

Who Will Redevelop Redevelopment?: Power and Pragmatism in California Redevelopment Law

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ABSTRACT

Although California's redevelopment law is among the strictest in the nation, from a layperson's perspective, redevelopment agencies (RDAs) appear to be no more obstructed from their projects in California as they would be in, say, Connecticut. This article addresses a sort of "tragedy of the commons" problem applied to redevelopment: If redevelopment powers are "over-harvested" such as to instigate serious political revolt against them, they will become barren and useless, and will no longer be available for the purposes for which they were intended and for which they are still needed. Even assuming that redevelopment is efficacious and necessary, redevelopment law ought not be made impotent. In a post-*Kelo* society, redevelopment finds itself in danger of being neutered of its ability to do what it is truly meant to do: to overcome market failure in urban areas and restore and preserve the vitality of our communities. If redevelopment agencies abuse their powers by manipulating the market rather than facilitating it, they expose themselves to political attack in an already volatile property rights climate. We are in need of reform that reminds RDAs why they exist in the first place: as market-facilitators, not revenue-generators.

The problem cannot be properly addressed at the local level. In the example of *99 Cents Only Stores v. Lancaster Redevelopment Agency*, it became clear that unscrupulous businesses will employ hostage-taker strategies to capture the RDA's eminent domain power. Cities are left resorting to economically-cogent-yet-legally-pathetic claims such as "future blight" in order to appease "800 pound gorillas" like Costco or Wal-Mart. Thus it is not enough for local governments to self-regulate their use of eminent domain; the regulation must come from without. Because an ill-conceived redevelopment regime allows rent-seekers to blackmail cities, and because it entices cities to use coercive bargaining and offend landowners' sensibilities, RDAs are in danger of ruining the tools it needs to achieve their true purpose of blight removal. Thus without careful review, RDAs threaten to kill the golden goose.

The solution lies in removing the blight from our redevelopment law, and in redeveloping the motivation that drives our redevelopment agencies.

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I. INTRODUCTION

Good redevelopment might be good policy, depending on whom you ask. Propertarians might concede nothing when it comes to the value in government-initiated redevelopment. But when it comes to bad redevelopment, well, it's just plain bad—there's no dressing it up. Bad redevelopment takes our homes, churches, and businesses, robs our schools of funds, and sinks our cities and towns into unfathomable debt.¹ Worst of all, it exists to serve businesses with deep pockets rather than the general welfare.²

But bad redevelopment is not only bad for citizens, it is bad for California redevelopment agencies. A bad redevelopment structure dooms agencies into a self-perpetuating chasm of impropriety,³ debt,⁴ blackmail,⁵ and public scorn.⁶ Bad redevelopment policy turns otherwise good city council members into ineffective, incompetent, or crooked redevelopment board members—any positive effects resulting from such a system could only be pure coincidence. Worst of all, a bad redevelopment structure creates a hostile environment for redevelopment in general—even good redevelopment.

¹ *Redevelopment: The Unknown Government*, Municipal Officials for Redevelopment Reform, 2006, at 11 [hereinafter MORR Report] (“Redevelopment agencies are debt machines that have amassed over \$61 billion in statewide bonded indebtedness.”).

² This article will explain not only why this is true, but that, since the public has come to perceive it as true, the actual verifiability of the claim is largely irrelevant.

³ See *infra* Part V (discussing one response by the California legislature to redevelopment agencies’ tendency to abuse their powers).

⁴ MORR Report, *supra* note 1 (“Debt is not just a temptation. It is a requirement.”).

⁵ See *infra* Part IV.D.1 (discussing how Costco forced the City of Lancaster’s hand into condemning a profitable 99 Cents Only store).

⁶ See *infra* Part IV.A (discussing the public’s response to the current redevelopment schema).

This article sets out the relevant California law that defines redevelopment agencies (RDAs) and grants the awesome power of eminent domain.⁷ California law purports to put strict limits on RDAs by requiring findings of physical and economic blight. However, the statutes are often ambiguously or loosely drafted so as to provide RDAs some play in the joints. The article will then discuss how courts have treated the removal of market obstacles like blight, from the removal of oligopolies⁸ to physical and economic blight,⁹ to finally the federal standard that economic revitalization alone is sufficient to justify the use eminent domain.¹⁰ Although some commentators urge that we have little to worry from the Supreme Court's vacuous public use standard set forth in *Kelo v. City of New London*,¹¹ California's friendly tax increment financing structure encourages RDAs to redevelop as much as possible, and thus to use the ambiguities in California's community redevelopment law (CRL) and the courts' legislative

⁷ "Eminent domain—the government's authority to force a property owner to sell his or her land to the government for 'just compensation'—has long been regarded as one of the most jarring and intrusive of government's powers." Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?* 707 (ALI-ABA Course of Study, Jan. 2006), available at SL049 ALI-ABA 703 (Westlaw). "[E]minent domain [is] a legal term meaning 'we can do anything we want.'" Steve Lopez, *In the Name of Her Father*, TIME, July 14, 1997, at 4. Eminent domain is the state's "most awesome grant of power" to municipalities. See *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 419 (1985).

⁸ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 230 (1984).

⁹ *Berman v. Parker*, 348 U.S. 26, 28 (1954).

¹⁰ *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

¹¹ See Bruce Tepper, *The Weight of Kelo*, LOS ANGELES LAWYER, Mar 29, 2006, at 37-38.

Since the Court specifically acknowledged that California has carefully limited the exercise of eminent domain to make sure that the type of taking that occurred in New London does not occur in California, one must question whether the recent push for redevelopment reform is grounded in sound policy and logic or is actually more opaque.

Id.

deference to their advantage. This article will then discuss some landmark California cases that illustrate the lengths to which RDAs will go to circumvent the CRL blight requirements. These cases also illustrate the danger to which a bad redevelopment structure exposes RDAs when it inspires unscrupulous rent-seekers, lusting for the benefits of eminent domain, to hold cities' tax revenues hostage by threatening to relocate. For all these reasons, redevelopment abuse in California is rampant,¹² despite the fact that California's redevelopment law provides one of the strictest blight requirements in the nation. If this regime is permitted to continue, it will lead to real difficulties for land use planning in California.

II. CALIFORNIA REDEVELOPMENT LAW

A. *Structure and Authority of the Redevelopment Agencies*

California Health & Safety Code § 33100 provides that “[t]here is *in each community* a public body, corporate and politic, known as the redevelopment agency of the community.”¹³ Redevelopment agencies are thus created and operated without a vote of the citizens affected. In California, 386 cities out of a total 478 operate their own RDA.¹⁴ The RDA's powers are vested in its current members,¹⁵ which consist of five resident electors of the community, and may be

¹² See Sandefur, *supra* note 7, at 736.

¹³ Cal. Health and Safety Code § 33100 (West 2006) (emphasis added).

¹⁴ MORR Report, *supra* note 1, at 2.

¹⁵ Cal. Health and Safety Code § 33121 (West 2006).

increased to seven upon adoption of an ordinance by the city council.¹⁶ The members may not be elective officers or employees of the city.¹⁷ The redevelopment agency board members sit for four year terms,¹⁸ and aside from the appointment of the first RDA chairman,¹⁹ the board is mostly autonomous, and will subsequently elect its own chairman from among its members.²⁰ Fiscal overhead includes board members' "actual and necessary expenses," including travel expenses, and other legislatively prescribed compensation.²¹ Although this compensation structure appears innocuous, fiscal year 2003-04 saw a \$580 million expenditure on redevelopment administration.²² This accounted for 11% of the \$5.3 billion that California redevelopment agencies spent that year.²³

These RDAs are given the power to "redevelop," which is

the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a survey area, and the provision of those residential, commercial, industrial, public, or other structures or spaces as may

¹⁶ Cal. Health and Safety Code § 33110 (West 2006).

¹⁷ *Id.* § 33111.

¹⁸ *Id.*

¹⁹ *Id.* § 33113.

²⁰ *Id.* § 33113.

²¹ *Id.* § 33114.

²² MORR Report, *supra* note 1, at 20. "This provides a lucrative bureaucratic base that redevelopment staffers seek to preserve and expand." *Id.* If section 33115, providing for removal of RDA board members for inefficiency, is effective at all, it is apparently impotent in the face of the titanic RDA expenditures. RDAs also contribute public monies to private groups that tout the advantages of redevelopment. *Two Groups Supported by LB Tax Dollars Work to Weaken or Defeat Homeowner Protection/Eminent Domain Reform Legislation...Without Council or Redevelopment Agency Board Public Discussion or Vote*, LB REPORT.COM, Apr. 30, 2006, <http://www.lbreport.com/news/apr06/emdombi.htm> ("The privately-run 'League of CA Cities' and the 'CA Redevelopment Association' operate in large part on public money sent to them as dues, memberships and event registrations by government officials on the public payroll...who in LB have (thus far) routinely expended the sums as 'government-related.'").

²³ *Id.*

be appropriate or necessary in the interest of the general welfare, including recreational and other facilities incidental or appurtenant to them and payments to school and community college districts . . .

. . .²⁴

RDAs are subject to separate requirements regarding redevelopment of undeveloped areas:²⁵ to qualify for redevelopment, undeveloped areas must be “stagnant or improperly utilized because of defective or inadequate street layout, faulty lot layout in relation to size, shape, accessibility, or usefulness, or for other causes,” or “[t]he areas require replanning and land assembly . . . in the interest of the general welfare because of widely scattered ownership, tax delinquency, or other reasons.”²⁶ The language in these statutes is worded very favorably for

RDAs: The requirement that government declare a neighborhood “blighted” before condemning property might protect property owners against government overreaching, if the definition of “blight” were precise enough to prevent the government from taking any but the most dangerous or extremely distressed property. Unfortunately, many states, such as California, have defined “blight” in terms so vague that officials are free to declare virtually any property “blighted.”²⁷

²⁴ Cal. Health and Safety Code § 33020 (West 2006).

