

Public-Private Redevelopment Partnerships and the Supreme Court: *Kelo v. City of New London*

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INTRODUCTION

Public opposition to the Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) ("*Kelo*") holds interest not only for its intensity but for its breadth. As expected, property rights groups and libertarian think tanks excoriated the majority opinion and celebrated the dissents. More interesting is the reaction of the rest of the population. Though with less animus than the organized political right, Americans of most political persuasions found the majority decision wrong-headed and oppressive.

What good, they asked, could come of the validation of this exercise of the power of eminent domain—the condemnation, with no finding of blight, of a group of well-kept single-family homes in a small, functioning single-family community in order to facilitate creation of a corporate industrial and office campus? Who could imagine a more oppressive use of the police power, a more convincing replay of the elitist, and perhaps racist legacy of urban renewal? The universality of this response hardly escaped the notice of legislators. In the months since the opinion, members of Congress, state legislators, and even councilpersons in charter cities have introduced measures containing palliatives or correctives to the perceived abuse.

What accounts for the breadth and the depth of this response? No doubt much is a tribute to the success of the political right in defining the way we view ourselves. From the New Deal into the 1980s, a positivist view of government prevailed. Since then, assiduous work by many on the right, including many of the key amici curiae in *Kelo*, has reframed the debate. The government provides for people every day, but the media rarely reports on those programs, and the concept that government can work a powerful good now lies generally outside the nation's collective, conscious thought (except apparently, for a latent desire in cases of natural disaster). It is not surprising then that the potential evils of redevelopment, one of the most powerful roles assigned to government, makes an easy target, while the virtues of redevelopment remain obscure.

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The opinions in *Kelo* reflect in one way or another this political sway. Each drafting Justice found herself or himself confronted with the two powerful Supreme Court precedents that sit astride all discussion of redevelopment, *Berman v. Parker*, 348 U.S. 26 (1954), upholding the use of eminent domain as part of redevelopment in the District of Columbia, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), validating the use of condemnation to undo the ancient Hawaiian feudal oligarchy through redistribution of its land. The holding and the rhetoric of *Berman* echo, without apology, the positive approach to government dominant in the decades after the New Deal. *Midkiff*, written by Justice O'Connor herself, restates positively Hawaii's legislative goals and defers to its legislative fact-finding. In stark contrast, the recent *Kelo* treatment of *Berman* and *Midkiff* reflects today's negative view of government: The *Kelo* majority opinion relies on these cases, but without acknowledging, much less reiterating their pro-redevelopment conviction. The *Kelo* dissents, embarrassed or disgusted, labor to distinguish *Berman* and *Midkiff* or overturn them entirely.

But, without diminishing the success of the political right in framing the debate, more is needed to explain both the popular and judicial response to the *Kelo* decision. Simple ignorance of the transformed and transforming nature of city-center land-use development lies at the heart of the pervasive popular reaction to the *Kelo* decision. Redevelopment has failed to make its case. Most Americans enjoy the fruits of revitalized urban cores, but they do not understand how the transformation occurred. Nor do they know that the very nature of land development in the city center has evolved, altering both public and private roles, erasing traditional boundaries between what is a public use and what is a private use, and between what is government owned and what is privately owned.

This essay contends that the Justices of the Supreme Court share that ignorance. Justice O'Connor's dissent invokes concepts, categories, and rules rendered inapposite and un-administrable by the practice of modern public-private development partnerships. Justice Thomas' policy complaints are forty years out of date, and the America it would reinstate lies in the irretrievable past. Whether these Justices and those who joined them are the victims of lack of comprehension or animated by the exigencies of a property rights-driven orthodoxy, their dissents in *Kelo* repeat a pattern in other key conservative land-use opinions which misconstrue or omit entirely an examination of the policy foundations, nature, methods, and pragmatic record of the governmental program at stake in the case.

The majority opinion, a tepid piece of rote reliance on precedent and deference,¹ fails to perform the function of holding the dissents up to the light of modern development realities,

¹ In a rare case of judicial self interpretation, the majority's lack of enthusiasm for its holding is confirmed not only by the tone and content of the opinion, but by the author of the opinion himself. In a public speech a few months after the opinion, Justice Stevens indicated he disagreed with the condemnation as a matter of policy, but felt compelled by precedent to reach the conclusion he did. Linda Greenhouse, Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails), N.Y. TIMES, Aug. 25, 2005, at A1.2 *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2660 (2005).

because, the author believes, the majority Justices do not understand the underlying process they rule upon. If the majority understood the practice of land use today, it could have articulated how the regime advocated by the dissents would do violence to the planning and contractual process that has recreated the modern American center city—a new regime that is the product of hard-won sophistication among city officials, regulators, and public and private development advocates.

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

Much of the popular reaction to *Kelo* rests on the specter of Suzette Kelo being forced out of her home, a fact pattern recited in both the majority and dissenting opinions. The majority tells us that petitioner Wilhelmina Dery has lived in her home all her life, and that Suzette Kelo has made extensive improvements to her house and prizes its water view.² Justice O'Connor adds that Dery's home has been in her family for over 100 years, and that her son lives next door in a house bestowed upon him as a wedding gift.³ It is difficult to imagine more perfect plaintiffs to sound a case against redevelopment. And, that may be why the case reached the high court.

This fact pattern, however, could hardly be less representative of what occurs throughout the land in redevelopment.⁴ Condemnation itself is rare. Most landowners in redevelopment projects either negotiate a sale to the city or redevelopment agency or “participate” in the project, that is they themselves redevelop their properties in a manner consistent with the redevelopment plan, often in partnership with other landowners and with the assistance of public financing. Redevelopment and economic development agencies are reluctant to use condemnation because the total costs of acquisition, including legal fees, run higher than fair market value, generally by about a third.

