Fordham Urban Law Journal

Volume 34 | Number 2 Article 3

2007

Urban Revitalization in the Post-Kelo Era

Lynn E. Blais

Urban Revitalization in the Post-Kelo Era

Cover Page Footnote

The author would like to thank Tad Duree, Eliot Turner, and Eric Willis for their extremely helpful research assitance on this project.

URBAN REVITALIZATION IN THE POST-*KELO* ERA

Lynn E. Blais *

I. INTRODUCTION

Freeport, Texas is a small city situated near the confluence of the Brazos River and the Gulf of Mexico.[1] Home to a large and thriving port,[2] the city itself has been in a period of decline for several decades.[3] In an attempt to reverse this trend, the City Council hired the Maritime Trust Company, a consulting firm, to evaluate the economic status and prospects of the city, and, if necessary, to make recommendations for revitalization.[4] The resulting report highlighted the lack of commercial and retail establishments in downtown Freeport and the excessive vacancy rate and disrepair of downtown buildings. The report concluded that the area was in a general state of decline that would require government intervention to reverse.[5] Ultimately, the report recommended that the City undertake a planned effort to revitalize the downtown area around a marina, concluding that development of a large, mixed-use marina was "probably the single most important development that can bring significant economic stimulus to the city."[6] Following the report's recommendations, the City and the Freeport Economic De-

* Leroy G. Denman, Jr., Regents Professor in Real Property Law, The University of Texas School of Law. The author would like to thank Tad Duree, Eliot Turner, and Eric Willis for their extremely helpful research assistance on this project.

1. The Ultimate Guide To Freeport, http://www.texasexplorer.net/Freeport.htm (last visited Mar. 25, 2007).

2. In a recent press release, Port Freeport claimed to have a $9 billion impact on the Texas economy and provide more than 11,000 jobs in Brazoria County. *See* Press Release, Port Freeport, Port Freeport is $9 Billion Economic Engine Directly Responsible for 11,131 Jobs (Sept. 13, 2006) (on file with author).

3. *See* Nancy Sarnoff, *Freeport Shakes Shadow of Dow*, HOUS. BUS. J., Feb. 21, 2003 ("After years of economic decline brought on by business flight and a blighted environmental image, the city of Freeport is plotting an ambitious course for the future in an attempt to erase the past."); *see generally* Master Plan for the Downtown Study Core Area for the City of Freeport, Texas (Oct. 2002) [hereinafter Freeport Master Plan].

4. *See* Freeport Master Plan, *supra* note 3, at 3. R

5. *See id.* at 10 (noting that thirty-one percent of the land uses in the study area are residential uses and, of these, twenty-three percent are vacant and ninety-seven percent are either severely or moderately blighted).

6. Western Seafood Co. v. United States, No. 04-41196, 2006 WL 2920809, at *1 (5th Cir. Oct. 11, 2006) (citing the Freeport Master Plan, *supra* note 3).

velopment Council ("FEDC") entered into an agreement with Freeport Marina LP, a private company, to develop and operate a large mixed-use marina on the banks of the Old Brazos River.[7] The agreement called for extensive public investment in the project, by means of low interest loans combined with substantial private investment by Freeport Marina.[8] The FEDC estimated that the marina would attract $60 million worth of hotels, restaurants, and retail establishments to the City's downtown area and create between 150 and 250 new jobs.[9]

Plans to develop the marina proceeded uneventfully, with the FEDC purchasing property designated in the development plan from private landowners. When the FEDC sought to purchase two seafood processing properties located on land crucial to the development, however, the owners of both operations objected.[10] Ultimately, Western Seafood Company sued the FEDC, arguing, among other things, that the planned marina did not constitute a valid public use, and that, therefore, the FEDC lacked constitutional authority to exercise eminent domain powers for this project.[11] The district court rejected Western Seafood's claims, concluding that the Public Use Clause of the Constitution was to be broadly interpreted with a particular deference to legislative judgments, and that Freeport's redevelopment plan clearly survived this deferential review.[12]

Western Seafood appealed, and while its appeal was pending, two important events transpired. First, the Supreme Court decided *Kelo v. City of New London*,[13] in which it reaffirmed the cases that formed the basis of the district court decision in *Western Seafood*.[14] In particular, the Supreme Court held that the public use limitation

7. Western Seafood Co. v. City of Freeport, 346 F. Supp. 2d 892, 894 (S.D. Tex. 2004).

8. *See* City of Freeport, Marina News, http://www.freeport.tx.us/Marina_News.htm (last visited Mar. 25, 2007) (describing the $6 million loan); *see also* Velda Hunter, *Freeport OKs Loan for Trico Move*, FACTS, Sept. 14, 2006 (detailing an additional $300,000 interest-free loan).

9. Thayer Evans, *Freeport Moves to Seize Three Properties*, HOUS. CHRON., June 24, 2005, at A6.

10. *Id.*

11. The other objecting company, Trico Seafood Company, has recently entered into an agreement with the FEDC, under which the Council agreed to pay up to $300,000 to relocate the operation from its current sight to a new location on the Old Brazos River. The Council will obtain the money to fund the relocation through a low-interest loan from the City. *See* Hunter, *supra* note 8. R

12. *Western Seafood*, 346 F. Supp. 2d at 892.

13. 545 U.S. 469 (2005).

14. *See id.* at 481-82.

on the exercise of eminent domain requires only that the state establish that its use of the property will serve a public purpose, that economic development was a legitimate public purpose, and that legislative determinations regarding the public benefit offered by a proposed project are generally entitled to substantial judicial deference.[15] Second, as happened in many other states, the Texas legislature responded to *Kelo* by adopting a statute, The Limitations on the Use of Eminent Domain Act (the "Act"), limiting the use of eminent domain for economic redevelopment.[16] Thus, when the Fifth Circuit addressed Western Seafood's claims, it recognized that the district court had correctly rejected the federal constitutional claim, as *Kelo* had made clear, but that the court's interpretation of the state constitutional claim might be affected by the subsequent passage of the Act.[17] Accordingly, the Fifth Circuit remanded the case to the district court to resolve the state claim in light of the new statute.[18]

This scenario—an ongoing urban revitalization project arrested by legislative responses to the *Kelo* decision—is likely to play out in many cities and towns across the country in the next few years.[19] Since *Kelo* was decided, thirty-four states have adopted some responsive legislation or constitutional amendment.[20] These new

15. *See id.* at 482.

16. The Limitations on the Use of Eminent Domain Act, S.B. 7, 79th Leg., 2d Sess. (Tex. 2005) (adopted August 10, 2005, significantly constraining the authority of government actors to use eminent domain for economic development purposes).

17. The Fifth Circuit pointed out that state courts in Texas interpret the Texas Constitution by reference to relevant legislative pronouncements, even subsequent ones. Western Seafood Co. v. United States, No. 04-41196, 2006 WL 2920809, at *13 (5th Cir. Oct. 11, 2006). Thus, a pre-existing constitutional provision might be interpreted differently in light of a subsequent statute speaking to the same issue.

18. *Id.* at *6.

19. In fact in June 2006, a Florida state court upheld a landowner's challenge to the exercise of eminent domain over its downtown property as part of a planned hotel, condominium, and retail complex undertaken by the city of Hollywood and a private developer. *See* John Holland, *Hollywood Can't Seize Family Land, Judge Rules*, S. FLA. SUN-SENTINEL, June 23, 2006 at 1A. The ruling was based on Florida's legislative response to *Kelo* limiting the use of eminent domain for economic development. *See id.*

20. Prior to November 7, 2006, thirty-one states had enacted post-*Kelo* eminent domain reform legislation. *See* H.B. 654, Reg. Sess., 2006 Ala. Laws 584; H.B. 318, 24th Leg., 2d Reg. Sess., 2006 Alaska Sess. Laws 84; H.B. 2675, 47th Leg., 2d Reg. Sess. (Ariz. 2006); S.B. 1809, 2005-2006 Reg. Sess., 2006 Cal. Stat. 603; H.B. 1411, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006); S.B. 217, 143d Gen. Assem. (Del. 2005); H.B. 1567, 19th Leg., 2d Reg. Sess., 2006 Fla. Sess. Law Serv. Ch. 2006-11 (West); H.J.R. 1569, 180th Reg. Sess. (Fla. 2006); H.B. 1313, Reg. Sess., 2006 Ga. Laws 444; H.R. 1306, Reg. Sess., 2006 Ga. Laws 445; H.B. 555, 59th Leg., 2d Reg. Sess., 2006 Idaho Sess. Laws 96; S.B. 3086, 94th Gen. Assem., 2006 Ill. Legis. Serv. 94-1055

laws, to varying degrees and using various mechanisms, limit the power of state and local governments to use eminent domain to facilitate economic redevelopment projects. This Article explores the reach of these statutes and their likely consequences for ongoing and future urban revitalization projects. Part II of the Article explores the problems inherent in attempting to craft a judicially enforceable public use limitation for the exercise of eminent domain and the Supreme Court's response to that dilemma, culminating with its recent decision in *Kelo*. Part III explores and analyzes the impressively swift and extensive legislative responses to the *Kelo* decision among the states. Part IV evaluates the urban revitalization movement leading up to *Kelo* and the importance of the use of eminent domain to the success of a comprehensive urban