²⁵ It is worth noting that, as a matter of textual purity, RDAs would have no authority over *undeveloped* areas. As a matter of fundamental purpose for the establishment of RDAs, there are few parallels for the need for governmental interference in developed versus undeveloped areas. Removal of blight and other impediments to the free market are drastically less severe in undeveloped areas.

²⁶ Cal. Health and Safety Code § 33021(c) (West 2006).

²⁷ Sandefur, *supra* note 7, at 717.

The theory of economic development condemnations begins with the concept of “blight.” Originally a term for a plant disease, the term “blight” was first applied to neighborhoods during the Progressive era, by urban planners who conceived of cities as similar to living organisms: when a neighborhood failed to perform up to the standard required by the “needs of the public,” it was up to the government to intercede and alter the economic situation so as to improve the neighborhood.

“Inadequate” street layout may be a point of legitimate debate: a challenger may provide data, statistics, information about the general area, and other professional opinions to rebut the RDA’s claim of inadequacy. “Defective” is much less tangible, however, and an RDA may assert its own standard of what “defective” is, making the claim unassailable. “Widely scattered ownership” is ominous language for any homeowner who apparently could not possibly have any counter argument unless he set to the task for buying up his neighbors’ homes as well.²⁸ But even then, the RDA apparently is invited to offer any “other causes”²⁹ to validate their actions.

The RDA is granted the power of eminent domain to redevelop an established project area.³⁰ The Code describes the proper use of eminent domain:

[W]henever the redevelopment of *blighted areas* cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land . . . it is in the public interest to employ the power of eminent domain . . . to provide a means by which blighted areas may be redeveloped or rehabilitated.³¹

Today, this attitude remains the keystone of economic development projects.

Id. at 716.

²⁸ See *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 407 (2000) (“The mere fact of multiple ownership does not establish blight. Otherwise, a condominium development by definition would be blighted.”).

²⁹ Cal. Health and Safety Code § 33021(c)(2) (West 2006).

³⁰ *Id.* § 33391 (“Within the survey area or for purposes of redevelopment an agency may . . . [a]cquire real property by eminent domain.”). The power of eminent domain is granted by the California Constitution. Cal. Const. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”). The U.S. Constitution authorizes eminent domain at U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

Thus an RDA may only use eminent domain when the requisite findings of blight make such use necessary. However, the Code provides that it is the RDA, not the judiciary, that is to determine when it is “necessary” to use eminent domain.³²

B. Elimination of Market Impediments

The blight problem as stated in section 33036 is relatively uncontroversial: “[C]onditions of blight tend to further obsolescence, deterioration, and disuse because of the lack of incentive to the individual landowner and his inability to improve, modernize, or rehabilitate his property while the condition of the neighboring properties remains unchanged.”³³ Alternatively stated, blight is a difficult challenge to the free market. The Code goes further, stating that blight “constitutes a serious and growing menace which is . . . injurious and inimical to the public health, safety, and welfare.”³⁴ Blight “present[s] difficulties and handicaps which are beyond remedy and control solely by regulatory processes.”³⁵ Blight contributes to crime, juvenile delinquency, and increased

³¹ Cal. Health and Safety Code § 33037 (West 2006) (emphasis added).

³² *Id.* (“[T]he necessity in the public interest for the provisions of this part is declared to be a matter of *legislative* determination.”) (emphasis added); *see also* Cal. Code Civ. Proc. § 1240.010 (West 2006).

The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.

Id.

³³ Cal. Health and Safety Code § 33036(a) (West 2006).

³⁴ *Id.* § 33035(a).

³⁵ *Id.* § 33035(b).

expenditures for police, fire, and other public services.³⁶ The “benefits which will result from the remedying of . . . blighted areas will accrue to all inhabitants and property owners of the communities in which they exist.”³⁷

The Code then begins to get more controversial, stating that, because of blight, “the process of deterioration . . . frequently cannot be halted or corrected except by redeveloping the entire area, or substantial portions of it.”³⁸ “[R]emedying [blighted areas] may require the public acquisition . . . and the redevelopment of [those] areas.”³⁹ This declaration is rephrased at section 33030(a): “It is found and declared that there exist in many communities blighted areas which constitute physical and economic liabilities, *requiring redevelopment* in the interest of the health, safety, and general welfare of the people of these communities and of the state.”⁴⁰ As a technical matter, of course, this statement is at the very best unverifiable; while the market may have certain observable tendencies towards blighted areas, it could not be said in any given case that the market *could not* correct the problem without RDA assistance. The market may take longer to address the blight than the RDA is willing to wait, but it is quite possible and even likely that the market would eventually be sufficiently incentivized to develop the area on its own. The issue is simply a matter of

³⁶ *Id.* § 33035(c).

³⁷ *Id.* § 33035(e).

³⁸ *Id.* § 33036(b).

³⁹ *Id.* § 33036(d).

⁴⁰ *Id.* § 33030(a) (emphasis added).

patience and of faith that our free market system is, in fact, the best among the alternatives.

The Code adds that “conditions of blight *are chiefly found in* areas subdivided into small parcels, held in divided and widely scattered ownerships.”⁴¹ It becomes clear that the drafters of the CRL misunderstood symptoms for causes, and thus misguidedly developed the CRL to eliminate the symptoms of blight, but made no provisions for the actual causes. If causes are to be eliminated in such a way, it would be purely coincidental. The CRL formally lists the causes of blight in section 33039: “[T]he principal causes of slum and blighted residential areas are . . . [i]nadequate enforcement of health, building, and safety laws. . . . limited financial resources [of inhabitants] [r]acial discrimination [and the] neglect of absentee landlords.”⁴² Except for removing neglectful landlords, it is unclear how redevelopment purports to address any of these causes.

Finally, to obtain approval for an RDA project, the agency must provide a report to the city council that, among other things, describes the project, describes the blight, explains how the project will further the RDA’s goals, explains why the free market alone could not overcome the blight, describes the method of financing, and describes how families will be relocated.⁴³ Although this seems to

⁴¹ *Id.* § 33036(c) (emphasis added).

⁴² *Id.* § 33039.

⁴³ *Id.* § 33352.

provide a substantial burden to the RDA, in practice these reports are typified by conclusory statements and boilerplate language.

1. The Blight Standard

“Fully 25% of all urbanized land in California has now been declared blighted,”⁴⁴ and under California law, blight designations can remain on the books indefinitely.⁴⁵

Section 33030 explains what an RDA must provide to satisfy a finding of blight under the California standard. The blight must create such a “serious physical *and* economic burden” that it could not “reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment.”⁴⁶ Thus the effect of the blight must be so serious that there could be no reasonable expectation of any other solution, be it private, government, or some hybrid. In addition, the RDA must make a specific showing of both the physical and economic elements of blight under section 33031(a) and (b), respectively.⁴⁷ Under section 33031(a), the RDA may prove the existence of physical blight by showing serious building code violations, unsafe or unhealthy buildings, factors hindering economically viable use, adjacent incompatible uses, inadequate utilities, inadequate and irregular lot sizes in multiple ownership,

⁴⁴ MORR Report, *supra* note 1, at 4.

⁴⁵ Sandefur, *supra* note 7, at 717.

⁴⁶ Cal. Health and Safety Code § 33030(b) (West 2006) (emphasis added).

⁴⁷ *Id.* § 33030(b)(2).

insufficient parking, or “other similar factors.”⁴⁸ Under section 33031(b), the RDA may prove the existence of economic blight by showing static property values, high crime, relatively low lease rates or high business vacancies, or too many vacant lots, bars, liquor stores, or people.⁴⁹ That California’s blight statutes are relatively strict is not comforting. It is still open to abuse, and rent-seekers know it. Section 33031(a)(2) and (3) “have been the subject of more frequent redevelopment misuses than any other part of the CRL. Focusing on greater precision in statutory definition than currently exists in these subsections of the blight statutes would have a far more meaningful effect on the perceived misuses of redevelopment.”⁵⁰

III. BRIEF HISTORY OF THE USE OF GOVERNMENT COERCION IN OVERCOMING MARKET IMPEDIMENTS

“In 1945, California was the first state to adopt a Community Redevelopment Act that gave cities and counties the ability to establish redevelopment agencies.”⁵¹ The vast power of government in its police powers governing land use has arguably been put to good use in overcoming classic market problems such as holdouts, free-riders, collective action, and oligopolies. In *Midkiff*, the U.S. Supreme Court held that breaking up a land oligopoly was a

⁴⁸ *Id.* § 33031(a).

⁴⁹ *Id.* § 33031(b).

⁵⁰ Tepper, *supra* note 11, at 40 (footnotes omitted).

⁵¹ JEFF CHAPMAN, *Tax Increment Financing and Fiscal Stress: The California Genesis*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 51, at 114.

permissible exercise of the state's eminent domain authority.⁵² Because the land was not likely to be made available for purchase by the general public by any reasonable efforts of the free market system, eminent domain is properly exercised to maintain a free property system. *Midkiff* is an example of the use of eminent domain for the (at least ostensible) purpose of facilitating the free market system. Because the Hawaii state authority did not have any further plans to put the property into the hands of other private individuals in particular (it was to be made available for purchase to the current tenants of the land), the exercise was reactive rather than proactive. That is, the remedy restored the fate of the land to the free market.⁵³

Berman illustrates the next major step by state authorities to use the power of eminent domain in a more proactive way. In *Berman*, Washington D.C. slums were labeled as physically and economically blighted, taken via eminent domain, and cleared and redeveloped by a private developer. The *Berman* court held that blight-removal is a legitimate public use for which the power of eminent domain may be exercised.⁵⁴ *Berman* can be seen as a logical step after *Midkiff*: if blight may be construed as an insurmountable market obstacle, akin to monopolies and oligopolies, the coercive power of eminent domain may be justified. The holding

⁵² Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984).

⁵³ “[I]ronically,” however, “the effect of the law was perverse. Instead of lowering, or at least maintaining home prices, it accomplished the opposite. It fueled a wholesale transfer of desirable homes to Japanese investors and provided huge economic incentives for the former land lessees to sell their homes and become instant millionaires.” Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 356 (2006).

