

REBUILDING THE PUBLIC-PRIVATE CITY: REGULATORY TAKING'S ANTI-SUBORDINATION INSIGHTS FOR EMINENT DOMAIN AND REDEVELOPMENT

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ABSTRACT

The eminent domain debate, steeped in the language of property rights, currently lacks language and conceptual space to address what is really at issue in today's cities: complex, fundamental disagreements between market and community about development. The core doctrinal issue presented by development is how can we acknowledge the subordination of citizens who happen to live in areas that are attractive to wealthier citizens. In particular, how should we address the political process failure reflected in the privatized methods of decisionmaking that typify redevelopment? The conceptual language and analytical construct for appropriately addressing these issues come from critical race theory and its project of anti-subordination. The doctrinal model for resolving urban development disagreement comes from the anti-subordination principles reflected in regulatory takings doctrine. This Article argues that regulatory takings doctrine reflects one of the most developed, yet underappreciated, anti-subordination doctrines in the law. Both takings and critical race theory provide a template for properly focusing on ways to improve the lack of public accountability in development and the unresponsiveness of eminent domain doctrine to commonly accepted notions of fairness as a component of the public good.

*"They don't know I got a[n] [eminent domain] clause of my own They can carry me out feet first . . . but my clause say . . . they got to meet my price!"*¹

—*Memphis Lee, Two Trains Running*

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1. AUGUST WILSON, *TWO TRAINS RUNNING* act 1, sc. 3 (1992) (statement of "greasy spoon" proprietor Memphis Lee). See Frank Rich, *Two Trains Running; August Wilson Reaches the 60's With Witnesses From a Distance*, N.Y. TIMES, Apr. 14, 1992, at C13 (Lee who "is negotiating a price for the city's demolition of his restaurant, is confident he can beat the white man at his own game as long as he knows the rules").

INTRODUCTION

With the failed challenge to the exercise of eminent domain in *Kelo v. City of New London*,² the state of eminent domain constitutional doctrine continues to be highly deferential to states and local government. For some reason, the popular objection to the sanction of economic development as an acceptable constitutional justification did not translate within the confines of eminent domain jurisprudence. The unresponsiveness of federal constitutional doctrine might be due to the ways that the challenge is typically framed. Objections are framed in highly individualized terms as issues of private property rights, discussed entirely along the axis of the public/private distinction.³ These public/private arguments demanded that the Court attempt to draw what would likely be unadministrable hard lines between valid and invalid purposes.

The overall eminent domain debate pits two types of concerns against each other in a dialogue that speaks past the other in different languages. At the core of the opposition are earnest and deeply held beliefs about individual property rights: claims to reliance and expectation interests that must be protected against governmental decisions. These emotionally charged arguments typically reflect outrage over the perceived violation of fundamental guarantees of free choice, control over unwanted change, and against uncertainty.⁴ Powerlessness in the face of change is part of the human condition, but legal doctrinal powerlessness in the face of human-initiated change is profoundly different; it suggests a frustrating lack of agency in the face of unfair governmental decisionmaking, which has the legitimizing imprimatur of democracy.

2. 545 U.S. 469 (2005).

3. See, e.g., Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 363-64 (1993) (evaluating the criticism of the public-private distinction that "state action . . . [is] ubiquitous" in a system of laws); Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 LAW & SOC'Y REV. 801, 812-13 (1988) (arguing that treating the public-private distinction as a relative concept saves it from incoherency by a continuum of images "ultimately, rooted in imagery from the past: 'The distinction is dead, but it rules us from the grave.'"); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 226 (1985) (book review) ("Doctrines that incorporate the public/private distinction include the principles that localities may issue bonds only for 'public purposes' and may be sued for torts committed in their private (proprietary) but not their public (governmental) capacity; that the government may take land in eminent domain only for 'public uses.'") (citations omitted).

4. See Kristi M. Burkard, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 HAMLINE J. PUB. L. & POL'Y 115 (2005); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006); Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81 (2005); Sonya D. Jones, Note, *That Land Is Your Land, This Land Is My Land . . . Until the Local Government Can Turn It for a Profit: A Critical Analysis of Kelo v. City of New London*, 20 BYU J. PUB. L. 139 (2005).

Arguments by urban development proponents of eminent domain are rational in defense of the need for both growth and change to reverse or avert urban decline.⁵ At the core of these arguments is a communitarian-like defense of the need for eminent domain: use “change” as a route to progress and urban economic health.⁶ That such change and growth may come at the expense of a few is a price worth paying in order to protect and promote the interests of the general good of the local polity.

Currently, there is no conceptual space or language in this property versus community debate to meaningfully acknowledge and address what is really at issue in today’s cities: complex, fundamental disagreements between market and community about development, economic growth, prosperity, and communal needs. The overarching question fueling the eminent domain issue is, can, and should, legal doctrine address the structural shift and current biases of the global economy? Market demand, fueled by globalization, weighs the interests of wealth more than the disaggregated claims of property rights presented by residents (either tenants or owners). This results in types, locations, and methods of development that are subordinating. An unanswered economic question about eminent domain is how the globalized economy affects or controls local government’s need to work to further local economic development. Are there so few choices left after globalization that the current approaches to economic development are inevitable?⁷

Doctrinally, the specific issue is how to address the subordination of citizens who happen to live in areas that are now attractive to wealthier citizens. We have not grappled with subordination resulting from the state and local political process. This subordination is reflected in the privatized method of decisionmaking that typifies redevelopment. Redevelopment’s improvements most often come at the expense of a consistent few types of persons: poor, working class people; however, there is an increasing effect on middle-class residents.

The conceptual language and analytical construct for addressing these issues come from critical race theory. Race, class, and wealth have long been at the

5. See, e.g., Brief for the American Planning Association et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166929; Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803 (2006); Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455 (2007); Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1 (2007).

6. See Cole, *supra* note 5, at 824 (noting that main supporters of the eminent domain power are “local government groups, such as the National League of Cities, city planners, and developers”).

7. A growing body of literature suggests that globalization need not have taken either the shape or the pace that it has in the United States. See, e.g., William Sites, *Primitive Globalization? State and Locale in Neoliberal Global Engagement*, 18 SOC. THEORY 121, 125 (2000) (arguing that different nations understand and have responded to globalization differently).

heart of the claim against eminent domain. The debate over eminent domain is inadequately acknowledged as a geographically and racially identified debate over development now being fueled by globalization. Prior to *Kelo v. City of New London*,⁸ eminent domain and redevelopment was largely a Black and urban phenomenon. The introductory epigraph quotes Memphis Lee, a character in an August Wilson play, and illustrates that eminent domain and redevelopment have been such a part of the Black American experience that it makes an appropriate plot. The perceived need to improve dilapidated, underserved, economically disconnected communities has been primarily located in poor or working-class, Black neighborhoods in the inner city. As demonstrated by the massive disruptions of community resulting from poorly conceived and poorly executed redevelopment schemes during the urban renewal era, the oppression of the “blight” designation predates *Kelo*, yet has long been accepted as part of the normal terrain of the urban landscape. *Kelo*, however, geographically decoupled eminent domain from the inner city and made clear that the power could potentially be exercised anywhere, even outside of the Black inner cities.⁹ By clarifying that “economic development” now permits property and communities to theoretically be taken and remade anywhere, the oppressive aspects of the broad term “development” is now receiving long overdue attention.¹⁰

The purpose of this Article is to bridge the language gap in the eminent domain discourse by translating the property rights language into the anti-subordination language of critical race theory. The best legal doctrinal model for resolving these urban development disagreements comes from the suburbs,¹¹ from the anti-subordination principles reflected in regulatory takings doctrine.¹²

8. 545 U.S. 469 (2005).

9. This point was presaged by *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984), where the eminent domain context was outside the inner city and focused on remedying a problem of oligopoly and concentration of land ownership.

10. The perception that the doctrine has shifted geographically has led to an alliance between otherwise strange bedfellows. Conservative property rights groups, small business owners, communitarians, and the NAACP have all united to oppose eminent domain. See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1418 (2006) (“The case united, if only for a short while, such unlikely allies as the Institute for Justice, the NAACP, Richard Epstein, and Amitai Etzioni, all of whom opposed the planned taking.”) (footnotes omitted).

11. Regulatory takings doctrine arises mainly from development controversies in suburban and rural settings. Though exercises of eminent domain have largely been confined to urban settings, they are increasingly occurring in inner-ring suburbs. See Wendell E. Prichett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 914 (2006) (arguing that the *Kelo* controversy reflects the move of the use of eminent domain to suburban locations).

12. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002). Although *Tahoe-Sierra* ostensibly stands for a very deferential standard for local government, which most experts agree means that the vast majority of takings challenges will fail under federal constitutional grounds, takings doctrine, nevertheless, illustrates what courts have

Because regulatory takings doctrine reflects one of the most developed, yet underappreciated, anti-subordination doctrines in the law, it provides a template for properly focusing on ways to improve the lack of public accountability and increase development's responsiveness to commonly accepted notions of public good. Financially compensated urban eminent domain condemnations and financially uncompensated exercises of suburban regulatory power (through moratoria on development or development exactions) involve analogous discretionary decisionmaking. In regulatory takings doctrine, the Supreme Court is interested both in individual property rights and in protecting property owners as a group from the public enterprise of government and the public needs of the general welfare.¹³

The evolution of the ad hoc doctrine of regulatory takings reflects an imperfect, yet effective, attempt to insulate private property owners from the structural inequities of the political process. In such cases, the harms to a few, or to consistently disadvantaged groups that are unable to affect governmental decisionmaking, suggests a structural compromise of property rights. The doctrine's evolution includes attempts to harden property rights protections by intervening to protect property owners on principle.¹⁴ This evolution suggests that regulatory takings is an anti-subordination doctrine. Thus, regulatory takings' anti-subordination logic allows us to account for the impact of eminent domain on property owners as well as on community. It allows us to move past focusing solely on the problems of the property owners to define the problem. We shift instead to a definition that encompasses the resident (whether owner or renter) and the small business person (a commercial resident), as well as the problems of low-wage workers who want to join in a community either as resident or laborer.

Part I of this Article discusses the nature of development disagreements in cities and the problems in both the *Kelo* majority and dissenting opinions. I argue that deference to local government in determining public purpose makes sense, but fails to account for the subordination inherent in much redevelopment. I also argue that the test advanced by the *Kelo* dissent, which reflects the prevailing view in the United States as indicated by the flurry of state eminent domain legislation and some subsequent state court decisions,¹⁵ is unduly narrow and unadministrable. The dissent's concern for the impact of eminent domain

found most compelling to protect for property owners. See *infra* Part II.E.

13. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-26 (1978) (discussing the important factors in regulatory takings jurisprudence).

14. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (adopting a categorical rule that a public easement was the equivalent of a permanent physical occupation and an invalid taking regardless of the impact on the market value of the land); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (requiring tenants to receive cable was a taking because the presence of the cable wire on the property owner's building destroyed the right to exclude).

15. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 Nw. U. L. REV. 365, 372-73 (2006).

approaches, but fails to fully adopt, an anti-subordination logic. I seek to expand upon these concerns by fully explicating the hidden and not-so-hidden subordination in redevelopment.

Part II explores Fifth Amendment Takings rationale and its implicit Equal Protection concerns as ways to doctrinally frame the obligations of government to refrain from using its powers to subordinate certain citizens. Part II also discusses the relevance of development disagreements in the suburbs and the effort to define property rights to protect one's property in the face of great public desire to preserve nature. I trace the evolution of the reasoning of regulatory takings doctrine in particular and examine the Court's attentiveness in scrutinizing the nature of the harm suffered. The imperfect evolution of the doctrine's attempt to create hard and fast property-based protections against government decisionmaking has, at the very least, signaled to local governments that they should tread carefully when imposing anti-development regulation and individual interests are in conflict with great public need.¹⁶ The principles derived from regulatory takings suggest a "gut" fairness standard that must be applicable to disagreements over redevelopment. These disagreements manifest most often in disputes over the exercise of eminent domain.

Part III concludes by suggesting how critical race theory's anti-subordination principles might be applied in the context of a "'carefully considered' development plan."¹⁷ If the plan is to be a validating device for redevelopment, it must be formulated to ensure some likelihood that it reflects representative interests within the polity.

I. DEVELOPMENT DISAGREEMENTS IN THE CITY

A. *The Supreme Court Majority's Embrace of Rational Deference*

1. *In the Beginning: Berman v. Parker and Urban Renewal.*—The Supreme Court's eminent domain jurisprudence illustrates the consistent, yet evolving, nature of disagreements over development in the cities. When the first redevelopment case of the modern era, *Berman v. Parker*,¹⁸ was decided, the motive for redevelopment was to offset the beginnings of urban decline by eliminating slums and redesigning the community according to the modern planning principles of the time.¹⁹ The petitioners' arguments focused on the

16. See Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 116 (2001) (indicating that "California planners have a high awareness of the [U.S. Supreme Court Takings] cases").

17. See *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

18. 348 U.S. 26 (1954).

19. For an extensive discussion of the modernist planning principles and their impact on the urban renewal era, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L. J. 699,

expansion of the redevelopment area beyond acknowledged slum areas and the insufficiency of the Redevelopment Authority's justifications for the plan. Petitioners argued their store was not properly characterized as blighted slum housing because general aesthetics was not a proper public purpose, and the transfer of the property from the Redevelopment Authority to private real estate developers was not a public use.²⁰ These arguments continue to this day to encompass the core of the arguments against exercises of eminent domain for economic development.²¹ As illustrated by Keith Aoki's work, the development disagreement of the urban renewal era was the conflict between what was perceived to be modern and undesirably pre-modern.²² There was the sense of an inexorable need to progress and abandon the past in order to properly meet the future. More concretely, the city foresaw a need to modernize in order to survive, but residents felt the changes came at their expense. Even though redevelopment plans were allowed to encompass viable working neighborhoods, the *Berman* Court affirmed the propriety of eminent domain used for these purposes.²³ The thought was that scientific excising of diseased or harmful areas needed to include adjacent unblighted land for a thorough, comprehensive redesign to prevent worsening conditions.²⁴ The Court found that this strategy was necessary and appropriate so long as the government said it was.²⁵

2. *The Difference Between Now and Then: Urban Renewal Versus Economic Development.*—The objections raised in *Berman* are not dissimilar from today's eminent domain objections. The redevelopment scenarios in each case, although separated by fifty-plus years and labeled differently, are quite similar. The concern in both New London and Southwest D.C. was, and is, to reverse decline and keep the cities viable.²⁶ What has changed about today's

767 (1993).

20. *Berman*, 348 U.S. at 31. Of course, what took place after the decision was drastic, poorly planned clearance and demolition, not just of slums and dilapidated housing, but of thriving neighborhood commercial districts and residential areas. Entire communities were displaced throughout the United States, usually working-class, and Black. This gave urban renewal the bad name it still carries today. See MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962*, at 8-9 (1964); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 5 (1961); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1, 47 (2003).

21. See, e.g., *Kelo*, 843 A.2d 500 (plaintiffs challenge whether economic development is a valid public use and whether the taking of plaintiffs' land was reasonably necessary to the development plan).

22. See Aoki, *supra* note 19, at 765-73.

23. *Berman*, 348 U.S. at 34-35.

24. *Id.*

25. *Id.* at 36.

26. See Mihaly, *supra* note 5, at 4 (arguing that "[s]imple 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. Americans enjoy the fruits of economic redevelopment . . . They do not, however, understand how the transformation occurred"). Mihaly also argues that the *Kelo*

development disagreements, however, is the prevailing view of what needs to be done to keep cities viable in the twenty-first century. Dramatic changes have taken place in available types of employment; the opportunity for stable, well-paid, self-directed work continues to decline.²⁷ The gap continues to widen between the highly compensated and everyone else.²⁸ Technology allows for sudden inflation and deflation of markets, economies, and currency through rapid global investment and disinvestment.²⁹ These changes have been heightened by the United States' relatively rapid entry into liberalized markets and globalization.³⁰ Thus, the problem is the same yet different. Adding the global dimensions of our collective exposure, and the city's exposure, to homogenizing market forces makes the already high stakes even higher. What is also different is that the underlying plan supporting the exercise of eminent domain in *Kelo* was openly conceived in tandem with, and designed to meet the specific needs of, a private corporation, Pfizer Pharmaceutical.³¹ The *Berman* question remains but is perhaps attenuated: what should a city like New London do to address dire economic conditions? In older, inner-ring suburbs that have lost their economic and social purpose, what can be done to address the reality of their decline?³²

In holding that economic development met the Fifth Amendment standard for public use by serving a valid public purpose,³³ the *Kelo* majority opinion carefully navigated a minefield of problems and contradictions. The problems all concern identifying a principled line that distinguishes proper from improper takings. In particular, the overt privatization of the development process produces a great challenge to the underlying public rationale of eminent domain. In order to provide continued justification for a city's exercise of eminent domain, the *Kelo* opinion had to decide between the private impact on resistant property owners and the public welfare. Although the Court noted the deeply

majority opinion follows *Berman*, but does not follow its pro-development stance. *See id.* at 59.

27. *See* DAVID DOOLEY & JOANN PRAUSE, THE SOCIAL COSTS OF UNDEREMPLOYMENT: INADEQUATE EMPLOYMENT AS DISGUISED UNEMPLOYMENT 11-14 (2004) (discussing differing patterns of under-employment for men, women, and minorities).

28. *See* Saskia Sassen, New Employment Regimes in Cities, *in* CITIES, ENTERPRISES AND SOCIETY ON THE EVE OF THE 21ST CENTURY 129, 136 (Frank Moulaert & Allen John Scott eds., 1997) (noting a dualization in wages in information and knowledge-intensive service industry wages).

29. *See* LARRY J. RAY, GLOBALIZATION AND EVERYDAY LIFE 66-67 (2007) (discussing the networks of trust and cultural practices that support rapid global capital flows).

30. *See* Sites *supra* note 7, at 127.

31. *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

32. *See generally* Mole Davis, *Ozzie and Harriet in Hell: On the Decline of Inner Suburbs*, *in* SPRAWL AND SUBURBIA 27 (William S. Sanders ed., 2005); WILLIAM H. LUCY & DAVID L. PHILLIPS, CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL 18-19 (2000).

33. *Kelo*, 545 U.S. at 484 ("Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

held personal value placed on the property,³⁴ the dashed feelings of the few were outweighed by the potential benefits to the many.³⁵ By emphasizing the city's perspective, the majority opinion was able to consider the dire economic conditions in New London separate from the specific interests that different groups of citizens, particularly residents of the redevelopment area, might have had.³⁶

3. *The Kelo Majority and Legitimizing the Privatized City as Public.*—Possibly the most difficult problem in crafting eminent domain doctrine is how to address the intertwined private-public nature of the redevelopment.³⁷ If a city believes that it absolutely must facilitate private business, what happens to assumptions that cities are public and acting on behalf of the general welfare? Does the city, by working so closely with, and acting in the interests of, a private corporation, lose its public character? Who gets to formulate the answer? According to *Kelo*, the city and the state give the answer.³⁸ According to both dissenting opinions, it is the courts who give the answer on behalf of property owners.³⁹ Recall that the arguments presented centered on the transfer of the property to a private company to redevelop the property for its own private benefit.⁴⁰ Because the Court has long-used a functional distinction to treat cities as having a public or private character,⁴¹ it is no longer sufficient for the City to formally, as a matter of its legally designated identity, be the City in order to be public and entitled to exercise eminent domain. The “public-ness” of the City is, in effect, a rebuttable presumption.⁴² Thus, the overall task for the *Kelo* majority opinion was to restore the City's eroding public legitimacy. It attempted to do so first by resorting to legal formalism and finding that the first source of City power and legitimacy came from the State.⁴³ This, of course, could not be the

34. See *id.* at 475 (noting that Kelo had made extensive improvements to her house and valued it for its view).

35. See Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 243-45 (2006) (discussing the competing influences of republicanism and liberalism in the logic and philosophy of eminent domain).

36. See *Kelo*, 545 U.S. at 483-84.

37. See CHRISTOPHER B. LEINBERGER, TURNING AROUND DOWNTOWN: TWELVE STEPS TO REVITALIZATION 5 (Brookings Institution 2005) (describing today's approach to development as a “private/public partnership”).