(West); H.B. 1010, 114th Gen. Assem, 2d Reg. Sess. (Ind. 2006); H.F. 2351, 81st Gen. Assem, 2d Reg. Sess. (Iowa 2006); S.B. 323, Reg. Sess., 2006 Kan. Sess. Laws 192; H.B. 508, 2006 Reg. Sess., 2006 Ky. Acts 73; S.B. 1, Reg. Sess., 2006 La. Acts 851; H.B. 707, Reg. Sess., 2006 La. Acts 859; H.P. 1310, 122nd Leg., 2d Reg. Sess., 2006 Me. Laws 579; S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005); S.F. 2750, 84th Leg., Reg. Sess., 2006 Minn. Laws 214; H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006); L.B. 924, 99th Leg., 2d Reg. Sess. (Neb. 2006); S.B. 287, 159th Sess., 2006 N.H. Laws 324; H.B. 746, 47th Leg., Reg. Sess. (N.M. 2006); H.B. 1965, Gen. Assem., 1st Sess., 2005 N.C. Sess. Laws 2006-224; S.B. 167, 126th Gen. Assem. (Ohio 2005; S.B. 881, 199th Gen. Assem., Reg. Sess., 2006 Pa. Laws 2006-35; Rat. 453, Gen. Assem., 116th Sess. (S.C. 2006); H.B. 1080, 81st Leg. Assem.: Reg. Sess., 2006 S.D. Sess. Laws 66; S.B. 3296, 104th Gen. Assem., 2006 Tenn. Pub. Acts 863; S.B. 7, 79th Leg., 2d Sess. (Tex. 2005); S.B. 184, 56th Leg., 2005 Utah Laws 292; S.B. 117 (Utah 2006); S. 246, 68th Biennial Sess., 2006 Vt. Acts & Resolves 111; H.B. 4048, 2006 W. Va. Acts 96; A.B. 657, 2005-2006 Biennial Sess., 2006 Wis. Sess. Laws 233.

On or about November 7, 2006, voters in ten states ratified constitutional amendments or ballot initiatives addressing eminent domain issues in response to *Kelo*. Louisiana ratified a constitutional amendment on September 30, 2006, while nine other states adopted or ratified constitutional amendments or ballot initiatives on November 7, 2006. *See* FLA. CONST. amend. VIII; GA. CONST. amend. I; LA. CONST. amend. V; S.C. CONST. amend. V; Ariz. Prposition 207, Arizona Official Canvass at 16, *available at* http://www.azsos.gov/election/2006/General/Canvass2006.GE.pdf (last visited Apr. 6, 2007); Mich. Proposal 06-04, Mich. Dep't of State, *available at*, http://miboecfr.nictusa.com/election/results/06GEN/90000004.html (last visited Apr. 6, 2007); Nev. Question 2, State of Nevada, 2006 Official Statewide General Election Results, *available at* http://www.sos.state.nv.us/nvelection12006StatewideGeneral/ElectionSummary.htm; N.H. Question 1, N.H. Elections Div., State General Election-Nov. 7, 2006, *available at* http://www.sos.nh.gov/general 2006/sum-chesconcon06.html (last visited Apr. 6, 2007); N.D. Measure 2, N.D. Sec'y of State, *available at* http://web.apps.state.nd.us/sec/emspublic/gp/electionresultssearch.htm (select "General Election-November 07, 2006" hyperlink; then select "Initiated Constitutional Measure No. 2") (last visited Apr. 6, 2007); Or. Measure 39, November 7, 2006, General Election Abstracts of Votes, Or. Sec'y of State, *available at* http://www.sos.state.or.us/elections/nov72006/results/m39.pdf (last visited Apr. 6, 2007). Because there is some overlap between these two lists (i.e. some states have both legislative and constitutional reactions to *Kelo*), the total number of states that have adopted post-*Kelo* eminent domain reforms is thirty-four.

revitalization plan. Finally, Part V evaluates the consequences of those state reactions to *Kelo* for the continued viability of urban revitalization initiatives. This section concludes that such initiatives are likely to continue essentially unabated, but that as a result of these legislative responses they will necessarily be constructed in a less efficient manner and will almost certainly have distressingly disproportionate impacts on poor minority communities, much like the now-discredited urban renewal projects of the past.

II. THE PROBLEM OF PUBLIC USE: A BRIEF HISTORY AND *KELO*

Much has been written of the United States Supreme Court's inability or unwillingness to craft a meaningful public use limitation on the Takings Clause.[21] The Fifth Amendment to the United States Constitution states: "nor shall private property be taken for public use without just compensation."[22] While it is not self-evident that the "Public Use" Clause in this Amendment is actually a constraint (it is sometimes suggested that it is merely a description of the particular type of eminent domain for which compensation is required),[23] most scholars assume it is a limiting clause and the Court has consistently treated it as such.[24] The extent of the limit, however, is unclear.

The easy cases of public use entail the condemnation of private property for government ownership of public infrastructure, such as roads, schools, and government buildings.[25] The inquiry is made more difficult, however, when the use to which the government wishes to put the property entails private ownership. Some such cases are still rather obviously valid public uses; for example, the provision of essential public infrastructure by highly regulated private entities, such as railroads and utility companies. Since such uses are essentially "open to the public" and highly regulated, most theories of public use readily encompass them.[26] In contrast, if the

21. *See, e.g.*, Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61-64 (1986); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078-79 (1993).

22. U.S. CONST. amend. V.

23. *See, e.g.*, Rubenfeld, *supra* note 21, at 1081 (outlining this reading of the Public Use Clause). R

24. The issue in *Kelo* was how much of a limit the clause imposes and which branch is best suited to enforce the limit. *See* Kelo v. City of New London, 545 U.S. 469, 478-80 (2005).

25. *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 861.

26. *See id.*

government proposes to condemn property solely for the purpose of transferring it from one landowner to another, to be put to whatever use the second landowner wishes, such a transfer is rather clearly not for a public use.[27] In between these two extremes, however, lies the public use dilemma.

The question of whether a particular use that falls within these extremes constitutes a permissible public use or a prohibited private benefit is both indeterminate and inextricably intertwined with the traditional police powers of legislative bodies to act for the public health, safety, and welfare. As a consequence, scholars troubled by the public use dilemma have generally attempted to solve it by shifting the focus from the central question of what counts as a public benefit to a proxy question designed to provide judicially manageable standards for limiting impermissible takings without treading on traditional legislative prerogatives.[28]

Jed Rubenfeld, for example, recommends adopting a "jurisprudence of usings," which would focus not on the purported benefit that would arise from a proposed project, but simply on the use to which the condemned property would be put.[29] Under his conception of the Public Use Clause, the compensation requirement would apply only so long as the condemned property was actually "used" by the government.[30] Taking a dramatically different approach, Thomas Merrill argues that courts are unwilling or ill-equipped to resolve the central question of what constitutes a valid public use, and therefore should determine the means by which government entities should acquire private property rather than evaluate the ends to which the property will be put.[31] Under this approach, courts would focus on "where and how the government should get property, not [on] what it may do with it."[32] Nicole Garnett extends this argument, proposing that courts should apply

27. *See id.*; *see also Kelo*, 545 U.S. at 480.

28. *See* Merrill, *supra* note 21, at 64-65; Rubenfeld, *supra* note 21, at 1113. R

29. *See* Rubenfeld, *supra* note 21, at 1113. R

30. Compare the use of private property for an irrigation system with the nonuse of cedar trees destroyed to avoid contamination of adjacent apple trees. This conception of the public use clause would, somewhat controversially, create an entire category of takings for which no compensation would be required. *See id.* at 1082-83.

31. Merrill, *supra* note 21, at 63-65. R

32. *Id.* at 66-67 ("The ends questions asks what the government plans to do once the property is obtained. This inquiry, in turn, requires a clear conception of the legitimate functions or purposes of the state. May the state promote employment by subsidizing the construction of a privately owned factory? May it own a professional football team or undertake land reform? The answers to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake.").

a *Nollan*/*Dolan* type of essential nexus and rough proportionality test to exercises of eminent domain power.[33]

While scholars have been struggling for theoretical clarity, courts have been busy resolving public use challenges. As John F. Hart's extensive chronicle of colonial era land use regulation makes clear, land ownership in this country has long been subject to extensive governmental control.[34] Town leaders, tasked with facilitating the development of entirely new, productive settlements, aggressively managed the type and intensity of land use permitted on private parcels.[35] Regulations authorizing condemnation of private property for the economic benefit of the community were extensive, and private property was regularly transferred from one private owner to another owner in order to facilitate construction of necessary infrastructure that the town leaders felt would be better run by private enterprise, such as mills and roads.[36] Many of these land use decisions were challenged as impermissible condemnations of private property for the private benefit of another citizen.[37]

In response to these challenges, the Supreme Court has consistently embraced a broad interpretation of the public use requirement, holding instead that the Fifth Amendment authorizes the use of eminent domain in any project that is undertaken for the benefit of the public, whether its actual use is open freely to the public or not.[38] Moreover, the Court has consistently deferred to legislative determinations of what counts as a public benefit.[39] This posture,

33. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936-37 (2003).

34. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-81 (1996).

35. *Id.* at 1278-79 (explaining that private landowners were often obligated to put their property to a particular use or have it taken from them to be put to that same use by another private citizen).

36. Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 349 (1999) (chronicling the forced transfer of private property from one citizen to another for the purpose of building mills and private roads).

37. *See, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530-32 (1906); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

38. *See, e.g.*, *Strickley*, 200 U.S. at 531-32 (upholding the condemnation of a right-of-way by a mining company for an aerial bucket line across a placer mining claim as a valid public purpose); Clark v. Nash, 198 U.S. 361, 369 (1905) (holding that the condemnation of land by an individual for the purpose of irrigating his own land constituted a valid public purpose); *Fallbrook Irrigation Dist.*, 164 U.S. at 160-63 (holding that condemnation for the construction of an irrigation project to benefit privately owned land constituted a public purpose).

39. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

developed over the course of 150 years, was solidified in two cases decided in the mid to late twentieth century—*Berman v. Parker*[40] and *Hawaii Housing Authority v. Midkiff*.[41]

The plaintiffs in *Berman* challenged the condemnation of their profitable retail establishment for transfer to another private owner.[42] This condemnation was part of the first phase of the District of Columbia's comprehensive urban renewal program, which targeted Project Area B in the "Southwest Survey Area" for complete revitalization.[43] Although the District's surveys indicated that the area covered by Project Area B was significantly blighted, some of the property was, like the plaintiffs', being profitably used in a productive manner.[44] Nonetheless, the plan called for complete revitalization, requiring the acquisition by purchase, gift, or eminent domain of every parcel.[45] Under the plan, some of the property would be kept in public ownership and used for things such as roads, schools, and parks.[46] The rest would be allocated according to the comprehensive plan to various forms of residential and commercial use.[47] This land would be resold to private owners and developers to accomplish the purposes of the renewal plan.[48] Berman objected to being forced to sell his profitable business to the District merely to have the District transfer it to another private landowner.[49] The Supreme Court upheld the District's authority to use its power of eminent domain for this purpose, however, stating grandly:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[50]

Moreover, the Court made it clear that legislative determinations of public purpose were entitled to extraordinary deference:

40. 348 U.S. 26 (1954).
41. 467 U.S. 229 (1984).
42. *Berman*, 348 U.S. at 31.
43. *Id.* at 30.
44. *Id.* at 31.
45. *Id.* at 30-31.
46. *Id.* at 30.
47. *Id.*
48. *Id.*
49. *Id.* at 31.
50. *Id.* at 33 (citations omitted).

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved.[51]

Hawaii Housing Authority v. Midkiff involved an even more dramatic use of eminent domain, consisting entirely of the forced transfer of private property from existing owners to other private owners.[52] The Hawaii Land Reform Act of 1967 authorized the use of eminent domain to force landowners to sell their land in fee simple to their lessees.[53] According to the Hawaii legislature, the forced sales were necessary to break up the oligopolistic land ownership patterns that had evolved in Hawaii since Polynesian settlers had established feudal tenurial systems built around ownership by High Chiefs.[54] Midkiff objected to being forced to sell his real property to his lessee, and again the Supreme Court rejected the public use challenge.[55] It held that:

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public . . . . The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.[56]

In addition, the Court reaffirmed the degree of deference owed to legislative determinations of public benefit, pointing out that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[57]

51. *Id.* at 32 (citations omitted).
52. 467 U.S. 229, 233 (1984).
53. *Id.*
54. *Id.* at 231-33.
55. *Id.* at 233.
56. *Id.* at 243-44.
57. *Id.* at 241.

The *Midkiff* decision was the Court's determinative statement of both the breadth of the Public Use Clause and the degree of deference to be accorded legislative determinations of public purpose for more than twenty years.[58] In light of its expansive holding, federal courts consistently rejected public use challenges to the exercise of eminent domain between 1984 and 2004, until the Court granted certiorari in *Kelo*. In fact, as David Mathues reports in his Note, "[a]ll reported federal appellate decisions between 1954 and 1986 in which the definition of 'public use' was contested upheld the challenged use of eminent domain, as did thirteen out of the fourteen reported appellate decisions on point between 1986 and 2003."[59]

In contrast to the deferential posture of the federal courts, state courts have generally been more willing to strike down attempts to use eminent domain for economic development based on the public use clauses of the relevant state constitutions. Thomas Merrill first observed this phenomenon in 1986 after surveying state and federal cases in which an exercise of eminent domain was challenged on public use grounds.[60] While his survey revealed that federal courts were faithfully adhering to the deferential standard of review articulated in *Berman*, he was surprised to discover that state courts were significantly less deferential in applying their own constitution's public use requirement.[61] Indeed, his survey revealed a trend of increasingly close scrutiny of public use claims in successive five year periods between 1954 and 1984.[62]

Intensive state court scrutiny of the public use requirement has continued to rise since Merrill conducted his survey. In some states, this heightened scrutiny is essentially distinct from the issue addressed in *Kelo*, as the constitutions of these states make clear that whether a proposed use of condemned property constitutes a public use is a matter for judicial, not legislative, determination.[63]

58. G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After* Kelo, 81 NOTRE DAME L. REV. 1653, 1662 (2006).

59. *Id.*

60. *See* Merrill, *supra* note 21, at 95. **R**

61. *Id.* at 96.

62. *See id.* at 97 ("When we divide the survey cases into five-year periods, we find that the total number of public use cases is fairly constant, ranging from 42 to 61 cases in each period. But the percentage of [state court] cases holding that a taking does not serve a public use generally increases throughout the 31-year period. The percentages are as follows: 1954-1960, 11.8%; 1961-1965, 12.5%; 1966-1970, 13.1%; 1971-1975, 13.7%; 1976-1980, 21.4%; and 1980-1985, 20.4%.").

63. Arizona, Colorado, Missouri, and Washington have such provisions in their constitutions. ARIZ. CONST. art. II, § 17 ("Whenever an attempt is made to take pri-

For example, Article I, Section 16 of the Washington Constitution states that

> [p]rivate property shall not be taken for private use . . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.[64]

Notwithstanding this constitutional directive, the Washington Supreme Court has held that "a legislative declaration [of public use] will be accorded great weight."[65] Ultimately, though, the degree of scrutiny is significantly less deferential than that articulated under *Berman*, *Midkiff*, and *Kelo*.[66]

But in cases in states with public use clauses similar to the federal clause and constitutional silence on the role of the judiciary in reviewing public use questions, courts are nonetheless departing from the *Berman* and *Midkiff* standards with what appears to be increasing frequency.[67] Perhaps the most noteworthy case is *County of Wayne v. Hathcock*,[68] in which the Michigan Supreme Court overruled its notorious *Poletown*[69] decision. In *Poletown*, the Michigan Supreme Court upheld Detroit's plan to condemn large parcels of private property and convey them to General Motors to build an assembly plant.[70] *Poletown* is widely thought to be the most extreme accommodation of legislative determination of

---

vate property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."); COLO. CONST. art. II, § 15 ("[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."); MO. CONST. art. I, § 28 ("[W]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."); WASH. CONST. art. I, § 16.

64. WASH. CONST. art. I, § 16.

65. Des Moines v. Hemenway, 437 P.2d 171, 174 (Wash. 1968).

66. *See, e.g.*, *In re* Petition of Seattle, 638 P.2d 549, 554-55 (Wash. 1981) (holding that a proposed downtown revitalization project, while clearly in the public interest, did not afford sufficient "public use" to satisfy the constitutional limitation).

67. For a discussion of this phenomenon, see Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1849-53 (2005) (citing state court cases that have applied more heightened scrutiny to the public use inquiry).

68. 684 N.W.2d 765 (Mich. 2004).

69. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

70. *Id.* at 459-60.

public benefit.[71] In *County of Wayne*, the plaintiffs challenged the condemnation of their residential property for the construction of a privately-owned 1,300 acre business and technology park that had the dual purpose of removing residential property from the overflight path of the expanded Wayne County airport and "re-invigorat[ing] the struggling economy of southeastern Michigan."[72] The Michigan Supreme Court recognized that the proposed condemnations were within the statutory authority of the county,[73] but held that those statutory provisions were unconstitutional as applied in this case.[74] Specifically, the court overruled *Poletown* and significantly limited the use of eminent domain for economic development. In many of these cases, the courts have been particularly concerned that the stated "public purpose" is actually pretextual, and the condemnation is intended solely or primarily to benefit an identified private entity.[75] This concern is central to Justice Kennedy's concurrence in *Kelo*.[76]

When the Supreme Court granted certiorari in *Kelo*, proponents of a more restrictive public use jurisprudence expressed guarded hope that the Supreme Court was reconsidering its expansive *Berman* and *Midkiff* pronouncements, and contemplating following the lead of the state courts in restricting the use of eminent domain for economic redevelopment, in part because *Kelo* presented the Court with virtually the same public use challenge as

71. *See* Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651, 665 (2006).