⁵⁴ *Berman v. Parker*, 348 U.S. 26, 28 (1954).

guaranteed that blight-removal was a permissible purpose, something that city planners had banked on since the first federal urban redevelopment laws in the 1960s.⁵⁵ *Berman*, of course, deferred to the legislative determination over the severity of blight and whether it is truly a market obstacle, as does California's redevelopment law. What is more, *Berman* permitted the state agency to take parcels that did not meet the blight standard, but that were deemed "necessary" to fulfill the overall blight-removal project.⁵⁶ This detail has been a source of alarm for many redevelopment critics. This rule leaves open the question of how far the RDA should be permitted to go in determining which parcels are "necessary." If a state's blight standard is already malleable, and if a court is to permit broad discretion in the municipality's exercise of eminent domain to achieve redevelopment objectives in blight-removal, is allowing an RDA an additional indeterminate buffer sound policy? Is it really even necessary? Providing limitations to RDAs that are malleable and adjudicative at every step of the

⁵⁵ See George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 42 HASTINGS L. J. 991, 992 (2001).

Proponents of the first federal urban redevelopment law were concerned that federal courts might declare redevelopment unconstitutional Blight removal brought redevelopment well within the ambit of "health and safety" since policy makers at that time were convinced that overcrowding in low income areas contributed to the spread of disease and crime.

Id.

⁵⁶ *Berman*, 348 U.S. at 35.

If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

Id.

redevelopment process makes it difficult for courts to impose meaningful checks on their authority without being criticized as being judicial activists. Redevelopment law thus provides precious few opportunities for judicial checks.

Berman's treatment of legislative determinations of the nature and severity of blight may have been suspect, but the Michigan Supreme Court's treatment in *Poletown Neighborhood Council v. Detroit*⁵⁷ was blatantly pretextual. The circumstances surrounding *Poletown* were heart-wrenching: 4,200 people lost their homes, businesses, and churches for corporate welfare in its purest form. In *Berman*, the U.S. Supreme Court had looked to aspects of both economic⁵⁸ and physical⁵⁹ blight, and determined that, where both of these elements exist, there is a plausible argument that the project area is beyond reasonable market correction. *Poletown* removed the physical blight requirement from the Michigan standard, allowing the full measure of eminent domain power to achieve purely economic purposes.⁶⁰ The U.S. Supreme Court implicitly validated the *Poletown* decision in *Kelo*, a case with analogous facts. The city of Detroit sought to supplant an entire residential neighborhood to make way for General Motors' new Cadillac plant; the City of New London, Connecticut, sought to accommodate pharmaceutical giant Pfizer in a quaint downtown waterfront residential

⁵⁷ 410 N.W.2d 455 (Mich. 1981).

⁵⁸ *Berman*, 348 U.S. at 28 n.1 (“‘Substandard housing conditions’ means . . . the existence of . . . lack of sanitary facilities, ventilation, or light, or . . . dilapidation, overcrowding, faulty interior arrangement . . .”).

⁵⁹ *Id.*

⁶⁰ *Poletown*, 410 N.W.2d at 459.

neighborhood. The Court held that potential future revenues deriving from Pfizer's profitable use of the land was a public purpose, satisfying the Fifth Amendment.⁶¹ "The rationale of such cases is that some of the private economic benefits expected to be reaped by the redeveloper will trickle down . . . and will thus constitute a 'public benefit' which the Court equated with . . . 'public use.'"⁶² Or in other words, "yuppification is a valid public purpose."⁶³

Thus in our case law respecting government powers in removing market obstacles, "we moved from 'slum clearance' to 'urban renewal' to 'removing blight' to 'economic redevelopment.'"⁶⁴

A. Redevelopment Under the Hathcock⁶⁵ Standard

Some years after the *Poletown* decision, the Michigan Supreme Court thought better of its takings jurisprudence, and instituted a new standard in its decision in *County of Wayne v. Hathcock*.⁶⁶ The *Hathcock* decision borrowed extensively from Justice Ryan's dissenting opinion in *Poletown*,⁶⁷ and set forth a new three-part disjunctive test to determine when an exercise of the eminent domain authority would be permitted .

⁶¹ *Kelo v. City of New London*, 125 S.Ct. 2655, 2665-66 (2005) ("Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

⁶² *Kanner*, *supra* note 53, at 336.

⁶³ *Id.*

⁶⁴ Theodore C. Taub, *The Changing Landscape of Condemnation and Redevelopment* 698 (ALI-ABA Course of Study, Aug. 2005), available at SL005 ALI-ABA 693 (Westlaw).

⁶⁵ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

⁶⁶ *Id.*

⁶⁷ *Poletown Neighborhood Council v. City of Detroit*, 410 N.W.2d 455 (Mich. 1981).

1. “Public Necessity of the Extreme Sort”⁶⁸

The taking is for a public use if it is towards achieving a public necessity of the extreme sort. This test requires that the project not only be advantageous to the community, but that there be some dire or exigent need for it. The condemning authority must demonstrate that the forced transfer “to a private entity involved ‘public necessity of the extreme sort otherwise impracticable.’”⁶⁹ The necessity required by the Michigan Supreme Court is an actual, physical necessity; the “very *existence* [of the public benefits] depends on the use of land.”⁷⁰ The kind of necessity intimated here includes the traditional examples of market failure: holdouts,⁷¹ free-riders, collective action, monopolies, and oligopolies. This was the sort of necessity that arose in *Midkiff*, as well as in other cases in legal history such as the building of “highways, railroads, [and] canals.”⁷² It is this kind of necessity that would serve well in California, as it would force RDAs to act as a facilitator or mediator between private enterprise and market obstacles such as blight and holdouts, rather than as a market actor itself, with its own tax and revenue agendas. Moreover, it would take the power of eminent domain from the pockets of prospective rent-seekers, since they would not be able

⁶⁸ *Hathcock*, 684 N.W.2d at 473 (quoting *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Tepper, *supra* note 11 at 38 (“Eminent domain is particularly useful in redevelopment settings to acquire property from these ‘holdout’ property owners—that is, the owners who sell last in order to extract the highest prices.”).

⁷² *Kelo v. City of New London*, 125 S.Ct. 2655, 2663 (2005) (quoting *Poletown*, 410 N.W.2d 455, 476 (Ryan, J., dissenting)).

to blackmail sales-tax-revenue-desperate cities unless they could show honest-to-goodness blight. While an RDA is certainly an administrative overhead whose costs are critically important to a bottom-line perspective, the objective of improving local revenues must be indirect, not direct. When a government makes generating revenues its primary goal, it tends to abuse the terrific powers at its disposal to reach those goals by a shorter cut than our free-market system is capable of.

2. “Independent Public Significance”⁷³

Eminent domain could be exercised under the *Hathcock* standard if the property itself has been “selected on the basis of ‘facts of independent public significance.’”⁷⁴ In other words, it does not avail the RDA under this test to argue that, by bringing GM or Pfizer or any other private developer in to redevelop the land, new sales taxes will revitalize the city to a bustling utopia. Instead, the agency must show that, whatever their ultimate plans for the land, the land is currently languishing in such a state of blight that its mere removal is required in

⁷³ *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

⁷⁴ *Id.*; see also *Redevelopment Agency of San Francisco v. Hayes*, 266 P.2d 105, 114, 123 (Cal. 1954), *cert. denied*.

Originally the definition of “public use” was very narrowly restricted. . . . [T]he more modern courts have enlarged the traditional definition of public use to include “public purpose.” The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest.

. . . .
 . . . [Since] the acquiring of the property is for a public use, its sale and the transfer of the property from one individual to another, so far as they may occur, are merely incidental to that use

Id.

the interests of the public welfare. This test implicitly assuages Justice O'Connor's fears put forth in her *Kelo* dissent: since any property may be put to a higher and better use by some deep-pocketed developer, the "specter of condemnation hangs over all property."⁷⁵ But under this prong of the *Hathcock* test, the RDA would not be able to mount its public use claim from the empty guarantee of incidental sales tax revenues springing from the new Wal-Mart, auto dealership, business park, or GM plant. Instead, government agencies are relegated to removing externalities that would inhibit such private uses. With the development landscape groomed this way, that is, without any additional pandering and influence from the redevelopment agencies, private enterprise would take its natural course in siting beneficial uses within the community. This view has much deeper roots in Michigan case law, going back to an 1852 decision in *Swan v. Williams*.⁷⁶ The Michigan Supreme Court in *Swan* noted the proper place for government in our system of free enterprise:

To say, as has been too often carelessly said, that "the acts done by these corporations are done with a view to their own interests, from which an incidental benefit springs to the public," is to admit their private character, and the private use of the property condemned to

⁷⁵ *Kelo v. City of New London*, 125 S.Ct. 2655 (2005); see also Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 237 (1978) (arguing that monopoly and efficiency are not sufficient to justify a taking without an impending public need); see also Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J. L. & PUB. POL'Y 651, 678 (2005) [hereinafter *Sandefur: A Gleeeful Obituary*] ("Americans in most states are at risk of losing their homes to whatever faction is able to gain political influence."); Gary P. Johnson, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 373-74 (1981) ("Consequently, courts began to look at the ultimate purpose of a project in order to justify a taking that eventually would benefit the public.").

⁷⁶ 2 Mich. 427 (1852).

their use. But it is obvious, that the object which determines the character of a corporation is that designed by the legislature, rather than that sought by the company. If that object be primarily the private interest of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private, but if that object be the public interest, to be secured by the exercise of powers, delegated for that purpose, which would otherwise repose in the State, then, although private interest may be incidentally promoted, the corporation is in its nature public—it is essentially the trustee of the government for the promotion of the objects desired—a mere agent, to which authority is delegated to work out the public interest through the means provided by government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally, and not necessarily, from its operations.⁷⁷

This is an astute observation, and one that has been largely ignored in more modern case law. The issue, simply stated, is that where private actors create a public benefit, this benefit is incidental, and cannot therefore be the purpose of state action. Instead, if a local government wishes to cite this benefit as a “public use” in order to exercise eminent domain authority, the private actor must become an agent of the public. To strike a sort of middle ground, as is the modern state of affairs, is to establish a kind of unholy union between government and free enterprise, a system in which certain individuals are able to gain access to the sovereign governmental powers without the attendant governmental legal and political restrictions. This is the source of frustration of propertarians, but more importantly, it encapsulates in heady legal prose what is so visceral and obvious about the debate. To take someone’s land to give to another is just plain irksome.

