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2006

### Beyond Kelo: Thinking About Urban Development in the 21st Century

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#### Repository Citation

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# BEYOND *KELO*: THINKING ABOUT URBAN DEVELOPMENT IN THE 21ST CENTURY

Wendell E. Pritchett\*

At the beginning of 2005, few people would have predicted that the year's most widely debated Supreme Court case would be one involving the obscure topic of eminent domain. However, that is what happened on June 30, 2005 when the Court issued its ruling in *Kelo v. City of New London*.<sup>1</sup> That decision, which approved the city's condemnation of the property of Suzette Kelo and her neighbors, set off a firestorm of debate that continues today.<sup>2</sup> Across the country pundits, politicians, and the general public complained that the decision was not only wrong, but immoral. The case became a national *cause célèbre*, discussed even by Jay Leno and David Letterman.<sup>3</sup> The decision resulted in the introduction of several bills in Congress to control the use of eminent domain, and state legislatures across the country are considering legislation to do the same.

Though disputes between property owners and government are a constant fact of our political economy, it is rare that one case has focused so much attention on these matters. In the past, eminent domain was of little interest to policymakers or academics, and the general public would have been hard-pressed to define the term just months ago; following the *Kelo* decision that has changed. *Kelo* involved the Court's interpretation of the "takings clause" of the Fifth Amendment to the United States Constitution.<sup>4</sup> This section states, "Nor shall private property be taken for public use without just

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

2. *Id.* at 2657.

3. Chip Mellor, *Americans Say "Hands Off My Home,"* 14 LIBERTY & L. (Aug. 2005), [http://ij.org/publications/liberty/2005/14\\_4\\_05\\_f.html](http://ij.org/publications/liberty/2005/14_4_05_f.html).

4. *See generally Kelo*, 125 S. Ct. 2655.

compensation.”<sup>5</sup> Although lawyers and legal scholars over the past three decades have devoted much attention to the question of what constitutes a governmental taking, the “public use” section of the clause has received much less attention. Over the past century, only a few cases have examined the limitations imposed on the government by the framers’ insertion of the words “for public use.”<sup>6</sup> During the past year scholars, policymakers, and the public have argued that the Court’s *Kelo* opinion erred by making that section meaningless. Many claim allowing the City of New London to condemn *Kelo*’s property and turn it over to other private parties in the name of economic development is unconstitutional, bad policy, and morally wrong.<sup>7</sup>

*Kelo* sparked a nationwide legal debate over how and when the government should be allowed to condemn private property. Focusing attention on the legality and appropriateness of urban development programs, the decision and the subsequent backlash present us with an opportunity to assess the current state of urban policy. *Kelo* is troubling to people for many reasons; one reason is that it exposes the difficult problem of who benefits and who loses when governments use eminent domain in the often contentious local battles over development in cities and suburbs. As the 21st century begins, American urban areas stand at a crossroads, a place where land use decisions are going to shape the nation’s future for decades. Across the country communities are debating the question, “what kind of development do we want?” The *Kelo* decision, by focusing

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5. U.S. CONST. amend. V.

6. *Id.* The literature of regulatory takings is extremely voluminous. See generally *Hands Off Our Homes, Property Rights and Eminent Domain*, ECONOMIST, Aug. 18, 2005; WILLIAM FISCHER, TAKINGS, FEDERALISM AND REGULATORY NORMS: LAW, ECONOMICS AND POLITICS (1995); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165 (1967); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

7. See, e.g., Paul Bass & Douglas W. Rae, *Eminent Disdain*, N.Y. TIMES, July 9, 2005, at A13; Nicole Gelinas, *They’re Taking Away Your Property for What?*, CITY J., Autumn 2005; Greg Gilbert, *Public-Use Ruling Has Political Backlash: Loss in Court Gives Law’s Opponents Help in Legislatures*, MILWAUKEE J.-SENTINEL, Aug. 7, 2005.

public attention on this important issue, presents an opportunity to engage in a broader public discussion.

The goals of this Article include the following: to develop a framework for understanding the deeper implications of *Kelo* for the future of urban development; to examine the underlying causes of the current conflict over urban land use, discussing in particular the inability of our current planning institutions to handle such disputes; and to propose some approaches that might begin to solve, or at least moderate, the conflicts over urban development. Additionally, this Article will describe some of the questions (empirical and normative) that must be answered in order to promote urban development policies that will receive broad public support, and it will lay out an agenda for attacking these issues.

This Article will first briefly describe the *Kelo* case, the questions surrounding the dispute, and the public response. Next, the Article examines some of the deeper causes for the backlash against *Kelo*, focusing in particular on what the case says about current urban policies. The Article will examine several current development disputes, many that involve eminent domain, in American suburbs and cities to understand the roots of the public concern. Put simply, the major reason *Kelo* garnered such attention is a large number of current development disputes involve the condemnation of residences or businesses in middle-class suburban areas. The lack of empirical data makes definitive statements on this issue difficult, but anecdotal evidence reveals that eminent domain is targeting a different group of people.

After examining the similarities and differences between suburban and big city development disputes, this Article assesses why current governmental institutions are failing to respond to public concerns, focusing in particular on the problematic role of urban planning in American society. One of the major reasons for complaints over development is the marginal role that urban planners and planning commissions currently play in discussions regarding urban policy. The public disregard for planning has complicated roots that are crucial to an understanding of the current debates in urban development policy. Much of the current conflict over urban

development stems from the inability of planners and planning commissions to mediate these disputes in the public interest.

Finally, the Article will focus on three types of institutions that may provide frameworks for mediating these conflicts. In particular, the Article will briefly assess the role of business improvement districts, community development corporations, and urban universities in urban planning and development. All three have productively participated in urban planning and development without some of the obstacles that face government planning institutions. At the same time, there are significant limitations to using these nongovernmental institutions to solve questions that are inherently public in nature.

The uproar over the *Kelo* decision questioning the Court's definition of the Public Use Clause presents an opportunity to engage in a conversation about how to define and promote the public interest. Although some policymakers (including Justice Clarence Thomas) would like to see the clause defined narrowly, most policymakers involved in the debate to define public use are seeking ways to balance the interests of property owners and those of the broader society. Striking this balance requires a careful assessment of the purposes of government and private institutions, particularly those at the local levels where most of the decisions that affect our everyday lives occur.

## I. EMINENT DOMAIN AND PRIVATE PROPERTY

Although no case has received the public attention of Suzette Kelo and her neighbors, disputes over eminent domain are as old as the nation. During the 1800s, governments frequently granted private corporations, including railroads, utilities, and mills, the right to condemn private property. Courts almost always approved such condemnations in the name of the public interest. During the late 1800s and early 1900s, even as some commentators became increasingly concerned about government and private uses of eminent domain, courts approved a wide variety of schemes that used

condemnation to build bridges, toll roads, and new residential communities.<sup>8</sup>

The use of eminent domain for urban development expanded dramatically during the 1930s, beginning first with efforts to clear slums and build public works and public housing. States and cities, supported by the Federal Government, condemned thousands of units of housing and commercial facilities with the goal of creating planned cities that would provide housing for the poor and middle-class. The Housing Act of 1949 created the Urban Renewal Program (“the Program”) and provided funding to cities to undertake large redevelopment projects to modernize cities and increase their ability to compete with suburbs.<sup>9</sup> Under the Act, cities across the country condemned and demolished tenement buildings and other blighted or substandard properties and turned over the property to private developers who built middle-income housing and cultural facilities.<sup>10</sup>

The use of eminent domain for urban renewal resulted in a substantial amount of public protest. Residents in the areas designated for redevelopment frequently did not want to leave their neighborhoods, and many knew they would be unable to secure decent housing elsewhere. The Program was also subject to legal attack, particularly from owners who argued their properties were not blighted and complained it was unconstitutional for the government to take their property and turn it over to others. In 1954, one such dispute made it all the way to the United States Supreme Court. In the case of *Berman v. Parker*, the plaintiffs attacked the District of Columbia Land Redevelopment Agency’s plan to condemn their property and turn it over to a developer, who would create a residential and commercial district in the southwest section of Washington, D.C.<sup>11</sup> A unanimous Court held that such condemnations did not violate the Public Use Clause. Writing for the

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8. Wendell Pritchett, *The ‘Public Menace’ of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 9-10 (2003).

9. 42 U.S.C. § 1450 (1949).

10. See MARK GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965 151-56 (1975) (discussing the Housing Act of 1949); NATHANIEL KEITH, POLITICS AND THE HOUSING CRISIS SINCE 1930 88-101 (Universe 1975).

11. *Berman v. Parker*, 348 U.S. 26, 28-29 (1954).

Court, Justice Douglas concluded that the “public purpose” of eliminating blight and creating “healthy” communities was justification for the District’s plans, even if they involved taking one person’s property and transferring it to another.<sup>12</sup>

The Supreme Court’s decision in *Berman* provided judicial legitimization for urban renewal efforts. During the two decades that followed, American cities undertook massive redevelopment projects that demolished thousands of units of housing, and dislocated more than one million people, the majority of whom were minorities.<sup>13</sup> Across the nation, governments designated inner-city neighborhoods as blighted, condemned properties, and turned over land to private parties. Notwithstanding claims of eminent domain abuse today, eminent domain directly impacted many more people in the post-war period than it does today.<sup>14</sup>

While urban development and redevelopment projects increased following the *Berman* decision, it was a Pyrrhic victory for the advocates of urban renewal. Less than a decade after the ruling, the approach was under attack in cities across the country. During the 1960s, activists, policy makers, and politicians attacked the basic philosophy of urban renewal and the idea of urban planning. They argued that urban renewal had not revitalized cities, despite the investment of billions of dollars, and complained that the dislocation caused by the Program had resulted in the creation of more slums. Critics from across the political spectrum declared the Urban Renewal Program a prime example of government overreaching. Liberals argued it exacerbated racial discrimination, while conservatives argued it wasted government resources and interfered with the private market.<sup>15</sup> As a result of these critiques, the Program

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12. *Id.* at 33.