38. See *Kelo*, 545 U.S. at 478.

39. *Id.* at 494 (O'Connor, J., dissenting), 506 (Thomas, J., dissenting).

40. *Id.* at 485 (“Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.”).

41. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

42. See *id.*

43. *Kelo*, 545 U.S. at 483-84 (noting that the City invoked a state statute specifically allowing eminent domain for economic development to effectuate its redevelopment plan).

sole determinant of the sufficiency of the City's "publicness" because the authority derived from the State does not speak directly to the eminent domain objections. The main challenge to the City's public legitimacy stemmed from doubt about the City's public motivations and the certainty that they were pretextual because private interests were at the heart of the City's decisions.⁴⁴ The Court used the phrase purely *private purpose* as an example of potentially pretextual public purpose.⁴⁵ A city having an actual purpose of bestowing a private benefit would supposedly be engaging in an arbitrary and capricious due process violation.⁴⁶

The other aspect of the city's eroding public legitimacy is the breadth of "economic development" as a justification. Many find economic development an unconvincing justification because anything can be justified as done in furtherance of economic development. Too often, the incremental, tertiary benefits of economic development are over-touted as real.⁴⁷ The results of public subsidy, either through direct financial support or assistance of eminent domain for site assembly, are rarely scrutinized and promises for jobs are rarely enforced.⁴⁸

The next significant source for strengthening the City's public legitimacy in the majority opinion comes from the City's planning function: New London had exercised eminent domain in connection with a "carefully considered" development plan.⁴⁹ The plan itself was regarded as legitimate because the reality of dire conditions in the city demonstrated a need to improve economic conditions. New London had long slipped off the national economic radar and recently lost its naval installation.⁵⁰ The city was also designated by the State as a "distressed municipality" eligible for state financial assistance.⁵¹ From the

44. *Id.* at 485.

45. *Id.* at 477 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

46. *See id.* at 478 n.5.

47. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 390-91 (1996).

48. *See* Mark Richard Lindblad, *Performance Measurement in Local Economic Development*, 41 URB. AFF. REV. 646, 646 (2006) ("Despite the trend toward accountability in the public sector, little inferential research exists on the use of accountability tools . . . in local economic development [I]n municipal policy making, both structural constraints and local choices matter, but local choices matter more."); *see also* JULIAN GOSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 21-22 (2005) (recommending ways to enforce local economic development agreements).

49. *See Kelo*, 545 U.S. at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

50. *Id.* at 473 ("In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people.").

51. *Id.*; *see* CONN. GEN. STAT. ANN. § 32-9(p) (West 2003) (defining distressed municipality, a term which arose from the federal Urban Development Action Grant (UDAG) program. Following termination of the UDAG program, the designation made the city eligible for state

majority's perspective, the validity of the City's purpose was ratified because it was part of a carefully considered plan of development, as well as by the traditional local and state activity of promoting economic development.⁵² Thus, the problem addressed sufficiently matched the stated purposes of the development plan.

Curiously, the comprehensiveness of the development plan is also a legitimizing basis for the exercise of eminent domain. This is ironic because the underlying objection to the exercise of eminent domain often is to the comprehensiveness of the plan. While the Court acknowledged that the Pfizer and New London Development Corporation (NLDC) plans were connected, "local planners [by inference the NLDC] hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation,"⁵³ the Court found that the transfer was a method of development that was sufficiently public to meet the public use test.⁵⁴ While seeking to convey a purely private benefit is never a valid goal,⁵⁵ the existence of a plan that passed a rational relationship test ensures that the city never seriously encountered the problem of seeking to confer a private benefit.⁵⁶

The final source of City legitimacy was that economic development is a valid and traditional goal of state and local government.⁵⁷ That is, seeking to attract or retain private companies is a legitimate government function.⁵⁸ All that New London had chosen to do, with the hope of ensuring its financial survival and continued provision of services to its residents, was to capitalize on possibly one of its few assets—its waterfront.

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.⁵⁹

Thus, facilitating private action by use of the eminent domain power to the

financial assistance under Connecticut's Small Town Economic Assistance Program. *See id.*; CONN. GEN. STAT. ANN. § 4-66g (West 2007 & Supp. 2008).

52. *Kelo*, 545 U.S. at 478, 484.

53. *Id.* at 473.

54. *Id.* at 483.

55. *Id.* at 477.

56. *Id.* at 490-91 (Kennedy, J., concurring) (suggesting there may be occasions where the plan is a sham).

57. *Id.* at 484.

58. *Id.* ("Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.").

59. *Id.* at 483 (footnote omitted).

specific satisfaction of the private actors in return for the secondary and tertiary benefits of economic activity within the town's borders is valid.⁶⁰

The greatest justification for the *Kelo* majority opinion is the difficulty, if not near impossibility, of defining "bright line" rules for whether a taking is valid.⁶¹ The Court, in effect, threw up its hands at the futility of determining a principled way to distinguish economic development from other recognized public purposes.⁶² The decision, however, is still deeply unsatisfying. Even if promoting economic development is a traditional, accepted function of government,⁶³ something still *feels* wrong with the exercise of eminent domain. The source of the continued dissatisfaction with the *Kelo* majority opinion is the lack of focus on the harm from the forced sale to property owners who are commercial and residential occupants of a neighborhood.⁶⁴ Even though the loss of the property's economic value is financially compensated, the compulsory aspect of the sale to the government and the loss of the ability to decide whether and when to sell are not compensated.⁶⁵

B. The Dissents—Anti-Subordination Obscured by Formalism in Search of a "Bright Line" Rule

The *Kelo* dissenting opinions were most concerned with the plight of private property owners in this new world of economic development and their inability to protect themselves during the redevelopment process.⁶⁶ According to the dissents, the Fifth Amendment's "public use" clause was intended as an anti-private command that would serve the interests of fairness by allowing the Court to police "bright lines" of valid and invalid takings. Dissenting Justices O'Connor and Thomas relied on the "bright line" of requiring some form of

60. *See id.*

61. *Id.* ("For more than a century, 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.").

62. *See id.* at 484 ("There is . . . no principled way of distinguishing economic development from other public purposes.").

63. *See id.* ("Promoting economic development is a traditional and long-accepted function of government.").

64. *See id.* at 475 ("Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties.").

65. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-67 (2004) (discussing the uncompensated increment). *But see* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 130-36 (2006) (case study indicating that above-market compensation for takings occurs more often than is commonly thought).

66. *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) (The public use clause's purpose is to protect "stable property ownership by providing safeguards against . . . unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will").

actual physical public use or ownership.⁶⁷ Roads, hospitals, and military bases are of *clear, direct* public benefit because they are owned by the government. Stadiums, railroads, and utilities are *open to the public* so they too are of clear, direct public benefit.⁶⁸ The dissents diverged, however, over whether there could be any additional “exigency” that would also justify an exercise of eminent domain.⁶⁹ Justice O’Connor’s approved exigency was the goal of affirmative harm prevention.⁷⁰ Under this perspective, *Berman* and *Midkiff* were transformed from being based on deference to a public purpose into exercises of eminent domain for the purpose of harm elimination.⁷¹

Under either of the dissents’ categorical formulations, economic development takings are constitutionally impermissible.⁷² This formulation is not only impracticable, but also overly restrictive. First, the actual use/direct benefit standard simply invites comparisons between the new proposed uses and the approved list. In some places, this means that all exercises of eminent domain will be approved; in others, it means too many will be restricted. The test is not meaningfully more doctrinally beneficial. Second, by offering a finite list of approved “public” purposes justifying eminent domain, the dissenting and majority opinions all resort to tradition. The majority rests on economic development as a traditional local government project.⁷³ The significant

67. *Id.* at 497-98 (O’Connor, J., dissenting) (including the following as examples of appropriate takings: (1) public ownership; (2) actual use by the public [common carriers, railroad, a public utility, or stadium]; (3) and property that serves a public purpose and meets certain exigencies [and harm elimination]).

68. *Id.*

69. *See infra* notes 86-89 and accompanying text (Justice Thomas rejects the harm prevention exigency).

70. *Kelo*, 545 U.S. at 500.

71. *See id.* (citing the harm prevented in *Berman* as “blight resulting from extreme poverty and in *Midkiff* [as the harm of] . . . oligopoly resulting from extreme wealth”); *see also Kelo*, 545 U.S. at 486 n.16 (“Nor do our cases support Justice O’Connor’s novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some ‘harmful property use.’ There was nothing ‘harmful’ about the nonblighted department store at issue in *Berman*.”) (citation omitted).

72. Most dramatically, in this formulation of clear and rigid lines between valid public and invalid private uses, the O’Connor dissent argues for a two-pronged retreat from deference to all exercises of the police power arguing that the police power is not coterminous with public use. *Id.* at 501. This “errant language” is now said to derive from mistaken dicta in *Berman* and *Midkiff* that was not necessary to the actual holdings in those cases. *Id.* This language is extraordinary since the *Berman* opinion was a direct response to the department store owner’s claim that his property was not harmful slum housing—it was commercial property in good condition. *Berman v. Parker*, 348 U.S. 26, 31 (1954). Thus, in *Berman*, there needed to be a rationale offered as to why the scope of the redevelopment power could expand to include the functioning store when the direct problem was dilapidated alley housing in a small section of the quadrant.

73. *See id.* at 484 (“[E]conomic development is a traditional and long-accepted function of government.”).

difference is that the dissent's proposed categorical standard of review is troublingly similar to *Agins v. City of Tiburon*'s⁷⁴ "substantially advances" regulatory takings test. The dissent's categories represent judicially approved notions of appropriate projects that the Court implicitly approves as substantially related to legitimate public purposes. Because the Court repudiated the "substantially advances" test in *Lingle v. Chevron*,⁷⁵ the dissent would put eminent domain doctrine in a dilemma. Under the dissent's formulation, an uncompensated regulatory taking would be subjected to a more deferential standard of review, while a compensated physical taking would be subjected to a heightened, standard-less, standard of review.

On the other hand, the dissent better acknowledges the difficulty of the public-private split. Justice O'Connor aptly points out that due to the merger of public and private, it is pointless to divine illicit purely private purposes.⁷⁶ In economic development takings, "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."⁷⁷ O'Connor's dissent also correctly rejects looking solely at the city's motive to divine the true benefits to the city: "How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public."⁷⁸

While Justice O'Connor correctly identifies one type of public/private chimera, she misses another. The types of underlying redevelopment supporting the exercise of eminent domain that would meet her approval include railroads, roads, and stadiums as valid public uses.⁷⁹ Private companies built those railroads for their own profit and wielded great power in the states where the railroad tracks were run.⁸⁰ Justice O'Connor's stadium example illustrates the illusory certainty of the public-private distinction, since most stadiums, even though publicly financed, are built at the behest of private sports team-owners, according to their specifications. Thus, the stadiums usually include expensive luxury skyboxes, which are inaccessible to the public, to meet team owners' private profit goals.⁸¹ The counter-intuitive conclusion to be drawn from Justice O'Connor's stadium example is that perhaps the public role in building these

74. 477 U.S. 225, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

75. 544 U.S. 528, 542 (2005).

76. *Kelo*, 545 U.S. at 502-03 (O'Connor, J., dissenting).

77. *Id.* at 502.

78. *Id.*

79. *See id.* at 497-98.

80. *See* ALBERTA M. SBRAGIA, *DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM AND ECONOMIC DEVELOPMENT* 48-50 (1996) (during the nineteenth century, cities and states competed to attract railroads by issuing bonds, on which they eventually defaulted, because of their desperate quest to avoid falling into oblivion by not having a railroad pass through their town).

81. *See* Peter Sepulveda, Comment, *The Use of the Eminent Domain Power in the Relocation of Sports Stadiums to Urban Areas: Is the Public Purpose Requirement Satisfied?*, 11 *SETON HALL J. SPORT L.* 137, 151 (2001) (contesting the publicness of publicly financed stadium development).

exclusive stadiums should not be considered public, but rather a further example of the impermissibly private.

Moreover, it is not possible to completely divorce the question of the validity of an exercise of eminent domain from the City's motive. Motives for redevelopment are particularly relevant since the touted benefits of economic development are based on projections that are often indirect, long-term, and incremental. Thus, motive is a way to evaluate whether the city's projections should be trusted. On the other hand, the reality is that local government often intends to benefit a favored private party, and that intention is actually part of the projected economic benefit. However, Justice O'Connor's dissent indirectly concedes that intention is, in fact, relevant because of the political process failures inherent in city redevelopment.⁸²

Although mired in the formalism of creating core categorical definitions of valid and invalid takings, the most apt observation in Justice O'Connor's dissent is that citizens in a redevelopment area are unable to protect their interests in the political process and indirectly acknowledge the problem of subordination. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."⁸³ While O'Connor's dissent fails to elaborate, it comes within a hair's breadth of acknowledging the class subordination inherent in redevelopment. In light of the Court's past unwillingness to acknowledge class as a basis for Equal Protection, this acknowledgment is actually significant.⁸⁴ It is the opening for a conversation on how the Constitution should respond to systematic local political process failures and the resulting wealth-based inability to resort to democratic devices for voice,

82. Justice O'Connor correctly argues that federalism protects important state functions, but federalism seems out of place here since it does not provide protection for citizens. The Tenth Amendment is not a Constitutional provision "meant to curtail state action." *Kelo*, 545 U.S. at 504 (O'Connor, J. dissenting). While I agree, one cannot avoid the reality that *Kelo*'s federalism rationale (i.e., returning the issue to the states) has really galvanized extremely important local political activism as well as spurred others to begin questioning the wisdom of economic development activities. For an account of the typical local reaction to eminent domain, see Jennifer Egan, *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, at A15 ("[R]esignation and bitter apathy afflicted many residents, who disliked the project but felt that it was unstoppable. What chance do we have . . . when our mayor, governor and borough president are in lockstep with a private developer?").

83. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

84. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-19 (1973) (rejecting "wealth discrimination" in property-tax based school funding as a basis for suspect classification and strict scrutiny). According to the Court, it was not feasible to do so without confronting "hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence." *Id.* at 19.

redress, or protection. Unfortunately, the categorical public-use approach as a protection for individual property rights provides inadequate conceptual space to focus on the problem of local political process defects and does not explore possibilities for addressing it.

Surprisingly,⁸⁵ Justice Thomas's dissent comes the closest to directly engaging issues of subordination present in redevelopment. He declines to approve harm elimination or "blight" takings.⁸⁶ Justice Thomas, like Justice O'Connor, applies an actual use standard⁸⁷ and finds that economic development never outweighs residents' property ownership rights.⁸⁸ However, in areas that would be labeled as "blighted," he would only allow eminent domain to be used if the supposed harmful land uses failed to meet a common law nuisance standard.⁸⁹ This issue is important since the flurry of post-*Kelo*, state anti-eminent domain reform legislation has retained blight as an acceptable justification, without regard to the subordination of eminent domain. Instead, Justice Thomas's view accounts for both the wealth and race subordination inherent in redevelopment.⁹⁰ He notes the systematic likelihood that "poor communities" will bear the brunt of economic development takings⁹¹ beyond any financially compensable level.⁹² He argues for heightened judicial review based on footnote four of *Carolene Products*.⁹³

The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including

85. See Angela Onwuachi-Willig, *Just Another Brother on the Sct?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (arguing that Justice Thomas's jurisprudence falls within a tradition of Black conservative thought, which condemns Black criminal defendants rights in favor of Black victims' rights and seeks to protect Black people from the stigma of affirmative action).

86. *Kelo*, 545 U.S. at 519-20 (Thomas, J., dissenting) (arguing that slums can be handled under state nuisance law).

87. *Id.* at 512 (referring to "quintessentially public goods").

88. See *id.* at 512-14.

89. *Id.* at 520.

90. *Id.* at 521.

91. *Id.* ("Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.").

92. *Id.* ("[N]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.").

93. *Id.* at 521-22 ("If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

large corporations and development firms” to victimize the weak.⁹⁴

Influenced by the inherent class discrimination in redevelopment, Justice Thomas’s dissent argues that the power of government should be restricted to prevent its powers from being used by the rich to the disadvantage of the poor. Thus, Thomas’s dissenting opinion, while advancing an impracticable test, correctly formulates the challenges of local economic development. As currently practiced, local economic development raises fundamental questions about the discretion of states and cities to use land to effectuate policy choices at the expense of the poor.

C. *Stepping Back to Survey the Glittering Landscape of Redevelopment*

The type of contemplated development in *Kelo* is not simply limited to New London. Similar projects, both large and small, are occurring in cities and suburbs around the world. Development of upscale tourist, residential, and commercial amenities and twenty-first century core growth industries, such as high-tech service industries, health care, and institutions of higher education are part of a prevailing approach to seeking economic vitality—the “attraction of the affluent.” While these projects can be found in residential districts with serious abandonment problems that are still owner and tenant occupied,⁹⁵ much redevelopment does not necessarily involve occupied property; it can also be vacant brown or grayfield redevelopment.⁹⁶ Dilapidated downtown districts in

94. *Id.* at 522 (citation omitted).

95. The Biotech Approach. For example, on the east side of Baltimore, a thirty-acre residential neighborhood is being transformed with the help of the city’s eminent domain powers into a biotechnology park in a depressed section of the city, adjacent to Johns Hopkins. See Brief for Mayor & City Council of Baltimore as Amici Curiae Supporting Respondents at *25, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166940. The plan is for the two million square-foot center to be used for research and business activities that will complement existing work at Johns Hopkins. *Id.* Estimates are that the development will create 6000 new jobs. “Of the approximately 1,700 total properties that the City expects to acquire in East Baltimore, approximately 1,150, or about two-thirds, are abandoned, while approximately 550 are currently—or recently—occupied private homes or businesses.” *Id.*

96. The New Private City Approach. In Atlanta, Atlantic Station, for example, consists of offices, condominiums, loft-style apartments, town homes, single-family residences, a variety of shopping ranging from IKEA to an upscale Dillards Department Store, multiplex cinema, cafes, restaurants, and bars.

The . . . development will ultimately include 6 million square feet of ultramodern Class A office space; 5000 residential units (from luxury condo lofts to more affordable townhouses and apartments); 2 million square feet of retail and entertainment space, including restaurants and movie theaters; 1000 hotel rooms, and 11 acres of public parks.

Lisa Chamberlain, *Square Feet: Building a City Within the City of Atlanta*, N.Y. TIMES, May 24, 2006, at C8. Its size encouraged the Postal Service to award the neighborhood its own ZIP code: 30363. See Jamie Gumbrecht, *Cracking the Zip Code of Atlanta Cool*, ATLANTA J. CONST., Apr.

need of rehab can be involved,⁹⁷ as well as districts suffering from vacancy but serving as a vital source of livelihood for small entrepreneurs.⁹⁸ Most of the redevelopments are mixed use.⁹⁹ It is nearly impossible across the broad array

25, 2008, available at www.ajc.com/living/content/living/stories/2008/04/25/zipcodes_0427.html. One 242-unit, four-story apartment building, Icon Apartments, will have a 20 percent affordable living component. Debra Wood, *Momentum Builds at Atlantic Station*, SOUTHEAST CONSTR. (2005), available at http://www.southeast.construction.com/features/archive/0506_Feature3.asp.

