development authority's action, the racetrack's revenues were expected to increase to up to \$14 million.<sup>135</sup> 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."<sup>136</sup>

Yet another case in which courts have 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.<sup>137</sup> Trump Plaza Hotel & Casino, owned by Donald Trump, had successfully petitioned the Redevelopment Authority to condemn the landowners' properties because Trump Plaza needed limousine parking. 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" to it, including the addition of more casino space, without oversight by the government.<sup>138</sup> 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 the fast-track post-*Kelo* and that is currently attracting significant media attention, is equally illustrative of the vast power that large corporate interests can have on municipalities and states. The city of Oakland has evicted two small businesses, Revelli Tire and Autohouse, from land that the businesses own, as part of a redevelopment of the city.<sup>139</sup> This development is expected to cost \$61 million to taxpayers, and it will consist of, in part, a Sears store that would also include a tire store.<sup>140</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> 768 N.E.2d 1 (Ill. 2002) (hereinafter *SWIDA*).

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *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.

<sup>135</sup> *Id.* at 25.

<sup>136</sup> *Id.* at 23. 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.

<sup>137</sup> *Casino Redevelopment Authority v. Banin*, 727 A.2d 102 (N.J. Super. 1998).

<sup>138</sup> *Id.* at 111.

<sup>139</sup> FOXNews.com, *Oakland Seizes Land, Swaps Retailer* (Nov. 4, 2005), [www.foxnews.com/printer\\_friendly\\_story/0,3566,174519,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,174519,00.html); see also Jim Herron Zamora, *City Forces Out Two Downtown Businesses*, SFGate.com (July 2, 2005), <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/200507/02BAGO4DI6GJ1.DTL> (last visited Nov. 17, 2005).

<sup>140</sup> FOXNews.com, *Oakland Seizes Land, Swaps Retailer* (Nov. 4, 2005), [www.foxnews.com/printer\\_friendly\\_story/0,3566,174519,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,174519,00.html); see also Jim Herron Zamora, *City Forces Out Two Downtown Businesses*, SFGate.com (July 2, 2005), <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/200507/02BAGO4DI6GJ1.DTL> (last visited Nov. 17, 2005). Other cases have involved the unsuccessful threat of eminent domain over small businesses and homes to make way for a Wal-Mart in

## B. Creative Solutions

Despite these instances of abuse of ordinary citizens and the implications thereof in the wake of *Kelo*, this paper, unlike others however, does not advocate a categorical ban on economic development.<sup>141</sup> If economic development takings were banned, cities may respond by retaining ownership of seized land, but “contracting it out” via leases to