13. Pritchett, *supra* note 8, at 47.

14. Gilbert, *supra* note 7, stated the following:

Yale law Professor Robert Ellickson, an expert on property rights, said one irony of the fallout over the *Kelo* decision is that eminent domain has not been abused in recent years on the scale it was in the urban renewal days of the 1960s and 1970s, when there was less political outcry over the uprooting of far more people.

15. See MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* 8-9 (1964); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 5 (1961); Pritchett, *supra* note 8, at 47-48.

was greatly curtailed. These concerns about racial discrimination, waste of government resources, and interference with private markets have all reappeared in the attacks on the *Kelo* decision and eminent domain in general.

By the early 1970s, after a decade of urban riots and decline, little faith remained in the dream of erasing the antiquated city and building a completely modern replacement. Condemnation, however, remained important to officials in pursuit of tax revenues and economic growth. For the past three decades, state and local governments undertook a wide variety of initiatives that transferred condemned property to private entities in the name of housing, commercial, or industrial development. Instead of promising to rebuild cities, promoters generally focused on more practical aspects of redevelopment such as job creation or increasing the tax base.<sup>16</sup>

Before the recent dispute in New London, Connecticut, the most famous eminent domain case of the last two decades involved the construction of a General Motors plant in the Poletown section of Detroit.<sup>17</sup> Most parties agreed the working-class area was not blighted, but in an effort to keep General Motors in the city, city officials agreed to clear the neighborhood for redevelopment.<sup>18</sup> This required the acquisition of over 1,000 buildings and the dislocation of more than 4,200 people.<sup>19</sup> Both government and labor leaders desperately wanted the project to succeed, which they hoped would stem the flood of job loss in the city.<sup>20</sup> As part of the effort to prevent General Motors from building elsewhere, the city spent over \$200 million to acquire and prepare the property, which it sold to the company for \$8 million.<sup>21</sup>

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16. Pritchett, *supra* note 8, at 48.

17. JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN POSTWAR DETROIT 161-66 (1997); William Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, MICH. ST. L. REV. 929, 940-41 (2004); Pritchett, *supra* note 8, at 48-49.

18. Fischel, *supra* note 17.

19. *Id.*

20. *Id.*

21. Pritchett, *supra* note 8, at 48-49.



The residents' fight against condemnation went all the way to the Michigan Supreme Court, which approved the redevelopment plan. Relying on *Berman*, the court declared that it would not restrict the ability of the state or local governments to respond to the economic problems facing the region.<sup>22</sup> If the legislature concluded that government support for this kind of economic growth was important, the court concluded the public use requirement was met.<sup>23</sup> During the 1980s, other courts granted approval to various uses of eminent domain, and the United States Supreme Court reiterated the principles established in *Berman*.<sup>24</sup> In 1984, the Court approved a Hawaiian program condemning land held by a small group of the state's gentry, who owned the overwhelming majority of the land in the state, for the purpose of wider distribution of ownership.<sup>25</sup> Writing for a 7-2 majority, Justice Sandra Day O'Connor ruled that the Court would accept any use of eminent domain that was "rationally related to a conceivable public purpose."<sup>26</sup> In response to that opinion, legal scholar Richard Epstein argued that the Court obliterated the phrase "public use" from the Fifth Amendment.<sup>27</sup>

In the early 1990s, however, legal advocates took an increasing interest in the use, or what they called abuse, of eminent domain. The Institute for Justice, based in Washington, D.C., established the Eminent Domain Law Project to assist clients fighting the condemnation of their properties. The organization has taken on cases across the country, representing clients such as a woman fighting the condemnation of her Atlantic City home for a casino owned by Donald Trump, and a group of African-American farmers battling the efforts of Mississippi to condemn their property for the construction of an automobile plant.<sup>28</sup> In the Atlantic City case, the condemnee

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22. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981).

23. *Id.*

24. *See, e.g., Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

25. *Id.* at 233.

26. *Id.* at 240-41.

27. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 162 (1985).

28. David Herszenhorn, *Widowed Homeowner Foils Trump Bid in Atlantic City*, N.Y. TIMES, July 21, 1998, at B1.

succeeded in convincing the trial judge that the transfer of her property to Trump Casino violated the state's Public Use Clause.<sup>29</sup>

In 2000, opponents of eminent domain found their standard-bearer in a nurse from New London, Connecticut named Suzette Kelo. Kelo refused to sell her home to the New London Development Corporation (NLDC), an authority charged with the revitalization of that once bustling but now declining small city.<sup>30</sup> In 1998, the NLDC announced a plan to turn the Fort Trumbull neighborhood (an area overlooking the Thames River) into a commercial and residential development with the goal of drawing new middle-class residents to the city and supporting the expansion of the Pfizer Corporation's facilities.<sup>31</sup> The plan envisioned acquiring approximately 115 privately-owned properties, re-planning the area to create public areas and new streets, and turning over the remainder for private development.<sup>32</sup> City officials hoped the project would bring new business, residents, and tax revenues.<sup>33</sup>

After the city announced the plan, the overwhelming majority of the affected property owners sold without much complaint, but a small group led by Kelo refused.<sup>34</sup> They garnered the support of the Institute for Justice, which litigated the case to the Connecticut Supreme Court, where the court ruled against the plaintiffs holding that the plan did not violate the Public Use Clause.<sup>35</sup> The plaintiffs then appealed to the U.S. Supreme Court. They argued that the condemnations violated the constitution because the takings were for "private use."<sup>36</sup> Unlike the eminent domain actions in prior cases where elimination of blight or an actual problem was the goal of the development plan, the sole reason for the NLDC's action was that the properties could produce more "economic benefit" if they were put in

29. *Id.*

30. *Kelo v. City of New London*, 125 S. Ct. 2655, 2659-60 (2005).

31. *Id.* at 2659.

32. *Id.*

33. Iver Peterson, *There Goes the Old Neighborhood, to Revitalization*, N.Y. TIMES, Jan. 30, 2005; Patricia Salkin & Lora Lucero, *Community Redevelopment, Public Use, and Eminent Domain*, 37 URB. LAW. 201, 224 (2005).

34. *Kelo*, 125 S. Ct. at 2659-60.

35. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004); Salkin, *supra* note 33, at 226-227.

36. Petition for Writ of Certiorari at 10-11, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

the hands of others. This, plaintiffs argued, was contrary to the public use limitation.<sup>37</sup>

To the surprise of many who thought the law was clearly settled in favor of the city, the Supreme Court granted certiorari on this case. Immediately the dispute became a national issue, drawing reporters from across the country to New London. Twenty-five organizations, as diverse as the NAACP, the Rutherford Institute and the Congress for New Urbanism, filed amicus briefs in support of the plaintiffs. Twelve amicus briefs, including those from the National League of Cities and the American Planning Association, were filed on behalf of the city. Pundits, complaining about the egregious actions of the city in depriving Ms. Kelo of her property, declared the case among the most important heard by the Supreme Court in years.<sup>38</sup>

Ultimately, the U.S. Supreme Court, by a thin 5-4 margin, rejected Susette Kelo's claim and upheld the Connecticut program. Writing for the majority, Justice John Paul Stevens concluded that the condemnation did not violate the Public Use Clause because the city "has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community" and was taking the property pursuant to that plan, not to benefit private parties.<sup>39</sup> Justice Stevens argued that the majority followed a consistent line of opinions, including *Berman* and *Midkiff*, in which the court deferred to legislatures to determine what constitutes a public use.<sup>40</sup>

Justice O'Connor, who had previously written in favor of eminent domain, issued a strident dissent, joined by Justices Rehnquist and Scalia, declaring that every American's property was under threat as a result of the Court's decision.<sup>41</sup> "The specter of condemnation

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37. *Id.*

38. Salkin, *supra* note 33, at 233-34. After the Supreme Court accepted the *Kelo* case, but prior to its decision, the Supreme Court of Michigan took a dramatic step in overruling its own interpretation of the Public Use Clause. In the case *Hatchcock v. Wayne County*, the court declared that the *Poletown* decision was wrong and rejected Detroit's effort to condemn some property for an industrial park, concluding that using eminent domain for economic development violated the state constitution. *Hatchcock*, 684 N.W.2d 765, 786 (Mich. 2004). Many viewed this case as a harbinger for the *Kelo* decision.

39. *Kelo*, 125 S. Ct. at 2665.