97. The New Private Downtown Approach. Attempting large-scale redevelopment on property privately owned by multiple parties is fraught with difficulty. For example, the city of Baltimore has been trying to get an ambitious redevelopment of its core downtown commercial district which has been in decline and long-abandoned by major retailers. The project seeks to acquire and transfer to private developers 100 properties owned by a variety of entities. See *West Side Story: What's at Stake in the Rush to Redevelop Baltimore's Original Downtown*, BALT. CITY PAPER, June 7, 2002, available at <http://www.citypaper.com/news/story.asp?id=3592>. The plan has unfolded slowly. Some early projects like the renovation of the Hippodrome Theater and the Center Point apartment and office complex are completed. Lorraine Mirabella, *West-Side Project Meets Resistance; City Preservationists Say Old Retail District Should Be Saved*, BALT. SUN, Dec. 12, 2008, at 16A. For the most part, however, the project has stalled for a number of reasons. There was initial opposition for failing to include historic preservation in the redevelopment plan. Charles Belfoure, *In Baltimore's West Side, Preservation Story Unfolds*, N.Y. TIMES, Feb. 18, 2001, at A11; Tom Chalkey, *West Side Glory*, BALT. CITY PAPER, Feb. 2, 2000, available at <http://www.citypaper.com/news/story.asp?id=2498>. There has been opposition from property owners and small business owners who claim they were not included in any part of the planning. The project has been the subject of three lawsuits over failure to make information available to bidders to be the developer, minority contractors alleging failure to comply with public contracting requirements, and a dispute by another failed bidder alleging mistaken inclusion of a key property in the redevelopment plan. See Eric Siegel & Jill Rosen, *Lawsuit Targets West-side Projects; Angelos, Developer Want City to Scrap Superblock Deal*, BALT. SUN, Feb. 27, 2007, at 1A.

98. According to one account, "The unlovely storefronts of the old west side are crammed with thriving businesses, most of them owned by Asian immigrants and African-American entrepreneurs who are, to paraphrase Bill Clinton's line, working hard and playing by the rules." Chalkey, *supra* note 97.

99. Examples include the Atlantic Station project in Atlanta, Georgia, the 138-acre mixed-use brownfield redevelopment on the site of Atlantic Steel, a former metals-recycling business. See, e.g., James Murdock, *Next Stop: Atlantic Station*, COMMERCIAL PROPERTY NEWS, Aug. 1, 2003, available at <http://www.allbusiness.com/operations/facilities-commercial-real-estate/4422322-1.html>. Waterfront redevelopment is extremely popular as well. In the Washington, D.C., metropolitan area, not one but two redevelopments are currently underway, unrelated but relatively close to each other. For example, the traditionally Black section of Southeast is slated to be transformed along its waterfront, along the Anacostia River in Washington, D.C., as part of the *Anacostia Waterfront Initiative*. See *Anacostia Waterfront Initiative*, http://www.planning.dc.gov/planning/cup/view,a,1285,q,571105,planningNav_GID,1708,planningNav,1323411.asp (last visited Mar. 12, 2009). This project consists of a 2800-acre development along the Potomac River comprised of ten different sub-projects, including a new baseball stadium for the Washington Nationals, a 20-mile Riverwalk Trail System, Kenilworth/Parkside (described as "a Mixed-Income,

of settings to characterize these developments as good or bad, positive or negative. Instead, they simply *are*. The significance is that regardless of whether or not direct displacement occurs, exclusion is inherent in these projects.

Large redevelopment projects will likely involve the exercise of eminent domain, but they also may not. If eminent domain is not exercised, this development would be characterized as seemingly *purely private* in terms of site acquisition and construction-financing, yet the City always plays a role in facilitating or making that redevelopment possible.¹⁰⁰ As argued elsewhere,¹⁰¹ eminent domain is only a subset of the governmental powers that are used to further development. The government's role in facilitating private development is ubiquitous and multiple. What is noteworthy is that when the government uses the eminent domain power, the government's motive is often to intervene and further land exchange value, rather than the use value placed on land by existing property owners and other residents.¹⁰² This further begs an alternate explanation of the rights and interests at stake beyond property rights conceptualizations.

Mixed Use Gateway to the Ward 7 Waterfront"), with 2000 residential units and 500,000 square feet of commercial and retail space. Office of the Deputy Mayor for Planning and Economic Development, Anacostia Waterfront, <http://dcbiz.dc.gov/dmped/cwp/view,a,1365,q,605699,dmpedNav,33026.asp> (last visited Feb. 28, 2009). The issue is not necessarily displacement, but who will get to partake in the new residential and commercial amenities. If the redevelopment is successful, it will make this area desirable and likely to gentrify. A few miles to the south, in Oxon Hill, Maryland, a massive waterfront development, National Harbor, is nearing completion. National Harbor, <http://www.nationalharbor.com/consumer/consumer.htm> (last visited Jan. 12, 2009). Loosely reminiscent of Baltimore's Inner Harbor, National Harbor is a 300-acre planned upscale tourist, entertainment destination centering around a colossal convention center with an eighteen-story glass atrium featuring a dramatic view of the Potomac River. *Id.* The Center is surrounded by upscale hotels, condominiums, shopping and restaurant venues along with ample parking. *See id.*

Redevelopment is also part of stadium development. For example, eminent domain was used to condemn both vacant and occupied property for a new stadium for Washington, D.C.'s, new baseball team, the Washington Nationals. Dana Hedgpeth, *Contesting a Stadium's Power*, WASH. POST, Feb. 20, 2006, at D03 (detailing the \$600 million in city financing for the new baseball stadium and land speculation in anticipation of the exercise eminent domain).

100. *See, e.g.,* Lynne B. Sagalyn, *Public/Private Development: Lessons from History, Research, and Practice*, 73 J. AM. PLAN. ASSN. 7, 10 (2007) (discussing the public-private nature of redevelopment); Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, VT. J. ENVTL. L. 41 (2005).

101. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006) [hereinafter McFarlane, *The New Inner City*].

102. Rachel Weber, *Extracting Value from the City: Neoliberalism and Urban Redevelopment*, in SPACES OF NEOLIBERALISM: URBAN RESTRUCTURING IN NORTH AMERICA AND WESTERN EUROPE 172, 174, 182 (Neil Brenner & Nik Theodore eds., 2002) (describing how developers, assisted by the State, pursue creative destruction in order to extract the economic value from fixed assets like real estate).

One of the most controversial large redevelopment projects currently underway is the Atlantic Yards Arena and Redevelopment Project in the Prospect Heights neighborhood of Brooklyn, New York.¹⁰³ This is a twenty-two-acre redevelopment of underutilized and underdeveloped rail yards and other properties in the midst of a thriving Brooklyn neighborhood.¹⁰⁴ The planned mixed-use development will include sixteen towers with more than 6000 units of rental housing, with fifty percent set aside for low and middle income renters,¹⁰⁵ four office buildings, a glass-walled sports arena (for the New Jersey Nets) to be designed by renowned architect Frank Gehry, a hotel, and six to seven acres of open space.¹⁰⁶ The City will use eminent domain to clear parts of the neighborhood.¹⁰⁷

One view of redevelopment is that both privately and publicly sponsored redevelopment is crucial to allow cities to adapt to changing economic and demographic conditions and to revamp and update outdated land uses and buildings to meet a changing society's needs.¹⁰⁸ The other view—more difficult to articulate because the new developments are often dramatically beautiful—is

103. Charles V. Bagli, *City Planners Recommend 8% Reduction in Atlantic Yards*, N.Y. TIMES, Sept. 26, 2006, at B3.

104. See Nicholas Confessore, *Another Step for Downtown Brooklyn Project*, N.Y. TIMES, Dec. 16, 2005, at B10 (describing some of the properties such as repair shops, a food supply store, and abandoned residential apartment buildings as dilapidated); Nicholas Confessore, *Cities Grow up, and Some See Sprawl*, N.Y. TIMES, Aug. 6, 2006, at 43 (the site is located “where a mix of vacant lots, low-rise apartments, abandoned buildings, and condominiums now sit”); Peter Slatin, *Yard Fight*, SLATIN REPORT, July 8, 2005, available at http://www.nolandgrab.org/archives/2005/07/yard_fight.html (discussing a rival proposal by the Extell Group for a more modest purely residential development that would have built on existing yards footprint and avoided use of eminent domain); see also *Goldstein v. Pataki*, 516 F.3d 50, 52 (2d Cir. 2008) (“[R]edevlopment of an area in downtown Brooklyn affected with substantial blight.”).

105. This arrangement is pursuant to a “community benefits agreement” between the developer and a variety of community organizations. See Nicholas Confessore, *Perspectives on the Atlantic Yards Development through the Prism of Race*, N.Y. TIMES, Nov. 12, 2006, at 35.

106. See Jennifer Egan, *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, at A15 (lamenting: “What was mostly lost in this caustic debate was the biggest question of all: what do we Brooklynites—a diverse and even divided collective—want our borough to be? Do we want it transformed from a sunny, low-lying place into knots of vertical superblocks? Are we content to let our borough’s future be imposed on us by developers and politicians?”).

107. A recent challenge to the exercise of eminent domain was rejected at the trial court level. *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 278 (E.D.N.Y. 2007) (“Plaintiffs have not sufficiently alleged that the takings at issue violate the public use requirement.”), *aff’d*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008); Jotham Sederstrom, *Yards Sued on Plan to Grab Land*, N.Y. DAILY NEWS, Feb. 8, 2007, at 1 (“While opponents fear the project will create a traffic nightmare and ruin the neighborhood’s character, supporters say it will create jobs and affordable housing.”).

108. According to Rachel Weber, this redevelopment is about prioritizing the exchange value placed on inner-city communities rationalized by neo-liberal ideology. Weber, *supra* note 102, at 175-76.

that not enough attention is paid to how these changes impact the urban social fabric by creating consistent winners and losers. The consumption needs and tastes of the affluent are prioritized in this form of development. The rejection of older, less-upscale, land uses becomes personal, class-based, and seemingly subjective.¹⁰⁹

This unfairness is starkly apparent, purposefully fostered by the market, and insufficiently addressed by the cities. Local economic development, as currently practiced, raises fundamental questions about the discretion of States and Cities to use land to effectuate social and economic policy choices. The history of redevelopment is notorious because society's needs are contested and subjective, often colored by narrow perspectives, racism¹¹⁰ and classism.¹¹¹ These questions cannot be separated from the eminent domain equation. While the majority opinion is persuasive in stating that "bright line" limits cannot, and should not, be read into the public use clause to limit government overreaching in the name of economic development, does that mean there can be no limits? While the public good is the stated goal, the broad range of choices for defining the public good and meeting that goal means that much can happen that can have negative consequences for ordinary city residents.

Eminent domain doctrine can grapple more meaningfully with the underlying issues presented through some exercises of eminent domain by assessing the subordination inherent in redevelopment. The public or private label assigned to the eminent domain decisionmaker or ultimate owner does not truly affect or change the subordination. Because the current debate on redevelopment is

109. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (refusing to apply strict scrutiny to economic or wealth discrimination challenge to property-tax based school funding disparities). The poor "have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. See *James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (declining to extend the protection of the Equal Protection Clause against a referendum requirement for "low rent" housing developments.); Carl Bialik, *The Numbers Guy: Flaws in Measuring the World's Poor May Hinder Solutions*, WALL ST. J., June 1, 2007, at B1 (noting criticism of World Bank global poverty numbers being compiled by cumulating national poverty statistics—"some economists argue that poverty should be defined as the inability to live at a level each person's society deems normal. Lacking a phone in Burundi might not be associated with poverty, but it is in the [United States]").

110. David Crump, *Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 315 (1998) ("[In polls] whites tend to use the word 'racism' to refer to explicit and conscious belief in racial superiority. African-Americans mean something different by racism: a set of practices and institutions that result in the oppression of black people.").

111. See Bradley R. Schiller, *Class Discrimination vs. Racial Discrimination*, 53 REV. OF ECON. & STAT. 263, 268 (1971) (suggesting that class discrimination is as harmful and invidious as racial discrimination and concluding that poverty harmed Black AFDC recipients more than race).

conducted only through the jurisprudence of eminent domain, that discussion is too narrow. It only recognizes the individual property holder and is confined to the public-private distinction, thereby missing the heart of the issues presented by redevelopment. Crucial to a broadened, more realistic consideration of redevelopment is to account for the subordination inherent in this practice.

D. *The Three Faces of Subordination in Redevelopment*

1. *What Is Anti-Subordination?*¹¹²—Anti-subordination originates from the Fourteenth Amendment¹¹³ Equal Protection guarantee. While Equal Protection

112. Research reveals anti-subordination arguments advanced in hate speech (First Amendment), employment law (statutory), and education/desegregation/affirmative action law (Fourteenth Amendment). See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 174 (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004 (1986) (arguing that anti-subordination should inform courts' analysis of equal protection doctrine.); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 705 n.53 (1997) (noting Catharine MacKinnon's evolution from the term, "inequality approach" to "antidiscrimination"); see also Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1514, § 16-22, at 1521 (2d ed. 1988) (stating that the antidiscrimination principle focuses on acts of prejudice, whereas antistatutory focuses on legally reinforced systems that treat some people as second-class citizens); Paul Brest, *Forward: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the antidiscrimination principle as one disfavoring classifications, decisions, and policies based on race and noting that other principles may be needed to address questions of economic justice); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988) (arguing that society refuses to recognize the role of racial subordination) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]; Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 79-80 (1994); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1450-56 (1991) (applying antistatutory principles to the actions of some state governments in criminally prosecuting pregnant drug addicts); accord Karen B. Brown & Mary Louise Fellows, *Introduction*, in *TAXING AMERICA* 1, 2 (Karen B. Brown & Mary Louise Fellows eds., 1996) ("What is missing from both the political and the academic debate about taxes is a serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups."); Karen B. Brown & Mary Louise Fellows, *Preface*, in *TAXING AMERICA*, at vii, vii (Karen B. Brown & Mary Louise Fellows eds., 1996) (and advocating the development of "an analytical framework [that] would both uncover biases in the tax law and reveal anti-subordination strategies to keep the tax law from maintaining and perpetuating marketplace discrimination."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 452 (2000) ("By reading the ADA as extending its protections only to members of a particular socially subordinated group, I draw on the work of scholars who have articulated an antistatutory theory as both a description and defense of civil rights law.").

113. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

is typically thought of as being purely about equal treatment between properly defined, similarly situated categories of people, a rich literature argues convincingly that anti-subordination is the true substantive¹¹⁴ protection of the Equal Protection Clause. The normative goal is neither mechanically equal treatment nor merely avoidance of explicit racial classifications, but rather a guarantee that no citizens will be relegated to second-class status by virtue of societal structures, disadvantage, and oppressive treatment over time.¹¹⁵ At the core of anti-subordination logic is the recognition that numerical minorities are often literally incapable of protecting their interests in a majoritarian political process.¹¹⁶ However, the goal of anti-subordination is to recognize that subordination can be present, even in the absence of explicit racial classifications. An accumulation of social practices can act to create a caste-like, second-class-citizen status which then reinforces disadvantage.¹¹⁷ This was at the

amend. XIV, § 1.

114. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2189 (1992) (“The point is that almost all the critical race theory literature seems to embrace the ideology of anti-subordination in some form.” (citing Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 112, at 1341; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398-99 (1991)); Charles R. Lawrence III, *Forward Ace, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822-28 (1995) (arguing that liberal individualist theory fails the cause of anti-racism and transformative humanization because it offers a nonsubstantive approach to racism that focuses exclusively on individual harms and procedural fairness rather than the disestablishment of ideologies, systems, and conditions of racial subordination); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 942 n.51 (2001) [hereinafter Lawrence, *Two Views*].

115. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1477 (2004) (“Antisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values, including the need to have a Constitution that speaks to all.”); see Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987 n.2 (2007) (“Many critics of the anticlassification approach argue instead that, properly understood, the Equal Protection Clause targets only those racial practices that contribute to racial hierarchy. The proponents of this antisubordination approach prominently include the following: J.M. Balkin . . . Owen M. Fiss . . . William E. Forbath . . . Reva Siegel . . .”) (citations omitted).

116. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The infamous footnote serves as the basis of heightened judicial scrutiny of racial classifications. I have always thought it jurisprudentially odd that the source of protection for a subset of American citizens is in a footnote.

117. Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 162 (1999) (noting that separate but equal laws lead to “‘antisubordination,’ ‘antisubjugation,’ ‘anti-caste’ or ‘substantive equality.’”).

heart of the desegregation mandate of *Brown v. Board of Education*,¹¹⁸ for example. Segregation involved separate but equal treatment.¹¹⁹ By invalidating separate but equal, the Supreme Court explicitly recognized that equal treatment had a disparate negative effect on Blacks.¹²⁰ The concept of anti-subordination was that separate but equal created a disadvantaged, stigmatized status for members of particular racial groups and the Fourteenth Amendment needed to be interpreted in a way that addressed these forms of discrimination.¹²¹ Critical race theory was built on these insights into the limits of the anti-discrimination principle to consistently call for addressing elements of structural disadvantage—namely, subordination. These elements stem not from individual acts of discrimination, but rather from a series of seemingly non-discriminatory acts that keep particular groups of people disadvantaged.¹²²

Critical race theory teaches that subordination must be addressed when any of the following are present: 1) politically disabling power disparities;¹²³ 2) caste-like status; 3) failure to reflect the perspective of the subordinated;¹²⁴ or 4)

118. Siegel, *supra* note 115, at 1547 (“[I]t is a history of debates over *Brown* that shows how racial conflict haunts the silences, ambiguities, and conflicts of modern equal protection doctrine.”).

119. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 84 (2007) (“The Missouri Compromise barred slaveowners from bringing their slaves with them north of 36°30’ latitude, imposing what we today would call a ‘disparate impact’ on Southerners. Thus, *Dred Scott* not only makes an egalitarian argument for slaveholders rights, it also makes what we would today call an ‘antisubordination’ argument.”); Perry, *supra* note 112, at 79-80 (arguing that the discourse or manner of speaking about transracial adoption is subordinating). The goal of anti-subordination is not simply a society in which everyone is treated “equally” but rather a society in which each member is guaranteed equal respect as a human being.

120. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 n. 11 (1954).

121. See Kathryn Abrams, “Groups” and the Advent of Critical Race Scholarship, at 10, available at <http://www.bepress.com/ils/iss2/art10> (last visited Feb. 21, 2009) (arguing that “Groups and the Equal Protection Clause” partially contributed to the emergence of critical race theory). *But see* David A. Strauss, “Group Rights” and the Problem of Statistical Discrimination, at 6, available at <http://www.bepress.com/ils/iss2/art17> (last visited Jan. 2, 2009) (arguing that the anti-subordination principle is not really something new or exotic).

122. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFFAIRS 107, 108 (1976) (proposing to shift Equal Protection doctrine’s emphasis on racial classifications towards the actual social practices that disadvantage racial groups); *see also* Owen Fiss, Abstract, *Another Equality*, available at <http://www.bepress.com/ils/iss2/art.20/> (last visited Jan. 2, 2009).

123. See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1367 (1997) (arguing that “[r]ecent Court decisions involving electoral district apportionment and a long-running, if disconnected, set of deliberations regarding local government directly implicate issues of group pluralism and subordination as they affect democratic institutions”); Perry, *supra* note 112, at 79 n.204 (citing and characterizing the arguments in Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-14 (1986)).

124. Lawrence, *Two Views*, *supra* note 114, at 950-51 (“Critics of liberal theory, including critical race theorists, have offered another way to think about promoting equality and human

systemic, reinforcing disadvantage. Additionally, anti-subordination is unapologetically and openly political. It does not pretend that politics and constitutional interpretation do not intermix.¹²⁵ However, anti-subordination theory has yet to meaningfully confront the real questions of social conflict that underlie its goal of social re-ordering,¹²⁶ and the constraints on courts and legislatures to detach themselves from the influence or control of that social conflict.¹²⁷ Reva Siegel has insightfully observed,

[I]t is evident why the Court and many of those defending its work began to shy from openly justifying equal protection decisions in language concerned with group inequality or associated concepts of subordination and status. Reasoning about practices that unjustly disadvantage groups, or enforce their inferior or *second-class status*, involves positive and normative claims of a politically provocative sort. As a descriptive matter, concepts of subordination focus attention on agonistic group relations that structure the polity. As a normative matter, concepts of subordination draw into question the legitimacy of customary practices and understandings that regulate, and rationalize, the social position of groups.¹²⁸

Siegel's critique is not made purely from the perspective that one person's gain is another's loss. Instead, it arises from the recognition that material resources are at stake and recognizing harm in a society has profound implications.¹²⁹

dignity, one that reflects the perspective of the subordinated.”).

125. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4 (2006) (“[S]ocial and not legal change is what will be necessary to eliminate structural workplace inequalities.”); Calmore, *supra* note 114, at 2137-38 (arguing that critical race theory and jazz have similar origins in that both involve notions of oppositional cultural and political practices and potentially effective use of fundamental criticism of society); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006) (defining popular constitutionalism as “the deployment of constitutional arguments by the people themselves, independent of, and sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by the courts”).

126. *But see* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 530 n.199 (2003) (“[T]he antisubordination jurisprudence has remained associated with a concept of race that inevitably would perpetuate the notion in ways that reflect nineteenth century thinking Thus, the antisubordination principle has not yet led to an adequate critique of the notion of race itself, or to a reconsideration of the comparison-based approach implicit in equal protection analysis.”).

127. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 715 (1990); Robin West, Abstract, *Groups, Equal Protection and Law*, available at <http://www.bepress.com/ils/iss2/art8> (last visited Jan. 5, 2009) (arguing that the Equal Protection Clause provides political ideals to guide legislation, rather than legal restraints on legislation).

128. Siegel, *supra* note 115, at 1544-45 (emphasis added).

129. *Id.*

Siegel's theory seeks a re-allocation of rights and privileges.¹³⁰ Her critique also considers the profound aspects of identity that arise from privilege and a sense of vulnerability and threat of danger that accompanies privileged identities.¹³¹ The task, then, is to devise a way to make the process fair.

Even more complicating are the unresolved tensions between race and class. At present, eminent domain doctrine leaves racial minorities and others living in redevelopment areas to the urban political process.¹³² The reality is that minority elected officials are often in charge of carrying out redevelopment. The economic forces and logic driving that decisionmaking and its subordinating effect are largely unchanged by the decisionmaker's racial identity. A purely racial lens is insufficient to understand the nature of the subordination. Instead, race, class, and the political process—in particular, the informality of the political process in redevelopment—must be used to flesh out an understanding of the subordination. Anti-subordination theory is complex, multi-dimensional, and capable of adapting,¹³³ and when applied to eminent domain, provides an opportunity to consider what redevelopment is and should be about.

2. *Subordination in the Types of Redevelopment Projects.*—Redevelopment seems like a straightforward process of acquiring and clearing a site and

130. *Id.*

131. For example, Reva Siegel makes a helpfully inductive observation about the impact of social conflict on the retreat of the Supreme Court from the anti-subordination principle. She argues that “[i]n deciding *Brown*, the Court had adopted an interpretation of the Equal Protection Clause that would alienate groups with the social standing and skills to challenge the authority of the Court itself.” *See id.* at 1544. She continues,

As the Court read the Constitution to draw into question the position and values of whites who sought to maintain segregation, they in turn charged the Court with illegitimacy and group partiality. Under assault, the Court needed more than a principled justification for its interpretive practice. It needed an account of the Constitution that could command the allegiance—if not the assent, then the engaged dissent—of those the Court's decisions had estranged.

Id.

132. Darren Lenard Hutchinson, “*Unexplainable on Grounds Other than Race*”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 682 (“Of the possible equal protection theories, the antisubordination or anticaste theories do more to dismantle the historical legacy of racial and other forms of domination. Many scholars have advocated antisubordination theories. A concern that the law promote substantive equality by considering ‘the concrete effects of government policy on the substantive condition of the disadvantaged’ unifies their analyses.” (quoting Roberts, *supra* note 112, at 1454)). Hutchinson also argues that the approach leaves minorities to the political process. *Id.*

133. Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 288 (2001) (drawing from race-sexuality theory and calling for a multi-dimensional antisubordination theory noting “structural problems in antisubordination theory . . . [that positions] progressive movements as oppositional and conflicting forces, rather than as potential alliances and coalitions, and the failure to recognize the multidimensional and complex nature of subordination”).

constructing a set of buildings to create a new use for the property. Nevertheless, this process also involves practices related to group formation and social exclusion, as well as oppression and domination. Redevelopment involves *social decisions* about land use that significantly alter property ownership patterns, neighborhoods, and community networks.¹³⁴ Because redevelopment occurs in furtherance of an upper-middle-class attraction strategy, the policy, in effect, prioritizes the land use needs of one social class over the other.¹³⁵

The similarity of these glittering new projects to each other is striking.¹³⁶ Not only is mixed-use (commercial and residential) development the wave of the present, but upscale residential and commercial developments are the standard of the day. One advantage of mixed-use development is it provides nearly all that young urban dwellers want—proximity to services and entertainment, excitement, walkability, upscale convenience, and controlled environment. The main disadvantage of mixed-use development is that it is usually market-driven. The residential tenant mix is expected to predict, match, and enable the commercial tenant mix. Although non-upscale development can be profitable, it is omitted from most redevelopment schema because it does not “fit the profile.”¹³⁷

There are underlying structural reasons for the similarities of these developments. Developers replicate the same schemas because they are forced to tell a cognizable story that financial markets easily understand.¹³⁸ Prevailing financing mechanisms require this exclusion to replicate the limited recognized types of real estate investment products. Failure to replicate makes financing more expensive or even unavailable.¹³⁹ Financing demands predictable, standardized forms of development. According to Christopher Leinberger, nineteen standard real estate products are used by real estate developers to produce developments that banks and other investors can readily recognize and

134. See Mihaly, *supra* note 5, at 4 (stating that “redevelopment [is] one of the most powerful roles assigned to government”).

135. For a more complete discussion of this point, see McFarlane, *The New Inner City*, *supra* note 101, at 3; see also Herman L. Boschken, *Global Cities, Systemic Power, and Upper-Middle-Class Influence*, 38 URB. AFF. REV. 808, 808 (2003) (an “important consideration in urban globalization is the disproportionately high presence of UMC whose membership includes institutional professionals at the forefront of postmodern awareness and international experience. Symbolized by a lifestyle genre, the upper middle class is more than a marker of the global city. It exerts a subliminal influence that prescribes the cityscape policy that outcomes planners emphasize to ensure principal membership for the city in global exchange”).

136. See *supra* Part I.C.

137. See MARY PATILLO MCCOY, *BLACK PICKET FENCES* 190 (1999).

138. MICHAEL SUK-YOUNG CHWE, *RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE* 25-49 (2001) (discussing ritual, common knowledge and the need to stigmatize).

139. See Christopher B. Leinberger, *Back to the Future: The Need for Patient Equity in Real Estate Development Finance*, BROOKINGS INSTITUTION RES. BRIEF, Jan. 2007, at 1, 7.

use to calculate the risk of financing or investment.¹⁴⁰ Building projects must conform to one of these standard real estate product types or financing becomes significantly more expensive. The problem is further exacerbated because real estate financing is globalized, and distant investors in real estate investment trusts (REITs) demand certain types of development (i.e., the product) that produce quick returns. Not only does this lead to standardization (typically upscale), but this homogenization leads to conservatism in decisionmaking about the types of development to pursue.¹⁴¹

This lack of “non-upscale” development is also partly due to the lack of subsidy to provide incentive for affordable, accessible development.¹⁴² The historic, judicially ratified opposition to multifamily housing in zoning ordinances and land use decisionmaking indicates that the shortage of *non-upscale* development is not solely a question of financial cost.¹⁴³ Even when financial support is available for building accessible development, it will often be opposed on race and class grounds. As Sheryll Cashin argues, property owners have a financial stake in opposing development that might negatively impact their property values.¹⁴⁴ However, this opposition is also likely due to the stigmatization of certain social groups. The uniformity of these redevelopment schemas contains an ideology of exclusion and inclusion.¹⁴⁵ Therefore, a better accounting of the social psychology and political economy of exclusion is needed.¹⁴⁶ These often “cookie-cutter” developments practice social

140. See Christopher B. Leinberger, *The Need for Alternatives to the Nineteen Standard Real Estate Product Types*, PLACES, July 2005, at 24, 24.

141. Jeffrey H. Epstein, *Advertisers Divide and Conquer*, FUTURIST, Mar. 1998, at 2, 16 (reviewing Joseph Turow and arguing that the prevalence of marketing to segments is splitting the social order: “radio, magazines, and cable television . . . in particular are more segmented than ever. Relatively little content . . . is aimed at a demographically broad audience. People increasingly filter their view of the world through these defined media experiences. One reason for the marketing is that segmentation increases the likelihood that the targeted consumer will experience a sense of personal identification with a product’s image and therefore feel an interest in purchasing and using it”). What concerns Turow most are the secondary impacts on society—the invisible walls of isolation created by the comfort zones of similarity. See JOSEPH TUROW, *BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD*, at ix (1997).

142. See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 531 (2007) (detailing eight possible and potentially conflicting objectives of subsidized housing: “1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds”).

143. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-88 (1926).

144. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004).

145. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1850-53 (2006) (exploring strategies to exclude indirectly by creating exclusionary vibes or constructing developments with exclusionary amenities).

146. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA.

differentiation with exclusion as the accepted development model through the use of clusters and geo-demographic profiling.¹⁴⁷ Target marketing in particular locations leads to stigma¹⁴⁸ and disdain.¹⁴⁹ Clusters facilitate exclusion by allowing specific targeting of demographic groups.¹⁵⁰ Society has not yet fully appreciated how such target marketing divides instead of unites.¹⁵¹ Class and performance are made increasingly more important because of the rise of mass affluence.¹⁵² Citizens have been trained to be consumers; to desire, fantasize, and “fetishize” market segmentation. Whereas a greater number of people depend on open access to public recreational opportunities, the rise of mass affluence

L. REV. 437, 454-55 (2006) (extending the indirect exclusionary argument to clubs and neighborhoods).

147. See generally IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2002).

148. See Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCH. Q. 319, 319 (2004) (Perceptions of disorder increase based on race and class identity. “Seeing disorder appears to be imbued with social meaning . . . generating self-reinforcing social processes that may help account for the perpetuation of urban racial inequality.”).

149. Stigma or stigmatization “refers to an invisible sign of disapproval which permits insiders to draw a line around ‘outsiders’ in order to demarcate the limits of inclusion in any group.” GERHARD FALK, *STIGMA: HOW WE TREAT OUTSIDERS* 17 (2001). According to Falk, the American ideology derived from the Protestant ethic

includes the belief that individual hard work leads to success and that lack of success is caused by moral failings, self-indulgence, and a lack of self-discipline Americans are likely to take credit for any outcomes in their lives which can be viewed as successful and generally approved. Consequently . . . those among us who deviate from the Protestant work ethic will be stigmatized and . . . most Americans, will severely reject those who deviate from these norms the most.

Id. at 334.

150. This is why Costco in Seattle has a massive coffee machine for fresh ground coffee but does not carry jumbo containers of curry as does the Costco in the Washington, D.C., area. See MICHAEL J. WEISS, *THE CLUSTERED WORLD: HOW WE LIVE, WHAT WE BUY AND WHAT IT ALL MEANS ABOUT WHO WE ARE* 9-13 (2000) (using census data, zip codes, and marketing surveys to classify people into lifestyle segments based on: (1) where they live—whether in a city, small town, or rural area; (2) their lifestage—whether they are young and single, married with children, or a retiree; and (3) their marketplace behavior). But see John T. Metzger, *Clustered Spaces: Racial Profiling in Real Estate Investment*, LINCOLN INST. OF LAND POL’Y CONF. PAPER 15-16 (2001) (arguing that racial segregation is replicated in the use of clusters in real estate investment; discussed more extensively in Audrey G. McFarlane, *Who Fits the Profile?: Thoughts on Race, Class, Clusters, and Redevelopment*, 22 GA. ST. U. L. REV. 877 (2006)).

151. See generally TUROW, *supra* note 141, at 1-2 (arguing that segmented marketing emphasizes divisions rather than overlap).

152. See generally PAUL NUNES & BRIAN JOHNSON, *MASS AFFLUENCE: SEVEN NEW RULES OF MARKETING TO TODAY’S CONSUMER* 29-58 (2004) (discussing contemporary middle class consumer logic and demands for luxury).

(financed by credit card debt) means that a huge number of people adopted the attitudes and preferences of aristocracy or royalty. In turn, their consumer demand for exclusion is built into the consumer market for commodities. The home is a cultural commodity, and the ability to stigmatize anyone who challenges the fantasy by being too different threatens property values. Since types of homes determine types of commercial amenities, types of development will likely subordinate certain non-affluent people by developing in ways that exclude their needs and interests.

3. *Subordination in the Location of Redevelopment.*—Renowned playwright August Wilson wrote ten plays chronicling the Black American experience through each decade of the twentieth century.¹⁵³ Nearly all of these plays were set in the Hill District, a Black neighborhood in Pittsburgh.¹⁵⁴ In three of these plays, set during the 1960s, 1970s, and 1990s, the characters struggle with the universally human quest to cope with and make sense of life's challenges.¹⁵⁵ One additional ongoing challenge present in two of the plays, *Jitney* and *Two Trains Running*, is the threat of urban renewal displacing the characters from their homes and businesses.¹⁵⁶ In Wilson's final play, *Radio Golf*, the challenge of urban renewal was renamed economic development. The play centers around the efforts of one character—a politically well-connected affluent Black developer—to displace an elderly Black homeowner to make way for a Starbucks and a Whole Foods.¹⁵⁷ The threat of redevelopment and displacement featured so consistently in plays meant to chronicle Black life illustrates the racialized nature of property ownership. The ubiquitous presence of urban renewal—which today is termed economic development—means that property ownership in areas with *race and class transformation* potential comes with an inherent limitation—residency is contingent and subject to revocation. Thus, the second reality of subordination in redevelopment is that the places where redevelopment occurs are often subordinating.¹⁵⁸

The measure of state and local government efficacy has long been its ability to facilitate economic development.¹⁵⁹ What has changed, however, is that globalization is rewriting the face of the city. Because the local economic development project currently transpires in cities throughout the United States,

153. See Jackson R. Bryer & Mary C. Hartig, *Introduction* to CONVERSATIONS WITH AUGUST WILSON, at vii, xiv (Jackson R. Bryer & Mary C. Hartig eds., 2006).

154. *Id.* at xi.

155. *Id.* at vii-xvi.

156. See generally Sandra G. Shannon, *August Wilson Explains His Dramatic Vision: An Interview*, in CONVERSATIONS WITH AUGUST WILSON 118, 145-46 (Jackson R. Bryer & Mary C. Hartig eds., 2006).

157. AUGUST WILSON, RADIO GOLF 9, 25, 48 (2007).

158. For an excellent, detailed account of how redevelopment affected a Black community in Cocoa, Florida, see generally Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75 (1996).

159. See Audrey G. McFarlane, *Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility*, 35 URB. LAW. 305, 309 (2003).

local economic development within the context of globalization has become increasingly desperate.¹⁶⁰ Local economies are being driven by national and global economic imperatives:

This process of transnational market expansion and integration is manifested in a range of phenomena: a new international division of labor, the global spread of financial markets, an interpenetration of industries across borders, the spatial reorganization of production, a temporal acceleration in economic activity, vast movements of population, a diffusion of consumer goods, and a welter of transnational cultural linkages. Taken together, these serve to significantly alter the nature of places, the relations of power, and the lived experiences of peoples in most part of the globe.¹⁶¹

Though globalization is not a fixed phenomenon and not all agree on its contours, causes, benefits, or detriments, it is still much like global warming: people generally recognize its presence.¹⁶² According to David Harvey, globalization is the “freer circulation of money, commodities and people (and hence capital) throughout the spaces of the city.”¹⁶³ Most significant is the shift in the urban economy from production-oriented development to consumption. The chief product of local economies shifts from work to leisure, and both local government policy and market preference converge in a dramatic urban spatial restructuring. The primary mechanism for local economic vitality is “attraction of the affluent” through tourism, development of upscale residential and commercial amenities, high-tech service industries, and institutions of higher education.

According to Rachel Weber, states make the built environment more flexible and responsive to the investment criteria of real estate capital through spatial policies such as urban renewal.¹⁶⁴ A broad interpretation of eminent domain

160. Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-balancing of Power between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J. L. & PUB. POL’Y 187, 210-29 (2006) (discussing domination of corporations over city decisions).

161. See Sites, *supra* note 7, at 123.

162. Saskia Sassen’s work in *The Global City* posited that certain world cities were centers of global finance and production operations such that they were global cities in population, priorities, and economic importance. Sassen’s insights can be broadened beyond these technopoles of world capital to every city in America and across the globe because the global economy has permeated localities everywhere. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001); e.g., Brian J. Godfrey, *Urban Development and Redevelopment in San Francisco*, 87 GEOGRAPHICAL REV. 309, 322 (1997) (expanding the global city hypothesis to a second tier of world cities like San Francisco).

163. David Harvey, *The Political Economy of Public Space*, in *THE POLITICS OF PUBLIC SPACE* 25 (Setha Low & Neil Smith eds., 2006).

164. Neil Brenner & Nik Theodore, *Cities and Geographies of “Actually Existing NeoLiberalism,”* in *SPACES OF NEOLIBERALISM* 4 (Neil Brenner & Nik Theodore eds., 2002).

doctrine, therefore, accommodates global capital, which seeks flexibility and change through creative destruction. Because global capital seeks sites of lucrative investment, distant investors in REITs control or influence our local spatial conflicts and policies.¹⁶⁵ Urban spatial restructuring and redevelopment presents particular issues of land access and land tenure rights for low- and moderate-income groups. The site of investment needs to rise in value, and property markets with economic value depressed by racialized geography will be particularly attractive for investment.¹⁶⁶ Working-class communities will always be more subject to redevelopment so property ownership in undervalued or centrally located urban areas is a more tenuous form of land tenure. Because market forces and government are symbiotically intertwined in the eminent domain process, the most compelling property rights and personhood aspect of the eminent domain debate is the reality that no justification can erase the impact of losing one's home and its deeply associated sense of personal autonomy, history, and community.¹⁶⁷

One reason that discussing eminent domain doctrine remains relevant,

(arguing that redevelopment is contextual, depending on “the legacies of inherited institutional frameworks, policy regimes, regulatory practices and political struggles”).

165. Weber, *supra* note 102, at 186; *see generally* Jack H. McCall, *A Primer on Real Estate Trusts: The Legal Basics of REITs*, 2 *TRANSACTIONS: TENN. J. BUS. L.* 1 (2001).

166. I expand on this point in McFarlane, *The New Inner City*, *supra* note 101, at 17-21; *see also* Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 *VILL. L. REV.* 1037, 1039 (2000) (“[R]acial spaces are visible artifacts of both racial segregation and the relations of investment, production and exchange . . . within racially subordinated communities.”).

167. There can be a plus side to the subordination of the location of redevelopment because one person's subordination is, of course, another person's advantage. In this case, the sweetener of the redevelopment's changes are the promise and reality of short-term construction jobs or service jobs. That these jobs are often low wage or without benefits is a problem, but many say some jobs are better than no jobs. In fact, some argue that one should bow to the inevitability of redevelopment and adapt by seeking to benefit from it. For example, the Atlantic Yards Project is anticipated to:

[B]ring an estimated 10,000 permanent and 15,000 construction jobs, contracting opportunities for minority- and women-owned business, and billions of dollars in net benefits, including \$2.8 billion in new net tax revenue to New York City and New York State over 30 years. It will make a real difference for a city where 48.3% of African-American males are unemployed or out of the workforce entirely, more than 1 in 5 households pay half their income on rent, and fiscal problems continue to force cuts in important services.