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Ogden, Utah, that was projected to yield \$1 million per year in additional sales tax revenue, and would have cost taxpayers \$2.1 million to move residents and to clear the land, but for which landowners complained Ogden was offering below-market rates and that two Wal-Mart stores were located within a 10 minute drive of the proposed site. See Lynn Arave, *Y'all Come! Ogden Leaders Eager to Get a Wal-Mart*, DESERET MORNING NEWS, Nov. 14, 2004, at B-3. Another example of the undue private influence in economic development takings akin to *Poletown* and *Kelo* was found in Mesa, Arizona, in which an Arizona appellate court struck down the condemnation of two small businesses, as inviolate of the “public use” restriction in the Arizona Constitution, that were slated for redevelopment after the owner of a neighboring Ace Hardware store, who came from a prominent family in Mesa, requested that the sites be included in the redevelopment project so that he could expand his hardware store on the new site, together with a large retail center that would have offered stores, offices, and eating establishments. *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003), and Berliner, *supra* note 127, at 16. In addition, in *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331-33 (N.Y. 1975), 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 that “openly expressed a desire to acquire” it, though Yonkers was to subsidize the acquisition and the City had made no more than a “bare pleading” that the area in which the land was located was “substandard.” See also Hous. and Redev. Auth. for Richfield v. Walsler Auto Sales, Inc., 630 N.W.2d 662 (Minn. 2001) (affirming the trial court’s holding to uphold a condemnation order of an auto dealership for a blighted area because of the closeness of the auto dealerships to residential areas, though the land was to be transferred to Best Buy to build a store). Moreover, in 2000, the city of New Rochelle, New York, took steps to declare a neighborhood of 34 homes, 160 primarily elderly residents, 29 businesses in which over 400 individuals worked, and two churches, “blighted,” based on a study paid for by Ikea, in order to make way for an Ikea store that the company had projected to bring \$2.5 million in annual sales tax revenue. Cognizant of New Rochelle’s past unsuccessful ventures with economic development takings, in which the City cleared downtown land in the 1960’s for a mall that closed in the early 1990’s but re-packaged ten years later as an “entertainment and retail complex” and in which the City cleared property around its train station in the late 1980’s for a condominium project that never got off the ground, residents protested and Ikea later backed out of the deal. See Debra West, *Ikea Wants to Move In, but Neighbors Fight Moving Out*, N.Y. TIMES (Mar. 7, 2000), at B1, and Winnie Hu, *Ikea Cancels Plans for Store In Westchester*, N.Y. TIMES, Feb. 1, 2001, at B1. In a similar project, the city of Pittsburgh, Pennsylvania, wanted to take 64 downtown buildings that included “restaurants, flower shops, and a 144-year-old optometry business,” to be replaced by a \$500 million retail project that would have yielded \$181,000 more in annually property tax revenues at a cost of \$70 million to taxpayers. *Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26. The project was halted after Nordstrom, a proposed anchor tenant of the project, chose not to pursue the deal. *Eminent Thievery*, at A26. The venerable New York Times has also been the recipient of eminent domain largesse from the government in the form of the Empire State Development Corporation. 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. 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, at a cost of over \$500 million in taxpayer subsidies. Dunlap, at D1.

<sup>141</sup> See Somin, *supra* note 78, at 1007 (discussing the need for a “categorical ban” on the use 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 including Michigan in *Hathcock*, *supra* note 115, Illinois in *S.W. Ill. Dev. Auth. v. Nat’l City Envtl. L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002), in which the court dismissed the economic development justification because “every lawful business” adds to the economy, and Kentucky in *Owensboro 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 78, at 1009-10.

powerful private interests for private development. 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. 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 the exploitation of the average citizen.<sup>142</sup> These scholars assert the idea that the taking of a home is more than an ordinary economic right deserving of only rational basis scrutiny, but one that is a fundamental right because of the “personal element” in a home.<sup>143</sup> They argue that an individual’s interest in his or her home is one akin to life or liberty under the Due Process Clause.<sup>144</sup>

Although cognizant of other proposals designed to address the power inequities in economic development takings between average citizens and large corporate interests, this paper will advocate 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 has, therefore, implicitly rejected a strict scrutiny test.

From the outset, however, it appears that regardless of the theoretical answers proposed to address the imbalance of power in these sorts of takings, as a practical matter there are a number of creative solutions to which the parties themselves, the landowner and the large corporate interest, without interference by the judicial system could agree. The advantage of more creative answers is that they may result in a balancing of the eminent domain scales between the average landowner, who must pay doubly with his home or small business and for taxpayer subsidies of economic development, and the government and large corporate interests. On the other hand, these solutions may likely be more time-consuming, given the need to think creatively instead of linearly, and more expensive for government, and ultimately for tax-payers, and large corporate interests with deep pockets. However, these characteristics may serve to force developers and government to consider carefully all of the ramifications of their plans.

For instance, an obvious resolution is one that would establish a premium price, above fair market value, for takings of homes.<sup>145</sup> This premium would take into account

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<sup>142</sup> Stephen J. Jones, *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 85, at 570-73 (comparing the deprivation of one’s property to the loss of life or liberty, thereby meriting strict scrutiny); see also Ralph Nadar and 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 67, at 444 (arguing that “the exercise of eminent domain for third-party use 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.”).

<sup>143</sup> Jones, *supra* note 142 at 309.