72. *County of Wayne*, 684 N.W.2d at 769-70.

73. *Id.* at 776.

74. *Id.* at 788.

75. *See, e.g.*, Southeastern Ill. Dev. Auth. v. Nat'l City Envtl. L.C.C., 768 N.E.2d 1, 10-11 (Ill. 2002) (invalidating a "quick-take" condemnation of private land for the purpose of expanding the parking lot of an adjacent business, upon concluding that "[w]e do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose"); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (rejecting proposed condemnation of private land for transfer to casino developer to hold for future development upon concluding that "the primary interest served here is a private rather than a public one," since the developer was unconstrained in his future uses of the property).

76. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring). Indeed, in the years leading up to *Kelo*, at least one lower federal court rejected attempts to condemn private property for economic development on the grounds that the public benefit was a pretext and that the purely private benefit was the primary motive for the condemnation. *See* 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (noting that "[i]n this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another," and invalidating the proposed condemnation).

did *Berman*.[77] In *Kelo*, the City of New London, an "economically distressed city" with a high unemployment rate, sought to revitalize an area of town left substantially underused when the federal government closed the Naval Undersea Warfare Center in the Fort Trumball area.[78] The comprehensive revitalization plan called for the integrated redevelopment of ninety acres, which required the New London Development Corporation to acquire all of the privately owned property within the plan's boundaries.[79] Kelo and several of her neighbors owned residential property in this area. The properties were neither blighted nor in poor condition, but were subject to condemnation simply because they were located within the area covered by the redevelopment plan.[80] The plan called for the transfer of their land to another private landowner for redevelopment purposes, and the landowners objected.[81]

The Court's decision in *Kelo v. City of New London* did not go as far as property rights proponents hoped, however.[82] In fact, the Court relied heavily on *Berman* and *Midkiff* in rejecting Kelo's challenge to the condemnation of her property for a privately owned revitalization project.[83] The Court reaffirmed the principle that "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[84] Property rights proponents were outraged, and the public seemed to take notice of the broad power of eminent domain almost for the first time.[85]

Contrary to what has emerged as the conventional wisdom about *Kelo*, however, the decision in fact significantly retreated from the broad holdings in *Berman* and *Midkiff*. As Justice O'Connor observed in her *Kelo* dissent, the "errant language" of deference in *Berman* is so sweeping as to admit of virtually no judicial oversight

77. *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1419 (2006) ("[A]t the time of the decision many takings scholars and public figures expected (or hoped) that the Supreme Court would narrow down the definition of public use.").

78. *Kelo*, 545 U.S. at 473 (majority opinion).

79. *Id.*

80. *Id.* at 475.

81. *Id.*

82. *See* Bell & Parchomovsky, *supra* note 77, at 1423-25 (detailing the disappointment of commentators after *Kelo*). R

83. *Kelo*, 545 U.S. at 480-82.

84. *Id.* at 483.

85. *See, e.g.*, Bell & Parchomovsky, *supra* note 77, at 1418-19 (describing the "instant and near universal condemnation" that *Kelo* engendered). R

of legislative determinations of public purpose.[86] The *Kelo* decision, in contrast, offers meaningful oversight of both the substance and procedure of eminent domain actions for essentially the first time.[87]

The procedural constraints articulated by the *Kelo* decision are widely recognized.[88] In upholding the City of New London's determination that the condemnations were for the public benefit, the Court relied on its observation that the planning process had been comprehensive, transparent, and specifically authorized by state statute.[89] These procedural safeguards presumably set the standard for when the Court's extraordinary deference to legislative determinations is appropriate.

In addition to these procedural requirements, *Kelo* imposes a substantive limitation on the use of eminent domain that may have been dormant under *Berman* and *Midkiff*.[90] According to the *Kelo* Court, the Public Use Clause not only prohibits a government actor from taking the private property of one citizen for the personal benefit of another, but also prohibits the taking of private property under the pretext of public purposes when the actual purpose is to bestow a private benefit.[91] In his concurrence, Justice Kennedy emphasized this substantive limitation, making clear that all the process in the world will not insulate from judicial scrutiny "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits."[92] A plausible allegation of private benefit would warrant much more rigorous scrutiny of the legislative determination than that articulated in *Berman* and *Midkiff*. Thus, notwithstanding public outcry to the contrary, *Kelo* significantly reined in the expansive approach to the public use inquiry that characterized *Berman* and *Midkiff*.

86. *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting).

87. *See id.* at 483-84 (majority opinion) (emphasizing the careful planning process that produced the revitalization plan at issue in *Kelo*), *id.* at 487 (recognizing that "one-to-one transfers" outside of a careful planning context would call for more intense judicial scrutiny of public purpose).

88. *See* David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After* Kelo v. City of New London, 24 UCLA J. ENVTL. L. & POL'Y 195, 221-22 (2006) (recognizing *Kelo*'s emphasis on the comprehensive planning process).

89. *Kelo*, 545 U.S. at 484.

90. *Id.* at 478 (emphasizing careful plan and lack of evidence of improper purpose).

91. *Id.* at 477-78; *see also id.* at 491 (Kennedy, J., concurring).

92. *Id.* at 490 (Kennedy, J., concurring).

III. STATE LEGISLATIVE RESPONSES TO *KELO*

Despite the Supreme Court's retreat from the broad conception of public use that had troubled property rights activists since *Midkiff*, many scholars and much of the public appeared to perceive it as a rubber-stamp of the Court's prior views, and were resoundingly disappointed.[93] Newspaper editorials decried the taking of homes and business for the benefit of other private citizens, and interest groups warned citizens that "your home could be next."[94] The *Kelo* opinion itself acknowledges that the limited effectiveness of the Public Use Clause as a constraint on the use of eminent domain for economic development purposes might be inconsistent with popular sentiment about the wisdom of using eminent domain for these purposes and invites legislative responses to the Constitution's forbearance.[95]

State legislators and citizens accepted the invitation extended by the *Kelo* opinion. With what might be record response time, public outcry after *Kelo* led very quickly to legislative proposals to limit the use of eminent domain for economic development. By the end of 2005, four state legislatures had enacted laws limiting the power of its governing bodies to use eminent domain for economic development,[96] and a fifth legislature had approved a constitutional amendment to appear on the November 2006 ballot.[97] The outcry did not dissipate with the passage of time, and by November 2006 an astonishing thirty-four states had passed legislation or adopted constitutional amendments (or both) restricting the use of eminent domain for economic development purposes.[98] The pervasiveness

93. *See, e.g.*, Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006); James W. Ely Jr., *Property Rights and the Takings Clause: Poor Relation Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39 (2004/2005); Richard A. Epstein, *The Public Use, Public Trust & Public Benefit: Could Both* Cooley *and* Kelo *Be Wrong?*, 9 GREEN BAG 2D 125 (2006).

94. *See* Larry Salzman & Alex Epstein, Commentary, *Our Eminent Tyranny*, PROVIDENCE J., Feb. 23, 2005; John Tierney, Editorial, *Your Land is My Land*, N.Y. TIMES, July 5, 2005, at A1.

95. *See Kelo*, 545 U.S. at 489 (majority opinion).

96. H.B. 654, Reg. Sess. (Ala. 2006); S.B. 217, 143d Gen. Assem. (Del. 2005); S.B. 167, 126th Gen. Assem. (Ohio 2005); S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

97. Michigan's amendment, State Proposal 06-4, passed overwhelmingly on November 7, 2006, according to the Michigan Secretary of State's unofficial election results. *See* Mich. Dep't of State, Election Results (2006), http://miboecfr.nictusa.com/election/results/06GEN/90000004.html (last visited Mar. 25, 2007).

98. See *supra* note 20 for a list of legislative enactments. Louisiana ratified a constitutional amendment on September 30, 2006, while nine other states adopted or

of the response is all the more remarkable given that in five of the non-responsive states the legislatures have not met in regular session since June 2005.[99]

In light of the coherent and sustained public condemnation of *Kelo*, it is not surprising that the legislative responses to the decision are strikingly similar. The two dominant themes of the post-*Kelo* eminent domain legislation are the protection of private landowners from the perceived overreaching of state and local governments by taking private property simply to put it to "better use" by another private landowner, and the recognition that some privately owned property is in such bad shape that condemnation—even for use by another private party—is justified. Much of the legislation is aptly named to reflect the first theme;[100] for example, Georgia titled its post-*Kelo* legislation "The Landowner's Bill of Rights and Private Property Protection Act."[101] As a result of this focus, virtually every state that has enacted eminent domain reform in the wake of *Kelo* has greatly restricted or entirely prohibited the use of eminent domain to facilitate economic development, or has prohibited the transfer of condemned property to private actors.[102] Less commonly, some states have responded to *Kelo* by adopting procedural constraints intended to reduce the use of eminent domain for these purposes.[103] Still others have adopted moratoria on such uses of eminent domain while their legislatures study the prob-

ratified constitutional amendments on November 7, 2006. *See supra* note 20 for a list of constitutional amendments and ballot initiatives. Some of these states had already enacted legislation restricting the use of eminent domain. These constitutional amendments in some cases expanded upon the legislative enactments and in others simply constitutionalized them.