Brief for Brooklyn United for Innovate Local Development (BUILD) et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 154143, at *3. *See* Confessore, *supra* note 105 (demonstrating that color lines have blurred in support and opposition of the project with Black working-class people possibly being more in support of the project rather than against because of jobs. On the other hand, one black proponent concedes the project is “instant gentrification”).

despite the recent flurry of state legislation purporting to restrict eminent domain for economic development, is that these reform efforts have left the blight exception intact.¹⁶⁸ The assumption is eminent domain should not be used for economic development, but only for public infrastructure or “blighted” properties. Given the difficulty of determining what blight is (one person’s blight is another person’s community), the ease of accepting blight elimination as a basis for exercising eminent domain is, in effect, a way of saying “[t]ake someone else’s property, not mine.” Does living in a blighted neighborhood mean one’s property is any less important to the owners who consider that blighted place home?¹⁶⁹ What do the ‘hood, a highway, and a city park have in common? They are the quintessential types of public works projects that satisfy the popular conception of the proper exercise of eminent domain. Public ownership or public use of a highway or road does not eliminate potential subordination if most highways are directed through one’s neighborhood. The other end of the urban renewal equation for Black communities and the devastation they suffered during that era was the federal highway program. Funds from that program were used to build highways directly through Black neighborhoods, eliminating vibrant and thriving residential neighborhoods and commercial districts. While the highways were public, their selected location devastated specific people and places.¹⁷⁰

4. *Subordination in the Method of Redevelopment.*—The most subordinating aspects of redevelopment are probably the methods of development decisionmaking. Redevelopment consists of a set of social and decisionmaking practices, born both of custom and of economic necessity that favor privatized decisionmaking. Redevelopment is a process heavily dominated by national real

168. See Dana, *supra* note 15, at 374-78; David A. Dana, *Why the Blight Distinction in Post-Kelo Reform Does Matter*, 102 NW. U. L. REV. COLLOQUY 30, 30-31 (2007) (discussing how few states have banned the blight exception).

169. See Bruce Fein, *Eminent Domain, Eminent Nonsense*, WASH. TIMES, Oct. 12, 2004, at A16 (describing the Fort Trumbull project as a “middle-class re-enactment of *Berman*” and criticizing Petitioners’ effort “to make the Constitution pivot on Marxist-like class distinctions” by limiting condemnation for redevelopment to blighted land); see also Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 686 n.178 (2007) (“Indeed, many of the cases in which landowners have prevailed in state courts involve urban revitalization projects that encompass middle-class landowners.”); Dana, *supra* note 15, at 366 (“Kelo-inspired reform movement privileges condemnations for blight removal and . . . the stability of middle-class households. . . .”); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 178-79 (2007); see, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1144 (Ohio 2006); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004).

170. See *Tullock v. State Highway Comm’n*, 507 F.2d 712, 714 n.1 (8th Cir. 1974) (“The impact of federally-assisted urban renewal and highway construction projects cannot be overestimated. More than two million dwelling units were demolished by such projects in the years between 1950-68 according to one study by the National Association of Home Builders, and some 62,000 families and individuals were displaced by federal highway programs in 1970 alone.”).

estate investment interests, practices, and conceptions.¹⁷¹ Although issues arise because of genuine conflicts or disagreements over development, for which there may be no constitutional prescription (it depends on politics), the main reason courts are asked to intervene in eminent domain exercises is a political process failure concerning redevelopment. The political process failure occurs because the economic development process is highly privatized. Additionally, cities are not merely welcoming to business but are using their governmental powers as proprietors in what is known as the “public-private” partnership.¹⁷² As Marc Mihaly argues, public and private roles have been reordered in the public-private partnership in order to allocate risk and reward consistent with market conditions and requirements.¹⁷³ The public-private partnership has become entrenched in the way cities think and act.¹⁷⁴ As a consequence, the public role of local government in development is now linked with private goals and perspectives. Thus, the public’s emphases fall necessarily on commercial success. Not only does the City establish quasi-private entities to oversee development, but the city itself is being carved up into private enclaves, both in terms of property ownership as well as financing and governance. Most Cities have authorized private business districts to manage these neighborhoods.¹⁷⁵ Financing techniques such as tax increment financing often leverage future tax revenues arising from the new developments. Most, if not all, of the increased taxes are paid to repay the district’s debt.¹⁷⁶

Second, opportunities for influencing economic development decisionmaking are limited because of the privatized decision-making process and the nature of informal communications and relationships between corporations, developers, Cities, and quasi-private development agencies. The economic development decision-making process is further privatized because it is run by quasi-public authorities immune from popular accountability.¹⁷⁷ Privatization of public

171. See *supra* Part I.D.2-3.

172. See SUSAN S. FAINSTEIN, *THE CITY BUILDERS: PROPERTY DEVELOPMENT IN NEW YORK AND LONDON, 1980-2000*, at 136-37 (2d ed. 2001) (discussing the lessons learned from publicity-initiated private redevelopment projects in Kings Cross and Times Square); see also David L.A. Gordon, *Review of Fainstien*, June 2002, <http://www.h-net.org/reviews/showrev.php?id=6384>.

173. See Mark B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, 7 VT. J. ENVTL. L. 41, 41-42 (2005), available at <http://www.vjel.org/journal.php?vol=2005-2006>.

174. For further development of this point, see Audrey McFarlane, *Putting the “Public” Back into Public-Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 41 (2007).

175. See Audrey G. McFarlane *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 5, at *1 (Fall 2003), available at <http://agora.stanford.edu/agora/volume4/mcfarlane.shtml>.

176. See George Lefcoe, *Finding the Blight that’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 995-97 (2001).

177. See Peter W. Salsich, Jr., *Privatization and Democratization—Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 755 (2006).

decisionmaking presents a democratic political process failure. Implicit in this argument is the understanding that in the political process of development, the lower classes and the politically unconnected lose out in a process that is informal, privatized, and shielded in large part from public scrutiny.

Third, strategic considerations can influence the application and waiver of regulatory power through the informal relationship between city administrators, developers, and any commercial entity wishing to locate in the city.¹⁷⁸ Regulatory waivers, infrastructure write-downs, and public financing are the norm. The public-private distinction continues on its undefined path. Cities act like merchants or proprietors when they pursue an explicit affluent class attraction policy and use incentives to lure and retain them.¹⁷⁹ Charles Tiebout's idealized vision of local governments as proprietary entities seeking to attract an optimal number of city residents (the "consumer-voters") has come to fruition. The problem with Tiebout's "model" is the reality that not everyone fulfills Tiebout's idealized assumptions that are fundamental to making his model work. Most people do not live on investment income, enjoy perfect employment opportunities, or even have the realistic ability of escaping violent impoverished neighborhoods. The result of both Tiebout's thesis and the reality of local government today is an alarming slant in local government policy towards the needs of those with wealth.

Additionally, the City's proprietor-like acts may relate to the class identity of the elite decisionmakers who dominate development decisionmaking. The existence of these networks suggests that part of the reason for economic development's popularity as a local government project is not only the desire to promote the economic growth of the municipality; it may also be attributable to the desire to get along with one's elite peers.¹⁸⁰ An alternate explanation is that the networks exist because private business has a way of legitimizing public government. This is confirmed by the prevalence of informal relationships and communications between corporations, developers, Cities, and quasi-private development agencies as the operative mode of conducting city life.¹⁸¹ Deal-making and public subsidy of infrastructure costs and coverage of site acquisition expenses are a part of this process. Redevelopment is characterized by formal deal-making that is preceded and shaped by informal relationships and behind-the-scenes communication and agreements. These deals are run through public approval processes only when absolutely necessary. By the time the deal reaches the public process, the parameters are set and the nature of the development is no

178. A pro-economic development discourse also makes economic development seem inevitable and beneficial. See David Wilson, *Metaphors, Growth Coalition Discourses and Black Poverty Neighborhoods in a U.S. City*, 28 *ANTIPODE* 72, 73 (1996) (analyzing the metaphors used in "growth" discourse in urban development).

179. See McFarlane, *The New Inner City*, *supra* note 101, at 21-22.

180. Or, at the very least, one's class position must undeniably influence one's perspective about what is desirable development.

181. See generally BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 17 (1989) (describing these relationships in the mid-twentieth century).

longer subject to question or significant modification.¹⁸² Thus, anyone inclined to oppose such deals is forced into an all-or-nothing situation: take it or leave it.¹⁸³

Fourth, development must happen quickly to be cost-effective. Politics are incremental. Thus far, these disagreements over development have been ignored in both the blight and the economic development context. Under the current regime, the effect of the broad interpretation of public purpose is that city property owners are left to the political process. Further indication of political process failure is that individual property owners become the inadvertent champions for their communities by opposing the taking of their individual parcels. But their opposition is almost too little, too late. They should have been involved in the formulation of the plan. Opposition to the plan typically proves ineffective in the long term and victories usually only slow down the process. The individual property owner against the government requires organizing and activism to combat governmental decisionmaking. Even if one fights, displacement may not be averted and the ability to return is not guaranteed.

In light of the nearly unlimited discretion afforded to states and local governments in the use of eminent domain power, the real controversy is fueled by the propriety of the underlying development plan—or to use the Court's language, the carefully considered development plan.¹⁸⁴ The institutional norms and structures of redevelopment sound very good on paper. The public entity, the City, is authorized by the State to control the use of land. The planning process seeks public input. The government enters into agreements with developers to achieve jointly what either could not achieve on its own because it is nearly impossible to cost-effectively assemble parcels for redevelopment independently. The government does not bring the organizational structure, know-how, or finances to carry out projects alone. Often, the anticipated market barriers of assembly problems suggest that a deal will not be touched. The lack of public accountability in economic development decisionmaking then raises questions about how those plans are put together and whether a plan adequately accounts for all relevant dimensions of the public interest. The lack of public accountability also raises issues of public resource allocation towards large private enterprises.¹⁸⁵ Many people have common-sense impressions that Cities

182. See Patience A. Crowder, "Ain't No Sunshine": *Examining Informality and State Open Meeting Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 638 (2007).

183. See, e.g., David Nakamura, *Council Approves Altered Stadium Deal; Requirement for 50% Private Financing Leaves Team's D.C. Future in Question*, WASH. POST, Dec. 15, 2004, at A01; David Nakamura & Thomas Heath, *Baseball Rejects Council's Changes in Financing Plan for D.C. Stadium*, WASH. POST, Dec. 16, 2004, at A01; see also GREGORY J. CROWLEY, *THE POLITICS OF PLACE: CONTENTIOUS URBAN REDEVELOPMENT IN PITTSBURGH*, 145-46 (2005) (case studies suggesting that city leaders strategically release information as late as possible to forestall opposition).

184. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

185. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints*

are beholden to big corporations and developers and are engaged in naked land-grabs to redevelop property to more lucrative tax-receivable, luxury-related land uses like condos and upscale retail and entertainment complexes.

The eminent domain controversy focuses on taking property from private parties and transferring it to developers, i.e., other private persons, to put the property to another use consistent with the town's revitalization plans. It seems a violation of all principles of property ownership to allow government to terminate one's property rights for the benefit of another. Yet, would government-run reconstruction projects produce a better outcome? The public-private distinction is not helpful in resolving the eminent domain/redevelopment dilemma. From an anti-subordination standpoint, redevelopment is not "okay" by virtue of any particular legislative classification.¹⁸⁶ Instead, subordination arises from the systematic impact of executing particular governmental acts. In *Village of Willowbrook v. Olech*, for example, the Supreme Court allowed a single homeowner to bring an equal protection claim based on unequal treatment in the execution of governmental regulations.¹⁸⁷ If a single act by government can be the basis for an equal protection claim, then the cumulative effects of similar redevelopment decisions by different local governments should seem a justifiable basis for an inquiry into the use of eminent domain and the nature of government support for redevelopment.

The reliance on a carefully considered plan leaves room for a form of municipal corruption which is the giving in to the taste of the affluent and reinforcing the disadvantage of not being upscale. If private companies want the benefit of public powers for redevelopment, then their developments should necessarily reflect the population in terms of residential and commercial amenities. The issue is the forces of capital, the intersection of race, class, and geography, and the fight for the social status of the city.¹⁸⁸ This aspect of

on State Tax Incentives for Business, 110 HARV. L. REV. 377, 393 (1996) (discussing the pressure to engage in economic development through business incentive competition). *But see* Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) (state and city taxpayers Commerce Clause challenge to massive business tax incentives rejected for lack of standing under Article III of U.S. Constitution).

186. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343 (1949) (in most contexts, the basic role of the Equal Protection Clause is to act as a limit on government classifications); *see, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").

187. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (finding no cause of action because the practical result will probably be the proliferation in the federal district courts of cases where an individual person claims that governmental officials have treated him or her unequally).

188. *See* Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1048 (2000) ("[T]he struggle against subordination must be understood as a struggle for power within the institutional arrangements through which power is legally organized

Fourteenth Amendment jurisprudence has been an explicit project of the study of regulatory takings.¹⁸⁹ Regulatory takings is also an anti-subordination doctrine, albeit not to avoid stigma, but to preserve the privileges and privileged status of property owners.¹⁹⁰ In the regulatory takings context anti-subordination addresses the limits of the local democratic process by acknowledging that small groups of property owners will rarely have the political will or power to realistically challenge local government decisionmaking that limits their use of their property. Thus, the government's actions are considered tantamount to taking their property.¹⁹¹

II. DEVELOPMENT DISAGREEMENTS IN THE SUBURBS

A. *The Struggle over the Right to Development*

Economic development is by no means limited to urban settings. In the older, declining suburbs, local government councils resort to economic development techniques previously found only in the cities.¹⁹² In the newer, ever-expanding suburbs, the major issue is not only development but too much development.¹⁹³ Rural space is being paved over for new homes, commercial office parks, and retail projects.¹⁹⁴ State and local government efforts focus primarily on seeking to ameliorate the impact of development on open space, delicate ecosystems, and disappearing rural land. They seek to regulate, balance, or halt the development process.¹⁹⁵ Governmental efforts to restrict development

and deployed. This in turn means that the anti-subordination objectives at the heart of CRT depend on reorganizing these institutional structures [and] reforming the legal doctrines that construct them.”).

189. *But see* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 211-12 (1993) (arguing the Court has fled from substance and accusations of “Lochnering”).

190. *See* discussion *infra* Part III.

191. As John Calmore argues, “the oppressed must use rights as attention grabbers and wedges In the context of collective conflict, the assertion of rights must be seen as claims to power, privileges, and resources.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2214 (1992).

192. *See, e.g.,* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (discussing the county’s attempt to capitalize on its airport and follow the new *aerotropolis* approach to economic development by making transportation the hub of development).

193. *See* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 12 (1991) (“Nowhere in the American national character, as it turns out, is there as deep a divide as that between our reverence for ‘unspoiled’ nature and our enduring devotion to ‘progress.’”).

194. *See generally* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137 (1999).

195. *See, e.g.,* Capacity analysis plus exactions statute—FLA. STAT. ANN. § 163.3180 (West 2006 & Supp. 2009) (enabling local governments to measure the adequacy of public facilities and restrict development that would exceed predicted levels of service, with exceptions for urban

have been controversial because they interfere with the development or investment expectations of property owners. A number of regulatory takings challenges centering around property owners rights to develop their properties have been decided by the U.S. Supreme Court, most recently in the *Tahoe-Sierra*¹⁹⁶ and *Lingle v. Chevron*¹⁹⁷ decisions.¹⁹⁸ In comparison with the level of loss and disruption seen in the eminent domain context, the regulatory takings stories are less dramatic, less disruptive, and arguably less compelling. Yet the response and opposition to government regulation have been no less angry or spirited. At the heart of the regulatory takings decisions is a fundamental disagreement over interfering with development, and a heartfelt belief that property ownership includes a right to development.

The Supreme Court's fact-specific regulatory takings doctrine has shifted back and forth in its responsiveness to property owners seeking the right to resist governmental regulation and develop their properties. Overall, however, the doctrine has been more responsive to property owners seeking the right to resist redevelopment and retain ownership of their properties. Although the doctrine has evolved imperfectly, its intention to solidify property-based boundaries against the intrusion of government decisionmaking has very clearly signaled to local governments that they should tread carefully when individual interests are in conflict with public need.

Accordingly, the evolution of regulatory takings jurisprudence lays out one of the most consistent anti-subordination doctrines in modern law. Although the analysis is framed in terms of individual harm to individually held property rights, the Court's willingness to intervene on behalf of citizens in situations of great public need (i.e., environmental preservation¹⁹⁹) or to intervene where the personal harm is rather minimal and the matter is one of principle (e.g. the

development or payments for improvements by developers); MD. CODE ANN., AGRIC. §§ 2-501 to -518 (West 2002 & Supp. 2008) (establishing the Maryland Agriculture Land Preservation Foundation with the power to create agricultural preservation areas and purchase agricultural land preservation easements); Urban Growth boundary—OR. REV. STAT. § 197.296 (West 2003 & Supp. 2008) (establishing factors to measure the sufficiency of buildable lands within an urban growth boundary that is created based on residential distribution); Growth moratorium ordinance—Union County, N.C., Amendment to the Union County Land Use Ordinance Establishing a 12-Month Moratorium on Major Residential Development (Aug. 15, 2005, Extended July 25, 2006), *available at* http://www.co.union.nc.us/Portals/0/Planning/Agenda_Min/2006/PB_min06-20-06.pdf (establishing a twelve-month moratorium on residential development over five dwelling units while the county creates an Adequate Public Facilities ordinance); Coastal protection—SANTA BARBARA COUNTY, CAL., COASTAL ZONING ORDINANCE, ch. 35, art. II, § 35-50 (2004) (protecting, among other things, public access and quality of the environment through prohibition of dry sand development, easements between road and wet sand, and set-backs for bluff developments), *available at* <http://www.sbcountyplanning.org/PDF/A/Article%20II.pdf>.

196. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

197. *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

198. *See id.* at 531; *Tahoe-Sierra*, 535 U.S. at 306.

199. *See, e.g., Tahoe-Sierra*, 535 U.S. at 306.

principle of the right to exclude has been abrogated in a way that the Court finds objectionable²⁰⁰) provides a striking contrast to the eminent domain redevelopment cases. The Court is most interested not in the individual rights of the parties before the Court, but more generally in protecting property owners as a group from the public enterprise of government and the public needs of the general welfare.

In particular, the doctrine of regulatory takings evolution reflects an imperfect, yet effective attempt to insulate private property owners from the structural inequities of the political process. In this process, the harms to a few or to consistently disadvantaged groups (in relation to the ability to affect governmental decisionmaking) suggest a structural disadvantaging of property rights in the face of increasingly complex and demanding public needs. Because the doctrine's evolution involved an attempt, albeit largely unsuccessful, to harden property rights protections by intervening to protect property owners based not on the extent of impact but on principle, the evolution of the regulatory takings doctrine suggests that regulatory takings is an anti-subordination doctrine. By creating a bulwark against the demands of public need, the doctrine implicitly supports individualism and withdrawal into private enclaves; it also activates the agency of suburban property owners by giving them a right to resist governmental decisionmaking.²⁰¹

The governmental projects of city and suburb are not unrelated. Fostering development in one setting and attempting to regulate, if not halt, development in another, takes place against a backdrop of each type of geographic area battling to obtain, retain, or manage middle-class residents.²⁰² Both city and suburb, to the extent this binary distinction retains salience, are engaged in a battle for identity to ensure that they will both capture the middle- and upper-middle class resident as well as establish themselves as the type of geographic area most associated with the social status, privilege, and power of affluent individuals.²⁰³ The geography of city and suburb is closely associated with

200. See, e.g., *Lingle*, 544 U.S. at 531.

201. The exclusionary zoning issue is based on this quest for some approximation of upper middle-class status. Zoning for the tax rate necessarily sets a premium on higher end incomes and residents. To the extent that race is associated with lower incomes in people's minds, the racial component of upper-middle-class identity is clear (regardless of the reality). See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L. J.* 527, 528 (2007); Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 163, 172-77, 186-89 (William A. Fischel ed., 2006) (exploring motives for exclusion).

202. See Maureen Kennedy & Paul Leonard, *DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 1* (2001), available at <http://www.brookings.edu/reports/2001/04metropolitanPolicy.aspx> (“[A] new corps of mayors has made attracting middle- and upper-income residents back to their cities a leading priority, to revitalize the tax base of their communities, the visibility of their neighborhoods and the vibrancy of their downtowns.”).

203. See J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 5 (2001) (arguing that suburbanization

maintaining an identity with particular spatial histories and configurations of property ownership or lack of ownership.²⁰⁴ Therefore, economic development, which is often predicated on attracting middle-class and affluent individuals by building or providing residential, commercial, and retail amenities that satisfy their consumption tastes, is in fact a battle to create a new identity for the city.