<sup>144</sup> *Id.*

<sup>145</sup> Benjamin Barros, *Home as a Legal Concept*, SANTA CLARA LAW REV, Vol. 46, (forthcoming Jan. 2006) <http://ssrn.com/abstract=801245>.

the sentimental or personal value of “home,” including one’s neighborhood and community,<sup>146</sup> a value that is often more than the market would assign and that is placed on the property if the landowner is not a willing seller.<sup>147</sup> 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.<sup>148</sup> For instance, the New York and Indiana Legislatures are deliberating legislation that would assess this premium at 25% and 50% above market value, respectively, for economic development takings.<sup>149</sup> In addition, some scholars have proposed that the premium be tied, on a sliding scale, to the length of residence in a home.<sup>150</sup>

Small-business owners would be similarly compensated for loss, not only for the fair market value of their land, but also for the value of their business’ good will, an amount that would correlate 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.<sup>151</sup> Still other scholars have suggested that another creative solution, albeit expensive and likely impractical but in keeping with a truly free market system, would be to have landowners name their price and to require the state and large corporate interests to oblige.<sup>152</sup>

Without resorting to takings, an additional inspired solution to accumulate land for an economic development project would be to have landowners, whose property is slated for the development, to share in the profits that it would generate.<sup>153</sup> There is precedent for just such an endeavor when in Atlanta, 39 African-American families were able to receive shares in the commercial development project that replaced their neighborhood.<sup>154</sup>

It should be remembered that countless successful economic development projects, such as Disney World,<sup>155</sup> 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. However, when it comes to holdouts, Euclid, Ohio, tried an unusual but fresh approach. When a developer that

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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. Bukowczyk, *supra* note 88, at 72.

<sup>146</sup> Bukowczyk, *supra* note 88, at 73.

<sup>147</sup> *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 home because of emotional attachments to it and to their neighborhoods).

<sup>148</sup> Barros, *supra* note 145, at 33; *accord* Gallagher, *supra* note 44, at 1869-70 and Bukowczyk, *supra* note 88, 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.”).

<sup>149</sup> Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, at 1A.

<sup>150</sup> Barros, *supra* note 145, at 33.

<sup>151</sup> Bukowczyk, *supra* note 88, at 72-73.

<sup>152</sup> *Id.* at 73.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (citing Roger Witherspoon, *Profits Out of Thin Air in Johnstown*, BLACK ENTERPRISE 65-68 (Dec. 1982)).

<sup>155</sup> 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 78, at 1026.



wanted to build a marina and a luxury high-rise development on Lake Erie was urging the city to use eminent domain on remaining holdout landowners, the city was well aware of the possibility of a public outcry from residents. Therefore, 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.”<sup>156</sup> 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.<sup>157</sup>

In Pittsburgh, instead of resorting to eminent domain on a holdout 50-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.<sup>158</sup> 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, the developers included the discount retailers, most of whom opposed the initial project, in the Mediterranean-themed shopping center.<sup>159</sup>

### 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 for a new framework by which courts examine post-*Kelo* economic development takings, other than those already discussed in Part IV.B. is necessary, as the Supreme Court has implicitly rejected these solutions.<sup>160</sup> 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 downtown revitalization, 2) the high degree of deference expressly accorded the legislature by the Supreme Court regarding economic development takings, though ordinary citizens have very little influence on the legislature, in contrast to well-financed politically powerful private interests, 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*

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<sup>156</sup> Thomas Ott, *Euclid Tried Polite Approach in Property Dispute*, THE PLAIN DEALER, Aug. 26, 2002, at B3.

<sup>157</sup> Thomas Ott, *Developers Offer to Let Holdout Keep House*, THE PLAIN DEALER, Sept. 20, 2002, at B3.

<sup>158</sup> Lawrence Walsh, *This Store’s Opening is Simply Grand; Home Depot Plays to Big, Enthusiastic East Liberty Crowd*, PITTSBURGH POST-GAZETTE, Feb. 11, 2000, at B1; see also Tom Barnes, *Home Depot to Oust Smaller Businesses*, PITTSBURGH POST-GAZETTE, Mar. 9, 1998, at A11.

<sup>159</sup> *Property Rights Victories*, ORANGE COUNTY REGISTER, Nov. 26, 2000; at 2; see also 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, at 8-9 (Aug. 16, 2002), <http://www.goldwaterinstitute.org/article.php/134.html>.

<sup>160</sup> See *supra* Part IV.B. notes 141-44.