More important, though, is the rarity of residential condemnation. The great majority of condemnation actions are aimed at undeveloped land, land in “holding uses,” such as underutilized parking lots and warehouses, or other commercial uses. For example, while redevelopment has played a major role in San Francisco since the inception of the concept, the Redevelopment Agency has utilized condemnation as a tool infrequently, and more than three decades have passed since the last residential condemnation in the city.

² *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2660 (2005).

³ *Id.* at 2671 (O'Connor, J., dissenting).

⁴ The terms commonly used to describe what both the majority and dissents call “economic development” (as in “are economic development takings constitutional?”) is “redevelopment” or “public-private redevelopment,” reflecting the intent of government to correct the failure of the market alone to bring an area back to life after a substantial period of economic decline. The language of the phrase “economic development” implies the dissents’ conclusion, namely a process operating simply to create new forms of economic wealth. This essay employs the more accurate terms.

In those few situations where condemnation is used, and in those even far fewer that involve residential land, an infinitesimal number would involve condemnation of a cluster of single-family residences in a functioning residential neighborhood. Residential condemnation for redevelopment, when it does occur, seeks to acquire and demolish residential tenements that are dangerously deteriorated, often owned by absentee landlords who have refused for decades to keep them up and often been the object of repeated efforts to enforce code. In most states, by law, the replacement projects will include more new low- or very low-income apartments than necessary to replace those demolished. This is because the very same political majority that objects to the *Kelo* decision elects city councils. Those councilpersons generally own homes. Most agencies, appointed by those city councils rule out residential condemnation for political reasons, even where it might benefit the community. In many states, redevelopment or economic development statutes make residential condemnation difficult absent the consent of the affected residential community.⁵

The reader of the *Kelo* opinions learns none of this from the majority opinion or dissents. We are not told that condemnation of the *Kelo* and *Dery* houses is an anomaly in this country, nor that Ms. *Kelo* could have participated in the formation and adoption of the plan, or even whether she did. The opinions do not mention New London's allocation of ten million dollars for relocation assistance, nor that the plan for redevelopment provides for the construction of eighty new housing units in an new urban neighborhood. And we certainly are not told, even by the majority, that in many states the condemnation could not have proceeded without the likely consent of a committee representing Ms. *Kelo* and her neighbors.

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

In a reference made largely for rhetorical effect, Justice O'Connor states, "Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. There is an objection in principle . . ." ⁶ This facile remark glosses over much of the entire terrain of redevelopment.

Modern, government-assisted economic redevelopment is a specific solution to land-use markets' failure to address urban poverty. A century of trial-and-error approaches to the stubborn persistence of economic decline and social impoverishment in large areas in central cities has led

⁵ In California, for example, no residential condemnation may proceed unless the Redevelopment Plan so specifies, and either a Project Area Committee of local residents and businesses must approve the plan with the express residential condemnation power or the local government cannot adopt the plan except by a 2/3 vote of its governing body, typically four votes out of a five-member council. Cal. Civ. Proc. §§ 1245.350, 1245.240 (West 2005); see also DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

⁶ *Kelo*, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

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

Redevelopment, as conceived in the 1940s and 1950s, was an attempt to solve the land-assembly problem. Once a redevelopment plan was formulated, a governmental agency could condemn the lots, assemble them into economically functional parcels, and resell them for development consistent with the plan. Dealing with the “holdout” was the heart of the concept of redevelopment.

It still is. Although condemnation is rare and expensive, the latent authority to condemn encourages the transactions necessary to effectuate the plan for redevelopment. Without condemnation, a single holdout knows it can torpedo an entire project. The expense of condemnation gives some bargaining power to the holdout, but the legal availability of condemnation ensures that the sale will occur at something approaching market value. Some state condemnation statutes structure the process to encourage settlement near true fair market value, for example, by offering condemnee owners reimbursement of their attorney’s fees, but only if the eventual judgment amount lies within the range of the condemnee owners’ first settlement offer.

If this seems coercive, it is because it *is* coercive, and that is the heart of the concept—the center of the power that has been used for both good and ill. The forced sale of Ms. Kelo’s home certainly conjures up the evil, but, as discussed above, these facts are not representative of what typically occurs. Here are two more typical and recent examples.

The Ferry Building in San Francisco lies at the base of Market Street along the Embarcadero, a boulevard running along San Francisco Bay. The imposing, two-story Beaux Arts structure with a colonnade, a two-story internal gallery, a roof supported by iron buttresses, and topped by a landmark clock tower, served for nearly a century as the hub of the City’s passenger ferry service. Commuters landed on its edge, purchased tickets, and shopped within. Shipping offices occupied much of the building. By the 1990s the building was in disrepair, a condition repeated on pier after pier along the waterfront as bridges replaced ferries and container cargo replaced break-bulk shipping, the latter infeasible in downtown San Francisco because of the absence of vacant acres of “back land” for truck and rail facilities. Divided from the immediately adjacent downtown office-core by an elevated freeway, the waterfront languished for more than two decades. Piers lay vacant or underused, offered for lease at lower and lower prices, often without takers.

In the 1990s, the City of San Francisco, through its Port and Redevelopment Agency, embarked on an ambitious redevelopment effort made much easier by the demolition of the waterside elevated freeway that had been damaged in the 1989 Loma Prieta earthquake. Ferry travel revived as

a commuter option, and housing and commerce again had become viable downtown uses. The City invested state, federal, and city funds to rebuild the dilapidated industrial waterfront Embarcadero roadway that had lain hidden underneath the elevated freeway, creating a palm tree-lined pedestrian, rail, bus, and automobile multi-modal boulevard. The Port built parks, negotiated for a new cruise terminal, and anchored the redevelopment at the southern end with a new baseball park, privately financed and built, but supported in part by city tax-increment financing. At the geographic and design center of this effort lay the Ferry Building itself, to be restored pursuant to Secretary of Interior historical preservation standards.