Thus, battles in the suburban context over land use related to a notion of identity in the background of the struggle to retain the right to develop. For example, fee simple absolute bestows the ultimate in legal rights and protections against the encroachment of outsiders—people, the economy, and government. This property right helps to formulate and reflect one's identity. One's identity comes with an associated level of agency—that is, the ability to exercise free will with regard to decisions and actions. Therefore, identity and agency are two components of property—what one expects to receive by owning property. Both concepts are constitutive of one another as well as a means of achieving the other. Property ownership is ultimately intended to endow individuals with a certain amount of agency to exercise the “sticks” in the bundle of property rights—the right to use and enjoy, transfer, exclude; the right to be immune from expropriation or damage, the right to devise, and so on. Therefore, property doctrine conceives of denial of property rights as a denial of individual agency. Although this is recognized implicitly, it is important for understanding that regulatory takings doctrine requires an adequate consideration of these different dimensions of property ownership to create consistent doctrines to handle property ownership and residency across varying geographies.

The fundamental ordering principle of regulatory takings doctrine is that sometimes regulation just “goes too far.”²⁰⁵ This statement, made at the dawn of the judicial willingness to acknowledge and provide a remedy for the impacts of regulation on property owner agency, captures the essence of regulatory takings doctrine. The jurisprudence associated with the doctrine is a complex, highly contextual attempt to limit governmental regulation through an ad hoc fact-based process, from which is distilled the refuge that property ownership provides to citizens. Justice Holmes's famous statement reflects both an increasing sophistication in conceptualizing property rights and an evolution in thinking about such rights against the government's prerogative to protect the general welfare. The statement represents a shift from willful blindness of the impacts on citizens to an attempt to mediate between government and citizen. It turns on judicial gut-felt principles of fundamental fairness couched in the language of property rights.

Regulatory takings doctrine represents a slow evolution in the idea of

displaces social conflicts between citizens based on race and class into social conflicts between political institutions).

204. It is not hard to picture geography and come up with an identity for the area—an economic class that will be associated with a particular racial identity. Although race does not always track class, more often than not, it does. See generally Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006).

205. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

acknowledging different impacts of the government on citizens. If a citizen can point to a significant-enough impairment of a property that decreases the economic value of the property enough to be considered harmful, then it will be considered a taking. In one historical sense, this tracks a similar evolution in eminent domain law. At one time in some jurisdictions, the government merely took property and rarely, if ever, paid compensation.²⁰⁶ This was upheld by the courts in part because of a judicial unwillingness to acknowledge the impacts on property owners for fear of interrupting the governmental project. It was also rationalized under the rubric of just compensation, which was considered a matter of opinion. This willful blindness gradually ended and eminent domain law and the regulatory takings concept evolved in tandem. First, eminent domain law acknowledged different kinds of actual seizures that require compensation. This led to acknowledging physical occupations directly connected to government activity that severely harmed landowners under the rationale of inverse condemnation. For example, flooding²⁰⁷ and blasting condemnation were recognized as unintentional indirect exercises of eminent domain accomplished through an affirmative government act. This idea was extended to include planes flying overhead as a significant-enough taking tantamount to physical occupation.²⁰⁸ At this point, regulatory takings concepts and eminent domain law diverged. Eminent domain doctrine remained steady for nearly fifty years with the Supreme Court adopting a deferential attitude towards the local government's exercise of eminent domain power. In contrast, regulatory takings doctrine reflects a less generous attitude towards the local government exercise of police power to manage the ill effects of development.

B. Is There a Right to Development? Tracing the Court's Response to the Claim of the Right to Development

The recent evolution in regulatory takings doctrine is difficult to characterize because each Supreme Court decision has seemed to signal a new direction. However, some general contextual observations are relevant. First, the suburbs rose and were created partly in response to the negatives of the city. Suburbs were a refuge from the city's crowded conditions and a sanctuary from the large bureaucracies controlled by ethnic immigrants and mob bosses. They were created in a quest for local control, for exclusion, and for the right to escape from all of the city's disadvantages. This quest to escape from disadvantage is an

206. See generally Arthur McEvoy, *Markets and Ethics in U.S. Property Law*, in WHO OWNS AMERICA?: SOCIAL CONFLICT OVER PROPERTY RIGHTS 94 (Harvey M. Jacobs ed., 1998) (brief historical description of early eminent domain law).

207. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1871) (extreme form of physical intrusion is always a taking such as when a dam floods neighboring property).

208. *United States v. Causby*, 328 U.S. 256, 267 (1946) (regular flights overhead by military aircraft held a taking); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (navigational servitude on pond housing private marina that involved actual physical invasion held a regulatory taking).

important dimension of the geographical context of regulatory takings decisions. Many regulatory takings cases reflect heightened privatized sensibilities about property rights, privilege, and affluence: the suburbs are designed for the affluent, who are usually able to buy their way out of urban disadvantages, social disorder, and redistribution imperatives from the heterogeneous society.

Second, the regulatory takings cases reflect a struggle over whether development is a stick in the bundle of property rights. The underlying common claim has tended to center around a property owner's quest to develop his or her property. The regulatory takings cases illustrate a background debate in property law about whether the bundle of property rights includes "the right to develop."

Some commentators are unequivocal in their conviction that there is a right to develop. In *Penn Central Transportation Co. v. City of New York*,²⁰⁹ the notion of a right to develop was rejected in favor of the concept of regulatory takings as protecting only "investment-backed" expectations of such magnitude that they outweighed the reasonableness of public regulation.²¹⁰ Assertions of a right to development are implicit in most of the major Supreme Court regulatory takings decisions. Regulatory takings claims assert that the right to develop is an inviolable stick in the bundle of property rights. Regulatory takings doctrine has shown an indirect solicitousness of this desire to develop, which is consistent with a common law tradition that the right to develop is highly prized in American law.²¹¹

Notwithstanding the acceptance of most, if not all, principles of English common law into the property doctrine of the United States, most states rejected English notions that did not fit with the new and developing character of the country.²¹² In *Prah v. Maretti*,²¹³ the Wisconsin Supreme Court explained that

209. 438 U.S. 104 (1978).

210. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233-34 (1967) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 104); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (opining that the Court's "'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property"); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (using the term "reasonable investment backed expectations"); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5-6 (1987) (questioning *Penn Central*'s omission of the estoppel or vested rights doctrine as a natural limit to the extent of valid investment-backed expectations. Without these existing doctrinal limits, "the expectations taking factor introduces a landowner tilt to taking theory that did not exist before").

211. McEvoy, *supra* note 206, at 94 ("The law of property in the United States contains a profound bias toward developmental uses and against such nonmarket values as the health and welfare of communities that live on the land or, indeed, the ecological well-being of the land itself.").

212. See, e.g., *Dillman v. Hoffman*, 38 Wis. 559, 574 (1875) ("In new states like this, the uses of land and of structures on land are more variable with the growth of population and business, than in England or the older states; and it might tend to impede sale and improvement of real property,

the common law rejection of a right to sunlight reflected the fact that the nineteenth and twentieth centuries were a period of growth when change was expected:²¹⁴

As the city grows, large grounds appurtenant to residences must be cut up to supply more residences The cistern, the outhouse, the cesspool, and the private drain must disappear in deference to the public waterworks and sewer; the terrace and the garden, to the need for more complete occupancy Strict limitation [on the recognition of easements of light and air over adjacent premises is] in accord with the popular conception upon which real estate has been and is daily being conveyed in Wisconsin and to be essential to easy and rapid development at least of our municipalities.²¹⁵

Direct restraints on alienation have also been disfavored by the courts for development reasons:

Another evil growing out of a restraint is its effect to discourage improvements when it is imposed upon an interest in land. A landowner will be reluctant to make improvements upon land that he cannot sell during the period of restraint, which may be a long term of years, or even his whole life. In many instances, therefore, the restraint deters the owner of land from obtaining the maximum enjoyment of it; it may also retard the development of a particular section of the community If a substantial portion of our land were subject to restraints upon alienation, the resultant effect upon social and economic life would be serious.²¹⁶

Laws designed to restrict development merely to preserve open land, natural resources or wildlife are a significant departure from, if not a repudiation of, the orientation of American property law.²¹⁷ A good portion of regulatory takings

if old uses of soil or buildings should be too easily placed beyond the power of owners by easements implied by conveyances in their chains of title.”); *see also* Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (allowing a hotel tower to block the pool and beach of neighboring hotel, rejecting an easement for light and air on the rationale that the English doctrine of ancient lights was rejected in the United States).

213. 321 N.W.2d 182 (Wis. 1982).

214. *See, e.g., id.* at 236.

215. *See id.* at 189 (quoting *Miller v. Hoeschler*, 105 N.W. 790, 791 (Wis. 1905)); *see also* *Depner v. U.S. Nat'l Bank*, 232 N.W. 851, 852 (Wis. 1930). The nuisance cases further illustrate the law's common pronouncements on development; the way in which the doctrine has been defined and applied has encouraged unimpeded development. *See Hadacheck v. Sebastian*, 239 U.S. 394, 404 (1915); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

216. *White v. White*, 251 A.2d 470, 473-74 (N.J. Super. Ct. Ch. Div. 1969) (quoting 6 AMERICAN LAW OF PROPERTY § 26.3, at 413-14).

217. *McEvoy*, *supra* note 206, at 101-02. (Early “traditional common-law restrictions on

doctrine represents an attempt to maintain consistency with the past or traditional presumptions in favor of development.²¹⁸ The claim that the government has no right to bother someone on his or her property only works with the implicit rural assumption that what one does on private land does not affect others. As the nation has developed, it has become more difficult for a property owner to argue that what one does on his or her own property does not affect others in terms of open land availability or unique types of property. Therefore, the presumption towards development is no longer as universally beneficial or a matter of life and death it once was. Similarly, the claim that one can hide on his or her land and do anything one wants is not true. Thus, property is not immune from societal interests.

The third general observation is that the ad hoc, factually based analysis of the competing interests of property owner and government has resulted in a doctrinally complex shifting back-and-forth in case outcomes. Although volumes have been written about the imperfections and contradictions in the rules announced in these cases, anyone who steps back and looks at the cases will see a relatively consistent evolution of regulatory takings reasoning since 1987. That evolution reveals the Supreme Court's emphasis on an additional analytical construct focusing on whether an aspect or dimension of property rights has been impaired.²¹⁹ This conceptual severance approach is further divided in two. The first is the categorical rule, under which a particular impact on a property owner is always a taking. The second imposes an intermediate heightened scrutiny standard in situations where the Court perceives inequality of bargaining power.²²⁰ In other words, the most predictable factor in the varied outcomes²²¹ seems to be the way in which the takings question is framed from the property owner's perspective or from the government's perspective. The resulting takings inquiry therefore emphasizes one side's interest and minimizes the other. In *Armstrong v. United States*,²²² Justice Brown offered the classic rationale for equating certain exercises of governmental regulatory power with the eminent domain power: the purpose of the notion of takings is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and

property ownership for centuries had limited the uses to which individual owners could put their property . . . so as to preserve the stability of the traditional agrarian economy over the long run . . . In the early nineteenth century, many of these traditional restrictions fell away as American courts overturned these 'anti-developmental' property rules and replaced them with market-oriented, pro-development doctrines so as to encourage what the legal historian J. Willard Hurst (1956) called the 'release of entrepreneurial energy.'").

218. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1005 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

219. See, e.g., *Lucas*, 505 U.S. at 1019.

220. See, e.g., *Dolan*, 512 U.S. at 374; *Nollan*, 483 U.S. at 825.

221. See generally John Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases*, 1 HOFSTRA PROP. L.J. 39 (1988).

222. 364 U.S. 40 (1960).

justice, should be borne by the public as a whole.”²²³

Eminent domain involves the claim of taking the right to keep one’s property. This is not merely a compensation issue, but also a takings issue. Regulatory takings doctrine evaluates the right to use one’s property and the extent of the right to the highest and best use of land and to create new economic value from land. The Court’s intention has been to protect the ability of property owners to, in effect, resist governmental decisionmaking in two ways. First, this is accomplished by providing additional protection against arbitrary decisionmaking and affirming well-considered planning that is neither arbitrary nor capricious where there is average reciprocity of advantage. The second way is by ensuring that particular owners have not been singled-out for arbitrary treatment. The way in which the *Penn Central* Court conducted its ad hoc fact-based analysis of the claim is quite instructive. It illustrates the different dimensions of the inquiry into when government regulation has gone too far and property rights have been impaired.

C. *Regulatory Takings Analysis of the Political Process Through a Government Lens*

The aspect of the takings claim considered most salient is the economic impact of the regulation. According to the Court, a diminution in value has to be substantial in order to distinguish it from the ubiquitous economic impact attendant with most government land regulation. In other words, mere diminution in value, standing alone, cannot establish a taking.²²⁴ Instead, diminution in value must be combined with “something else,” to amount to a taking. That “something else” could be, for example, being singled out for discriminatory treatment.²²⁵ In *Penn Central*, because the challenged landmark law was part of a comprehensive plan of land use regulation,²²⁶ it could not involve a singling out or “few are burdened” problem.²²⁷

The pure property rights approach to taking would be to conceive of the

223. *See id.* at 49; *see also* Michelman, *supra* note 210, at 1216-17 (discussing being subject to the control of political majorities as a compensable occasion).

224. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

225. Singling out touches on the Equal Protection dimension of takings analysis. *See Nollan*, 483 U.S. at 835 n.4.

226. *Penn Cent. Transp. Co.*, 438 U.S. at 132 (“[L]andmark laws are *not* like discriminatory, or ‘reverse spot,’ zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.”) (emphasis added). The opinion’s reference to discrimination through reverse-spot zoning suggests that diminution in value arguments must be accompanied by an arbitrary unjustified decision or in other words, diminution in value must present a substantive due process problem. Otherwise, diminution in value standing alone with a regulation with a *substantial relationship to a legitimate government purpose that’s part of a comprehensive set of regulations* will not constitute a taking.

227. *Id.* at 133; *Hadacheck v. Sebastian*, 239 U.S. 394, 409 (1915); *Miller v. Hoeschler*, 105 N.W. 790, 792 (Wis. 1905). Disparate severity of impact is not enough to establish singling out.

taken property as the entirely distinct property right, in the form of Penn Central's air rights and the owner's expectations to have use of those property rights for economic gain. The Court rejected this "conceptual severance" claim that 100% of the air rights had been taken, articulating instead a "parcel as a whole" rule:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole²²⁸

Takings doctrine, however, indirectly acknowledges certain property expectations as a cognizable loss of a stick in the bundle of property rights. First, a claim of deprivation of a discrete property interest can escape the unacceptability of being a conceptual severance claim when there are distinct investment-backed expectations.²²⁹ Second, the Court acknowledged property expectations when it supported the landmarks law by reasoning that the plaintiffs were not harmed because the regulation did not interfere with the present uses; they could continue to use the property as they were and earn a reasonable return on their investment. According to the Court, this case was not even as sympathetic as other cases in which the governmental acts interfered with the present uses of the properties, and yet no taking was found.²³⁰ Because the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel,²³¹ then the claim must be rejected. Of course, this reasoning ignores that Penn Central argued for a right to develop, a right to create new value out of its property.

Also instructive of the takings principles important to the ad hoc analysis is the imperfect, transferable development rights program, offered in the landmarks law as some sort of offset or compensation for Penn Central.²³² This reasoning seems contradictory, particularly since the opinion rejected the argument that any

228. 438 U.S. at 130-31.

229. The reference to those expectations actually was mentioned in an attempt to distinguish *Pennsylvania Coal v. Mahon*'s acceptance of a conceptual severance claim by characterizing that decision as being about "distinct investment-backed expectations" and by implication, not about conceptual severance. *Id.* at 127 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (*Mahon* is "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'")).

230. 438 U.S. at 136 ("Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal [A]ppellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions.").

231. *Id.*

232. *Id.* at 137.

regulatory takings had occurred because diminution in value standing alone was not enough of a basis for a takings claim. However, this prong of the opinion actually relates more to the reasonableness of the program—that government had sought to be somewhat accommodating and attempted to ameliorate, albeit imperfectly, the impact of the regulation. Although not required to do so in order to pass muster under a takings analysis, it bolstered the planning that went into crafting the regulatory program—it had tried to be fair. In other words, where the regulation is substantially related to the promotion of the general welfare²³³ and the present uses are not impaired, and a claim of negative economic impact stands alone without substantive due process violations, there is no taking. Primary expectations or investment-backed expectations are not impaired.²³⁴

The overall lesson of *Penn Central* with respect to development disagreements is to defer to the government's exercise of police power. The decision announced a rule that was intended to definitively signal that takings analysis was to be deferential to exercises of governmental regulatory power if certain conditions existed to ensure that the decision was not arbitrary, and exercises of regulatory power are presumed to contain no substantive due process violations where the challenged regulation was part of a well-considered plan. This government-focused regulatory takings decision thus shows a presumption of the validity of government regulation. Nevertheless, the no-takings calculus also pays attention to attempts to be fair as part of the reasonableness calculation. Concrete and demonstrable attempts to be fair by addressing legitimate property expectations are part of the calculation of the reasonableness of a redevelopment scheme.

D. Regulatory Takings and Development Disagreements from the Property-Owner's Perspective—Conceptual Severance Revisited

The flip side of the government-focused regulatory takings analysis is the property rights-based analysis and a receptiveness to conceptual severance—focusing on whether an aspect or dimension of property rights has been impaired.²³⁵ The conceptual severance approach is further divided into two approaches. The first is the categorical approach under which a particular impact on a property owner is always a taking. The second is to impose an intermediate, heightened scrutiny standard in situations where the Court perceives inequality of bargaining power.²³⁶

233. *Id.* at 127, 138.

234. The Court later deviated from this government-focused deferential, anti-conceptual severance, severe impact combined with arbitrary government decisionmaking take on regulatory takings in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), which resorted to a categorical rule based on a conceptual severance claim of physical occupation. This claim was then not acknowledged to be a conceptual severance claim, but viewed as a physical occupation claim. *Id.* at 427.

235. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

236. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*,

The cases illustrate that strong property owner protections are not easily reconcilable with deference to government prerogatives or government judgments. For example, the opinion in *Kaiser v. Aetna*,²³⁷ though contradictory and more of an illustration of results-oriented jurisprudence, is instructive of the relevant property rights interests when considering takings claims from the property owner's perspective. These include the right to exclude, property owners expectations, and detrimental reliance. Of these, the right to exclude and the owner's substantial financial investment were the predominant concerns.²³⁸ Any precedent for deference to government was eliminated by the government's supposed complicity in the owner's investment. Granting a dredging permit, which was an implied consent to the investment.²³⁹ *Kaiser's* overall lesson is that government complicity in creating or allowing an investment equitably estops the government from retreating from supporting that investment. In the redevelopment and gentrification context, this suggests that the individuals driven out were those encouraged to invest in the city by the City. Because they held the city together a protectible property interest in remaining in the community, seeing that investment and commitment come to fruition, or continuing to enjoy that investment should be acknowledged.

1. *Conceptual Severance and Investment Backed Expectations from the Property Owner's Perspective.*—Notwithstanding *Penn Central's* rejection of conceptual severance, the Court in *Lucas v. South Carolina Coastal Commission*²⁴⁰ looked at the matter from the property owner's perspective. The Court regarded the loss of even a strand in the bundle of property rights as very important.²⁴¹ In particular, the right to decide to retain ownership is as fundamental to property ownership as any other right.²⁴² The property owner was prevented from developing two small parcels of land with attractive use value and lucrative development potential as residential beachfront property.²⁴³ The case squarely confronted the question of what to do about the competing goals of development and wanting to maximize financial investment for profit and the

483 U.S. 825 (1987).

237. 444 U.S. 164 (1979).

238. *Id.* at 174-75.

239. Though oriented to the interests of the property owner, the *Kaiser* majority opinion was consistent with *Penn Central*, that there was no real balancing of the competing interests. No deference could eliminate the problem that, in the majority's view, a compensable property interest had been impaired. This is consistent with both the *Loretto* line of cases which are called physical takings, as well as part of *Penn Central* by its emphasis on the economic impact; interference with investment-backed expectations, and the character of the government regulation.

240. *Lucas*, 505 U.S. at 1003.

241. *Id.* at 1027.

242. *Id.* at 1028-29.