40. *Id.*

41. *Id.* at 2671.

hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>42</sup>

The reaction to the decision was swift and loud and brought together an amazingly disparate group of people from across the political spectrum.<sup>43</sup> Among the congressional critics of the decision were then-House Majority Leader Tom DeLay, liberal Democrat Maxine Waters, Chair of the House Judiciary Committee James Sensenbrenner, Jr., and Congressman John Conyers of Detroit.<sup>44</sup> Sensenbrenner called the ruling the “Dred Scott Decision of the 21st century,” while Waters argued that the decision was “the most un-American thing that can be done.”<sup>45</sup> Days after the decision, the House of Representatives voted 365-33 to express “grave disapproval” of the ruling. Both Ralph Nader and Rush Limbaugh criticized the Court’s opinion.<sup>46</sup>

Shortly after the Court issued the *Kelo* decision, several members of Congress introduced legislation in response to the ruling proposing, among other things, to amend the Constitution to specifically bar condemnation in *Kelo*-like cases and to deny federal funding to governments that use eminent domain to transfer property to private parties.<sup>47</sup> A week later, the House amended an appropriations bill to bar funding to cities for housing, transportation, and other programs if they used eminent domain for economic development.<sup>48</sup>

Members of state legislatures across the country introduced bills to limit the use of eminent domain or to study the problem in their

42. *Id.* at 2676 (O’Connor, J., dissenting).

43. David Lightman, *Lawmakers Stand up to Court; Bipartisan Coalition Hopes to Dilute Impact of Eminent Domain Ruling*, HARTFORD COURANT, July 1, 2005, at A1; Kenneth Harney, *Justices’ Ruling on Property Seizure Ignites Revolt*, DETROIT FREE PRESS, July 24, 2005.

44. Lightman, *supra* note 43.

45. *Id.*; Harney, *supra* note 43.

46. Sheryl Gay Stolberg, *Republican Law Makers Fire Back at Judiciary*, N.Y. TIMES, July 1, 2005, at A10.

47. *Hands Off Our Homes, Property Rights and Eminent Domain*, *supra* note 6; Protection of Homes, Small Businesses, and Private Property Act of 2005, S.R. 1313, 109th Cong. (2005) (introduced within a week of the *Kelo* decision); Protect Our Homes Act, H.R. 4088, 109th Cong. (2005).

48. H.R. 4088, 109th Cong. (2005).

states.<sup>49</sup> In Texas and Alabama, legislators held special summer sessions to respond immediately to the public uproar, passing bills that their governors quickly signed.<sup>50</sup> The Governor of Connecticut, who had just taken office during the summer of 2005, imposed a moratorium on the use of eminent domain, put a hold on the New London project, and called the Kelo dispute “the 21st century equivalent of the Boston Tea Party.”<sup>51</sup> Legislators in at least 20 states introduced legislation banning the use of eminent domain for economic development, and ten introduced state constitutional amendments defining the Public Use Clause.<sup>52</sup>

While politicians were responding to the decision, journalists and pundits also devoted increasing attention to the issue. The Institute for Justice and its Castle Coalition affiliate announced its Hands Off My Home campaign, a nationwide effort to fight eminent domain in the state legislatures. “We’ll do whatever it takes to protect every American home, small business, and house of worship from the government and its corporate allies. We urge you to join us in the fight.”<sup>53</sup> Activists went to local and state officials demanding they sign the Hands Off My Home Pledge. By the end of July, eminent domain was the legal topic of the summer, with one poll declaring public opposition to *Kelo* at 89% and another concluding that 90% of the public were against the use of eminent domain in the case.<sup>54</sup>

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49. In the opinion Justice Stevens invited states to pass legislation granting greater protection to property owners. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

50. *Hands Off Our Homes, Property Rights and Eminent Domain*, *supra* note 6.

51. Timothy Egan, *Ruling Sets off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Harney, *supra* note 43.

52. Harney, *supra* note 43; Tresa Boldas, *States Ride Post-‘Kelo’ Wave of Legislation*, NAT’L L. J., Aug. 1, 2005.

53. Castle Coalition, *Hands Off My Home*, <http://www.castlecoalition.org/handsoffmyhome/> (last visited May 5, 2006).

54. Michael Cockery & Ryan Chittum, *Eminent Domain Uproar Imperils Projects*, WALL ST. J., Aug. 3, 2005; *Hands Off Our Homes, Property Rights and Eminent Domain*, *supra* note 6.

## II. EMINENT DOMAIN, URBAN DEVELOPMENT, AND THE PUBLIC INTEREST

What accounts for all of this uproar about a decision that really did little to change existing law? An important aspect of the public concern about eminent domain clearly stems from the crucial role of homeownership in American economic and social life. During the 1800s, although more working-class Americans owned homes than their European counterparts, purchasing a home was difficult. During the early 1900s, public policies brought about a spectacular expansion of this investment for Americans.<sup>55</sup> Since Commerce Secretary Herbert Hoover declared that homeownership makes good, patriotic citizens, government programs have sought to make the purchase of a home achievable for the masses of Americans. Particularly after World War II, with the rise of the FHA, VA, and other similar programs, homeownership grew dramatically.<sup>56</sup> Purchasing a home in a Levittown or other modern community became a crucial aspect of the “American Dream.”<sup>57</sup> Acquisition of one’s own home is viewed as a crucial part of the path to maturity. Despite many changes in urban and land use policy over the decades, policymakers consistently supported homeownership, and the country’s current homeownership rate of almost 70% is among the highest in the world.<sup>58</sup>

At the same time, Americans’ desire to protect their homes has shaped land use policies for decades. American urban historians have constantly pointed to the homeowner as the crucial actor in urban politics, shaping debates over, among other things, racial integration

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55. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 117, 175 (1985).

56. *Id.* at 193-218.

57. MICHELLE MILLER-ADAMS, *OWNING UP: POVERTY, ASSETS, AND THE AMERICAN DREAM* 23 (2002).

58. Nicolas P. Retsinas & Eric S. Belsky, *Examining the Unexamined Goal, in* *LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL* 1-3 (Nicholas P. Retsinas & Eric S. Belsky, eds., 2002).

in neighborhoods and schools, the rise of exclusionary zoning in suburbs, and the continued expansion of suburban America.<sup>59</sup>

Given America's obsession with homeownership, it is hardly surprising that an overwhelming majority of the public is concerned that the government may take the homes of fellow citizens. The fact that these homes were well-maintained and owned by white, middle-class residents would certainly increase public sympathy. Furthermore, the knowledge that this property would be turned over to a large drug manufacturer increased outrage. Property rights advocates have productively exploited these factors to support their efforts to weaken government power over homes.

In making their claims against eminent domain, advocates frequently argued that government abuse of eminent domain is on the rise today. The Institute for Justice published a report documenting 10,000 cases it defined as eminent domain abuse during the 1990s and early 2000s.<sup>60</sup> Whether government use of eminent domain is on the rise is one of many questions that requires empirical research. We know very little about how often eminent domain occurs in this country and even less about how much condemnation has occurred in the past. One of the useful results of the increased attention to condemnation, and the creation of several state commissions to study it, could be greater knowledge about the uses of eminent domain.<sup>61</sup> There is little empirical data on the extent to which eminent domain is used, the impact that condemnation has on individuals and communities, or the outcomes resulting from government seizure of property.

Legislators would be well-advised to pursue more knowledge before acting. Preliminary examinations of current eminent domain debates at the local level help explain the reasons for the rise of public concern about the initiative. A review of eminent domain

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59. See, e.g., THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN DETROIT* (1996); ARNOLD HIRSCH, *MAKING THE SECOND GHETTO: CHICAGO, 1940-1960* (1996).

60. DANA BERLINER, *PUBLIC POWER, PRIVATE GAIN* 2 (2003).

61. The state of Missouri is among several states establishing commissions to study the use of eminent domain. Cathy Kingsley, *Missouri Gov. Blunt Picks Eminent Domain Task Force Members*, ST. CHARLES BUS. REC., Aug. 5, 2005.

disputes in the past year reveals that a large number of these battles are occurring in suburban areas. If this data accurately captures the national trend (and again the empirical evidence has yet to be compiled), there has been a change in the use of condemnation by local governments. Put simply, eminent domain has received more attention over the past year because the people involved in these disputes are middle-class suburban homeowners and small businessmen, particularly those in older, built-out suburbs.<sup>62</sup>

This finding comports with several trends in the “inner-ring” or “first-generation” suburbs. These districts have been subject to increasing attention over the past decade, as many have begun to experience decline, but scholars have yet to systematically define this category.<sup>63</sup> First generation suburbs are a diverse group—while some are deteriorating, many remain vibrant.<sup>64</sup> However, they have several commonalities that are relevant to the disputes over eminent domain. Because they are decades old, most first generation suburbs have no developable land remaining, and others have used open space laws to prevent construction on the undeveloped land. At the same time, many of these suburban communities are facing increasing demands for services from constituents, and some have experienced significant declines in their tax bases as residents move to newer areas.<sup>65</sup> Limited by politics and economics in their ability to raise taxes, local officials, as their counterparts in big cities did decades ago, have increasingly turned to economic development as a means to increase

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62. This conclusion is taken from a review of articles on eminent domain disputes during the period June 1, 2005 to September 30, 2005. This review surveyed articles taken from searches on Lexis, Westlaw, and America’s Newspapers. Out of 50 separate disputes uncovered, 24 were located in suburban areas. This finding is supported by the research of the Castle Coalition, an affiliate of the Institute for Justice. The coalition’s website lists 82 “Current Controversies.” Fifty-two controversies listed on the Castle Coalition website are in suburban or vacation communities. Castle Coalition, *Current Controversies*, [http://www.castlecoalition.org/current\\_controversies/index.html](http://www.castlecoalition.org/current_controversies/index.html) (last visited May 5, 2006).