Court's refusal to hold municipalities and states accountable for the public benefits promised as a result of the economic development, in the face of striking evidence that the public benefits promised are not always yielded.

In this new framework, it is evident that many economic development takings largely involve the taking of land owned by generally small groups of average citizens who are individual homeowners and/or small business owners. Examples of these takings abound and include the petitioners in *Kelo*, *99 Cents*,<sup>161</sup> *SWIDA*,<sup>162</sup> *Casino Redevelopment Authority*,<sup>163</sup> *Bailey v. Myers*,<sup>164</sup> and *Richfield*.<sup>165</sup> Other examples include the owner of the Rivelli Tire Store that the city of Oakland wanted to replace with a Sears,<sup>166</sup> the New Rochelle, New York, homeowners who resisted the taking of their land for an IKEA,<sup>167</sup> the Ogden, Utah, residents who opposed the development of a Wal-Mart on their land,<sup>168</sup> and the small business owners and residents displaced by the construction of a new New York Times building in Manhattan.<sup>169</sup>

It is logical that these economic development takings would occur, given that the cost of land in many of these areas is lower, often due to previous neglect by city leaders. Moreover, in the midst of the popular wave of revitalization, the land has been identified as valuable, because it is waterfront property, as was the case in *Kelo*,<sup>170</sup> or because large corporate interests have identified the property as desirable, as evidenced in *Poletown*, *Kelo*, *Casino Redevelopment Authority*, *Bailey*, and *Richfield*, among others. The individuals, however, that are impacted by this category of economic development takings are largely ordinary residents, those who may own their own homes and have small businesses, but who lack political influence with decision-makers, including municipal leaders that give the go-ahead to many urban revitalization projects, or state legislators that promulgate enabling statutes for eminent domain.

Accordingly, given the current environment post-*Kelo*, an alternative solution would be one in which courts, or state or federal enabling legislation, would require the study of the social effects of economic development takings on these average citizens in the form of a social impact study. Similar purely environmental studies, termed

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<sup>161</sup> See *supra* notes 128-31.

<sup>162</sup> See *supra* notes 132-36.

<sup>163</sup> See *supra* note 137-38.

<sup>164</sup> See *supra* note 140.

<sup>165</sup> *Id.*

<sup>166</sup> See *supra* notes 139-40.

<sup>167</sup> See *supra* note 140.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> 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.COM, Dec. 11, 2005, [www.palmbeachpost.com/localnews/content/local\\_news/epaper](http://www.palmbeachpost.com/localnews/content/local_news/epaper); 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, [www.courierpostonline.com/apps/pbcs.dll/article?AID=/200602](http://www.courierpostonline.com/apps/pbcs.dll/article?AID=/200602), New Jersey FIT: Future In Transportation, <http://www.state.nj.us/transportation/works/njfit/case/route30.shtm> (describing the Cramer Hill Redevelopment Project), and Dwight Ott, *Camden Wants Judge to Revisit Cramer Hill Ruling*, PHILADELPHIA INQUIRER, Feb. 3, 2006, at B03.

Environmental Impact Studies (EIS) and Environmental Impact Assessments (EIA), are already prescribed in the National Environmental Policy Act of 1969.<sup>171</sup>

## 1. NEPA-EISs

Some view NEPA as an “environmental constitution”<sup>172</sup> because it was promulgated to ensure environmental harmony and to avert damage to the environment<sup>173</sup> by making information available to the public in an effort to compel federal “agencies to incorporate environmental values into their thinking.”<sup>174</sup> 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.<sup>175</sup> The EIS is meant to be an “action-forcing mechanism”<sup>176</sup> and is a detailed statement on

(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.<sup>177</sup>

In addition, the Council on Environmental Quality (CEQ) has established regulations that implement NEPA. 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 comments to meaningfully affect the agency’s decision,”<sup>178</sup> to which the lead agency must subsequently respond in the final EIS.<sup>179</sup> Because of the detail required,

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<sup>171</sup> National Environmental Policy Act of 1969, 42 U.S.C § 4321-4375 (2006) (hereinafter NEPA).

<sup>172</sup> Jeannette MacMillan, 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 *ECOLOGY L.Q.* 491, 494 (2005).