⁷⁷ *Swan*, 2 Mich. at 435.

And at some point, it's going to drive people crazy,⁷⁸ or break their spirits.⁷⁹ The *Swan* treatment warrants review in the wake of our current upheaval of eminent domain law post-*Kelo*.

3. "Accountab[ility] to the Public"⁸⁰

The third test under the *Hathcock* standard prohibits exercise of eminent domain authority "unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"⁸¹ This test suggests a return to the *Swan* rationale, leaving behind fanciful constructions of private development as being effected for public use. To meet the standard for employing the drastic measure of eminent domain, the project must truly be in the hands of the public. Under this standard, regulation⁸² and subsidies⁸³ would remain a public use, but clearing entire neighborhoods and assembling city blocks to make way for a new Costco would not. Governments would be able to

⁷⁸ See *infra*, note 107, at 31(describing a condemnee who shot and killed two sheriff's deputies in South Carolina).

⁷⁹ See *infra*, Part IV.

⁸⁰ *Hathcock*, 684 N.W.2d at 782.

⁸¹ *Id.* (quoting *Poletown*, 304 N.W.2d 455, 476 (Ryan, J., dissenting) (quoting *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 94 N.W. 379, 380-81 (Mich. 1903))).

⁸² See *Sandefur: A Gleeful Obituary*, *supra* note 75, at 656 ("One chief rationalization [for finding a public use] was that the railroad was regulated by the government in such a way as to render it essentially 'public.'").

⁸³ See Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL OF RTS. J. 653, 727 (2005) [hereinafter *Kanner: Making Laws and Sausages*] (remarking that subsidies were given to railroads because of the substantial reciprocal benefits given to society, and because of the great risk taken by the railroads, intimating that the government wished to make up the cost of risk by granting subsidies.) However, subsidies are often also granted towards wasteful projects to reward political supporters. *Id.* at 762-63. See also *Greater Westchester Homeowners Ass'n v. Los Angeles*, 603 P.2d 1329, 1333 (Cal. 1979) ("[A]irports so subsidized must be available for public use on 'fair and reasonable terms and without unjust discrimination, . . .").

subsidize utilities that would pay enormous dividends to constituents, but may be too risky for private investors, or would not pay out sufficient dividends.⁸⁴ Requiring the government to retain control over the project ensures accountability and the continued public usefulness of the project, rather than a mere hand-off to private investment.⁸⁵

B. Tax Increment Financing Improperly Incentivizes RDAs

The financing structure behind California RDAs is out of alignment with the purpose of removing true blight. As such, it creates an inefficient and impossibly conflicted regime in which RDAs seek out pseudo-blighted properties, when what they really want is to capture increment property values. Tax increment financing (TIF) is one of the most widely used methods of generating the funds necessary to finance community redevelopment projects.⁸⁶ TIF is permitted under the California Constitution,⁸⁷ and is articulated by the California Supreme Court thusly:

⁸⁴ See *Kanner: Making Laws and Sausages*, *supra* note 83, at 727 (discussing the importance of the role of railroads, which is why they were subsidized).

⁸⁵ A hand-off not only removes the project from oversight by the political process, it also removes the project from the stricter legal accountability that applies to government employers.

⁸⁶ JOYCE Y. MAN, *Introduction*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT*, *supra* note 51, at 1; George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 42 *HASTINGS L. J.* 991, 996 (2001).

⁸⁷ Cal. Const. art. XVI, § 16. That formula is as follows:

(a) That portion of the taxes which would be produced by the rate upon which the tax is levied each year by . . . [the] taxing agencies upon the total sum of the assessed value of the taxable property in the redevelopment project as shown upon the assessment roll used in connection with the taxation of such property by such taxing agenc[ies], last equalized prior to the effective date of such ordinance [adopting the redevelopment plan], shall be allocated to . . . the funds of the respective taxing agencies . . . ; and (P)(b) That portion of said levied taxes

In essence this section provides that if, after a redevelopment project has been approved, the assessed valuation of taxable property in the project increases, the taxes levied on such property in the project area are divided between the taxing agency and the redevelopment agency. The taxing agency receives the same amount of money it would have realized under the assessed valuation existing at the time the project was approved, while the additional money resulting from the rise in assessed valuation is placed in a special fund for repayment of indebtedness incurred in financing the project.⁸⁸

TIF experienced enormous popularity in California after the adoption of Proposition 13, which strictly limited increases in property taxes.⁸⁹ California was the first state to adopt TIF,⁹⁰ and its TIF laws are amazingly detailed and complex, totaling over three hundred printed pages.⁹¹

The allure of TIFs, of course, is that it provides a way that RDAs may, in theory, pay for their projects without putting additional burden on the general tax

each year in excess of such amount shall be allocated to . . . a special fund of the redevelopment agency

Id.

⁸⁸ *Redevelopment Agency v. County of San Bernardino*, 21 Cal. 3d 255, 259 (1978); *see also County of Santa Clara v. Redevelopment Agency*, 18 Cal. App. 4th 1008, 1011 (1993):

Increment revenue, which is the primary source of funding for redevelopment projects, consists of the increased property tax revenue resulting from rises in the assessed valuation of property in a redevelopment project area. Taxing agencies continue to receive the amount of revenue they would have received under the assessed valuation existing at the time the project was approved, while the additional revenue attributable to the project is placed in a special fund of the redevelopment agency for repayment of indebtedness incurred in financing the project.

Id.

⁸⁹ *Man, supra* note 86, at 17.

⁹⁰ *Id.*

⁹¹ CRAIG L. JOHNSON & KENNETH A. KRIZ, *A Review of State Tax Increment Financing Laws*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT*, *supra* note 51, at 32.

base.⁹² And naturally, the TIF system is not without its criticisms.⁹³ But in the context of our discussion of structural defects in the California redevelopment regime, perhaps the most compelling criticism is that it improperly incentivizes RDAs to plan project areas where private enterprise is already likely to invest.⁹⁴

⁹² *But see* JOYCE Y. MAN, *Effects of Tax Increment Financing on Economic Development*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 51, at 105 (“Given the conflicting views with respect to the effectiveness of TIF, more research needs to be done before we can reach a consensus, if any, on the issue of whether TIF programs have achieved their goals of stimulating economic development.”). And yet despite the uncertain efficacy of TIF, California has wagered \$61 billion in RDA debt, largely funded through TIF, in hopes that TIF will pay out. *See* MORR Report, *supra* note 1, at 11.

⁹³ These criticisms include: (1) TIFs provide an inefficient incentive system; (2) TIFs represent a zero-sum game that simply rearranges wealth, but does not actually generate new revenues; (3) TIF systems allow municipalities to capture the revenue from other municipalities, most notably from school districts; (4) TIF systems are complex and administratively costly; (5) TIF systems provide little or no voter participation, and as such are an improper delegation of legislative power; (6) TIF systems provide an incentive for RDAs to initiate projects irrespective of the likelihood that development would be initiated by private enterprise. Man, *supra* note 86, at 4-7.

⁹⁴ Man explains further:

Although local governments claim to adopt the TIF program as an incentive to induce development in an area that would have otherwise not occurred, in some cases it could be argued that such development would have occurred without the incentive provided through TIF. There are also charges that local incentives under TIF mislead some firms to an inappropriate location and that government subsidies are provided to firms or affluent areas that do not need them, thus wasting taxpayers’ money.

Id. at 6.

TIF is a popular tool when redevelopment is truly necessary and TIF is used in an appropriate manner. However, in some cases when TIF is misused, school and other affected jurisdictions often object to TIF on the grounds that they lose tax revenues from investments in the area unrelated to the TIF district and fear increased demand on their services without compensation.

JOYCE Y. MAN, *Determinants of the Municipal Decision to Adopt Tax Increment Financing*, TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 51, at 91, n.3; *see also* CRAIG L. JOHNSON, *Conclusion*, TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 51, at 258, discussing sales tax increment finance programs (STIFs) (“The most attractive areas for generating [] tax increment flows are not blighted urban areas, but rather undeveloped tracts or areas with the potential for manufacturing or wholesaling development that will add to the regional export base.”). Johnson also urges for careful oversight of RDAs’ use of TIF:

TIF projects must be carefully planned, continually monitored, diligently implemented, critically evaluated, and ultimately terminated. The laws of a state that govern the TIF process must be structured to channel the political process

The ideal site for the production of a big tax increment is either vacant when declared a redevelopment project area or easily cleared. It must also be a site upon which private redevelopers are ready to build immediately. This usually precludes redevelopment of the most crime-ridden and poverty-stricken sites in town because there is simply no alternate market for them.

....

*The realities of TIF contradict the premise . . . that redevelopment powers should be reserved exclusively for projects which private developers wouldn't have built on their own.*⁹⁵

Blight removal is, at bottom, only an indirect boon to revenue stimulation.

CRL is carefully designed to ensure that future revenues are not a direct or principal motivator of RDAs in their duty of removing community blight.⁹⁶ TIFs

and financial subsidies in ways that further the public interest. A finding of blight in a TID [tax increment district] creates the link between the activities of private developers and the public purpose necessary for government to exercise the powers of eminent domain and support a project using tax dollars. In addition, if the development would have occurred without the expenditure of public TIF funds (i.e., the “but for” test was not passed), then a larger public purpose has not been served, and development should be left to the private sector. . . . [A] blighted finding and but for test . . . are fundamentally sound “first” principles and do provide the underpinning justification for TIF . . .

Id. at 258-59.