63. Sugie Lee & Nancy Green Leigh, *The Role of Inner Ring Suburbs in Metropolitan Smart Growth Strategies*, 19 J. PLAN. LITERATURE 330, 337 (2005).

64. WILLIAM HUDNUT, *HALFWAY TO EVERYWHERE: A PORTRAIT OF AMERICA’S FIRST TIER SUBURBS* (Urban Land Inst. 2003); Lee & Leigh, *supra* note 63, at 333, 337.

65. DELAWARE VALLEY REGIONAL PLANNING COMMISSION, *THE FUTURE OF FIRST GENERATION SUBURBS IN THE DELAWARE VALLEY* (1998); HUDNUT, *supra* note 64, at 285-97; Diane Mestrull, et al., *Crisis on Main Street*, PHILA. INQUIRER, Nov. 23, 2003; Peterson, *supra* note 33.



revenues. Eminent domain becomes an important tool in areas where building new structures requires the demolition of older structures, even when that older parcel is still productive.<sup>66</sup>

A brief examination of two typical suburban disputes illuminates the dilemma facing many of these communities. In Ardmore, Pennsylvania, a generally well-to-do first-generation suburb of Philadelphia, local commissioners approved an initiative to redevelop a large section of the town's commercial strip.<sup>67</sup> The plan, introduced in 2004, would require the acquisition and demolition of at least 11 buildings.<sup>68</sup> The town planned to sell the property to a private developer who would build a complex of shops, offices, and residences.<sup>69</sup> Officials proposed the project would create \$160 million of investment in the town and significantly increase Ardmore's property tax revenues.<sup>70</sup> City officials marked several of the structures as blighted and ill-suited to the type of retail stores that would attract the upscale clientele officials desired.<sup>71</sup>

The owners of the mostly profitable businesses that would be demolished refused to sell. When the town announced it would take the properties by condemnation, public protest erupted. "Ardmore needs some revitalization, but it doesn't need to be destroyed."<sup>72</sup> Residents argued that the properties were not blighted but rather historic and consistent with the architecture of the community. Opponents organized a protest march attended by 200 people and hired a group of planning experts to review the proposal.<sup>73</sup> Complaints about the project were so severe that several

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66. See generally Bruce Katz & Robert Puentes, *Extreme Makeover: Nassau*, N.Y. TIMES, Jan. 29, 2006.

67. Diane Mestrull, *Gloves Are Off Over Lower Merion Development*, PHILA. INQUIRER, July 24, 2005.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Matt Blanchard, *Expert's Plan Rejects Ardmore Renewal Plan*, PHILA. INQUIRER, Sept. 25, 2004, at B01.

73. *Id.*

commissioners declined to run for re-election and others were defeated at the polls in 2005.<sup>74</sup>

Residents of the town of Lakewood, Ohio, a suburb of Cleveland, found themselves fighting a city government looking for ways to increase “ratables.”<sup>75</sup> Like Ardmore, Lakewood is a middle-class community, but local officials concerned about blight encroaching from Cleveland hoped to use economic development to stem further decline.<sup>76</sup> In 2003, city officials announced a deal with two developers for the construction of a shopping center and movie complex as well as a deal for the construction of an upscale residential community.<sup>77</sup> The city planned to financially contribute to the acquisition and clearing of the land, and the developers committed to invest \$150 million dollars in the project.<sup>78</sup> The mayor argued that the development was crucial to increase the tax base and stem the outflow of residents to other areas.<sup>79</sup>

However, the project required the demolition of a neighborhood called the West End.<sup>80</sup> Though most of the homes in the area were owner-occupied, Lakewood declared the area blighted.<sup>81</sup> Residents were particularly upset about the designation, which declared that any residence without three bedrooms, an attached two-car garage, and central air conditioning could be considered blighted.<sup>82</sup> Although the majority of the West End residents agreed to sell their properties directly to the developers, a number of homeowners refused to sell and filed for an injunction against the development plan.<sup>83</sup> They argued that the neighborhood was not blighted and that the benefits

74. Cheryl Allison, *LM Loses Another Candidate*, MAIN LINE LIFE, Aug. 22, 2005. The new board is currently re-evaluating the proposal.

75. Blaine Harden, *In Ohio, A Test for Eminent Domain: Rights vs. Renewal at Stake in Case*, WASH. POST, June 22, 2003, at A03.

76. Bert Gall, *Beating Bogus 'Blight' in Lakewood, Ohio*, 13 LIBERTY & L. (Apr. 2004), [http://www.ij.org/publications/liberty/2004/13\\_2\\_04\\_b.html](http://www.ij.org/publications/liberty/2004/13_2_04_b.html).

77. *Id.*; Harden, *supra* note 75.

78. *See* Harden, *supra* note 75.

79. *Id.*

80. Dan Slife, *Redeveloping Lakewood*, <http://www.lkwdpl.org/currentevents/westend/slife.pdf> (last visited May 5, 2006).

81. *See* Gall, *supra* note 76.

82. *Id.*

83. *See* Slife, *supra* note 80, at 9.

of the proposal were speculative. After a year of legal and political battles, the residents of Lakewood voted to stop the project.<sup>84</sup>

The stories of Ardmore and Lakewood are being replicated across the country in older suburbs such as Tempe, Arizona, and Brooklyn Center, Minnesota.<sup>85</sup> In addition, eminent domain has become a major issue in aging vacation communities like Daytona Beach, Florida and Long Branch and Asbury Park, New Jersey.<sup>86</sup> The towns struggling with eminent domain are a diverse group, but they have one thing in common. In each, officials struggle with declining or stagnating tax bases at the same time public demands for services increase. In addition, in each of these cases, government has used eminent domain or proposed to remove businesses and people with long-standing roots in the community and to support dramatic changes in community character. Not surprisingly, opposition to these projects has been significant. In New Jersey, eminent domain was one of the major issues in local elections during the fall 2005 campaign for state legislature and governor.<sup>87</sup>

Eminent domain is playing an increasingly crucial role in inner-ring suburban policy at the same time it continues to serve as a tool for big cities. In the past decade, however, the character of development in many cities has changed. From the 1970s through the mid-1990s only a few cities were attractive to significant investment from real estate entrepreneurs. As a result, most city governments were forced to offer significant financial incentives to promote development policies that would bring increased tax revenues.<sup>88</sup> Athletic stadiums, convention center complexes and entertainment centers received deep subsidies in the hopes of spurring additional

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84. Gall, *supra* note 76; Harden, *supra* note 75; *60 Minutes: Eminent Domain* (CBS television broadcast Sept. 28, 2003).

85. Jon Talton, *Land Seizure Demonstrates Tempe's Predicament*, ARIZ. REPUBLIC, Aug. 18, 2005, at 1D; Curt Brown, *Hmong Businesses Stung by Redevelopment*, STAR TRIB., June 27, 2005, at 1B.

86. Ludmilla Lelis, *Daytona Businesses Must Sell Property*, ORLANDO SENTINEL, Aug. 20, 2005, at A1; Bill Bowmen, *Protestors Rally Against Eminent Domain*, ASBURY PARK PRESS, July 20, 2005, at B1; Robert Tanner, *40 States Re-Examining Eminent Domain*, ASSOCIATED PRESS, Feb. 5, 2006.

87. Monica Yant Kinney, *Redevelopment Land Grab Is Off*, PHILA. INQUIRER, Nov. 20, 2005, at B01; Christine Verno, *Reilly, Doherty Make Run for Assembly Seats*, THE HUB, Nov. 3, 2005.

88. *See generally* ROBERT FITCH, *THE ASSASSINATION OF NEW YORK* (1993).

development, much of which was also subsidized.<sup>89</sup> In addition, during these decades cities were happy to accept any private development proposals without regard for their impact on existing neighborhoods or businesses.<sup>90</sup> Any kind of development was beneficial.

Although local governments still subsidize many development projects, over the past decade many cities have become markets targeted by builders who believe they can make a profit without incentives. As more suburban areas adopted anti-development policies while many cities witnessed population growth for the first time in decades, the market incentives for inner-city construction improved dramatically.

Since cities possess a wealth of vacant or abandoned property, development has often occurred without the need for eminent domain. As it has for decades, however, eminent domain provides cities with an important tool for strategic economic development. As in the suburbs, such initiatives often focus on small businesses. Oakland, California, for example, used eminent domain to clear several businesses on the fringe of the downtown to enable the development of a residential community of 1,200 apartments.<sup>91</sup> St. Louis is considering the condemnation of several businesses to provide land for an upscale commercial and residential community.<sup>92</sup>

Geographically attractive residential communities also continue to draw interest from city officials and developers. Camden, New Jersey adopted a plan that will require the clearance of the Cramer Hill neighborhood and the dislocation of over 1,000 families.<sup>93</sup> The city intends to transfer the property, which is in one of the few densely populated areas remaining in the city, to a private developer who will

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89. BERNARD FRIEDEN & LYNN SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* xi-xii (1989).

90. *Id.*

91. Jim Zomore, *Eminent Domain Ruling Chills Property Owners; Fear of Land Grabs Unites Odd Coalition*, S.F. CHRON., July 18, 2005, at A1.

92. Jake Wagmen, *Dogtown Alderman Fights Recall Bauer May Be Casualty in Battle Over Eminent Domain to Take Property for Development*, ST. LOUIS POST-DISPATCH, Sept. 12, 2005, at B1.