This effort comprises what the *Kelo* Court calls “economic development.” Years of area committee work and public hearings produced a design. The renovated Ferry Building would house ferry passenger facilities and an urban marketplace tenanted by small Bay Area food businesses and restaurants. The Port of San Francisco would vacate its offices on the second floor, leaving the space available for rent as private office space. The City hoped that the office space, with many waterfront views, would rent at a sufficient premium to cover the cost of the historic renovation and the public spaces, and make up potential deficits from the small-scale, locally based retail operation.

The City and its Port carried out the proposed redevelopment. Today, the renovated San Francisco waterfront is one of the most heavily used public spaces in the Bay Area. Market rate and low-income housing is under construction. Tens of thousands of workers and tourists walk or ride transit along the Embarcadero to ball games on summer days and evenings. New restaurants have sprung up, and private developers have produced thousands of new residential units along the Embarcadero and near the ball park. The Ferry Building itself, restored and rebuilt, has won national planning awards and local acclaim, and is today in heavy use. Ferry commuters mingle with downtown residents in the urban market. The project finances appear to work, though, at this time of this writing, with less margin and certainty than the City and the project developer would prefer.

Yet the Ferry Building project would never have happened without the power of eminent domain. For many years, an old San Francisco institution, the World Trade Club, shared the dilapidated second floor with the Port staff under a long-term lease from the Port. Its faded dining room hosted many civic events. As the plans for the renovation matured, it became clear that the World Trade Club had to relocate to allow the creation of office space in the second floor, the only true revenue-generating use and the hoped for economic engine of the project. The Port offered generous terms and relocation. The Club refused, not for financial reasons, but instead basing its stance on the same “principle” as Ms. Kelo: it simply did not want to move. No amount of patient negotiation or relocation efforts would change the stance of the Club’s board of directors. And beyond a certain point, financial inducements, even if they had been effective, were impossible due to the marginal project economics. Finally, the Port moved to condemn the lease. Then, in the context of initiation of the condemnation case, settlement ensued, the Port moved the Club into comparable quarters nearby, and the Ferry Building project moved forward. Site assembly in this situation meant acquisition of the leasehold. The site assembly, the historic renovation, and the consolidation of the Embarcadero

renovation project would all have failed without the power of eminent domain.

Nearby on the same Embarcadero lies another version of economic development, more purely private, yet just as dependant on the use of eminent domain for redevelopment. The clothing company, the Gap, headquartered in San Francisco since the company's inception, found its corporate headquarters no longer physically sufficient or suitable for its corporate campus needs. A long and fruitless search for a downtown location of sufficient size led the company to determine to abandon San Francisco. Faced with the loss of 1200 jobs downtown, the Redevelopment Agency found a large site for the Gap headquarters on the Embarcadero. The Gap agreed to help defray some costs of the Embarcadero renovation, and as mitigation for open space impacts, to construct and dedicate to the City one of the park areas on the water's edge as called for in the Port's Waterfront Plan. The Redevelopment Agency successfully negotiated the purchase of most of the land necessary for the project. Near the conclusion of the effort, the owner of a corner parcel, a strategic 13,600 square feet of the 90,000 square-foot site, suddenly became enamored of his parking lot and refused to accept even a generous above-market value price. This was a financial holdout. The project stopped until the Agency condemned the site.

These public-private redevelopment experiences tell a story different from the facts in *Kelo*. Yet these are the typical scenes of redevelopment. New public facilities, often in tandem with new affordable housing, rise on vacant or under-utilized sites, producing uses and amenities that reinvent the urban center. Millions of Americans live, work and recreate in these areas. It is these projects, efforts such as the Ferry Building and the Gap headquarters, that the legal approach of the *Kelo* dissents would render impossible to carry out. Not difficult—impossible.

III. THE DISSENT'S DISTINCTIONS BETWEEN PUBLIC USE AND PRIVATE USE NO LONGER FUNCTION IN THE MODERN URBAN DEVELOPMENT CONTEXT

Broad concepts concerning the nature of real-estate development underlie the *Kelo* dissents, some express and some not. Most are inaccurate. Fortunately the dissents did not prevail. But, especially in light of the lukewarm majority and changes likely on the Court, they could prevail. And, even if they do not, the same misconceptions influence the current debates over proposed legislation, which would enact to one degree or another the dissenters' position. We examine in this section the dissenters' assumptions and lay out the corresponding reality.

The case turns, of course, on the meaning of "public use" for which eminent domain is constitutionally permissible. O'Connor's dissent parses public use to create three categories. Two, she tells us are "relatively straightforward and uncontroversial."⁷ They are:

⁷ *Id.* (O'Connor, J., dissenting).

First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.⁸

She characterizes these two categories as “public ownership” and “use-by-the-public,”⁹ and we will as well. Although the words of her opinion could hardly be more clear, their substance oversimplifies reality to the point of misrepresentation, as discussed below.

A. “Use-by-the public”: The Problematic Distinction Between Public Land Use and Private Land Use

At the outset, what does “use-by-the-public”¹⁰ mean to the dissent? Justice O’Connor, as just quoted above seems to use the common meaning of “available for the public’s use.” Justice Thomas likewise talks of the public’s “legal right to use the property.”¹¹ Justice O’Connor’s phrase “often common carriers”¹² would seem a bit limiting, as are two of the three examples (the railroad and public utility). Without the stadium, one might indeed wonder if the Court intended the class to be far narrower than is usually meant by “public use” in planning and zoning terms, perhaps limited to regulated monopolies.