⁹⁵ Lefcoe, *supra* note 86, at 1003-05 (emphasis added). Lefcoe explains further: This premise is beside the point to redevelopment officials single-mindedly following the money. For this reason, a much favored strategy is to include within newly established redevelopment project area boundaries major private projects already scheduled for construction. Though patently illegal because these projects would have been built even in the absence of redevelopment, the ensuing tax increment jump-starts the rest of the redevelopment effort.

Id. at 1005.

⁹⁶ Jeff Chapman explains:

TIF redevelopment must be carefully monitored by public-sector decision makers. There is a good deal of money involved in the process, and there are often conflicting pressures on the RDA. These pressures come from the jurisdiction that initiated the redevelopment agency, developers, advocates for low-income residents, citizens, and overlapping jurisdictions. Gradually, the California law has been tightened to ensure that redevelopment activity is in response to blight, not in response to fiscal stress or arcane state revenue distribution formulas.

create a counter-productive incentive system, as George Lefcoe points out, and it is no wonder that RDAs are falling over themselves to find “blight” in their neighborhoods so that they can sell more bonds against tax increments. If a project is inefficiently planned in an area that would have been developed just as well in the private sector without the RDA, the effect is that the taxpayer winds up footing the costs of the development instead of the private developer.⁹⁷ This will likely have a direct impact on the school district that is now frozen out of its share of the tax increment,⁹⁸ enrich bond brokers and investors, inspire TIF-funded municipal bidding wars,⁹⁹ and keep the RDA in business.¹⁰⁰ Thus while TIF is

. . . . If [blight statutes] are accurately followed, the use of TIF to avoid fiscal stress would be more difficult.

Chapman, *supra* note 51, at 129. Chapman explains additional legislative changes considered by the California legislature, including a requirement that RDAs show a link between expenditures and blight removal, and a prohibition on projects that benefited automobile dealerships and other big box retailers. “In the year in which the law was completing the legislative process . . . redevelopment agencies placed about three times more land into project areas than they had in the year before.” *Id.* at 129-30.

⁹⁷ *Id.* at 131.

If development is occurring in a particular area, or if that area is situated in a location in which development is highly likely to occur in the future . . . then a property tax increment will be generated. If a redevelopment agency decides to consider this area as blighted, it will unjustly appropriate the increment, the overlapping jurisdictions will not receive their fair share, and it is likely that the redevelopment project is being formed for reasons other than blight.

Id.

⁹⁸ “The efficiency justification for TIF is weakened when the project would have been built anyway somewhere within the boundaries of the school district or county. Redevelopment proponents admit this possibility but contend that without their efforts poor areas would continue deteriorating while rich areas prosper.” Lefcoe, *supra* note 86, at 997.

⁹⁹ “Taxpayers are understandably chagrined when municipalities try to lure private developers away from each other with tax dollars. The temptation is always present and often proves irresistible when most of the funding comes from taxing entities other than the one extending the subsidy.” *Id.* at 1007.

¹⁰⁰ “To succeed in California, a redevelopment agency depends on there being new construction or a change in ownership within project area boundaries since California’s property

attractive in theory, its abuse is just too great a temptation for California's misconceived and misdirected RDAs.

Jeff Chapman encapsulates the incentive problem in California redevelopment law with respect to TIF:

Over the past fifteen years, California has enacted a complex series of laws that have attempted to ensure that TIF development is used appropriately. This illustrates that continual monitoring is necessary in order to convince the agencies, developers, and public that TIF is being used to eliminate blight—the purpose for which it was justified. But even under these continuing legal constraints, redevelopment agencies are likely to continue to search for exceptions

TIF can be a useful tool. Projects can generate revenue streams that can be turned into a self-financing instrument. But it only works correctly if it is carefully planned, monitored, and implemented under the light of public scrutiny.¹⁰¹

IV. POWER AND PRAGMATISM

A. The People Will Not Receive Current Redevelopment Law

When Solon, the great Athenian lawmaker, was asked whether he had given to the Athenians the best laws he could devise, he replied that he had given them instead “the best they w[ou]ld receive.”¹⁰² Solon recognized that laws must not only be just, but they must be agreeable to those they mean to govern. The

tax regime allows for assessments to current market value only upon a change in ownership or new construction.” *Id.* at 1003.

¹⁰¹ See Chapman, *supra* note 51, at 132.

¹⁰² James Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION 317 (Ohio Univ. Press, 1966) (July 18, 1787). Solon wrote the Solonian Constitution, incorporating the first elements of a civil democracy. His laws were a compromise between oligarchy and democracy, appealing both the aristocrats and the ordinary people.

Kelo decision dismayed the entire nation, transcending party and class designations, and regardless of the lawfulness of the decision, the people have not received it. People are angry at the decision, and unwilling to accept that their local government officials have the right to take their homes to boost tax revenues. “The Court's stature plummeted when it endorsed taking private property for private use.”¹⁰³ In the wake of *Kelo*, Professor Thomas Merrill was surprised by the public outcry. “Merrill finally decided that ‘the nub of the problem is that the American people believe that property rights are invested with moral significance.’”¹⁰⁴

The policy towards defending individual rights is not a groundless one, nor is it merely normative. It is rooted in notions of pragmatism, the notion that the right action is not always the one that looks best on paper. It is the notion that embraces the plain fact that humans are not rational economic actors, and that even if we were, we cannot possibly understand or accurately assess all of the values at stake in social choices. Pragmatism is the practical companion to utilitarianism. Although utilitarianism seeks the greatest good, it is often conflated with applied economics, and sets to the task of gathering and calculating values to determine the best outcome. While such an approach is a useful

¹⁰³ Douglas W. Kmiec, *Abandoning Common Sense*, CAL. LAW., Sep. 2005, at 21, 21. Polls have described the backlash: 89% of people are opposed to takings for economic development. Michael Corkery & Ryan Chittum, *Eminent Domain Uproar Imperils Projects*, WALL ST. J., Aug. 3, 2005, at B1. Another poll increased the number to 93%. Matt Welch, *The Left's Eyeing Your Home*, L.A. TIMES, Aug. 14, 2005, at M6.

¹⁰⁴ Sandefur, *supra* note 7, at 706.

academic exercise, and would ostensibly endorse such redevelopment decisions as those in *Poletown* and *Kelo*, it fails to take into account certain unshakable principles to which human beings cling, namely that we should be free in our property.¹⁰⁵ To claim that such tenacity is irrational is of no use. Irrational it is, and so we must account for it. To do otherwise would be to act irrationally ourselves. And as aristocratic policy makers, we cannot afford such a folly. Thankfully, we can deal with irrationality. It is unpredictability that would prove troublesome. If people's reactions towards violations of these principles were unpredictable, we may not be able to account for them in any meaningful way. But they are not. People may be irrational, but taken en masse they are quite predictable.

So what is this "irrational" sentiment to which we humans, particularly we Americans, cling? The overwhelming feeling is that "[n]o Americans, no matter how poor and powerless, should be forcibly thrown out of their own homes and undercompensated in the process; *certainly not because another private party wants to make money* from their land without observing the basic societal nicety of buying it in a voluntary transaction."¹⁰⁶ "There are a lot of citizens who are offended by the widespread employment of this power—and not all of them are

¹⁰⁵ *People v. Lacey*, 787 N.Y.S.2d 680 (N.Y. Co. Ct. 2004) (unpublished disposition), available at 2004 WL 1040676. Although this language refers to privacy, it accurately captures the attitude that average landowners have towards their property.

¹⁰⁶ Kanner, *supra* note 53, at 381 (emphasis added).

completely rational about it.”¹⁰⁷ “Regardless of the amount paid, many people are offended that they can be forced by their government to yield their property so that somebody else can profit from it.”¹⁰⁸

For many, the jig is up, and citizens are becoming aware that “government agencies [are] try[ing] to balance their budgets on the backs of faultless property owners who are simply unlucky enough to own the wrong land at the wrong time.”¹⁰⁹ An upset Poletown resident objected to Detroit’s plan thusly: “Even in communist Poland we can find no record of churches being torn down along with, or without, their neighborhood homes to establish an industrial facility.”¹¹⁰ George Lefcoe remarks that “[t]axpayers are understandably chagrined when municipalities try to lure private developers away from each other with tax dollars.”¹¹¹

B. Fixing the Problem

So what is needed? Propertarians are angry, to be sure, but do they offer anything helpful in the stead of the current regime? Although the idea of eminent domain sours the stomach, it is arguably quite necessary in the concept of an

¹⁰⁷ Michael M. Berger, *Update on the Right to Take* 13 (ALI-ABA Course of Study, Jan. 2005) available at SK045 ALI-ABA 1. Berger goes on to describe a South Carolina man who shot and killed two sheriff’s deputies as the State Department of Transportation came to take his land to widen a highway. Afterwards, the man remarked “‘If we can’t be any freer than that in this country, I’d rather die.’” This type of event, though not likely to become very common, should at least serve as a “warning to government agencies that there may be something amiss in their acquisition procedures.” *Id.*

¹⁰⁸ *Id.* at 15.

¹⁰⁹ *Id.* at 14.

¹¹⁰ POLETOWN LIVES! (Information Factory 1983).

¹¹¹ Lefcoe, *supra* note 86, at 1007.

ordered liberty protected by a sovereign government. “Government agencies at all levels have become blasé about their use of the power of eminent domain”¹¹² “Should the process of public land acquisition grind to a halt? Nothing so drastic is needed. Perhaps, however, governments at all levels could use a bit of what the touchy-feely folks call sensitivity training.”¹¹³ However, the solution will be neither easily implemented nor easily known. “Eminent domain abuse is a symptom of a profound cultural and philosophical breakdown, meaning that really fixing the problem posed by *Kelo* will take much more than political action.”¹¹⁴

On the other side of the debate, municipalities are perhaps just as attached to their redevelopment powers as individuals are to the homes and businesses. During the debate over Poletown, Detroit city council member Clyde Cleveland complained that he was “sick and tired of one of the best things that has happened to the city of Detroit, that people have used every obstruction and tactic they could come up with in order to block it.”¹¹⁵ Similarly, Erma Henderson, another Detroit city council member, said “I don’t know why they persist in doing this.”¹¹⁶ The paradigm of local governments in providing services and competing with neighboring cities and towns in the past 50 years has become more and more

¹¹² Michael M. Berger, *supra* note 107, at 12.