99. The legislatures of Arkansas, Montana, Nevada, North Dakota, and Oregon did not meet in regular session in 2006, and these states have not enacted legislative responses to *Kelo*, although bills are pre-filed in both Montana and North Dakota, and in Arkansas the state has commissioned a study of the use of eminent domain. *See* The Castle Coalition, *Legislative Action since* Kelo, Nov. 29, 2006, *available at* http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf. The Castle Coalition web page also includes an up to date list of legislative initiatives. *See* The Castle Coalition, *State Legislative Actions*, http://maps.castlecoalition.org/legislation.html (last visited Mar. 25, 2007). In Texas, although the legislature was not sitting in regular session, a special session had been called at the time *Kelo* was decided, and the legislature added takings reform to the agenda of the special session and passed S.B. 7. *See* The Castle Coalition, *Legislative Action since* Kelo, *supra*.

100. *See, e.g.*, 2006 Ga. Laws 444.

101. *Id.*

102. See *supra* note 20 for a list of eminent domain reforms. R

103. *See, e.g.*, H.F. 2351, 81st Gen. Assem. (Iowa 2006) (requiring that the condemning authority establish that a property is blighted by clear and convincing evidence and also imposing additional procedural hurdles to promoting administrative transparency).

lem.[104] At the same time, however, virtually every state adopting eminent domain restrictions has included one or more exceptions to these restrictions, primarily for condemnations aimed at reducing or eliminating blight.[105] The combination of these broad prohibitions and blight-based exceptions renders the statutes both less effective and more problematic than legislatures might have predicted.

A. Limitations on the Uses of Condemned Property

The particular mechanics of limiting the use of eminent domain for economic development purposes or transfer to private parties vary among the states. Most of the states employ language that specifically outlaws the use of eminent domain for these purposes. For example, Senate Bill 68 in Alabama states that: "Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public/private partnership, corporation, or other business entity."[106] Similarly, Senate Bill 323 in Kansas prohibits the "taking of private property by eminent domain for the purpose of selling, leasing or otherwise transferring such property to any private entity."[107]

Other states define the type of projects that can appropriately be classified as public use projects, and omit, either expressly or by implication, economic development or transfer to private entities from the list. For example, in House Bill 1313 from Georgia, the legislature approved an amendment to Title 36 of the Georgia Code, prescribing that "[a]ny exercise of the power of eminent domain . . . must: (1) be for a public use."[108] House Bill 1313 then defines public use by reference to a list of permissible uses and this prohibition: "The public benefit of economic development shall not constitute a public use."[109] House Bill 1313 further defines economic development as:

104. *See, e.g.*, S.B. 167, 126th Gen. Assem. (Ohio 2005) (imposing a moratorium on the use of eminent domain in areas that were not blighted and creating a task force to study the use of eminent domain in the state).

105. *See infra* note 112 for a list of states including exceptions to their eminent domain reforms.

106. 2006 Ala. Laws 584.

107. 2006 Kan. Sess. Laws 192.

108. 2006 Ga. Laws 444, § 22.

109. *Id.* § 3.

> any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in: (A) Transfer of the land to public ownership; (B) Transfer of the property to a private entity that is a public utility; (C) Lease of the property to private entities that occupy an incidental area within a public project; or (D) The remedy of blight.[110]

Similarly, Tennessee S.B. 3296 contains a provision stating that eminent domain can only be exercised to effectuate a public use and then states that private benefit resulting from private economic development such as increased tax revenue or increased employment does not qualify as a public use.[111]

B. Exceptions for the Eradication of Blight

Of the thirty-four states that have enacted eminent domain reform in the wake of *Kelo*, twenty-three states (more than sixty percent) have explicitly excluded from their prohibitions the exercise of eminent domain intended to address or eradicate blight.[112] At the same time, these states have uniformly adopted language limiting the exception in an attempt to preclude the exception from swallowing the rule.

The most common method by which states have limited the scope of the blight exception has been to provide a detailed, specific definition of the term. Alabama, for instance, changed the definition of blight in its post-*Kelo* legislation to narrow the circumstances in which the government can use this classification to justify the exercise of eminent domain.[113] Before *Kelo*, Alabama Code Section 24-2-2(a) stated that property could be condemned as blighted for reasons such as "excessive land coverage," "faulty layout," or "other factors."[114] Alabama was the first state to enact legislation in response to *Kelo*, but this version of the state response (Senate Bill 68) included a blight exception without defining the term blight. The next year, Alabama House Bill 654

110. *Id.*

111. 2006 Tenn. Pub. Acts 863, § 1.

112. The states that included exceptions to their eminent domain reform are Arizona, Alabama, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, and Wisconsin. *See* The Castle Coalition, *Legislative Action since* Kelo, *supra* note 99 (giving links to all post-*Kelo* reforms). R

113. ALA. CODE § 24-2-2(a)(2), (b) (LexisNexis 2007).

114. *Id.* § 24-2-2(a).

revisited the issue, prescribing specific and limiting factors that must be established before property can be condemned as blighted.[115] The new definition includes a precise list of the conditions that a property must meet before it can be condemned as blighted, and these conditions essentially require the property to be neglected, run-down, or so unsanitary as to present a health hazard or otherwise be unfit for human habitation.[116] Virtually every state that permits a blight exception to its restrictions on the use of eminent domain for economic development has created definitions of blight similar to Alabama's.[117]

While the definitions of blight differ slightly from state to state, all of the legislation broadly concerns three main factors: (1) lack of structural integrity; (2) presence of a health hazard; and (3) lack of suitability for human habitation. In addition, a few states consider the presence of a high level of crime in deciding if an area is blighted. For example, in Georgia, "repeated illegal activity" on property is considered to be an indication of blight.[118] Similarly, in Wisconsin, property can be considered to be blighted if the crime rate on the property is at least three times as high as the average crime rate in the city in which the property is located.[119]

C. Procedural Constraints on the Determination of Blight

A few states have adopted heightened new procedural requirements that place a substantial burden on the governmental entity seeking to condemn property in order to eradicate blight.[120] For example, Colorado House Bill 1411 imposes a higher standard of proof on condemnations intended to eliminate blight than is applicable to the use of eminent domain for other purposes.[121] If a taking is intended to eradicate blight, the condemning authority must show by clear and convincing evidence that the taking is necessary to eradicate blight.[122] For all other types of takings, the condemning authority must only demonstrate by a preponderance of the

115. H.B. 654, Reg. Sess., 2006 Ala. Laws 584.

116. *Id.*

117. *See supra* note 112; s*ee, e.g.*, S.B. 3086, 94th Gen. Assem. (Ill. 2006) (limiting use of eminent domain for private development unless the area is blighted). **R**

118. GA. CODE ANN. § 22-1-1(a)(A)(V) (2007).

119. 2006 Wis. Sess. Laws 233.

120. Notable among these are Colorado (H.B. 1411), Missouri (H.B. 1944), West Virginia (H.B. 4048), and Wisconsin (A.B. 657).

121. H.B. 1411, 65th Gen. Assem., Reg. Sess. (Colo. 2006).

122. *Id.*

evidence that the taking in question is necessary.[123] Other states require a parcel-by-parcel determination of blight, precluding the exercise of eminent domain unless a preponderance of the properties in the targeted area satisfy the criteria.[124] West Virginia prohibits a municipal authority from condemning non-blighted property in a blighted area unless it satisfies several conditions.[125] In essence, the city must demonstrate that the redevelopment project cannot proceed without the challenged condemnation, and that there is no practical alternative to the condemnation of the blighted property.[126] Many particular alternatives are enumerated, such as incorporation of the existing property into the redevelopment plan and modification of the redevelopment plan such that the existing property will not be included.[127] Finally, Wisconsin Assembly Bill 657 requires that before condemning property, the condemning authority must provide: (1) a statement of the scope of the redevelopment plan; (2) a legal description of the redevelopment area; (3) the purpose of the condemnation; and (4) a finding that the property is blighted and the reasons for the finding.[128]

Overall, the post-*Kelo* eminent domain statutes overwhelmingly share two characteristics: they limit the use of eminent domain to transfer private property from one owner to another for economic development purposes and they make exceptions to that prohibition for the eradication of blight. These two components, taken together, are unlikely to meaningfully limit the ability of state and local governments to pursue urban revitalization projects. They are very likely, however, to channel such projects in ways that make them less effective, less efficient, and dramatically less fair.

IV. URBAN REVITALIZATION AND EMINENT DOMAIN

To understand why the various legislative responses are unlikely to constrain state and local governments from pursuing urban revi-

123. *Id.*

124. *See, e.g.*, H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006) (creating MO. REV. STAT. § 523.274(1) (2006), which states: "Where eminent domain authority is based upon a determination that a defined area is blighted, the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.").