Her stadium example, however, appears to confirm that for her the concept means what it usually means in the land use context; that is, it includes both classic public land uses and private uses operated for a profit and open to the subset of the general public willing and able to pay the price of entry. Such uses include theaters, movie houses, shopping centers, smaller stores, restaurants, hotels, and also perhaps spas and resorts open to the public on day-use basis. Each of these uses serves anyone who pays for the use (reserving only the right to exclude troublemakers, and even that right is circumscribed). While it is unclear whether the dissent would embrace this logical extension given the ideologically driven nature of the opinion and its imprecision, this essay assumes the dissenters would accept this common meaning of the term.

The unraveling of the dissent’s logic begins with the concept, now well developed, of

⁸ *Id.* (citations omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2679 (Thomas, J., dissenting).

¹² *Id.* at 2673 (O’Connor, J., dissenting).

“mixed use.” Commencing in the late 1960s, architects, urban planners, and developers set about rethinking development patterns created by traditional “Euclidian”¹³ zoning ordinances which separated uses into distinct zones, and formed the legal backbone of suburbia. These new thinkers hoped to replicate the development patterns of older cities, creating something more vital than the use-segregated, monolithic developments of the decades before. They focused on the desirability of mixing uses together to create social and economic synergies. The reaction evolved slowly, and included in its earlier versions the new town concept, and by the 1990s, the New Urbanist movement. These critics, urbanists, and practitioners believed housing types should be intermixed, and housing should be commingled with commercial uses and with open space. Appropriate types of heavy commercial or light industrial uses could be intermixed as well in ways that brought jobs close to housing.

New regulatory concepts such as the Planned Unit Development overlay and the Specific Plan supplanted traditional single-use zones, especially in urban centers. These concepts freed private developers to mix uses more intensely than ever and also to invent new land uses which defied the traditional Euclidian categories. Since the early 1990s this trend has accelerated such that nearly all urban development is of a “mixed-use” or “new-use” nature. In a quiet land use revolution, Americans are growing used to living, recreating, and working in these mixed use/new use environments. Readers may recognize these examples in their own communities:

- A structure with a public indoor plaza, a food court, and an arcade with shops.
- A single structure that includes a public plaza, combined with the lobby to a hotel tower and the lobby of a residential multi-family tower. Restaurants inside the building are open to the public and provide food service to the hotel and take-out service to the residential tower. Gym, massage, and day care facilities are shared by the hotel and residential users, and are open to the public.
- An older, derelict shopping center redeveloped into a mixed use development (a process called “refill”) that includes public spaces at ground level, on parking podiums, on the mezzanine, and on rooftops, some landscaped. New buildings contain shops, community meeting rooms, a movie theater, and an all-purpose theater available for

¹³ A concept named for the Supreme Court case which upheld the basic zoning power, *Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926) (granting the states the power to determine if a zoning scheme is necessary for the “public health, safety, morals, or general welfare”). This invention could be just as well named for Euclid himself, the Greek mathematician credited with the invention of geometry. In this Euclidian world, land areas are divided into zones, each with a primary use, such as residential, commercial, or light industrial, essentially pre-permitted in the zone, subject subsequently only to non-discretionary approvals such as the issuance of a building permit.

rent for civic uses, all on ground level. Shops are on the mezzanine, and housing above. All uses share the parking.

- A renovation of an old warehouse into a project with ground floor restaurants, retail on the first and second levels, low- and very low-income units on the third floor, and a fourth floor of “loft” living/work residences and penthouse apartments.
- A new shopping center with a central spine, partially indoor and partially outdoor, that is developed as a central park, anchored at one end by a department store and at the other by structure that contains ground floor retail and restaurants, and an entry foyer for a second floor public library and city hall. Structured parking serves all the uses.
- A structure containing, in one undivided space, a series of small open shops, a restaurant and bar, and a bowling alley.
- A single structure containing offices, shops, and a public school.

Developments such as these are no longer the exception; they are sprouting everywhere—in the center city, suburbia, in “edge cities,” in large cities and smaller cities. The public enjoys these models and their attention makes them prominent economic success stories. And for that same reason, redevelopment and public-private development aimed at revitalization of distressed areas look to these models as well.

The mere perusal of this list both asks and answers the obvious question raised by the *Kelo* dissents. How, in this new land use world, can one find the “bright line” dividing the prohibited use of eminent domain exercised for development of private uses from the permitted use of eminent domain for redevelopment of public uses? The answer of course is that one cannot. The dissents’ rule is simply unworkable.

Eminent domain is a tool for land assembly. Agencies negotiate to acquire on a parcel-by-parcel basis. Failed negotiation leads to condemnation. The boundaries of the individual parcel are a historical artifact that has little or no relationship to the “footprints” of the ultimate uses. The point of the redevelopment is the creation of a new use pattern which the prior parcelization would not support. Thus, even if uses in the ultimate development were separated and vertically uniform, one could not necessarily assign one parcel proposed for condemnation to one ultimate land use fate that could be then labeled “public” or “private.”

But these modern land uses are decidedly not separated or vertically uniform. Public uses are intermingled with private uses in the same development, in the same building, and even the same space. How should we characterize a condemnation to acquire the space that includes shops and the city hall, or the space that includes shops and residential space? The dissents’

bright line is no longer a line at all, but a muddle, a test inapplicable to most urban development situations.

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

The O'Connor dissent would also allow, in blanket manner, condemnation in aid of all projects where the private property is transferred to "public ownership." Again, the dissent gives us a short list of examples: "a road, a hospital, or a military base."¹⁴ These are, in fact, uses the government has traditionally owned. Again, the dissents oversimplify; governmental ownership has evolved to include many uses previously considered private, and private ownership now embraces many uses traditionally viewed as public.