243. In keeping with the view that our vision of property's value and the most important stick in the bundle being the right to exclude, in the early nineteenth century, the beach was referred to as a wasteland; its aesthetic use value was not fully appreciated by anyone at all. See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

goal of environmental preservation. Though situated in the hardened framework of property rights analysis, the underlying question was, what does fairness dictate?

Lucas's inability to exploit the economic potential of the land by developing his parcel was equated to the "essential right to exclude stick" in the bundle of property rights. Thus, the Court found a balancing approach to the takings question inappropriate because the severe impact on the property owner trumped the governmental interest.²⁴⁴ Deference to governmental regulation "d[id] not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."²⁴⁵ Instead, categorical treatment was necessary. Although it took much logical work to supportably reach this conclusion,²⁴⁶ the result was a categorical rule for takings where there was elimination of value. It is difficult to imagine, however, what regulatory circumstance would result in a hundred percent elimination of property value.²⁴⁷

As in all regulatory takings cases, the real issue not addressed in *Lucas* is the development disagreement. The whole doctrine of regulatory takings has been raised around the question of whether the government can impose regulatory harm on a property owner. Yet, the question is impossible to resolve sensibly because the issue is framed in competing versions of the doctrine.²⁴⁸ Once the issue goes past physical appropriation, any takings analysis runs into the overwhelming power and interest in governance contained in police power. Property owners are supposed to protect their interests through the democratic process. By declaring that certain property rights always trump government regulation that is otherwise not corrupt or arbitrary or capricious,²⁴⁹ regulatory takings analysis in effect acknowledges the shortcomings of the local political process. The Court in *Lucas* used property law to give property owners an "out" from disagreements over development, thus, in effect, creating a "right to development." Using property law to mediate with government on behalf of property owners in this manner specifically fails to acknowledge the subjective, gut-based, substantive decision made about what are fair property owner expectations and what are fair, or unfair, government actions.²⁵⁰

244. Interestingly, *Lucas* is really a temporary takings case. The Beachfront Management Act was amended to allow for special permits in 1990, two years after the complained of 1988 amendments, yet the Court proceeded to decide the case because Lucas would be denied a remedy for the two years during which he had been denied the ability to build. Thus, there was temporal conceptual severance in this case. *Lucas*, 505 U.S. at 1012.

245. *Id.* at 1017.

246. *Id.* at 1022-23, 1025 n.12, 1027, 1031.

247. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22 (2002) (discussing the rareness of 100% elimination of value).

248. See, e.g., *Lucas*, 505 U.S. at 1003; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

249. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 754 n.13 (1999).

250. Even more so, beyond this lack of acknowledgment, there has been a decision to protect

Instead, the *Lucas* Court responded to the development versus preservation dilemma by fashioning an unworkable categorical rule that total elimination of value was a per se taking unless justified by common law understandings from the nineteenth century. This is a significant example of a masked exercise of substantive due process. The decision attempted to structure legal doctrine as a bulwark against any justification for modern governmental decisionmaking that might retard land development. The decision therefore embraced a right to development and acknowledged it as part of the expectation of land ownership. The increasing economic value of land, not for its productive features, such as agriculture, but for its use features as a place of residence or commerce, raises the question, what happens if land is no longer available under government regulation for the desired use? In some ways, the Court's approach is not without precedent and makes perverse sense. As discussed above, the common law of this country has traditionally promoted the free use and development of land.²⁵¹ Today, it seems that the community's expectation of land has evolved such that an expected right to development—regardless of whether it is in fact a right—has been granted increasing recognition by the Supreme Court. Recognizing community standards for this evolving economic expectation certainly has implications for the urban side of eminent domain law. In particular, would a categorical rule be called for in certain exigent circumstances when there is a political process failure in the eminent domain context?

2. *Inequality of Bargaining Power and Political Process Failure in the Context of Development: Heightened Scrutiny and Expectation.*—The *Nollan v. California Coastal Commission*²⁵² and *Dolan v. City of Tigard*²⁵³ decisions are regulatory takings cases that deal directly with development disputes between property owners seeking to expand the development of their properties and the difficulty of negotiating with government. In both cases, the right to cross someone's land in return for the right to develop was subjected to heightened scrutiny and held to a strict means-ends standard of fairness and appropriateness. In both cases, the Court intervened and elevated the individual's right to be free

economically beneficial uses; while this sounds hard and fast, it is an arbitrary selection to the benefit of the property owner. This is seemingly consistent with the eminent domain reliance on fair market value to compensate owners even when there is significant personal loss, except that concept is to the benefit of the government. See Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 123 (1995).

251. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (no taking when prohibited activity could be performed elsewhere). But see *Lucas*, 505 U.S. at 1059 (Blackmun, J., dissenting) (“[S]tate courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped . . . [T]he power of the legislature to take unimproved land without proper compensation was [also] sanctioned by ‘ancient rights and principles.’”) (emphasis added) (quoting *Lindsay v. Comm’rs*, 2 S.C.L. 38, 57 (S.C. Ct. App. 1796))) (emphasis added).

252. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

253. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

from the Government's strong-arming in negotiations to a constitutionally protected property right. Both *Nollan* and *Dolan* were analyzed from the property owner's perspective with no balancing of the competing interests.

The Nollans's desire to enlarge a tiny, dilapidated, single-story bungalow along the California coast into a two-story, three-bedroom house with a two-car garage was restricted by California's strict regulation of coastal development.²⁵⁴ The grant of the Nollans' application for a coastal development permit was conditioned upon their provision of "lateral access to the public beaches in the form of an easement across their property."²⁵⁵ They claimed that this condition constituted a taking of their property,²⁵⁶ and the Court was receptive to their claim.²⁵⁷ The Commission's requirement of an easement as a condition to receiving the coastal permit meant that the substance of the permit requirement compromised the right to exclude.²⁵⁸ Also, the manner of acquiring the easement violated the Fourteenth Amendment by using an improper unilateral form of bargaining.²⁵⁹

The *Nollan* opinion seems to have utilized a substantive due process analysis whereby the Court's consideration of the existence of a taking was necessarily informed by a disagreement with the nature of the underlying regulation.²⁶⁰ The opinion begins with the observation: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"²⁶¹ "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out and out plan of extortion.'"²⁶² Consistent with the "substantially advances" prong of the *Agins v. Tiburon* test²⁶³ (now repudiated in *Lingle v. Chevron*²⁶⁴), the Court announced an "essential nexus" standard for such

254. *Nollan*, 483 U.S. at 827-29.

255. *Id.* at 829. "The Commission . . . had similarly conditioned 43 out of 60 coastal development permits along the same tract of land." *Id.*

256. *Id.*

257. *Id.* at 836.

258. *See id.* at 831-32.

259. *Id.* at 832.

260. *See id.* at 838-39.

261. *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 529 (2005)). The difference in the formulation of the *Agins* standard is striking. In *Lucas*, the Court used an "or" formulation which supported the conclusion that diminution in value standing alone was enough for a regulatory takings. In this case, the "and" standard is conveniently supportive of the means-end test formulated by the Court.

262. *Id.* at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)); *see also* *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (further characterizing the permit condition as "gimmickry").

263. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

264. 544 U.S. 528 (2005).

conditions and found that this condition failed the test.²⁶⁵

Nollan appears to be primarily about the Supreme Court reacting protectively to an inequality of bargaining power between local government and citizens who wish to develop. The Court sought to weigh in on behalf of the property owner.²⁶⁶ This is colorfully illustrated by the majority opinion's use of terms like "extortion"²⁶⁷ and "leveraging of the police power."²⁶⁸ To extort is defined as "to obtain from a person by force, intimidation or undue or illegal power."²⁶⁹ The particular impact on the property owner, of being required to convey a property interest like an easement as the condition for obtaining a permit to develop, was deemed to present the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."²⁷⁰ Under the articulated standard in the case, the propriety of this decision could only be reached by the Court's eschewing the deferential standard of the "reasonable relationship test" and adopting a higher standard such as "substantially advances a legitimate governmental interest."²⁷¹ Thus, the proposed bargain, impacting the right to exclude imposed by the government, was, at best, suggestive of a substantive due process violation.

Requiring the government to provide a precise connection between the increased impact of the proposed development and the permit condition makes sense only in the abstract, removed from the actual context of governing. In reality, the government is responsible for meeting multiple, often conflicting public needs. Coastal protection perfectly reflects the tradeoffs between many public needs.²⁷² Because government has to accommodate many interests, and has accommodated many interests in the past, the opinion does not explain why government cannot juggle these many accommodations by offsetting the management of one while obtaining a concession on the other.²⁷³ In other words, if visual access is decreased, why can the government not compensate for that decrease, or balance out that decrease by securing another concession that would be otherwise beneficial to the public? Although beach access in no way compensates for the loss of view, it shifts the public rights and public benefits in

265. *Nollan*, 483 U.S. at 837.

266. *See id.* at 839.

267. *Id.* at 837.

268. *Id.* at 837 n.5.

269. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 440 (1991).

270. *Nollan*, 483 U.S. at 841.

271. *But see* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532 (2005) (explicitly repudiating the "substantially advances" heightened standard of review in regulatory takings cases). The opinion states that the Court considers *Nollan* good law as an unconstitutional condition requiring a person to give up a constitutional right in return for some government action. *Id.* at 546; *see* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 730-31 (2007) (arguing that "exactions decisions sit uneasily alongside . . . *Lingle* to make sense of its long, confusing line of takings decisions").

272. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009-10 (1992).

273. *See Nolan*, 483 U.S. at 825.

a way that is beneficial to the public.²⁷⁴ Narrowly viewing the issue as a loss of a strand from the bundle of rights—the right to exclude—ignores this very compelling context and allows property owners to narrowly conceive of and enforce their property rights, regardless of public concessions that secure and enhance these property rights.²⁷⁵

Nollan involved homeowners who were opposed to sharing the beach with the public and a Court that agreed they were right to object. The Court disagreed that the government should be able to do anything short of a forced purchase to impair that expectation of immunity from public access across their property, even where economic injury does not exist.²⁷⁶ The Court considered it unconscionable for government to use its regulatory might to allow strangers to occupy one's land. How did an easement get equated with quartering troops on one's land if the impact was minimal at best? The Court's willingness to acknowledge impairment of the landowners' agency to exercise a right is apparent. Also evident was a sense that fundamental fairness was violated because the government always has more muscle to win. Thus, *Nollan* stands for the principle that there is a fundamental right not to be strong-armed by government because of the unequal bargaining power between citizen and government.²⁷⁷ This is a neo-classic concern with the inequality of bargaining

274. Justice Brennan's dissenting opinion points out the obvious reciprocity of advantage view of this case:

[The] development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value Furthermore, appellants . . . benefit from the . . . permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.

Id. at 856 (Brennan, J., dissenting).

275. J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002); Lee Ann Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004); see also Carlson & Pollak, *supra* note 16, at 115-16 (study indicating "*Nollan* and *Dolan* penalize ad hoc decisions to impose exactions . . . but may actually encourage the imposition of higher impact fees").

276. See *Nollan*, 483 U.S. at 857 (Brennan, J., dissenting) ("Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. '[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.'") (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

277. The view that it is the impact on a few for the benefit of the many fails to explain the outcome. It seems instead there is a sense of entitlement to have a beach house consistent with

power. The Court is in effect saying that imposing standards to make the exercise of unequal power fair is important. These standards are usually read into contracts between individuals, where one is poor, uneducated, and unaware of his or her rights, or is desperate enough to waive fundamental rights and make deals that are detrimental to his or her interests. Here, the citizens are affluent, educated, and aware of their rights, and are arguably making a deal that benefits their interests. Nevertheless, this bargaining inequality is inimical in the Court's view and demands the Court's intervention.²⁷⁸

In *Lingle v. Chevron*,²⁷⁹ the Court used a challenge to a gas service station regulation capping rents, which did not involve a regulatory taking, to clarify regulatory takings doctrine and the appropriateness of substantive due process reasoning. The Court repudiated any suggestion that substantive due process analysis belonged in regulatory takings doctrine.²⁸⁰ The Court attributed the source of the doctrinal confusion to be *Agins v. City of Tiburon*'s²⁸¹ "substantially advances" standard which used an impermissibly heightened means-ends test.²⁸² Though *Nollan* (and *Dolan*) used the substantially advances test, the Court identified a new source of precedent that supported those decisions. According to the Court, these cases could survive decoupling from *Agins*'s heightened substantive standard by viewing them as drawing their rationale from another line of doctrine known as "unconstitutional conditions."²⁸³ This ad hoc line of cases prohibits government from conditioning receipt of some benefit upon the surrender of a constitutional right. Curiously, the constitutional rights protected in prior "unconstitutional conditions" cases involved civil rights like freedom of speech and religion. *Nollan* and *Dolan* represent the first set of cases to equate property rights with fundamental civil rights.²⁸⁴

Notwithstanding *Lingle*'s attempt to inoculate *Nollan* and *Dolan* from the heightened means/end test, the *Nollan* essential nexus test, and the rough proportionality standard, the opinions are clear in expressing a judicial disagreement with the underlying reasons advanced for the exaction or condition posed by the legislation. Thus, both *Nollan* and *Dolan* provide a detailed and difficult analytic regime for municipalities to provide a factual basis for their

affluent expectations of privacy and exclusion of the public.

278. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703-04 (1999) (upholding a \$1.45 million jury verdict for landowners where they sought to develop an ocean-front parcel, but were impeded by arbitrary delay and denial by local government).

279. 544 U.S. 528 (2005).

280. *Id.* at 545-48.

281. 447 U.S. 255 (1980), *abrogated by Lingle*, 544 U.S. 528.

282. See Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle and Public Discourse About Private Property*, 34 *FORDHAM URB. L.J.* 613, 637 (2007).

283. *Lingle*, 544 U.S. at 547-48.

284. See ROBERT B. STANDLER, *DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN THE USA* 3 (2005), available at <http://www.rbs2.com/duc.pdf> (summarizing the cases and articles about unconstitutional conditions).

legislative decisions.²⁸⁵ The Court's opinion provides a detailed analytic regime for municipalities to prove the validity of their legislative decision.²⁸⁶

Dolan is a more sober and balanced opinion than *Nollan*. It is written from both the government's and the property owner's perspectives because the case had to venture where *Nollan* did not. The *Dolan* Court acknowledged the right of the government to regulate and define the connection between the condition and the government regulation, thus defining how far this exaction regulation could go.²⁸⁷ The question turned upon whether the supporting "findings [were] constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."²⁸⁸ After surveying various state standards, the Court stated it was selecting the intermediate standard requiring a reasonable relationship, which it translated to mean a standard of "rough proportionality." "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."²⁸⁹

The Court invalidated the conditions for failing the first prong of essential nexus²⁹⁰ and failure of rough proportionality.²⁹¹ Though this opinion was arguably more balanced than *Nollan*, it suffers from the same substantive defect. The Court was influenced by gut-felt fundamental fairness principles in fashioning the unprecedented "rough proportionality" standard. Moreover, the Court refused to "cut local government any slack," instead holding them to an exacting and expensive standard of justifying government actions with very precise studies individually tailored to the impacts of individual property owners. Although such studies can only come at great cost, it is possible to find a consultant to conduct studies to support one's actions. This requirement of "more paper" signals that the Supreme Court was willing to intervene to equalize the bargaining power between government and citizen by raising the costs of justifying what were likely well-founded exercises of regulatory power in

285. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). But see generally D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005).

286. *Dolan*, 512 U.S. at 391, 398 (rough proportionality and individualized determination); *Nollan*, 483 U.S. at 837 ("essential nexus").

287. *Dolan*, 512 U.S. at 388 ("[W]hether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development." (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987))).

288. *Id.* at 389.

289. *Id.* at 391.

290. *Id.* at 394-95 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.").

291. *Id.* at 395-96 ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.").

furtherance of the public welfare. The *Dolan* decision imposed an impediment that could slow the government down and limit the scope of what it could accomplish through exactions. Where a property owner substantially disagrees with the exercise of a governmental regulatory power, *Dolan* tipped the balance of power between government and citizen in favor of the citizen as property owner.

The most striking aspect of the implicit role of unequal bargaining power in the Supreme Court's property rights jurisprudence is that the property owners do not fit the profile of people who are typically protected under the inequality of bargaining power rationale. The owners are neither uneducated, disabled, elderly, or impoverished. They are, in fact, the opposite—owners of lucrative pieces of real estate who are able to reach the Supreme Court to vindicate rights based on principle rather than on irreparable or severe harm.²⁹² What about these property owners triggers the inequality of bargaining power scrutiny? It can only be the view of the government as an overly powerful entity that poses threats to property owners beyond the ability of any individual property owner to address their complaints or concerns through the political process. Because the opinions are silent about the need or ability of property owners to seek redress through the political process, the Court then may be led to believe such processes to be unavailing or too costly.²⁹³

In effect, the *Nollan* and *Dolan* cases evince a concern that property owners who wish to develop have been singled out. While this singling-out is not of any great economic detriment, it raises Fourteenth Amendment Due Process concerns by interfering with the property owner's expectation to exploit the economic potential of his or her property. The categorical rules signal that it is arbitrary and capricious or unreasonable for the government to thwart the desire or expectations of a property owner who seeks to develop, merely because the owner is fortunate enough to own beachfront or waterfront property, as in *Dolan*. Thus, the regulatory takings cases represent the landed privileged who should essentially be immune from disadvantage because they own desirable land. The privileges and benefits that attend to this form of property ownership are particularly troublesome to the Court.²⁹⁴ Apparently privileged property ownership should be more protected from government interference or from the needs of the public.

*E. Implications of Attempting to Split the Difference in Perspective
Between Government and Property Owner: Reigning in the
Categorical but Maintaining the Warning to Government*

In *Tahoe-Sierra*, the Court returned to the government-focused analysis of regulatory takings cases.²⁹⁵ The decision reflects the Court's struggle to mediate

292. See *id.* at 379; *Nollan*, 483 U.S. at 828-30.

293. See generally *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

294. See, e.g., *Nollan*, 483 U.S. at 831-32.

295. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

a balance between the two approaches in simultaneous retreat from, but acceptance of, the more property-based approach to regulatory takings. The retreat results from recognition that the natural trajectory of the stronger property-based takings decisions like *Lucas*²⁹⁶ and *First English*²⁹⁷ presented administrability problems. The Court's refusal to overrule any property-based precedent signals that governments should take note and be careful in land use regulation.

Tahoe-Sierra reflects the battle between *Penn Central*'s balancing approach to takings and the combination of *First English* and *Lucas* gut-satisfying, categorical, conceptual severance approach to takings.²⁹⁸ The *Tahoe-Sierra* property owners were apparently powerless to affect a very complex and technical planning and political process. In some ways, their only leverage was to impose a financial penalty on the government for failing to devise a timely plan.²⁹⁹ Thus, even if they did not have the political clout to move the process along, this leverage provided at least a more consequential voice because it exacted a financial penalty on the government for delaying the owners' personally beneficial use (building on their lots and enjoying the lake for themselves).³⁰⁰ Similarly, they could have financially benefited from developing their lot and enjoying the lucrative advantage of improving the value of the parcel and creating an economic opportunity for themselves.

The majority opinion explained that a temporary moratorium is neither a taking nor not-a-taking. The answer would depend on the particular circumstances of the case.³⁰¹ The opinion then corralled the categorical rules from *Lucas*.³⁰² Physical occupation cases are not precedent for evaluating a claim of a regulatory taking.³⁰³ The Court seemed to imply that regulatory takings do not therefore represent as great an affront to individual property rights. While a categorical rule might be appropriate for a physical occupation, in the regulatory taking context, the categorical rule will only apply when there has

296. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

297. *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987).

298. *See Tahoe-Sierra*, 535 U.S. 302.

299. *Id.* at 310-12.

300. *See id.* Interestingly, this was one of the arguments advanced but never granted any cognizance by the Court.

301. *Id.* at 331.

302. The examples offered by the majority opinion illustrate that the physical part of takings law does not make much sense because what is physical? Is the physicality the source of the purported harm or is it the magnitude of the impact of the regulation that is the source of the harm? *See id.* at 330 (explaining the *Lucas* rule based on "extraordinary circumstances") (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992)).