¹¹² 82 Cal. App. 4th 511 (2000); *see also* STEVEN GREENHUT, ABUSE OF POWER: HOW GOVERNMENT MISUSES EMINENT DOMAIN 144 (2005) (“This is how governments now routinely operate, taking property from small owners and giving them to big ones, and treating the victimized owners shabbily. It’s no aberration.”).

¹¹³ Michael M. Berger, *supra* note 107, at 14.

¹¹⁴ Sandefur, *supra* note 7, at 707.

¹¹⁵ POLETOWN LIVES!, *supra* note 110.

¹¹⁶ *Id.*

entangled with and dependent upon the notion of coercive bargaining and redevelopment. Weaning them off of this dependency will not be easy. It is not enough that an RDA make a “lawful”¹¹⁷ exercise of authority, nor is it enough that the benefits of the project outweigh the immediate political costs. Just as the private market often fails to accurately assess the externalities of its actions, especially as to long-range externalities, politicians and RDAs fail to appreciate the sociological externalities of their coercive methods in redevelopment.

The city of Detroit provides a good example of this in its exercise of redevelopment and eminent domain authority to obliterate the community of Poletown, replete with beautiful churches and vibrant businesses. As part of its strategy to demoralize and dismantle the steadfastness of the community’s holdouts, the city approached Cardinal John F. Dearden of the Archdiocese of Detroit to acquire the community’s Catholic churches, the Immaculate

¹¹⁷ It is of little comfort that redevelopment agencies be procedurally precise. Given the difficulty and expense in surmounting blight findings, not to mention finding and availing oneself of the narrow windows available for such objections, it is the rare challenger that is able to mount a successful attack against a careful RDA staff that has been adequately prepared by city attorneys. This is not to mention that one must learn to watch out for the wiles and pretext of the agency:

Officials are often required to draft a redevelopment plan before proceeding; such a plan will include fact-finding by consultants, who are hired to advise the city on whether a specified area is “blighted.” These consultants are too often willing to tell cities whatever they want to hear; in one recent California case, a trial court rejected the findings of a consultant that had performed what it euphemistically called a “windshield survey” of a neighborhood to determine whether it was blighted. A windshield survey, of course, means that the consultant simply drove through the neighborhood before writing up a report declaring the neighborhood blighted.

Sandefur, *supra* note 7, at 716-17.

Conception and St. John the Evangelist.¹¹⁸ The backlash against the Archdiocese was great. Reverend Joseph Karasiewicz of the Immaculate Conception Church, was an important leader in the protest against both the Archdiocese's decision and the city's scheme to demolish his parishioners' homes, businesses, and churches. Karasiewicz's defiance of his Cardinal and Archdiocese is indicative of the sociological impacts that coercive governmental dealings create. He denounced the city's actions, saying "this is an evil law, and we have to fight it."¹¹⁹ For his protesting Karasiewicz was kicked out of the rectory and never given another permanent assignment. Parishioner Ann Locklear remarked a year after her evacuation that she had "lost my faith in the Church, the city and General Motors."¹²⁰ "It's the principle of the thing," said Poletown resident Kris Biernacki.¹²¹ "I think the whole thing stinks. I just don't believe it happened. It's breathtaking. We didn't have a voice in it—not a voice. We didn't want to move. We were literally forced to move out. We were just told to go."¹²²

Eventually, of course, the last of the residents were eliminated, some forcibly,¹²³ and the neighborhood homes and churches were obliterated to make

¹¹⁸ POLETOWN LIVES!, *supra* note 110; *see also* Jenny Nolan, *Auto Plant vs. Neighborhood: The Poletown Battle*, THE DETROIT NEWS, <http://info.detnews.com/history/story/index.cfm?id=18&category=business>.

¹¹⁹ Jacob Sullum, *Rediscovering Property Rights in the Rubble of Poletown*, THE ECOLOGIC POWERHOUSE (Oct. 2004), <http://www.eco.freedom.org/articles/sullum-1004.shtml> (last visited Apr. 29, 2006).

¹²⁰ Nolan, *supra* note 118.

¹²¹ Sullum, *supra* note 119.

¹²² *Id.*

¹²³ *See* POLETOWN LIVES!, *supra* note 110 (depicting the arrest of several elderly women during the final protest of the taking and demolition of their neighborhood church).

way for the sprawling green GM campus. Over time, the story of the Poletown residents' fight disappeared from the headlines. But the fight remains an integral part of American legal history. The case appears in every property law textbook as the archetypical illustration of the devastating power of redevelopment and the consequences of a deferential blight standard.

C. Where's the Blight? California Redevelopment Abuse

Preeminent redevelopment attorney Murray O. Kane exposed Diamond Bar's bogus blight determination in *Diamond Bar*. "The mere fact of multiple ownership does not establish blight. Otherwise, a condominium development by definition would be blighted."¹²⁴ Kane provided a videotaped 28 minute tour of Diamond Bar's designated project area to illustrate in the plainest of terms the senselessness of the City's blight claims. As to this video, the appellate court remarked: "[We] feel[] compelled to comment that [we] viewed the plaintiffs' videotapes in their entirety and did not perceive anything remotely resembling blight. The videotapes depicted modern, well-maintained, retail and office structures, amidst ample landscaping and open space, in a partially rustic setting."¹²⁵ The *Kelo* decision has kindled national recognition of eminent domain abuse through redevelopment. *Kelo* sends the message to homeowners and business owners that no property is safe that attracts the attention of the local RDA. However, Californians are not up against the same unfettered

¹²⁴ *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 407 (2000).

¹²⁵ *Id.* at 394 n.4.

governmental power that *Kelo* validated. At least, not in theory. California's blight standard was designed to provide additional checks against the kind of seemingly arbitrary abuse that *Kelo* showed was otherwise permissible. But does California's CRL actually provide any meaningful check against the full brunt of the federal *Kelo* rule for takings? Or does the California blight standard simply mean more paperwork for the RDAs? California Health and Safety Code treats redevelopment as a "last resort."¹²⁶ But do redevelopment agencies?

D. Treatment of Blight in California Case Law

Commentators have noted the relative severity of California blight laws. "Nowhere have the statutory definitions of blight, and judicial enforcement of those standards, been more restrictive than in California."¹²⁷ "In California, based solely on the administrative record, courts will overturn a local government's finding of blight, or a trial court's affirmation of such a finding, for want of substantial evidence supporting the decision."¹²⁸ Compared to the treatment of blight by other state courts,¹²⁹ California shows markedly less deference to RDAs.

¹²⁶ Lefcoe, *supra* note 86, at 997; Cal. Health and Safety Code § 33030(b)(1) (West 2006) (providing for redevelopment only when the extent of blight "constitutes a serious physical and economic burden . . . which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment").

¹²⁷ Lefcoe, *supra* note 86, at 991.

¹²⁸ *Id.* at 1010 (citing *Fosselman's, Inc. v. City of Alhambra*, 224 Cal. Rptr. 361, 363-64 (Ct. App. 1986)).

¹²⁹ *See id.* (describing other state court tests, including overturning when the determination was arbitrary and capricious and without any evidentiary support (*Miller v. City of Tacoma*, 378 P.2d 464, 474-75 (Wash. 1963)), only for findings arising from "fraud, bad faith, [or] abuse of discretion" (*Urban Renewal Agency v. Decker*, 415 P.2d 373, 377 (Kan. 1966)), or almost complete preclusion of challenges to RDA resolutions (*Allen v. City Council*, 113 S.E.2d 621, 623-24 (Ga. 1960))).

“City renewal directors quickly learned there was no realistic chance that private builders could be drawn to developing commercial projects in hopelessly blighted areas.”¹³⁰ On the other hand, “[w]ith more than 200 condemnations benefiting private parties in the five years between 1998 and 2003, California is one of the leading abusers of eminent domain in America.”¹³¹ “Proposals in other states, including two brought forward in the California Legislature, even appear to have been consciously designed, in the words of one commentator, as ‘disingenuous’ attempts’ to pretend to do something about eminent domain without actually doing anything to upset the apple cart.”¹³²

Of course, if RDAs were really concerned with eliminating true blight, they should be lauded. But they are not so concerned, and nor could we possibly expect them to be. CRL provides sticks, but few carrots to encourage RDAs to actually do good by removing actual blight. TIF likewise provides maximum payouts for eliminating the “blight that’s right,”¹³³ and that rarely means true blight. Instead we find that RDAs apparently have no real desire for eliminating blight, but with drumming up whatever land they can assemble to attract big-box

¹³⁰ *Id.* at 994.

¹³¹ Sandefur, *supra* note 7, at 736.

¹³² *Id.* at 706.

¹³³ See MORR Report, *supra* note 1, at 16 (“Corporate decisions once based on market forces are now determined by which city’s redevelopment agency will cut the best deal.”). The amount of corporate welfare given by California RDAs is astonishing: Wal-Mart has taken an estimated \$100 million, and Costco has taken \$30 million from Orange County alone. *Id.* at 15.

retailers.¹³⁴ Surely RDAs would prefer to do this with the most economically depressed areas; doing so would both eliminate blight and present lower up-front assembly costs. But if these goals are only secondarily important to the primary goal of generating more tax revenue, then RDAs will “search[] for ‘the blight that’s right’—places just bad enough to clear but good enough to attract developers.”¹³⁵ In other words, “[w]hen program administrators [cannot] legitimately find blight in areas with good prospects for redevelopment, they fabricate[] it.”¹³⁶

*1. No “Naked Transfers” to Private Businesses: 99 Cents Only Stores v. Lancaster Redevelopment Agency*¹³⁷

99 Cents illustrates precisely the problem with not maintaining adequate separation between market and government and letting government agencies function as if they were market participants. Market actors will unscrupulously outsmart RDAs and strong-arm them into using the power of eminent domain for their own advantage. RDAs thus become, perhaps unwittingly, permanent participants in market actors' machinations and power plays against one another.¹³⁸

¹³⁴ “Generally, governments undertake such projects on the theory that the more profitable new use will create jobs, spur economic growth in the city, and ultimately raise the local government's tax revenue.” Sandefur, *supra* note 7, at 715-16.