125. W. VA. CODE § 16-18-6a(b) (2006).

126. *Id.*

127. *Id.* § 16-18-6a(b)(4)-(8).

128. A.B. 657, 2005-2006 Assem., Biennial Sess. (Wis. 2006) (creating WIS. STAT. § 32.03(6)(c) (2006)).

talization using eminent domain, we must first examine the impetus toward urban revitalization and the essential role eminent domain plays in any comprehensive revitalization plan.

The first wave of urban revitalization in the United States arose out of a growing recognition in the 1940s that American cities had "drifted into a situation, both physically and financially, that [was] becoming intolerable . . . . [The plight of the cities was] becoming progressively worse."[129] The response to this problem was focused almost entirely on slum removal and eradication of blight in residential areas for two main reasons. First, while the symptoms of urban distress were multitudinous and far-reaching (such as stagnating or declining commercial and industrial tax bases, suburban out-migration, and aging public infrastructure), the primary cause of these symptoms was widely perceived to be the concentration of extremely poor residents in substandard, blighted, and densely built housing, otherwise known as slums. Second, the public perception of the appropriate reach of the state's police power was much more limited in the 1940s than it is today. In that era, just a few decades after *Lochner v. New York*,[130] the possibility that the federal government would become involved in a broad-based and expensive scheme to improve the general economic and social well-being of the nation's cities was essentially untenable.[131] Thus, the federal urban renewal program adopted in 1949 was specifically designed to empower local governments to condemn broad swaths of blighted residential property to eliminate health and safety problems, and to subsidize redevelopment of safer, healthier residential property in its place.[132]

Planners felt from the beginning that the focus on residential redevelopment was short-sighted and destined to fail. As one planner warned,

129. Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation*, *in* URBAN RENEWAL, THE RECORD AND THE CONTROVERSY 71, 72-73 (James Q. Wilson ed., 1966) (quoting from GUY GREER & ALVIN H. HANSEN, URBAN REDEVELOPMENT AND HOUSING (Nat'l Planning Ass'n 1941)).

130. 198 U.S. 45 (1905)

131. *See, e.g.*, *id.* at 106 (noting that the Taft Subcommittee Report on Postwar Housing, issued Aug. 1, 1945, stated that "[t]he Subcommittee is not convinced that the federal government should embark upon a general program of aid to cities looking to their rebuilding in more attractive and economical patterns").

132. *See* Wilton S. Sogg & Warren Wertheimer, *Legal and Governmental Issues in Urban Renewal*, 72 HARV. L. REV. 504 (1959), *reprinted in* URBAN RENEWAL, *supra* note 129, at 126, 128-32 (explaining the scope and operation of the federal urban renewal program).

> a costly mistake will be made if urban redevelopment be conceived of as the re-planning and rebuilding of slum areas only or rebuilding for housing only . . . . [U]nless the legislation, planning and administration be understood to be for all kinds of blighted areas for all classes of urban uses, the process will not produce sound and stable results.[133]

Today most commentators agree that these concerns were prescient.[134] While there is no general consensus that the urban renewal program was a complete failure,[135] there is widespread agreement that the costs of the program were substantial in comparison to the benefits, and that the focus on eradicating blight and slums was a primary reason for its poor performance.[136] In particular, as a consequence of urban renewal in the 1950s and 1960s, large numbers of poor minority residents were displaced from marginal or substandard housing.[137] As one onlooker observed,

> [I]t is not because of misunderstanding but because of suffering that some have called urban renewal "urban removal" or "Negro removal." Since our whole pattern of discrimination has forced Negroes and Puerto Ricans into slums and ghettos, they find themselves living in precisely those areas which the city designates as blighted and suitable for urban renewal.[138]

133. Foard & Fefferman, *supra* note 129, at 105 (quoting from the statement of Seward H. Mott, Director of the Urban Land Institute). R

134. As Professor Garnett has said, "[c]ritiques of the largely discredited urban renewal experiment abound." Garnett, *supra* note 33, at 934, 953 n.119 (collecting cites of the most prominent critiques).

135. Compare Martin Anderson, *The Federal Bulldozer*, *in* URBAN RENEWAL, *supra* note 129, at 491-95 (arguing that the entire concept of public involvement with urban redevelopment is flawed), *with* HERBERT J. GANS, PEOPLE AND PLANS: ESSAYS ON URBAN PROBLEMS AND SOLUTIONS 260-77 (1968) (defending the concept of publicly administered redevelopment and suggesting improvements).

136. *See, e.g.*, GANS, *supra* note 135, at 274 ("This massive program has much to recommend it, but we must clearly understand that moving the low-income population out of the slums would not eliminate poverty or the other problems that stem from it . . . . What poor people need most is decent incomes, proper jobs, better schools, and freedom from racial and class discrimination."). R

137. *See* Chester Hartman, *The Housing of Relocated Families*, *in* URBAN RENEWAL, *supra* note 129, at 293, 311 ("Every study of racially mixed relocation areas in which the effects of relocation are analyzed separately for white and nonwhite households indicates that the effects of discrimination make decent relocation housing more difficult and expensive to obtain for non-whites and force them to pay high rents, even for poor housing."); *see also* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 29-30 (1989); Anderson, *supra* note 134, at 494-95 (noting that between 1950 and 1960 the urban renewal program tore down 126,000 housing units and built only 28,000 new units).

138. Arthur R. Simon, *New Yorkers Without a Voice: A Tragedy of Urban Renewal*, THE ATLANTIC MONTHLY, Apr. 1966, at 54 (explaining the impacts of New York City's redevelopment plans for the Lower East Side in 1961).

Often, these minority families were not even relocated by the program, but were left to find whatever substitute housing they could.[139] Those that were relocated often found themselves in huge and ultimately failed housing projects that segregated the poor from the rest of the city and concentrated the problems associated with poverty in a new form of urban ghetto.[140] The redevelopment in the cleared areas was often dedicated to the construction of middle- and upper-income housing[141] with no effort to maintain diversity and dynamic social interaction in the neighborhood.[142] Worse, due to a failure of planning and foresight, many of the urban renewal areas lay vacant and deserted for years after the low-income residents were forced out.[143]

A second wave of urban revitalization grew out of the failures of the urban renewal program and the shift of federal financial input from urban renewal grants to Community Development Block Grants ("CDBGs"). In addition to CDBGs, state and local governments turned to innovative tax and subsidy strategies to encourage urban revitalization.[144] In this incarnation of urban revitalization, freed from the yoke of the urban renewal limitations, the focus was forward-looking, not backward, and the vision encompassed the whole city—not just the deteriorating or substandard residential areas targeted by urban renewal. Rather than ask

139. *See Kelo*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (citing FRIEDAN & SAGALAYN, *supra* note 137, at 17, 28) ("Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them."); *see also* Lawrence C. Christy & Peter W. Coogan, Note, *Family Relocation in Urban Renewal*, 82 HARV. L. REV. 864, 872-73 (1969). R

140. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 57 (1993) ("[B]y 1970, after two decades of urban renewal, public housing projects in most large cities became black reservations, highly segregated from the rest of society and characterized by extreme social isolation."); *see also* Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353, 355 (2006).

141. For example, Stuyvesant Town and Peter Cooper Village were built on eradicated slums as housing for middle-class white families of returning World War II veterans. *See* Charles V. Bagli & Janny Scott, *Housing Complex of 110 Buildings for Sale in City*, N.Y. TIMES, Aug. 30, 2006, at A1.

142. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 270 (1961).

143. Garnett, *supra* note 33, at 953-55. R

144. *See* Edward T. Rogowsky et al., *New York City's Outer Borough Development Strategy*, in URBAN REVITALIZATION: POLICIES & PROGRAMS 69, 69-99 (Fritz W. Wagner, Timothy E. Joder & Anthony J. Mumphrey, Jr. eds., 1995) (describing the planning and financing aspects of several urban revitalization projects from the post urban renewal era).

how a city could react to the emergence of blight and urban decline, revitalization proponents sought to harness the power of comprehensive planning to help guide the future development of cities, so that they would not find themselves having "drifted" into a state of decline and deterioration from which it is hard to recover.[145] Thus, this version of urban revitalization was about proactive engagement by local governments in the life and future of cities.