<sup>173</sup> *See id.* § 4331.

<sup>174</sup> JAMES P. LESTER, *ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE* 245 (1995).

<sup>175</sup> 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).

<sup>176</sup> MacMillan, *supra* note 172, at 495.

<sup>177</sup> National Environmental Policy Act, 42 U.S.C. § 102.

<sup>178</sup> MacMillan, *supra* note 172, at 494; *see also* Regulations for Implementing NEPA, 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 Regulations for Implementing NEPA, 40 C.F.R. § 1503.1 (2006) (inviting comments by the public and other agencies).

<sup>179</sup> Regulations for Implementing NEPA, 40 C.F.R. § 1503.4 (2006) (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).

EISs can be costly, ranging from “hundreds of thousands of dollars to several million dollars.”<sup>180</sup> Moreover, in practice, EISs generally take one to two years, if not longer, to complete.<sup>181</sup>

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.<sup>182</sup> The public and other agencies are similarly invited to comment on the EA.<sup>183</sup> In contrast to EISs, EAs are usually approximately 12 pages, and they do not include discussion of alternatives to a project and to incorporate scant analysis of environmental impact.<sup>184</sup> If the agency determines that there is no significant impact after performing the EA, then it prepares a Finding of No Significant Impact (FONSI).<sup>185</sup>

### i. Judicial Review

NEPA provides no provisions for judicial review. It has, therefore, been left to the Administrative Procedure Act (APA) to review matters arising under NEPA largely using the APA’s “arbitrary and capricious” standard of review.<sup>186</sup> In certain cases, the standard of review falls under a “rule of reason.” These matters frequently comprehend an agency’s decision (1) not to prepare an initial EIS,<sup>187</sup> (2) to perform an EIS, but one that certain interest groups deem is inadequate under NEPA,<sup>188</sup> (3) not to compile a supplemental EIS,<sup>189</sup> or (4) to perform an EA, but one that is similarly regarded by interested parties as insufficient under NEPA.<sup>190</sup>

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<sup>180</sup> Cole, *supra* note 179, at 1163.

<sup>181</sup> *Id.*

<sup>182</sup> Regulations for Implementing NEPA, 40 C.F.R. § 1501.4 (2006).

<sup>183</sup> *Id.*

<sup>184</sup> Cole, *supra* note 179, at 1164.

<sup>185</sup> *Kern*, 284 F.3d at 1067.

<sup>186</sup> MacMillan, *supra* note 172, at 407.

<sup>187</sup> *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, 433 (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).

<sup>188</sup> 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); *Kern*, 284 F.3d at 1071 (noting 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) (citing *Oregon Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997)).

<sup>189</sup> 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” criterion).

<sup>190</sup> 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 1970 (stating that “[a]n agency’s threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness.”).

In general, however, “NEPA forces a process but not an outcome.”<sup>191</sup> The process should be “fully informed and well considered,”<sup>192</sup> 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.<sup>193</sup>

## ii. Assessment of NEPA

The EIS process in NEPA has been roundly criticized for being too burdensome, costly, and time-consuming.<sup>194</sup> Other criticism has centered around NEPA’s heavy emphasis on process, to the detriment of substance.<sup>195</sup> One scholar has noted that “[t]o this day, the Supreme Court has never decided in favor of a NEPA-plaintiff,” while lower courts have a more diverse history of rulings favorable to NEPA plaintiffs, but nonetheless constrained by the focus on process.<sup>196</sup>

However, Lynton Caldwell, the “intellectual father of EIS” and public administration professor,<sup>197</sup> 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.<sup>198</sup> Because of NEPA, federal projects have been reconsidered, redesigned, or even withdrawn, if the environmental consequences were simply too severe.<sup>199</sup> For instance, projects that would have impacted old-growth forests or the northern spotted owl have been halted as a result of the EIS process.<sup>200</sup>

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.<sup>201</sup> Indeed, this scrutiny has empowered environmental and community groups to participate in the decision-making process, a process from which they were excluded previously, and has contributed to their increase. Finally, NEPA has fostered more inter-agency cooperation on plans, and has provided more information to other potential decision-makers, such as legislators.<sup>202</sup> Therefore, there is an argument that the challenges posed by NEPA are far outweighed by the Act’s benefits, namely the rise and empowerment of previously excluded environmental and community groups.