¹³⁵ Lefcoe, *supra* note 86, at 994-5.

¹³⁶ *Id.* at 995.

¹³⁷ 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

¹³⁸ See MORR Report, *supra* note 1, at 16 (describing how Cerritos engaged in “auto dealer piracy,” and siphoned nearly all of neighboring Lakewood’s auto dealerships, earning itself the nickname, the “Darth Vader of Cities.”).

In 1988, the Lancaster Redevelopment Agency used its powers of redevelopment to “revitalize” the area in the “Amargosa Plan,” the cornerstone of which was to be the “Power Center,” home to Costco, Wal-Mart, Circuit City, and HomeBase.¹³⁹ Costco moved into the Power Center in that same year and proceeded to be very profitable for the next ten years. Then, in 1998, 99 Cents moved into the vacant space next door to Costco and proceeded to do very profitable business of its own, with sales in excess of \$5 million in its first full year.¹⁴⁰ Lancaster openly expressed its affection for 99 Cents because of the terrific sales tax revenues it generated for the city.¹⁴¹

Then, the great sleeping giant stirred: Costco decided to expand. Although expansion was possible to the south of its existing facility, Costco did neither consider this option nor approach 99 Cents to negotiate a buy-out of its lease. Instead, having previously known the benefits of RDA-assisted expansion, Costco went directly to the city of Lancaster and threatened to relocate to neighboring Palmdale and to “leave the Lancaster store shuttered and unoccupied, refusing to rent it to anyone else,”¹⁴² if it could not obtain 99 Cents’ property.¹⁴³ Terrified at the prospect of losing “the city’s 800-pound gorilla,”¹⁴⁴ the City

¹³⁹ 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1125 (C.D. 2001).

¹⁴⁰ *Id.* at 1126.

¹⁴¹ *Id.*

¹⁴² Michael M. Berger, *supra* note 107, at 6.

¹⁴³ 99 Cents, 237 F. Supp. 2d at 1125.

¹⁴⁴ Michael M. Berger, *supra* note 107, at 6.

approved a development agreement to use its best efforts to acquire the property and sell it to Costco for \$1.00.¹⁴⁵

The court ruled against the City. The City failed to renew its blight findings, even though it had opportunity to do so at two separate occasions.¹⁴⁶ The court noted that the City's scheme "rest[ed] on nothing more than the desire to achieve the naked transfer of property from one private party to another,"¹⁴⁷ and that "the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco."¹⁴⁸ The City's failure to abide by the statutory blight requirements barred it from exercising its eminent domain authority and left its improper motives exposed to judicial reprimand.

Although the facts of this case were just plain rotten for Lancaster, could our federal constitution, as interpreted under *Kelo*, have come to the same conclusion and striking down the use of eminent domain? Probably not without a sympathetic and "activist" court.¹⁴⁹ The added evidentiary check of California's blight requirements ultimately exposed the greed and manipulation behind the attempted land grab.

¹⁴⁵ *99 Cents*, 237 F. Supp. 2d at 1125. The author notes that \$0.99 would have been more poetic.

¹⁴⁶ *Id.* at 1125-26. In neither the 1994 plan amendment to extend TIF benefits nor the 1997 plan amendment to renew condemnation rights did the RDA bother to make new evidentiary findings of blight. *Id.*

¹⁴⁷ *Id.* at 1129.

¹⁴⁸ *Id.*

¹⁴⁹ *But see* Kanner, *supra* note 53, at 383 ("The Constitution does not require courts to facilitate predatory behavior by business-government alliances seeking to increase their cash flow by depriving people of modest means of their homes. The Public Use clause is not 'hortatory fluff.'").

It is easy to be callous towards the City of Lancaster in its failed attempt to establish blight. Noted one commentator, “Eight hundred-pound gorillas can be tough to deal with, but sometimes it is best to just tell them to pipe down and eat their bananas.”¹⁵⁰ It is fun to quip at the situation, but we must not take this oversimplified conclusion seriously. The city perhaps could not have done any differently: it was forced to negotiate with the hostage-taker (Costco), and thus had to demonstrate that it was doing everything in its power to fulfill the demands. Although the court ultimately barred the transfer, if the City had not been able to work out a separate agreement with Costco, Costco would have moved to a neighboring city as it had threatened to do, and “killed” Lancaster’s hostage (its sales tax revenues). This would have been a grave casualty. Thus the judicial remedy is an unsatisfying solution. While it protects challengers in these more egregious cases, it leaves cities unprotected from unscrupulous mega-tax-generators like Costco who threaten to use the town’s own redevelopment tools against it.¹⁵¹

¹⁵⁰ Michael M. Berger, *supra* note 107, at 8.

¹⁵¹ It starts to become clear that the City may have been an unwitting victim. Given the tools to bring in an “800 pound gorilla” such as Costco, a city will naturally use them. If it does not, the next town certainly will. Costco, realizing of course that Lancaster possesses the awesome power of eminent domain, need only exert the correct amount of pressure to obtain that power. “Future blight” is thus a very real danger for the city; it has invested millions in bringing in its 800 pound gorillas, and if they leave it will very likely leave the area a shambles. This is basic hostage negotiations strategy: a hostage-taker will only demand what he believes the negotiator can provide. If the negotiator can make the hostage-taker believe that the negotiator simply cannot provide what he wants, then the hostage-taker will not demand it. Thus *99 Cents* instructs that, to prevent Costcos from taking their respective cities’ sales tax revenues hostage, it need only be made clear that the power of redevelopment for such a purpose is off the table.

2. *More than Lip Service to Blight Requirements: Friends of Mammoth v. Mammoth Lakes Redevelopment Agency*¹⁵²

This case involved a community challenge to the RDA of the mountain town of Mammoth after it sought to establish a redevelopment project area.¹⁵³ The Town's plan specifically authorized the RDA "to provide or participate in providing at least 72 separate and identified public improvements and facilities" and "400 new housing units."¹⁵⁴ Plaintiffs contended that the RDA had failed to comply with CRL with respect to its blight findings, and with the California Environmental Quality Act (CEQA) in the Town's Environmental Impact Report (EIR).

The appellate court agreed with Plaintiffs, holding that the RDA had failed to produce sufficient evidence to support its finding that the project area suffered from physical conditions causing blight, and failed to show sufficient evidence that the buildings were economically nonviable or that adjacent incompatible uses prevented economic development.¹⁵⁵ The court examined the Town's evidence regarding unsafe or unhealthy buildings.¹⁵⁶ Although the Town provided building surveys for the project area, the surveys failed to define what a violation entailed, and how the violation could constitute blight under section 33031(a)(1).¹⁵⁷ "The

¹⁵² 82 Cal. App. 4th 511 (2000).

¹⁵³ One critic called this "a scam to designate much of the resort town of Mammoth Lakes as 'blighted,' so it could be 'redeveloped' . . . into a more profitable recreational community." Michael M. Berger, *supra* note 107, at 4.

¹⁵⁴ *Friends of Mammoth*, 82 Cal. App. 4th at 524.

¹⁵⁵ *Id.* at 559-60.

¹⁵⁶ Cal. Health & Safety Code § 33031(a)(1) (West 2006).

¹⁵⁷ *Friends of Mammoth*, 82 Cal. App. 4th at 550.

Town Council thus could not know whether the evidence of building code violations demonstrated the existence of buildings that were unsafe or unhealthy for human occupation, nor can we.”¹⁵⁸ The court also reviewed the findings of “deterioration and dilapidation.”¹⁵⁹ The Town had pointed to houses that had been “constructed with single glazed windows and electric heating” and rendered them therefore to be unsafe.¹⁶⁰ The Town pointed to “inadequate depths for retail display” and energy inefficiency as evidence of “defective design and substandard construction.”¹⁶¹ These claims did not pass the laugh test, and the court held that this could not be found to satisfy the evidentiary requirements of the Code.¹⁶²

Ultimately, the Town could not fool the court into believing that blight removal was really its goal. Blight is not merely an evidentiary hurdle; it represents the finish line itself. It is the very point of redevelopment in the first place. Before an RDA can get to its actual purposes of redevelopment, it must do more than just play lip service to the state’s requirements. Because California’s blight requirements are relatively strict, “the courts are required to be more than rubber stamps for local governments.”¹⁶³

¹⁵⁸ *Id.* at 550-51.

¹⁵⁹ *Id.* at 551.

¹⁶⁰ *Id.* at 552.

¹⁶¹ *Id.*

¹⁶² *Id.* at 556.

¹⁶³ *Id.* at 538.

3. More than Merely Higher and Better Use: Beach-Courchesne v. City of Diamond Bar¹⁶⁴

In 1995, Diamond Bar, an affluent suburban community of pricey low-density housing and low crime,¹⁶⁵ wished to increase commercial development. To accomplish this, the City relied on its redevelopment powers and established a 1,300 area redevelopment project area.¹⁶⁶ In its attempt to comply with CRL, the City made findings that the area suffered from blight that was “so prevalent and so substantial that it causes a reduction of, and a lack of, *proper utilization* of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment.”¹⁶⁷

Here again the court found that the City did not satisfy its evidentiary burden in showing blight. The City pointed to “multiple ownership”¹⁶⁸ as evidence of physical blight, but the court rejected this claim, reasoning that “[t]he mere fact of multiple ownership does not establish blight. Otherwise, a condominium development by definition would be blighted.”¹⁶⁹ The court found the rest of the City’s evidence of blight wanting and invalidated the redevelopment.¹⁷⁰ The City’s implicit reasoning is that the definition of blight should be made to include not only the removal of uses that produce externalities, but uses

¹⁶⁴ 80 Cal. App. 4th 388 (2000).

¹⁶⁵ *Id.* at 392.