The simplest and most common example is the long-term ground lease. Many clearly private uses are built on land owned by the public and leased to the developer and subsequent user. For example:

- Apartments are built on land owned entirely by a governmental entity which leases the land to a developer to build and operate the structure; the developer leases back the low-income units to the housing authority.
- A city enters into a long-term ground lease with a private company which contracts to develop an office building on the site. The term of the lease is substantially less than the useful life of the building, which will revert to the city when the ground lease expires. The building is built to city specifications so that, at the end of the lease, the city can locate city offices in the building.

In each case the use is private (for now) and the land is public. Is this a private or public land use under the test articulated by the *Kelo* dissents?

However unclear the answer may be, the increasing sophistication of the public-private relationship adds to the uncertainty. During the last several decades those engaged in the design of the institutions and instruments to carry out redevelopment and other public-private development partnerships have given much thought to the respective capabilities of the public and private sectors. Agencies appreciate the private sector's access to capital and its capacity to accept risk. Developers have come to understand that government has planning powers, legitimacy, and fiscal attributes to contribute to a project that a private party does not.

¹⁴ *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

The last decades have seen an examination of each stage in the life of a project to determine whether its attributes are more efficiently performed by the private or public entity. Projects move through concept planning, development planning, zoning, subdivision, engineering, land acquisition, grading and utility installation, construction of structures (“vertical development”), sale and leasing, and maintenance. For each stage for each project, public and private negotiators wrestle with defining the best allocation of the components of responsibility: specifically, which entity directs it, which pays for it, and which performs it.

The result transcends anything that could be memorialized in a government plan or zoning ordinance. It is instead embodied in a contractual relationship between the public and private entities. At that point it is much too simple to talk about “ownership” as a measure of anything. The bundle of sticks associated with land ownership has been deliberately broken apart and replaced with a pattern of contractual responsibilities that, given the nature of the deal, allocates to the respective public and private parties the specific elements of assembly, clearance, construction, maintenance, and control they are best equipped to perform. Typical patterns might include:

- A mixed-use development, planned and conceived by a city, built by a developer, where the public open spaces are planned by the city, constructed by the developer, and transferred to a home-owners association which must allow public use pursuant to adopted covenants, conditions, and restrictions (“CC&R’s”).
- A large redevelopment where the city owns part of the property and private parties own the rest. The city, which has low carrying costs, agrees, for valuable consideration reflected elsewhere in the deal, to acquire the private property and hold it until the market is ready to absorb the planned uses. The property is held for more than a decade.
- After a public-selection process, a city enters into a contract with a large developer who will serve as master developer of an area. The city owns the land. The city creates the master plan and zoning. The developer pays for the subdivision planning and engineering. The developer and city jointly hold public forums and jointly staff a public-advisory board selected by the city, the expenses of which are paid by the developer. The developer advances the funds for and builds the “backbone” infrastructure. The city floats bonds and buys the infrastructure from the developer. The city holds the land until ready for sale to the developer. The developer takes and owns the land on which a hospital, a stadium, and a public school are built by the developer. The school is leased back to the city. The city retains the land under multi-family mixed income rental housing, which the developer builds and turns over to the city ownership. The developer maintains and manages the housing pursuant to a contract with the housing agency.

These kinds of relationships are the rule, not the exception. As discussed above, parcels that may be condemned cut through these projects in random ways, embracing different uses. Which condemnation is to acquire a project for “public ownership”? The O’Connor opinion complains that the majority approach would “wash out any distinction between private and public use of property.”¹⁵ That has already occurred by simple evolution of the land-use model.

IV. GRAPPLING WITH “AFFIRMATIVE HARM ON SOCIETY”: IDEOLOGY OVER REALITY

Justice O’Connor then addresses what she calls a third category of condemnation which her dissent tells us is addressed by *Berman* and *Midkiff*. She begins with an admission somewhat strange in light of what is to come:

But “public ownership” and “use-by-the-public” are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.¹⁶

Up to this point, Justice Douglas (the author of *Berman*) would no doubt concur. The category to which Justice O’Connor refers is redevelopment, a concept *Berman* firmly endorsed as a tool for use in America’s urban landscape. But then she extracts a rule that limits both *Berman* and her own prior opinion in *Midkiff* to what she now construes as their facts. There is no substitute here for her own language: “In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.”¹⁷ The opinion thus would limit the use of condemnation in aid of redevelopment to situations where the existing use inflicts an “affirmative harm on society.”¹⁸

What does “affirmative harm on society” mean? Justice O’Connor’s dissent, in her urgency to distinguish, without overruling *Berman* and her own *Midkiff*, characterizes those opinions as permitting condemnation only to eliminate an “extraordinary” pre-condemnation use; “extraordinary”¹⁹ being

¹⁵ *Id.* at 2671 (O’Connor, J., dissenting).

¹⁶ *Id.* at 2673.

¹⁷ *Id.* at 2674.

¹⁸ *Id.*

¹⁹ *Id.*

something on the order of the horrible slums (“extreme poverty”) referenced in *Berman* and the extraordinary aristocracy referenced in *Midkiff* (“resulting from extreme wealth”).²⁰ By implication only, it appears that the facts in *Kelo* would not pass the test.

But they do pass the test, such as it is. No findings of blight were made in this case because none was required by law. But the facts in *Kelo* constitute the elements that typically lead to exercise of the redevelopment power in states where a finding of “blight” is required, and would support the finding. An area potentially attractive due to location (such as on the waterfront) suffers long-standing stagnation or worse; no market exists for uses in the area, banks will not lend, and so developers will not redevelop. The human cost is high: existing businesses fall into patterns of substandard performance due to lack of customers and inability to finance purchase of machinery, make building repairs, or undergo improvements; houses are abandoned; apartment buildings stand half empty;²¹ residents are unemployed or must travel long distances outside the area to find work; the area is not safe. In sum, the unassisted market fails to function.