As a consequence of this broader proactive approach, urban revitalization plans more often encompassed areas of cities inhabited by middle-class, non-minority citizens and the planning process incorporated opportunities for public participation.[146] Even successful urban revitalization projects met some degree of resistance, which found its outlet in the media, the political process, and the courts.[147] As noted above, federal and state constitutional challenges generally failed until the emergence of the recent trend (which is still relatively limited) by state courts to restrict the scope of their own constitutions' public use clause.[148] As previously mentioned, however, the resistance has gained a political foothold, and, as a result of the legislative responses to *Kelo*, the urban revitalization movement is now at a crossroads.[149]

V. URBAN REVITALIZATION IN A POST-*KELO* WORLD

It remains to be seen what form the urban revitalization movement will take in the post-*Kelo* world. Several things, however, seem clear. First, state and local governments are unlikely to forsake their obligations to plan for the growth and revitalization of economically challenged urban environments. Second, implementing the fruits of this planning will necessarily entail the exercise of eminent domain. Third, unless the post-*Kelo* restrictions on the use of eminent domain are lifted, urban revitalization projects of

145. *See, e.g.*, Louis K. Lowenstein & Dorn C. McGrath, Jr., *The Planning Imperative in America's Future*, 405 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 17 (1973) (describing the movement of the National Planning Board toward a more comprehensive plan of urban land use).

146. *See* WILLIAM C. JOHNSON, THE POLITICS OF URBAN PLANNING 85-97 (1989) (discussing citizen participation in urban planning).

147. *See, e.g.*, *id.* at 4-5 (describing the successful effort by citizens of San Diego to pass a ballot initiative prohibiting future development of a 52,000-acre urbanization zone without specific voter approval).

148. *See supra* notes 93-128 and accompanying text. R

149. *See supra* notes 93-105 and accompanying text. R

the future are likely to be less efficient, less effective, and much less fair than their pre-*Kelo* counterparts.

A. The Lasting Allure of Urban Revitalization

Urban planning and, concomitantly, urban revitalization are here to stay. After decades of declining population, there is new evidence that cities are on the rebound.[150] This trend, however, is not uniform. Population trends indicate that urban areas in the West and the sunbelt will experience continued high growth rates, while older rust belt cities will continue to struggle against population loss.[151] Inner cities, after years of decline due to suburban flight, sprawl, and industrial migration, are currently being repopulated as young, professional suburbanites with financial clout move back to the city and are joined by the empty nesters of the baby boom generation.[152] City planning departments are unlikely to sit by passively as this rejuvenation occurs. Similarly, smaller cities and towns have suffered from lost industrial and commercial uses over the last two decades,[153] and these communities will have to undertake development initiatives if they are to survive. The successes of public/private partnership redevelopment schemes in cities throughout the United States provides alluring evidence to declining cities that they need not accept the hand that the free market has dealt them.[154]

150. *See* Edward L. Glaeser & Jesse M. Shapiro, *City Growth & the 2000 Census: Which Places Grew, and Why*, BROOKINGS INST. SURVEY SERIES, 2001, at 7 (asserting that the median growth rate for cities in the 1990s was more than double the median growth in the 1980s).

151. Edward L. Glaeser & Jesse M. Shapiro, *Is There a New Urbanism? The Growth of U.S. Cities in the 1990s*, HARV. INST. ECON. RES., June 2001, at 23, *available at* http://ssrn.com/abstract=274379.

152. *See* WILLIAM H. HUDNUT III, CITIES ON THE REBOUND: A VISION FOR URBAN AMERICA 116-17 (1998) (stating that empty nesters and twenty-somethings "find[ ] that urban living fits their lifestyles," creating a possible rebirth of the urban housing market); U.S. Census Bureau, Population Trends in Metropolitan Areas and Central Cities (1990) (providing detailed statistics evidencing population growth in metropolitan areas throughout the United States and in central cities in the West and the South).

153. *See* Sam Staley, *Ground Zero in Urban Decline*, REASON MAG., Nov. 2001, at 2 (describing the effects of suburban migration and loss of industry on Cincinnati and suggesting that the city serves as a metaphor for the future of America's small cities); *see also* DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 205-11, 348-51 (2004) (describing the decline of industrial cities, such as St. Louis and Cleveland, and the recovery of some cities during the 1990s).

154. There is no shortage of revitalization success stories to tempt cities to embark on public/private partnership planned redevelopments. *See* JUDD & SWANSTROM, *supra* note 152, at 362-63 (detailing the extraordinary and unanticipated success of

To accomplish this revitalization, local governments have increasingly turned to public/private partnerships, in which the city collaborates with one or more private developers to undertake a planned mixed-use development suited to a particular area of the city.[155] These partnerships are funded by a variety of mechanisms, including Business Improvement Districts, municipal bonds, tax incentives, tax increment financing, and private investment.[156] Overall, this model of redevelopment has been much more successful than its predecessor, urban renewal.[157]

Boston's Quincy Market); *see also* Kristen Hoffman, Note, *Waterfront Development as an Urban Revitalization Tool: Boston's Waterfront Redevelopment Plan*, 23 HARV. ENVTL. L. REV. 471, 524-27 (1999) (discussing Baltimore's successful revitalization).

155. *See* Fritz W. Wagner, Timothy E. Jader & Anthony J. Mumphrey, Jr., *Introduction* to URBAN REVITALIZATION: POLICIES AND PROGRAMS, *supra* note 144, at ix, xiv (noting that "[v]irtually all of the successful revitalization projects featured an emphasis on creating partnerships between the public and private sectors. Perhaps no other single strategy has been as critical to the success of redevelopment projects"); *see also* ROBERTH G. DREHER, & JOHN D. ECHEVERRIA, *KELO*'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT (2006) (providing many examples of successful redevelopment projects driven by public/private partnerships and creative use of government financing schemes such as low interest loans); FRITZ W. WAGNER, TIMOTHY E. JODER & ANTHONY J. MUMPHREY, JR., MANAGING CAPITAL RESOURCES FOR CENTRAL CITY REVITALIZATION 19-27 (2000) (providing case studies of successful public/private partnerships for urban revitalization by examining sixteen central city neighborhoods in four large American cities: Atlanta, Georgia; Minneapolis, Minnesota; New Orleans, Louisiana; Portland, Oregon); Peter W. Salsich, Jr., *Privatization and Democratization – Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 751 (2006) (describing the trend toward public/private partnerships and creative public financing of redevelopment projects). R

156. For examples of successful uses of these strategies to revitalize declining urban areas such as Times Square in New York City, see Wendell E. Prichett, *Beyond* Kelo*: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 919-32 (2006). For an interesting discussion of New York's experience with creative public involvement in revitalization, see William J. Stern, *State Capitalism, New York Style*, CITY J., Summer 1994.

157. The Downtown Waterfront urban renewal district in Portland, Oregon is a good example of the power of tax increment financing and progressive planning in accomplishing urban revitalization. Initiated in 1974, the Portland Downtown Waterfront district is considered among the most successful urban revitalization projects of its era. Since its inception, more than $1.5 billion in private and public funding has been invested in the waterfront revitalization project, resulting in the creation of a vibrant and diverse mix of retail, office, commercial, and residential uses in a previously underutilized area, and generating an estimated 30,000 new jobs. *See* Arthur C. Nelson with Jeffrey H. Milgroom, *Regional Growth Management and Central-City Vitality: Comparing Development Patterns in Atlanta, Georgia, and Portland, Oregon*, *in* URBAN REVITALIZATION: POLICIES AND PROGRAMS, *supra* note 144, at 1, 27-29. R

B. The Importance of Eminent Domain to Successful Revitalization

The power of eminent domain is indispensable to effective and efficient urban revitalization.[158] If local governments remain intent on planning for the economic health of their communities, then they will continue to rely on their eminent domain powers to effectuate the goals of their comprehensive plans.

Effective urban revitalization through public/private partnerships often entails the development of large mixed-use projects that require a lot of land to implement.[159] Most of the property needed to pursue these development projects can be, and is, acquired through voluntary purchase agreements.[160] In the event some (or even one) landowner in the redevelopment area refuses to negotiate the sale of her property, however, the project would not be able to move forward without the use of eminent domain. Professor Merrill explains the obstacles that a noncompetitive market (what he terms a "thin market") creates for the acquisition of tracts needed for redevelopment.[161] In essence, the identification of a particular tract of land necessary to permit completion of a large-scale project permits the owner of that parcel or parcels to command a higher price for the property than she would be able to in a fully competitive market (a "thick market").[162] If her demands are not met she can, essentially, veto the entire project unless the developer can use eminent domain to force the transfer at the price that would have prevailed in an actually competitive market.

Critics of the use of eminent domain for economic development suggest that this power is not really necessary because some projects have been successfully undertaken without the use of eminent domain.[163] This criticism is unpersuasive for three reasons. First, while some of the projects cited are large and multi-faceted, most tend to be relatively small and uni-dimensional compared to

158. For a thorough discussion of the importance of the power of eminent domain to efficient urban redevelopment, see generally Thomas Merrill, *supra* note 21. Many of the points made in this section were first made in this seminal work.

159. *See generally* WAGNER, JODER & MUMPHREY, *supra* note 155. R

160. Indeed, even in the City of New London, most of the land needed for the revitalization project was purchased through voluntary transactions. *See* Kelo v. City of New London, 545 U.S. 469, 472 (2005).

161. *See* Merrill, *supra* note 21, at 74-77. R

162. *Id.* at 75-76.