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<sup>191</sup> Cole, *supra* note 179, at 1170.

<sup>192</sup> Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

<sup>193</sup> Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

<sup>194</sup> MacMillan, *supra* note 172, at 521; *see also* Cole, *supra* note 179, at 1169.

<sup>195</sup> *See supra* notes 193-94.

<sup>196</sup> Macmillan, *supra* note 172, at 523.

<sup>197</sup> *Id.* at 517.

<sup>198</sup> Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205, 207 (1998).

<sup>199</sup> *Id.* at 207.

<sup>200</sup> *See* Thomas Sander, Environmental Impact Statements and Their Lessons for Social Capital Analysis, <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), and 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)).

<sup>201</sup> MacMillan, *supra* note 172, at 529; *see also* Caldwell, *supra* note 198, at 207.

<sup>202</sup> Caldwell, *supra* note 198, at 207; *see also* MacMillan, *supra* note 172, at 519-20.

## 2. Social Capital Impact Assessments

Within a project that may have significant environmental consequences and thus triggers an EIS, Sander identifies several socioeconomic factors that may be used to form a Social Capital Impact Statement (SCIS).<sup>203</sup> This paper, however, proposes that many of 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's 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's be executed at an early enough time in a development proposal's history to allow for meaningful public comment on a project. Presumably, this year is a perfect time for states' considerations of this proposal, given the legislative reaction of 39 states to *Kelo* on the issue of takings for economic development.<sup>204</sup> Third, SCIA's could be placed into not only any federal legislation contemplating restrictions on economic development takings,<sup>205</sup> but also into federal enabling legislation for such takings that are applicable to Washington, D.C., as was at issue in *Berman*.<sup>206</sup>

### i. Components of a SCIA

SCIA's for economic development takings would likely include, at a minimum, a response to the following questions, with studies or data to support the answers. Many of the following address the concerns outlined in Part III of this paper:

1. How will the taking or development project disrupt existing land uses?;
2. How will the taking or development affect neighborhood integrity?;

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<sup>203</sup> Thomas Sander, *Environmental Impact Statements and Their Lessons for Social Capital Analysis*, <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 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 p.4.

<sup>204</sup> *See supra* note 6.

<sup>205</sup> *See supra* note 7.

<sup>206</sup> *See supra* note 29.

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?;
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, how many opportunities will there be for displaced residents to occupy space in the new development as a home or as a small business?;<sup>207</sup>
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

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<sup>207</sup> 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 rent of \$17 per room per month." *Id.*

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?; and

14. What alternatives exist to placing the economic development project in the proposed site?

## ii. The SCIA Process

Just as with EISs in NEPA, SCIAs would incorporate pre-draft and draft versions, both to which the public and other decision-makers could respond. They would also include final versions in which the entity seeking to use an economic development taking would respond to public comments. In addition, provisions for supplemental SCIAs should be included, in case the initial assessment is inadequate. Moreover, because of the fractured nature that eminent domain can take, especially with respect to economic development, it would likely be wise to incorporate public hearings as well as public comments at each stage of the process in order to allow meaningful input. Furthermore, it is important to set a reasonable page limit on the SCIAs and ensure that the document is written in plain English in order for the public to understand it. The fourteen questions, however, in Part IV.C.2.i. above could be further expanded and standards added to ensure a consistent process.

Because of the need for this type of information, this paper advocates that SCIAs should be mandated by the courts or by the legislatures for all economic development takings. On the other hand, there is the further argument that a mandatory process would only serve to increase bureaucratic red tape, engender resistance, and perhaps waste time and resources for economic development takings that might not have a significant impact.<sup>208</sup>

Standards for judicial review would depend on the goals of SCIAs. Is the goal to ensure a process so that the public will have access to information and government and large corporate interests will have considered all relevant issues in an economic development project? Or, is the goal to ensure a particular outcome? Because courts have been reluctant to intervene substantively in NEPA cases, and as evidenced in *Kelo* are even more hesitant to interfere in the legislative decision-making in economic development takings, this paper advocates that SCIAs focus on procedure. This procedural concentration would encourage the availability of more information and would foment meaningful participation of previously excluded groups.