Redevelopment attacks the problem by generating an area-wide plan, and then facilitating both catalyst public improvements and pioneer private development. These early projects must be thoughtfully selected to ensure strategic investment of scarce public funds. Early infrastructure thus often focuses on parks and new attractive streets which serve as on-the-ground evidence to lenders and developers that the area is changing. The agency selects pioneer projects, or builds upon pioneer projects underway, seeking private development that will provide quality jobs, attract secondary beneficial uses, and promote the renewed visibility of the area. Thus, the City of New London’s first infusion of public capital followed a typical and rational pattern: it focused on developing a plan, and then a park, and its first pioneer private project, already underway—a research facility—is job-intensive, highly visible, and will in the words of the majority, “draw new business to the area, thereby serving as a catalyst for the area’s rejuvenation.”²²

The majority opinion commences with a recital (albeit characteristically brief and bland) of the facts leading to redevelopment, describing a city designated by a state agency as “distressed” after decades of economic decline, unemployment nearly double the state average, and actual decreases in population. The dissenting Justices do not acknowledge, much less address, these conditions. The truncated factual recitation in Justice O’Connor’s opinion begins with the petitioners and skips directly to the Pfizer development. She does not mention the economic decay, unemployment, or population loss. The only reference to the underlying purpose of redevelopment is in a brief clause on the mission of

²⁰ *Id.*

²¹ The record reveals a high percentage of vacant housing, and an eighty-two percent vacancy rate for non-residential structures. Sixty-six percent of these structures were in fair or poor condition. Brief for the Respondent at 3, *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005) (No. 04-108).

²² *Kelo*, 125 S. Ct. at 2659.

the New London Development Corporation (immediately followed by a sentence informing us that the Corporation's Board is not elected). She selects as her only mention of the redevelopment plan a quote that the redevelopment was designed to "complement the facility that Pfizer was planning to build."²³

Justice Thomas' recitation is more pronouncedly political. All we would know from his opinion is that the case involves "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."²⁴

Why do the *Kelo* dissents ignore the stated public purpose of this redevelopment? After a careful read these opinions, why would one still have no knowledge of the goals of redevelopment, the processes, and the procedural protections developed over the last three decades, and the supporting facts in this case? Because the idea structure of a Fifth Amendment ideologue demands it. In a world-view fixed on the property rights of individuals, government program (indeed, any collective action) holds no interest or, for that matter, relevance. Thus, these two dissents look at the redevelopment world from the bottom up, that is from the eyes of the landowner alone, because these judges believe that their only obligation, as guardians of the Constitutional "rights" of the property owner, is to ask and answer what this all this means for the condemnee. And once a need or desire is converted into a "right," such as the dissent's creation of Suzette Kelo's "right" to be free from the exercise of eminent domain, then there is no point to discussing whether her need should be accommodated, and no need to balance her needs against others' needs, individual or collective.²⁵

V. THE PROBLEMATIC DISTINCTION BETWEEN PUBLIC AND PRIVATE GAIN

The Court's misperception of the nature of modern, public-private redevelopment goes beyond the dissents' confusion over use, ownership, and blight. The majority opinion, the concurrence, and the dissents share an outdated, nostalgic perception of the fundamental relationship between the public and private sector.

²³ *Id.* at 2671 (O'Connor, J., dissenting). As discussed below, working with a pioneer developer early in project formation is desirable.

²⁴ *Id.* at 2677 (Thomas, J., dissenting).

²⁵ This determined ignorance of governmental purpose is no stranger to Justices Rehnquist and Scalia. An early version emerges in Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). One could read his dissent there and emerge from the effort knowing nothing of historic preservation or the New York City ordinance. Justice Scalia takes the same approach in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where he is joined in the majority by Justices Rehnquist, White, Powell, and O'Connor. Nowhere in that opinion is there discussion of the pattern of privatization of the California coast such that members of the public could drive for dozens of miles along the coast, unable to reach the beaches they could see. Nor does the opinion discuss the California Coastal Initiative, the Coastal Act, the operative statute, or the theory and nature of public access regulation.

These Justices share the view that government does not possess the legal authority to acquire property from one citizen merely to transfer it to another.²⁶ Why? What is wrong with the government taking private property to transfer it to another private party? The answer is common to all the opinions: a fear that government will act as an agent of private rather than public power. The majority admits that use of eminent domain to transfer property from one citizen to another for the sole reason that the second “will put the property to a more productive use and thus pay more taxes” would “raise a suspicion that a private purpose was afoot.”²⁷ Justice Kennedy’s concurrence dwells on judicial remedies to this possibility.

The dissents, of course, focus almost entirely on the possibility of takings for such impermissible private purposes, and put a political gloss on their discussions. Justice O’Connor tells us the beneficiaries of the majority rule will be “citizens with disproportionate influence and power in the political process, including large corporations and development firms.”²⁸ Justice Thomas quotes her language with approval and adds race as an issue: “Urban renewal projects have long been associated with the displacement of blacks[.]”²⁹

A. A Brief Defense of Redevelopment

Some of the charges of abuse are undoubtedly true. A full discussion of the merits of redevelopment is beyond the ambit of this essay. Suffice it to say that as is the case with any large, complex undertaking, it has its success stories and its failures, its friends and enemies. We make a few observations. One is that none of the Justices knows much about this area, as their opinions make clear. The difference among them lies in their reaction to this ignorance. The majority refuses to take sides, seeking refuge in precedent. The dissents, as we have seen, do take sides on this complex social issue, and they do so without reference to facts or opinions that were the subject of judicial fact finding or judicially noticed or, in most cases, noticeable.