93. Dwight Ott, *Camden Trial to Test Eminent Domain*, PHILA. INQUIRER, Jan. 23, 2006, at B01; Luise Puga, *Housing Project at Stalemate*, COURIER-POST, Aug. 6, 2005, at B3G.

build an upper-middle-class golf community on the Delaware River.<sup>94</sup> Many of the residents, some of whom have lived in their homes for decades, are fighting the condemnation of their homes.<sup>95</sup> However, the project is supported by both the city and state's political leadership, so homeowner success seems unlikely.<sup>96</sup>

In the suburbs, eminent domain plays an important role in almost every redevelopment conflict. In big cities, battles over condemnation are just one variety of a larger dispute over the future course of building. Although local officials are conditioned to reflexively support all types of construction, residents are increasingly questioning the efficacy of certain projects and complaining about their impact on neighborhood fabric. Among the most controversial city development projects have been the construction of "big box" stores.<sup>97</sup> Until the past decade, few big box retailers considered city markets. Recently many large chains, including Walmart, Ikea, Lowes, and Home Depot, have shifted their focus to urban markets.<sup>98</sup> As a result, numerous cities are being forced to grapple with the impact of these suburban-style developments. A proposed Ikea store in the Red Hook section of Brooklyn brought loud protests from residents concerned about increased traffic and safety issues.<sup>99</sup> Concerned about the impact of such stores on many neighborhoods, the city of Dallas placed a moratorium on such development in 2004.<sup>100</sup>

In several cities, particularly New York, commercial and residential development has expanded to such an extent that it is

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94. Ott, *supra* note 93.

95. Puga, *supra* note 93.

96. *Id.*

97. "Big Box stores" refers to retail shops that are larger than the average retail shop. They are free-standing, single-story structures with large open air parking that attract consumers traveling by car, and are most often located in suburban areas. Wikipedia: The Free Encyclopedia, [http://en.wikipedia.org/wiki/Big\\_box](http://en.wikipedia.org/wiki/Big_box) (last visited May 5, 2006). *See, e.g.*, Diane Cardwell, *Suburban Retailing for the New Brooklyn*, N.Y. TIMES, Apr. 28, 2004, at B1; Emily Ramshaw, *Is City Boxing Itself In? Dallas Leads Others in Putting Moratoriums on Development*, DALLAS MORNING NEWS, Aug. 24, 2004, at 1A.

98. *Id.*

99. *See* Cardwell, *supra* note 97.

100. *See* Ramshaw, *supra* note 97.

pushing out viable industries.<sup>101</sup> In several sections of Brooklyn and Queens, planning departments have rezoned industrial areas, opening up new districts for development.<sup>102</sup> These actions have caused labor leaders to complain that the city is making it more difficult for industries to survive in the city and that closure of these operations will have a negative impact on job opportunities of working-class people.<sup>103</sup>

All of these disputes are rooted in the competing goals of government officials, developers, and residents. Political leaders want to be able to point to growth in their areas, both to bring new revenue and to justify their election. Developers, restricted by zoning regulations and directed by economics, are looking to build where the market is right. Residents welcome many types of construction and like to have improved services without tax increases, but they are opposed to development that changes the character of their neighborhoods or is disruptive in other ways. These divergent viewpoints are not wholly compatible—there will be winners and losers in urban development. But these disputes have become increasingly vituperative because local governments lack the institutions to mediate and ameliorate them. That job, in theory, is the occupation of the planning commission.

### III. URBAN THEORY AND THE LIMITATIONS OF PLANNING

In his majority opinion in *Kelo*, Justice Stevens relied heavily upon the argument that the City of New London, through the New London Development Corporation, had created a “carefully considered” plan for the redevelopment of the area.<sup>104</sup> Relying on the *Berman* decision, Justice Stevens held that the public interest was reflected in the adoption, by a democratically initiated process, of a comprehensive

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101. Charles Bagli, *Is a Blue-Collar Future a Luxury on the Waterfront?*, N.Y. TIMES, Feb. 4, 2004.

102. *Id.*

103. Laura Wolf-Powers, *Up-Zoning New York City's Mixed Use Neighborhoods: Property Led-Economic Development and the Anatomy of a Planning Dilemma*, 24 J. PLAN. EDUC. & RES. 379 (2005); Bagli, *supra* note 101.

104. *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005).

plan for development in the city.<sup>105</sup> Justice Stevens's opinion returns several times to the theme of planning to conclude that the condemnations were in the public interest.<sup>106</sup> As Justice Douglas stated in the *Berman* decision, the Court should defer to legislative determinations that comprehensive redevelopment is necessary to create a healthy community.<sup>107</sup> The *Kelo* decision, however, comes at a very different time in the history of urban planning than *Berman* did. By turning the New London dispute into a question about the adequacy of urban planning, Justice Stevens created an opportunity to assess the role of that institution in the development process.

Urban planning is as old as cities, but planning as a profession dates to the Progressive era of the early 1900s.<sup>108</sup> The planning profession arose partly in response to complaints about the health of American cities and partly to support the interests of property owners in newly developing areas of cities and suburbs. The central principal of the planning movement was that land use decisions shaped social and economic development. The haphazard growth of cities during the 1800s, planners argued, produced disease, environmental decline, crime, and other social problems. All of these things, advocates argued, negatively affected property values and investments by homeowners and businesses. The careful implementation of professionally managed land use systems would, they claimed, improve the lives of citizens and promote economic growth. Planners sought to impose apolitical standards for research, development, and management of land use, an approach they claimed would promote the public interest.<sup>109</sup>

In the United States, zoning became the focal point for planning, as professionals created "comprehensive plans" for urban areas that

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105. *Id.* at 2663, 2665.

106. *Id.*

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

108. See generally LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 484-85 (1961).

109. M. CHRISTINE BOYER, *DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING* ix (1997) (discussing the history of the planning profession). See generally PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY* xii (1996).

divided land into residential, commercial, and industrial districts. According to the model code proposed by the American Planning Association, the implementation of these plans would be overseen by local planning commissions. These commissions would be composed of officials appointed by local politicians but given statutory authority to make decisions free of political pressure.<sup>110</sup> The planning commission would be responsible for determining whether development proposals were consistent with locally-adopted comprehensive plans, and it could reject projects that conflicted with community goals. Although the basic principles of planning were contested from the inception of the profession, during much of the 20th century, these planning institutions played a major role in shaping American development. The rise of planned suburbs in the 1920s and the development of the urban renewal program in the 1940s are prime examples of the power of the “rationalist” approach to land use.<sup>111</sup>

During the 1960s, however, led by activists such as Jane Jacobs and academics including Martin Meyerson, Edward Banfield, and Alan Altshuler, many people began to question the idea that development decisions should, or could, be made by objective, apolitical professionals. Meyerson and Banfield argued that planning decisions were inherently political, while Jacobs criticized the fundamental tenets of modern planning, claiming that the principles were contrary to human goals.<sup>112</sup> Activists attacked planning commissions for approving developments that supported racial discrimination, allowed the politically powerful to oppress those with less influence, and destroyed historic communities. Since this period, the planning profession has been in constant turmoil over the appropriate role of planners in land use decisions. In addition, since

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110. Stuart Meck, *APA Fine Tunes the Planning Commission*, COMMISSIONER, Fall 1997.

111. *Id.*; BOYER, *supra* note 109, at iv.

112. ALAN ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* 1 (1965); MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* 1 (1964); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 11-12 (1961); MARTIN MEYERSON & EDWARD BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST* 1 (1955).



the 1970s, public attacks on the idea of planning as socialist have weakened the political viability of these institutions.<sup>113</sup>

Although urban planners continue to participate in development decisions and maintain planning commissions in most cities and suburbs, most of these institutions are marginalized and weak. The zoning framework retains its power in most suburban areas and many cities, but the idea of comprehensive planning has been replaced with ad hoc decisions about specific projects.<sup>114</sup> Planners in many areas have refocused their efforts on aiding community groups and non-profit organizations interested in more narrow efforts to plan specific areas or neighborhoods. Scholars have produced a large literature on theories of planning and have conducted research on the success and limitations of planning in the United States and around the world.<sup>115</sup> But there is little research or discussion about the role of planning commissions in current disputes over development, likely because many scholars question their viability.

Planners argue that their profession could successfully “mediate development issues, and serve as a buffer between elected officials and the public.”<sup>116</sup> But most planning commissions are under-funded and many are demoralized by their lack of influence over development policy. Gary Hack, Dean of the University of Pennsylvania School of Design and former Chair of the Philadelphia City Planning Commission, argues that “the influence of planning commissions has declined for the last twenty years.”<sup>117</sup> In many cities, planning commissions are accused of “rubber-stamping” the proposals that political leaders support, whether or not they reflect the goals of the community. As in Ardmore, many local residents

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113. David Allor, *Toward a Longer View and Higher Duty for Local Planning Commissions*, APA J. 437-443 (Fall 1994) (discussing recent debates among planners about their appropriate role). See generally Susan Fainstein, *New Directions in Planning Theory*, 35 URB. AFF. R. 451 (Mar. 2000); Wolf-Powers, *supra* note 103, at 379.

114. Allor, *supra* note 113, at 437-43.

115. See, e.g., Fainstein, *supra* note 113, at 451 (discussing contemporary planning theory and its application within a global economy).