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

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<sup>208</sup> See Cole, *supra* 179, at 1176 (supporting the use of Health Impact Assessments as part of EISs or as free-standing documents).



applicable standard of review could 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.<sup>209</sup> On the other hand, the judicial standard of review for a case in which it is argued that a supplemental SCIA is necessary would invoke an "arbitrary and capricious" standard.<sup>210</sup>

### iii. Assessment of SCIA's

SCIA's would likely inject more time, expense, and work for the parties involved and 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, as in *Poletown* and *Kelo*, the investment in a SCIA may be miniscule, especially when compared to the investment of taxpayer dollars that are used to support a project and the unnecessary bad will that is engendered. By virtue of the time, expense, and public disclosure, SCIA's would 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 would 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, SCIA's and the public scrutiny to which they would be subject would 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 focused on the pure economic impact of the Fort Trumbull redevelopment project on the city of New London and New London County, a study that was commissioned by the New London Development Corporation.<sup>211</sup> The second study<sup>212</sup> was performed pursuant to the Connecticut Environmental Policy Act,<sup>213</sup> and it required an Environmental Impact Evaluation (EIE)<sup>214</sup> or a Finding of No Significant Impact (FONSI) to be performed and submitted to and approved by the Connecticut Office of Policy Management.<sup>215</sup>

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<sup>209</sup> See *supra* notes 188-190.

<sup>210</sup> See *supra* note 189.

<sup>211</sup> See generally Fred Carstensen et al., *The Economic Impact of the Pfizer and Fort Trumbull Development Projects*, Connecticut Center for Economic Analysis, June 18, 2001, <http://ceea.uconn.edu/studies/New%20London%20City%20Impact%20Study--Final%20Report.pdf> (last visited on Feb. 18, 2006).

<sup>212</sup> See *Kelo*, 125 S. Ct. at 2659 n.2; see also Brief of Amicus Curiae State of Connecticut at \*5, *Kelo* (No. 04-108).

<sup>213</sup> CONN. GEN. STAT. § 22a-1, et seq. (2005).

<sup>214</sup> 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

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.<sup>216</sup> The Connecticut Office of Policy Management concluded that the economic development project did not conflict with the state's housing goals.<sup>217</sup>

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. Nonetheless, in comparison to the proposed alternative framework, the law does not delve into the deeper 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.<sup>218</sup>

## V. Conclusion

The current explosion in urban redevelopment in many cities, as well as cities' increasingly "desperate" measures to revitalize not only their downtowns, but also their bottom-lines through increased tax revenue, has created a situation of economic development takings that is ripe for abuse post-*Kelo*. The lack of safeguards placed by the Supreme Court in *Kelo*, in the form of extreme deference to the legislature, a refusal

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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 (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) (2005).

<sup>215</sup> Connecticut Attorney General Opinion, 2001 WL 1639012, (Opinion 2001-026) Dec. 6, 2001.

<sup>216</sup> CONN. GEN. STAT. § 22a-1b(7)(c)(A)-(B) (2005).

<sup>217</sup> *Kelo*, 125 S. Ct. at 2659 n.2.

<sup>218</sup> 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 AND BACHELOR, *supra* note 82, 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." JONES AND BACHELOR, *supra* note 82, 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. supra* note 82, at 86.

to hold cities and large corporate interests accountable for public benefits promised, but seldom yielded, and the “sustaining hand” of many large private interests in economic development takings, is frightening to the average citizen faced with the threat of his or her home or small business being taken by eminent domain. Given these factors, it is important that these takings be examined under an alternative framework.

Social Capital Impact Assessments that are either mandated by the legislatures in enabling legislation or by the courts may allow average citizens to bridge the power inequities between them and the cities, states, and powerful private interests often behind eminent domain. By providing the public with greater access to information at an early stage of an economic development project, greater choices will be provided to the public. As NEPA has proven, the average citizen will be empowered to exert influence over economic development projects in order to change or even to stop them entirely.