Much of the secondary literature cited by the dissents and many of the amici supporting their view take aim at redevelopment defects that have been eliminated or ameliorated in most states decades ago. It is certain that advocates for social justice in the 1960s recognized the elitist and racist purposes to which many federal urban renewal funds were dedicated, inventing a nickname for urban renewal, “Negro Removal”; the most scathing critiques written were published in that period.³⁰ Urban renewal had its

²⁶ *Kelo*, 125 S.Ct. at 2667–68; *id.* at 2670–71 (Kennedy, J., concurring) (explaining that there may be cases where the transfers are “suspicious” and will require courts to apply a demanding level of scrutiny to determine if the transfer is for “an impermissible private purpose”); *id.* at 2677 (O’Connor, J., dissenting).

²⁷ *Id.* at 2667–68.

²⁸ *Id.* at 2677 (O’Connor, J., dissenting).

²⁹ *Id.* at 2687 (Thomas, J., dissenting).

³⁰ See, e.g., YERBA BUENA HARTMAN, LAND GRAB AND COMMUNITY RESISTANCE (1974); JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC

catastrophic failures, although in many cases the critical literature focuses on the number of jobs and housing units destroyed without mentioning the number of new housing units and new jobs created.

Today, however, in most cities, no housing unit can be removed without the application of strict requirements that inhabitants of residential units taken be relocated into units of similar quality and job accessibility. Many states and cities require one-for-one or more than one-for-one replacement of low-income housing demolished inside any redevelopment area. Many metropolitan redevelopment agencies are run by and substantially staffed by racial minorities. Elected project area committees are representative of the local affected community. Today redevelopment is responsible for a large percentage of all the low- and very low-income housing produced. Most of the nation's low-income housing advocates would disagree with the policy perspective of the dissents and their amici.

Finally, note that condemnees are often better off than those displaced by private development. The picture-postcard *Kelo* plaintiffs are long-time homeowners. They are not typical condemnees. To the extent the exercise of eminent domain touches residential uses, the residential displacees are almost entirely tenants, not owners. Tenants have fewer rights in the United States than in any industrialized nation, a fact that does not appear to concern Justice Thomas. Most poor tenants are on month-to-month leases and may be evicted on thirty days notice. Regardless of the term of their lease, in many states (in contrast to negotiated commercial leases) sale of the residential building terminates the leases of all the renters. Thus, where a private developer negotiates a sale with the owner of a multi-family residential building, the residents are on the street in a month with no recourse or relocation rights. Those same residents fare much better if the building is condemned by a redevelopment agency providing relocation assistance and equal or improved affordable replacement housing.

B. The Evolution of the Public-Private Relationship: The Dissents' Worst Fears Meet Reality

Of more import however, is the majority and the dissents' failure to grasp a fundamental change in the way public-private development occurs, a change that alters the concern over the use of eminent domain for private purposes. It is not that corruption has ceased, or that in many cities, politics are not in fact dominated by elites. Rather, the average case, the now typical large redevelopment project, is undertaken in a manner that renders almost quaint the very concept of distinct, clearly separable "public" gain and "private" gain. It is worth examining the outlines of this relationship between a public entity and the dissent's "large corporations and development firms,"³¹ a relationship which Justice Thomas merely characterizes as "suspiciously agreeable."³²

INTERVENTION (1965). The critique continued through the 1980s and to some extent into the 1990s but was largely retrospective. See HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* (1st ed. 1962); HERBERT J. GANS, *THE URBAN VILLAGERS* (2nd ed. 1982).

³¹ *Kelo*, 125 S.Ct. at 2677 (O'Connor, J., dissenting).

³² *Id.* at 2678 (Thomas, J., dissenting).

Most large area redevelopment poses enormous fiscal challenges. Replacement of antiquated infrastructure, often high demolition costs, and a strong local-community desire for a healthy public benefit package overwhelm likely revenues from possible market uses. Cities and their agencies (referred to here as “city” or “cities”) struggle with how to bridge the gap, and in successful projects usually come up with a federal contribution for regional or backbone infrastructure, grants, and creative public financing. Tax-increment financing, for example, is such a bootstrapping device. Bonds are issued now on the basis of pledge of the “increment” between current property tax revenues and the increased tax revenues generated when new uses hopefully increase the value of the land and improvements. Even after the application of these techniques, the economics of these projects are often marginal. In most situations, the redevelopment, while hoping to revitalize a depressed area by creating jobs and new infrastructure to serve the public, also poses major development risk.

Cities recognize that while they can facilitate or oversee much of the redevelopment, they are not equipped to take on many aspects of the effort. They can provide a conduit for grants, issue public debt, and since they often own the subject land outright, they can hold land for long periods without actual cash outlays for the debt service as a developer would likely incur. While city officials might welcome a profit, in most cases the public development goals are more important to the city than the need to make money. But cities or redevelopment agencies typically cannot accept market and development risk, and often cannot front high “predevelopment” expenses, that is the costs of planners, economists, engineers, and attorneys necessary to work through the details of the project proposal; and they are ill suited to perform the vertical development.

The typical city, recognizing the reciprocal advantages of a relationship with a private developer, may advertise for a “master developer.” The master developer will assist the city in planning, perform due diligence reviews concerning site issues such as contamination, and assist in the preparation of estimates of the cost of removal of old infrastructure and the cost of new project infrastructure and improvements, as well as eventually find and manage relationships with developers of sub-areas within the project. The request typically asks for experience and financial capability.

Public advisory committees often advise the city council on the selection process and the selection itself. Competing development teams make presentations to the council in open session. On the basis of these, the council selects one developer with whom to negotiate the documents that would guide a permanent relationship. This exclusive negotiation period may be short or take several years, depending on the size of the project. The negotiators ordinarily meet in private and make interim reports to the council in executive session.