116. Meck, *supra* note 110.

117. Stuart Meck, *Change Comes to the Planning Commission*, 2004 PLAN. 24, 25-28 (Dec. 2004).

have taken to hiring their own planning professionals to contest the proposals of local officials.<sup>118</sup>

As one Ardmore opponent of development stated, “We’re lacking the process for creating a community vision for the future that we can all participate in. There’s no conversation for what we want 20 years out.”<sup>119</sup> In theory, planning commissions could play an enhanced role in mediating disputes over development. As professionals trained to gather information and assess the impact of development decisions on different constituent groups, planners could be well-suited to forging consensus about at least some aspects of a development plan.<sup>120</sup> Additional research examining the influence that planners have on urban development would provide a more complete picture of the current state of planning and point to successful examples that could be emulated. But it is unlikely, particularly in the short-term, that planning commissions will be able to overcome both their inherent and practical limitations. As a result, it is necessary to look for other tools to promote urban development “in the public interest.”<sup>121</sup>

#### IV. MEDIATING INSTITUTIONS IN MODERN URBAN SOCIETY: BIDS, CDCs, AND UNIVERSITIES

Because they have struggled with problems of decline and disinvestment for much longer, cities have many things to teach suburban areas about how to deal with battles over how and what to build. Over the past three decades, three institutions have emerged that undertake urban development in ways that successfully (at least sometimes) reconcile the conflicts that such projects raise: Business Improvement Districts (BIDs), Community Development Corporations (CDCs), and urban universities. Though they have

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118. Allor, *supra* note 113, at 437-43; Inga Saffron, *Neighbors Take on City Planners' Role*, PHILA. INQUIRER, Dec. 9, 2005, <http://www.philly.com/mld/inquirer/living/home/design/13364107.htm>.

119. Diane Mastrull, *Gloves Are Off Over Lower Merion Development*, PHILA. INQUIRER, July 24, 2005.

120. Judith Innes, *Planning Through Consensus Building*, 62 J. AMER. PLAN. ASS'N 463 (Autumn 1996).

121. Mastrull, *supra* note 119.

disparate origins and purposes, these institutions have several things in common. All three are involved in long-range planning for the areas they serve, and each of them, to varying degrees, is obligated to consider the broader public interest in its plans. As a result, these institutions receive widespread, though not complete, public support for their activities. For these reasons, these institutions provide frameworks that others could adapt to solve disputes over development in cities and suburbs. At the same time, each of these institutions is structurally limited in its ability to promote the public interest. An assessment of the potential and limitations of these institutions is helpful for thinking about how they might be used to deal with urban development disputes and for developing more comprehensive solutions to the problem of socially responsible land use.

#### A. *Business Improvement Districts and Urban Development*

Business Improvement Districts (BIDs) are a relatively recent addition to city governance structures. Initiated in Canada, BIDs arrived in the United States during the 1980s.<sup>122</sup> The goal of BID promoters was to bring about revitalization of business districts in cities where governments had failed to provide the level of services that business owners desired.<sup>123</sup> Today, there are over 1,000 BIDs in large, medium, and small cities across the country.<sup>124</sup> Almost every large city has several, and New York City has over 40 separate BIDs.<sup>125</sup> Though they have different titles and governance structures, the basic form is the same. In essence, a BID is created when a group of businesses agree to assess themselves additional taxes to fund a non-profit corporation known as the BID. In all states, the city or state must approve the initiative. BIDs are generally run by boards of directors appointed by local government. The BID management is

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122. Jerry Mitchell, *Business Improvement Districts and the 'New' Revitalization of Downtown*, 15 *ECON. DEV. Q.* 115, 116 (2001).

123. *Id.* at 116.

124. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 *COLUMBIA L. REV.* 365, 366 (1999).

125. *Id.*

authorized to use tax revenues to provide services or improvements to the BID district.<sup>126</sup>

The basic principle of BIDs is that they are better equipped to promote economic development because they focus solely on quality of life issues in their designated areas. As the demands on city governments have increased, the theory goes, these governments have become incapable of providing the efficient services that business districts need to compete with suburban malls.<sup>127</sup> BIDs are innovative, *private sector* (really a public/private hybrid) responses to the decline of local government. According to one advocate, BIDs are “a powerful combination of ingredients—business self-interest and vision, together with public financing unencumbered by urban politics.”<sup>128</sup> BID activities vary widely, but the most prevalent are street maintenance, public safety, marketing, and capital improvements. Some BIDs manage parking and transportation and provide social services, particularly with regard to homeless persons.<sup>129</sup>

Over the past two decades, BIDs such as the Historic Third Ward Association in Milwaukee, Wisconsin, the Downtown DC BID, and the Mesa Town Center Corporation in Mesa, Arizona, have received praise for revitalizing downtown areas and making them safe for tourists and residents.<sup>130</sup> BIDs devote resources to aesthetic improvements, including improving streets, lighting, and public spaces, and creating “a distinctive stamp” on their areas. Although originally focused on the central business district, the BID approach has been adopted by smaller business communities in cities across the nation.<sup>131</sup> Many argue that BIDs have been successful because they focus on the small things, primarily aesthetic and safety improvements. In contrast to development officials during the urban

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126. *Id.* at 367, 413.

127. LAWRENCE HOUSTOUN, JR., BIDS: BUSINESS IMPROVEMENT DISTRICTS 6 (2003).

128. Mitchell, *supra* note 122, at 116, 120.

129. Briffault, *supra* note 124, at 366-70; HOUSTOUN, *supra* note 127, at 8.

130. Briffault, *supra* note 124, at 395; Mitchell, *supra* note 122, at 117.

131. Jill Simone Gross, *Business Improvement Districts in New York City's Low-Income and High-Income Neighborhoods*, 19 ECON. DEV. Q. 174, 178-79 (2005); HOUSTOUN, *supra* note 127, at 121.

renewal years, BID leaders do not focus on grand, sweeping programs of clearance and construction.

Although few BIDs describe themselves as planning agencies, by definition most engage in urban planning—they focus on the promotion of certain types of enterprises and work to limit growth of others, adult theaters for example. They work to create within the district a particular image, and they allocate resources to achieve that goal. The large capital improvements made by BIDs, such as the Times Square BID and the Philadelphia Center City District, were implemented pursuant to comprehensive plans for their areas. Increasingly, BIDs are directly taking on the task of planning for the development of commercial, residential, and cultural resources in their districts.<sup>132</sup>

Despite their significant achievements, BIDs are not without their detractors. Some criticize them for focusing on the needs of large businesses in their areas and neglecting the concerns of smaller enterprises. In at least a few cities, advocates for the poor and the homeless have accused BID representatives of strong-arm tactics in their treatment of certain visitors.<sup>133</sup> Others claim that BIDs are responsible for “privatizing” public space and imposing severe restrictions on the use of public property.<sup>134</sup> But BIDs are also subject to many legal restrictions that push them to consider the public interest in their operations. As Richard Briffault has argued, “the BID is a public-private hybrid that can function as an asset, not a threat, to local public space.”<sup>135</sup> By raising additional funds for public purposes and by focusing attention on business development, BIDs provide a necessary function in most cities.<sup>136</sup>

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132. Briffault, *supra* note 124, at 377, 405-09; Paul Levy, *Paying for the Public Life*, 15 *ECON. DEV. Q.* 124, 128 (2001).

133. Daniel Garodnick, *What's the BID Deal?: Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 *U. PA. L. REV.* 1733, 1760 (2000); James Traub, *Can Associations of Business Be True Community Builders?*, 6 *RESPONSIVE COMMUNITY* 29, 30 (1996); see also Richard Schragger, *The Limits of Localism*, 100 *MICH. L. REV.* 371 (2001).

134. Andrew Stark, *America, The Gated?*, 22 *WILSON Q.* 60, 75 (1998).

135. Briffault, *supra* note 124, at 373.

136. *Id.* at 457; Gross, *supra* note 131, at 178.

Few suburban areas have BIDs, but they could provide a mechanism to reconcile the conflicting goals of parties disputing over suburban economic development. By promoting the participation of interested parties in the redevelopment plan, a BID could assuage some of the concerns of existing business owners and residents. As professionals intimately involved in the operations of the district, BID managers could provide knowledge crucial to the success of revitalization plans. In cities, BIDs that have played a major role in the revitalization of declining areas could bring those tools to the development of new commercial and residential areas.