¹⁶⁶ *Id.* at 393.

¹⁶⁷ *Id.* at 393 (emphasis added).

¹⁶⁸ Cal. Health & Safety § 33031(a)(4) (West 2006).

¹⁶⁹ *Diamond Bar*, 80 Cal. App. 4th at 405.

¹⁷⁰ *Id.* at 407.

that fall short of the highest and best theoretical use. The court rejected the interpretation that a public use could be merely a more beneficial use, stating that “the concededly desirable goal of improving an area is ‘insufficient by itself to justify use of the extraordinary powers of community redevelopment.’”¹⁷¹ Following the instruction of the California Supreme Court, the court stated that it would be “‘chary of the use of the [redevelopment] act unless . . . there is a situation where the blight is such that it constitutes a real *hindrance* to the development of the city It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan.’”¹⁷² And further, “[t]he CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements. If the showing made in the case were sufficient to rise to the level of blight, it is the rare locality in California that is not afflicted with that condition.”¹⁷³

The decision in *Diamond Bar* assuages the fear that Justice O’Connor articulated in her dissenting opinion in *Kelo*:

For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.¹⁷⁴

¹⁷¹ *Id.* at 395 (quoting *Regus v. City of Baldwin Park* 70 Cal. App. 3d 968, 979 (1977)).

¹⁷² *Id.* at 395 (quoting *Sweetwater Valley Civic Assn. v. City of National City* 18 Cal. 3d 270, 278 (1976)) (emphasis added).

¹⁷³ *Id.* at 407.

¹⁷⁴ *Kelo v. Town of New London*, 125 S.Ct. 2655, 2676 (2005) (O’Connor, dissenting). *But see* Sandefur, *supra* note 7, at 717 (“Such amorphous standards [in California redevelopment

The pragmatism of redevelopment is of great concern to California attorneys such as Murray O. Kane. Although Kane's clients are typically RDAs,¹⁷⁵ he took on Diamond Bar's RDA when it used "blight" as "simply a vehicle . . . to finance community improvements."¹⁷⁶ Kane explained his motivation for fighting the city of Diamond Bar: "If Diamond Bar gets away with it, then California's reform legislation is greatly weakened, and a legislative backlash could go beyond stopping redevelopment abuse, and will also hurt redevelopment *in truly blighted areas where redevelopment is really needed.*"¹⁷⁷ Kane is worried about a tragedy of the commons in a redevelopment context. If the redevelopment powers are "over-harvested" such as to instigate serious political revolt against them, they will become barren and useless, and will no longer be available for the purposes for which they were intended and for which they are *really needed*. Kane's remarks remind us that it is important for redevelopment proponents to not only protect the formal redevelopment powers, but the pragmatic foundations of its exercise. Cases like *Poletown* and *Kelo* have already opened Pandora's box, piquing citizens' interest as to what redevelopment is all about and whether they might fall prey to it. Without careful review in California in such cases as *99 Cent Stores*, *Diamond Bar*, and *Mammoth Lakes*, these

law] make it possible to declare property blighted whenever officials believe it is failing to produce revenue at a level that they would like to see.").

¹⁷⁵ See Murray O. Kane—Biography, http://www.kbblaw.com/members_kane.htm (last visited Apr. 29, 2006).

¹⁷⁶ *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 407 (2000).

¹⁷⁷ *Did Diamond Bar Conduct a \$450 Million Raid on School Funds?*, DIAMOND BAR/WALNUT NEWS GAZETTE, May 1, 1999 (emphasis added).

respective cities' RDAs threaten to kill the golden goose of redevelopment. The public has its eye trained on redevelopment agencies; will it abide the kinds of choices RDAs have made in recent years?

V. AN ARGUMENT FOR REFORM

The idea, of course, is that RDAs are in power for the purpose of eliminating blight so that redevelopment can happen. The misfortune of the whole enterprise was perhaps in the nomenclature—a “redevelopment agency” wants to do more than just eliminate blight: it wants to redevelop. Of course the two things are inextricably linked. But the phenomena that began to occur was that the primary focus left the sphere of blight removal and instead became the redevelopment itself. This leads to RDAs searching not for the worst instances of blight, but instead the “blight that’s right”¹⁷⁸ and other opportunities to bring more tax revenue—tax revenue which was supposed to be a nice fringe benefit of redevelopment, but which has actually become the primary motivator. As a result, we are in need of reform that reminds RDAs why they exist in the first place. One way to do this might be to require greater evidentiary support of the blight in each case. “[I]t was suggested to the legislative committees that they more closely tie condemnation to conditions of blight by requiring redevelopment agencies in resolutions of necessity to make parcel-specific findings of blight and thereby link the proposed project to the blighting conditions identified by the

¹⁷⁸ Lefcoe, *supra* note 86, at 994-95.

agencies.”¹⁷⁹ However, while this may help stem the tide of bad redevelopment, we must correct the faulty incentive structure. The California legislature has recognized some of the dangerous incentives that encourage bad redevelopment:

The state legislature recognized the irresistible attraction for redevelopment agencies to lure big, tax-generating uses to vacant sites, blighted or not. To remove this temptation, the legislature banned automobile dealerships in redevelopment project areas from being located on land never previously developed for urban uses. Cal. Health & Safety Code 33426.5(a) (West 1999). The legislature also banned development that would generate sales taxes from being located on a parcel of land five acres or larger, unless the principal permitted use was office, hotel, manufacturing, or industrial. Cal. Health & Safety Code 33426.5(b) (West 1999).¹⁸⁰

If it is really the case that RDAs simply cannot help themselves when it comes to things like auto dealerships and Costcos, then instead of making provisions for certain types of the particularly juicy earners, perhaps it is more sensible to remove this insidious incentive altogether, instead of a piecemeal approach. These types of exclusions illustrate the lack of principle in the approach to redevelopment.¹⁸¹ Through such legislation, RDAs are still improperly motivated

¹⁷⁹ Tepper, *supra* note 11, at 42.

The way to address Kelo-type issues is to require a site-specific blight finding *at the time of the hearing* on a resolution of necessity.

Those seeking redevelopment reform should base their proposals on reported California decisions invalidating redevelopment plans and not upon perceived abuses reported anecdotally by the press. Legitimate concerns exist regarding the use of the blight statutes by agencies in recent reported decisions. Nevertheless, real redevelopment reform will only occur if the legislature brings a precise focus to its efforts.

Id. at 43 (emphasis added).

¹⁸⁰ Lefcoe, *supra* note 86, at 1003 n.61.

¹⁸¹ This piecemeal approach has been used since 1975, when the California Law Revision Commission, in response to the California Supreme Court’s abdication of review over legislative fraud, bad faith, and abuse of discretion (*People v. Chevalier*, 52 Cal. 2d 299, 307 (1959)), the

to eliminate real blight, but in the event that a project does eliminate real blight, it is forbidden from installing a big earner like an auto mall. Thus they are told to seek out higher and better uses, but not the highest and best use.

We might not even need eminent domain reform as much as we need reform to the incentive structure and general mindset behind redevelopment. Government cannot be expected to behave like a business because government is subject to a different set of legal rules, rules that are not designed for fair play in a market environment. Thus a government redevelopment agency cannot be designed to have revenue-generation as its prime directive. Government's role in a republic is generally corrective, not speculative. Government's job is to manicure an environment that is conducive to successful private enterprise; it is private individuals and businesses that must make a community succeed. That's not just good policy; it is in principle what a republic is.¹⁸² Government only helps the market *indirectly* by providing services; market success *cannot* be government's *direct* goal; this just leads to too great a temptation to abuse its awesome powers. A snow plow makes roads navigable that were otherwise

California legislature finally annulled the *Chevalier* holding. See Cal. Civ. Proc. Code § 1245.255 (1982) (stating that resolution not conclusive when procured by "gross abuse of discretion").

¹⁸² See *Republic*, 23 ENCYCLOPAEDIA BRITANNICA 177 (1911).

[R]epublic has, however, always been understood to mean a state in which the head holds his place by the choice of his subjects. . . . What, however, is emphatically not a republic is a state in which the ruler can truly tell his subjects that the sovereignty resides in his royal person

. . . [T]he community . . . [must] confine the head of the government to defined functions.

Id.

unnavigable. But to tool around in the snow plow in normal conditions puts much unnecessary wear on the road, which will eventually become cracked and pitted, unsafe and unsuitable for those whom the plow was intended to serve.

Cities can spot uses that are aggregate losers (blighted), and restore them to point zero. The public use is satisfied in this.¹⁸³ The subsequent hand off to private development should be largely ancillary. Cities may not, however, identify properties that are not aggregate losers (not blighted), and call them losers (blighted) by pointing to a better market function. This creates inappropriate government entanglement with free enterprise, a sphere in which the players must not be permitted to capture and use the government's tools against one another.¹⁸⁴ It also overstates the role of government; when reasonable and profitable use is being made of land, it is not for government to improve upon it.¹⁸⁵ Because an ill-conceived redevelopment regime allows rent-seekers to blackmail cities, and entices cities to use coercive bargaining and offend landowners' sensibilities, RDAs are in danger of ruining the tools it needs to achieve their true purpose of blight removal. We are on a road to revolt, and while the revolt might restore a principled approach to eminent domain abuse—

¹⁸³ See *supra* Part III.A.2 (explaining how Michigan case law treats true blight removal as a public use).

¹⁸⁴ See *supra* Part IV.D.1 (explaining how Costco captured the power of eminent domain by holding Lancaster's sales taxes hostage).

¹⁸⁵ See Berger, *supra* note 75, at 237 (arguing that monopoly and efficiency are not sufficient to justify a taking without an impending public need); Sandefur: *A Gleeeful Obituary*, *supra* note 75, at 678 ("Americans in most states are at risk of losing their homes to whatever faction is able to gain political influence.").

and ostensibly provided needed protection to land owners—it will likely hurt cities' ability to provide for their own welfare. Thus we must remove the blight in our redevelopment law, and redevelop the principles and policies underlying redevelopment agencies, in order to save them from a demise of their own doing.