303. *Id.* at 322. Physical takings are still at the takings end of the continuum and categorically require compensation. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Id.* (citation omitted)

been permanent obliteration of the value of a fee simple estate. This must be an obliteration of 100% of the value of the parcel; a mere 95% would not be enough of a diminution to justify categorical treatment.³⁰⁴ Instead, the operative default rule for determining when a regulatory taking has occurred requires a fact-specific inquiry.³⁰⁵ The matter turns on whether the issue presents a question of whether there is an interest in protecting individual property owners from bearing public burdens, “which in all fairness and justice should be borne by the public as a whole.”³⁰⁶ This statement brings us full circle to the purpose of the taking inquiry—determining when it is unfair as a matter of property rights to single out certain property owners from an Equal Protection perspective guided by a substantive Due Process assessment of fairness. The anti-subordination rationale is clear; it looks to the impact of the deprivation as compared to others and assesses its fairness.

Similar to *Lingle*'s determination to rescue *Nollan* and *Dolan*, perhaps the weakest aspect of *Tahoe-Sierra* is that it affirms the validity of the *Lucas* Court's finding a permanent deprivation of all value when, in reality, Mr. Lucas did not suffer a permanent deprivation of all value.³⁰⁷ The regulation was not permanent. Without permanence, the permanent deprivation of value did not actually occur. Yet the *Lucas* case precipitated a categorical rule stating that there was a permanent deprivation.³⁰⁸ The petitioners' arguments in *Tahoe-Sierra* for similar categorical treatment make sense as long as *Lucas* is retained as good law. Why did *Tahoe-Sierra* decline to follow the absolutist language and reasoning of *Lucas* and *First English*? The primary reason is that the rules announced, notwithstanding their emotionally gratifying categorical protections from the excess of government interference with private property rights, were unadministrable. Regulatory takings cases are really about fairness rather than any bedrock coherent right of property. Within the constraining rubric of property rights, the taking principle admits of no limit—government regulation necessarily diminishes the free use of property. While the reciprocity of advantage rationale in *Penn Central* is appealing to some, to others that approach to protection of property rights is too diffuse and indirect. On the other hand, the absolutist vision of regulatory takings admits of no limits, and any attempt to signal limits results in rules that are difficult, if not impossible, to apply consistently.

One might conclude that the *Penn Central* standard re-invoked in *Tahoe-Sierra* means that local governments need not worry about regulatory takings claims. Instead, notwithstanding *Lucas*'s banishment to the margins of regulatory takings jurisprudence, it is significant that *Lucas* was not overruled.³⁰⁹

304. See *id.* at 330 (citing *Lucas*, 505 U.S. at 1019 n.8 (noting that the categorical rule does not apply to diminutions in value of 95%)).

305. *Id.* at 332.

306. *Id.* at 321 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

307. See *Lucas*, 505 U.S. at 1020 (discussing limits on Mr. Lucas's land).

308. See *id.* at 1017.

309. The same can be said of *Nollan*'s and *Dolan*'s similar, yet less convincing, banishment

The Court backed away from the unadministrability of categorical rules, but the cumulative effect of the past twenty years of regulatory takings jurisprudence cautions local governments. The decision still serves the practical purpose of signaling the theoretical limit to governmental action. It warns government that regulations should not be permanent when they can be made temporary. While this suggests that the government need only put an expiration or sunset date on a regulation to remove it from *Lucas*'s purview, it still lays out a theoretical limit that puts government on notice of situations in which governmental justifications will be irrelevant, average reciprocity of advantage arguments will be unavailing, and the impact on the property owners will trump the public interest.

Also, the categorical rules still lurk, perhaps not to be reinstated in their full form, but still threatening enough to be partially resurrected if the local government's actions shock the conscience of the property-rights-minded judge.³¹⁰ Therefore, local governments are on notice to proceed carefully in managing suburban development and should consider compensating in advance, whenever possible, or providing a quid pro quo to forestall the next unpredictable set of takings arguments.

III. CRITICAL ANTI-SUBORDINATION LESSONS FOR THE WELL-CONSIDERED PLAN: TOWARD A MEANINGFUL STANDARD

Acknowledging the underlying reality of regulatory takings, anti-subordination concerns serve two purposes. First, they focus attention on harms that may not be directly cognizable under traditional Equal Protection or Due Process doctrine. Second, and more importantly, they allow a move past the strictures of property rights language typically used to challenge exercises of eminent domain. This expands the eminent domain discussion to acknowledge the complexity of interests at play in disagreements over development. The context for redevelopment suggests that globalization is driving the subordination inherent in redevelopment as well as simultaneously strengthening the need for local economic development.³¹¹ As Margit Mayer observes, cities are trying to remake themselves to keep up with international competition; the higher up they are in the chain of global cities, the more imperative it is that they provide advanced services and the more intense the restructuring of urban space.³¹² "Local political actors everywhere emphasize economic innovation, seek

to the margins of regulatory takings jurisprudence as mere land exactions that wreak unconstitutional conditions. The banishment cannot negate the implied recognition of inequality of bargaining power as a motivation for this doctrinal detour. Moreover, it fully supports the Court's loud signal to local governments about a categorical definition of unfairness that they should take care to avoid. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994).

310. *See, e.g., Lucas*, 505 U.S. at 1014-16 (discussing the categorical rule of compensating for regulatory takings).

311. *See supra* Part I.A-B.

312. Margit Mayer, *Urban Social Movements in an Era of Globalisation*, in *URBAN MOVEMENTS IN A GLOBALISING WORLD* 141, 143 (Pierre Hamel et al. eds., 2000).

entrepreneurial culture, and implement labour market flexibility in order to counter the crisis of Fordism and to meet intensified international competition. Other policy areas are increasingly subordinated to these economic priorities.”³¹³

Thus, the globalization imperative is real. But this imperative also structures redevelopment in a way that certain types of people who live in certain types of places are left without a voice and without recourse in redevelopment. This expanded vision of regulatory takings doctrine here invites us to see those individuals, subordinated by redevelopment, as having a property-like interest in not being denied their effective voice in the fate of their homes, small businesses, and desire to live in their community. Regulatory takings doctrine illustrates that the Court is willing to respond to a perceived subordination in the suburban context. The language of property rights is individualistic, categorical, inadequate to the task of community, and ambiguous about the rights and interests harmed by redevelopment. A new conception of the harms and interests at stake is necessary to acknowledge how community interests should be considered. Once we drop the blinders obscuring property rights, it will be possible to see how regulatory takings anti-subordination underpinnings recognize that property is constitutive of identity and that local governments are attempting to create a new identity for their cities.³¹⁴ The categorical approach of declaring some takings invalid because they involve “economic development” while retaining the blight exception would still leave the very same neighborhoods subordinated by redevelopment disproportionately affected. These neighborhoods would continue to be burdened by a privatized public decision-making process that is properly characterized as a political process failure.

Land use and eminent domain doctrine invests local government with the power to determine or resolve the outcomes of these conflicting interests by investing government with the sole power or title of community. This sovereign view of government looks only to the formal powers of government and the content of these laws, but barely looks to the execution of these powers.³¹⁵ One approach might be to suggest local community institutions that would better represent community interests in the redevelopment decision-making process. The difficulty is that there is no unitary community; instead, there are cleavages in interests that lead to conflict when brought together.³¹⁶ Forming new local institutions is not the answer because this only results in more fragmentation. According to Crowley, “[P]luralists tend to overlook the structural imbalance in organizational capacity between elites who set agendas and other stakeholders

313. *Id.* (citing POST FORDISM: A READER (Ash Amin ed., 1994)).

314. See generally Elizabeth Blackmar, *Appropriating “the Commons”: The Tragedy of Property Rights Discourse*, in THE POLITICS OF PUBLIC SPACE 49 (Setha Low & Neil Smith eds., 2006).

315. *But see* Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (per curiam) (permitting a plaintiff “class of one” to bring an equal protection claim against the village in regards to an easement the City demanded from the plaintiff).

316. CROWLEY, *supra* note 183, at 18-19.

wishing to challenge those agendas.”³¹⁷ Thus, Crowley recommends “[c]ontentious collective action [a]s an alternative mode of participation for areas lacking regular access to government officials.”³¹⁸ It is helpful, then, to focus on two structural variables: 1) the “structure of political opportunities”³¹⁹ (the threat of disruption), and 2) “mobilizing structures.”³²⁰ These suggestions refer to both material, as well as social and structural, resources. Crowley also notes that “[n]ational and local federated organizations have been decisive in the outcomes of contention because of their independence from” what has been referred to as the pro-growth coalition.³²¹ “Community organizations that depend heavily upon urban growth coalitions for operating resources are not likely to take the lead in challenging unwanted growth and redevelopment agendas because they might risk alienating their supporters and losing access to valuable resources.”³²²

Another key issue facing community institutions is the problem of informality in the redevelopment process. So many aspects of transactions are negotiated behind closed doors and are based on interpersonal relations. As Patience Crowder observes, the need for informality in deal-making is in potentially irresolvable tension with the public’s need for transparency and information.³²³ This reinforces the reality that there is a political process failure in redevelopment. The lesson of critical race theory is that the Court must gently steer this political process by sending a substantive message of fairness and reasonableness countering subordination in redevelopment. This is accomplished by establishing substantive standards of inclusion that cities must adhere to in legislating and executing redevelopment projects.

In certain respects, the Court began to make this “political” intervention in eminent domain doctrine by conditioning the validity of the exercise of eminent domain on a well-considered development plan. With the well-considered plan offered as safeguard, it only makes sense to define standards for what is “well-considered.” This is similar to the results of the means-ends connections

317. *Id.* at 12.

318. *Id.* at 17.

319. *Id.* at 20 (quoting Peter K. Eisenger, *The Conditions of Protest Behavior in American Cities*, 67 AM. POL. SCI. REV. 11-25 (1973)).

320. See Doug McAdam et al., *Introduction*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 2-4* (McAdam et al. eds., 1996).

321. CROWLEY, *supra* note 183, at 22.

322. *Id.* Crowley elaborates on “mobilizing structures” noting,

The phrase “mobilizing structures” refers to resources that challengers can access and convert into vehicles for mounting and sustaining collective actions. Examples . . . include money, communications media, and meeting places, but also social structures such as family units, friendship networks, voluntary groups, work units, businesses, professional organizations, and government agencies that can facilitate resource mobilization.

Id.

323. See Crowder, *supra* note 182, at 658 (“Informality in redevelopment clouds transparency and prevents the achievement of [the] public policy [of getting information to the public].”).

required in *Nollan* and *Dolan*; the connection between a regulation's means and ends must now be justified with expert studies to provide factual support for the regulation. In the context of the "well-considered" plan, however, instead of using the means-ends match standard, the Court should actually focus on defining the "ends." Here, "well-considered" should be backed by bringing to the table the stakeholders and visionaries of urban living. We are facing enormous decisions about the future of our cities, and cities are unduly influenced by upscale private structural pressures of globalization, narrow-mindedness, copycat approaches, and investment pressures for quick returns. Ratifying plans created under this globalized context as "well-considered" without defining standards results in a political choice that favors the status quo. It also ratifies the worst of what is seriously wrong with current local economic development practices.

The difficult issue is that local governments seem to need no prompting to seek out informal relations with business elites. Thus, how can we systematically encourage local government to reach out to others in the community? What legal carrots-and-sticks can one provide to make it in their interest to seek out community? A starting point is to define substantive anti-subordination standards for the "well-considered" plan. The plans underlying eminent domain can reflect gut-felt fairness principles of inclusion and responsiveness to community perspectives. More specifically, this will require participatory institutional structures that provide training and resources to enable citizen participation in plan formulation.³²⁴

This lengthy discussion on regulatory takings suggests an argument for a heightened standard of review. But actually, as much I would like to develop such an argument, I have not seen, nor have I been able to come up with, a principled basis upon which to draw the line between proper and improper purposes. Proponents of a closer means-ends match usually throw a doctrinal wrench in the development process that may not be proportionate to the particular harm or impact of the redevelopment.³²⁵ The convergence of critical race theory and regulatory takings anti-subordination concerns looks to the context of a government decision and acknowledges the defects in the political process that hamper individual property owners or residents of certain types of

324. See generally JAMES L. CREIGHTON, *THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT* (2005). Creighton notes, "This book shows how to design and conduct a public participation from beginning to end." *Id.* at 5. For additional resources on citizen participation, see HENRY SANOFF, *COMMUNITY PARTICIPATION METHODS IN DESIGN AND PLANNING* 6 (2000) (describing Nos Quedamos involvement of impoverished residents in urban renewal at Melrose Commons); Emil E. Malizia, *Structuring Urban Redevelopment Projects: Moving Participants up the Learning Curve*, 25 J. REAL EST. RES. 463, 473-76 (2003) (providing ideas for attempting to communicate lenders' expectations to community).

325. See, e.g., Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 969 (2003) (arguing for a reasonable necessity standard of review for the public-use clause to demand factual justification for land transfers and require the government to justify how it chooses to acquire property).

communities from protecting their interests.³²⁶ What regulatory takings doctrine provides is the example of specific expressions of judicial guidance on a roadmap of concerns that local government must consider. Critical race theory provides an explicit, unapologetic acknowledgment that these disagreements about development are political. Thus, perhaps the fix to what is so unsatisfying about the *Kelo* majority opinion comes from focusing on the politics of the redevelopment process and providing a hopefully ameliorating antidote to the current state of political process failure.³²⁷ As John Hart Ely observes:

The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure, first, that everyone’s interests will be . . . represented . . . at the point of substantive decision, and second, that the . . . application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.³²⁸

326. The divergences are also potentially, although not necessarily, quite clear. For example, it might seem that regulatory takings is solely concerned with property owners. Justice Thomas’s unique expression of concern for the systematic disadvantages to certain communities, for instance, arises because he can see disadvantage (racial and class) as it affects the property owner. *See supra* notes 90-94 and accompanying text. Yet, other types of residents, namely tenants, can also be included under the regulatory takings umbrella because strong protections of property rights necessarily involve “conceptual severance.” *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (discussing conceptual severance). Tenants are the owners of strands of property rights. Thus, tenants should be protectible under the regulatory takings property rights umbrella as well.

327. For other approaches to the role of the political process in redevelopment, see Brief for the American Planning Association et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166929, at *25-26 (“Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain.”); Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 1 (2005) (proposing “eminent domain be constitutionally impermissible when it is both used to take land destined for private hands and disproportionately hurts the poor or politically disadvantaged”); Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 426-27 (2007) (discussing participation in the political process and negotiation with politicians as the appropriate response to *Kelo*); *see generally* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) (advocating a citizenship model of property rights to create a fairness-based framework for analyzing regulatory takings).

328. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 100-01 (1980).

That political process is currently subsumed within the carefully considered redevelopment plan that *Kelo* says will ratify an exercise of eminent domain.³²⁹ As currently formulated, the Court affirmed a top-down planning process developed by the state.³³⁰ The reality is that within the field of urban planning, a plan has legitimacy not because of authority granted from the state and the convening or several meetings to merely inform residents.³³¹ For example, an international organization, the International Association for Public Participation (IAP2), has developed core values for public participation.³³²

The planning process involves certain inclusive procedural components. It is supposed to directly involve residents in articulating the needs for the area and envisioning future development, thereby receiving an opportunity to ensure that their needs are met by the resulting development.³³³ Concededly, this last point means both a procedural component to planning as well as a substantive

329. See *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

330. See generally *id.*

331. See generally Nicole Stelle Garnett, *Planning as Public Use*, 34 *ECOLOGICAL Q.* 443, 461-68 (2007) (arguing that land use planning is inadequate to limit pretextual takings or lead to more successful projects).

332. The IAP2 website states:

As an international leader in public participation, IAP2 has developed the "IAP2 Core Values for Public Participation" for use in the development and implementation of public participation processes. These core values were developed over a two-year period with broad international input to identify those aspects of public participation which cross national, cultural, and religious boundaries. The purpose of these core values is to help make better decisions which reflect the interests and concerns of potentially affected people and entities.

International Association for Public Participation, *IAP2 Core Values*, <http://www.iap2.org/displaycommon.cfm?an=4> (last visited Mar. 12, 2009).

333. See *id.* "IAP2 Core Values for the Practice of Public Participation:

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision-makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

component; it suggests that a plan involving the residents that is carefully considered will yield a substantive result that ensures that their needs are considered in the plan. Thus, it is not possible to avoid some normative view of the proper substance of a redevelopment plan when competing needs are so great. On the other hand, the appeal of strengthening the carefully considered plan is limited—the disadvantages to existing residents in the political process are still present. Yet, Professor Ann Carlson and Daniel Pollak's study has shown in the regulatory takings setting that the doctrine, even with its pro-government deferential standard, has impacted the way that local government officials make land use decisions.³³⁴ Similarly, it would probably take very little for the Supreme Court to impact eminent domain redevelopment decisionmaking by clarifying the standard for what a carefully considered plan by rights should look like.

The state of the planning literature today suggests that planning both is and is not the answer.³³⁵ The planning field is in flux. It has promised too much, and its practitioners and theorists are never politically placed to have a very significant role in actual planning. They have been either brought in as procedural facilitators or advocates, but not as part of imagining what will actually take place. Thus, just as the problem of redevelopment is complex, the solutions are equally complex. The role of the Supreme Court is to remedy the political process failure and not place a finger on the balance of a political process that is unduly weighted in favor of the types of redevelopment we see.³³⁶

We cannot assume that in this arena, however, the States are making the best decisions. The disaster of urban renewal proves as much. In addition, the Supreme Court cannot substitute its judgment for what is a good project. To the extent, however, that the Court conditions eminent domain on a carefully considered plan—the plan that is truly well-considered in fact, not just theory—can be easily infused with some broad but substantive teeth. Specifically, the Court could require that the plan endorse actual planning and inclusion in the process and the substance of the outcome. This point echoes the *Kelo* dissents trying to use public ownership or public access as the measure; instead, I focus on process because it allows greater flexibility and more directly acknowledges its political nature. The lessons of regulatory takings doctrine are that the Supreme Court should intervene in defining standards where there is political process failure due to unequal bargaining power. Conceptual severance

334. See Carlson & Pollak, *supra* note 16, at 116-17.

335. See Robert Fishman, *The Fifth Migration*, 71 J. AM. PLAN. ASS'N, 357, 358 (2005) (arguing that the United States is in the early stages of another great "migration" of population identified by Lewis Mumford in a classic 1925 article as largely shaping America).

336. Peter Marcuse, *The Politics of Public Space; The Right to the City: Social Justice and the Fight for Public Space*, 73.1 J. AM. PLANNING ASS'N 125 (2007) (reviewing both *THE POLITICS OF PUBLIC SPACE* (Setha Low & Neil Smith eds., 2006) and *DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* (2003)) ("Public space can be used to limit democracy as well as further it. And Harvey links the use of public space to discussions of the right to the city.").

allows the cognizance of different types of property owners—residential and commercial, owners and renters.

CONCLUSION

Not all property owners are wealthy and politically powerful. Not all of the poor are without political power or social capital. Nevertheless, it is the case that in the redevelopment context, the nature of the development imperatives, described at length above, work to the exclusion of the existing residents through privatized decision-making processes that ironically are used to justify the “publicness” of the redevelopment plan. The Supreme Court’s decision in *Kelo* is understandable for its reluctance to intervene in legislative decisionmaking about valid and invalid purposes. The decision has the inadvertent effect, however, of placing a hand on the balance of urban redevelopment, to the unacknowledged detriment of residents, property owners, and small business people. In light of the ever-increasing imperatives towards economic development from globalization—with cities viewing their interests as consistently aligned with national developers, corporations, and retailers—the consistent winners and losers in that redevelopment game should not be ignored. We cannot presume that because development is state-sponsored the interests of the public or of the residents of the proposed redevelopment will be appropriately considered. Both regulatory takings and critical race theory provide the language and the logic of anti-subordination provides a way to acknowledge the subordination. The Court has a responsibility to ensure that the eminent domain doctrine encourages a meaningful process and substantive standards that secures the interests of all who are present and subjected to a proposed redevelopment scheme.