Though they receive much public attention, few have empirically studied BIDs. Few studies measure the success of BIDs in improving the management or safety of business districts, and no literature estimates their economic effects. In addition, only a few studies assess the ability of BIDs to mediate among the competing interests of large and small business owners, residents, and government actors. Before expanding the purview of BIDs to more comprehensive planning, we have much to learn about their successes and limitations. Twenty years of experience, however, supports the claim that the broader use of BIDs would respond to some of the concerns raised by opponents of urban development projects.<sup>137</sup>

### *B. Community Development Corporations*

Another institutional framework for managing disputes over urban land use is the Community Development Corporation (CDC). Since the 1970s, CDCs have become a crucial actor in inner-city housing and economic policy. The community-based development model has roots that date back to the settlement house movement in the early 1900s, but the modern efforts began with the Ford Foundation's Gray Areas program and the War on Poverty. Sponsored by the federal Community Action Program, activists in many neighborhoods secured funding for housing, social services, and economic

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137. Lorlene Hoyt, *Collective Private Funds for Safer Public Spaces: An Empirical Examination of the Business Improvement District Concept*, 31 ENV. AND PLAN. B: PLAN. AND DESIGN 367 (2004) (studying BID operation).

development. In 1966, Brooklyn's Bedford-Stuyvesant Redevelopment Corporation (founded by Sen. Robert F. Kennedy and others) became one of the first incorporated development agencies. In the core principle of the CDC movement, inner-city areas could only truly be revitalized through efforts grounded in those communities. CDCs responded to the urban renewal regime, which relied on centralized planning and management and, many argued, ignored the needs of poor, minority areas.<sup>138</sup>

The passage of the Housing and Community Development Act of 1974 spurred a dramatic growth in CDCs across the country.<sup>139</sup> Also a response to criticism of federal housing and development programs, particularly public housing and urban renewal, the Act sought to turn over funds and control to local governments, with the expectation, at least among some of the Act's promoters, that local governments would direct resources to community-based organizations.<sup>140</sup> During the 1980s, with support from foundations and federal, state, and local programs, many CDCs emerged as the leading development institutions in inner-city communities. Though most focus on housing development and management, many CDCs also provide social services such as health and child care and promote economic development in their areas.<sup>141</sup>

Today, there are over 2,000 CDCs in America.<sup>142</sup> Working in neighborhoods around the country such as the southside of Chicago, the south Bronx, and north Philadelphia, CDCs have produced almost

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138. See generally ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 131-48 (1998); ALEXANDER VON HOFFMAN, HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS 15-17 (2003); HERBERT J. RUBIN, RENEWING HOPE WITHIN NEIGHBORHOODS OF DESPAIR: THE COMMUNITY-BASED DEVELOPMENT MODEL 1 (2000); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY 1 (2001) (discussing the history of CDCs).

139. Pub. L. No. 93-383, 88 Stat. 633 (1974).

140. R. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY 200-01 (1995); Bernard Frieden & Marshall Kaplan, *Urban Aid Comes Full Cycle*, 1977 C.R. DIG. 18; Henry J. Schmandt, George D. Wendel, & George Otte, *CDBG: Continuity or Change?*, 13 PUBLIUS 7, 12-13 (1983).

141. HALPERN, *supra* note 138, at 132-33; VON HOFFMAN, *supra* note 138, at 15; Ross Gittel & Margaret Wilder, *Community Development Corporations: Critical Factors That Influence Success*, 21 J. URB. AFF. 341, 342 (1999).

142. Gittel & Wilder, *supra* note 141, at 342.

one million units of affordable housing during the past 30 years.<sup>143</sup> One of the many areas that has benefited from such efforts is the Brooklyn neighborhood of Brownsville. Considered a poster child for urban decline during the 1970s, Brownsville has witnessed significant improvements over the past decade. Two groups, the Eastern Brooklyn Churches, which have built over 3,000 homes for ownership since 1980, and the Ocean Hill-Brownsville Tenants Association, which has renovated more than 1,000 rental units and pushed the New York City Housing Authority to improve its vast holdings in the area, have been leaders in providing decent, affordable housing to New York residents. These efforts have also spurred the return of private capital to the area.<sup>144</sup>

Unlike prior efforts at inner-city development, CDCs focus their efforts on long-range planning that promotes the interests of current neighborhood residents. CDCs particularly concern themselves with resource distribution within their communities instead of transferring resources to other areas.<sup>145</sup> In many cities, CDCs have successfully battled against initiatives that would primarily benefit outside developers and have demanded that cities direct their development dollars to community-based institutions. In New York, which is unfortunately the exception in the size of its commitment, lobbying by CDCs and other non-profit organizations brought significant state and local resources to supplement federal funds. Between the mid-1980s and the mid-1990s, New York City invested \$4 billion in the creation of affordable housing.<sup>146</sup> These resources have produced a substantial increase in the amount of affordable housing, but the deficit still remains immense.<sup>147</sup>

CDCs have benefited from federal requirements that cities conduct comprehensive neighborhood planning and allow for significant community input before they receive funding. Most local

143. HALPERN, *supra* note 138, at 131-32; *see also* Gittell & Wilder, *supra* note 141, at 342.

144. *See generally* WENDELL PRITCHETT, BROWNSVILLE, BROOKLYN: BLACKS, JEWS, AND THE CHANGING FACE OF THE GHETTO (2002).

145. HALPERN, *supra* note 138, at 142-43; SIMON, *supra* note 138, at 70-71.

146. Michael Schill, et al., *Revitalizing Inner-City Neighborhoods: New York's Ten Year Plan*, 13 HOUSING POL'Y DEBATE 529 (2002).

147. Gittell & Wilder, *supra* note 141, at 356.



governments did not decide to allocate funds to community groups on their own. In fact, during the early years of the program, locally-based groups were often ignored, and governments allocated block grant funds to politically-favored neighborhoods or private developers.<sup>148</sup> Of course this still occurs, but community-based organizations have used federal requirements for local participation as leverage to force the political structure to allocate funds in a more equitable manner. For many groups, block grants have enabled them to secure foundation grants and private funding for housing and other programs.

As developers, CDCs frequently benefit from local government use of eminent domain to acquire both abandoned and occupied housing. Though they prefer to purchase properties, CDCs are often frustrated by owners who refuse to sell or who have problems with title, preventing property acquisition. Since they rely on government condemnation, CDCs sometimes find themselves in conflict with neighborhood residents.<sup>149</sup> But because they are run by community leaders, these organizations usually overcome such opposition. Because they view the power of eminent domain as crucial to their success, CDCs have strongly supported broad government condemnation rights.<sup>150</sup> CDC leaders argue that the planning process, which involves significant community output, ensures that their efforts will promote the needs of local residents while at the same time preventing past abuses of eminent domain.

In recent years, CDCs have increasingly partnered with for-profit businesses and non-profit institutions, particularly universities, to promote housing and economic development.<sup>151</sup> With the support of foundations and local government, CDCs in many cities have

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148. Frieden & Kaplan, *supra* note 140, at 22; Charles J. Orlebeke, *CDBG in Chicago: The Politics of Control*, 13 PUBLIUS 57, 60-61 (1983); Dennis W. Gleiber & Mary Ann Steger, *Decentralization, Local Priorities, and the Community Development Block Grant Program in Milwaukee*, 13 PUBLIUS 39, 53 (1983).

149. One recent study concluded that CDCs have positive impact on property values. Brent C. Smith, *The Impact of Community Development Corporations on Neighborhood Housing Markets: Modeling Appreciation*, 39 URB. AFF. R. 181 (Nov. 2003).

150. Philadelphia Association of Community Development Corporations, *Invest In Neighborhoods: An Agenda for Livable Philadelphia Communities*, May 2003, <http://www.pacdc.org/docs/InvestIn.pdf>.

151. VON HOFFMAN, *supra* note 138, at 253.

undertaken comprehensive plans for neighborhood development. In these projects, planning professionals, CDC staff, local residents, and government officials work together to produce a vision for the neighborhood and agree to coordinate their efforts to secure funding for development. By promoting planning from the ground up, the CDC approach seeks to ensure that marginalized groups participate in decisions about their neighborhoods.<sup>152</sup>

CDCs are responsible for greater community involvement in urban planning, but these institutions have many limitations. Although their efficiency has improved, many CDCs have struggled to manage their organizations. In every major city, CDCs have faced accusations of financial improprieties, and many have closed operations due to financial mismanagement.<sup>153</sup> Because many rely on inconsistent funding and are run by neighborhood activists who lack financial or management training, CDCs are volatile institutions. The lack of management expertise at many CDCs has inhibited their ability to engage in large-scale planning and redevelopment projects.<sup>154</sup>

In addition, CDCs are not distributed evenly throughout poor communities, and some organizations have more success than others at marshalling the political power to secure funding. As a result, even though CDCs are responsible for creating political capital for formerly marginalized groups, they do not necessarily represent the poor. Many of the neediest communities do not have viable nonprofit groups, and these neighborhoods therefore are limited in their ability to participate in the urban planning process. Finally, although they consider themselves neighborhood based, CDCs often represent certain community interests more strongly than they represent others. Some CDCs focus on improving property values and increasing

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152. Urban Land Institute, *Involving the Community in Neighborhood Planning*, available at <http://www.uli.org> (follow "Research" hyperlink; then follow "Policy Papers" hyperlink) (last visited May 8, 2006). It is important to note that this positive review of CDCs applies primarily to large cities. We know very little about the operation of the program in smaller towns, and it is likely that CDCs have been unable to make similarly significant contributions.

153. HALPERN, *supra* note 138, at 138-39.

154. William M. Rohe & Rachel Bratt, *Failures, Downsizings and Mergers Among Community Development Corporations*, 14 HOUSING POL'Y DEBATE 1, 6, 31 (2003).

homeownership in their communities, a goal that often conflicts with the needs of residents in the rental market.<sup>155</sup>

Many middle-class suburbs have community organizations that play important roles in neighborhood planning, but few have permanent, full-time staff like most CDCs. But the use of CDCs is on the rise in inner-ring suburbs, particularly those suffering from problems of housing abandonment and economic decline.<sup>156</sup> The CDC model could provide a useful framework for promoting housing and commercial developments that take into account the desires of existing residents, decreasing opposition to the use of eminent domain.