During the exclusive negotiation period, the developer usually fronts all of its “predevelopment costs” (planners, engineers, economists, and attorneys) and all or a portion of the city’s as well. For a large project area, these costs run into the millions of dollars. This is high-risk money for the developer because the city, while obligated to negotiate for the full period in good faith,

has no obligation to consummate the relationship; if the negotiations fail, the developer has lost the fruit of its work. If the city and developer teams reach agreement on key issues, the relationship matures to a set of contractual documents which the council then hears in open session. If, after public hearing and testimony, the council agrees, the contracts are signed, the obligations mature, and the project commences.

For significant redevelopment efforts the negotiation of these contractual documents is contentious and the issues are difficult. What emerges is a relationship sufficiently complex to defy summary presentation, a fact of life typical of many aspects of public-private relationships in an advanced economy, but often frustrating to busy city managers, preoccupied councilpersons, and many members of the public. The course of each negotiation is different, but, especially for large project areas, the elements are similar. The parties first attempt to reach a mutual understanding of the project economics. They spend many months developing engineering estimates of project costs such as infrastructure and performing market studies to determine the likely revenues from the sale of land and sale or rental of buildings. This effort, when reasonably complete, allows the construction of a hopefully mutually agreed-upon economic model of the development, a spreadsheet commonly called a “pro-forma.”

As they build the pro-forma, the city and the developer negotiate a reasonable rate of profit for the developer, based on the risk associated with the developer’s contributions. That profit is usually measured as the developer’s internal rate of return (IRR). The parties argue about the level of each sort of risk—regulatory risk (which the city asserts it will mitigate through the contract under negotiation), construction risk (the risk of cost overruns can be quite high), market risk (the risk that the rental and sales markets will change), and interest rate risk (the risk that interest rates will change).

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

The value of these city concessions is calculated or “monetized” and, in return, the city would typically require that the developer assume specific risks, for purely financial reasons, to insure that the project moves forward and to incentivize the developer to keep its money in the project. The city might, for example, require that the developer take the land for the backbone infrastructure early, engineer and build it according to a schedule in order to “prime the pump” regardless of whether the market is present for development at that time. Similarly, the contract might require the developer to develop at its own cost key public benefits, such as parks and

community facilities, and dedicate them to the city. These negotiations also often produce a profit-sharing arrangement. In many situations the developer has a right to the excess of project revenues over project costs up to a certain IRR, and after that, the parties divide profits according to an agreed formula.

The draft contract allocates financial and performance rights and obligations. The deal documents for a typical large project consume the space of several or many large binders. These documents define the relationship, and what is it really? The relationship that emerges from these arduous negotiations is actually in the nature of a complex partnership. In some situations it takes that legal form (typically a “joint venture”). In either case, for example, the city might contribute tax-increment financing, tax relief, substantial in-kind predevelopment costs, and the land either for free or at below market value (“written down”). The developer makes a large initial cash infusion prior to the sale of bonds for most of the predevelopment costs, contributes the remaining cash required after public financing for most of the predevelopment, demolition, and construction of the infrastructure and improvements. The developer takes the market risk, and is charged with the sale or lease of the revenue-producing elements.

In light of this complex reality, how fare the archetypes underlying the rule that the government must never condemn the land of A to give it to B? Where is the line between public and private? Has not the creative effort of modern public-private redevelopment, dedicated to maximizing efficiency of role, destroyed the very concepts? This is no longer a regulatory world in which government exercises a reactive, police-power role and the developer plays the protagonist. This is instead a contractual world, where the elements of the traditional roles are broken apart and rearranged with much refinement to reflect the needs and attributes of each party. The government typically is the project protagonist, affirmatively pushing the redevelopment to achieve public benefits. This public-benefit package often achieves major public goals such as the production of low-income housing, creation of new jobs for a lower-income community, construction of new parks and recreational facilities, and needed infrastructure. The developer is more of an agent of the public, performing specified tasks for a return which allows it to function and attract the necessary private capital to make the project succeed. In some cases, this agency relationship is formalized such that the developer simply performs its obligations for a negotiated fee. Whatever the form, public gain and private gain intertwine.

CONCLUSION

The Courts that produced *Berman* and *Midkiff* would have employed judicial deference to legislative efforts and respect for the changing nature of the police power to sidestep entirely the unrealities of the *Kelo* opinions discussed in this essay. Relying on *Berman*, O'Connor herself wrote in *Midkiff* that “the Court has made clear that it will not substitute its judgment for a legislature’s

judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”³³

How then does one explain the change in the Court, the tepid majority, and the change in Justice O’Connor? The explanation, though not the excuse, this essay contends, lies in all that has been discussed above. Justice O’Connor could, and the other Justices would, with no special land use expertise, grasp the unusual concentration of power in *Midkiff*. The feudal remnant that owned so much of Hawaii’s land represented a concept hostile to both capitalism and individual liberty. It is easy for an American conservative, even a property rights advocate, to find in her ideological orthodoxy a home for Hawaii’s effort to extirpate the oligarchy so the modern land-use market could function.

The same cannot be said for redevelopment. The *Kelo* Justices do not grasp the context or the program. The movement towards new forms of capitalism that partners with the state has no place in their belief structure. The majority does not comprehend the new concepts and the dissents are utterly uncomfortable with the heart of the public-private relationship, or do not care. The Court lives in the past when the public and private roles were crisply separate. They do not understand how much the public has benefited from the commingling of those roles. They would prefer to return to an era when government built roads and parks with general fund money derived from property taxes, and the private market built the houses and shops.

The ignorance of the *Kelo* court is a sad commentary on the failure of thoughtful land-use experts to communicate a policy idea beyond its immediate practitioners, a failure especially poignant because much of this entire sea change in land use comes at the urging of thoughtful conservatives who have spearheaded, intellectually and in practice, the movement to remake government in ways that imitate qualities found in the private sector, and to bring to government land-use planning an understanding of economics and the operation of markets.

³³ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).