163. *See* THE CASTLE COALITION, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE 9-12 (June 2006), *available at* http://www.castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf (providing examples of public and private development projects undertaken without the use of eminent domain).

complex urban revitalization projects.[164] Second, most of the projects referred to involve private developers that can rely on secret buying agents to avoid strategic bargaining by the landowners. Government actors are precluded from conducting the business of the city in private and under a cloak of secrecy, and therefore are not well situated to accumulate large tracts of land without the power of eminent domain.[165] Finally, the fact that these projects did not actually require the use of eminent domain does not establish that they did not rely on the threat of eminent domain.[166] As noted above, most of the transfers of property rights in urban revitalization projects are also voluntary, but it is generally conceded that the voluntary transfers are aided by the background threat of eminent domain.

C. The Consequences of *Kelo*

As mentioned above, thirty-four states have already adopted legislation restricting the use of eminent domain for economic development, and others are likely to follow suit.[167] None of the statutes, however, will completely preclude governments from condemning private property in service of urban revitalization schemes, even when the primary purpose of the plan is to foster economic development. Rather, the legislation will simply result in urban revitalization projects that are conceived and implemented to comply with the statutory restrictions. In many ways, these statutes reintroduce into urban revitalization many of the pitfalls of the urban renewal program. As a result, urban revitalization in the post-*Kelo* world is likely to be less efficient, less effective, and much less fair than it has the potential to be.

Urban revitalization projects are likely to be less efficient in the future because planners will be compelled to engage in backward-looking planning, as opposed to proactive planning. Because most of the statutes limit revitalization projects to those that address

164. *Id.*

165. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 9-14 (2006) (explaining the power of the secret buying agent for private accumulation of large parcels, and distinguishing governmental attempts to accumulate large tracts).

166. *See, e.g.*, Benjamin Powell, *Eminent Domain Roulette*, INVESTOR'S BUS. DAILY, May 30, 2006, *available at* http://www.independent.org/newsroom/article.asp?id=1735 (showing an example of how the threat of eminent domain was used in Hercules, California).

167. See *supra* note 20 for a list of states that have enacted legislation restricting the use of eminent domain. R

blight, planners will be precluded from choosing the best, most efficient area for urban revitalization projects. Instead, projects will have to be made to "work" in blighted areas that might be poorly suited for them. In Freeport, Texas, for example, the proposed economic development project relies on the marina as its anchor.[168] While much of the neighborhood surrounding the riverfront was found to be severely or moderately blighted,[169] it might not be to the degree and extent of blight sufficient to satisfy the new Texas statute.[170] If the FEDC could not negotiate voluntary transfers from every single landowner on the waterfront, the revitalization project would have to be moved to a less ideal location and restructured as a less ideal project or simply abandoned.[171] If it were moved, it would likely cost more per dollar of generated public benefit and generate less economic benefit overall.[172] Moreover, because many post-*Kelo* reform statutes require local governments to wait until a city area is in substantial decline before engaging in revitalization projects, it is likely to be more difficult or at least more costly to involve private developers in the revitalization process.

Finally, because the post-*Kelo* statutes generally prohibit the use of eminent domain for economic development only if the property is to be transferred to a private owner,[173] city governments may move into the business of running retail and commercial enterprises in the future to ensure that they can fully implement proposed development projects. If a development corporation is successful in negotiating voluntary buyouts of all but a few parcels necessary to a comprehensive revitalization project, the redeveloping authority may decide to retain the holdout properties in public ownership to ensure that they can use their newly limited eminent domain powers to facilitate the revitalization. Under this scenario, the government entity would either operate one portion of the revitalization plan as a publicly owned enterprise or lease its interest out for private management. In fact, the city of Freeport, Texas,

168. *See* Freeport Master Plan, *supra* note 3, at 26. **R**

169. *See id.* at 13.

170. The Texas statute prohibits the use of eminent domain for economic development purposes unless the economic development purpose is secondary to municipal actions taken for the purpose of eliminating an existing affirmative harm to society caused by a slum or blighted area. *See* TEX. CODE ANN. § 2206.001(b)(3) (2005).

171. *See* Freeport Master Plan, *supra* note 3, at 52. **R**

172. *See id.* at 76, 83.

173. *See, e.g.*, COLO. REV STAT. § 31-25-105.5 (2005) (stating that private property acquired by eminent domain cannot be subsequently transferred to a private party unless the property is blighted or in a blighted area).

appears to have decided to go into the marina business, rather than continue to defend its embattled revitalization project under the post-*Kelo* Texas statute.[174]

Thus, statutes that permit eminent domain as long as the government retains title to the condemned property are likely to result in more publicly operated enterprises within public/private redevelopment projects. Economic theory and empirical studies suggest that these publicly operated enterprises are likely to be less efficiently operated than their private counterparts.[175]

Most importantly, urban revitalization in the post-*Kelo* world is likely to be tragically unfair.[176] The omnipresent blight exception in the post-*Kelo* statutes revives the worst aspect of the urban renewal programs of the past—the imposition of the costs of revitalization on poor, minority communities for the benefit of middle- and upper-class citizens. Urban renewal took an enormous toll on poor minority communities in the 1940s through the 1960s, when there was little concerted public opposition.[177] Under the broad conception of public use and the deference to legislative judgments articulated in *Berman* and *Midkiff*, there was at least the potential to shift the impacts of urban revitalization beyond blighted communities and perhaps to distribute the burdens of urban revitalization among the various demographic groups of the city.[178] Not

174. *See* Velda Hunter, *Freeport Might Become Landlord*, FACTS, Nov. 11, 2006; *see also* Velda Hunter, *Freeport EDC Passes Marina Resolutions*, FACTS, Aug. 27, 2006 ("The city is considering developing the project as a public marina, instead of a private development, and letting someone else operate it, city officials have said.").

175. *See generally* Mary M. Shirley & Patrick Walsh, *Public vs. Private Ownership: The Current State of the Debate* (World Bank Policy Research Paper No. 2420, Jan. 2001) (reviewing the theoretical and empirical literature on public versus private ownership of economic enterprises and concluding that while economic theory suggests that public ownership may be preferable to private ownership in some circumstances, empirical studies establish that private or privatized firms consistently perform more efficiently in most markets).

176. *See* David Barron, Op-Ed., *Eminent Domain Is Dead! (Long Live Eminent Domain!)*, BOSTON GLOBE, Apr. 16, 2006.

177. *See* Garnett, *supra* note 33, at 953-54 (detailing the effects of urban renewal on poor minority communities). R

178. Indeed, many of the cases in which landowners have prevailed in state courts involve urban revitalization projects that encompass middle-class landowners. *See, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981) and invalidating a planned condemnation of non-blighted parcels for economic development purposes); *see also* City of Norwood v. Horney, 853 N.E.2d 1115, 1144 (Ohio 2006) (invalidating under the Ohio Constitution, the proposed condemnation of private property defined as deteriorating but not blighted; the property at issue was found to be "generally in good condition" and the owners were not delinquent in paying their property taxes, nor was there any suggestion that the area was invested with vermin

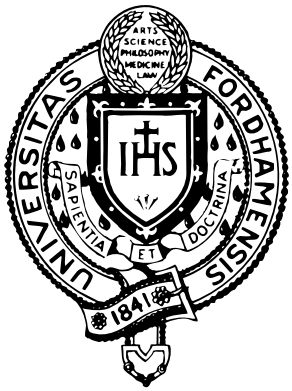
only did this permit the local governments to design the most appropriate revitalization scheme for the city, but it also fostered public participation in the planning process.[179] After all, if everyone's property was equally available for condemnation-backed revitalization, everyone had an interest in making sure revitalization plans were really worthwhile and narrowly tailored.[180]

Under the most prevalent statutory responses to *Kelo*, however, revitalizing cities must concentrate their efforts on areas that meet strictly drawn definitions of blight. In doing so, they will, no doubt, disproportionately impact the poor and minority members of the community, much like the discredited urban renewal movement of the past. Returning to an era of blight eradication as a pretext for urban revitalization will likely increase the probability that governments will engage in this sort of condemnation and decrease the political power of the landowners to resist. The post-*Kelo* legislative responses have essentially codified the worst aspects of the mid century urban renewal movement.

or subject to high crime rates, or otherwise posed "an impermissible risk to the larger community").

179. *See* National Building Museum, *Metropolitan Perspectives: Smart Growth & Choices for Change* (2000), http://www.nbm.org/Exhibits/past/2000_1996/Metropolitan_Perspectives_Script.html.

180. *See* Cohen, *supra* note 93, at 549 (discussing the potential oppression that can result from the concentration of potential condemnations on marginalized minority groups during the urban renewal process, but not acknowledging the theoretical political safeguards that result in distributing the risk of eminent domain to more mainstream landowners). Both the oppression of marginalized landowners, however, and the political protection of more mainstream landowners have been evidenced in the past sixty years—the first by the ill-conceived urban renewal program and the second by the legislative response to *Kelo*. *See supra* notes 129-143. **R**


ARTS
SCIENCE
PHILOSOPHY
MEDICINE
LAW
IHS
SAPIENTIA
ET
DOCTRINA
1841
UNIVERSITAS
FORDHAMENSIS