The amount of empirical study of CDCs is increasing, but it remains small considering how long they have existed. There is little empirical data on the impact of CDCs on communities, and we have much to learn about the role of CDCs in the production of housing, the improvement of crime and other social indices, and the impact of CDCs on property values.<sup>157</sup> In addition, further study is necessary to examine the interaction of CDCs and other actors in the process of urban development. For example, growing literature has concluded that CDCs often struggle to reconcile the competing interests of renters and homeowners. More study is required before anyone can make a full assessment of CDC viability.<sup>158</sup>

### C. *Urban Development and the University*

Universities have played an important role in urban development around the world for centuries.<sup>159</sup> In America, the growth of educational institutions in the late 1800s and early 1900s shaped the

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155. Edward Goetz & Mara Sidney, *Revolt of the Property Owners: Community Development and the Politics of Property*, 16 J. URB. AFF. 319, 332 (1994); Rohe & Bratt, *supra* note 154, at 21-41. For a broader critique of the CDC movement, see Randy Stoeker, *The Community Development Model of Urban Development: A Critique and an Alternative*, 19 J. URB. AFF. 1 (1997).

156. Hudnut, *supra* note 64, at 215-30.

157. See, e.g., George Galster, et al., *Measuring the Impact of Community Development Block Grant Spending on Urban Neighborhoods*, 15 HOUSING POL'Y DEBATE 903 (2004) (attempting to answer such questions about the role of CDCs).

158. Smith, *supra* note 149, at 199.

159. THE UNIVERSITY AND THE CITY: FROM MEDIEVAL ORIGINS TO THE PRESENT (Thomas Bender, ed., 1988).

geography of many cities. Columbia University's move to Morningside Heights, the University of Pennsylvania's new campus in West Philadelphia, and John D. Rockefeller's decision to site the new University of Chicago in Hyde Park all significantly influenced the growth of those cities. By the early 1900s, each of these areas, once bucolic, had become an integral part of its city, as faculty, staff, students, and others moved into these growing neighborhoods.<sup>160</sup> Universities played a crucial role in the development of the planning profession, both through the creation of planning schools and by giving planners practical experience in the creation of the modern university. By the 1920s, urban universities were integral parts of city economies, training their professionals, providing research that spurred technological innovation, and providing work to thousands of residents.<sup>161</sup>

Although most urban campuses were consciously located far away from the teeming urban slums, by the early 20th century urbanization had caught up with many universities, and by the 1940s neighborhood decline was a major problem for many of them. Complicating their woes, many university neighborhoods, often the most racially progressive areas in their cities, were experiencing rapid African-American urban migration. During the post-WWII years, university administrators constantly worried about the impact of racial change on their ability to attract students and draw and retain faculty.<sup>162</sup>

The Urban Renewal Program provided many universities with the tools to protect their campuses. In 1959, Congress amended the law to authorize specifically the use of federal funds to clear "blighted" properties for university expansion.<sup>163</sup> Columbia University, the University of Pennsylvania, and the University of Chicago were among the most active universities in the competition for these funds.

160. MARGARET PUGH O'MARA, CITIES OF KNOWLEDGE: COLD WAR SCIENCE AND THE SEARCH FOR THE NEXT SILICON VALLEY 60-62 (2005).

161. *Id.* at 61.

162. *See id.* at 158-61; JOEL SCHWARTZ, THE NEW YORK APPROACH, ROBERT MOSES, URBAN LIBERALS xviii-xx (1993); ARNOLD HIRSCH, MAKING THE SECOND GHETTO: CHICAGO, 1940-1960 (1995).

163. O'MARA, *supra* note 157, at 78-80.

During the 1960s, each of these institutions conducted major efforts to reorganize their campuses with federal, state, and local assistance. In New York, Philadelphia, and Chicago, as well as other cities, urban renewal administrators realized that universities were a crucial part of the local economy and focused much of their efforts on creating zones of protection for these institutions. The common goal of administrators and government officials was to make Hyde Park, Morningside Heights, and the newly renamed University City in Philadelphia white, middle-class enclaves for university professionals. In the process, they dislocated thousands of mostly black residents, creating significant controversy and bitterness among the existing residents.<sup>164</sup>

For decades an important part of city economies, universities have become crucial as the manufacturing base of most cities has disappeared. According to a 2002 study, urban universities today employ over two million people.<sup>165</sup> A 1999 Brookings report found that educational institutions and hospitals, many of which are affiliated with universities, employed more than half the private sector workers in Washington, Philadelphia, San Diego, and Baltimore.<sup>166</sup> The economic impact of urban universities is even more significant because many other employers depend upon them for business. In 1996, the nation's 1,900 urban universities spent \$136 billion on salaries, goods, and services.<sup>167</sup>

After the turmoil of the 1960s, many universities, worried about public perception that the universities were indifferent to community needs, decreased their participation in urban planning initiatives. However, during the past decade, increasing numbers of universities have begun to re-engage their surrounding neighborhoods, organizing

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164. SCHWARTZ, *supra* note 159, at xviii-xx; HIRSCH, *supra* note 121; O'MARA, *supra* note 159, at 174-75.

165. CEOs for Cities, *Leveraging Colleges and Universities for Urban Economic Revitalization: An Action Agenda 2*, [http://ceosforcities.org/research/2002/leveraging\\_colleges/colleges\\_1.pdf](http://ceosforcities.org/research/2002/leveraging_colleges/colleges_1.pdf) (last visited May 8, 2006).

166. Ira Harkavy & Harmon Zuckerman, *Eds and Meds: Cities' Hidden Assets*, BROOKINGS REPORT, Aug. 1999.

167. ANDREW HAHN, COLLEGES AND UNIVERSITIES AS ECONOMIC ANCHORS: PROFILES OF PROMISING PRACTICES 3 (2002).

efforts to promote economic revitalization and housing development. Unlike most businesses, universities cannot easily move. They are bound by geography, and they have found that perceptions about the safety and vitality of their surrounding communities play a big role in their ability to compete with other universities. As a result, many institutions have adopted comprehensive development programs. Several have undertaken housing construction programs, particularly for faculty and staff, but they have also partnered with CDCs to produce affordable housing. To improve the bottom line, universities are increasingly engaging in for-profit commercial activities. Many universities have organized efforts to direct their purchasing power to local businesses and have created work-force development programs to improve the employment prospects of local residents.<sup>168</sup>

Because they are concerned about the sustainability of the communities that surround them, universities often engage in long-range community planning. As in the past, many criticize these efforts because they did not incorporate neighborhood residents or businesses and instead chose to focus solely on the housing and development needs of the university.<sup>169</sup> However, increasing numbers of universities have made significant efforts to include local residents and neighborhood organizations in their planning processes. At Howard University in Washington, D.C., for example, the university partnered with local groups to promote the comprehensive revitalization of the Le Detroit Park neighborhood. A significant number of university planning departments are engaged with CDCs and neighborhood groups in comprehensive planning efforts.<sup>170</sup>

University and neighborhood collaborations have the potential to produce positive results for all parties involved, but they also have significant limitations. Research on these partnerships has found that universities frequently give less attention to the demands of neighborhood residents than to their own needs, and it has concluded that local groups often feel disrespected by university

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168. HAHN, *supra* note 164, at 4; CEOs for Cities, *supra* note 165, at 3.

169. CEOs for Cities, *supra* note 165, at 51.

170. CEOs for Cities, *supra* note 165, at 23-24; Allegra Calder & Rosalind Greenstein, *Universities as Developers*, 13 LANDLINES 1 (July 2001).

administrators.<sup>171</sup> Such collaborations also struggle when the goals of local residents and of the university conflict—when the university wants to build a dorm in an area of single-family homes. In response to such complaints, the University of Minnesota adopted a requirement that all future development projects be subject to a mandatory Neighborhood Impact Assessment—a process that, according to promoters makes the university’s planning vision accessible to the public and requires the university to consider alternatives to its master plan.<sup>172</sup> But the challenge of balancing the competing interests of many parties remains a significant one—one that cannot be completely resolved.

Of the three institutions, the university approach has the most significant limitations for the obvious reason that universities are private entities. University administrators are charged with promoting their institutions by increasing its attractiveness, improving its financial situations, and competing for students and faculty. These goals will often conflict, and university leaders would not be doing their jobs if they failed to look out for their employers. At the same time, because universities have deep, almost unbreakable ties to their communities, they provide useful insights regarding how best to meet the needs of the diverse constituencies of urban areas.

In the end, however, none of these three groups will solve the ongoing conflicts over urban development. These disputes involve questions about the appropriate role of government in society, and they will only be fully answered through democratic processes. A reinvigoration of urban planning institutions would greatly aid our ability to address these matters.

## CONCLUSION

Though American cities have been struggling to revitalize for decades, there is much that we do not know about how urban areas change and what factors influence these changes. In part, this Article

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171. HAHN, *supra* note 164, at 6.

172. Calder & Greenstein, *supra* note 170, at 13; CEOs for Cities, *supra* note 165, at 51.

is a call for further research on the interaction of policymakers, social and economic institutions, and residents in the making and remaking of urban America. To determine the most successful approaches to create healthy, safe, and productive cities and suburbs, we must carefully examine the role of numerous participants in the process of urban growth and decline. Eminent domain is only one of many initiatives shaping urban society. Focusing exclusively on the appropriateness of condemnation will, in the end, obstruct solutions to the larger, more important issue of creating vibrant urban communities.

Even after more research, we will still face the inherently political question: what kind of cities and suburbs do we want? The furor over the *Kelo* decision is an appropriate place to begin, or continue, that discussion. The debate over the proper interpretation of the public use clause presents us with an opportunity to examine the proper relationship between individuals and urban institutions. As the overwhelming majority of Americans live in urban areas, this question involves all of the major domestic issues: health, environment, transportation, economic growth, and social relations among them. In the end, our answers to this broader question will determine how our society uses all of the tools at its disposal to promote the public interest.